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Editorial

Dear Readers,

We are delighted to present Volume 15, No. 1 of the Goettingen Journal of International Law.

As we present the latest issue of the Goettingen Journal of International Law, we find ourselves reflecting on the profound legacy of one of our most esteemed advisors, *Thomas Buergenthal,* who passed away on May 29, 2023. Buergenthal's contribution to the development of international human rights law, particularly through his work with the Inter-American Court of Human Rights, is a legacy that continues to inspire us as young scholars of public international law. He was a key figure in forming the current landscape of international law, making a significant impact through his contributions in various areas.

He especially did so in his role as a judge at the International Court of Justice and President of the Inter-American Court of Justice. The article 'Thomas Buergenthal and the Americas: A Comprehensive Contribution to Human Rights Protection.', by *Kai Ambos*, which was pre-published at the beginning of this year, honours Buergenthal's life and work, highlighting his pivotal role in shaping the Inter-American human rights system. It draws attention to Buergenthal's pragmatic, yet ambitious approach to fostering regional human rights mechanisms, offering a timely reminder of the value of persistence and strategic foresight in international law.

Following this tribute, we present an in-depth analysis of a key topic in international law, "The Montreux Convention and its Importance for International Peace and Security," by *Ioannis Antonopoulos*, which examines the legal frame-

work governing the Dardanelles and Bosporus Straits. This article explores the Convention's role in maintaining international order and stability from its inception to the present day, providing critical insights into the regulation of warship transit and its implications for contemporary security challenges.

The second part of this issue presents a special section featuring articles contributed by scholars who participated in the Max Planck Law Conference for Young European Scholars. The topic of the conference was Methodological Pluralism in European Law. The authors address a range of timely and complex legal issues pertaining to the European Union, offering insights into potential avenues for enhancement.

The first article, "Regulating Uncertainty: On the Regulation of Human Behavior and its Interpretation by the Court of Justice of the European Union," by *Sebastian J. Kasper,* explores how behavioral economics can inform the interpretation and application of EU law by the CJEU. Through an analysis of the role of bounded rationality, heuristics, and decision-making biases, Kasper investigates how the CJEU might incorporate these insights to refine judicial reasoning. The article also addresses the methodological and normative challenges posed by incorporating behavioral findings into legal interpretation, offering a critical perspective on the implications for legal certainty and fundamental rights.

The second article, "Adding to the Toolbox: Court-Published 'Fact Sheets' in the EU Legal Order," by *Mareike Hoffmann*, explores the role of fact sheets issued by the Court of Justice of the European Union (CJEU). It investigates the regulatory framework governing fact sheets and evaluates their classification as a form of "soft law." Hoffmann's analysis investigates their legal and practical effects, highlighting the fine balance between promoting accessibility and preserving judicial neutrality.

The third article is "To Err Twice: Methodological Pluralism Through the Lens of EU Prison Policy," by *Christos Papachristopoulos* and *Denise Di Nica*, who examine the interplay between EU legal principles and prison policy within the Area of Freedom, Security, and Justice (AFSJ). The authors critique the limitations of the EU's doctrinal approach, especially its reliance on the principle of mutual trust, and call for a more interdisciplinary methodological framework to

address the realities of detention standards across Member States.

Concluding the section is, "Capabilitarian Social Justice in the EU: Care, Dependency, and the Concep tion of the Person," by *Elisabeth Schöyen*. She invites readers to reconsider the conception of personhood within EU law. Drawing on Martha Nussbaum's capabilities approach, the article challenges the dominant portrayal of the EU's legal subject as a rational, autonomous actor. Instead, it advocates for a legal perspective that better recognizes human vulnerability and interdependence, offering a fresh lens through which to evaluate EU social justice commitments.

At the heart of this issue lies a shared aspiration to reflect on, critique, and ultimately strengthen the international legal order. Our authors confront challenges old and new, from the institutionalization of human rights to the conceptual underpinnings of justice. Each contribution demonstrates that while the pursuit of justice can be methodologically diverse, it remains unified in its goal of bettering the human condition. The MPI articles, in particular, tackle distinct yet interconnected challenges, offering theoretical insights and practical guidance for contemporary legal issues.

This issue also reflects on the enduring impact of mentorship, exemplified by the legacy of Thomas Buergenthal. His life's work serves as a source of inspiration. As we engage with the diverse legal perspectives offered in these pages, we are reminded of his belief in the transformative power of human rights law.

We thank our contributors, reviewers, and editorial team for their dedication and scholarly rigor. It is through their work that GoJIL continues to serve as a space for critical reflection and academic discourse. We hope this issue will inspire new ideas, foster debate, and reaffirm our shared commitment to the advancement of international law.

With deepest respect and gratitude,

The Editors

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Thomas Buergenthal and the Americas: A Comprehensive Contribution to Human Rights Protection

Kai Ambos*

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Abstract

While Thomas Buergenthal's contribution to the field of human rights is certainly of global importance, it had a particular impact in the Americas, especially during the crucial initial phase of the Inter-American Human Rights System (IAHRS) with the Court as its core institution on which Buergenthal served as one of the first group of judges from 1979 to 1991. In a nutshell, Buergenthal's contribution may be characterized as a comprehensive and decisive effort to the regional protection of human rights in a threefold way: prudent proactivity (A.), active promotion and optimization (B.), interaction and critical follow-up (C.). At the same time, Buergenthal pursued a strategic-progressive approach which offers valuable lessons for the protection of human rights going well beyond the Americas. Buergenthal's contribution to human rights and to international law in general cannot be overestimated. His principled and at the same time prudent strategic approach will be greatly missed, especially in our challenging times where international law is under attack at various fronts.

A. By Way of Introduction: Prudent Proactivity

Against the background of his tragic past, touchingly recounted in his book *A Lucky Child*,[1] Buergenthal saw his destiny in contributing to the protection of human rights.[2] His proactive involvement in the establishment of a human rights system in the Americas,[3] which led him to advise the establishment of the Inter-American Court of Human Rights (IACtHR) in 1979 and become part of the first group of judges there the same year and a member of the Truth Commission for El Salvador (TCES) in 1992,[4] can be traced back to a paper published in

1 T. Buergenthal, *A Lucky Child*: *A Memoir of Surviving Auschwitz as a Young Boy* (2015) [Buergenthal, *Lucky Child*]; see also the long interview with C. Kreß & D. Stahl, 'Lebensgeschichtliches Interview mit Thomas Buergenthal' (4 March 2015), available at https://www.geschichte-menschenrechte.de/personen/thomas-buergenthal (last visited 14 March 2024) [Kreß & Stahl, 'Interview with Thomas Buergenthal'].

2 Buergenthal, *Lucky Child*, *supra* note 1, 215-216: "[…] my camp experience has certainly shaped my later professional life. Unlike most of my law-school classmates, I was never much interested in the traditional practice of law, that is, in doing what lawyers usually do […]. Instead, I was drawn to international law, and to international human rights law in particular, because I believed, somewhat naively at first, that these areas of the law, if developed and strengthened, could spare future generations the type of terrible human tragedies that Nazi Germany had visited on the world. Over time I also gradually concluded that I had an *obligation* to devote my professional activities to the international *protection of human rights*. This *sense of obligation* had its source in the belief, which grew stronger as the years passed that those of us who survived the Holocaust owe it to those who perished in it to try to improve, each in our own way, the lives of others. To me that meant working towards a world in which the rights and dignity of human beings everywhere would be protected. I also convinced myself that international human rights was the branch of the law to which I, as a lawyer and because of my Holocaust experience, would be able to make the *most significant contribution*. After all, I knew what it meant to be a victim of human rights violations." (emphasis added).

3 While Buergenthal did not in any official position participate in the drafting of the ACHR, he closely followed the process and had some direct influence, cf. T. Buergenthal, 'Remembering the Early Years of the Inter-American Court of Human Rights', 37 *New York University Journal of International Law and Politics* (2005) 2, 259, 261, fn. 2: "I had by then written a number of articles on the European and inter-American systems and *had had some input* in the drafting of the American Convention" [Buergenthal, 'Remembering'] and Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 15: "I followed the drafting […]. And so I suggested some revisions, which found their way into the American Convention, see Article 8(1) of the Convention."

4 See United Nations, 'Secretary-General Appoints 3 Member Commission on Truth to Investigate Acts of Violence in El Salvador' (10 December 1991), available at https://digitallibrary.un.org/record/1311672?ln=en (last visited 14 March 2024).

the *Buffalo Law Review* in 1971.[5] In this paper, Buergenthal, considering the regional political context at the time, expressed concerns about a too broad and ambitious regional human rights instrument, arguably even broader than that of the *European Convention on Human Rights* (ECHR).[6] Buergenthal's practical concern was to ensure that the *American Convention of Human Rights* (ACHR) obtained the necessary number of ratifications to quickly enter into force given the widespread authoritarianism in the region.[7]

Buergenthal's skepticism regarding the feasibility of the ACHR project points to two important aspects of his thinking that deserve to be highlighted: On the one hand, Buergenthal has always been a realist in being fully aware of the divergence between a normative aspiration and the political realities. He saw this divergence with regard to a political environment which may produce unintended consequences detrimental to a certain regulatory goal, especially one striving for a better human rights protection. While Buergenthal's worst fears did not materialize since the ACHR eventually entered into force, his cautious and humble approach was certainly prudent given that there is always a risk of rejection of an overambitious project whose normative overexpectations may cause skeptical political forces to increase their pressure and resistance.

On the other hand, Buergenthal's political acumen and practical sense proved to be valuable qualities in the field of international law, especially if a

5 T. Buergenthal, 'The American Convention on Human Rights: Illusions and Hopes', 21 *Buffalo Law Review* (1971) 1, 121-136 [Buergenthal, 'American Convention'].

6 *Ibid.*, 123: "The American Convention on Human Rights guarantees 23 broad categories of rights and freedoms. By contrast, the European Convention of Human Rights, as originally adopted proclaimed merely 13 rights." Comparing the American and European systems and advocating a regional approach see T. Buergenthal, 'The American and European Conventions on Human Rights: Similarities and Differences', 30 *American University Law Review* (1980) 1, 155, 155 [Buergenthal, 'American and European Conventions'].

7 Buergenthal, 'American Convention', *supra* note 5, 124: "But the very fact that such an extensive catalog of rights is needed, suggests that it was *most unwise* to include all of them in the Convention. Elementary common sense should have told the proponents of the American Convention that the more burdensome the obligations imposed by the treaty, the less likely it becomes that eleven American states will be willing or able in the foreseeable future to ratify that instrument." (emphasis added), and p. 122: "Of the eleven ratifications that are necessary to bring this instrument into force, only one – by Costa Rica – has been deposited thus far. Political realities being what they are in the Western Hemisphere, it would probably take a long time to obtain eleven ratifications for any human rights convention. It will take much more time in the case of the American Convention on Human Rights, for it seems to have been drafted in a form calculated to discourage its ratification."

new international instrument is to be created.[8] He expressly lamented the lack of political skill on the part of the promoters of the ACHR in setting overly high demands:

> "[…] many of the true proponents of human rights attending the Conference succumbed to the intoxicating effect of the dream world created by their own rhetoric and urged the inclusion of more and more rights, while the opponents of human rights must have been gloating at their lack of political sophistication."[9]

However, one should not misread Buergenthal's realism as a complete surrender to *Realpolitik*.[10] In fact, Buergenthal always aimed for a comprehensive human rights system for the Americas, guided by a strategic-progressive way of thinking and one which was highly perceptive to the change of political realities. While he was more cautious during the drafting of the ACHR and the first years of the Court given the authoritarian political landscape, he became more forthcoming and proactive once the political climate started to change. In that sense, the reduction of the ACHR project to a kind of minimum standard in the form of basic political and civil rights was only the first step, the starting point so to say, of a long road of human rights expansion reaching out to other, more controversial rights:

> "One obvious approach is to limit the number of rights to be guaranteed to those that are most basic and to avoid being too innovative by introducing juridical conceptions that have not found

8 I have already highlighted this with regard to the International Criminal Court in K. Ambos, 'Interests of Justice? The ICC Urgently Needs Reforms' (11 June 2019), EJIL: Talk, available at https://www.ejiltalk.org/interests-of-justice-the-icc-urgently-needs-reforms/ (last visited 14 March 2024) [Ambos, 'Interests of Justice?'].

9 Buergenthal, 'American Convention', *supra* note 5, 125-6. Providing alternative hypotheses regarding the difference between the AHRC and the EHRC, namely, that the drafters of the EHRC were more realistic or that the inhabitants of the American Continents needed international protection for more rights (*ibid*., 123).

10 T. Buergenthal, 'The Human Rights Revolution', 23 *St. Mary's Law Journal* (1991) 1, 3-10, *passim* (arguing in favor of a progressive approach, specifically advocating for the internationalization of human rights) [Buergenthal, 'HR Revolution']. See also *ibid*., 10, where he criticizes an approach solely based on political realism: "That [human rights] revolution is proving ever more convincingly that so-called political realism, which discounts all but military and economic power, has no monopoly on political wisdom nor is it all that realistic."

> even theoretical acceptance among the majority of states in the particular region. A regional convention for regions facing problems similar to those found in Latin America, for example, should initially merely recognize the right to juridical personality, the right to life, the right not to be tortured, freedom from *ex post facto* laws, the right to a fair trial, the right not to be deprived of one's liberty arbitrarily, freedom from slavery, freedom of speech, conscience and religion. It should contain a sweeping nondiscrimination clause of the type found in the American Convention as well as soundly drawn reservation and derogation clauses. […] Once such a rudimentary human rights charter has been accepted and tied to an enforcement machinery which individuals may effectively invoke – and that obviously should be one indispensable prerequisite of any regional system for the protection of human rights – it will become much easier as time goes on to engraft additional rights onto the original instrument.
>
> I would be the first to advocate more advanced and comprehensive conventions […] As long as present conditions exist, we must resist the temptation to build castles in the sky. Instead, we should concentrate our efforts on establishing either universal or regional systems for the protection of human rights capable of saving human lives, emptying the concentration camps, and removing the torture chambers and the sadists from jails, from police stations and from military interrogation centers. That, after all, is still the first and most important item on the human rights agenda."[11]

Buergenthal was fully aware of the fragility and uncertainty of a human rights mechanism, even a basic one, at the time. Thus, he took a pragmatic, a kind of 'better something than nothing' approach: "And even if that should prove to be a much slower process than one might wish for, it is plainly better to have some protection rather than none at all." [12]

I note in passing that Buergenthal himself used to joke about his ability to anticipate certain events:

> "During one of many periods of high tension in the Middle East, his mother called from Italy to ask if he thought that there would be a

11 Buergenthal, 'American Convention', *supra* note 5, 135-136.
12 *Ibid.*, 136.

war. He assured her that it would not happen this time. His mother then told all her friends that "her son, the international lawyer," said not to worry. Two days later a full scale war broke out."[13]

B. Inter-American Court of Human Rights: Active Promotion and Optimization

I. Appointment and Beginning

Perhaps the unusual luck that accompanied Buergenthal, according to his own judgment, in his life could have also contributed to paving the path of becoming a judge at the IACtHR in 1979. This at least seems to follow from the somewhat anecdotal story preceding the appointment to the position. Buergenthal was an US national but the US, not being a State party to the ACHR, could not propose him as a candidate. Buergenthal, regularly noted this circumstance – and perhaps with some frustration – in his seminar on international human rights law at the University of Texas at Austin. He also noted that any State party could nominate US citizens but never thought that this would ever happen in his case. As it turned out, he "could not have been more wrong": All of a sudden Buergenthal received an unexpected phone call from the Costa Rican ambassador – which he initially took as a joke from one of his students – where he was informed that Costa Rica would nominate him.[14]

Being a pioneer Judge at the IACtHR, Buergenthal had to face most basic challenges, well-known from the initial stages of such institutions but perhaps more extreme in the Caribbean-like informality of the Americas.[15] After a

13 Cf. J. M. Pasqualucci, 'Thomas Buergenthal: Holocaust Survivor to Human Rights Advocate', 18 *Human Rights Quarterly* (1996) 4, 877, 883 (quoting Buergenthal, 'Address at George Washington University Law School to a Human Rights Class' (22 September 1995)) [Pasqualucci, 'Buergenthal: Holocaust Survivor'].

14 Buergenthal, 'Remembering', *supra* note 3, 260: "I was teaching at the University of Texas Law School in Austin at the time. One of the courses I taught was a seminar on international human rights law in which I also dealt with the inter-American human rights system and would regularly point out that, since the United States had not ratified the Convention, the U.S. would not be able to nominate candidates for the Court. Although I would explain that U.S. citizens could nevertheless be nominated by any other State that had ratified the Convention, I seriously doubted that this would ever happen and never missed a chance to say so. As it turned out, I could not have been more wrong."

15 *Ibid.*, 259: "In the Americas of that time, the Cold War permitted the military regimes and civilian dictators to torture and disappear anyone who they labeled as subversive.

pompous inauguration by Costa Rica as the host country the Judges faced the "sad reality" that the government has not even provided for office space:

> "As a result, we held our first working session in the bathhouse of the Costa Rican bar association. Here the voices of children swimming and jumping into the association's pool often drowned out our early drafting efforts, hardly an auspicious beginning for those of us who thought of ourselves as modern-day John Marshalls."[16]

Apart from that, South America was well in the hands authoritarian regimes, if not outright military dictatorships, which all, despite not being State parties to the ACHR, "had a vote in deciding on the contents of our Statute and our budget".[17]

Often, too, the mere public discussion of human rights could land a person in jail or worse. This was the political climate in which the Inter-American Court opened shop, so to speak. But apart from obstacles to human rights inherent in the political climate, we also faced many practical administrative challenges, for we started at the very beginning. Statutes, rules of procedure, and headquarters agreements had to be negotiated and drafted. Internal judicial procedures had to be promulgated. Personnel had to be hired. Even judicial robes had to be purchased. We did all this and more without a budget and with judges serving only part-time, none of whom had prior judicial experience."

16 *Ibid.*, 261.

17 *Ibid.*, 262: "In 1979, most of South America-including Brazil, Argentina, Paraguay, Bolivia, Chile, and Uruguay-was either in the hands of military regimes or controlled by them. With the exception of democratic Costa Rica, the situation in Central America was not much better, nor in neighboring Panama, Haiti, or the Dominican Republic. Mexico's then so called "democracy" was also not favorably disposed to human rights or international human rights institutions. Yet, all of these countries had a vote in deciding on the contents of our Statute and our budget, despite the fact they had not even ratified the Convention."

II. The Court's Case Law

1. Advisory Opinions

In terms of the Court's case law, the first five years were dominated by (only) four advisory opinions[18] without any decision in contentious cases.[19] Yet, despite their non-binding character, these advisory opinions had an important impact in the region and thus proved to be an early indication of the Court's (future) effectiveness. For instance, an advisory opinion of 1983 regarding Guatemala led to the suspension of the death penalty in that country.[20] This was highly remarkable given that Pope John Paul II did not achieve this result a year earlier during a visit to Central America. Thus this impact was, in Buergenthal's own words, "quite a morale booster for the Court".[21] Another advisory opinion of 1985,[22] related to the Costa Rican *Schmidt Case* – where the IACtHR affirmed that a Costa Rican law requiring a compulsory membership of journalists in an association to practice their profession violated the freedom of expression –

18 See American Convention on Human Rights, 22 November 1969, Art. 64 [ACHR]. Up to now (March 2024) the Court delivered 29 advisory opinions, see here https://www.corteidh.or.cr/opiniones_consultivas.cfm?lang=en (last visited 14 March 2024). The ECtHR can only issue advisory opinions since 1 August 2018 pursuant to the entry into force of Protocol 16 to the ECHR, cf. https://www.echr.coe.int/advisory-opinions (last visited 14 March 2024).

19 T. Buergenthal, 'The Advisory Practice of the Inter-American Human Rights Court', 79 *The American Journal of International Law* (1985) 1, 1, 2: "Although the Court's contentious jurisdiction has been resorted to in only one case in the first 5 years of its existence, it has in that same period rendered four advisory opinions." The contentious cases of the IACtHR are listed here: https://www.corteidh.or.cr/casos_sentencias.cfm?lang=en (last visited 14 March 2024) [Buergenthal, 'The Advisory Practice'].

20 See *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights*), Advisory Opinion OC-3/83 of 8 September 1983, IACtHR Series A, No. 3; see in this regard Buergenthal, 'Remembering', *supra* note 3, 266.

21 *Ibid.*, 266: "A year earlier, Pope John Paul II on a visit to Central America had appealed, without success, to the Guatemalan authorities to stop the executions. And we had succeeded with a mere advisory opinion. It was quite a morale booster for the Court."

22 This opinion had been requested by Costa Rica itself after its President had been challenged on it at a meeting of the Inter-American Press Society in Miami, held a few months after the pronouncement of the IAComHR. First, the IAComHR did not establish a violation and did not refer the case to the Court within the requisite period (3 months), nor did Costa Rica nor could the complainant (Schmidt) do so. See Buergenthal, 'Remembering', *supra* note 3, 268.

strengthened this right well beyond Costa Rica[23] and proved to be a standard setter regarding freedom of expression in the IAHRS.[24] In addition, this opinion enhanced the autonomy of the Court *vis-a-vis* the Inter-American Commission on Human Rights (IAComHR) for it allowed it to adjudicate a case not referred to by the Commission[25] thus revealing its questionably non referral practice.[26]

23 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of 13 November 1985, IACtHR, Series A, No. 5, para. 25 [*Compulsory Membership Case*]: "matter of special importance to the hemisphere because several states have adopted laws similar to that of Costa Rica".

24 T. Causanilhas & S. Legale, 'O Caso Schmidt, a Liberdade de Expressão e a Rivalidade Entre a Comissão e Corte Interamericana de Direitos Humanos nos Anos 1980', 1 *Revista de Direito Internacional e Direitos Humanos da UFRJ* (2018) 1 (without page numbers), quoting other cases in fn 29 [Causanilhas & Legale, 'O Caso Schmidt']; see also M. Silva Abott, 'El Incierto Futuro de la Libertad de Expresión en el Sistema Interamericano de Derechos Humanos', 42 *Revista Chilena de Derecho* (2015) 3, 1063 (1070-1071.); see also S. Cantón, 'El Legado Democrático de la OC-5/85', in Comisión Interamericana de Derechos Humanos (ed.), *Libertad de Expresión: A 30 Años de la Opinión Consultiva Sobre la Colegiación Obligatoria de Periodistas*, 21, 23: "El camino iniciado por la Corte permitió que con posterioridad a la OC-5/85, en otras tres ocasiones, la CIDH haya tenido la oportunidad de resaltar la importancia del derecho a la libertad de expresión: el Informe sobre Desacato, la creación de la Relatoría Especial de Libertad de Expresión y la Declaración de Principios de Libertad de Expresión. Estas cuatro instancias de defensa, […] configuran los pilares que sostienen una red de defensa hemisférica, que a lo largo de las décadas ha contribuido significativamente al fortalecimiento de nuestras democracias." ("The path initiated by the Court allowed the Inter-American Commission for Human Rights to highlight the importance of the right to freedom of expression on three other occasions after OC-5/85: the Report on Contempt, the creation of the Office of the Special Rapporteur for Freedom of Expression, and the Declaration of Principles on Freedom of Expression. These four instances of defense […] form the pillars that support a hemispheric defense network, which over the decades has contributed significantly to the strengthening of our democracies."). See also *Álvarez Ramos v. Venezuela*, Judgment of 30 August 2019, IACtHR, Series C, No. 380, para. 94.

25 See *supra* note 22.

26 The Court quite explicitly criticized the Commission: "Although the Convention does not specify under what circumstances a case should be referred to the Court by the Commission, it is implicit in the functions that the Convention assigns to the Commission and to the Court that certain cases should be referred by the former to the Court, provided they have not been the subject of a friendly settlement, notwithstanding the fact that there is no legal obligation to do so. The Schmidt case clearly falls into this category. The controversial legal issues it raised had not been previously considered by the Court; the domestic proceedings in Costa Rica produced conflicting judicial decisions; the Commission itself was not able to arrive at a unanimous decision on the relevant legal issues; and its subject is a matter of special importance to the hemisphere because several

As a consequence, this referral practice improved.[27] In another advisory opinion it was held, in a pioneering way, that States participating in international human rights treaties assume obligations directly towards individuals and not only reciprocal rights towards other State Parties.[28] In sum, it is fair to say then that the Court's advisory opinions contributed to the substantive development of human rights protection in the region.

Buergenthal himself took a very nuanced approach regarding advisory opinions. On the one hand, he provided a positive account in a paper in the American Journal of International Law published in 1985:

> "They have enabled the Court to clarify the scope of its advisory jurisdiction and the role it performs in human rights matters within the inter-American system. These opinions are important also for the contributions they make to the development of international human rights law.
> More important, however, is the fact that […] [they] have enabled it [the Court] to define the scope of its advisory jurisdiction to a significant extent and to give judicial expression to certain principles that are basic to the development of the international law of human rights. In delineating the scope of its advisory jurisdiction and specifying the rules applicable to it, the Court has sought to avoid burdening the advisory process with formalistic and time-consuming obstacles. Instead, its practice reflects the view that, to be useful and effective, the advisory process has to be expeditious and capable of providing OAS organs and member states with

states have adopted laws similar to that of Costa Rica" (*Compulsory Membership Case*, *supra* note 23, para. 25). See also Causanilhas & Legale, 'O Caso Schmidt', *supra* note 24: "A OC-5/85 foi […] duplamente emblemática, porque fixou o […] direito de liberdade de expressão e por fixar o espaço de atuação da Corte IDH em relação à CIDH." ("OC-5/85 was […] emblematic in a double way, because it established the […] right to freedom of expression and because it established the scope of action of the Inter-American Court in relation to the IACHR."); see also Buergenthal, 'Remembering', *supra* note 3, 269.

27 Cf. *ibid*., 270: "A year later, the Commission referred not just one but three contentious cases to the Court."

28 *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of 24 September 1982, IACtHR, Series A, No. 2. See also Pasqualucci, 'Buergenthal: Holocaust Survivor', *supra* note 13, 888.

> legally sound judicial rulings conceived in an atmosphere that inspires trust in the deliberative and interpretative processes."[29]

In a similar positive vein Buergenthal stressed the paradoxical effectiveness of advisory opinions which despite their non-binding nature facilitated compliance by States given their lower stigmatizing effect than that of a contentious decision labeling the convicted State as a human rights violator:

> "[…] the advisory process has the advantage, and this is particularly so in the human rights context, of making it politically easier for a government to comply with advisory opinions: […] they do not stigmatize the state as a lawbreaker and permit a delinquent government to make its compliance appear to be a voluntary act."[30]

29 Buergenthal, 'The Advisory Practice', *supra* note 19, 2, 25.

30 *Ibid.*, 26; see also T. Buergenthal, 'Address by Judge Thomas Buergenthal, President, Inter-American Court of Human Rights Before a Special Session of the OAS Permanent Council' (3 December 1986), 130-131, available at http://historico.juridicas.unam.mx/publica/librev/rev/iidh/cont/4/pr/pr8.pdf (last visited 14 March 2024) [Buergenthal, 'Address']: "The sole legal effect of the opinion is that it constitutes an authoritative interpretation by a judicial body whose value derives from the institutional legitimacy the Court enjoys as an independent, impartial and non-political judicial body.

It is obvious, and I do not need to belabor this point in a room full of experienced diplomats and lawyers, that the mere fact that an opinion is not legally binding in a formal sense does not mean that it is necessarily less effective than a legally binding opinion. Politically, moreover, an advisory opinion has the great advantage that it does not stigmatize a government as a violator of human rights, it does not accuse the government and it does not determine its guilt. At the same time, however it makes the abstract legal issue perfectly clear for any government wishing to avoid being held in violation of its international legal obligations. By resolving the legal issue, it can also change the tenor and character of the political debate in the body that asked for the opinion. The advisory opinion route can therefore provide a politically and diplomatically useful technique for OAS organs wishing to avoid over-politicizing an issue and giving governments a graceful way to comply with their obligations.

As you know, much of the Court's jurisprudence up to now has consisted of advisory opinions, and some of these have had a *beneficial impact.* Here I should note that all OAS Member States have the *right to submit* their written and oral observations in any advisory proceeding pending before the Court. Unfortunately, very few states have thus far availed themselves of this opportunity, which is an opportunity to affect the interpretation of the international human rights law of our hemisphere. Here each permanent representative could help. You have no doubt seen the various notices for observations by governments that the Court sends out whenever it receives an advisory opinion request. A note from you to your foreign ministries in appropriate cases suggesting that someone consider

Buergenthal also pointed to the special legitimizing potential of advisory opinions in the Americas[31] given that they apply to all States of the Organization of American States (OAS)[32] while the Court's *contentious jurisdiction* only applies to the States parties of the Convention.[33]

On the other hand, Buergenthal argued that the viability of the advisory opinions and that of the IAHRS as a whole depended largely on the Court's contentious jurisdiction. In his intervention before the OAS Permanent Council on 3 December 1986, while promoting the advisory jurisdiction, Buergenthal also stressed the importance of the Court's contentious jurisdiction, by highlighting the interdependence between the two:

> "[…] the Court's advisory role will only perform its function if the contentious jurisdiction is also utilized. The mere existence of a contentious system provides states with the incentive to comply with the Court's advisory rulings. In short, it does not help much to tell a state what the law is, if it knows that it can go on violating it with impunity, that is, if there is no risk that it will be called to account in a contentious proceeding. It is clear, therefore, that the Court's two jurisdictions are intertwined and that one cannot function without the other also being operational."[34]

the advisability of a written or oral comment would have an impact and would, I am sure, enable the Court to have a better understanding of the legal considerations deemed significant by individual governments." (emphasis added).

31 Buergenthal, 'The Advisory Practice', *supra* note 19, 2: "The role of the Court as a judicial institution of the OAS is grounded in its advisory jurisdiction. It may be invoked by all OAS organs and all OAS member states, whether or not they have ratified the Convention. In the exercise of this jurisdiction, the Court has the power to interpret the Convention and any other human rights treaty applicable in the Americas." See also J. Nascimento, 'Os Juízes da CIJ: Thomas Buergenthal', available at https://neiarcadas.wordpress.com/2010/07/20/thomas-buergenthal/ (last visited 14 March 2024).

32 Cf. ACHR, Art. 64(1): "member states of the Organization may consult".

33 Cf. ACHR, Art. 61(1) ("Only the States Parties") and Art. 62(1) (recognition of Court's jurisdiction).

34 Buergenthal, 'Address', *supra* note 30, 131. See previously Buergenthal, 'The Advisory Practice', *supra* note 19, 26: "It should be kept in mind, in this connection, that the effectiveness of an advisory process such as the one provided for by the Convention depends to some extent -whether to a greater or lesser extent is difficult to say- upon a working contentious judicial system that can be invoked to give teeth to the advisory process." See also T. Buergenthal, 'The OAS and the Protection of Rights', 3 *Emory Journal of International Dispute Resolution* (1988) 1, 1, 22-23: "It would be a mistake not to recognize, however, that the inter-American human rights system will in the long

In other words, the paradoxical performance capacity of advisory opinions is essentially the result of their *interaction with the contentious jurisdiction*. Advisory opinions can only appear as the more benevolent option since there is the alternative of binding decision in contentious cases.

Here again we see Buergenthal's strategic-progressive approach which was always motivated by the ultimate goal of an overall strengthening of human rights protection. Now, after the establishment of the IACtHR, he could operate within the framework of an existing human rights mechanism being one of its most prominent actors and trying to capitalize on a less hostile political environment in the region:

> "Let me say too, Mr. Chairman, that your invitation that I address this special session of the Permanent Council also marks an important and most encouraging development. It would probably not have been possible all that many years ago, when a significant number of government representatives on this Council were not great friends of human rights. The fact that this is no longer true today, that we have in this regard witnessed a dramatic change in our region, is good reason for rejoicing and offers hope for the future.
> […] The machinery exists, the normative basis exists, the institutions exist to grasp this opportunity. What is needed is the political will and imagination to make the promotion and protection of human rights a high priority policy of the Organization."[35]

run lose its effectiveness unless the Court's contentious jurisdiction is also routinely invoked. If governments come to believe that the Court will only be resorted to by the Commission for advisory opinions, they are less likely to pay much attention to these rulings as time goes on. An effective contentious system therefore also serves to give muscle to the advisory opinions."

35 Buergenthal, 'Address', *supra* note 30, 131-132. See also Buergenthal, 'Remembering', *supra* note 3, 276: "The Court's position was significantly strengthened by the political transformation of the Americas in the early 1980's, which resulted in the fall of many oppressive regimes. The newly elected governments rapidly ratified the American Convention and gradually recognized the jurisdiction of the Court. Today, all Latin American OAS Member States have accepted the Court's jurisdiction. This is a sea change compared to the situation that existed in 1979."

2. Contentious Cases

In its early contentious case law, the IACtHR had to deal with so-called enforced disappearances,[36] especially in the *Velásquez Rodríguez* case against Honduras.[37] These cases posed complex evidentiary issues with a view to the attribution of responsibility to the respective State for the "mere" disappearance of a person. To overcome these difficulties the Court opted for a reversal of the burden of proof, placing it on the State concerned if the findings of the Commission and information/evidence presented by the complainant point to the former's responsibility.[38] In such a situation this State has to prove that it was not involved in the disappearance of the respective person.[39] In *Velásquez*

36 On the concept of enforced disappearances see K. Ambos, *Treatise on International Criminal Law*, Vol. II, 2nd ed. (2022), 126-130 [Ambos, *Treatise II*]; L. van den Herik & R. Braga da Silva, 'Enforced disappearance of persons', in K. Ambos (ed.), *Rome Statute of the International Criminal Court*, 4th ed. (2022), 305; K. Ambos & M. L. Böhm, 'La Desaparición Forzada de Personas Como Tipo Penal Autónomo. Análisis Comparativo-Internacional y Propuesta Legislativa', in K. Ambos (ed.) *Desaparición Forzada de Personas* (2009), 195, 198 [Ambos & Böhm, 'Desaparición Forzada'].

37 *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, IACtHR, Series C, No. 4, para. 123 ("Because the Commission is accusing the Government of the disappearance of Manfredo Velásquez, it, in principle, should *bear the burden of proving the facts* underlying its petition."), para. 126 ("The Court finds no reason to consider the Commission's argument inadmissible. *If it can be shown that there was an official practice of disappearances* in Honduras, carried out by the Government or at least tolerated by it*, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction,* so long as the evidence presented on both points meets the standard of proof required in cases such as this."), para. 135 ("In contrast to domestic criminal law, in proceedings to determine human rights violations the *State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation*."), para. 136 ("*The State controls the means to verify acts occurring within its territory.* Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State.") [*Velásquez Rodríguez Case*]. All emphasis added.

38 *Velásquez Rodríguez Case*, *supra* note 37, para. 135: "In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation" and 136: "The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State."

39 That solution was offered by the Human Rights Committee in *Bleier v. Uruguay*, Communication No. R.7/30, UN Doc. Supp. No. 40 (A/37/40) at 130 (1982), 29 March 1982, para. 13.3: "With regard to the *burden of proof*, this *cannot rest alone on the author of the communication*, especially considering that the author and the State party do not

Rodríguez this led to the following finding of the Court holding Honduras responsible for the relevant disappearances:

> "The testimony and other evidence […] leads to the conclusion that, during the period under consideration, although there may have been legal remedies in Honduras that theoretically allowed a person detained by the authorities to be found, those remedies were ineffective in cases of disappearances because the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities."[40]

This case law had an impact well beyond the Americas, not so much for the nature of the human rights violation dealt with, but because of the establishment of a duty to investigate, prosecute and adjudicate serious human rights violations.[41] For this reason it has also been referred to by the European

always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4 (2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it. In cases where the *author has submitted to the Committee allegations supported by substantial witness testimony,* as in this case*, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party*." (emphasis added), available at http://hrlibrary.umn.edu/undocs/session37/7-30.htm (last visited 14 March 2024).

40 *Velásquez Rodríguez Case*, *supra* note 37, para. 80; see *Godínez Cruz v. Honduras*, Judgment of 20 January 1989, IACtHR, Series C, No. 5, para. 87; see also *Fairén Garbi and Solís Corrales v. Honduras, Merits*, Judgment of 15 March 1989, IACtHR, Series C, No. 6, para. 102; see also Ambos *&* Böhm, 'Desaparición Forzada', *supra* note 36, 243.

41 *Velásquez Rodríguez Case*, *supra* note 37, para. 174: "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." See on this principle K. Ambos, *Impunidad y DPI*, 2nd ed. (1999), 65-121 [Ambos, *Impunidad]*; K. Ambos, 'Principle 19. Duties of States With Regard to the Administration of Justice', in F. Haldemann & T. Unger (eds), *The United Nations Principles to Combat Impunity* (2018), 205, 205-216 [Ambos, 'Principle 19'].

Court of Human Rights (ECtHR)[42] and thus constituted the beginning of a long relationship between these two regional human rights courts.[43] We will return to Buergenthal's efforts to strengthen the IACtHR's relationship with the ECtHR below.

Buergenthal was a judge at the Court during these challenging times, from 1979 to 1991.[44] His important contribution to the Court's case law during that period follows from his involvement in significant decisions and opinions, as the aforementioned *Velásquez Rodríguez*[45] and *Schmidt Cases*,[46] as well as other

42 Namely in *Akdivar and Others v. Turkey*, Judgment of 16 September 1996, ECtHR, para. 68, where the Court referred to the IACtHR with regard to the exhaustion of domestic remedies: "In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, inter alia, […] the judgment of 26 June 1987 of the Inter-American Court of Human Rights in the Velásquez Rodríguez case, Preliminary Objections, Series C no. 1, para. 88, and that Court's Advisory Opinion of 10 August 1990 on "Exceptions to the Exhaustion of Domestic Remedies" (Article 46 (1), 46 (2) (a) and 46 (2) (b) of the American Convention on Human Rights), Series A no. 11, p. 32, para. 41). One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of." See also in this regard M. Díaz Crego, 'El Impacto de la Jurisprudencia de la Corte Interamericana Sobre el Tribunal Europeo de Derechos Humanos', 75 *Derecho PUCP* (2015), 31, 32. [Díaz Crego, 'Impacto de la Jurisprudencia de la Corte Interamericana'].

43 See B. Rodríguez Reveggino, 'Espacios de Diálogo entre la Corte Interamericana de Derechos Humanos y el Tribunal Europeo de Derechos Humanos', *Revista Internacional de Derechos Humanos* (2017), 15, 23-28, focusing on "Amnesties and the duty to investigate serious human rights violations" and "military jurisdiction" as emblematic topics; 21, mentioning the forced disappearances; see also Díaz Crego, 'Impacto de la Jurisprudencia de la Corte Interamericana', *supra* note 42, 31, *passim*.

44 See https://www.corteidh.or.cr/tablas/jueces/TBU.pdf (last visited 14 March 2024).

45 To which he attributed special relevance, see Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 31.

46 Where fundamental argumentation regarding the connection between freedom of expression and democracy is also provided, see *Compulsory Membership Case*, *supra* note

important matters.[47] However, Buergenthal also dissented with the majority twice, most importantly perhaps in the context of Advisory Opinion OC-4/84. In this case the Court had to decide on the compatibility of a proposed amendment of the Constitution of Costa Rica related to naturalization with the ACHR.[48] The amendment aimed to extend the minimum residency requirement for Central Americans, Ibero-Americans, and Spaniards to obtain Costa Rican nationality, requiring a two year longer period for those who obtained their original nationality by naturalization (7 years) as opposed to birth (5 years), thus privileging – insofar in line with the original provision[49] – the latter group.[50]

23, para. 70: "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a conditio sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free."

47 See for instance *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights),* Advisory Opinion OC-1/82 of 24 September 1982, IACtHR, Series A, No. 1, in which the Court clarified its advisory jurisdiction in the sense that it "can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States" (see first conclusion), see also *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, Advisory Opinion OC-9/87 of 6 October 1987, IACtHR, Series A, No. 9, where the Court stated (see para. 41.1) *inter alia* that "the 'essential' judicial guarantees which are not subject to derogation […] include habeas corpus […] amparo, and any other effective remedy before judges or competent tribunals […], which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the Convention."

48 *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 of 19 January 1984, IACtHR, Series A, No. 4 [*Proposed Amendments Case*].

49 Former Art. 14 Constitution Costa Rica reads:
"The following are Costa Ricans by naturalization:
3. Native-born Spaniards and Ibero-Americans who obtain the appropriate certificate from the civil registrar, provided they have been domiciled in the country during the two years prior to application;
4. Central Americans, Spaniards and Ibero-Americans who are not native-born, and other foreigners who have been domiciled in Costa Rica for a minimum period of five years immediately preceding their application for naturalization, in accordance with the requirements of the law." (translation taken from *Proposed Amendments Case*, *supra* note 48, para. 7).

50 *Amendments Proposed by the Special Committee of the Legislative Assembly in its Report of 22 June 1983*:

While the majority of the judges did not find a relevant discrimination in the preferential treatment based on birth,[51] Buergenthal argued that the distinction between nationality *by birth* or *by naturalization* was unjustified.[52]

While it is not possible to recount in more detail Buergenthal's contribution to the Court's case law during his tenure, it should have already become clear from the above that this contribution must have been decisive in steering the Court through the muddy waters of external political pressure by predominantly hostile States. The Court could only overcome the ensuing challenges by optimizing its performance and producing solid jurisprudence. Indeed, the adverse political context that characterized those early years and the IACtHR's performance, aimed at ensuring the protection of human rights notwithstanding, might allow us to speak of a true boldness of the Court during

"Art. 14: The following are Costa Ricans by naturalization:
2) Native-born nationals of the other countries of Central America, Spaniards and Ibero-Americans with five years official residence in the country and who fulfill the other requirements of the law;
3) Central Americans, Spaniards and Ibero-Americans, who are not native-born, and other foreigners who have held official residence for a minimum period of seven years and who fulfill the other requirements of the law." (translation taken from *Proposed Amendments Case*, *supra* note 48, para. 7).

51 *Proposed Amendments Case*, *supra* note 48, Dissenting Opinion of Judge Thomas Buergenthal, para. 3.

52 *Ibid.*, paras 5-6 (6: "What legitimate governmental end will be accomplished by requiring these naturalized Central Americans, Spaniards and Ibero-Americans to wait two years longer than their co-nationals? It can be argued that these individuals might have acquired their earlier nationality by fraud. True, but under international law, Costa Rica is not required to recognize any nationality that is not based on real and effective ties between the individual and the state granting the nationality. Moreover, the likelihood that a very small percentage of individuals might act dishonestly is hardly a legitimate reason for punishing the vast majority of honest foreigners. It can also be argued that the additional two years are required to permit these people to speak better Spanish or to acquire a more profound knowledge of Costa Rican history, culture and life. True, but Article 15 of the same proposed constitutional amendment already addresses that issue; it would require the Government of Costa Rica to accomplish that objective in a much more rational and disproportionately less harmful manner by examinations designed to test what each individual knows about Costa Rica, rather than by assuming ignorance on the part of all"). See also the Dissenting and Concurring Opinion of Buergenthal in *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*, Advisory Opinion OC-7/85 of 29 August 1986, IACtHR, Series A, No. 7, para. 1, where he defends the inadmissibility of the advisory opinion in that case.

that phase.[53] And Buergenthal has been considered as one of the most influential judges, if not the most influential one, of that Court, in a way being *primus inter pares*, among fellow judges, some of whom had also been victims of human rights violations.[54] Thus, according to Pasqualucci, an emeritus professor at the University of Dakota: "[E]ven among those renowned personages, Buergenthal is generally considered to have been the Court's most influential and creative member."[55] For Buergenthal's fellow judge Pedro Nikken, of Venezuelan nationality, Buergenthal's contribution to the Court "has been […] invaluable. […] The respectability earned by the Court is the mark of his efforts."[56] The

53 See in this regard K. Ambos & M. L. Böhm, 'Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos. ¿Tribunal Tímido vs. Tribunal Audaz?', in K. Ambos *&* E. Malarino (eds), *Sistema Interamericano de Protección de los Derechos Humanos y Derecho Penal Internacional – Vol. II* (2011), 43, 67 (updated in: E. Ferrer Mac-Gregor *&* A. Herrera García (eds), *Diálogo Jurisprudencial en Derechos Humanos* (2013), 1057, 1057-1088) [Ambos & Böhm, 'Tribunal Europeo y Corte Interamericana'].

54 Pasqualucci, 'Buergenthal: Holocaust Survivor', *supra* note 13, 885: "Moreover, the members of the Court had themselves had practical experience in the area of human rights: four of the judges had been jailed for political reasons at different times of their lives."

55 *Ibid*., 885; see also S. Picado Sotela, 'Thomas Buergenthal', in Â. Cançado Trindade (ed.), *The Modern World of Human Rights. Essays in Honour of Thomas Buergenthal* (1996), 19, 24 [Cançado Trindade (ed.), *Essays in Honour of Thomas Buergenthal*].

56 P. Nikken, 'Presentation', in Cançado Trindade (ed.), *Essays in Honour of Thomas Buergenthal*, *supra* note 55, XIII, XIV: "Capítulo aparte merece el aporte del Juez Buergenthal a la Corte Interamericana de Derechos Humanos, donde tuve la oportunidad de compartir con él casi diez años de actividades judiciales. Ese aporte ha sido – permítaseme subrayarlo con pleno conocimiento de causa – invalorable. Como jurista y como hombre justo; como intelectual y como hombre recto; como académico y como hombre de trabajo; como profesor y como hombre de virtud; como magistrado y como hombre de la calle consustanciado con lo que pasa en nuestro mundo convulsionado y cambiante, el juez Buergenthal marcó los doce primeros anos de existencia de la Corte. En la respetabilidad que el Tribunal ganó, está presente su impronta y su obra." ("Judge Buergenthal's contribution to the Inter-American Court of Human Rights, where I had the opportunity to share with him almost ten years of judicial activities, deserves a separate chapter. That contribution has been – let me emphasize it with full knowledge of the facts – invaluable. As a jurist and as a just man; as an intellectual and as an upright man; as an academic and as a man of work; as a professor and as a man of virtue; as a magistrate and as a man of the street attuned to what is happening in our convulsed and changing world, Judge Buergenthal marked the first twelve years of the Court's existence. His imprint and his work are present in the respectability that the Court has earned.") (quoted translation in main text taken from Pasqualucci, 'Buergenthal: Holocaust Survivor', *supra* note 13, 890)] [Nikken, 'Presentation']. See also E. Abad, 'Recensión a J.E. Mendez y F. Cox, (eds), *El futuro del Sistema Interamericano de Protección de los Derechos Humanos*, San José,

Court itself issued a press release at the occasion of Buergenthal's death stressing his "essential role in the Court's consolidation during its initial years and his legacy", as "one of the founding fathers of the Inter-American Court".[57]

C. European Court of Human Rights (ECtHR) and Inter-American Institute of Human Rights (IIHR): Interaction and Critical Support/Follow-Up

Two additional aspects deserve further emphasis to fully capture Buergenthal's contribution to the IAHRS: on the one hand, the proactive pursuit of a fruitful, productive relationship with the ECtHR and the critical support and monitoring of the IAHRS by way of the IIHR.

I. ECtHR

As to the ECtHR, Buergenthal acknowledged early on how important this relationship would be for the IACtHR and, in general, how important the cooperation of regional human rights systems would be for the future of human rights protection.[58] This was not so much for the jurisprudential influence by the (older) ECtHR[59] but rather for institutional reasons and the accumulated experience of the ECtHR.[60] As recounted by Buergenthal himself:

Instituto Interamericano de Derechos Humanos, 609 pp.', 39 *Persona y Derecho* (1998), 378, 380: "Thomas Buergenthal y […] Antônio Cançado Trindade [son] (probablemente los jueces que más doctrina han sentado en la Corte Interamericana, y verdaderos motores de todo el sistema)." ("Thomas Buergenthal and […] Antônio Cançado Trindade [are] (probably the judges who have established the most doctrine in the Inter-American Court, and true motors of the entire system)."

57 See the press release here https://www.corteidh.or.cr/docs/comunicados/cp_34_2023_eng.pdf [last visited 14 March 2024]. The latter part of the quote is from Judge Ricardo Pérez Manrique, current president of the Court.

58 He made the same point for the still in the making African Court of Human Rights (AfCHR), cf. Buergenthal, 'Remembering', *supra* note 3, 275, fn. 35.

59 Buergenthal, 'American and European Conventions', *supra* note 6, 156: "Although the American Convention is modelled on the European Convention, it departs from or improves upon the latter in a number of important respects."

60 T. Buergenthal, 'International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction', 12 *Texas International Law Journal* (1977) 2-3, 321, 324 [Buergenthal, 'Institutions'].

> "As soon as the Court was established, we decided to cultivate special contacts with the European Court of Human Rights. This effort began with the inauguration of our Court in San José, which was attended by the Vice-President of the European Court of Human Rights. There followed an informal agreement between the Inter-American Court and the European Court, providing for periodic meetings between judges of the two courts, alternating between Strasbourg and San José. Apart from our need to have the benefit of the European Court's prior judicial experience, it was also important for us to be seen by the governments in the Americas to have international support outside our region."[61]

Yet, Buergenthal did not see this relationship as one-sided; rather he expected that the time would come where the IACtHR's case law on (more) serious human rights violations would also become relevant for the ECtHR.[62]

At the same time, Buergenthal's thinking was never limited to the region but he always aspired and pursued the global protection of human rights. To achieve such a global reach, he pursued a twofold strategy. On the one hand, considering the relative political and cultural homogeneity of the countries in the Americas (albeit acknowledging the socioeconomic differences between the North and the South),[63] Buergenthal argued that the effectiveness of human rights protection primarily depended on the strengthening of regional systems.[64]

61 Buergenthal, 'Remembering', *supra* note 3, 275-276.

62 *Ibid.*, 276: "The precedents established by the Inter-American Court concerning disappearances, states of siege, the meaning of the rule of law, and so forth-which at one time seemed of no relevance to the European system-may well prove of interest to the enlarged and transformed European human rights system."

63 Buergenthal, 'American Convention', *supra* note 5, 123-124. However, he expressed doubts regarding homogeneity in the case of Asia, see T. Buergenthal, 'Keynote Lecture: International Human Rights: Need for Further Institutional Development', 50 *Case Western Reserve Journal of International Law* (2018) 1, 9, 16: "Asia might make a good candidate for one or more sub-regional systems, consisting of no more than a dozen member states. The Asian continent is too large, and politically and culturally too diverse for just one system. A single regional system would better suit other parts of the world." [Buergenthal, 'Keynote Lecture'].

64 Buergenthal, 'American and European Conventions', *supra* note 6, 156: "It thus would appear that the regional approach holds, at least for the time being, a greater promise of effectiveness. Why should this be so? For one thing, political and cultural homogeneity are basic prerequisites for an effective human rights system, and these are more likely to be found on the regional plane. Other preconditions for such a system include reasonably well-developed legal systems as well as shared juridical traditions and institutions. Here

On the other hand, Buergenthal was aware that this *intra*regional homogeneity is the flip side of *inter*regional heterogeneity. Consequently, he highlighted the cultural differences between regional human rights protection systems.[65] These differences, however, speak in favor of a true dialogue at the same level instead of an impoverishing, lecturing-kind-of-monologue.

With the foregoing in mind, Buergenthal's stance on the connection between regional systems and global human rights protection can be set out more clearly. Given the interregional socio-cultural diversity, the protection of human rights did, in his view, not require a centralized strategy, that is, implementation through a *top-down* structure with a global institution at its peak. Instead, he advocated for approaching human rights protection as a decentralized endeavor, supported by a *bottom-up* structure – sustained through the involvement of various regional and local institutions. Hence, when speaking of global human rights protection, the idea that should be evoked is not that of a system of protection projected from a centralized world institution *to* every corner of the world but rather protection *from* every corner of the world trough regional/local institutions covering the whole world. In a way Buergenthal was a regionalist with a universalist aspiration:

> "It thus would appear that the regional approach holds, at least for the time being, a greater promise of effectiveness. Why should this be so? For one thing, political and cultural homogeneity are basic prerequisites for an effective human rights system, and these are more likely to be found on the regional plane. Other preconditions for such a system include reasonably well-developed legal systems as well as shared juridical traditions and institutions. Here again, smaller regional groupings of states are more likely to meet these requirements than the human rights systems that are open to the entire international community."[66]

> "I've always been a great supporter of regional human rights tribunals. I don't believe in having a world human rights court. I wouldn't be opposed to it, but the regional human rights tribunals, if they are honest, are much closer to the people, to the region. And they socialize the governments in the region to human rights, to

again, smaller regional groupings of states are more likely to meet these requirements than the human rights systems that are open to the entire international community."

65 *Ibid.*, 156, 166.

66 *Ibid.*, 156.

their obligations in human rights. Much easier than something that is far away."[67]

Of course, the success of this approach depends on the success of each regional human rights system, which in turn depends on a variety of different factors. In general, it depends on its *implementation*, *promotion*, *interconnection*, and *critical follow-up*. So far, we have seen how Buergenthal's approach covered the first three factors, we will now turn to the fourth.

II. Inter-American Institute of Human Rights

The need of a critical follow-up did not escape Buergenthal's attention. In fact, he was behind the establishment of the IIHR in 1980 (by means of an agreement between the Court and Costa Rica),[68] was president of its board since its foundation and its honorary president since 1992,[69] and, perhaps

67 Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 47, where Buergenthal also refers in a similar vein to international criminal justice: "I think the same thing, that if we really want to develop a truly effective international criminal law system. We would need, in addition to the International Criminal Court, regional international criminal courts that deal with slavery issues, certain types of drug gangs, and some things that are within the jurisdiction of the ICC, but important on a lower level of importance. For example, this whole criticism by Africa of the ICC would probably be less if you had an African court of criminal justice. Maybe they would have been smarter in choosing which countries to go after. The ICC is immediately identified as a foreign court, not their own. *So, I believe that we need two things in the world today: We need regional human rights courts and regional criminal courts.*" (emphasis added).

68 See https://www.iidh.ed.cr/en/ (last visited 14 March 2024); the agreement was approved by the Law No. 6528, 28 October 1980, available here https://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=1545&nValor3=1654&strTipM=TC (last visited 14 March 2024). Buergenthal and his colleagues from the El Salvador Truth Commission were also involved in the establishment of the Due Process of Law Foundation (DPLF), which is based in Washington D.C. The DPLF is "a regional organization comprised of professionals with a variety of nationalities, that promotes the Rule of Law in Latin America through the use of analysis and recommendations, cooperation with private and public organizations and institutions, exchanges of experiences, and advocacy efforts", cf. https://www.dplf.org/en/who-we-are (last visited 14 March 2024).

69 P. Nikken, 'Sobre la Autonomía y Naturaleza del Instituto Interamericano de Derechos Humanos', in Cançado Trindade (ed.), *Essays in Honour of Thomas Buergenthal*, *supra* note 55, 3 [Nikken, 'Autonomía y Naturaleza del IIDH'].

most importantly, actively supported it until before his death.[70] The IIHR, modeled after the René Cassin International Institute of Human Rights based in Strasbourg,[71] is an independent and autonomous institution, dedicated to teaching, research, and promotion of human rights.[72] For Buergenthal its main purpose was to promote and strengthen the IAHRS with the Court as its centerpiece:

70 The significance and comprehensiveness of his contribution to the establishment of the IIHR have been expressed by the Institute itself at the occasion of his death, IIDH, 'Sensible Fallecimiento del Sr. Thomas Buergenthal, Fundador y Presidente Honorario del Instituto Interamericano de Derechos Humanos' (2023), available at: https://www.iidh.ed.cr/en/component/content/article/sensible-fallecimiento-del-sr-thomas-buergenthal-fundador-y-presidente-honorario-del-instituto-interamericano-de-derechos-humanos?catid=15:novedades&Itemid=101 (last visited 14 March 2024): "La creación de nuestro Instituto se debe a la visión y esfuerzo de Thomas Buergenthal. Fue él quien, en enero de 1980, convocó figuras prominentes en el campo de derechos humanos de todos los países del hemisferio a una reunión en San José para hablar de la necesidad y posibilidad de una institución de este tipo, con autonomía y legitimidad para encabezar los esfuerzos de enseñanza, investigación y promoción de los derechos humanos. Fue el que consiguió los fondos que permitió el IIDH de lanzar importantes proyectos desde su inicio. Pensar que fuera posible la consolidación de una entidad con dicha naturaleza al inicio de la década de los ochentas, cuando gran parte de los Estados latinoamericanos se encontraban bajo dictaduras militares no solo era necesario, sino profundamente valeroso." ("The creation of our Institute is due to the vision and efforts of Thomas Buergenthal. It was he who, in January 1980, summoned prominent figures in the field of human rights from all the countries of the hemisphere to a meeting in San José to discuss the need and possibility of such an institution, with autonomy and legitimacy to spearhead efforts in teaching, research and promotion of human rights. He was the one who obtained the funds that allowed the IIDH to launch important projects since its inception. To think that it was possible to consolidate such an entity at the beginning of the 1980s, when most Latin American States were under military dictatorships, was not only necessary, but profoundly courageous.") See also Nikken, 'Autonomía y Naturaleza del IIDH', *supra* note 69, 3: "Quien concibió la idea de crear el Instituto y su impulsor determinante y más vigoroso fue Thomas Buergenthal." ("Thomas Buergenthal was the one who conceived the idea of creating the Institute and its most vigorous and decisive driving force.").

71 See https://iidh.org/en/ (last visited 14 March 2024); see in this regard Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 30, where Buergenthal states: "In many ways when I founded the Inter-American Institute of Human Rights, which was my baby, it was based on the Cassin Institute."

72 See https://www.iidh.ed.cr/es/acerca-del-iidh (last visited 14 March 2024): "una entidad internacional autónoma, académica, dedicada a la enseñanza, investigación y promoción de los derechos humanos".

> "When I arrived at the court, I went to the library of the university in Costa Rica, which is very close to where we were sitting. And I realized that they had only one shelf of books on international law. I thought: »Not only do we need an institute to teach. We need an institute that will help us get the books, and that will help us raise money for travel and other purposes. The OAS is not going to give us ever enough money, not as long as you have all of these dictatorial regimes in power. So, we have to have our own independent nongovernmental way to raise money.« That led to the establishment of the Institute. The court at the first session voted for the establishment of the Institute, and empowered me to bring it about it."[73]

The Institute has certainly played an essential role in promoting human rights within the Americas, by supporting the Court, as an independent think tank[74] and resource centre for numerous Latin American legal practitioners and scholars.[75] This becomes particularly relevant when considering the challenging and heterogeneous conditions of Latin American academia, even more challenging before the existence of the internet with the access to academic and other material it facilitates. Interestingly, for Buergenthal the Institute was even more important than the Court in terms of human rights impact:

> "During my period on the Court, I don't think we had very much of an impact at all. […] a decision of the Inter-American Court would not be something that would get wide attention in the region […] we had a minimal effect. […] *But I think the Institute in many*

73 See Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 30.

74 Note that Buergenthal actively defended the Institute's independence, especially regarding the various donors, cf. *ibid.*, 34, where it is recounted how Sonia Picado, Executive Director of the IIHR, resisted different types of pressure stating regarding Buergenthal: "*Tom envió un tremendo telegrama en contestación a un fax que nos enviaron diciéndonos qué teníamos que hacer. Tom dijo: 'nosotros no vamos a aceptar ningún donante que nos venga a decir lo que tenemos que hacer, de manera que ya ustedes no están invitados.'*" (emphasis in the original) ("Tom sent a tremendous telegram in response to a fax that was sent to us telling us what to do. Tom said, 'We are not going to accept any donor who comes to us and tells us what to do, so you are no longer invited.'").

75 See Buergenthal, 'Remembering', *supra* note 3, 273-274; see also 'Encuentros en el IIDH, N° 1, Memoria de la Conmemoración del Convenio de Sede del Instituto Interamericano de Derechos Humanos. Homenaje a Thomas Buergenthal', 30 and 31 October 2000, 37-40, available at https://www.corteidh.or.cr/tablas/14751.pdf (last visited 14 March 2024).

> *ways played a more important role, because it played an educational role*. Costa Rica was the one place where you could come and talk human rights. You couldn't do that in Argentina, you couldn't do that in many other places, because you were immediately identified as a leftist, communist, or whatever they wanted to call it."[76]

Against this background it is fair to say that the IIHR turned out to be a critical but constructive companion of the IAHRS and the IACtHR. Still, Buergenthal complained of a lack of interest in and knowledge of the IAHRS in general (including in the mass media)[77] and in particular in the USA, as part of "American provincialism and sheer ignorance when it comes to Latin America",[78] and of a lack of an institutional support structure similar to the one existing in Europe.[79] He also questioned whether the IACtHR's size was appropriate, considering the weak impact of the Court's decisions on domestic law.[80] Yet, at the same time Buergenthal acknowledged the impact of the Court's case law, recounting an anecdote from his work at the Salvadoran Truth Commission involving a simple peasant:

> "We were interviewing some *campesinos* in a small village where serious human rights violations had taken place. During El Salvador's long civil war. One of the witnesses, an old farmer, reported on what had happened in his village. He concluded with the demand that the government comply fully with the "Velásquez Rodriguez Law." Our chairman responded, 'you mean the Velásquez Rodriguez Case?'

76 Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 32 (emphasis added).
77 Buergenthal, 'Remembering', *supra* note 3, 279.
78 T. Buergenthal, 'Human Rights in the Americas: View From the Inter-American Court', 2 *Connecticut Journal of International Law* (1987) 2, 301, 305: "American international lawyers and human rights experts know a great deal about the European system and very little about the inter-American system" [Buergenthal, 'Human Rights in the Americas'].
79 American Society of International Law, *Proceedings of the Annual Meeting*, Vol. 82, 20-23 April 1988, 101, 117: "On one level, the lack of progress is related to the serious political, economic and social problems that have confronted the region and continue to do so. But there are other reasons as well. One of the major systemic weaknesses of the inter-American human rights system, when it is compared with the European, for example, is that the former lacks an institutional human rights lobby whose function is performed in the Council of Europe by its Parliamentary Assembly. The inter-American system does not have a comparable institution."
80 Buergenthal, 'Remembering', *supra* note 3, 278: "I have also frequently wondered whether the Court's small size contributes to the limited domestic effect of its judgments?".

> 'Yes,' the old man replied, 'the law that does away with impunity and makes governments pay for their human rights violations.'"[81]

This brings us to Buergenthal's work in dealing with the civil war in El Salvador.

D. Truth Commission for El Salvador (TCES)

Shortly after concluding his work at the IACtHR, Buergenthal assumed another prominent role to further contribute to human rights, again via a telephone call invitation:

> "In November 1991, while attending a human rights conference in Norway, I received a call from the office of the UN Secretary-General in New York. The caller explained that the Secretary-General wished to name me to the United Nations Truth Commission for El Salvador that would be established shortly. Would I accept the appointment? As I listened to the caller, I looked out of the window of the Oslo conference center where we were meeting; the icy rain continued to fall and the cold I had been nursing in Oslo for the past few days was getting worse. All I could think of at that moment was the tropical climate of El Salvador. I immediately accepted the appointment without so much as asking all the right questions one is supposed to ask on such occasions."[82]

The TCES was established in 1992 to address the conflict between the Army and the guerrillas that took place in the country during Buergenthal's tenure as a judge at the IACtHR.[83] The TCES was entirely composed of foreigners, including two politicians and Buergenthal as the only trained jurist.[84]

81 *Ibid*., 280.

82 T. Buergenthal, 'Truth Commisions: Between Impunity and Prosecution', 38 *Case Western Reserve Journal of International Law* (2006) 2, 217, 217 [Buergenthal, 'Truth Commisions'].

83 On political background see C. Collins & P. Cuellar, 'Truth Commission/Comisión de la Verdad (El Salvador)', in L. Stan & N. Nedelsky (eds), *Encyclopedia of Transitional Justice,* Vol. 3, 2nd ed. (2023), 586, 586 [Collins & Cuellar, 'CV El Salvador'].

84 The other members of the TCES were the Colombian politician Belisario Betancur (former President from 1982 to 1986) and the former Venezuelan Foreign Minister Reinaldo Figueredo. See also Buergenthal, 'Truth Commisions', *supra* note 82, 218:

Perhaps the most important challenge of the TCES was to find witnesses willing to speak out given the high risks this entailed.[85] The TCES made great efforts to overcome this challenge, although at times this created risks for the commissioners themselves:[86]

> "I was often scared in El Salvador […]. We couldn't bring our wives because it was considered too dangerous, because the government that had committed all of these things was still in power. The generals were still in office. We were sitting in the restaurant cafeteria one evening, and suddenly the lights went out. Our bodyguards didn't have flashlights and they're sitting there with matches, trying to see what was going on. We thought we were under attack. That was one of the scariest moments there".[87]

> "We also had to find ways to protect those who were willing to talk and realized that to get witnesses to come forward, we had to guarantee them full confidentiality. As a result, clandestine meetings with witnesses had to be arranged outside our offices, particularly when military officers or insurgents agreed to testify against their superiors. Some of these meetings were scary cloak and dagger operations. Specialists from the UN periodically swept our offices for hidden microphones, and our radio was always on when we received sensitive testimony that we did not want to be overheard."[88]

This strategy yielded the expected results, allowing the Commission to obtain the necessary testimonies and publish their final report, expressively named "From Madness to Hope" (*De la Locura a la Esperanza*) within

"Some people who knew of my prior service as judge and president of the Inter-American Court of Human Rights, joked that the Commission was composed of two politicians and a judge to keep them honest."

85 *Ibid.*, 218-219: "During the first three months of our investigation, we had very little success in getting much information. People were afraid to testify, particularly against the military and security forces because the government which had conducted the war was still in power, with its military and police infrastructure intact."

86 See *Acuerdo de Chapultepec*, 16 January 1992, ch. 1, para. 5, available at https://peacemaker.un.org/sites/peacemaker.un.org/files/SV_920116_ChapultepecAgreement.pdf (last visited 14 March 2024).

87 Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 40.

88 Buergenthal, 'Truth Commisions', *supra* note 82, 219.

approximately eight months.[89] Through this final report, the TCES contributed to the dissemination of various events, including the infamous massacres of the Jesuit priests[90] and of "El Mozote"[91], events whose cruelty deeply affected Buergenthal himself:

> "Until then I had always believed that my Holocaust experience had hardened me to even the most egregious violations of human rights. In El Salvador I found this not to be true. To see the skeleton of a baby still in the womb of a mother killed in the El Mozote massacre, where around five hundred women, children and old men had been murdered, was more than I could take without being deeply affected by the utter depravity of those who committed such crimes".[92]

> "I always find, I learn something from all of these terrible things, like the El Mozote Massacre. About 500 or 600 women, children and old men were killed. One survivor, a woman, started to talk, and within a few minutes I could tell her what happened, because it was what I remembered happened in the evacuation of the Ghetto of Kielce. It was the same thing, the killings, you know, people running. And I suddenly realized how we humans are so good at repeating the same cruelty, every time. We don't have any creative imagination when it comes to cruelty. We always do the same thing to each other, which is a frightening discovery to make. Whether I want them to be original, I don't know, but I was struck by the fact that it's always the same."[93]

89 *Ibid*. The Final Report TCES is available here: TCES, 'De la Locura a la Esperanza: La Guerra de 12 Años en El Salvador: Informe de la Comisión de la Verdad Para El Salvador' (1992), available at https://digitallibrary.un.org/record/183599?ln=es (last visited 14 March 2024) [Final Report TCES].

90 See in this regard: The Center for Justice & Accountability, 'Murder of Jesuit Priests and Civilians in El Salvador', available at https://cja.org/what-we-do/litigation/the-jesuits-massacre-case/ (last visited 14 March 2024).

91 See M. Uetricht & B. Marcetic, 'Remember El Mozote' (11 December 2022), available at https://inthesetimes.com/article/remember-el-mozote (last visited 14 March 2024).

92 Buergenthal, *Lucky Child*, *supra* note 1, 219.

93 Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 39.

The TCES offered also a series of recommendations aimed at facilitating national reconciliation in El Salvador.[94] A particular noteworthy aspect of the TCES's final report is the identification ("naming") of concrete suspects of serious human rights violations.[95] Unfortunately, this bold step was not followed-up by subsequent criminal investigations or prosecutions. To the contrary, a few days after the TCES's final report, an amnesty law was enacted, creating a full-fledged impunity and impeding the prosecution of possible perpetrators.[96] Even though this law was declared unconstitutional by the country's Supreme Court in 2016,[97] an adequate judicialization of the horrendous crimes committed during the civil law is still outstanding until today.[98]

Against this background, one may think that the TCES underestimated the harmful, unintended consequences of a report "naming names".[99] But this was not the case.[100] The TCES was well aware of the country's political situation

94 See Final Report TCES, *supra* note 89, 185-198; see also T. Buergenthal, 'The United Nations Truth Commission for El Salvador', 27 *Vanderbilt Journal of Transnational Law* (1994) 3, 497, 533-537 [Buergenthal, Truth Commission El Salvador].

95 Pasqualucci, 'Buergenthal: Holocaust Survivor', *supra* note 13, 893. See also Buergenthal, 'Truth Commission El Salvador', *supra* note 94, 519-522; Collins & Cuellar, 'CV El Salvador', *supra* note 83, 586.

96 See El Salvador, 'Decreto No. 486 de 1993 - Ley de Amnistía General Para la Consolidación de la Paz' (20 March 1993), available at https://www.refworld.org/docid/3e50fd334.html (last visited 14 March 2024); see also Collins & Cuellar, 'CV El Salvador', *supra* note 83, 588.

97 El Salvador Supreme Court, 'Sentencia de Inconstitucionalidad 44-2013/145-2013' (13 July 2016), available at https://www.refworld.org.es/type,CASELAW,,,59d276aa4,0.html (last visited 14 March 2024).

98 See DW, 'El Salvador: Exigen Ley Para las Víctimas de la Guerra Civil' (21 March 2023), available at https://www.dw.com/es/exigen-al-congreso-de-el-salvador-una-ley-para-las-v%C3%ADctimas-de-la-guerra-civil/a-65054710 (last visited 14 March 2024); see also Office of the High Commissioner for Human Rights, 'Justice Delayed but not Denied: Transitional Justice in El Salvador' (2 April 2020), available at https://www.ohchr.org/en/stories/2020/04/justice-delayed-not-denied-transitional-justice-el-salvador (last visited 14 March 2024).

99 For instance: J. Ávalos, 'El Salvador: La Comisión que no Calculó la Resistencia de las Èlites, available at https://www.dejusticia.org/especiales/la-verdad-en-el-espejo-retrovisor-de-america-latina/el-salvador-la-comision-que-no-calculo-la-resistencia-de-las-elites/ (last visited 14 March 2024). Regarding the reception of the final report see Collins & Cuellar, 'CV El Salvador', *supra* note 83, 588.

100 Buergenthal, 'Truth Commission El Salvador', *supra* note 94, 522: "In our view, national reconciliation would be harmed rather than helped by a Commission report that told only part of the truth. If there had been an effective justice system in El Salvador at the time of the publication of our Report, it could have used the Report as a basis for an

and anticipated the limited judicial action that the final report might ensue.[101] In fact, the publication of the names of concrete suspects was motivated by the expectation that the above mentioned amnesty law would be adopted.[102] Thus, the idea was to compensate the potential and anticipated justice deficit by maximizing truth:

> "We named people who we believed had committed these offences. […] We did it, for one very simple reason. We knew that as soon as our report was adopted, the government would declare an amnesty for everybody, which they did. We figured if they do that, our report is useless. The people of Salvador will not get the truth that they needed. We wanted to make sure that the people of El Salvador knew who the people were that we accused. If that's a violation of due process, we will take our punishment for that. But we thought that this was important enough to do and we had safeguards. We named names only if we felt 95 percent sure about the guilty party. We would not mention names if we were not 95% sure."[103]

This represents another example of Buergenthal's approach, here in a transitional justice context: faced with the risk of an unlikely realization of justice (i.e., the prosecution and adjudication of the responsible perpetrators), some degree of individualization – as a form of truth – was better than nothing. Of course, the question remains whether Commission could in fact be reasonably

independent investigation of those guilty of the violations. In these circumstances, it might have made some sense for the Commission not to publish the names and, instead, to transmit the relevant information to the police or courts for appropriate action. But one reason for establishing the Commission was that the Parties to the Peace Accords knew, and the Truth Commission had ample evidence to confirm, that the Salvadoran justice system was corrupt, ineffective, and incapable of rendering impartial judgments in so-called 'political' cases."

101 *Ibid*. Indeed, this was the reason behind the establishment of a fully internationally constituted Truth Commission, composed entirely of foreign members, *ibid*., 221: "The establishment of an international commission will frequently make sense for a small country, where the population continues to be politically polarized. Here it may be difficult to find even a small group of nationals of the country the population would trust to be impartial. This was the situation in El Salvador and explains why the parties to the Salvadoran peace agreement preferred to have only foreigners comprise their truth commission."

102 Kreß & Stahl, 'Interview with Thomas Buergenthal', *supra* note 1, 38.

103 *Ibid*.

certain to have "named" the right persons and how this concrete identification played out with regard to the presumption of innocence. At any rate, Buergenthal, was well aware of the problem but was ready to pay the consequences: "If that's a violation of due process, we will take our punishment for that."[104]

E. Conclusion

Thomas Buergenthal's comprehensive and decisive contribution to human rights in the Americas and, indeed, beyond cannot be overestimated. Buergenthal played a central role for the protection of human rights in the region because of his unwavering commitment to the viability of the IAHRS before, during, and after its implementation. As a judge of the IACtHR he made a decisive contribution not only to the Court's case law but to its institutional embedding in the Americas and its reach beyond the region. As an academic and activist Buergenthal was key in founding the IIHR which turned out to be a major force in the strengthening of the IAHRS. In a nutshell, Buergenthal's contribution can be summarized in a threefold way by the notions of prudent proactivity, promotion/optimization, interaction/critical follow-up. He thus was one of the architects of the IAHRS thereby reinforcing the global protection of human rights from a regional basis.[105]

The reflections he shared during this path also reveal his remarkable realism and a bold, pragmatic approach, which he also had the opportunity to apply while serving at the TCES. This approach offers valuable lessons for the global protection of human rights which may be summarized in three key phrases:

- *some* protection rather than *none*;
- maximizing the performance of an institution rather than fostering a mere illusion of protection;
- setting ambitious goals, but taking modest steps.

What factors converged to make Buergenthal's contribution so significant? Apart from his undeniable academic abilities, his political acumen and a

104 *Ibid*.

105 Buergenthal, 'American and European Conventions', *supra* note 6, 156: "With the entry into force of the American Convention and the establishment of the Commission and Court, we have a significant opportunity to make our own distinctive inter-American contribution to the protection of human rights."

profound understanding of the reality of the Americas surely played crucial roles.[106] Additionally, his acute awareness of human rights violations as a latent risk in any society and of the struggle against them as a constant task, requiring institutionalization and a pragmatic approach.[107] As shown by his appointment to the IACtHR, perhaps some of his extraordinary fortune, reflected in his personal account in a "Lucky Child", favored paving his way to his contribution. But the *Lucky Child* was just the seed of the *Human Rights Lawyer*. The enormity of Buergenthal's contribution undoubtedly goes beyond luck and is the result of his undeniable talent and tireless work. Life had reserved two monumental challenges for him: the struggle for *his* most basic rights in Europe, and for the rights of *others* in the Americas. He dedicated himself with equal fervor to both missions, showcasing the significance he attributed to the rights of all. He is one of those iconic figures in the history of international law and human rights who are irreplaceable and so needed in these challenging times.

106 Even demonstrating his own identification with the continent, Buergenthal, 'American and European Conventions', *supra* note 6, 166: "I should emphazise, however, that while *we* in the Americas can learn a great deal from the European experience, it would be a mistake to rely on it excessively. For better or for worse, the problems of *our* Hemisphere are more unique to the Americas than they are universal or European. They can only be solved within the framework of *our own* legal, cultural, political, and social traditions." (emphasis added).

107 Buergenthal, *Lucky Child*, *supra* note 1, 226: "The terrible crimes and cruelties inflicted in many parts of the world since the Holocaust have not weakened my commitment to human rights one jot; instead, they have reinforced my belief in the need to work ever harder to promote human rights education on all levels and to build an international and national legal and political framework that will make governmental violation of human rights increasingly difficult"; see also T. Buergenthal, 'Acceptance Speech and Lecture', in Juristische Fakultät der Universität Heidelberg, *Laudationes et Gratiae, Verleihung der Ehrendoktorwürde an Thomas Buergenthal und Andre Colomer zum 600 Jahrigen der Jahrigenbestehend der Juristenfakultät der Universität Heidelberg* (1986), 39, 40: "no nation or people has a monopoly on evil or on goodness and that, consequently, mankind everywhere has to be perennially on guard against the Hitlers, the Stalins and the Pol Pots of this world." [Buergenthal, 'Acceptance Speech'].

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The Montreux Convention and its Importance for International Peace and Security

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Abstract

Since its conclusion, the Montreux Convention regarding the regime of the Straits (1936) constitutes an important pillar of the international order. This may be proven by many historical events from the 20th century until today: From the application of the Convention in WWII to its recent invocation in the ongoing Ukrainian conflict. The Convention's significance derives from its subject-matter, the freedom of transit through the Dardanelles/Turkish Straits in regard to the warships and aircraft in time of peace and in time of war. This is a legal analysis of the Montreux Convention under the scope of International Law providing a brief look at the historical background of events that have led to the signature of the Convention, an extensive presentation of the legal framework of its provisions regarding passage of warships and overflight of aircraft, as well as, some thoughts on its importance for the international peace and security.

A. Introduction: What Are the Straits?

The Montreux Convention constitutes an international binding instrument "regarding the regime of the Straits"[1]. Before our analysis of its provisions on the maintenance of international peace and security, we need to answer a rather simple but crucial question: what are the Straits in the title of the Convention? This term refers to the geographic area that includes the Dardanelles and Bosporus straits as well as the Sea of Marmara. Their total length is estimated around 330 km. and they are the waterway giving access to the Black Sea from eastern Mediterranean Sea and vice versa. And thus, as it can be easily understood, their geographic, strategic and economic importance cannot be understated. Thus, the Straits have been the constant object of legal regulation by a number of international treaties in modern history, beginning with the Treaty of Küçük Kaynarca in July 1774.

Due to the strategic geographic location of the Straits, these treaties' context has been shaped by three different poles of interest: the Western Powers' ambitions which have consisted of their aim to restrict Russia's naval military power inside the Black Sea; the riparian States' interests regarding their national security and their right of free transit and navigation in and through the Straits; and last but not least, the involvement of the Ottoman Empire -present day, Türkiye- in Near East affairs, which was always seeking to project its influence in eastern Mediterranean and to become a significant regional power by regulating the use of the Straits. Without a doubt the two most outstanding international agreements on this subject were the Peace Treaty of Lausanne[2] and the Montreux Convention.[3] The former treaty was replaced by the latter as regards the above-mentioned subject-matter.

International Law is not static; it constantly evolves and changes. It is not simply a set of different rules of law, but a flexible, resilient and dynamic legal system capable of maintaining the international world order by way of the peaceful settlement of international disputes. This dynamic nature of International Law has to be attributed especially to customary international law, to the conclusion of international agreements or treaties and to the case-law of international courts and tribunals, which all constitute sources of International Law. For this reason, it is extremely uncommon for a subject related to International Law to be solely,

1 *Convention regarding the regime of the straits singed at Montreux*, 20 July 1936, 173 LNTS 213, [Montreux Convention].

2 *Treaty of Peace with Türkiye and other instruments: Signed at Lausanne,* 24 July 1923, 28 LNTS 11, 115.

3 E. Roukounas, *Public International Law,* 3rd ed. (2019), 278-280 *(in Greek)*.

continuously and uninterruptedly governed by a single international treaty. Yet, that is the case with the Montreux Convention and the regime of the Straits. In my opinion, two are the main reasons that have led to the appearance of this rare phenomenon: 1) the Convention's provisions are worded in a certain way that leaves room for evolutionary interpretation; this option is in turn taken advantage of by the contracting parties, so they can promote their own agenda. 2) The application in practice of the Convention aligns with the main objective of the International Community and the UN[4] to secure international peace and international order since the end of WWII.

Therefore, the above-mentioned proposition will be illustrated through close examination of State practice. At the outset, I will present a brief historical overview of the development of the Straits' legal regime (Section B). Secondly, I shall give a short comparison with treaty regimes governing other straits highlighting any difference between their legal status and that of the Straits (Section C). Thirdly, an extensive analysis of the Montreux Convention will follow, combined with the relevant State practice (Section D). Finally, I shall deal with the significant role of the Convention in relation to international security and to the divergent approaches of Türkiye and US/NATO to Montreux (Section E).

B. A Historical Review: From Lausanne to Montreux.

Prior to the present legal regime, the status of the Straits had been regulated by the Peace Treaty of Lausanne, which was concluded between the victorious Entente Powers on the one hand and Türkiye on the other. In particular, this matter has been dealt with by article 23 of the peace treaty and more extensively by the supplementary Lausanne Convention on the Straits. This was the result of the Entente's inability to enforce the peace terms of the previously concluded Treaty of Sevres (1920), because of the fierce resistance that had been put up by the Turkish Nationalist movement and its leader and founding father of the Turkish Republic, Mustafa Kemal Atatürk. Greece was burdened with the task of enforcing the terms of the Treaty of Sevres on behalf of the Entente. The military defeat of the Hellenic army by the Turkish Nationalists in Asia Minor marked the end of all prospect of Türkiye accepting the framework of this Treaty. As a direct consequence of these events, new negotiations began between the opposing parties, which led to the signature of the Lausanne Peace

4 Charter of the United Nations, 26 June 1945, XV UNICO 335, 337, Art. 1 para. 1 .

Treaty on 24 July 1923, at the Swiss city of Lausanne, and its entry into force on 6 August 1924.

The newly established legal regime of the Straits after the end of WWI was perfectly in line with the LoN agenda at the time: the demilitarization of Europe, so as the possibility of another "Great War" could be prevented at all cost. And to that extent, the Lausanne Convention on the Straits consisted of many provisions aiming at this end. For example, Articles 3 to 9 regarding the demilitarization of the Straits and some other areas; or Articles 10 to 16 which provided the establishment of a Commission for the Straits under the League supervision, that would guarantee the non-violation of the Convention.

Unfortunately, all of the League's ambitions about the post-WWI international order had been proven futile. Nazi Germany deployed troops in the Rhineland in 1936 contrary to the Peace Treaty of Versailles; Imperial Japan invaded Manchuria in 1931 and Fascist Italy invaded Abyssinia in 1935. The Axis and the USSR were preparing for war and, thus, the League's disarmament efforts had failed. The Axis ambitions to extend its own sphere of influence politically or even militarily into Anatolia, gave Türkiye a reasonable excuse for demanding the revision of the Straits legal status as it was regulated by the Lausanne Convention.[5]

Mustafa Kemal's proclamations on the revision of the legal regime of the Straits was based on two main legal arguments. Firstly, that Türkiye had every right to demand the reset of the regulations regarding the Straits due to a fundamental change of circumstances that once supported the existence of the previous regional status quo[6]; secondly, that if the legal regime of the Straits hadn't been altered, then Turkish national security would have been weakened.[7]

In September 1935, Türkiye asked for the remilitarization of the Straits contrary to the Treaty of Lausanne, but unsuccessfully. By contrast, after repeating the same demands in the following year, Türkiye finally achieved the amendment of the legal regime of the Straits. It was able to accomplish that mainly because of the WWI victors' fear that a new World War was imminent. And so, on 20 July 1936 the Montreux Convention was signed and it entered into

5 N. Oral, 'The 1936 Montreux Convention' in H. A. Conley (ed.) *The History Lessons for the Arctic: What International Maritime Disputes Tell Us about a New Ocean* (2016), 24-37.

6 'Anadolu Agency, Bulletin, 11 July 1935' in F. Kaya, 'Ataturk's Foreign Minister Tevfik Rustu Aras', 10 *International Journal of Social and Economic Sciences* (2020), 1, ref. 4.

7 F. Kaya, 'Ataturk's Foreign Minister Tevfik Rustu Aras', 10 *International Journal of Social and Economic Sciences* (2020), 1, 34, 45.

force on 9 November 1936. The contracting parties of the Montreux Convention were the same as those of the Lausanne Convention, with the exception of Italy.[8]

After this short historical review of the events leading to the signature of the Montreux Convention, it is important to make note of article 35 (c) of the United Nations Convention on the law of the Sea (1982). According to this, "Nothing in this Part affects the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits". In a few simple words, article 35 (c) suggests that, if a strait's legal regime has been regulated by a "long-standing" treaty prior to the UNCLOS, then the latter's provisions is not applicable.

Moreover, it is important to stress that article 35 (c) introduces an exemption of certain cases regarding the use of straits for international navigation under Part III of UNCLOS. Additionally, it refers to "long-standing" treaties. The ambiguity of this term is obvious; yet, what is implied might be the existence of a convention in force, constantly over a long period of time prior to the UNCLOS. Although, how much time is necessary for a treaty to be characterized as "long-standing" is not specifically provided; that is a matter of interpretation. Nonetheless, it is widely accepted that article 35 (c) has to do with 1) the Straits of Gibraltar, 2) the Magellan Straits, 3) the Danish Straits, 4) the Malacca Straits, 5) the Malaysia Straits, and, finally, 6) the Dardanelles and Bosporus Straits. Thus, the Montreux Convention constitutes the only international binding instrument regarding the regime of these straits.[9]

C. Special Regimes Governing other International Straits

Except for the Dardanelles and Bosporus Straits, Article 35 (c) is applicable in other similar situations. It is generally considered that the 1936 Montreux Convention constitutes the only special regime which excludes as a whole the general rules on international straits provided in UNCLOS. For example, the 1881 Boundary Treaty between Argentina and Chile regulating the legal status of the Straits of Magellan[10] would apply to the neutrality obligations solely, whereas the matter of free navigation will fall within the regulatory range of UNCLOS general rules. The same can be said for the 1904 France-Great Britain Declaration respecting Egypt and Morocco in regard to the legal status

8 Italy had acceded to the Montreux Convention on 2 May 1938.

9 K. Ioannou & A. Strati, *The Law of the Sea,* 4th ed. (2013), 113-114 *(in Greek).*

10 *Boundary Treaty between the Argentine Republic and Chile, signed at Buenos Aires,* 23 July 1881, 159 CTS 45.

of the Straits of Gibraltar.[1112] Moreover the 1857 Treaty for the Redemption of Sound Dues[13] would be applied to costal State enforcement jurisdiction only; the 1921 convention on the Non-Fortification and Neutrality of the Åaland Islands between Finland and Sweden[14], which limits the access of warships to the territorial seas of the islands, and the 1940 Agreement on the demilitarisation of the islands between Finland and the USSR[15] could also fall within Article 35 (c). To sum up, it is important to clarify that the previously mentioned Treats only partially exclude some of UNCLOS general rules and thus they could be considered semi-special regimes, in contrast to 1936 Montreux Convention.[16]

D. Provisions Regarding Vessels of War and Aircrafts

I. The General Framework

As it will be pointed out, the Montreux Convention's provisions regarding vessels of war and aircraft constitute a significant tool for the maintenance of international peace and security, as well as of the stability in the eastern Mediterranean and Black Sea regions. Sections II and III of the Convention establish a detailed and sophisticated regime of transit about warships, submarines and aircraft.

Articles 8 to 22 can be divided into four different categories: provisions applied 1) in time of peace; 2) in time of war with Türkiye being neutral; 3) in time of war with Türkiye being a belligerent, or 4) whenever Türkiye considers herself to be threatened by imminent danger of war. Additionally, these articles can also be categorized in three parts in regard with which they are applied to.

11 *Declaration between the United Kingdom and France Respecting Egypt and Morocco, Together with the Secret Articles Signed at the Same Time,* 8 April 1904, Avalon Project, available at https://avalon.law.yale.edu/20th_century/entecord.asp (last visited 13 November 2024).

12 That is the case because both of these treaties generally refer to *free navigation* and *free passage* without distinguishing them from the general rules of UNCLOS.

13 *Treaty for the Redemption of the Sound Dues between Austria, Belgium, France, Great Britain, Hanover, the Hansa Towns, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia, Sweden-Norway, and Denmark, signed at Copenhagen,* 14 March 1857, 116 CTS 357.

14 Convention relating to the Non-Fortification and Neutralisation of the Aaland Islands, signed at Geneva, 20 October 1921, 9 LNTS 255, 211.

15 *Treaty between Finland and The Union of Socialist Soviet Republics Concerning the Åaland Islands,* 11 October 1940, available at https://histdoc.net/pdf/FOFI1940-10-11.pdf (last visited 13 November 2024).

16 R. Churchill, V. Lowe & A. Sander, *The law of the sea*, 4th ed. (2022), 183-186.

Thus, there are provisions that have to do only with 1) the Black Sea riparian States, 2) the non-riparian States, 3) or both of them. In general, more autonomy of action is provided to riparian States than their non-riparian counterparts by reason of their national security.

Article 1 of the Convention refers to a general rule regarding the legal regime of the Straits: it recognizes and affirms the principle of freedom of transit and navigation by sea in them. This principle is also mentioned in article 10 paragraph 1. Although, in practice the principle of freedom of navigation is much more restricted towards warships due to limitations to its application as it is stipulated in article 1 paragraph 2.

The regulatory framework of Section's II provisions is very precise. It consists of 1) the definition of vessels of war, 2) their categorization and 3) the calculation of their tonnage as well as the caliber of their guns. This framework is described in great detail in Annex II and more briefly by article 8. Vessels of war are classified by the treaty into: a) capital ships, b) aircraft-carriers, c) light surface vessels, d) submarines, e) minor war vessels and f) auxiliary vessels. The classification of warships, which was not stated in the Turkish proposal but proposed in the British draft text, was taken completely from the Treaty on Naval Armament signed on 25 March 1936[17] [18].

From this normative framework the following may be concluded: though the contracting parties knew that war vessels bigger than 10.000 tons [19] already existed at their time, nonetheless, they deliberately chose this limit; that decision may have been made because of not only Türkiye's and other riparian State's national security, but also of the general stability in eastern Mediterranean. Moreover, this choice was in accordance with the interests of the victorious Entente Powers whose past experience with WWI was still recent and the probability of another world conflict was very high. It is safe to argue that, those provisions were politically motivated.[20] Due to rapid technological advancement in the field of arms industry, this legal framework can be modified or amended as it is provided by article 28.

17 K. Yücel, *The Legal Regime of the Turkish Straits: Regulation of the Montreux Convention and its Importance on the International Relations after the Conflict of Ukraine* (2019), 109.

18 *Ibid*, 109, fn. 341.

19 Also see, Montreux Convention Annex II B. Categories 1 (a) and 3.

20 Yücel, *supra* note 12, 109, fn. 342.

II. Vessels of War in Time of Peace.

In time of peace, according to Article 10, certain types of warships, irrespective of their flag and of whether belonging to Black Sea or non-Black Sea Powers, enjoy freedom of transit through the Straits without any taxes or charges. Yet, their transit must begin during daylight and take place under certain prescribed conditions[21]. This regulation applies to three categories of warships: 1) light surface vessels, 2) minor war vessels and 3) auxiliary vessels. And so, on the one hand article 10 provides them with the right of freedom of transit in accordance with article 1 paragraph 1; on the other hand, it establishes an individual quantity limitation about the maximum tonnage of a ship as a unit, which caps at 10,000 tons.

Furthermore, Article 14, that specifically refers to non-riparian Black Sea States, prohibits transit of their naval forces through the Straits, if their maximum tonnage exceeds 15,000 tons and if they comprise more than nine vessels. In this article, a general quantity limitation is provided regarding the whole naval force and not its vessels as separate units.

If the aforementioned quantity restrictions were combined, the following could be concluded: A) individual warships of non-riparian States have the ability to conduct full-transit through the Straits, only if 1) they don't exceed 10,000 tons separately and if 2) the calibre of their guns is less than 203mm[22]; B) other types of military naval units are excluded, such as modern capital ships, aircraft-carriers and submarines of non-Black Sea Powers; C) the total size of the naval force must not exceed 15,000 tons and must consist of nine ships maximum. There exist three exceptions to Articles 10 and 14: 1) the performance of a courtesy visit to a port in the Straits[23], 2) in cases of naval auxiliary vessels specifically designed for the carriage of fuel[24] and 3) on grounds of force majeure[25].

According to Articles 17 and 14 paragraph 3, warships of non-Black Sea States that are paying a courtesy visit of limited duration to a port in the Straits, at the invitation of the Turkish Government, are restricted neither by Article 10 individual quantity limitation nor by Article 14 general one. Thus, this kind

21 Montreux Convention Art. 13.
22 *Ibid*, Annex II B. Categories, 3.
23 *bid*, Arts 17 & 14 para. 3.
24 *bid*, Art. 9.
25 *bid*, Art. 14 para. 4.

of vessels not only can exceed 10,000 tons as single units[26], but also their total tonnage is not calculated in the 15,000 tons of a passing fleet, because they aren't part of such a naval force. But these ships do not have the ability to perform a full-transit through the Straits by reason of their obligation to leave by the same route as that by which they have entered.

Moreover, no vessels of war which have suffered damage during their passage through the Straits are included in this tonnage stipulated in Article 14 paragraph 4 and in accordance with the principle of force majeure. In addition, such vessels, while undergoing repair, are subject to any special provisions relating to security laid down by Türkiye.

Lastly, according to Article 9, naval auxiliary vessels specifically designed for the carriage of fuel, liquid or non-liquid, are not subject to the provisions of Article 13 regarding notification, nor are they counted for the purpose of calculating the tonnage which is subject to limitation under Articles 14 and 18. For this to happen, they are obliged to pass through the Straits singly and to fulfill specifically mentioned technical requirements as well[27].

As it has already been stated, the Montreux Convention provides the Black Sea States with a privileged legal status in contrast to others. Article 11 stipulates that only Black Sea Powers have the right to send capital ships of a tonnage larger than 15,000 tons through the Straits, on condition that these vessels pass through singly, escorted by not more than two destroyers. Additionally, only these States may send submarines constructed or purchased outside the Black Sea through the Straits, for the purpose of rejoining their base, provided that adequate notice of the laying down or purchase of such submarines has been given to Türkiye. Last but not least, by interpretation a contrario of Article 18 paragraph 2, it is obvious that only these riparian States can keep their fleet inside the Black Sea for more than twenty-one days.

The Montreux Convention, also, consists of provisions which set mandatory rules regarding the transit of vessels of war through the Straits. These provisions are applied to all these ships with no exception on grounds of their sovereignty. According to Article 15, vessels of war in transit through the Straits are not allowed under any circumstances to make use any aircraft which they may be carrying. Furthermore, they are prohibited to remain longer inside the Straits than is necessary for them to effect passage, except in the event of damage or peril at sea.

26 As it was mentioned above 10.000 tons is the maximum tonnage for a single naval unit to be able to conduct transit through the Straits.

27 Montreux Convention, Art. 9 para. 2.

It is important to briefly analyze Article 13 regulating the conditions for a non-Turkish vessel of war to effect legally transit through the Straits. For such action to take place, a notification given to the Turkish Government through the diplomatic channel by the warship's State is compulsory. The normal period of notice is eight days; but in the case of non-Black Sea Powers this period is increased to fifteen days. The notification specifies the destination, name, type and number of the vessels, as also the date of entry for the outward passage and, if necessary, for the return voyage. Any change of date is subject to three days' notice. The commander of the naval force, when exercising transit, has to communicate to a signal station at the entrance of the Dardanelles or the Bosporus the exact composition of the force under his orders, without being under any obligation to stop.[28] Entry into the Straits for the outward passage must take place within a period of five days from the date given in the original notification. After the expiry of this period, a new notification is given under the same conditions as the original notification.[29]

Article 13, though, is subject to some exceptions. In particular, 1) naval auxiliary vessels designed only for the carriage of fuel and 2) non-Black Sea Power naval forces not exceeding 8,000 tons sent in this area for humanitarian purposes are not subject to Article 13 regulations.

Article 18 significance for the maintenance of peace and security in the Black Sea and in the wider region is undoubtably great. And this is so, because it regulates the conditions under which non-Black Sea States naval forces may remain inside the area. It sets a combination of limitations which promote the national security of the riparian States of the Black Sea enhancing their protection against outside threats.

The total size of non-riparian States must not exceed 30,000 tons. Yet, in any case if the strongest fleet in the Black Sea increases its power by adding a naval strength that exceeds 10,000 tons[30], then the new maximum may reach 45,000 tons for the naval forces outside the region. After WWII and in comparison, with the date of signature of the Montreux Convention (1936), the USSR fleet had surpassed the 10,000 tons threshold.[31] Thus, in practice non-Black Sea Power's naval forces can remain in this area, if their total tonnage does

28 *Ibid*, Art. 13 para. 3.

29 *bid*, Art. 13 para. 2.

30 *Ibid*, Art. 18 para. 1 (b) mentions "If at any time the tonnage of the strongest fleet in the Black Sea shall exceed by at least 10,000 tons the tonnage of the strongest fleet in that sea at the date of the signature of the present Convention […]."

31 Yücel, *supra* note 12, 113.

not exceed 45,000 tons (general quantity limitation).[32] Moreover, the tonnage which any one non-Black Sea Power may have in the Black Sea is limited to two-thirds of the aggregate tonnage. Simply, the total size of each individual non-riparian State's fleet must not exceed 30,000 tons -2/3 of the 45,000 tons (individual quantity limitation). [33]

Furthermore, according to Article 18 paragraph 2, vessels of war belonging to non-Black Sea Powers shall not remain in the Black Sea more than twenty-one days, whatever be the object of their presence there. This provision did not exist in the Lausanne Convention for the Straits; it, also, constitutes a de facto limitation to the freedom of navigation of the non-riparian States in the Black Sea contrary to their riparian counterparts.

A special legal status applies to one or more non-Black Sea Powers intending to send naval forces into the Black Sea, for humanitarian purposes. These forces must be less than 8,000 tons in total and they are not subject to Article 13. Additionally, an authorization for this purpose has to be acquired from the Turkish Government, and the other Black Sea Powers shall be informed as well of this request. If they remain inert and do not raise any objection within twenty-four hours of having received this information, the Turkish Government is allowed to reply to the interested Power's request.

However, neither what a "humanitarian purpose" is nor a "Turkish Government's authorization" has been made clear. And that might have occurred on purpose, so that the scope of this provision may be wider and able to cover all possible humanitarian disasters. It is not further explained if the objections of all riparian States are required or only some are sufficient. On grounds of the principle of effectiveness and teleological interpretation it may be concluded that a sole objection of only one Black Sea state is enough to impede the transit through the Straits.[34]

Lastly, Article 22 stipulates a method of protecting the Straits' ports from infectious diseases via quarantining the infected ships. This provision had been adopted nearly verbatim from the Lausanne Convention for the Straits.[35]

32 Montreux Convention Art. 18 para. 1 (a) & (b).

33 *Ibid*, Art. 18 para. 1 (c).

34 Yücel, *supra* note 12, 114.

35 Art. 2 para. 6 of the Lausanne Convention for the Straits has content similar to Art. 22 of the Montreux Convention.

1. State Practice Regarding the Peace-Time Provisions

The Montreux Convention peace time provisions have been most frequently applied since the signature of the Convention in 1936. Their consistent application has been the result of the long period of peace starting at the end of WWII and lasting till the 21st century. Throughout this period, all States in general have universally complied with these regulations.[36] [37] Nonetheless, the provisions regarding the quantity limitations have been applied more loosely in recent State practice. For example, in November 2021, the USS Porter, a guided missile destroyer, conducted exercises and operations with the Ukrainian, Turkish, Romanian and Bulgarian navies in the Black Sea.[38]

a. The Russian War Against Georgia (2008)

During the course of the Russian war against Georgia, in 2008, the United States of America attempted to send humanitarian aid to Georgia with two hospital ships on grounds of Article 18 (d): the USNS Witney and USNS Comfort, weighing 140,000 tons in total. This humanitarian assistance mission was not conducted due to Russia's objection and strong response. Additionally, these ships' total tonnage was larger than the above-mentioned quantity limitations of 8,000 tons[39] and 45,000 tons [40]respectively.[41] In the same period, USS Mount Witney exercised transit through the Straits despite questions about its tonnage and whether it fell under a Montreux exception. Russia saw this action as a direct violation of the Convention and as an unnecessary provocation; and

36 LCDR Norm Going, 'Black Sea OPS: in and out of the Black Sea', 10 *Surface Warfare Magazine*, 6 (November/December 1985), 14.

37 B. Bir, 'Türkiye to abide by Montreux Convention with no double standard: Foreign Minister of Türkiye finds Russian president's call for military takeover in Ukraine strange, unacceptable, says Turkish top diplomat', Anadolu Agency (25 February 2022), available at https://www.aa.com.tr/en/politics/turkiye-to-abide-by-montreux-convention-with-no-double-standard-foreign-minister/2515283 (last visited 3 November 2024).

38 B. Hefron, 'USS Porter Departs Black Sea, Arrives in Istanbul', United States Navy, News Stories (16 November 2021), available at https://www.navy.mil/Press-Office/News-Stories/Article/2844377/uss-porter-departs-black-sea-arrives-in-istanbul/ (last visited 3 November 2024).

39 Montreux Convention Art. 18 para. 1 (d).

40 *Ibid*, Art. 18 para. 1 (a) & (b).

41 Yücel, *supra* note 12, 210.

yet, Türkiye has allowed this transit since at that time U.S. destroyers routinely transited the Straits, thus confirming US practice.[42]

b. The Syrian War (2011-)

During the ongoing Syrian war (2011-), Russia has actively been involved at the request of the Syrian Government. In return for its support, Russia obtained a naval base on the Syrian coast by an agreement which was signed with Syria on 19 January 2017. According to this agreement, Russia leased the Port of Tartus for 49 years. That event contributed to the gradual traffic augmentation in the Straits. According to passage statistics of warships, while 168 warships passed through the Straits in 2006, this number increased to 200 due to the occupation of South Ossetia in 2008. After the beginning of the Syrian civil war, the total number of warships that passed through the Straits increased to 237 in 2014 and to 318 in 2015. Additionally, in 2016, 347 warships passed through the Straits[43] and 254 of these were Russian warships[44].[45] On 4 of December 2015, Turkish-Russian relations were soured, when a Russian navy serviceman had held a rocket launcher pointed towards the city of Istanbul as his ship passed through the Bosporus straits.[46] This event started a debate whether this action affected the inoffensive character of the passage and whether Türkiye had the right to ban the above-mentioned warship's passage.[47]

42 M. Nevitt, 'The Russia-Ukraine Conflict, the Black Sea, and the Montreux Convention', *Justsecurity* (28 February 2022), available at https://www.justsecurity.org/80384/the-russia-ukraine-conflict-the-black-sea-and-the-montreux-convention/ (last visited 3 November 2024).

43 'The Statistics Summary of Vessels passed through the Turkish Straits in 2016 [General Directorate of Maritime Trade of Türkiye]', in Yücel, *supra* note 12, 213 fn. 677.

44 'Foreign warships on Bosphorus in 2016' (2016), available at https://devrimyaylali.com/foreign-warship-on-bosphorus/foreign-warship-on-bosphorus-in-2016/ (last visited 3 November 2024).

45 Yücel, *supra* note 12, 213.

46 Reuters, 'Türkiye angered by serviceman brandishing rocket launcher on Russian ship passing through Istanbul', The Telegraph (7 December 2015), available at https://www.telegraph.co.uk/news/worldnews/12036531/Turkey-angered-by-serviceman-brandishing-rocket-on-Russian-ship-passing-through-Istanbul.html (last visited 3 November 2024).

47 Yücel, *supra* note 12, 214.

c. The Russian Annexation of Crimea (2014)

During the Russian annexation of Crimea (2014), there has been -yet again- a flexible application of Article 14 quantity limitation by reason of Türkiye's compliance to USS Mount Witney's request for passage through the Straits, regardless the fact that its total tonnage exceeded 15,000 tons. The U.S. responded that USS Mount Witney's weight was 13,957 tons. But, in my opinion, this justification was not sufficient, because this warship's total tonnage exceeded Article 10 and Annex II quality limitation of 10,000 tons, as well. Finally, Article 18 paragraph 2 had also been applied rather creatively; USS Taylor had remained for more than 21 days in the Black Sea due to technical malfunctions, unable to exit on its previously notified date. In both of the above-mentioned instances, Russia's response was very strong.[48]

2. General Thoughts on the Peace-Time Provisions

Articles 10 to 18 and 22 have been by far the most frequently invoked in practice. It is not an overstatement to say that the peace-time provisions of the 1936 Montreux Convention have surpassed the expectations of its drafters. As I previously mentioned, on many different occasions Türkiye managed to successfully regulate the passage of warships in time of peace in accordance to the "spirit" of the Convention. Nonetheless, if someone carefully and scholastically read the fore-mentioned provisions, it would have detected two major and fundamental "flaws" in the Convention.

Even though, Articles 10, 14 and 18 clearly set specific quantity restrictions to the warships of Non-Riparian States that they are allowed to conduct full-passage through the Straits and Section II categorizes the war vessels according to detailed metrics, Türkiye tends to have a more flexible approach to their application. The USS Mount Witney's case is the most characteristic, as Türkiye had essentially tampered -twice- with the warship's tonnage, so it would not fall within the Conventions limitation and pass through and out to the Black Sea. These actions could be explained, if we evaluate Türkiye's position on the international society; the geostrategic location of the Straits transforms it into a high-value component for anyone how wants to maintain international security. Since its signature in 1936, Montreux was an important piece in the Türkiye foreign affairs strategy, because it reinforces and legally establishes its special position in the post-WWII era. And so, to reassure that its greatest jewel will

48 *Ibid*, 214.

stay in its crown, Türkiye not only implements the Convention properly and impartially for more than seven decades[49], but also aligns its application to the interests of NATO and the US, proving to them that it is an invaluable and trustworthy ally.

Furthermore, the quantity limitations of Articles 10, 14 and 18 were put in place in reference to the capabilities of the States conducting maritime warfare back in the first half of the 20th century, when the Convention was signed; Section II is completely out of date. Due to the recent and ever evolving technological advancements on the field of naval military industry, these restrictions have to either be replaced by new ones through an amendment of the Convention or be interpreted in accordance to the current state of affairs. Türkiye, it seems, has adopted a different stance towards this issue; because it is really difficult to persuade all the contracting parties to agree to an amendment of the quantity limitations and moreover a more liberal interpretation of these provision could lead to great complaints from other States in the Black Sea area, primarily Russia, Türkiye has chosen to keep them as they are and then it adapts the real tonnage of the ships to the restrictions.

Apart from these interpretations advanced by Türkiye, it is fair to say that the 1936 Montreux Convention does a pretty good job at balancing colliding interests in the Aegean and Black Sea regions. On the one hand, it provides through Türkiye NATO and the US with a legal tool to contain the Russian naval forces inside the Black Sea, and on the other hand it establishes a privileged status for all littoral States of the Black Sea, including Russia. The Convention, also, by its strict regulations, limits access to Non-Black Sea naval forces inside the area, and thus it promotes international peace and security by making a large-scale naval engagement in this region nearly impossible.

III. Vessels of War in Time of War with Türkiye not Being Belligerent.

In time of war with Türkiye being neutral, vessels of war belonging only to non-belligerent States possess the right of freedom of transit through the Straits, which is regulated by the provisions applied in time of peace.[50] On the contrary, warships of the belligerent Powers are prohibited from exercising transit. There are, though, three exceptions: A) the return of warships to their naval bases in

49 Y. Acer, 'Russia's Attack on Ukraine: The Montreux Convention and Turkiye', 100 *International Law Studies* (2023), 15.

50 Montreux Convention Art. 19 para. 1

or out the Black Sea, B) the enforcement of UN military sanctions towards the aggressor, C) the military assistance towards a state victim of aggression in virtue of a treaty of mutual assistance binding Türkiye.

According to Article 19 paragraphs 4 and 5, when, as a result of an ongoing armed conflict, vessels of war belonging to a belligerent party were separated from their bases, wherever those may be, they have the right to return thereto. This may occur under the condition that these fleets will behave in accordance with the Law of the Use of Force, the Humanitarian Law and the Jus ad Bellum; additionally, they shall not make any capture, exercise the right of visit and search, or carry out any hostile act in the Straits.

According to Article 19 paragraph 2, naval forces which are operating under UN Security Council's authorization for the purpose of enforcing military sanctions towards a hostile state, are allowed to pass through the Straits. This is based on Article 25 of the Convention[51] and Article 103 of the UN Charter.[52] Moreover, the belligerent parties that are providing with military support a victim of an ongoing armed conflict, may exercise transit through the Straits in virtue of a treaty of mutual assistance binding Türkiye. On these occasions, all quantity restrictions are not applied.[53]

Article 19 exceptions reflect the political motives of the USSR and France at the time of the Convention's signature. These States had managed to introduce them, so they could have sent large naval forces in the Black Sea, if that had been necessary in virtue of a treaty of mutual assistance singed between them. On the same matter, Japan protested against Article 19, because paragraph 2 was not able to be applied to it as an ex-member of League of Nations.[54] It is important to mention further that Article 19 paragraph 4 gives a strategic advantage to the riparian Black Sea States, due to the fact that they dispose many naval bases in the Black Sea. Furthermore, Paragraph 2 still remains significant today regardless its reference to the League of Nations; this can be analogously applied in the case of the UN. In modern history, Article 19 had been in use only twice: 1) in WWII (1939-1945) and 2) in the ongoing Ukrainian conflict (2022-present).

51 "Nothing in the present Convention shall prejudice the rights and obligations of Türkiye, or of any of the other High Contracting Parties members of the League of Nations, arising out of the Covenant of the League of Nations."

52 "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

53 Montreux Convention Art. 19 para. 3.

54 Yücel, *supra* note 12, 115 fn. 352.

1. State Practice Regarding the War-Time Provisions with Türkiye not Being Belligerent

a. WWII (1939-1945)

From the spring of 1939, when Nazi Germany occupied Czechoslovakia, until 23 February 1945, when Türkiye became a belligerent, Article 19 had been applicable by reason of Türkiye's neutrality. To remain non-belligerent, Türkiye had signed a non-aggression and friendship treaty with Nazi Germany on 18 June 1941. Furthermore, on 9 October 1941 they had, also, concluded a trade agreement by virtue of which Türkiye agreed to sell chrome to Germany, a strategic resource used as raw material in the arms industry at the time. These actions greatly displeased the Allies; Great Britain and the USSR protested and argued that the Nazi shipping through the Straits had been illegal. On many occasions, they accused Türkiye that it provided access to German cargo ships through the Straits, whereas they were suspected to be vessels of war. In most of those instances, these arguments proved to be false allegations.

But, in the end of May 1944, when a number of German ships (the Ems/Manheim Class of Krieg Transportschiff) were granted passage permission after assurances were given by von Papen, the German Ambassador to Türkiye, that these ships were not war vessels, it was revealed that the opposite was true. After the Allies had protested against this incident, Turkish officials conducted a search during their passage through the Straits. What was discovered proved the Allies' suspicions true: these ships were fully mounted with radar equipment, weapons and naval equipment; and so, Türkiye denied their passage. During closer investigation of the German vessel "Kassel" it was revealed that it was an auxiliary naval vessel with armor, a dismantled ship's guns and a camouflaged thirty-ton derrick. Türkiye protested against Germany for violating the terms of the Montreux Convention and informed them that henceforth all German vessels would be inspected and that the vessels of Ems and Manheim Classes would be denied passage without any inspection. Finally, on 2 August 1944, Türkiye severed its relations with Germany, at the request of Great Britain and the U.S.A.[55]

55 Yücel, *supra* note 12, 131.

b. The Russian Invasion of Ukraine (2022-)

Article 19 became relevant again because of the ongoing Ukraine War (2022-present). On 24 February 2022 the Russian President, Vladimir Putin, announced the start of a full-scale invasion of Ukraine, which is an act of aggression in violation of Article 2 Paragraph 4 of the UN Charter regarding the prohibition of use of force in international relations. On the same day, Ukraine's President, Vladimir Zelensky, asked the Turkish Government to activate Article 19 par.1, in order to deny Russian Navy's entry in the Black Sea. At first, Türkiye did not accept this proposal suggesting that Black Sea naval forces had the right to return to their bases without any restrictions.[56]

Three days later, on 27 February 2022, the Turkish Minister of Foreign Affairs announced the closure of the Straits for Russia -and for Ukraine as well- on grounds of Article 19. In reality, though, Article 19 par.4 in combination with Article 18 par.2 made this measure largely inefficient due to the fact that the Russian Black Sea fleet can conduct military operations in the area without any restrictions. The only practical gain for the NATO Allies and Ukraine from this act is that Russia is unable to send naval reinforcements in the Black Sea from other naval bases outside this area.[57] [58]

2. General Thoughts on the War-Time Provisions with Türkiye Not Being Belligerent

Article 19 is associated with the Law of Neutrality when it refers to "Türkiye not being belligerent". There exist two main types of neutrality; traditional and qualified neutrality. In accordance with traditional neutrality, neutral States have two basic obligations: abstention from participating in the armed conflict and impartiality of conduct towards all belligerent parties. In contrast, they also enjoy two important rights: inviolability of their territory and the freedom to continue peaceful trade relations among themselves and with

56 M. E. Hayyar, 'Can Türkiye Close the Turkish Straits to Russian Warships?', *European Journal of International Law: Talk!*, (28 February 2022), available at https://www.ejiltalk.org/can-turkey-close-the-turkish-straits-to-russian-warships/ (last visited 25 February 2024).

57 N. Oral, 'To Close or Not to Close the Turkish Straits under Article 19 of the 1936 Montreux Convention Regarding the Regime of the Straits', *Centre for International Law – National University of Singapore* (2022), available at https://cil.nus.edu.sg/to-close-or-not-to-close-the-turkish-straits-under-article-19-of-the-1936-montreux-convention-regarding-the-regime-of-the-straits/ (last visited 3 November 2024).

58 Nevitt, *supra* note 37.

each belligerent.[59] On the other hand qualified neutrality provides a "neutral" State with the right to aid the victim of aggression as a countermeasure or on the basis of self-defense while simultaneously enjoying the rights prescribed under the law of neutrality by simply not participating in the hostilities.[60] Basically, the core difference between qualified and traditional neutrality is that the former demands only the abstention from taking part in the armed conflict for a state to be considered as neutral and the latter sets as dual conditions for bestowing the status of neutrality both the abstention and the impartiality towards all belligerents.

Therefore, in my opinion whenever the Convention refers to the "non-belligerency of Tuckey", this terminology should be interpreted under the principle of good faith as "Türkiye's traditional neutrality", because there is not enough evidence to support that the Convention implies the need for the "qualified neutrality of Türkiye".

IV. Vessels of War in Time of War with Türkiye Being Belligerent.

In time of war with Türkiye being belligerent, the passage of warships shall be left entirely to the discretion of the Turkish Government.[61] Thus, in this case Türkiye is bestowed with absolute authority over the Straits; it is in a position which enables it to decide which States naval forces are permitted to exercise transit and which are not. This is the case, because the provisions of Articles 10 to 18 are not applicable. From 1936, Article 20 hadn't been activated, and thus, there exists no state practice.

V. Vessels of War whenever Türkiye Considers herself to be Threatened with Imminent Danger of War.

Whenever Türkiye considers herself to be threatened with imminent danger of war, it has the right to apply Article 21.[62] In this case, though, Türkiye does not possess absolute authority over the Straits. Vessels which have passed through the Straits before Türkiye has invoked Article 21, and which thus find themselves separated from their bases, may return thereto. However, Türkiye may deny this right to vessels of war belonging to the State whose conduct has

59 C. Antonopoulos, *Non-Participation in Armed Conflict-Continuity and Modern Challenges to the Law of Neutrality* (2022), 225 (3)(a).

60 *Ibid,* 15.

61 Montreux Convention Art. 20.

62 *Ibid*, Art. 21 para. 1.

given rise to the application of the present Article. [63]Additionally, the Turkish Government has to notify the contracting parties to the Convention and the General-Secretary of UN[64], after the invocation of Article 21.[65] If the General Assemble decides by a majority of two-thirds that the measures taken by Türkiye are not justified, and if such should also be the opinion of the majority of the contracting parties signatories to the Convention, the Turkish Government undertakes to discontinue the measures in question as also any measures which may have been taken under Article 6 of the Convention regarding merchant vessels.[66]

This legal framework was introduced for the first time in the Montreux Convention, whereas to the Lausanne Convention on the Straits nothing parallel to it existed. More specifically, a "threat of imminent danger of war" is no different than a threat of force for International Law. And that is the case because both of those actions are acts of aggression in violation of Article 2 paragraph 4 of the UN Charter regarding the prohibition of use of force in international relationships. The words "war" and "force" do not differ from each other; they have the same negative essence in law. And so, the term "threat of imminent danger of war" may be interpreted in a broader way. For this reason, Article 21 constitutes a huge diplomatic success for Türkiye; this provides it with a great margin of authority over the Straits prior to the beginning of an armed conflict against it, such as an imminent attack or in the case of a threat of force. Thus, Türkiye not only upgrades itself geopolitically, but also reenforces its national security. Historically, Article 21 hadn't been activated, and so, there exists no state practice.

However, there have been different points of view on this matter. In particular, it is suggested by some authors [67]that on 28 February 2022 the Turkish Minister of Foreign Affairs, Mevlüt Çavuşoğlu, had stated that all vessels of war belonging either to non-riparian or to riparian Black Sea States shall not transit through the Straits. According to this opinion, Article 21 had been invoked tacitly. Yet, it is submitted that this viewpoint is contrary to the ratio of Montreux Convention's provisions and the principle of good faith; the Turkish Minister of Foreign Affairs stated the application of Article 19 and not 21. Moreover,

63 *Ibid*, Art. 21 para. 2.
64 *Ibid* in place of 'the League of Nations'.
65 *bid*, Art. 21 para. 3.
66 *Ibid*, Art. 21 para. 4.
67 R. P. Pedrozo, 'Closing the Turkish Straits in Times of War'*, Lieber Institute West Point* (3 March 2022), available at https://lieber.westpoint.edu/closing-turkish-straits-war/ (last visited 3 November 2024).

if a wide interpretation and application of Article 21 was accepted, this might limit the effect of Article 19, thus, destabilizing the regulatory framework of the Convention.

Furthermore, it was, also, suggested that Türkiye could invoke Article 21 on grounds of Russian mines washing ashore in Turkish territory.[68] But, does this incident constitute a "threat of imminent danger of war"? I believe this argument is not valid. Firstly, it can be made clear that this event is neither a "threat of force", and thus, nor a "threat of imminent danger of war". Threat of force, which is forbidden by Article 2(4) of UN Charter, constitutes a State's expression to use force against another State in the future, unless the target State does or not commit an act or omission as demanded by the threatening State and the threat is not premised on an exception to the prohibition of use of force, a fundamental rule of International Law.[69] Furthermore, for state conduct to be considered a threat of force, it is necessary to assess the seriousness of the dispute between the States in combination with the context of the threat, as well as the probability of this to become a real event.[70]In the above-mentioned situation, this seems to be not the case; claims of compensation on grounds of state responsibility may not be overlooked.

Secondly, the Russian sea mines incident does not constitute a form of "imminent attack" either. According to some authors,[71] a state may use force under the justification of the right of anticipatory self-defense, if there exists enough evidence that a series of interconnected events has been set in motion, which will eventually result to an armed conflict; yet, it is not clear if anticipatory self-defense without a doubt may be a rule of customary law[72] [73] and, thus, Article 21 is not applicable in this instance.

68 A. Aliano & R. Spivak, 'Ukraine Symposium – The Montreux Convention and Türkiye's Impact on Black Sea Operations' *Lieber Institute West Point*, (25 April 2022), available at https://lieber.westpoint.edu/montreux-convention-turkeys-impact-black-sea-operations/ (last visited 3 November 2024).

69 *Legality of the Treat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 246-247, paras 47-48; I. Brownlie, *International Law and the Use of Force by States* (1963), 364.

70 C. Antonopoulos, 'The Law of Use of Force' in C. Antonopoulos & C. Magliveras (eds.) *The Law of the International Society,* 4th ed. (2022), 753, para. 1491 (*in Greek*).

71 R. Buchan & N. Tsagourias, '*Regulating the use of Force in International Law: Stability and Change'* (2021), 59-65.

72 T. Ruys, "*'Armed Attack' and Article 51 of the UN Charter. Evolutions in Customary Law and Practice"* (2010), 255 fn. 20, 341-342.

73 C. Henderson, '*The Use of Force and International Law'* (2018), 274.

Nonetheless, it may be concluded that Article 21 is a creative or constructively ambiguous stipulation:; "To be threatened with imminent danger of war" constitutes a phrase that can be applied in many different situations, without the need for a complex legal argument. This potential for a flexible interpretation of Article 21 puts Türkiye in an advantageous position, because it offers a great amount of control over the Straits.

VI. Aircraft

In contrast to freedom of transit, the legal framework of the Montreux Convention regarding the freedom of overflight is specific. By virtue of the Convention this freedom is recognized only for civil aircraft; as for the military aircraft the general rules of International Law apply.[74] Additionally, Article 23 does not introduce different regulations in time of peace or war. Thus, there is uncertainty with respect to the level of authority that the Turkish Government may exercise over the flying lanes in time of war.

Even though, the regulatory framework regarding the freedom of overflight for civil aircraft is not as sophisticated as the one previously presented about the freedom of transit of vessels,[75] it is significant for international transport and carriage of goods. Istanbul is a global transit hub and the application of Article 23 contributes to this fact. Istanbul Airport (IST/LTFM), the biggest airport in Türkiye and one of the greatest in the world, between 29.10.2018 and 18.02.2024 welcomed approximately 262.927.646 from 1.792.960 flights in total; it has 315 flights, from which 100 are for cargo transportation only.[76]

74 L. Doswald-Beck, '*San Remo Manual on International Law Applicable to Armed Conflict at Sea*', (1995), 12-13, Sec. II, Arts 23-33.

75 According to Art. 23 of the Montreux Convention "In order to assure the passage of civil aircraft between the Mediterranean and the Black Sea, the Turkish Government will indicate the air routes available for this purpose, outside the forbidden zones which may be established in the Straits. Civil aircraft may use these routes provided that they give the Turkish Government, as regards occasional flights, a notification of three days, and as regards flights on regular services, a general notification of the dates of passage."
"The Turkish Government moreover undertake, notwithstanding any remilitarization of the Straits, to furnish the necessary facilities for the safe passage of civil aircraft authorized under the air regulations in force in Türkiye to fly across Turkish territory between Europe and Asia. The route which is to be followed in the Straits zone by aircraft which have obtained an authorization shall be indicated from time to time."

76 *iGA Istanbul Airport in Numbers*, available at https://www.istairport.com/en/corporate/about-us/?locale=en (last visited 3 November 2024). These statistics frequently fluctuate around these numbers and they don't remain stable. Nonetheless, they can provide a clear

E. The Key and the Gate: Türkiye's and US' Intertwined Stances towards 1936 Convention

It becomes obvious that the present regime of the Straits, as it is regulated by the Montreux Convention, provides Türkiye with an advantageous and privileged position in relation to the other contracting parties. Its authority to ensure the proper application of the treaty in practice and its significant powers regarding transit through the Straits (especially Articles 20 and 21) prove that. Moreover, for the same reason this treaty constitutes an important tool in Türkiye's foreign affairs arsenal; it is not inaccurate to be stated that the Montreux Convention is the key which widely opens the seaway towards the Black Sea and the eastern Mediterranean. At once, Türkiye's geostrategic position is upgraded. This may be illustrated by a plethora of events: for example, Türkiye's objections with regard to the accession of Sweden and Finland to NATO membership or its willingness to buy weapons from Russia, a primary NATO opponent. These events can be seen as apt diplomatic moves on the part of Türkiye, an exploitation of the current status quo of the region. And yet, this shrewd -but realistic- balance between the principal actors would not have been possible, if the Montreux Convention had not existed. And thus, it won't be an exaggeration to state that the probability of Türkiye's becoming a regional power in eastern Mediterranean is high, because of the present legal framework regarding the Straits regime as well as the events which are currently taking place in the broader area, notably the Ukrainian war.

Furthermore, the Montreux Convention constitutes an important element of the present-day world order. Firstly, it complies with and supports Article 1(1) of UN Charter, due to its sophisticated and well-placed restrictions which limit the number of warships in the Black Sea. Additionally, the application of these limitations may be interpreted in another way; the power that controls the Straits may exclude or at the very least weaken any potential unwanted presence in the Black Sea and empower any cooperative forces. Thus, from a western point of view, the Straits are the gates that conceal and contain every threat coming from the other side, limiting these threats inside the Black Sea; and so, the Treaty is the barrier against the adversaries of the West. For this reason, it should be in the US and NATO's best interest to ensure that Türkiye remains in

enough picture of Istanbul's significance to international transit, giving at the same time a practical reason for why the Convention regulates the transit of civil aircraft.

the western camp and NATO, so that the Straits remain firmly closed towards their enemies.

And here, in my opinion, lies the major challenge that NATO and the US must overcome: to ensure that the bond between Türkiye and the West does not break. Unfortunately, this is easier said than done, and that is the case due to a difference in the approach that Türkiye and the US adopt regarding the Montreux Convention's fundamental rationale; Türkiye sees Montreux as its way to greatness and on the contrary the US and NATO conceive it as a devise to prolong and conserve their dominance. If this bond breaks, then developments may occur which may change the region's status quo; what can be stated with certainty is that the global stability will be severely threatened. And so, finally, I suggest that the Montreux Convention should be applied as it is and as its true goal implies: to ensure of International Peace and Security.

F. Conclusion: The Future of 1936 Montreux Convention

After many decades in force, the 1936 Montreux Convention has been put to the test on multiple occasions, each time proving more or less its worth at securing peace and stability in the Black Sea region. It won't be an overstatement that Montreux should be considered as one the most important international treaties of the 20th century, rightfully claiming its position alongside all the rest of the classical international agreements of the past. From the extensive legal analyses of the 1936 Convention's provisions regarding the transit of war vessels through the Straits and their application in State Practice, the following may be concluded:

a) The Montreux Convention had been worded in such a way so as to balance different national and international interests involved in this area of the world: US' and NATO's aims to contain Russia's influence inside the Black Sea by not letting Russia send large naval force out in the Mediterranean are offset by the privileged legal status that was laid down for all States littoral of the Black Sea.

b) Türkiye's geopolitical and geostrategic position not only in the Black Sea area but also in the Eastern Mediterranean is recognized by the 1936 Convention: its control over the Straits is currently total, especially if it is taken into consideration that it has the right to fully deny access to any naval force in case Türkiye is belligerent or even if it considers itself to be threatened with imminent danger of war. Thus, Türkiye's role in the area has been upgraded to that of a regional "traffic warden" of one the busiest maritime routes world-wide.

c) From State Practice it may be concluded that in general all States conform to the Treaty's provisions and act lawfully in accordance with its true spirit. What is most interesting, though, is that even in cases where States violate the Convention, they still try to harmonize their actions with Montreux, presenting them as lawful. For example, this was the case with USS Mount Witney during the Russian War against Georgia (2008) and the Russian annexation of Crimea (2014).

d) Türkiye and the US have two completely different approaches to Montreux: the former understands it as an important tool which if it is used wisely, could be a critical factor for fulfilling its greatest ambition to be acknowledged as the most robust regional power on the Eastern Mediterranean; the latter sees Montreux as an instrument of restricting Russia's influence inside the Black Sea. As long as a compromise between the two sides exists, the status quo of the region will be maintained, but if this fails, then I believe that it could lend to significant and unpredictable situations beyond anyone's control permanently damaging International Peace and Security in the process.

For these reasons, I submit that a world and an international society without the 1936 Montreux Convention is hard to be imagined. In 2036 it will eventually mark 100 years of being in force, and it is going to be celebrated as by far one of the most significant pieces of international legislation that promotes and provides stability in an international globalized world. It has all the conditions to endure and last for more years to come, and as such to prove that International Law is the only means of maintaining International Peace and Security.

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Regulating Uncertainty: On the Regulation of Human Behavior and its Interpretation by the Court of Justice of the European Union

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Table of Contents

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Abstract

More often than not, laws are meant to regulate human behavior. However, human beings' reactions to such regulations are to a large degree uncertain and one can only try to predict them. In that regard, the neighboring field of behavioral economics might provide relevant and necessary insights for effective regulation. However, the Court of Justice of the European Union might, should, or ought to rely on such findings when interpreting European Union (EU) secondary law, to give such rules the most effective meaning by limiting possible infringements on individuals' fundamental rights. Built on an assessment of the *Market in Financial Instruments Directive II* (MiFID II), as part of European capital markets law, and with references to consumer protection law, the Taxonomy Regulation, and other European legal acts, this paper, first of all, demonstrates that not only the European legislator but also the Court can, in most situations, rely on behavioral economic findings. Although human behavior as well as results stemming from experimental research are to a certain degree uncertain, concepts developed in behavioral economics describe human behavior better than concepts implying (fully) rational behavior. In addition, obstacles – stemming from both the field of behavioral economics and legal methodology – that arise when applying these experimental findings to interpreting EU secondary law will be summarized and ideas to counter those obstacles are presented. The overall objective of this paper is to further a discussion on how to best incorporate findings from the field of behavioral economics into legal methodology. For this, the paper references, among others, European capital markets law but strives to abstract and generalize key aspects to facilitate a broader reception and discussion.

A. Introduction

I. Overview and Research Agenda

The purpose of this paper is to demonstrate that not only the European legislator[1] but also the Court of Justice of the European Union (the CJEU or the Court) can or ought to, in many instances, rely on behavioral economic findings when interpreting European Union (EU) legislative acts. This is because, through many such regulations, the EU intends to regulate human behavior even as human beings' reactions to such regulation are to a large degree uncertain.

To demonstrate how and under which circumstances the CJEU may build its interpretation of EU law (also) on findings from the neighboring field of behavioral economics, I will first exemplify some regulatory acts through which the EU tries to influence human behavior (A. II) and clarify the notion of uncertainty in law and economics (A. III).

It appears that the EU often relies on information requirements as a tool of its regulatory toolbox.[2] Examples can be found, *inter alia*, in consumer protection law (e.g., Arts 5(1) or 6(7) of Directive 2011/83/EU[3]), data protection law (e.g., Arts 4(11), 6(1)(a), 12–14 of the *General Data Protection Regulation* [GDPR][4]), EU environmental law (e.g., Arts 5–8 of Regulation (EU) 2020/852 [Taxonomy Regulation][5]), and European capital markets law (e.g., Arts 24 and 25 of the *Market in Financial Instruments Directive II* [MiFID II][6]). Two main aspects led me to build this paper on an assessment of Arts 24 and 25 MiFID II without neglecting other important provisions in EU secondary law. First, information requirements in European capital markets law are currently also utilized to achieve further objectives in EU law, in particular to support and accelerate ecological transformation. Second, these information requirements are meant to directly influence the contractual relationship between investment firms and individual investors while not limiting the latter group but, in principle, including all possible contracting parties (i.e., retail clients, professional clients, and eligible counterparties[7]). This allows to assess the ideas summarized in this

1 This general term includes all kinds of legislative processes enshrined in Arts 288–299 of the *Treaty on the Functioning of the European Union*.
2 See at note 30 below.
3 EP and Council Directive 2011/83/EU, OJ 2011 L 304/ 64 [Directive 2011/83/EU].
4 EP and Council Regulation (EU) 2016/679, OJ 2016 L 119/1 [GDPR].
5 EP and Council Regulation (EU) 2020/852, OJ 2020 L 198/13 [Taxonomy Regulation].
6 EP and Council Directive 2014/65/EU, OJ 2014 L 173/349 [MiFID II].
7 See also notes 21–23 below.

paper with a broad focus. Nonetheless, the assessments and results outlined here seek to be generalizable to allow a broader reception and discussion in various other fields of EU (secondary) law.

Consequently, this paper progresses by examining the legitimacy of applying behavioral economic findings in EU law (B) and establishing the CJEU's competence to build on such findings (C). Since findings stemming from empirical research about human behavior are, however, to some degree uncertain, this paper also outlines obstacles to applying such findings in EU law, both stemming from the field of behavioral economics (D. I) and the field of legal methodology (D. II) while offering possible paths to countering such obstacles (D. III). These discussions are followed by concluding observations (E).

II. Regulating Human Behavior

In many instances, the law is meant to regulate human behavior directly through orders and prohibitions, or indirectly by setting incentives or establishing restrictions.[8] This is true for EU law, *inter alia*, in the areas of consumer protection,[9] capital markets,[10] environmental protection,[11] and corporate sustainability in supply chain management.[12]

As part of EU capital markets law, the MiFID II[13] was enacted, following a lengthy consultation process,[14] in 2014. The objective was to revise its predecessor

8 See also R. B. Korobkin & T. S. Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics', 88 *California Law Review* (2000) 4, 1051, 1143 and, including a focus on a regulation's evaluation, C. Coglianese, 'Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy' (2012), 9–10, available at https://web-archive.oecd.org/2012-08-10/207894-1_coglianese%20web.pdf (last visited 10 October 2024).

9 See only Directive 2011/83/EU, *supra* note 3.

10 See mainly MiFID II, *supra* note 6; EP and Council Regulation (EU) No 596/2014, OJ 2014 L 173/1 [MAR].

11 See the various regulations and directives planned by the European Commission, European Commission, 'The European Green Deal: Communication From the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions', COM(2019) 640 final.

12 See only the currently discussed proposal: European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937', COM(2022) 71 final.

13 MiFID II, *supra* note 6.

14 See only The High-Level Group on Financial Supervision in the EU, 'Report of the High Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosière' (2009), available at https://ec.europa.eu/economy_finance/publications/pages/

after the financial crisis of 2007.[15] The European Commission summarized its objectives as "[…] to further the integration, competitiveness, and efficiency of EU financial markets."[16] For this, the Commission proposed additional rules on transparency and regulations dealing with conflict of interests. The Commission also extended the directive's scope to include all organized trading venues—i.e., regulated markets, multilateral trading facilities (MTFs), and organized trading facilities (OTFs)—to provide a level playing field for derivatives and other instruments too.[17]

Although MiFID II is a directive addressed to the EU Member States, which leaves them the choice of form and methods to implement the binding results (see Art. 288(3) of the *Treaty of the Functioning of the European Union* [TFEU][18]), the directive remains relevant when interpreting the relevant national laws.[19] Furthermore, the Member States may be restricted to legislate more broadly or narrowly than the directive stipulates, subject to its degree of harmonization—a matter left for other essays to determine.[20]

Arts 24 and 25 MiFID II, which form the central investor protection provisions, probably have the widest scope of application. They might become relevant not only regarding investment firms but also investors, including retail investors. In essence, and without going into the provisions' details, they regulate which pieces of information investment firms must provide to (potential)

publication14527_en.pdf (last visited 25 February 2009), paras 38–39; the summary by European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Markets in Financial Instruments Repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast)', COM(2011) 656 final, 3–4 [European Commission, 'COM(2011) 656 final'].

15 See only S. J. Kasper, 'Harmonisierungsgrad der Bestimmungen zum Anlegerschutz Nach der MiFID II: Teil I', 75 *Wertpapier-Mitteilungen* (2021) 2, 60, 60-61 [Kasper, 'Harmonisierungsgrad MiFID II: Teil I'].

16 European Commission, 'COM(2011) 656 final', *supra* note 14.

17 See only the overview and explanation by *ibid*., 4–11.

18 *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, OJ 2012 C 326/47 [TEU and TFEU].

19 *Jean Noël Royer,* C-48/75, Judgment of 8 April 1976, ECLI:EU:C:1976:57, paras 69, 73.

20 Regarding the degree of harmonization, and arguing that MiFID II is a fully harmonizing directive, see only Kasper, 'Harmonisierungsgrad MiFID II: Teil I', *supra* note 15; S. J. Kasper, 'Harmonisierungsgrad der Bestimmungen zum Anlegerschutz Nach der MiFID II: Teil II', 75 *Wertpapier-Mitteilungen* (2021) 3, 101 [Kasper, 'Harmonisierungsgrad MiFID II: Teil II'] with further references.

investors—i.e., retail clients,[21] professional clients,[22] or eligible counterparties[23]—when providing investment services, i.e., portfolio management[24] or investment advice,[25] investment advice on an independent basis,[26] other investment services,[27] or execution only services[28]. The information provided to clients in accordance with Arts 24 and 25 MiFID II is meant to enable clients to make informed choices.[29]

For this, MiFID II, together with its supplementary regulation, i.e., Delegated Regulation (EU) 2017/565[30], requires a plethora of information that needs to be provided to (potential) clients and investors. From my point of view, the most essential points of information are those concerning the investment firm and its offered services (see Art. 24(4)(1)(1) MiFID II and Arts 47–48 Delegated Regulation (EU) 2017/565).[31] This is so because, based on this information, (potential) clients decide what kind of services they want to make use of. Consequently, such information and the decision made because of it will influence the further relationship between the investor and investment firm. Furthermore, the information has to be provided in good time (see Art. 24(4)(1)(1) MiFID II and Art. 46(1),(2) Delegated Regulation (EU) 2017/565), which should be interpreted as a point in time at which the (potential) client is still mostly unaffected by the investment firm, has not yet invested much time, and might still feel free to make decisions.[32] After the (potential) client had made an initial decision with regard to an investment firm and a type of service, further information, *inter alia*, regarding potentially suitable investment products, costs, and charges (see Art. 24(4)(1),(2) MiFID II), as well as potentially unresolved conflicts of interest must be provided.

In addition to providing the above-mentioned information, and as from its date of application, Art. 6(2)(2) of Regulation (EU) 2019/2088[33] requires

21 Art. 4(11) MiFID II, *supra* note 6.
22 Art. 5(12) MiFID II, *supra* note 6.
23 Art. 30 MiFID II, *supra* note 6.
24 Arts 24(8), 25(2) MiFID II, *supra* note 6.
25 Arts 24(4), 25(2) MiFID II, *supra* note 6.
26 Art. 24(4)(1)(a)(i)–(ii), (7) MiFID II, *supra* note 6.
27 Art. 25(3)(1) MiFID II, *supra* note 6.
28 Art. 25(4) MiFID II, *supra* note 6.
29 This is expressly stated in Art. 24(5) MiFID II and also referred to in Recitals 74 and 81 to MiFID II, *supra* note 6.
30 Commission Delegated Regulation (EU) 2017/565, OJ 2017 L 87/1.
31 A more detailed analysis of this example must be left for another essay.
32 See below in section B. I.
33 Regulation (EU) 2019/2088, OJ 2019 L 317/1 [Regulation (EU) 2019/2088].

investment firms – by referencing the purported Taxonomy Regulation[34] – to also disclose to their clients sustainability-related information regarding their investments.[35] The Commission amended[36] the Taxonomy Regulation and its supplementary Regulation[37] without objection in the scrutiny phase's given timeframe (July 11, 2022) by the European Parliament and the Council according to Regulation (EU) 182/2011.[38] One of the objectives of the amendment was to also include nuclear power and natural gas as green technologies, at least for a transitory period. The Taxonomy Regulation and its supplementary Regulation were initially enacted to establish criteria for an investment to qualify as "environmentally sustainable"[39]. The underlying purpose is to "reorient capital flows towards sustainable investment in order to achieve sustainable and inclusive growth."[40]

Besides the MiFID II and Taxonomy Regulation and without going into these or further regulations details, the EU arguably also builds on human behavior to protect a proper functioning of the internal market (e.g., Art. 1 of Directive 2011/83/EU[41]), to protect natural persons' personal data while guaranteeing the free movement of such data (e.g., Art. 1 GDPR[42]), or to fight market abuse practices (e.g., Art. 1 MAR[43]). As such, the term "clear and comprehensible" (see Arts 5(1) and 6(1) of Directive 2011/83/EU), the notion of the "consumer" (Art. 6(7) of Directive 2011/83/EU),[44] the notion of the "investor" as a reasonable investor (Art. 7(4) MAR and Recital 14),[45] the

34 Taxonomy Regulation, *supra* note 5.

35 See also Recital 33 of Regulation (EU) 2019/2088, *supra* note 33.

36 Commission Delegated Regulation (EU) 2022/1214, OJ 2022 L 188/1. The amended Commission Delegated Regulation takes effect on 1 January 2023, see Art. 3 of the Commission Delegated Regulation (EU) 2022/1214. For details on the context, consultations, and legal elements, see Commission Delegated Regulation (EU) …/…, C(2022) 631/3, available at ec.europa.eu/finance/docs/level-2-measures/taxonomy-regulation-delegated-act-2022-631_en.pdf (last visited 8 October 2024).

37 Commission Delegated Regulation (EU) 2021/2139, OJ 2021 L 442/1.

38 EP and Council Regulation (EU) No 182/2011, OJ 2011 L 55/13.

39 Art. 1(1) of the Taxonomy Regulation, *supra* note 5.

40 Recital 6 of the *ibid*.

41 Directive 2011/83/EU, *supra* note 3.

42 GDPR, *supra* note 4.

43 MAR, *supra* note 10.

44 This is especially in light of the consequences enshrined in Art. 10 of Directive 2011/83/EU, *supra* note 3.

45 See for a summary of the debate only M. Ventoruzzo & S. Mock (eds), *Market Abuse Regulation*, 2nd ed. (2022), chapter B.7 paras 76–79; C. Kumpan & R. Misterek, 'Artikel 7 Insiderinformationen', in E. Schwark & D. Zimmer (eds), *Kapitalmarktrechts-Kommentar*,

information requirements stemming from Arts 4(11), 5(1)(a), 12–14 GDPR for lawful consent (see Art. 6(1)(a) GDPR)[46], and many other notions, terms, and undefined or vague formulations might require an interpretation in line with behavioral economic findings.[47]

In summary, the EU legislator decided to use wide-ranging information as a tool to enable (potential) clients and contracting partners to make informed decisions about investments or data disclosures, to incentivize them to direct their investments toward environmentally sustainable causes, to refrain from exploiting insider information, and to exercise their right to withdraw from distance or off-premises contracts. These examples demonstrate that the European legislator uses, *inter alia*, frames[48] and transparency through information[49] to incentivize market actors to support its legislative (normative) objectives. With this approach, the European legislator relies on (predicted) compliance by market actors and trusts them to make informed decisions when provided with relevant information. The following question then arises: Under which assumptions of human behavior does the European legislator choose its regulatory tools and can it trust that humans will act accordingly?

This leads to the field of behavioral economics in law, which is closely linked to uncertainty in law (A. III) and which will be discussed in more detail in a later section (B. I). From the outset of this paper, it is necessary to clarify that the ideas presented herein have been formed by an assessment of Arts 24 and 25 MiFID II and its supplementary pieces of legislation. However, I strive

5th ed. (2020), paras. 128–142. On the interpretation of the adverb "reasonably" as referring on common experience, see *Markus Geltl v. Daimler AG*, C-19/11, Judgment of 28 June 2012, ECLI:EU:C:2012:397, paras 44–45.

46 On information requirements for a lawful consent, see only *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. v. Planet49 GmbH,* C-673/17, Judgment of 1 October 2019, ECLI:EU:C:2019:801, paras 46, 79-81.

47 In particular regarding the interpretation of the reasonable investor (see Art. 7(4) MAR, *supra* note 10) in light of behavioral economic findings, see only H. Fleischer, 'Ad-hoc-Publizität beim Einvernehmlichen Vorzeitigen Ausscheiden de Vorstandsvorsitzenden: Der DaimlerChrysler-Musterentscheid des OLG Stuttgart', 10 *Neue Zeitschrift für Gesellschaftsrecht* (2007) 11, 401, 405; K. Langenbucher, 'In Brüssel Nichts Neues? – Der „Verständige Anleger" in der Marktmissbrauchsverordnung', Die Aktiengesellschaft (2016) 12, 417, 420.

48 On the concept, see only A. Tversky & D. Kahneman, 'The Framing of Decisions and the Psychology of Choice', 211 *Science* (1981) 4481, 453.

49 See especially Art. 24 and 25 MiFID II, *supra* note 6.

to abstract and generalize the presented concepts and ideas to allow for a wider application in EU law.

III. Uncertainty in Law

In economics, there is a strict differentiation between risk and uncertainty.[50] Whereas risk refers to situations in which decision makers know about the (possible) decision outcomes and their probabilities (quantifiability),[51] uncertainty refers to those situations in which such information is unavailable.[52]

The concept of uncertainty is also not unknown to legal methodology.[53] Whenever the legislator regulates in a field for which needed knowledge and

50 F. H. Knight, *Risk, Uncertainty and Profit* (1921), 19–20 and Chapter VII; T. Richards, *Investing Psychology: The Effects of Behavioral Finance on Investment Choice and Bias* (2014), 12; A. Tversky & D. Kahneman, 'Advances in Prospect Theory: Cumulative Representation of Uncertainty', 5 *Journal of Risk and Uncertainty* (1992) 4, 297, 303 [Tversky & Kahneman, 'Advances in Prospect']. With a focus on ambiguity (i.e., "uncertainty about probability, created by missing information that is relevant"), see C. F. Camerer & M. Weber, 'Recent Developments in Modeling Preferences: Uncertainty and Ambiguity', 5 *Journal of Risk and Uncertainty* (1992) 4, 325, 330.

51 Examples are coin tosses, lotteries, and dice games.

52 K. F. Park & Z. Shapira, 'Risk and Uncertainty', in M. Augier & D. J. Teece (eds), *The Palgrave Encyclopedia of Strategic Management* (2020). For a broader discussion of the notion, see also S. C. Dow, *Foundations for New Economic Thinking: A Collection of Essays* (2012), 72–82.

53 For a general discussion and with a definition of legal uncertainty as "[a] situation that obtains when the rule that is relevant to a given act or transaction is said by informed attorneys to have an expected official outcome at or near the 0.5 level of predictability", see A. D'Amato, 'Legal Uncertainty', 71 *California Law Review* (1983) 1, 1, 2, regarding strategies for reducing legal uncertainty pp. 45–55 *et passim*. Referring to risk vs. uncertainty, unambiguous vs. ambiguous probability, precise/sharp vs. vague probability, and epistemic reliability in the realm of tort reform, see M. A. Geistfeld, 'Legal Ambiguity, Liability Insurance, and Tort Reform', 60 *DePaul Law Review* (2011) 2, 539, 541. Differentiating between idiosyncratic (diversifiable) and systematic (non-diversifiable) legal uncertainty as well as with references to D. M. Trubek, 'Max Weber on Law and the Rise of Capitalism' *Wisconsin Law Review* (1972) 3, 720, 741 and others, see J. Lee, D. Schoenherr & J. Starmans, 'The Economics of Legal Uncertainty', *SSRN Electronic Journal* (2023), 1–6 with further references. With a focus on (managing legal) risk rather than (scientific) uncertainty, see R. Baldwin, 'Introduction – Risk: The Legal Contribution', in R. Baldwin (ed.), *Law and Uncertainty* (1997), 1, 17–19. On contact risk and uncertainty, including the costs of uncertainty, see D. Shannon, 'Contract Risk and Uncertainty Management', in V. A. Suveiu (ed.), *Routledge Handbook of Risk Management and the Law* (2023), 144, *passim*. On the terms ambiguity and vagueness (rather than uncertainty) in legal interpretation, see R. Poscher, 'Ambiguity and Vagueness in Legal

information is unavailable, we grant the legislator a margin of judgment or discretion, also with regard to infringements on human rights, for example, COVID-related regulations. Furthermore, also in terms of the means of regulation, we allow the legislator to exercise discretion to the extent that the chosen means are not *per se* ineffective or there are means available that might render the same result by less rights-intrusive means. Legal rules also need to comply with the general legal doctrine of legal certainty, which requires "that those subject to the law must know what the law is so as to be able to plan their actions accordingly."[54] Moreover, we allow the administrative wider discretion whenever their assessment is necessary to cope with the situation at hand, whereas only the courts can control the exercise of discretion as to any abuse of discretion or power.[55]

Whenever the legislator aims at regulating or incentivizing human behavior, a regulation's effects are *per se* uncertain (to a certain extent), since individuals, both in and outside of democratic societies, are still free to choose their actions and behavior and will do so.[56] Nonetheless, findings in the field of behavioral economics suggest that human behavior is predictable, though only to a certain degree. This allows legislators to use such research findings for regulatory purposes. However, also the competent courts, which in EU law is primarily the CJEU, might be advised or even obliged to rely on such findings when interpreting EU secondary law (C).

The question that I must exclude from the scope of this paper is whether judges themselves can decide free from influence by political or philosophical opinions, regardless of their heritage, career, or other personal characteristics, and whether rules of thumb will often influence their decisions.[57] The scope

Interpretation', in P. M. Tiersma & L. Solan (eds), *The Oxford Handbook of Language and Law* (2012), 128. On the ambiguities of statutes and legal decisions made by way of judgments, see W. Farnsworth, D. F. Guzior & A. Malani, 'Ambiguity About Ambiguity: An Empirical Inquiry Into Legal Interpretation', 2 *Journal of Legal Analysis* (2010) 1, 257, paras. 1–2, 4, 63–65.

54 T. Tridimas, *The General Principles of EU Law,* 2nd ed. (2007), 242, with a focus on foreseeability pp. 265–266.

55 For a systematic overview of various forms of discretion, although with a focus on the US legal system, see only H. L. A. Hart, 'Discretion', 127 *Harvard Law Review* (2013) 2, 652, 655; with a focus on EU administrative law, see P. Craig, *EU Administrative Law*, 2nd ed. (2012), 549-589.

56 See also, generalizing from patent law, K. C. Mullally, 'Legal (Un)Certainty, Legal Process, and Patent Law', 43 *Loyola of Los Angeles Law Review* (2010) 3, 1109, 1116, 1158.

57 For a discussion of those influences, see only C. K. Winter, 'The Value of Behavioral Economics for EU Judicial Decision-Making', 21 *German Law Journal* (2020) 2, 240,

will further be limited to the interpretation of secondary EU law by the CJEU, although the concepts of nudging and behaviorally informed legislation (B. I. 2) will be summarized to set the scene.

Since it is not possible to discuss theories and findings from behavioral economics in detail in this paper, only the essential ideas will be presented, referring readers to their most important parameters. Furthermore, this paper is meant to assess the research question broadly to facilitate stakeholders drawing their conclusions in individual cases.

B. Legitimacy of Applying Behavioral Economics in EU Law

This section aims to outline not only a number of fundamental findings in the field of behavioral economics (B. I. 1) and their relevance for legislative purposes (B. I. 2) but also the limitations for applying these findings that are linked to the idea of (democratic) legitimacy (B. II).

I. Behavioral Economics in EU Law

The EU legislator usually does not outline its theoretical understanding of how the addressees will behave or on which behavior it builds its regulation.[58] This leaves room for interpretation. Since human behavior is not the lawyer's primary research focus, research findings from other fields must be applied. These are primarily the fields of economic and psychological research. The findings from those fields and actual human behavior *vis-à-vis* regulatory concepts are informative for assessing a regulation's effects. In that regard, the following arguments are built on the self-styled bathtub model, stemming from social theory.[59]

240–242 *et passim* with additional references.

58 See only the discussion about the interpretation of a "reasonable investor" (Art. 7(4) MAR, *supra* note 10) described in and at note 45 above, the notion of the consumer (Art. 6(7) of Directive 2011/83/EU, *supra* note 3), or what kind of client—i.e. fully informed, rationally deciding, reasonable, average, etc.—is meant by Arts 24 and 25 MiFID II, *supra* note 6.

59 J. S. Coleman, 'Micro Foundations and Macrosocial Theory', in S. Lindenberg, J. S. Coleman & S. Nowak (eds), *Approaches to Social Theory* (1986), 345. For a more modern recent discussion, see C. A. Dunlo & C. M. Radaelli, 'Learning in the Bath-Tub: The Micro and Macro Dimensions of the Causal Relationship Between Learning and Policy Change', 36 *Policy and Society* (2017) 2, 304.

Traditionally, psychologists and economists described a human behavioral model in which actors strived to maximize their individual utility; this was termed the *homo oeconomicus* model.[60] The underlying idea was the purported resourceful, evaluating, maximizing individual who would always decide (perfectly) rationally (*rational choice theory*).[61]

However, humans do not behave perfectly rationally. For example, New Year's resolutions are made and then broken within the first few hours or days of the new year; more or more eadditional or more expensive goods are purchased simply because of their visibility or availability in a store or online market, or a person's competence is evaluated based on their attractiveness.

In the field of capital markets law, it is evidenced that individuals do not process all relevant information completely and that they (often) assess information regardless of its relevance for an actual investment decision at hand.[62] Without presenting the individual findings, the following subsection (1) summarizes the concept of bounded rationality and introduces the prospect theory. The second subsection demonstrates how such concepts can be and are used in (EU) legislation (2).

1. Bounded Rationality and Prospect Theory

Building on prior research,[63] Herbert Alexander Simon developed his theory of bounded rationality[64] in which he acknowledged that individuals usually lack (complete) information, are not capable of processing all information (computational capacity), and that their decisions are subject to time constraints.[65] With these and further empirically proven findings, he modified the above-mentioned *homo oeconomicus* model.[66]

60 See on the development from *homo oeconomicus* to a more realistic approach, R. H. Thaler, 'From Homo Economicus to Homo Sapiens', 14 *Journal of Economic Perspectives* (2000) 1, 133.

61 Korobkin & Ulen, *supra* note 8, 1055–1059, 1060–1066.

62 See only A. Shleifer & L. H. Summers, 'The Noice Trader Approach to Finance', 4 *Journal of Economic Perspectives* (1990) 2, 19, 24–25 with further references and the (general) assessment by Korobkin & Ulen, *supra* note 8; E. Burton & S. Shah, *Behavioral Finance: Understanding the Social, Cognitive, and Economic Debates* (2013).

63 Knight, *supra* note 50.

64 See only R. Selten, 'What Is Bounded Rationality?', in G. Gigerenzer & R. Selten (eds), *Bounded Rationality* (2001), 13.

65 H. A. Simon, *Models of Man, Social and Rational: Mathematical Essays on Rational Human Behavior in a Social Setting*, 4th ed. (1957), 256 (under the term ‚approximate rationality').

66 See in and at note 60 above.

Daniel Kahneman and Amos Tversky then built on this bounded rationality model and developed their empirically proven[67] *prospect theory*, which describes how individuals make decisions.[68] Superficially, the *prospect theory* is founded upon four assumptions that all contradict the *homo oeconomicus* model: Individuals are reference-dependent, have nonlinear preferences, are risk-seeking, and are loss-averse.[69]

In this process of aligning the psychological and economic model of how individuals make decisions in the real world, a plethora of individual heuristics and biases have been discovered that cannot all be named, let alone summarized in this paper. Yet, the literature provides summaries.[70]

The above-mentioned[71] examples demonstrate hyperbolic discounting[72], which is based on a different evaluation of incidents in the near and distant future (New Year's resolutions), the availability heuristic[73] (the purchase of additional or more expensive goods), and the halo heuristic[74] (individual's competence measured by their attractiveness). Furthermore, individuals are often overwhelmed by the sheer quantity of information they receive, which might lead to a state of information overload.[75] In that state, one of the following can occur: Individuals can no longer process new information or they lose their ability to

67 See only with further references Burton & Shah, *supra* note 62, 98.

68 A. Tversky & D. Kahneman, 'Prospect Theory: An Analysis of Decision under Risk', 47 *Econometrica* (1979) 2, 263.

69 Tversky & Kahneman, 'Advances in Prospect', *supra* note 50, 298.

70 For an overview that is not all-encompassing, see only B. Fischhoff, 'Heuristics and Biases in Application', in T. Gilovich, D. Griffin & D. Kahneman (eds), *Heuristics and Biases*, 14th ed. (2013), 730. A shorter summary with a special focus on using behavioral insights in administrative law is presented by A. Alemanno & A. Spina, 'Nudging Legally: On the Checks and Balances of Behavioral Regulation', 12 *International Journal of Constitutional Law* (2014) 2, 429, 434.

71 See at note 62 above.

72 S. Frederick, G. F. Loewenstein & T. O'Donoghue, 'Time Discounting and Time Preference: A Critical Review', 40 *Journal of Economic Literature* (2002) 2, 351, 360–362, 366–367.

73 A. Tversky & D. Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases', 185 *Science* (1974) 4157, 1124, 1127.

74 First described by F. L. Wells, 'A Statistical Study of Literary Merit', *Archives of Psychology* (1907) 7, 5.

75 See only M. J. Eppler & J. Mengis, 'The Concept of Information Overload: A Review of Literature From Organization Science, Accounting, Marketing, MIS, and Related Disciplines', 20 *The Information Society* (2004) 5, 325, 326 which also refer to related notions, such as cognitive overload, sensory overload, communication overload, knowledge overload, and information fatigue syndrome.

differentiate between highly relevant, less relevant, and irrelevant information, or they experience that their decision-making abilities are negatively affected.[76] The focus of this paper will not be on the discussion of further heuristics and biases that might affect individuals' decision-making abilities.[77]

Generally,[78] behavioral biases apply to all humans, regardless of their age, profession, literacy, and other factors.[79] This goes contrary to common intuitions, since people expect experts to behave more rationally – if not completely rational – compared to laypeople. Although experts sometimes behave more rationally, even their behavior can be better described as non-rational, which leaves them closer to laypeople's behavior than to behavior that the *homo oeconomicus* model describes.

These findings are, however, not to be understood as guaranteeing that every individual will behave in the same way; in other words, an individual's behavior in a specific situation cannot be predicted.[80] However, one can ignore this uncertainty as to how an individual person will react to a regulation if a sufficient number of individuals will act as predicted.

Consequently, a large number of findings in behavioral economics can be described as robust, i.e., – superficially – they could be demonstrated in

76 On the negative consequences of information overload, see only J. Jacoby, D. E. Speller & C. A. Kohn, 'Brand Choice as a Function of Information Load', 11 *Journal of Marketing Research* (1974) 1, 63, 63–69; N. Cowan, 'The Magical Number 4 in Short-Term Memory: A Reconsideration of Mental Storage Capacity', 24 *Behavioral and Brain Sciences* (2001) 1, 87; Eppler & Mengis, *supra* note 75, 326, 328; T. W. Jackson & P. Farzaneh, 'Theory-Based Model of Factors Affecting Information Overload', 32 *International Journal of Information Management* (2012) 6, 523; P. G. Roetzel, 'Information Overload in the Information Age: A Review of the Literature From Business Administration, Business Psychology, and Related Disciplines With a Bibliometric Approach and Framework Development', 12 *Business Research* (2019) 2, 479, 483. With proof that information overload affects experts and laypeople, see only T. A. Paredes, 'Blinded by the Light: Information Overload and its Consequences for Securities Regulation', 81 *Washington University Law Review (formerly Washington University Law Quarterly)* (2003) 2, 417, 484 *et passim*.

77 See also references to relevant literature in note 70 above.

78 A number of biases tend to be less distorting for certain professional backgrounds, although they do not disappear completely.

79 See, among others, and with further references only K. Daniel, D. Hirshleifer & S. H. Teoh, 'Investor Psychology in Capital Markets: Evidence and Policy Implications', 49 *Journal of Monetary Economics* (2002) 1, 139, 177; W. F. M. de Bondt & R. H. Thaler, 'Do Analysts Overreact?', in Gilovich, Griffin & Kahneman, *supra* note 70, 678, 678; Winter, *supra* note 57, 248.

80 See only Alemanno & Spina, *supra* note 70, 432.

many individual empirical studies to influence the decision-making process of individuals. Their existence is therefore proven beyond doubt, and yet still a certain level of uncertainty persists.[81] Possible obstacles to the legal methodology that arise from this uncertainty will be discussed in a later subsection (D).

2. Nudging and Behaviorally Informed Legislation

If it can be shown that certain heuristics and biases influence the decision-making process, why should legislators not use these findings to incentivize individuals to take better or at least better-informed decisions? This is, vaguely, the question and idea underlying the concepts of nudging[82] and behaviorally informed legislation.[83] Nudging, which is inspired by libertarian paternalism,[84] aims to alter the individual's behavior without limiting the choice set by policymakers organizing the "context, process, and environment in which individuals make decisions"[85].[86] Policymakers can thus aptly be described as "choice architects".[87] Behaviorally informed regulation might include the method of nudging but can also use – detailedly described – disclosure requirements, default rules, and simplification.[88] Those approaches must be understood as influencing the run-up to the actual decision making. In their details, both concepts might overlap. In any case, both concepts raise similar legal and legitimacy questions, as discussed in the following section (II).

To operationalize the findings from behavioral economics for the legislature and administration, many States as well as the EU have formed self-

81 See only *ibid.*

82 See only A. van Aaken, 'Constitutional Limits to Paternalistic Nudging: A Proportionality Assessment', in A. Kemmerer *et al.* (eds), *Choice Architecture in Democracies* (2016), 161, 161–167 [Van Aaken, 'Constitutional Limits'].

83 Alemanno & Spina, *supra* note 70; M. Baggio *et al.*, 'The Evolution of Behaviourally Informed Policy-Making in the EU', 28 *Journal of European Public Policy* (2021) 5, 658, 660.

84 See on its roots, R. H. Thaler & C. R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008), 1–16. See also van Aaken, 'Constitutional Limits', *supra* note 82, 167–171; A. van Aaken, 'Judge the Nudge: In Search of the Legal Limits of Paternalistic Nudging in the EU', in A. Alemanno & A.-L. Sibony (eds), *Nudge and the Law* (2015), 83.

85 Alemanno & Spina, *supra* note 70, 438.

86 See fundamentally on nudging, Thaler & Sunstein, *supra* note 84, 6. With a focus on policy tools, see van Aaken, 'Constitutional Limits', *supra* note 82, 171–182.

87 Alemanno & Spina, *supra* note 70, 438.

88 See only *ibid.*, 438–439.

styled nudging units or, as the EU's unit is named, Competence Centers on Behavioral Insights[89].

A (purposeful?) example of relying on behavioral insights in EU law is the withdrawal right in consumer law, now enshrined, *inter alia*, in Art. 9 of Directive 2011/83/EU.[90] It enables consumers to rectify an intuitive decision within a fixed period. Such rights can counterbalance, among others, purchases caused by the halo heuristic. Another example, the effects of which have yet to be seen, is the Taxonomy Regulation and its effects in conjunction with information obligations in European capital markets law. This example allows to label specific financial instruments as "environmentally sustainable", thereby incentivizing investments in such instruments without limiting the investor's free choice.[91] In addition, investment firms are obliged to inform (potential) investors whether an investment is "environmentally sustainable" (Arts 5–8 Taxonomy Regulation). Even if a financial product might not be covered by the specific regulations enshrined in the Taxonomy Regulation and Regulation (EU) 2019/2088, the provided information should at least read: "The investments underlying this financial product do not take into account the EU criteria for environmentally sustainable economic activities." (Art. 7 Taxonomy Regulation).[92]

Arguably, information requirements laid down in Arts 24 and 25 MiFID II could also be regarded as building on findings from the field of behavioral economics. However, the mere requirement to disclose a large quantity of information should not be understood as effectively building on such insights. Yet first good efforts can be detected in, for example, Art. 44(2) and (3) of the Delegated Regulation 2017/565, which detail requirements for the presentation of information (font sizes, necessary data for informative comparisons, etc.).

Similarly, the obligation to label a button with the words "order with obligation to pay" (Art. 8(2)(2) of Directive 2011/83/EU) when a distance contract is concluded by electronic means may be influenced by behavioral

89 European Commission, 'Competence Centre on Behavioural Insights' (2011), available at knowledge4policy.ec.europa.eu/behavioural-insights_en (last visited 8 October 2024).

90 Directive 2011/83/EU, *supra* note 3. Another example may be Arts 6 and 7 of EP and Council Directive 2005/29/EC, OJ 2005 L 149/22 [Unfair Commercial Practices Directive], which regulate misleading commercial practices as also including "factually correct" information which can nonetheless mislead the average consumer by way of its presentation.

91 See at note 34 above.

92 A more detailed assessment must be left for future assessments.

economic findings.[93] Overall, applying findings from behavioral economics is debated in various legal fields which cannot be outlined altogether in this paper.[94]

II. (Democratic) Legitimacy

Having established that humans do not behave (completely) rationally and that legislators and the administration can use findings from behavioral economics, among others, to enact laws that build on those findings, the question arises whether or under which circumstances the European legislator may use tools such as nudging and behaviorally informed legislation (1). Furthermore, and (partly) derived from that assessment, I discuss the limitations for the CJEU to use findings from behavioral economics in its judgments (2). In a later section, I outline five scenarios in which the CJEU might be advised or even obliged to build on such findings in its judgments (C).

At the outset, it is important to clarify the notion of legitimacy that is applied in this paper. Legitimacy, as it is understood in this paper, stems from the field of political science and can be divided into input, output, and throughput legitimacy.[95] Input legitimacy asks whether political decisions are legitimate, i.e.,

93 For a more detailed assessment of, among others, Directive 2011/83/EU, see only G. Helleringer & A.-L. Sibony, 'European Consumer Protection Through the Behavioral Lens', 23 *Columbia Journal of European Law* (2017) 3, 607, 625–628 *et passim*.

94 See only and without claiming a comprehensive overview G. Spindler, 'Behavioural Finance and Investor Protection Regulations', 34 *Journal of Consumer Policy* (2011) 3, 315; W. H. van Boom, 'Price Intransparency, Consumer Decision Making and European Consumer Law', 34 *Journal of Consumer Policy* (2011) 3, 359; A.-F. Lefevre & M. Chapman, 'OECD Working Papers on Finance, Insurance and Private Pensions' (2017), available at https://www.oecd-ilibrary.org/docserver/0c8685b2-en.pdf (last visited 8 October 2024); N. Chater, S. Huck & R. Inderst, 'Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective' (2010), available at https://www.dectech.co.uk/behavioural_science/public_research/dectech_research_ec.pdf (last visited December 2024); each with additional references and with a US-focus: I. Baum, J. Beldowski & D. Solomon, 'Regulation of Information About Unfolding Events in Securities Markets: A Behavioral Economics Perspective', in K. Mathis & A. Tor (eds), *Law and Economics of Regulation* (2021), 101; J. Canals-Cerda & R. Roman, 'Climate Change and Consumer Finance: A Very Brief Literature Review' (2021), *Discussion Papers (Federal Reserve Bank of Philadelphia)*, available at https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/discussion-papers/dp21-04.pdf (last visited 8 October 2024); P. Tufano, 'Consumer Finance', 1 *Annual Review of Financial Economics* (2009), 227; J. J. Xiao, *Handbook of Consumer Finance Research* (2016).

95 See with further references to all three aspects of legitimacy K. Purnhagen, 'Why do we Need Responsive Regulation and Behavioural Research in EU Internal Market Law?', in

whether the political decisions reflect the will of the people, their real demands. Output legitimacy asks whether the political decisions effectively promote common welfare, which is mostly equated with the concept of efficiency[96]. Throughput legitimacy focuses on the process between input and output.[97]

Since this paper's purpose is a legal analysis,[98] the following sections will primarily focus on aspects of input and output legitimacy and, in more detail, on democratic legitimacy[99], the observance of fundamental rights enshrined in the EU's Charter of Fundamental Rights (CFR)[100], and justiciability as an aspect of the rule of law.[101]

1. Limits for the European Legislator

Despite an arguable democratic deficit in the election of representatives and the composition of EU legislative institutions,[102] the EU is a democratic supranational organization with a democratically organized legislative process.[103] The European legislator can therefore, *prima facie*, be trusted to act according to the will of the people. If its regulations build effectively on behavioral economic

K. Mathis (ed.), *European Perspectives on Behavioural Law and Economics* (2015), 51, 53.

96 This concept is derived from economic research and builds on research by Vilfredo Pareto (V. Pareto, *Cours d'Économie Politique* (1897)) as well as Nicholas Kaldor and John Hicks (N. Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility', 49 *The Economic Journal* (1939) 195, 549; J. R. Hicks, 'The Foundations of Welfare Economics', 49 *The Economic Journal* (1939) 196, 696). For a focus on tool-efficiency, see with further references the overview by B. Morgan & K. Yeung, *An Introduction to Law and Regulation: Text and Materials* (2007), 116–132.

97 See, on all three aspects, Purnhagen, *supra* note 95, 53.

98 For references to philosophical or ethical analyses, see Alemanno & Spina, *supra* note 70, 431 in note 8.

99 See only M. Allen, 'Democratic Legitimacy', in D. K. Chatterjee (ed.), *Encyclopedia of Global Justice* (2011), 242 with further references.

100 *Charter of Fundamental Rights of the European Union*, OJ 2012 C 326/391 (EU).

101 *Parti Écologiste "Les Verts" v. European Parliament*, C-294/83, Judgment of 23 April 1986, ECLI:EU:C:1986:166, para. 23. See also M. Klamert & B. Schima, 'Article 19 TEU', in M. Kellerbauer, M. Klamert & J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (2019), 172, para. 24 [Klamert & Schima, 'Article 19 TEU'].

102 See, on a positive note *vis-à-vis* the discussion, S. Malinov, 'The Democratic Deficit of the EU: Breaking the Spell of a False Analogy', 20 *European View* (2021) 2, 226. See also M. Hailbronner, 'Beyond Legitimacy: Europe's Crisis of Constitutional Democracy', in M. A. Graber, S. Levinson & M. V. Tushnet (eds), *Constitutional Democracy in Crisis?* (2018), 277, 292 *et passim*, who establishes a clear distinction between issues of legitimacy and constitutional problems.

103 See also Art. 2 TEU, *supra* note 18 and Arts 288-292 TFEU, *supra* note 18.

findings, they will, in many instances, lead to cost-efficient[104] and effective rules that the addressees will (voluntarily) follow. Due to its democratic legitimization, the European legislator is in principle free to enact legal rules and regulations as it deems fit.

The regulations must, however, comply with the EU Treaties, namely the *Treaty on the European Union* (TEU), the *Treaty on the Functioning of the European Union* (TFEU), and the CFR,[105] including the limitations enshrined in these Treaties. The most important limitations stem from the EU's limited competence (see Arts 4–5 TEU), the four freedoms of the internal market (see Arts 45 et seqq. TFEU), and the fundamental rights enshrined in the CFR.

For this paper, I assume that the European legislator is, in principle, competent to legislate on the particular subject matter.[106] With regard to Arts 24 and 25 MiFID II, the European legislator is competent in terms of Art. 53(1) TFEU to legislate harmonizing rules. The Taxonomy Regulation, MAR, and Directive 2011/83/EU are based on Art. 114 TFEU. The GDPR is based on Art. 16 TFEU.

If the Commission, European Parliament, and the Council base regulations on behavioral economic findings, it is generally likely that those regulations are less intrusive and cost-efficient,[107] with an (indirect) positive effect on fundamental freedoms. Legislating a right to withdrawal for consumers, for example, is likely to facilitate cross-border purchases since they become (almost) risk-free for the consumer.[108] Furthermore, and apart from any discussion on the normative decision to incentivize sustainable investments, such incentives are likely to be more effective if they are based on a regulatory concept that builds on a realistic understanding of how individuals make decisions.

Nonetheless, it is noteworthy that every duty to inform comes with costs for the parties obliged to produce and for the parties who are envisaged to process

104 Cost-efficiency, as a concept, stems from the methodology of economic theories in law and asks which regulation (or interpretation of a rule) causes the least costs (including personnel and financial resources) in a society. On economic analysis of law, see only R. A. Posner, *Economic Analysis of Law*, 9th ed. (2014), § 1.2 *et passim*.

105 Arts 6(1)(1) and 19(1) TEU, *supra* note 18. See only P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials*, 7th ed. (2020), 582–583 [Craig & de Búrca, *EU Law*].

106 For an introduction to the EU's competences, see R. Schütze, *European Constitutional Law*, 3rd ed. (2021), 237–247.

107 Alemanno & Spina, *supra* note 70, 437.

108 Similarly, the EU limits unfair commercial practices to "which by deceiving the consumer prevent him from making an informed and thus efficient choice.", Recital 14 of the Unfair Commercial Practices Directive, *supra* note 90.

such information. The normative decision of whether or not to regulate duties to inform must therefore be closely monitored and assessed to determine whether such duties constitute an efficient means to regulate. However, this aspect falls outside the ambit of this paper and must therefore be left to another assessment. This paper therefore focuses on the fundamental rights enshrined in the CFR, with which the EU legislator must comply as per Art. 51(1)(1) CFR.

Using nudging or behaviorally informed techniques when legislating might infringe, in particular, on Arts 7, 8, 11(1), or 15 CFR. Art. 7 CFR protects private life aspects, including personal autonomy, as understood by the European Court of Human Rights by virtue of Art. 52(3) CFR.[109] Nudging especially, i.e., directly influencing the presentation of choices, is a tool that is used to incentivize individuals to decide in a certain way. The essence of nudging is therefore the utilization – arguably also the exploitation – of decision situations in which, for example, a default option leads to a higher number of, arguably, "right" choices.

A perfect example is the prohibition of a purported opt-out clause in Art. 22 of Directive 2011/83/EU for additional payment options in consumer contracts. This rule infringes on companies' right to freedom of contract (see Art. 15 CFR[110]) but protects the personal autonomy of consumers. In other fields, opt-out, or for that matter opt-in, clauses could also have the opposite effect.

Nudges and behaviorally informed rules can also infringe on Art. 11(1) CFR when those rules are designed to influence the opinion-forming process.[111] In that regard, there can be a fine line between acceptable and unacceptable use of information. Again, a regulation might come into conflict with other rights of the CFR, in this instance Art. 15 CFR, if companies are obliged to produce and transmit certain amounts of information or frame them in a specific way, for example, by using pictorial warnings such as those on tobacco packaging (see Art. 9 of Directive 2014/40/EU).[112] Companies' right to freedom of contract is thereby infringed for the public interest good of public health. Similar considerations apply when it comes to the font sizes and way of presentation required by Art. 44 Delegated Regulation 2017/565 as described above.[113]

109 T. Lock, 'Article 7 CFR', in Kellerbauer, Klamert & Tomkin, *supra* note 101, 2115, para. 5 [Lock 'Article 7 CFR'].

110 See, with further references, *Lidl GmbH & Co. KG v. Freistaat Sachsen*, C-134/15, Judgment of 30 June 2016, ECLI:EU:C:2016:498, para. 28.

111 See also Alemanno & Spina, *supra* note 70, 445–446.

112 EP and Council Directive 2014/40/EU, OJ 2014 L 127/1.

113 See at the end of section B. I. 2 above.

Lastly, Art. 7 CFR, in conjunction with Art. 8 CFR, can be understood as enshrining a right to privacy and might become relevant.[114] Particularly, if data will be used to personalize the information that is presented to an individual, the use of such data might infringe on an individual's interest in (and right to) data protection. In this regard, the use of cookies to display personalized advertising could be regarded as a field worth considering for behaviorally influenced legislation.[115] Regarding capital market law, personalized information might lead to a more direct address of the individual client, which might facilitate the processing of information.[116] At the same time, such personal information could potentially also be exploited to further the sale of investment products.

Considering the possible infringements described above, one should note that not every infringement is prohibited under the CFR. Instead, Art. 52(1) CFR allows infringements if they are provided by law, preserve the essence of the right, and are proportionate.[117] Especially if multiple rights come into conflict, as was shown, *inter alia*, by the prohibition of an opt-out clause in consumer contracts, all affected rights must be considered in a proportionality assessment and be balanced. The European legislator therefore must define the regulation's legitimate objective and assess the suitability, necessity, as well as the proportionality *strictu sensu* of the tools applied.[118]

Furthermore, it is a (common) fallacy—known as *status quo* bias[119]—to assume that only (positive) legislation, which might be influenced by behavioral economic findings, would set a default. Not regulating sets the default as it is

114 Lock, 'Article 7 CFR', *supra* note 109, paras.x 5–7; Alemanno & Spina, *supra* note 70, 447–448.

115 See the research project 'Vectors of Data Disclosure', which is funded by the Bavarian Research Institute for Digital Transformation, available at https://www.uni-passau.de/en/research/research-projects-and-special-funding/project-details/research_project/vektoren-der-datenpreisgabe (last visited 8 October 2024).

116 See only I. Koller, '§ 63 WpHG', in H.-D. Assmann, U. H. Schneider & P. O. Mülbert (eds), *Wertpapierhandelsrecht*, 7th ed. (2019), para. 66; P. Hacker, *Verhaltensökonomik und Normativität: Die Grenzen des Informationsmodells im Privatrecht und Seine Alternativen* (2017), 739.

117 T. Lock, 'Article 52 CFR', in Kellerbauer, Klamert & Tomkin, *supra* note 101, 2248 [Lock, 'Article 52 CFR'].

118 See also van Aaken, 'Constitutional Limits', *supra* note 82, 185–194; Lock, 'Article 52 CFR', *supra* note 117, paras 10–19.

119 W. Samuelson & R. Zeckhauser, 'Status Quo Bias in Decision Making', 1 *Journal of Risk and Uncertainty* (1988) 1, 7.

known to the market without considering potentially adverse effects, let alone market failures.[120]

In conclusion, the European legislator is, in principle and within its competencies, free to apply behavioral economic findings to its regulations if it conducts a diligent proportionality assessment. Thereby, its discretion must be particularly wide when social policy choices have to be made,[121] which is usually the case when applying behaviorally informed methods of legislation.

2. Limits for the Court of Justice of the European Union

Since the Court is entrusted in Art. 19(1) TEU with ensuring "that in the interpretation and application of the Treaties the law is observed", it is fair to state that a control mechanism for the European legislator's acts is established.[122] Despite the ambiguous formulation, it appears to be generally accepted that "law" in this context refers to the Treaties as well as secondary EU law, general principles of EU law, and all other acts of the EU.[123]

When the CJEU reviews secondary EU law (e.g., regarding a possible annulment), it must allow the European legislator (wide) discretion with regard to the application of behavioral economic findings, particularly when social policy questions are an issue.[124] This is a consequence of the separation of powers within the EU and corresponds to the legitimacy idea that the (more) directly elected representatives decide on policy questions. Besides, also the CJEU is bound by the Treaties and therefore comments made in the previous section need no repetition but apply *mutatis mutandis*. Following this, the subsequent section will summarize five scenarios in which the CJEU might, might not, or might even be obliged to rely on findings from the field of behavioral economics in its interpretation.

120 This is also known under the term 'no neutral defaults', see only Alemanno & Spina, *supra* note 70, 450.

121 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, C-84/94, Judgment of 12 November 1996, ECLI:EU:C:1996:431, para. 58.

122 See also the annulment procedure in Art. 263 TFEU, *supra* note 18.

123 See only Klamert & Schima, 'Article 19 TEU', *supra* note 101, 172, paras 8–9.

124 See above in and at note 121.

C. Competence of the Court of Justice of the European Union to Build on Behavioral Economic Findings

Having established the limitations for applying nudging and behaviorally informed legislation that originates from the Treaties, this section assesses under which circumstances and by which methodological means the CJEU may, may not, or ought to interpret secondary EU law in light of behavioral economic findings.[125]

Unlike the Statute of the International Court of Justice,[126] the Statute of the CJEU[127] does not contain a provision on the sources for the interpretation of EU law. The Court therefore had to establish its methodology for the interpretation of EU law, as also outlined in the landmark case of *van Gend en Loos*, and consistently continued from that point onward to focus on "the spirit, the general scheme and the wording of the Treaty"[128]. Thereby, the "real intention" of the author of a piece of legislation in all its language versions, including the "aim he seeks to achieve", must be considered.[129]

This allows to differentiate five scenarios, which are discussed in more detail in subsequent subsections (I–V), followed by an overall assessment (VI). These scenarios are:

1.) The text of an EU legislative act refers directly to behavioral economic findings or its overall concept(s).

2.) Concepts of behavioral economics underly an EU legislative act as evidenced by its preparatory documents or overall assessment.

3.) The relevant EU legislative act is meant to regulate or incentivize individuals' behavior and either the text or the expressed[130] purpose refers to "efficiency" or "efficacy".

125 This applies particularly to preliminary reference proceedings under Art. 167 TFEU, *supra* note 18.

126 Art. 38 of the ICJ-Statute, *Charter of the United Nations and Statue of the International Court of Justice*, 26 June 1945, 1 UNTS XVI.

127 Protocol (No 3) on the Statute of the Court of Justice of the European Union, OJ 2016 C 202/210.

128 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, C-26/62, Judgment of 5 February 1963, ECLI:EU:C:1963:1, p. 13.

129 See only *Erich Stauder v. City of Ulm - Sozialamt*, C-29/69, Judgment of 12 November 1969, ECLI:EU:C:1969:57, para. 3.

130 This is usually done within the recitals that precede the legal articles or becomes apparent through the legislative process and the preparatory documents. In the latter situation, caution is advised since the only purposes that become relevant for the interpretation of

4.) In neither the preparatory documents nor the legislative act's text can a reference to (behavioral) economic ideas or concepts be found, although human behavior ought to be regulated.

5.) The EU legislative act entails an explicit prohibition to build on (behavioral) economics or to interpret the act according to such findings.

I. Direct Reference to Behavioral Economic Findings

In the first scenario, the CJEU will have to apply behavioral economic findings within its interpretation because the competent legislator itself has made direct reference to them. After all, the objective of behaviorally informed regulations is to have "effective, low-cost, choice-preserving approaches to societal problems".[131]

Furthermore, also from a legitimacy-focused point of view, the CJEU would be well advised to follow the legislator in its approach. As of this writing, no such European legal act can readily be identified.

However, the following question remains: Which findings out of the plethora of findings must be applied? Moreover, an obstacle might arise when various equally fitting findings might lead to different interpretative results. Both questions will be discussed in more detail below (D).

II. Concepts of Behavioral Economics Underly an EU Legislative Act

Should the text of a European legislative act not, *expressis verbis*, refer to behavioral economics, such concepts might nonetheless underly the particular regulation. Whether that is the case must, of course, be determined by means of classic legal methodology, i.e., interpreting the legal act, with a focus on the wording, historical influences, systematic, and *telos* that underly the regulation.

Should such an interpretation establish that behavioral economic concepts must be applied, the CJEU must comply as well. Consequently, this scenario is largely comparable to the first scenario, although the reference to behavioral economics might only be indirect.

In current European law, one can understand the Taxonomy Regulation in conjunction with Regulation (EU) 2019/2088 as constituting an example of

the final legislative act are those that the legislative organs have accepted in their final readings.

131 Alemanno & Spina, *supra* note 70, 430.

this scenario. This is so, since the European legislator's objective is to incentivize investors to direct their funds toward sustainable investments by means of labeling such (desired) investments as "green". However, it is necessary to concede that even this rather recent regulation builds only very indirectly on behavioral economic ideas.

III. Regulation of Human Behavior and Reference to Efficiency or Efficacy

In the third scenario, the terms efficiency and efficacy would have to be interpreted in line with the understanding the European legislator has applied when drafting and enacting the relevant regulation. At this point, it is important to stress that efficiency usually only refers to the method that must be applied but does not outline the precise objective that shall be achieved efficiently. The CJEU would therefore have to prudently establish the concrete[132] objectives and purposes that underly the relevant regulation.

Subsequently, the Court would have to demonstrate that those objectives include or rely on findings from the field of behavioral economics. The Court would have to apply such findings only as a final step to provide an effective or efficient interpretation of the relevant legal rule. Importantly, a rule that is not effective can never be efficient because such a rule would only produce costs (e.g., workload, claims, expenses) without having the intended effect.[133]

With the MiFID II, the European legislator pursues a total of four specific objectives: providing a more harmonized set of financial regulations,[134] improving investor protection,[135] improving the functioning of financial markets,[136] and safeguarding the efficiency of the financial market.[137] Notably, all four objectives can be combined to efficiently provide a more harmonized set of financial regulations that improves investor protection and the overall

132 Those objects must be narrower than a mere reference to a *high level of harmonization* or the *realization of the internal market*, since those are too broad.

133 On that argument, see Kaldor, *supra* note 96; Hicks, *supra* note 96 and note 96 above.

134 Recital 6 to MiFID II, *supra* note 6.

135 Recitals 3, 4, 7, 37, 39, 42, 58, 70, 74, 77, 80, 86, 87, 97, 104, 133, 151, 154, 155, 156, 164, and 29, 45, 51, 52, 54, 57, 82, 84, 109, 144, 166 to MiFID II, *supra* note 6.

136 See only Recitals 4, 11, 13, 63, 67, 108, 113, 125, 154, 155, 160, and 164 to MiFID II, *supra* note 6.

137 See only Recitals 13 and 164 to MiFID II, *supra* note 6.

functioning of the financial market.[138] Thus, it is fair to suggest that the CJEU is required to rely on behavioral economic findings when interpreting Arts 24 and 25 MiFID II since those provisions affect investment firms and investors directly.[139]

IV. No Reference to (Behavioral) Economic Concepts

The most complicated scenario is the fourth, since the European legislator did not express in the text or the preparatory documents any standpoint on the applicability of behavioral economic or (simple) economic findings. Instead, it would be the CJEU itself that would avail itself of these concepts to facilitate its interpretation.

Had the application of behavioral economic findings been accepted as a general principle of EU law, the Court would have to apply them.[140] As of yet, the European legislator has not, as far as I am informed, formally integrated behavioral economic findings into its legislative process.[141] Currently, a legal basis for accepting behavioral economic findings as general principles of EU law is therefore lacking.

Nonetheless, one could make the argument that efficient and cost-effective interpretations of the law serve the legitimacy of a regulation.[142] Consequently, the CJEU would be diligent and cognizant of the individuals' fundamental rights and the concept of limited resources (in terms of financial means, workload, attentiveness, etc.) when it interprets regulations, which ought to affect human behavior, in line with behavioral economic findings. Against the background of the already discussed legitimacy question, the Court could thus prevent legal rules from disproportionately infringing on individuals' rights.

However, one could argue that the CJEU may not apply behavioral economic findings to the interpretation if there is no linking point in the text or preparatory documents.[143] This is true, particularly since applying behavioral

138 See only Kasper, 'Harmonisierungsgrad MiFID II – Teil II', *supra* note 20, 104–105 *et passim* with further references.

139 Details of such interpretation must be reserved for future publications.

140 See above at note 123.

141 See only Alemanno & Spina, *supra* note 70, 440.

142 Purnhagen, *supra* note 95, 52.

143 That the Court nonetheless rendered decisions that contradicted or went beyond an act's text, was demonstrated by S. Brittain, 'Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal', 55 *Irish Jurist* (2016), 134.

economic findings to the interpretation of legal acts is still (highly) disputed[144] and not practiced in the Member States.

Nonetheless, in this paper, it is argued that the CJEU – in the absence of an explicit prohibition in the text of the EU legislative act – is free, if not obliged, to use behavioral economic ideas. Its principal function is to interpret EU legislative acts in accordance with the Treaties and to give them effective meaning.[145] If the CJEU would not rely on behavioral economic findings, it would still, even if only implicitly, build its arguments on another concept of human behavior. That concept would most likely be the (fully) rational individual as it was described and (at least partially) refuted above.[146]

Therefore, and in line with the CJEU's concept of an autonomous interpretation of European law, it can and should build arguments on the basis of behavioral economic findings.

V. Prohibition to Build on (Behavioral) Economics

The fifth scenario considers expressed prohibitions in building on (behavioral) economics when interpreting EU secondary law. These might be prohibitions *expressis verbis* in the form that the legislator has formulated a rule on interpretative means that excludes certain means of interpretation or they might be prohibitions through interpretation. The latter will usually mean that the legislator's intention becomes clear through interpretation, in that it intended the rule to be interpreted in a certain way only. In that instance, the means of interpretation are limited to the means as outlined in the particular legal act or supported by general legal methodology.

This scenario is expected to be relatively rare since the EU legislator is bound by Art. 51 CFR to produce effective rules that only infringe on the individuals' fundamental rights to the extent necessary to achieve the intended objective. Put differently: Why should the EU legislator prohibit an effective interpretation by applying behavioral economic findings? A question not

144 See only D. Hirshleifer, 'Investor Psychology and Asset Pricing', 56 *The Journal of Finance* (2001) 4, 1533, 1535.

145 Art. 19(1)(1) TEU, *supra* note 18 and its interpretation by Klamert & Schima, 'Article 19 TEU', *supra* note 101, para. 13; Craig & de Búrca, *EU Law*, *supra* note 105, 95 and in the Court's interpretation of the *effet utile* principle, see only, among others, *Camera Care Limited v. Commission of the European Communities*, C-792/79 R, Order of 17 January 1980, ECLI:EU:C:1980:18, para. 17.

146 See section B. I. 1.

discussed in this paper that is linked to this is, under which circumstances could the European legislator deny the application of behavioral economic findings?

VI. Assessment

Having established the scenarios in which the CJEU is allowed to or must rely on behavioral economic findings, two final questions remain: What is the methodology underlying the interpretation and which findings must the Court choose?

From a legal methodology point of view, and under the assumption that the Court will continue the well-established interpretation of legal norms in accordance with their wording, history, systematic, and *telos*, behavioral economic findings best fit in the teleological interpretation.[147] This is because the purpose of a piece of legislation and its presumed effects are to be established, assessed, and transferred into an interpretation of the relevant norm.

A more challenging question pertains to which findings from the extensive field of behavioral economics must be applied. First, it must be reiterated that not every heuristic and bias will occur in every situation. The findings that will have to be favored are therefore those that demonstrate a situational connection. In that respect, the European legislator's hints in the legislative documents must be privileged. Second, not every finding has proved to be equally robust; hence, in principle, only robust findings should be considered. Third, it is for the CJEU to explain and justify why it applies a particular finding to its interpretation. As long as the legislator has not laid down any guidelines, this is within the Court's competence.

Finally, it is important to remember that no research finding is absolutely certain. Instead, uncertainty is part of a legislative and interpretative process. The Court should therefore apply findings from the field of behavioral economics even if those findings have not been proven in every circumstance. The alternative – i.e., not applying behavioral economic findings to the interpretation of the law – would mean that the Court will continue to discount how individuals actually behave. This would not only discredit the findings in the field of behavioral economics but would also pose the question of the legitimacy of the Court's decisions when it disregards the real world. Nonetheless, there are various

147 See above at note 128 and in general only N. Fennelly, 'Legal Interpretation at the European Court of Justice', 20 *Fordham International Law Journal* (1996) 3, 656, 664–668.

obstacles when applying behavioral economic findings in EU law, and those obstacles are the subject of the next section (D).

D. Obstacles to Applying Behavioral Economics in EU Law

When applying behavioral economic theories in law, one will encounter obstacles. I will address a number of these obstacles in the following subsections, without claiming that the list is exhaustive. In general, obstacles might originate from the theories, concepts, and current state of behavioral economics (I) or from the legal methodology when applying behavioral economic theories (II). However, legal methodology is not without remedies when it comes to countering these obstacles (III).

I. Obstacles Stemming from Behavioral Economics

Whenever one wishes to build legal arguments on findings from the field of behavioral economics, it becomes necessary to follow multiple steps to justify reliance on a particular theory or concept. Apart from the question of whether applying any concepts from the field of behavioral economics is justified in terms of legitimacy, the concept under consideration needs to be well-proven in economics and applicable to the legal field and to the group of people (e.g., laypeople or experts) at hand.[148]

However, every finding in the field of experimental economics, including psychology and behavioral economics, is in itself uncertain to a varying degree.[149] This is partly due to the methodology underlying experimental economics, which is based on the concept of methodological individualism,[150] and it is partly because experiments cannot be conducted with every single individual to whom the research question might be relevant, nor can experiments be conducted with a focus on every single real-world application in and for which the findings might

148 See also G. Spindler & L. Klöhn, 'Korreferat zu Markus Rehberg', in T. Eger & H.-B. Schäfer (eds), Ökonomische Analyse der *Europäischen Zivilrechtsentwicklung* (2007), 355, 358.

149 See only M. Sarstedt & E. Mooi, *A Concise Guide to Market Research: The Process, Data, and Methods Using IBM SPSS Statistics* (2019), 157.

150 J. Agassi, 'Methodological Individualism', 11 *The British Journal of Sociology* (1960) 3, 244, *passim* with references. For a more critical assessment, see R. Neck, 'Methodological Individualism: Still a Useful Methodology for the Social Sciences?', 49 *Atlantic Economic Journal* (2021) 4, 349.

become relevant.[151] Instead, researchers have to choose a setting (or scenario) and a variety of participants that are representative of the situation and affected population for which the experiment is conducted. Moreover, even within these experiments not every individual will behave in the same way or because of the same rationale. It is for this reason that findings in experimental economics usually only read that there might be, subject to an inevitable failure rate, a correlation or causality[152] between an independent variable (such as additional information provided in the form of well-structured overviews) and a dependent variable (such as the individual's understanding of a subject matter).

Furthermore, observations must be translatable to real-world applications outside the laboratory to become relevant for a legal analysis. In empirical research, this is summarized by the term external validity.[153]

As a rule of thumb, it can be summarized that for transferring the findings of an experiment to real-world applications, such as the interpretation of EU secondary law, any experimental design fits better the more representative the participants[154] and the closer the scenario chosen are to a real-world scenario. Moreover, possible limitations that are outlined in a published study should be clearly explained to allow, not only but also, legal experts to evaluate the fit of an experiment and its results for their purposes.

Another obstacle stems from the plethora of possible influences that might affect human behavior and their interactions with each other. Whereas unsystematic errors, or noise,[155] can be explained relatively well by means of

151 On population and sampling, see only Sarstedt & Mooi, *supra* note 149, 38–43; on sample sizes, see *ibid.*, 43.

152 Correlation refers to a relationship between two variables in which "it can merely be observed that the increase of one variable is accompanied by an increase or decrease of the other variable.", J. Weimann & J. Brosig-Koch, *Methods in Experimental Economics: An Introduction* (2019), 249. Causality, by contrast, means "that the value of one variable causes a change in the value of another variable.", *ibid.* Whether a correlation or causality can be proven by an experiment largely depends on its design, which must be assessed in every individual case. See *ibid.*

153 Sometimes the term economical validity is used interchangeably, which, however, focuses on the comparability between the situation in an experiment and the relevant real-world situation. See only T. Richards, *supra* note 50, 182; C. A. Studebaker *et al.*, 'Studying Pretrial Publicity Effects: New Methods for Improving Ecological Validity and Testing External Validity', 26 *Law and Human Behavior* (2002) 1, 19, 21.

154 With a focus on finding a representative sample size, which can be relatively small, without committing a systematic error or bias, see only Sarstedt & Mooi, *supra* note 149, 39, 43.

155 With a focus on the terminology, see F. Black, 'Noise', 41 *The Journal of Finance* (1986) 3, 528. From the world of popular sciences, see only D. Kahneman, O. Sibony & C. R.

experimental methodology, interactions between various biases within-person are, in many instances, yet to be examined.

A third obstacle stems from the relevance of emotions for and their effects on cognitive biases. These aspects do not form part of this paper, although it appears relevant for future research – not only but also with regard to the purported affect heuristic.[156]

II. Obstacles in Legal Methodology

From the legal methodology point of view, applying behavioral economic findings also meets several challenges. First, legal researchers need a methodology to discover and scrutinize relevant concepts, theories, and findings before they can build legal arguments upon them. This need is closely linked to an overarching need for (general) literacy regarding (behavioral) economics and the relevant methodology. Although legal researchers cannot be required to scrutinize findings from neighboring research fields to the same extent as experts in those fields, they nonetheless need a basic command of the neighboring field's methodology.

Furthermore, also legal researchers need to acknowledge that life as well as their research findings are uncertain, at least to a certain degree. Although this appears to be a truism, one ought to remember that statements are usually made against the background of current debates, are influenced by recently read articles or held discussions (availability heuristic[157]), and that statements do not stand alone but in the context in which they were made. In the next moment, the same statement might be proven false, misleading, or outdated. That is the crux of the research that is based on existing findings and develops new ideas.

The third obstacle in legal methodology, which coincides with the third aspect mentioned in the last subsection, has to do with emotions in legal methodology and their relevance for interpreting legal rules. These aspects fall

Sunstein, *Noise: A Flaw in Human Judgment* (2021).

156 G. F. Loewenstein & J. S. Lerner, 'The Role of Affect in Decision Making', in R. J. Davidson, K. R. Scherer & H. H. Goldsmith (eds), *Handbook of Affective Sciences* (2003), 619; P. Slovic *et al.*, 'The Affect Heuristic', in Gilovich, Griffin & Kahneman, *supra* note 70, 397; S. A. Bandes & J. A. Blumenthal, 'Emotion and the Law', 8 *Annual Review of Law and Social Science* (2012) 1, 161, 166–167. With a focus on the terminology debate concerning affects, emotions, and feelings, see only P. R. Kleinginna, Jr. & A. M. Kleinginna, 'A Categorized List of Emotion Definitions, With Suggestions for a Consensual Definition', 5 *Motivation and Emotion* (1981) 4, 345, *passim.*

157 A. Tversky & D. Kahneman, 'Availability: A Heuristic for Judging Frequency and Probability', 5 *Cognitive Psychology* (1973) 2, 207.

outside the ambit of this paper; they might, however, be a research area suitable for other papers.[158]

III. Countering These Obstacles in Legal Methodology

The question arises whether and how legal methodology can counter the obstacles described above.

A rather obvious aspect is further education in neighboring research fields. For those professionals who are asked on an almost daily basis to interpret legal rules meant to regulate human behavior, a basic understanding of the relevant concepts and research methodology can be necessary and relevant. Such an endeavor appears to be a long-term goal. Therefore, and in the meantime, a network of experts in behavioral economics could advise not only policymakers and legislators as described above but also judges and administrative officials.

Moreover, further interdisciplinary and multidisciplinary research should be pursued to build bridges between the neighboring disciplines and to facilitate more holistic research findings that could, at least partly, substitute the aforementioned network of experts by providing well-founded research.

Within legal methodology, findings from the field of behavioral economics should form a constant focus when interpreting legal rules that ought to regulate human behavior. In that regard, one should be reminded that also today, arguments are, at least implicitly, built upon an understanding and concept of human behavior. This concept will, however, most likely be similar to the idea of a (fully) rationally acting individual. As has been demonstrated, that concept is further from the truth than many of us would probably like to acknowledge.

By including behavioral economic findings in the teleological interpretation of EU secondary law, the legal profession can move closer to bestowing upon legal rules the power and effect the European legislator intended them to have.

Taken together, uncertainty is an element interwoven not only with behavioral economics but also with the law. Accepting this, and progressively trying to cope with uncertainty in law also through the interpretation of legal rules, will not only build the basis for more effective legal rules but will also facilitate a higher degree of legitimacy among the European population.

158 See also B. Lange, 'The Emotional Dimension in Legal Regulation', 29 *Journal of Law and Society* (2002) 1, 197; with a focus on the impact of emotions in different fields but decision theory, see H. Conway & J. Stannard (eds), *Emotional Dynamics of Law and Legal Discourse* (2016); H. Conway & J. Stannard, 'Contextualising Law and Emotions: Past Narratives and Future Directions', in H. Conway & J. Stannard (eds), *Emotional Dynamics of Law and Legal Discourse* (2016), 1.

Furthermore, the European legislator could make use of concepts like regulatory sandboxes to take initial small steps in testing new regulatory regimes. If a multidisciplinary research group was to closely monitor such steps, every iteration is likely to produce better knowledge on which future regulations should be based.

E. Concluding Observations

This paper has reiterated that individuals do not behave (completely) rationally. Their decision-making process is influenced by heuristics and biases instead. Concepts of behaviorally informed legislation, including the idea of nudging, have therefore been developed in legal theory.

That these concepts cannot be applied boundlessly in EU law might be a truism. However, we have discussed here which limitations apply and that not only the European legislator but also the Court is bound by them. Furthermore, five scenarios in which the CJEU can or ought to rely on findings from the field of behavioral economics were presented. Notably, only in sporadic cases would the CJEU be prohibited from relying on such findings. In the majority of cases in which human behavior is regulated, the Court would even be obliged to consider the field of behavioral economics.

This is true, especially against the background of (democratic) legitimacy. Giving an effective meaning to legal rules is, after all, one of the Court's key functions. However, it has also been established that behavioral economic findings should not be applied to every legal act. Furthermore, it has been demonstrated that disregarding such findings poses a legitimacy question for the Court, since its judgments are in danger of losing the linkage with the addressees of legal acts.

Finally, a non-exhaustive list of obstacles stemming both from the field of behavioral economics and law has been discussed. It appears that most of these obstacles are linked to a better understanding of the relevant neighboring academic field and its implementation in legal methodology. Moreover, legal researchers should be cognizant when implicitly relying on assumptions about human behavior. Applying findings from the field of behavioral economics has the potential to move the legal interpretation of rules closer to real-world applications. Apart from resolving normative disputes, this, in turn, has the potential to increase the acceptance of legal rules among EU citizens, too.

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Adding to the Toolbox: Court Published 'Fact Sheets' in the EU Legal Order

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Abstract

Issued by the Court of Justice of the European Union (CJEU), fact sheets act as communication tool within the EU legal landscape, serving as informative summaries of key jurisprudence on selected topics. They raise intriguing questions about institutional responsibilities and the broader implications for dissemination of information by courts. By combining traditional legal analysis with empirical insights, this study investigates the regulatory framework governing court-issued fact sheets and evaluates their classification as a form of "soft law." The article argues that while fact sheets enhance transparency and reduce information asymmetries, they must balance their informational role with the neutrality and core adjudicatory functions of the CJEU. The research highlights both the potential of these documents to support judicial efficiency and informed discourse, as well as areas where refinement could bolster their reliability and effectiveness in the evolving landscape of EU legal communication.

A. Introduction

Societies and the laws governing them are subject to constant change. New technologies, but also complex problems emerge. For example, people increasingly consume and research news through the internet rather than traditional media outlets.[1] To accommodate these changes, courts increasingly rely on new tools, such as emerging communication channels, to engage and proactively communicate with citizens. In addition to their traditional public relations (PR) activities,[2] encompassing open days, annual reports, and press releases, the German Supreme Court and Constitutional Court use X (previously Twitter) to distribute information about them. The Dutch and English Supreme Courts go even further by also publishing informative materials and blog entries.[3] All over Europe, Supreme Courts use a variety of communication tools, including summaries, commentaries, press releases as well as social media.[4] Thereby, case law summaries are considered an especially efficient method for providing content in understandable legal terms to a broader public without the intervention of mass media.[5]

The trend to use new tools for relaying information to the public is not confined to national courts but also reaches the international level. To enhance public accessibility, many institutions, ranging from nongovernmental organizations (NGOs) to international bodies and regional institutions, create informative materials to facilitate the understanding of regional law. These informative materials are not only comprised of applicable laws and policy documents but also interpretations thereof in the form of judgments by regional or national courts. At the European Union (EU)level, public relations (PR) was initially perceived as a danger to deeper integration and so the European Union's

1 W. Voß, 'Twitternde Gerichte? Öffentlichkeitsstrategien der Ziviljustiz im Informationszeitalter', 7 *Zeitschrift für die gesamte Privatrechtswissenschaft* (2021) 3, 335, 336.

2 Merriam-Webster Dictionary, 'Public Relations', available at https://www.merriam-webster.com/dictionary/public%20relations (last visited 1 October 2024).

3 W. Voß, 'Twitternde Gerichte? Öffentlichkeitsstrategien der Ziviljustiz im Informationszeitalter', 7 *Zeitschrift für die gesamte Privatrechtswissenschaft* (2021) 3, 335, 337.

4 P. Passaglia, 'Institutional Communication as a Means to Strengthen the Legitimacy of Constitutional Courts', in P. Pinto de Albuquerque & K. Wojtyczek (eds), *Judicial Power in a Globalised World* (2019), 359-375.

5 Ibid., 370.

predecessors were hesitant to engage in it.[6] While this understanding gradually changed, the EU's PR efforts were considered 'amateur-like' until well into the 2000's.[7]

While the Court of Justice of the European Union (CJEU, Court) has been no stranger to X, the Court also started to follow suit and increasingly publishes informative materials, fact sheets, on its website in recent years. The curia-website categorizes fact sheets as "documents analyzing the legislation, case-law or state of positive law on a given subject' and 'identify (…) the most relevant points of law from a selection of judgments."[8] Although fact sheets focus on the jurisprudence of the Court, they can also include reviews of summaries, compilations of decisions, and explanatory notes.[9] Overall, however, these court-issued fact sheets pose new questions for researchers and practitioners alike. In contrast to the fact sheets produced by 'outsiders', which were never part of the decision-making process of judgments, these fact sheets emanate from the deciding court. Due to this origin, the public might attach, for example, heightened reliability and enforceability to the cited information. Legal provisions to govern the informative work of any institution remain rare in EU law. Nevertheless, unclarity regarding the practical and legal effects of documents issued by institutions is not a novel issue in the EU. There are various EU documents whose effects are not clear-cut as EU institutions issue a multitude of documents whose status and effects are not explicitly regulated. Drawing inspiration from international public law, EU scholars summarized such documents 'with an uncertain legal status' under the concept of 'soft law'.[10]

6 M. R. Gramberger, *Die Öffentlichkeitsarbeit der Europäischen Kommission 1952-1996: PR zur Legitimation von Integration?* (1997), 274; M. Brüggemann, *Europäische Öffentlichkeit durch Öffentlichkeitsarbeit? Die Informationspolitik der Europäischen Kommission* (2008), 120-122.

7 T. Mast, 'Gute Öffentlichkeitsarbeit und die Europäische Union', 81 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (2021) 2, 443, 445 [Mast, 'Gute Öffentlichkeitsarbeit'].

8 CJEU, 'Fact Sheets', available at https://curia.europa.eu/jcms/jcms/p1_1043150/en/ (last visited 1 October 2022).

9 *Ibid*.

10 O. Stefan *et al*., 'EU Soft Law in the EU Legal Order: A Literature Review', SoLaR Working Paper 2019, 8; Nevertheless, not all authors agree that the concept is sufficient as umbrella term as some documents are issued by institutions with law-making competences; A. von Bogdandy, F. Arndt & J. Bast, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis', 23 *Yearbook of European Law* (2004) 1, 91, 112.

Accordingly, this paper investigates the place of fact sheets as court-issued informative documents in the EU legal order, specifically the obligations on the issuing institution and its effects. To set a basis for analysis, this paper first outlines the research design, characteristics of fact sheets, and the theoretical framework. Then, the analysis of fact sheets is two-prong: First, it is necessary to investigate what obligations EU law imposes when institutions provide information to the public and the extent to which the established principles apply to fact sheets published by the CJEU. Second, the concept of soft law as a theoretical framework can grant further insights regarding the practical and legal effects of fact sheets. Due to the lack of regulation of both, the discussion surrounding EU soft law provides a suitable theoretical framework for the evaluation of potential effects of fact sheets in the EU legal order.

B. Research Design

I. Research Approach

To evaluate fact sheets in the EU legal order, this research employs a mixed-method approach consisting of doctrinal legal research and a qualitative empirical study. As part of the doctrinal legal research, a literature review builds the foundation of this paper. Doctrinal legal research establishes the state of law, presenting law "in a way that is as neutral and consistent as possible in order to inform the reader of how it actually reads."[11] As the obligation of institutions to serve as information providers and the concept of soft law were predominantly expounded upon in academia, the review of academic literature in addition to the jurisprudence of the CJEU ensures a comprehensive analysis.[12] In addition, the qualitative empirical study supplies explanatory information on the creation and perception of fact sheets through semi-structured expert interviews with CJEU judges and staff. Interviews can reveal considerations that were not expressed in the official sources through informal responses, thereby elucidating how

11 J. M. Smits, *The Mind and Method of the Legal Academic* (2012), 13. Thereby, it constitutes a critical conceptual analysis of all relevant legislation and case law; T. Hutchinson, 'Doctrinal Research: Researching the Jury', in D. Watkins & M. Burton (eds), *Research Methods in Law*, 2nd ed. (2017), 13.

12 For the importance of CJEU judgments, see also V. Trstenjak, 'General Report: The Influence of Human Rights and Basic Rights in Private Law', in V. Trstenjak & P. Weingerl (eds), *The Influence of Human Rights and Basic Rights in Private Law* (2016), 3, 7.

fact sheets operate in context. Consequently, the data collected from interviews counteracts the possibility of gaps in the understanding of the fact sheets.

II. Fact Sheets

The origin of the idea to supply informative overviews through the Court can be traced back to the early 2000's. During this time, the Research and Documentation Directorate (RDD) started to author research notes, which an interviewee considered the precursors to fact sheets.[13] These research notes still exist and provide information on any legal issue to the judges, first of the Court of Justice but later on also of the General Court.[14] The research notes were initially only distributed to judges, their cabinets, and other relevant services within the Court. The public was excluded because of "considerable hesitations" from the Court that the references to national law in the research notes could be used as grounds to fight judgments.[15] This attitude has since shifted and research notes have been published on the Court's website since 2015.[16]

Fact sheets are another extension of the Court's mission to provide the public with informative overviews. They are exclusively published on the website of the curia website under the tab 'Case law' point 'Fact sheets' and are available to anyone with internet access.[17] The curia-website categorizes fact sheets as "documents analyzing the legislation, case-law or state of positive law on a given subject."[18] Although fact sheets focus on the jurisprudence of the Court, they can also include reviews of summaries, compilations of decisions, and explanatory

13 CJEU-FRDD-1, interview by author, 08 March 2022. About 70 lawyers from all national jurisdictions within the EU work at the RDD in three units which are each responsible for a different field of law and the respective fact sheets related thereto. Their tasks encompass the preliminary review of cases, the creation of research notes and summaries of judgments; CJEU, 'Research and Documentation Directorate', available at https://curia.europa.eu/jcms/jcms/Jo2_11968/en (last visited 1 October 2024).

14 CJEU-FRDD-1, interview by author, 08 March 2022.

15 A former staff member of the RDD mused that the roots of these concerns might have been generational. As judges during the time were not familiar with technology, they had a heightened mistrust towards it. The interviewee felt that this attitude shifted as younger generations assumed positions within the Court; CJEU-FRDD-1, interview by author, 08 March 2022.

16 CJEU, 'Judicial Network of the EU: Notes and Studies', available at https://curia.europa.eu/jcms/jcms/p1_2170124/en/ (last visited 1 October 2024).

17 CJEU, 'Fact Sheets', available at https://curia.europa.eu/jcms/jcms/p1_1043150/en/ (last visited 1 October 2024).

18 *Ibid*.

notes.[19] Overall, however, the fact sheets "identify (…) the most relevant points of law from a selection of judgments."[20] Nevertheless, fact sheets address a wide range of legislative instruments of the Union, including directives, the Charter, regulations, framework decisions, council directives, the Statute of the CJEU, and the Treaties. The fact sheets summarize the Court's jurisprudence on different legislative instruments regarding seven topics, including community design, value-added tax (VAT), personal data, electronic commerce, environmental information, the urgent preliminary ruling procedure, and the application of the Charter.[21] The fact sheets carry little importance compared to the RDD's other tasks. This insignificance is evident by the lack of an express mention of the fact sheets on the website describing the RDD. Furthermore, other tasks of the RDD, such as the summaries, are more time-sensitive than the fact sheets, which makes the fact sheets a lesser point of interest for RDD staff.[22]

To further contextualize the fact sheets and build a basis for analysis, this section outlines their choice of topics before turning to the creation process and use in practice. Where data was not publicly available, the information in this section was drawn from interviews conducted by the author with staff of the Court.

The original reasons for the choice of topics are unknown. Regarding the new fact sheet on the fiscal advantages related to state aid, one interviewee noted that, "it's not an important area, but it's a very interesting question."[23] Another interviewee was surprised by the choice of 'public access to environmental information' as there were topics in environmental law that garner more attention in the sense of preliminary references.[24]

19 *Ibid*.
20 *Ibid.*
21 The full titles of the fact sheets are: 'Community Design' (2023), 'The Deduction of Value Added Tax' (2019), 'The Protection of Personal Data' (2021), 'Electronic Commerce and Contractual Obligations' (2020), 'The Field of Application of the Charter of Fundamental Rights of the European Union' (2021), 'Public Access to Environmental Information' (2017), and 'The Urgent Preliminary Ruling Procedure and Expedited Procedure'(2019). As some of these fact sheets have since been updated and are no longer available on the website, the author retrieved them through a request to the Court's archives on 21 January 2022 (documents request No. 0001/2022D). In addition, the RDD is currently working on a fact sheet on the fiscal advantages related to state aid; CJEU-RDDSM-1, interview by author, 24 February 2022.
22 CJEU-RDDSM-1, interview by author, 24 February 2022.
23 *Ibid*.
24 CJEU-AGSM-1, interview by author, 28 January 2022.

This choice of topics is likely connected with the envisaged purpose of the fact sheets. Overall, the aim of the fact sheets is to provide information to national courts and the general public.[25] The fact sheets focus on topics that the EU citizen and companies engage with on a daily basis (electronic commerce, protection of personal data, and deduction of VAT). The fact sheet on public access to environmental information or community design are of further practical use to companies and NGOs in the preparation for judicial disputes. On the one hand, the provision of this information forms part of the larger mission of the Court to be of service to the outside world.[26] The fact sheets therefore facilitate the accessibility of EU law, e.g. in countries where information might otherwise be scarce.[27] As a result, the fact sheets spread awareness on the jurisprudence of the Court.[28] Moreover, the fact sheets provide information which is particularly useful for national courts. The fact sheets on the urgent preliminary ruling procedure and on the scope of application of the Charter, on the other hand, seem to be particularly useful to national courts who have to decide on the application of the Charter or the referral of a question in specific court proceedings. Better informed national courts, in turn, can reduce preliminary references and reduce the CJEU's caseload. Consequently, the efficiency of the Court increases.[29] Fact sheets can further supply background information and updates for judges of the CJEU and the General Court.[30] Hence, the purpose and topic selection of fact sheets allow the conclusion that the main characteristics of facts are their informative value.

The creation process of the fact sheets is more nuanced than the one of the original research notes. At the beginning of the process, a unit recognizes a potential topic for a new fact sheet.[31] Then, a staff member of that unit gathers all the relevant case law on a systematic basis.[32] The author then typically selects a list of the most important cases from the collected case law. While the RDD

25 CJEU-RDDSM-1, interview by author, 24 February 2022; CJEU-AGSM-1, interview by author, 28 January 2022; CJEU-CJEUJ-1, interview by author, 25 February 2022.
26 CJEU-CJEUJ-1, interview by author, 25 February 2022.
27 *Ibid*.
28 CJEU-RDDSM-1, interview by author, 24 February 2022.
29 It is not clear whether this effect is actually achieved in practice; CJEU-AGSM-1, interview by author, 28 January 2022.
30 CJEU-GCJ-1, interview by author, 08 March 2022.
31 CJEU-RDDSM-1, interview by author, 24 February 2022.
32 The relevance of a case depends mostly on its content, although the type of court resp. tribunal, the existence of an appeal, jurisdiction, and formation of the judgment can constitute indicators for its relevance.

does not prescribe the use of specific criteria, RDD staff are considered experts regarding the case law. The cases are further sorted and classified in a more precise manner with the use of their respective résumés. Thus, the RDD does not consider its actions as interpretative. Rather, the author of a fact sheet states the content of the résumés.[33] Staff of other departments occasionally contributes to the fact sheets.[34] During this process, the fact sheets are approved twice by the office of the president: first, the list of cases and then the final draft. That way, the office ensures that the fact sheet does not distort the case law and that it expresses the intention of the judges.[35] As the interviewee from the RDD succinctly pointed out, the RDD is "just a service, we are not the mouth of the law", and thus approval by the President is required.[36] Finally, the fact sheets are distributed to the judges, other units of the CJEU, and the public through the website. After the initial distribution, judges also continue to receive updates to the fact sheets.[37]

While their reasons vary, none of the interviewed Court staff encountered or used the fact sheet in their day-to-day work. Judges might read the fact sheets as supplements; however, they do not use them in concrete cases due to the availability of other research tools and arguments by the parties.[38] Regarding the RDD, the interviewee added that there was simply no time to consult fact sheets as tasks are often time-sensitive in their day-to-day work.[39]

It is not possible to establish whether fact sheets achieve their informative purpose regarding national courts and the public. While it was indicated by participants of the Max Planck Institute (MPI) Conference on 15 July 2022 that national courts and lawyers regularly refer to the fact sheets in their day-to-day work, such references seem to not be included in the final versions of documents and submissions. To verify this use on national level, it would be necessary to conduct a large-scale survey among the courts as well as the citizens of the EU Member States, which is beyond the scope of this paper.

33 CJEU-RDDSM-1, interview by author, 24 February 2022.
34 A staff member of an AG, for example, was asked to review the fact sheet on public access to environmental access; CJEU-AGSM-1, interview by author, 28 January 2022.
35 CJEU-RDDSM-1, interview by author, 24 February 2022.
36 *Ibid*.
37 One interviewee assumes, however, that the update frequency for judges might be higher as the editing process for the public is more thorough; CJEU-GCJ-1, interview by author, 08 March 2022.
38 *Ibid*.; CJEU-CJEUJ-1, interview by author, 25 February 2022.
39 CJEU-RDDSM-1, interview by author, 24 February 2022.

III. Soft Law as Theoretical Framework

While the Treaties and jurisprudence outline the effects of primary, secondary, and tertiary legal instruments as well as international treaties,[40] informative documents, such as fact sheets, remain unregulated. Unclarity regarding the practical and legal effects of documents issued by institutions is not a novel issue in the EU. A lack of regulation, however, does not necessarily equate to a lack of effects. EU scholars refer to such documents 'with an uncertain legal status' as 'soft law'.[41]

The use of soft law at EU courts generates varied degrees of criticism. First, the recognition of soft law at the Court potentially legitimizes an expansion of competences through EU institutions to the detriment of Member States.[42] Soft law effectuates, for example, a "creeping supranationalization of both *de facto* and *de jure* competence" in the areas of competition law, education, and access to information.[43] In turn, Scott criticizes the absent consideration of soft law regarding environmental matters. As a result, these instruments are not under any judicial scrutiny.[44] Secondly, the use of soft law for judicial proceedings threatens legal certainty.[45] Despite the desirable characteristics of soft law regarding its flexibility and its potential for standard-setting, soft law measures "play havoc with juristic concepts" and "create conceptual uncertainty" through their use in adjudication.[46] Third, the recasting of soft law into 'accepted sources of law' through international tribunals makes it indistinguishable from hard law.[47] This

40 Art. 288 TFEU; Art. 216(2) TFEU, Art. 290 TFEU & Art. 291 TFEU.

41 O. Stefan *et al*., *supra* note 10, 8; nevertheless, not all authors agree that the concept is sufficient as umbrella term as some documents are issued by institutions with law-making competences; A. von Bogdandy, F. Arndt & J. Bast, *supra* note 10, 112.

42 L. Senden, *Soft Law in European Community Law* (2004), 393-397.

43 D. Lehmkuhl, 'On Government, Governance and Judicial Review: The Case of European Competition Policy', 28 *Journal of Public Policy* (2008) 1, 139, 157; K. Lenaerts, 'Education in European Community Law After "Maastricht"', 31 *Common Market Law Review* (1994) 1, 7, 9-10; I. Österdahl, 'The CoJ and Soft Law: Who's Afraid of the EU Fundamental Rights Charter?', in U. Mörth (ed.), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (2004), 53.

44 J. Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law', 48 *Common Market Law Review* (2011) 2, 329, 342-343.

45 C. Chinkin, 'The Challenges of Soft Law: Development and Change in International Law', *38 International and Comparative Law Quarterly* (1989) 4, 850, 862-865.

46 *Ibid*., 865.

47 J. Klabbers, 'Informal Instruments Before the European Court of Justice', 31 *Common Market Law Review* (1994) 5, 997; J. Klabbers 'The Redundancy of Soft Law', 65 *Nordic Journal of International Law* (1996) 2, 167, 174, 176-177.

transformation can also occur through repeated references to soft law by the CJEU, or Advocate Generals, or by an incorporation of institutional outputs through interactions between the Commission and the CJEU.[48] Furthermore, soft law can harden through the Court's application of the principles of legitimate expectations and of legal certainty.[49] Some scholars, however, see the danger of hardening only in the inclusion in the *ratio decidendi* or in an invocation through Art. 263 TFEU.[50]

Despite the concerns of scholars, the existence and use of soft law in the EU remains a fact recognized by the CJEU and should be acknowledged accordingly. To examine the fact sheets' potential to have legal and practical effects, this study draws on the research surrounding soft law as a foundation for this evaluation. As soft law is a theoretical concept, it is necessary to bear its limits in mind considering theoretical findings could deviate from practice. Therefore, further research is necessary to encapsulate the actual use of fact sheets in practice, i.a. through surveys.

The literature on EU soft law overflows with definitions of the concept. Most definitions focus on defining soft law *in negativo* to hard law, according to which the latter is adopted according to a EU legislative procedure and is legally binding.[51] Though comprehensive, this common denominator is unduly broad and captures any non-legislative document published under the auspices of the EU. Other definitions focus on soft law as rules of conduct or the nature of the obligation and enforcement to categorize a document as soft law.[52]

48 Österdahl, *supra* note 43, 51; F. Snyder, 'Soft Law and Institutional Practice in the European Community', in S. Martin (ed.), *The Construction of Europe: Essays in Honour of Emile Noël* (1994), 197, 204 [Snyder, 'Soft Law and Institutional Practice'].

49 H. C. F. Hofmann, 'Negotiated and Non-Negotiated Administrative Rule-Making: The Example of EC Competition Policy', 43 *Common Market Law Review* (2006) 1, 153, 162-163.

50 K. C. Wellens & G. M. Borchardt, 'Soft Law in European Community Law', 14 *European Law Reporter* (1989) 5, 267, 280-281.

51 F. Terpan, 'Soft Law in the European Union – the Changing Nature of EU Law', 21 *European Law Journal* (2015) 1, 68, 77; Senden, *supra* note 42, 112-113; B. Eberlein & D. Kerwer, 'New Governance in the European Union: A Theoretical Perspective', 42 *Journal of Common Market Studies* (2004) 1, 121, 123; K. W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 3, 421, 422; D. Thürer, 'The Role of Soft Law in the Actual Process of European Integration', in O. Jacot-Guillarmod & P. Pescatore (eds), *L'Avenir du Libre-Échange en Europe: Vers un Espace Économique Européen?* (1990), 132.

52 F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 56 *Modern Law Review* (1993) 1, 19; Terpan, *supra* note 51, 73.

For the purposes of this research, Senden's definition of soft law is most suitable. She condenses the views of most scholars into a succinct definition by including the focus on rules of conduct, the lack of attribution of legal force, and the production of legal and practical effects.[53] Moreover, she adds more elements to suitably elevate measures into the realm of soft law: the Commission and Council must lay down the measure in instruments and aim to produce practical effects.[54] As such, the focus is on the intention of the issuing institution to produce practical effects.[55] Nevertheless, this intention should not be over-emphasized as a measure may also create expectations irrespective of the intentions of the author. In addition to these criteria, the origin of the measure from an EU institution safeguards the division of competencies. This definition is also reflected in the jurisprudence of the CJEU, who found that the production of legal effects by EU acts depends on the content of the act, its context, and the powers of the adopting institution.[56]

Fact sheets fulfill this definition. Rules of conduct require addressees to adopt a certain behavior or measure and excludes mere political or informative statements.[57] Although fact sheets summarize the jurisprudence of the CJEU on a certain topic, they go beyond the provision of information by indicating how the Court exercises its powers. Therefore, fact sheets provide an overview of how EU laws are interpreted and fall in the category of interpretative and decisional soft law.[58] Moreover, fact sheets originate from the Court, which is the EU institution tasked with the interpretation and application of EU law.[59] Thus, the dissemination thereof is naturally within the competencies of the Court.[60] Although the fact sheets are not attributed any legal force, the intentions to reduce preliminary references and provide information aim at producing

53 Senden, *supra* note 42, 112-113.
54 Senden, *supra* note 42, 112-113.
55 *Ibid*., 113; legal effects, however, can occur independently from the intention of the issuing institution, e.g. through the application of general principles; Stefan *et al*., *supra* note 10, 10.
56 *Belgium v. Commission*, C-16/16 P, Judgment of 20 February 2018, ECLI:EU:C:2018:79, para. 32; *Asociația "Forumul Judecătorilor din România"*, C-83/19, Judgment of 18 May 2021, ECLI:EU:C:2021:393, para. 173.
57 Although Senden adds that the "dividing line might not always be clear", Senden, *supra* note 42, 112.
58 *Ibid*., 120.
59 Art. 19(1) TEU.
60 See also section C.I.1. The Obligations of the CJEU as Information Provider.

practical effects.[61] By fulfilling this definition, the fact sheets can be categorized as a form of soft law for the sake of this paper.

C. Fact Sheets in the EU Legal Order

To place fact sheets within the EU legal order, it is necessary to analyze two aspects. On the one hand, it is necessary to evaluate which obligations EU law places on the CJEU when it acts as an information provider. On the other hand, as there are no specific provisions regulation informative documents such, there are no clear effects attached to fact sheets. To explore the potential effects of fact sheets, this section relies on the concept of soft law as a theoretical framework.

I. The Obligations of the CJEU as Information Provider

Fact sheets inform the public on the jurisprudence of the CJEU regarding specific topics. Yet this informative work, or PR in general, remains a neglected topic in EU law. Neither the Treaties nor secondary law contain specific provisions on how EU institutions must conduct their PR-related activities. Thus, it is unsurprising that no provision in EU primary or secondary legislation attaches explicit effects to fact sheets. Moreover, neither the Statute of the CJEU nor the Rules of Procedure of either court contain articles to govern this informative work.[62] Only art. 2 Statute of the Court of Justice requires judges in general to perform their duties impartially and preserve the secrecy of their deliberations.

Nevertheless, there are several general articles that define a framework to regulate the performance of duties by EU institutions. These articles serve as a guideline to establish the obligations of the CJEU when it provides information to the public. To that end, it is necessary to establish the content of the relevant principle and the requirements it imposes on informative work. The results from the first section are then synthesized and applied to fact sheets.

61 CJEU-CJEUJ-1, interview by author, 25 February 2022; CJEU-AGSM-1, interview by author, 28 January 2022; CJEU-RDDSM-1, interview by author, 24 February 2022; CJEU-GCJ-1, interview by author, 08 March 2022.

62 Rules of Procedure of the Court of Justice OJ 2012 L 265/1; Rules of Procedure of the General Court OJ 2015 L 105/1.

1. Obligations under EU law

Before the Lisbon Treaty, EU primary law did not cover the PR activities of EU institutions. As a result, PR was either understood as an implied power and, thus, an annex to competencies of the EU,[63] or as necessity within the meaning of art. 352(1) TFEU.[64] Despite the continuous lack of explicit provisions relating to PR, several articles require the institutions to conduct their work in an open and transparent manner: art. 1(2) TEU (decisions should be taken as openly as possible), art. 10 (3) TEU (open decision-making), art. 15 (1) (open work environment), (3) (right to access files) TFEU, art. 298 TFEU (EU institutions should have the support of an open, efficient, and independent European administration), art. 41(2)(b) CFR (right to access of one's file), and art. 42 CFR (right of access to documents).[65] Although most commentaries on these articles stress their relevance regarding the EU administration,[66] Gellermann rightly points out that the wordings are usually sufficiently broad to cover any acts by EU institutions rather than just administrative ones.[67]

The most relevant articles are art. 15 TFEU and art. 11 TFEU. Art. 15 TFEU mandates the EU institutions to "conduct their work as openly as possible".[68] While this article is mostly understood as an expression of the principle of transparency, its overall aim is to promote the participation of citizens. Fact sheets stimulate this participation by reducing information asymmetries and ensuring EU citizens understand EU law and its application by the CJEU. The most explicit reference, however, is by art. 11(2) TEU, which requires EU institutions to engage in "open, transparent, and regular dialogue" with the public. Art. 11(2) TEU supplements the other articles with the proactive element

63 S. Kadelbach, 'Art. 5 EUV', in H. von der Groeben, J. Schwarze & A. Hatje (eds), *Europäisches Unionsrecht*, 7th ed. (2015), para 11.

64 The necessary objective to attain could, for example, be democracy, Art. 2 TEU; Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 460; Brüggemann, *supra* note 6, 129.

65 For the principle of openness as *Leitmotiv* in EU law, see also: T. von Danwitz, 'Öffentlichkeit, Transparenz und Vermittlung von Rationalität in der Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaften', in I. Pernice & L. S. Otto (eds), *Europa Vermitteln im Diskurs* (2011), 29, 31.

66 M. Klamert, 'Art. 15 TFEU', in M. Kellerbauer, M. Klamert & J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2019), para. 2; B. W. Wegener, 'Art. 15', in C. Callies & M. Ruffert (eds), *EUV, AEUV*, 6th ed. (2022), para. 2.

67 M. Gellermann, 'Art. 15', in R. Streinz (eds), *EUV/AEUV,* 3rd ed. (2018), para. 2.

68 Art. 15 TFEU.

of starting a dialogue rather than just passively allowing access to documents.[69] As the article does not give further instruction, EU institutions freely decide when they engage in this dialogue.[70] There is, however, no discretion regarding the question of 'whether' to engage in PR, considering Art. 11(2) TEU requires a 'regular dialogue' and this implies a consistent supply of information in whatever form.

The principles of transparency and openness also carry important procedural implications. On the one hand, the principles heighten the public insight into the decision-making and opinion-forming process of EU institutions.[71] Overall, the aim is to increase the involvement of the public and to foster the legitimacy of EU decisions.[72] On the other hand, the principles allow the responsibility of the EU administration and institutions towards citizens when PR activities attribute political standpoints and actions to specific persons resp. institutions. Furthermore, the ability to trace decisions heightens the clarity of decision-making by defining the standpoints of each institution.[73]

Furthermore, EU law generally regulates the way in which institutions discharge their obligations. The requirements are of procedural as well as substantive nature. In terms of procedure, the EU's lack of a *Kompetenz-Kompetenz* is a basic tenet of EU law.[74] Consequently, any EU action requires a legal basis conferring the institutions the power to act.[75] A legal basis further has a substantive and formal dimension by defining the content and form of measures.[76] While some scholars dispute the applicability of the principle of conferral to documents not listed in art. 288 TFEU,[77] art. 13(2) TEU clearly

69 Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 461.

70 *Ibid*., 472.

71 M. Nettesheim, 'Art. 10 EUV', in E. Grabitz, M. Hilf & M. Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV*, 75th ed. (2022), para. 93.

72 *Kuijer v. Commission*, T-211/00, Judgment of 7 February 2002, EU:T:2002:30, para. 52; *Schecke GbR and Eifert v. Land Hessen*, joined cases C-92/09 and C-93/09, Judgment of 9 November 2010, EU:C:2010:662, para. 68.

73 T. Mast, *Staatsinformationsqualität* (2020), 336 [Mast, *Staatsinformationsqualität*].

74 *Kompetenz-Kompetenz* refers to the concept that a sovereign state is able to assume competences on its own initiative; M. Große Hüttmann, 'Kompetenz-Kompetenz', available at https://www.bpb.de/kurz-knapp/lexika/das-europalexikon/177087/kompetenz-kompetenz/ (last visited 1 October 2024).

75 Art. 5(1) in connection with Art. 5(2) TEU.

76 J. Bast, 'Art. 5 EUV', in E. Grabitz, M. Hilf & M. Nettesheim (eds), *supra* note 71, para. 17.

77 It is already disputed as to whether the non-legislative documents listed in Art. 288 TFEU fall under the principle of conferral; Mast, 'Gute Öffentlichkeitsarbeit', *supra*

stipulates that every institution "shall act within the powers conferred to it". Such an extension is logical considering even informative documents may have steering functions.[78] Moreover, the function of PR to further legitimacy and democracy can only be fulfilled when institutions stay within their transferred competences and confine themselves to informing the public by making their work visible.[79] Thus, the principle of conferral limits the issuance of informative documents to conferred subject-matters.

Another formal requirement is the clear attribution of documents to an EU institution to ensure their accountability. Although it is not necessary to be able to trace decisions to individuals on a committee, the public should be informed of the end results and decisions.[80] When a statement or explanation is not published in the Official Journal, the document should still be recognizable as a Union act through the inclusion of the official EU logo in the header of chosen media format. In addition, the document should mention the authoring institution or department within that institution to allow for further inquiries or questions by the public.

Substantive requirements relate to the desirable level of quality of informative documents requiring them to be transparent, correct, clear, and comprehensive.[81] Depending on the institution, context, and situation, however, the quality of PR may differ.[82] Thus, it should not be held to an unrealistically high standard.[83]

First, drawing upon the concept of human dignity, Mast defines transparency as incorporating the possibility for self-criticism and reflection. As dialogue occurs between individuals on eye-level, transparency secures one's ability to form an informed opinion, which constitutes an expression of the

note 7, 462.

78 Kadelbach, *supra* note 63, para. 12; M. Nettesheim, 'Art. 288 AEUV', in E. Grabitz, M. Hilf & M. Nettesheim (eds), *supra* note 71, para. 200, 206.

79 Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 463.

80 *Ibid*., 472.

81 See overview by Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 443.

82 W. Hoffmann-Riem & W. Schulz, 'Politische Kommunikation – Rechtswissenschaftliche Perspektiven', in: O. Jarren, U. Sarcinelli & U. Saxer (eds), *Politische Kommunikation in der Demokratischen Gesellschaft* (1998), 154, 161.

83 C. Hillgruber, 'Verfassungsrecht Zwischen Normativem Anspruch und Politischer Wirklichkeit', 67 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2008), 7, 10-13.

individual's human dignity.[84] Similarly, transparency excludes any attempts at manipulating information or the way it is presented *a priori*.[85]

Second, the presented information should be correct. While requiring a standard of objective truth in informative documents is unrealistic and too high a threshold, institutions should not knowingly spread incorrect information and ensure the subjective correctness based on the information that is available to them at the time.[86] Misinformation should be corrected as soon as it comes to light and through the same media channels to reach its initial audience.

Third, the information needs to be presented in a clear manner. Due to its plethora of official languages and differences in translation, clarity is often a problem in the EU. While this problem will always persist to a certain extent, EU institutions can ensure the involvement of the public by using accessible language and formulations suited for the level of expertise of the intended audience. Drawing on the principle of public accessibility, Haag understands the use of accessible language as an obligation of EU institutions.[87] A necessity for this close involvement can also be drawn from art. 1 and 10 TEU which stipulate the right of the public to participate in Union matters.[88]

Fourthly, the requirement of comprehensiveness cautions against over-simplification. Although EU matters often involve complex legal and practical situations, oversimplifying them carries the danger of distorting the information.[89] Thus, while it is tempting to repackage information to appeal to a broader audience, EU institutions need to strike a careful balance so that simplification does not devolve into distortion of information.

2. Application to Fact Sheets

This section investigates to what extent fact sheets adhere to the established principles. While the institutional design of the CJEU features a press unit, it is not involved in the creation of fact sheets, which is the responsibility of the RDD.[90] Considering the content of the fact sheets is the simplification of legal

84 Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 465.
85 *Ibid*., 463.
86 *Ibid*., 466.
87 M. Haag, 'Art. 10 EUV', in H. von der Groeben, J. Schwarze & A. Hatje (eds), *EUV/AEUV*, 7th ed. (2015), para. 18.
88 *Ibid*., para. 17.
89 Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 468.
90 CJEU, 'Press and Media: Services for the Media', available at https://curia.europa.eu/jcms/jcms/Jo2_7053/en/ (last visited 1 October 2024).

information, it is prudent to relay the responsibility to the RDD as legal experts. Nonetheless, expert-based approaches carry dangers, including an over-reliance on the Court for information.

In terms of formal limits, the Court must ensure the principle of conferral, its core duties, and the clear attribution of authors. Although there is no explicit basis for informative work, a connection to a conferred task or subject matter suffices to satisfy the principle of conferral. Thus, the informative work of the CJEU needs to be grounded in the tasks conferred to it by the Treaties. Art. 19(1) TEU appoints the CJEU as the institution responsible for the 'interpretation and application of the Treaties.' The dissemination of information related to these interpretations can be considered an area of responsibility for the Court. As the topics of the fact sheets designate the important cases on a topic and the Court's interpretation thereof, it falls within the mandate of the CJEU. Furthermore, the Court as an institution must ensure that its informative work does not impact on its core duties. For the CJEU, its core obligation is to adjudicate disputes concerning EU law. Its ability to adjudicate disputes would be compromised were the Court to not be perceived as an impartial institution or if it infringes on the secrecy of its deliberations.[91] This neutrality could be compromised if the Court, for example, comments on its cases or includes references to commentary by third parties. Hence, as long as the fact sheets continue to only include summaries of the cases, the CJEU stays within its limits.

Lastly, informative work should be clearly attributed to an author. While it would be sufficient to refer to the issuing institution, the fact sheets go beyond this requirement. They not only feature the logo of the CJEU in their header but also the RDD as the responsible sub-unit within the Court.

With regard to substantive limits, several elements ensure an acceptable level of quality. Transparency entails an openness to self-criticism and not manipulating information through dramatization or distortion. The fact sheets avoid manipulation by providing the original sources through the ECLI-identifiers of the summarized cases. Nevertheless, greater transparency would be achieved through the inclusion of a fact sheet's current edition number and an archive containing older versions. In a further step to spread awareness, updates should be included in newsletters or press releases.

Correctness requires courts to not knowingly spread incorrect information and to ensure subjective correctness based on the available information. At the very least, courts need to produce claims with procedural diligence. The procedure to create fact sheets contains several instances to ensure their correctness. First, the

91 Art. 2 Statute of the CJEU.

creation process is overseen by the office of the president. The summaries used by the RDD were, furthermore, approved by the respective judge rapporteurs. Second, readers can access the sourced cases. If the fact sheets contain incorrect information, it would be prudent to correct this information immediately using the same communication channels as for the initial dissemination.

Clarity and comprehensiveness are two closely connected requirements. They necessitate balancing the use of accessible language and formulations with not distorting complex issues through oversimplification. Although the fact sheet's use of legal and formal language reduces clarity, this level of language is necessary to avoid oversimplifications of complex legal issues. As summaries, fact sheets still heighten the intelligibility by providing concise information and inviting the public to read further on the issues. In practice, the clarity and comprehensiveness are enhanced by presenting the important parts of a judgment. Accordingly, the Court identifies important judgments for a subject matter and the decisive parts therein. Dividing the cases into categories and sub-headings also facilitates the public's understanding.

In conclusion, the CJEU largely adheres to the obligations regarding informative publications under EU law. First, the CJEU stays within the tasks conferred to it by the Treaties as fact sheets are a dissemination of information related to the interpretation and application of the Treaties. As long as fact sheets continue to rely on summaries of judgments, there is also no impact on the CJEU's core duties. Lastly, the fact sheets are clearly attributed to the CJEU and especially the RDD as the author. In terms of adhering to substantive obligations, the fact sheets provide overall correct, clear, and comprehensive information. With regard to transparency, it lacks a clear archive of previous versions and includes edition numbers only in the fact sheets themselves.

II. Effects of Fact Sheets

EU law does not explicitly attach effects to informative documents, such as fact sheets. Thus, to evaluate the legal and practical effects of fact sheets, this research uses the lens of soft law.[92] Using soft law as a theoretical framework, this subsection extrapolates the practical and legal effects soft law has been attributed and evaluates to what degree these arguments can be extended to fact sheets.

92 See B. III. Soft Law as Theoretical Framework.

1. Practical Effects

In terms of practical effects, soft law can effect changes in the discourse surrounding subject matters as well as in the behavior of stakeholders. A change in the discourse refers to the understanding of concepts and the perception of issues. Thereby, soft law contributes to the knowledge of stakeholders and 'meaning making'.[93] Through systems of peer pressure resp. praise, benchmarking and peer reviewing, stakeholders find a common 'good' policy.[94] Such processes define values, which in turn can shift policy and public discourse.[95] In a study on the open method of coordination, Jacobsson confirms the "strong sociological character" of these mechanisms and their ability to effect (subtle) policy changes.[96] She deems the creation of a common discourse and symbols through repeated meetings, the mobilization of actors, and the iterative process even more important than the soft law measure itself.[97]

In addition to the discourse, soft law measures can also influence the behavior of actors regarding their policies and actions. During the creation of new (hard) laws, soft law documents inform stakeholders, such as lobby groups, about the development and ensure their involvement.[98] Through the circumvention of majority thresholds in legislative procedures, soft law measures heighten the influence of minority groups to effectuate change in their favor.[99] Connecting to the sociological character of soft law, the socialization during its creation

93 Stefan *et al*., *supra* note 10, 22; I. P. Ionescu & M. Eliantonio, 'Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective', 17 *Journal of Contemporary European Research* (2021) 1, 43, 48.

94 M. Tsakatika, 'A Parliamentary Dimension for EU Soft Governance', 29 *Journal of European Integration* (2007) 5, 549, 551; S. Kröger, 'The End of Democracy as We Know It? The Legitimacy Deficits of Bureaucratic Social Policy Governance', 29 *Journal of European Integration* (2007) 5, 565, 566; E. Radulova, 'The OMC: An Opaque Method of Consideration of Deliberative Governance in Action?', 29 *Journal of European Integration* (2007) 3, 363, 365.

95 J. Jacobsson, 'Between Deliberation and Discipline: Soft Governance in the EU Employment Policy', in U. Mörth (ed.), *Soft Law and Governance and Regulation: An Interdisciplinary Analysis* (2004), 82, 89 [Jacobsson, 'Between Deliberation and Discipline']; S. Borrás & T. Conzelmann, 'Democracy, Legitimacy and Soft Modes of Governance in the EU: The Empirical Turn', 29 *Journal of European Integration* (2007) 5, 531, 535.

96 Jacobsson, 'Between Deliberation and Discipline', *supra* note 95, 82, 89.

97 *Ibid*., 90-98.

98 F. Beveridge & S. Nott, 'A Hard Look at Soft Law', in P. Craig & C. Harlow (eds), *Lawmaking in the European Union* (1998), 293.

99 *Ibid*., 295-296.

processes exert a positive influence on stakeholders and institute consultation procedures as common practice.[100] States might translate this external input into their legal orders through these consultations.[101] The internalization of norms through discourse or peer pressure can even culminate in 'normative effects' which result in specific behavioral changes.[102] Hence, soft law measures not only influence policy but also transform the behavior of stakeholders such as the EU Member States and the EU institutions themselves.[103] While soft law has been said to become gradually "politically, socially and morally binding for actors involved",[104] its effectiveness remains questionable.[105] Nevertheless, the creation of networks to manage implementation through soft law reduces judicial action due to a lowered need for doctrinal clarification.[106] Furthermore, the provision of information and administrative resources through soft law increases the effectiveness of eventual infringement procedures.[107]

2. Legal Effects

While the treaties do not attribute express effects to fact sheets, soft law affects legal relationships and thereby has legal effects. Snyder accumulated a comprehensive list of these effects.[108] With regard to the realm of cooperation between states, soft law can provide a framework for future negotiations, bind the parties to an international agreement, and concretize the requirements of

100 R. Dehousse & J. H. H. Weiler, 'EPC and the Single Act: From Soft Law to Hard Law?', in M. Holland (eds), *The Future of European Political Cooperation* (1991), 121, 132.

101 Stefan *et al.*, *supra* note 10, 22; Ionescu & Eliantonio, *supra* note 93, 48.

102 D. Ashiagbor, 'Soft Harmonisation: The Open Method of Coordination in the European Employment Strategy', 10 *European Public Law* (2004) 2, 305, 314-315.

103 Stefan *et al.*, *supra* note 10, 22, 24.

104 K. Jacobsson, 'Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy', 14 *Journal of European Social Policy* (2004) 4, 355, 359.

105 A. Bouveresse, 'La Portée Normative de la Soft Law', *Revue de l'Union européenne* (2015) 588, 291, 298; F. Berrod, 'L'Utilisation de la Soft Law Comme Méthode de Conception du Droit Européen de la Concurrence', *Revue de l'Union Européenne* (2015) 588, 283, 287-288; Stefan *et al.*, *supra* note 10, 24.

106 E. Korkea-aho, 'Watering Down the Court of Justice? The Dynamics Between Network Implementation and Article 258 TFEU Litigation', 20 *European Law Journal* (2014) 5, 649, 666.

107 *Ibid*.

108 F. Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations', in G. Winter (eds), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (1996), 463 [Snyder, 'Interinstitutional Agreements'].

the duty of international cooperation. Soft law measures can further shape the legal relationships between actors. On the one hand, soft law measures generate expectations regarding the behavior of the institution. On the other hand, it influences the rights and expectations of third parties and imposes a standstill effect on non-conforming conduct. In its informative function, the provided information and transparency can ameliorate the relations between actors.[109] For example, the communications of the Commission form a source of doctrine and clarify the rights and obligations of national administrations as well as individuals.[110] The SoLaR report found that soft law predominately binds the Commission as an issuing institution with limited effect on national legal systems, while Cini adds the ability to limit discretion and to encourage consistent decisions to the features of soft law measures.[111] The self-binding effect thereby serves to guard the legitimate expectations of recipients of measures. As a consequence of this self-binding effect, the issuing institution may only derogate from soft law by providing "sufficient and acceptable legal reasons."[112] A publication of the soft law measure is not always necessary to achieve this self-binding effect because a consistent practice can also create legitimate expectations and, as such, a *de facto* binding obligation.[113] Lastly, soft law can have legal effects through its influence on hard law. Soft law can constitute an expression of general principles of the EU legal order or the *acquis communautaire*. Moreover, soft law can serve as an interpretative aid for hard law provisions in court. Besides, parties may invoke soft law in litigation as a basis for judicial review.[114]

The legally binding force can be further cemented by the use of soft law in courts either as interpretation aid or as a basis for adjudication.[115] Although Chinkin argues that the subjective and discretionary content of soft law

109 The phenomenon is also referred to as 'regulation by publication' or as 'regulation by information'; Snyder, 'Soft Law and Institutional Practice', *supra* note 48, 199-201; Hofmann, *supra* note 49, 169-170.

110 Stefan *et al*., *supra* note 10, 25.

111 M. Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime', 8 *Journal of European Public Policy* (2001) 2, 192, 194.

112 Ionescu & Eliantonio, *supra* note 93, 48.

113 A. Beckers, 'The Creeping Juridification of the Code of Conduct for Business Taxation: How EU Soft Law Can Transform Into Hard Law', 37 *Yearbook of European Law* (2018) 1, 569, 580, 595.

114 Snyder, 'Interinstitutional Agreements', *supra* note 108, 463.

115 *Salvatore Grimaldi v. Fonds des Maladies Professionnelles,* C-322/88, Judgment of 13 December 1989, EU:C:1989:646 [*Grimaldi*]; Senden, *supra* note 42, 138; Ionescu & Eliantonio, *supra* note 93, 48.

disqualifies it for usage in court, soft law plays a role in EU courts.[116] As a matter of fact, the CJEU considers soft law in its deliberations and likewise requires national courts to take it into account.[117]

With regard to using soft law as a basis for adjudication, it is clear that the annulment procedure does not apply to purely informative actions or measures.[118] This result stems mostly from the Court's rigid understanding of legal effects necessary under art. 263 TFEU.[119] In order to trigger a direct judicial review of soft law under art. 263 TFEU, the act needs to produce legal effects. To determine the production of legal effects by an act, the CJEU initially followed a 'substance over form approach', where the effect on third parties trumped considerations like the nature or form of the measure.[120] In contrast, the CJEU focuses on the intention and powers of the issuing authority in the recent judgments.[121] Thereby, the CJEU finds it "necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act."[122] Considering its recent application of these criteria, the CJEU's approach has been characterized as adopting a 'formalistic' understanding of the notion of legally binding effects of EU soft law.[123] Thus, the intention of the author of an act as well as its form gain importance in the consideration of legal effects.[124] In contrast, the wording and context of an act are less important in the determination of legal

116 Chinkin, *supra* note 45, 862.
117 *Grimaldi, supra* note 115.
118 T. Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union*, (2014).
119 Senden, *supra* note 42, 112-113.
120 *Commission v. Council (ERTA)*, C-22/70, Judgment of 31 March 1971, ECLI:EU:C:1971:32, para. 42. Confirmed in *Commission v. Council*, C-25/94, Judgment of 19 March 1996, ECLI:EU:C:1996:114.
121 Overview by G. Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment Before the EU Courts: A Plea for a Liberal-Constitutional Approach', 16 *European Constitutional Law Review* (2020) 3, 466, 477. [Gentile, 'Ensuring Effective Judicial Review'].
122 *Belgium v. Commission*, *supra* note 56, para. 32.
123 Gentile, 'Ensuring Effective Judicial Review', *supra* note 121, 14.
124 *Ibid*., 11; *Mallis and Malli v. Commission and ECB*, Joined Cases C-105/15 P to C-109/15 P, Judgment of 20 September 2016, ECLI:EU:C:2016:702, para. 58; *NF and Others* v. *European Council*, C-208/17 P to C-210/17 P, Judgment of 12 September 2018, ECLI:EU:C:2018:705; *Czech Republic v. Commission*, C-575/18 P, Judgment of 9 July 2020, ECLI:EU:C:2020:530, para. 51; *FBF*, C-911/19, Judgment of 15 July 2021, CLI:EU:C:2021:599, para. 48.

effects.[125] As soft law rarely has the required form, it has become less likely to be considered as having legal effects in the sense of art. 263 TFEU. Nevertheless, a soft law declared invalid through the preliminary reference procedure can form the basis for a claim of damages in national proceedings. The CJEU argued in relation to national proceedings that "individuals harmed by the breach of Union law established by such a (invalid) recommendation, even if they are not the addressees of the recommendation, must be able to rely on it as a basis for establishing, before the competent national courts, the liability of the Member State concerned for the breach of Union law in question."[126]

Although the CJEU does not systematically review soft law under art. 263 TFEU, soft law functions as an interpretation aid through art. 267 TFEU with increasing frequency.[127] The CJEU discussed the effects of soft law through the preliminary reference procedure of art. 267 TFEU as early as 1989. The judgment did not garner much attention initially as neither the CJEU nor scholars understood *Grimaldi* to be a landmark judgment.[128] It involved a preliminary reference on the question whether a recommendation by the Commission, like the European schedule on occupational diseases, was capable of having direct effect.[129] Firstly, the Court confirmed its jurisdiction to give preliminary rulings with regard to any type of institutional act.[130] Secondly, the CJEU explained that, while not granting legally enforceable rights, recommendations have legal effects. Therefore, national courts are required "to take recommendations into consideration" when interpreting the implementing national provisions or when the national measure supplements binding EU laws.[131] In recent cases, the CJEU differentiates between different categories of effects: legal effects and persuasion resp. exhortation effects.[132] There is, however, little guidance on how

125 *Mallis and Malli v. Commission and ECB, supra* note 124; *Czech Republic v. Commission, supra* note 124.

126 *Balgarska Narodna Banka*, C-501/18, Judgment of 25 March 2021, ECLI:EU:C:2021:249, para. 81.

127 Senden, *supra* note 42; O. Ştefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (2013).

128 *Grimaldi, supra* note 115; E. Korkea-aho, 'National Courts and European Soft Law: Is Grimaldi Still Good Law?', 37 *Yearbook of European Law* (2018), 470.

129 *Grimaldi, supra* note 115, para. 5.

130 *Ibid*., para. 8.

131 *Ibid*., para. 18.

132 *Balgarska Narodna Banka, supra* note 126, para. 79; *FBF*, supra note 124, para. 69; G. Gentile, 'To Be or not to Be (Legally Binding)? Judicial Review of EU Soft Law After BT and Féderation Bancaire Francaise', *Revista de Derecho Comunitario Europeo* (2021) 70, 981, 994 [Gentile, 'To Be or not to Be'].

to distinguish these effects. In the BT-Judgment, the Court decided without further analysis that a recommendation does not have binding force under Art. 288 TFEU.[133] In the FBF-judgment, the fact that the guideline authorizes national authorities to depart by giving reasons means it only has persuasion and exhortation effects.[134] Due to the lack of guidance by the CJEU, it has become hard to distinguish between the different categories of legal effects for national courts, which in turn makes it unclear what the CJEU concretely means by 'taking into account'.[135] At the same time, the CJEU reinforces the obligation of national courts and authorities to take soft law into account and to not jeopardize the results prescribed by it by relying on the principle of sincere cooperation.[136]

Whereas the Court clearly accepts the ability of non-legal documents to have legal effects, scholars attach different meanings and consequences to the phrasing of the Court.[137] Despite attesting a hardening of soft law from a voluntary to a mandatory interpretation aid, Senden advocates a restrictive application which requires national courts to only take soft law into account.[138] In contrast, Arnull argues that *Grimaldi* obliges national authorities to interpret national law in light of EU law akin to the duty of consistent interpretation.[139] While Korkea-aho concludes that a dictionary interpretation of the wording accommodates both interpretations, her review of the CJEU's follow-up jurisprudence illuminates the nuances in the Court's jurisprudence.[140] On the one hand, national courts are required to fully take EU soft law into account when it is foreseen in EU legislative acts and issued by an EU institution.[141] Deviations are possible as long as national authorities provide 'specific, detailed

133 *Balgarska Narodna Banka, supra* note 126, para. 79.
134 *FBF*, *supra* note 124, para. 43.
135 *Balgarska Narodna Banka, supra* note 126, para. 79; *FBF*, *supra* note 124, para. 69; Gentile, 'To Be or not to Be', *supra* note 132, 999.
136 *Asociaţia "Forumul Judecătorilor din România"*, *supra* note 56, paras 176-177; it has previously also been argued by Advocate Generals that authorities are obliged to take EU soft law into account due to the principle of sincere cooperation under art. 4(3) TFEU: *Tadej Kotnik and Others v. Državni zbor Republike Slovenije*, C-526/14, Opinion delivered on 18 February 2016, EU:C:2016:102, para. 38; *Tadej Kotnik and Others v. Državni zbor Republike Slovenije,* C-526/14, Judgment of 19 July 2016, EU:C:2016:570.
137 Senden, *supra* note 42, 240, 267; Korkea-aho, 'National Courts and European Soft Law', *supra* note 128, 476.
138 Senden, *supra* note 42, 402-407, 473.
139 A. Arnull, 'The Legal Status of Recommendations', 15 *European Law Review* (1990), 318, 319.
140 Korkea-aho, 'National Courts and European Soft Law', *supra* note 128, 476-477.
141 *Ibid*., 486.

and substantively valid reasons'.[142] On the other hand, without foresight, national courts enjoy more discretion regarding the inclusion of soft law as long as they do not endanger the goals of an EU soft law.[143] Moreover, while the Court recognizes that Commission guidelines may have 'some effect' on the practice of national authorities, these effects do not bind national courts.[144] While national authorities might have to take such recommendations into consideration when acting, the case law is still unclear with regard to which documents have legal and which have persuasive effects. To this point, it seems that the Court favors national procedural autonomy over the creation of expectations and legal certainty for third parties through EU soft law.[145]

Nevertheless, soft law has a self-binding effect on the issuing institution. As institutions limit their discretion through soft law, a departure constitutes a breach of general principles, such as the principle of equal treatment or of legitimate expectations.[146] With regard to the use of soft law as an interpretation aid at the CJEU itself, soft law does not constitute 'a significantly authoritative source'.[147] Similarly, the CJEU rarely refers to 'free-standing' soft law.[148] Due to the difference in treatment of soft law required from national courts respecting the lenient practice by the CJEU itself, Eliantonio and Stefan rightly refer to this contradiction as a double standard.[149]

3. Application to Fact Sheets

Most soft laws gain practical effects through social processes stemming from their multilateral creation. It is unclear to what extent fact sheets can achieve practical effects similar to those of other types of soft law considering their unilateral creation. Even though fact sheets are exclusively authored by

142 *Ibid*., 494.
143 *Ibid*.; *Asociația "Forumul Judecătorilor din România"*, *supra* note 56, para. 176.
144 *Tadej Kotnik and Others v. Državni zbor Republike Slovenije,* EU:C:2016:570, *supra* note 136.
145 *Pfleiderer AG v. Bundeskartellamt*, C-360/09, Judgment of 14 June 2011, EU:C:2011:389, para. 23; *Expedia Inc. v. Autorité de la Concurrence and Others*, C-226/11, Judgment of 13 December 2012, EU:C:2012:795, para. 32.
146 *Dansk Rørindustri and Others v. Commission*, C-189/02 P, Judgment of 28 June 2005, EU:C:2005:408, para. 211.
147 M. Eliantonio in relation to the interpretation of environmental hard law through the CJEU, M. Eliantonio & O. Stefan, 'Soft Law Before the European Courts: Discovering a "Common Pattern"?', 37 *Yearbook of European Law* (2018) 7, 457, 462.
148 Free-standing soft law lacks a basis in hard law, *ibid*., 462.
149 *Ibid*., 463.

the RDD, the fact sheets are based primarily on judgments. These judgments originate from a process with multilateral elements: the parties to a dispute bring forward their arguments, the Advocates General can also contribute their legal analysis through their opinions, and the RDD supplies legal analysis at the request of judges. The exchange of arguments can either be through the submission of documents in a written procedure or through oral hearings. Despite the involvement of several stakeholders, the judges of the Court make the final decision. Moreover, not all relevant stakeholders are involved in a court proceeding, which is limited to the parties to a certain case. Thus, notwithstanding the multilateral elements of a court procedure, the judgment as the end product is unilaterally imposed, which underlines the fact sheets' status as unilaterally created documents.

Due to the lack of socialization during the creation process, fact sheets are unlikely to effect changes in the discourse or behavior of stakeholders. Fact sheets can, however, provide doctrinal clarification to increase the effectiveness of judicial proceedings at the CJEU. The interviews could not corroborate these effects in practice. Consequently, a confirmation would require a follow-up study to investigate the effects within national courts and with national stakeholders, such as environmental NGOs or consumer protection organizations.[150]

In terms of legal effects, fact sheets are neither a basis for adjudication nor an obligatory interpretation aid.

Soft laws rarely form the basis for adjudication under EU law. Generally, for soft law to be considered to have legal effects in the sense of art. 263 TFEU, the CJEU analyzes its intention, form, wording, and context. Thereby, fact sheets quite clearly do not fall into the category. Although the Court issues binding judgments, documents beyond a judgment, such as fact sheets, might be considered persuasive but not binding.[151] This is further underlined by the fact that the author of the fact sheets is a lawyer from the RDD, a research service, and not judges of the Court. Moreover, it is unlikely that the CJEU will declare a fact sheet invalid through a preliminary reference under art. 267 TFEU. Unlike other soft law, fact sheets neither prescribe certain actions nor set requirements to adhere to. Thus, it is hard to imagine that informative documents could have negative repercussions on the parties which could lead to damage claims in national proceedings.

150 To confirm, for example, the effects of the fact sheets on public access to environmental information or on electronic commerce and contractual organizations.

151 Only the judgments are conferred binding power by the Treaties.

The creation of fact sheets is not foreseen in any EU hard law and thus fact sheets do not develop legal effects which require national courts to take them into account as interpretation aid. During the interviews, there was a consensus that fact sheets do not have any legal effects or a higher legitimacy than other sources of information.[152] As the RDD only provides a service, the judges remain 'the mouth of the law'.[153] Within the Court, fact sheets are also likened to the work of editors which should not receive special legitimacy through its publication by the Court as it is "just information".[154] In addition, the principle of sincere cooperation does not mean requiring national courts to take into account fact sheets as these do not prescribe any specific aims or results.

Authority and legal effects might be found, nevertheless, in the cited judgments. First, the judgments might indicate that the jurisprudence is 'éclairé' regarding a specific point.[155] The acte-éclairé-doctrine then lifts the obligation of a national court to refer under art. 267 TFEU when "the question raised [by the referring court] is materially identical with a question which has already been the subject of a preliminary ruling in a similar case".[156] This change in the national court's obligations constitutes a legal effect. Nevertheless, as with every source of information, it is still necessary to approach the fact sheets with caution as their comprehensiveness might depend on the specific author's expertise.[157] While the acquisition of information always requires a certain amount of caution, the fact sheets retain a heightened reliability as the list of important cases is approved by the Cabinet of the President and the staff members of the RDD are experts in their respective fields.[158] Second, the collection of judgments might impose a self-binding effect on the Court. Whereas the Court confirmed this self-binding effect regarding other EU institutions based on the principles of equal treatment and legitimate expectations, the concept of self-binding effect of judgments is disputed.[159] Such a system of precedent originates from the Anglo-Saxon legal

152 CJEU-CJEUJ-1, interview by author, 25 February 2022; CJEU-AGSM-1, interview by author, 28 January 2022; CJEU-RDDSM-1, interview by author, 24 February 2022; CJEU-GCJ-1, interview by author, 08 March 2022.

153 CJEU-RDDSM-1, interview by author, 24 February 2022; CJEU-AGSM-1, interview by author, 28 January 2022.

154 CJEU-CJEUJ-1, interview by author, 25 February 2022.

155 CJEU-AGSM-1, interview by author, 28 January 2022.

156 *Da Costa en Schaake NV and Others v. Administratie der Belastingen*, C-28-30/62, Judgment of 27 March 1963, EU:C:1963:6.

157 CJEU-AGSM-1, interview by author, 28 January 2022.

158 CJEU-RDDSM-1, interview by author, 24 February 2022.

159 CJEU-CJEUJ-1, interview by author, 25 February 2022.

systems. Although EU law borrows terminology, such as *precedent*, *stare decisis*, *ratio decedendi* and *obiter*, from these systems, the EU system does not imitate the Anglo-Saxon systems of precedent.[160] Neither the Treaties nor the Statue of the Court of Justice or the respective Rules of Procedure impose the obligation to follow previous jurisprudence.[161] Nevertheless, the principles of legal certainty and legitimate expectations require a 'consistent and clear case law'. As a result, the Court rarely deviates from its 'well established case law,' although there exists no obligation to follow its previous decisions.[162] Consequently, the judges retain their independence regarding their decisions in cases before them.[163] The inclusion of judgments in fact sheets does not compromise the independence of this decision-making process or create a self-binding effect. Thus, the fact sheets neither derive a legally binding effect from the judgments referenced therein nor impose a self-binding effect on the Court.

D. Conclusion

Courts on the national and regional levels increasingly communicate directly with the public. In addition to traditional PR activities, they use modern communication technologies as tools to publish informative materials regarding their work and adjudicated cases. This article investigated the place of one of those new communication tools, fact sheets, in the EU legal order. As informative documents with the character of interpretative and decisional soft law, fact sheets aim to ensure transparency and reduce information asymmetries. By furthering the understanding of EU law by the public, fact sheets also contribute to ensuring democracy in the working procedures of the EU. Despite this important role, fact sheets seem to have neither legal nor practical effects in the EU legal order based on the findings thus far.[164]

160 T. Szabados, '"Precedents" in EU Law – The Problem of Overruling', *ELTE Law Journal* (2015) 1, 125, 127-128.

161 Treaty of the European Union, Treaty on the Functioning of the European Union, Statute of the Court of Justice, Rules of Procedure of the Court of Justice, Rules of Procedure of the General Court.

162 Szabados, *supra* note 160, 129-130.

163 Also stressed by CJEU-CJEUJ-1, interview by author, 25 February 2022.

164 As mentioned above, however, the scope of this research is limited. As soft law, however, is a theoretical concept, the theoretical findings might deviate from practice. Further research is necessary to encapsulate the actual use of fact sheets in practice, i.a. through surveys. Thus, to fully explore the effects of fact sheets, more research into their use and relevance at the national level is warranted.

As unilaterally created judgments constitute the main content of the fact sheets, the latter have limited practical effects regarding their influence on the discourse and behavior of actors. While the CJEU attributes legal effects to soft law in certain circumstances, these effects cannot be translated to fact sheets as a basis for adjudication or an interpretation aid. As EU law has neither a basis for the creation of fact sheets in hard law nor a system of precedence for judgments, fact sheets also do not have legal effects.

Authority might be found in the cited judgments which could relieve a national court from its obligation to refer under art. 267 TFEU through the 'acte éclairé' doctrine. For this purpose, fact sheets can be regarded as especially authoritative due to the expertise of their authors and the involvement of the Cabinet of the President. In contrast to soft law issued by the Commission, however, the fact sheets do not impose a self-binding effect on the judges of the General Court and the CJEU due to the principle of independence of judges. Despite these limitations, fact sheets remain an important starting point for citizens to foster their understanding of EU law.

To ensure the reliability of fact sheets as a tool for communicating with the public, it is important that caution is exercised during the creation process of fact sheets. Although EU law remains silent on the procedure to issue information materials, several general principles could be drawn from EU law and national systems to ensure their quality. In terms of formal requirements, institutions should only publish materials that remain in their conferred competencies and do not compromise their core duties. Furthermore, any document should be attributed explicitly to an author or the authoring institution. Substantive quality requires transparent, correct, clear, and comprehensive content. Informative documents further transparency, legitimacy, and democracy if these conditions are fulfilled. Overall, the fact sheets published by the Court adhere to these requirements and are a valuable asset to reduce information asymmetries regarding the interpretation and application of EU law.

There is, as always, room for further improvement to heighten the perception of fact sheets by the public. Although the Court understands the fact sheets to feature 'just information', nonprofessionals might not have a sufficient understanding of legal materials to make that distinction. While the inclusion of the CJEU's header is desirable in terms of attributability of documents to authors, it might give laypeople the impression of a heightened reliability and enforceability of the cited information.[165] This misunderstanding

165 In relation to notes issued by the French Conseil d'État, Passaglia stresses that, despite their lack of authoritative value, the notes have an 'extremely high degree of reliability'

can, for example, be easily avoided through the inclusion of a disclaimer that the summaries provided in the fact sheets are not legally binding. In addition, transparency could be increased by clearly designating updates of the fact sheets and making the outdated versions available in an archive.

On an institutional level, guidelines or even regulations regarding formal and substantive criteria for informative work by the Court (or even the institutions in general) would further legal certainty.[166] The value and importance of fact sheets should further be reflected in ensuring the allocation of sufficient funds for quality control.[167] Funds could also be used to establish courses that train staff with legal expertise in how to relay information to nonprofessionals. Moreover, EU law features other potential control mechanisms which could remedy the lack of judicial enforcement as quality control. The Commission, for example, could issue a quality report similar to its report on the state of the rule of law. Additionally, the European Ombudsman has expertise regarding the creation of guidelines by already having produced guidelines on good administration.[168] Under art. 228 TFEU, the Ombudsman also has a complaint mechanism in place. Lastly, Mast correctly points out that the recipients of materials constitute a control mechanism by remaining critical and questioning the information received.[169]

E. Annex

I. Interview Background Information

The interviews conducted were semi-structured. Open-ended questions allowed respondents to address matters that the researcher might not have originally considered while also streamlining data collection and guaranteeing the acquisition of necessary information. With the consent of the participants, the interviews were recorded and transcribed. In case of concerns from the interviewee regarding the recording, the interviewer switched to note-taking

simply by being prepared within the institution; Passaglia, *supra* note 4, 368.

166 This could be realized, for example, by amending the Court's rules of procedure; Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 475.

167 Brüggemann, *supra* note 6, 286.

168 S. Magiera, 'Art. 41', in J. Meyer & S. Hölscheidt (eds), *Charta der Grundrechte der Europäischen Union,*
5th ed. (2019), para. 16.

169 Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 476.

to prevent a negative influence on the participants through self-censure.[170] The interviews were transcribed non-verbatim by eliminating filler words, grammatical inconsistencies, and false starts. Where the interviewee did not consent to a recording and transcription, notes were taken manually combined with a verbatim from memory added directly after the end of the interview. The interviews are anonymized through the assignment of codes and stored according to current data protection guidelines.

An ideal sample size for interviews is acknowledged to be between 5% to 10% of the studied group.[171] For the CJEU, the number of interviewed experts thus ranged between six and ten, divided into the working units of the Court which include the Research and Documentation Directorate, the judges, and the Advocate Generals.[172] Considering the aim of the interviews was to support the primary method of doctrinal research rather than to provide statistically relevant data, a small number of interviews was sufficient. The reliability of the information is ensured, as far as possible, by interviewing diverse actors at the Court. The questionnaire was developed during the doctrinal legal research stage. As the interviews were semi-structured, they only contained a rough guideline in terms of topics to be touched upon. Although this method reduces the comparability between interviews, it grants flexibility to include questions that arise during the interview.[173] The number of interviewed persons was seven.[174]

There are various ways to analyze the qualitative data collected from these interviews. As the use of the data is anecdotal and the aim of the interviews was to provide context for the creation of fact sheets and elicit latent meanings, a hermeneutic method was best suited to achieve this aim.[175] The hermeneutic method chosen was the thematic analysis, where the researcher inductively

170 Y.-C. Gagnon, *The Case Study as Research Method: A Practical Handbook* (2009), 61.

171 G. Psacharopoulos, 'Questionnaire Surveys in Educational Planning', 16 *Comparative Education* (1980) 2, 159-165.

172 For the Courts, the number of interviewed judges should be between six and eight. Out of the eleven AGs, one should be interviewed. The staff members of the Research and Documentation Directorate should be between two and three.

173 Gagnon, *supra* note 170, 61.

174 For an overview, see Annex II. 'Interview Codes'.

175 D. Goodrick & P. Rogers, 'Qualitative Data Analysis', in K. E. Newcomer, H. P. Hatry & J. S. Wholey (eds), *Handbook of Practical Program Evaluation*, 4th ed. (2015), 566; Hermeneutic research focuses on the subjective interpretation of phenomena by individuals rather than establishing objective facts; Koppa, 'Hermeneutic Analysis' (2010), available at https://koppa.jyu.fi/avoimet/hum/menetelmapolkuja/en/methodmap/data-analysis/hermeneutic-analysis (last visited 1 October 2024).

organizes the material into categories during the review. A preliminary list of categories was developed during the initial literature review. Repeating these categorizations allowed the researcher to develop them from descriptive categories into more abstract concepts.[176] This method is considered appropriate to review rich data, such as interview transcripts, and provided the advantage of fuller coverage of the data while maintaining the depth and detail of the original transcripts.[177] As software for this categorization resp. coding process, this research relied on the software Atlas-TI, which provides a reliable structure for organizing, classifying, and storing data as well as extracted information.

II. Interview Codes

Institution	Department	Position
CJEU	CJEU (Court of Justice)	J (Judge)
CJEU	AG (Advocate General)	SM (Staff Member)
CJEU	GC (General Court)	J (Judge)
CJEU	GC (General Court)	SM (Staff Member)
CJEU	RDD (Research and Documentation Directorate)	SM (Staff Member)
CJEU	FRDD (formerly part of the RDD)	SM (Staff Member)

III. Interview Template

The interviews were only semi-structured. Thus, while the following template presents an overview of the discussed topics, the interviews did not necessarily address all questions, nor were the questions presented in the order in which they appear here.

1. Introduction: Researcher, Reasons for selection of interviewee, Use of data

2. Information on interviewee: professional background and current position

176 Goodrick & Rogers, *supra* note 175, 566.
177 *Ibid*., 580.

3. General information on work tasks of interviewee

4. Do you use fact sheets in your work?
    - Are the fact sheets helpful in completing your work tasks?
    - How frequently do you consult CJEU fact sheets?
    - In what kind of situations do you deal with CJEU fact sheets?

5. Can you describe the process that led to the decision to (not) use these instruments?

6. What are the practical/legal effects of the fact sheets?

7. Conclusion
    - Is there anything I forgot to ask that is important in this context?
    - Any other people you would recommend to talk to?

8. Only RDD: Creation of FS
    - What was the impetus for developing the fact sheets?
    - What aim(s) do you pursue with the fact sheets?
    - How do you choose topics on which you create fact sheets?
    - Can you describe the process of creating the fact sheets?
    - What type of authors
    - Working steps
    - How to choose cases (Specific criteria?)

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To Err Twice: Methodological Pluralism Through the Lens of EU Prison Policy

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Abstract

Utilizing the tension between EU and prisons as case study, this article argues for the necessity of a multidisciplinary EU methodological framework. To address the threat of cross-border criminality, the legal principle of mutual trust has been placed at the core of EU judicial cooperation mechanisms. Mutual trust translates to the presumption of equivalent rights protection, a presumption extending to detention, and on the basis of legal standards comprising the pan-EU penal imaginary. Yet, in light of disparate and inadequate detention regimes, mutual trust proves legal fiction. Consequently, and by ignoring the operation of law in action, the Union has exposed itself to the challenge of regulating and effectively enforcing individual standards in prison. To this end, following a doctrinal approach, EU scholars and institutions advocate for further harmonization of detention at EU level. This article argues that such a motion suffers two methodological shortcomings. Firstly, EU scholarship overly underscores the legal dimension of the issue, too readily framing the problematic situation of detention as a legal problem to be redressed via legislative recourse. Secondly, calls for legal harmonization underestimate the political nature of law as policy, and the perils of perceived (horizontal or vertical) illegitimacy of any legally binding intervention. Framing its enquiry by reference to the question posed in this special issue, the article concludes that, while black-letter research in EU law remains essential, novel challenges and idiosyncrasies of the *acquis communautaire* demand an evolved methodological toolbox, to better reflect the inherent interdisciplinarity of prison policy in the AFSJ.

A. Introduction

This article submits that the EU is faced with a multi-prong crisis that calls for the development of a novel regulatory toolbox. To this end, the analysis utilizes criminal detention within the Union's Area of Freedom, Security, and Justice (AFSJ) as a case study. To briefly conceptualize both actors:

Criminal detention is to be understood in its post-trial context, as imprisonment or incarceration, and hence the consequence of a custodial sentence, sanction, or penalty.[1] In this light, detainees (alternatively referred to as prisoners, or inmates) include individuals lawfully tried, sentenced, and deprived of their liberty, for a crime they have been proven to have committed by a court of law operating in accordance to the criminal justice system.[2] As for the AFSJ, the focus lies on the policy area of criminal justice, and specifically the governance of crime within the internally frontier-less territory.[3]

As for the narrative, the central argument runs as follows. EU law and scholarship has long relied on a doctrinal approach. Faced with the issue of cross-border criminality in a heterotopic Union, EU law adopted the legal principle of mutual trust at the core of its judicial cooperation framework. Mutual trust translates to the presumption of equivalent rights protection, a presumption extending to detention, and on the basis of the pan-EU penal

1 In the context of EU criminal law, and while Article 83 TFEU refers to sanctions, most Directives adopted on the basis of this provision refer to penalties. The terms seem to be used interchangeably. See A. Giannakoula, 'Approximation of Criminal Penalties in the EU: Comparative Review of the Methods Used and the Provisions Adopted – Future Perspectives and Proposals', 5 *European Criminal Law Review* (2015) 2, 133, 133.

2 While cognizant of the stigmatization and dehumanization effect that the use of labels such as 'criminals' and 'inmates' has, as proven in recent criminal justice literature, the authors have opted to include such language when necessary, to accurately and holistically reflect the terminology of the pan-EU penal imaginary itself, and as deriving from the respective EU, CoE, and UN provisions.

3 As established under the EU framework, see *Consolidated Version of the Treaty on European Union*, OJ 2012 C 326/13, Article 3 [TEU]; and as opposed to other EU hats, such as the EU as a Single Market, or a Common Defense Area. Consequently, excluding civil justice, and asylum and migration policies; see *Consolidated Version of the Treaty on the Functioning of the European Union*, OJ 2012 C 326/47, Article 67 [TFEU]. In addition, and when reference is made 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 TFEU Protocol (No. 21) On the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, OJ 2016 C 202/295; and TFEU Protocol (No. 22) On the Position of Denmark, OJ 2012 C 202/299.

imaginary. In action, however, individual rights protection in the prison context proves disparate and inadequate. Normative standards do not reflect reality, and mutual trust proves legal fiction. Now, faced with the disparity between law in the books and law in action, EU scholars and institutions propose another doctrinal approach: the legal harmonization of prison conditions at EU level. While such an approach has potential, relying solely on positive litigation ignores the context in which law operates, essentially repeating the mistakes that originally led to this conundrum. Instead, the authors argue for an approach merging legislative and non-legislative approaches, and utilizing lessons from other disciplines.

In overview, the burden that the article shall meet lies on uncovering the problematic nexus between EU and post-trial detention; assessing the potential benefits and pitfalls of a purely doctrinal response; and uncovering the added value of a multidisciplinary methodological approach.

To this end, the article provides for an analysis and critical assessment of both doctrine and alternative (multidisciplinary) approaches, structured in the following manner. Section B uncovers the dialectics between EU law and prisons. It outlines the normative standards that shape detention at EU level, and explains how and why the Union has transfigured these standards into the legal principle of mutual trust; further, it commends on the potential to further harmonize detention at EU level. Section C critically assesses a purely doctrinal approach, uncovering inherent limitations and potential pitfalls that such a strategy would face, and making the case for a multidisciplinary methodological approach instead. Section D provides for a few concluding thoughts.

B. A Story of Doctrine

This section focuses on the place of prisons in EU law. To govern the threat of cross-border criminality, the Union relies on the legal principle of mutual trust, which presupposes normative convergence of detainee rights. Faced with concrete data of divergent and harsh detention regimes, data that challenges the validity of mutual trust, the latter is to be further reinforced with legal harmonization of detention standards at EU level.

I. Mutual Trust as Legal Principle

Studying the law on paper, the EU emerges as a Union of values, with all States presumed to provide for equivalent human rights protection. This presumption extends to detainee rights, and on the basis of the pan-EU penal

imaginary, as shaped at normative level by the multi-level EU human rights regulatory framework.

1. Governing Crime in the AFSJ Heterotopia

At the outset, it is important to comprehend how and why EU law relies on the normative convergence of individual rights standards, transmuting legal norms into mutual trust, a legal principle that is used to propel legal integration, and lies at the core of EU law.

Safeguarding the functioning of the Union as an AFSJ constitutes a key objective of EU law. Hence, Art. 3 TEU notes that "[t]he 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 […] the prevention and combating of crime".[4] The AFSJ objective proves paramount to EU integration. Within the Area of Freedom, the free movement of goods, services, capital, and people is propelled forward.[5] Owing to its uniqueness and plethora of socio-economic benefits, this reality has been rightly identified as a core feature of EU law, and welcomed by States and citizens alike.[6] Yet, simultaneously, the very existence of an Area of Freedom enhances the risk of cross-border criminality.[7] Consequently, governing crime has been prioritized in the EU agenda, as there is a necessity to balance Freedom with Security and Justice.[8]

To this end, and in light of the interconnected and internally frontierless Union, alongside the ineffective and cumbersome traditional cooperation

4 TEU Art. 3. para. 2.

5 C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, 4th ed. (2013); J. C. Piris, *The Lisbon Treaty – a Legal and Political Analysis* (2010), 167.

6 J. Apap & S. Carrera, 'Progress and Obstacles in the Area of Justice and Home Affairs in an Enlarging Europe', in J. Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement* (2004), 19; E. de Capitani, 'The Schengen System After Lisbon: From Cooperation to Integration', 15 *ERA Forum* (2014) 1, 101, 115.

7 V. Mitsilegas, J. Monar, & W. Rees, *The European Union and Internal Security: Guardian of the People?* (2003); M. L. Wade, 'Cross-Border Crimes', in K. Ambos & P. Rackow (eds), *The Cambridge Companion to European Criminal Law* (2023), 182.

8 W. van Ballegooij, 'European Implementation Assessment 2004–2020 on the European Arrest Warrant', 15 *Eucrim* (2020) 2, 149; V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', 43 *Common Market Law Review* (2006) 5, 1277, 1286 [Mitsilegas, 'Constitutional Implications']; C. C. Murphy, 'Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the "Wars on Terror"', 6 *Transnational Legal Theory* (2015) 1, 31.

frameworks, the need for cross-border collaboration emerged as prerequisite.[9] There was, however, a rather glaring lacuna: the AFSJ does not constitute a single area of law, but rather a community of individual nodes, all with their own independent, distinct legal order and culture.[10] The plurality of normative, legal, and judicial orders posed a hurdle to anti-crime cross-border cooperation;[11] yet this plurality must not be suffocated but rather safeguarded, as the AFSJ is to be construed with "respect for […] the different legal systems and traditions of the Member States".[12]

To address this issue, EU States agreed to implement the mutual recognition principle, which has since served as the cornerstone of cooperation between judicial authorities in the AFSJ.[13] Mutual recognition *per se* escapes the focus of this article. For the purposes of the analysis, it shall be reminded that the principle essentially dictates that a judicial order or judgment issued by the authorities of one Member State is to be recognized and enforced by the authorities of another EU State.[14] In other words, mutual recognition allows one EU State (issuing State) to produce a legal order and transmit it to another State; the latter (executing State) has to comply with the judicial will of the former, recognize the validity of its order, and grant it full effect, as if it originated from

9 C. Janssens, *The Principle of Mutual Recognition in EU Law* (2014), 167, 175.

10 C. Eckes, 'External Relations Law: How the Outside Shapes the Inside', in D. A. Arcarazo, & C. C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (2014), 188.

11 V. Mitsilegas, 'The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness Based on Earned Trust', 5 *Revista Brasileira de Direito Processual Penal* (2019) 2, 565, 575 [Mitsilegas, 'European Model'].

12 TFEU Art. 67 para. 1.

13 Ester Herlin-Karnell, 'Constitutional Principles in the Area of Freedom, Security and Justice', in C. C. Murphy & D. A. Arcarazo, *EU Security and Justice Law: After Lisbon and Stockholm* (2014), 38; K. Ambos, *European Criminal Law* (2018), 412; Presidency Conclusions of the Tampere European Council, European Council (1999) 15 and 16 October 1999, para. 2, available at https://www.europarl.europa.eu/summits/tam_en.htm (last visited 3 October 2024).

14 J. Monar, 'The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs', 39 *Journal of Common Market Studies* (2001) 4, 747, 753; M. Joutsen, 'The European Union and Cooperation in Criminal Matters: The Search for Balance', 25 *HEUNI Papers* (2006) 1, 9; V. Mitsilegas, *EU Criminal Law* (2009), 116 [Mitsilegas, *EU Criminal Law*]; K. Lenaerts, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice* (2015), 7; L. Bay Larsen, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice', in P. Cardonnel, A. Rosas & N. Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (2012), 139, 140.

its own legal *acquis*.[15] It should be further noted that the executing State may not, as a rule, refuse recognition. Indeed, objections based on grounds of national sovereignty, or on the need to safeguard the national constitutional order of the executing State, are to be in principle ignored, and the executing State may refuse to recognize only if such refusal is based on the grounds provided for within the mutual recognition instrument itself.[16]

Overall, mutual recognition serves as a fundamental tenet of the institutional architecture of EU criminal law, allowing judicial authorities to cooperate in the fight against cross-border crime despite their differences. In this manner, it has been welcomed as an effective manner to govern the AFSJ legal heterotopia, while respecting legal plurality and striking a balance between *varietate* and *concordia*.[17]

Nevertheless, mutual recognition in criminal matters remains, fundamentally, rather paradoxical. Allowing for the will of foreign authorities to be unequivocally imposed on another State in a unilateral manner, especially in matters of criminal law, an area serving as an expression of both national sovereignty and societal conscience, and has the potential to have such a profound effect on individual rights, may not be ignored. It has been rightly noted that, by recognizing and giving effect to the judicial order of a foreign order, the executing State undertakes a "journey into the unknown".[18]

EU law justifies the mutual recognition principle on the basis of mutual trust. In essence, the latter principle translates to the presumption of equivalent rights protection; in turn, this presumption of equivalence justifies mutual recognition and the obligations it imposes on national authorities.[19] Indeed,

15 K. Nicolaidis & G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government', 68 *Law and Contemporary Problems* (2005) 3 & 4, 263, 269, 270; K. Nicolaidis, 'Trusting the Poles? Constructing Europe through mutual recognition', 14 *Journal of European Public Policy* (2007) 5, 682, 683.

16 Janssens, *supra* note 9, 9; D. Helenius, 'Mutual Recognition in Criminal Matters and the Principle of Proportionality: Effective Proportionality or Proportionate Effectiveness?', 5 *New Journal of European Criminal Law* (2014) 3, 349, 351.

17 W. Schroeder, 'Limits to European Harmonisation of Criminal Law', 15 *Eucrim* (2020) 2, 144, 145; S. White, 'European Law – The Corpus Juris: A Bold Step', 17 *Amicus Curiae* (1999), 23, 24; Mitsilegas, 'Constitutional Implications', *supra* note 8, 1282; Eckes, *supra* note 10, 188.

18 Mitsilegas, 'Constitutional Implications', *supra* note 8, 1282.

19 C. Rizcallah, 'The Challenges to Trust-Based Governance in the European Union: Assessing the Use of Mutual Trust as a Driver of EU Integration', 25 *European Law Journal* (2019) 1, 37; H. Nilsson, 'Mutual Trust or Mutual Mistrust?', in G. de Kerchove & A. Weyembergh (eds), *La Confiance Mutuelle Dans l'Espace Pénal Européen/Mutual*

in theory, the argument appears straightforward: if all EU States provide for equivalent levels of human rights protection, and thus respect the same values and principles, then they are not to be considered foreign to one another. Bound together by a common normative glue, the obligation to acknowledge and enforce judicial orders proves no outlandish demand after all, since the Member States are only enforcing judicial orders produced in a church not unlike their own.

Despite its significance, mutual trust is not defined in the EU Treaties as such. Instead, early references to this principle are found in a series of Commission policy documents, declaring that mutual recognition "presupposes mutual trust in the Member States' legal systems and a shared fundamental basis".[20] Subsequently, the European Council describes 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".[21] Primarily, however, mutual trust is at its core a judicially forged notion. Hence, in *Gözütok and Brügge* the Court of Justice of the EU (CJEU, or the Kirchberg Court) stated how "there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied".[22] In the subsequent *Radu* case, the Kirchberg Court confirmed that the operation of mutual recognition instruments "is based on a high level of confidence between Member States".[23] Further, in *Jeremy*,

Trust in the European Criminal Area (2005), 29, 33; S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?', 41 *Common Market Law Review* (2004) 1, 5.

20 Commission Communication to the Council and the European Parliament, 26 July 2000, COM(2000) 495 final, 18 [COM(2000) 495 final] ; see further Commission Communication to the Council and the European Parliament, 16 June 2004, COM(2004) 429 final; Commission Communication to the Council and the European Parliament, 2 June 2004, COM(2004) 401 final.

21 Council Programme 2001/C 12/02, OJ 2001 C 12/10.

22 *Gözütok and Brügge,* C-187/01 and C-385/01, Judgment of 11 February 2003, ECLI:EU:C:2003:87, para. 33. See further, *Opinion of Advocate General Ruiz-Jarabo Colomer*, C-187/01 and C-385/01, delivered on 19 September 2002, ECLI:EU:C:2002:516, paras 55, 119-124. For a commentary, M. Fletcher, 'Some Developments to the ne bis in idem Principle in the European Union: Criminal Proceedings Against Huseyn Gözutök and Klaus Brügge', 66 *Modern Law Review* (2003) 5, 769, 780.

23 *Ciprian Vasile Radu,* C-396/11, Judgment of 29 January 2013, ECLI:EU:C:2013:39, para. 10.

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 recognized at European Union level, particularly in the Charter".[24] Finally, in delivering *Opinion 2/13*, the Court 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 recognized by EU law."[25]

Mutual trust thus dictates that, when implementing EU law (particularly 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 adhere to a 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", 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".[26] Essentially, all EU Member States have to trust the quality of all legal systems in the Union; further, they must also trust that the rules within these systems are interpreted and applied correctly.[27]

In essence, then, mutual trust translates to the legal presumption of equivalent rights protection, which justifies the legal effects of mutual recognition. Member State A should trust Member State B to respect human rights, and hence A should recognize and give effect to the judicial will of B. Equivalent protection of human rights proves a "condition to be assumed".[28]

24 *Jeremy F v. Premier Ministre,* C-168/13 PPU, Judgment of 30 May 2013, ECLI:EU:C:2013:358 para. 50.

25 *Court Opinion 2/13* of 18 December 2014, ECLI:EU:C:2014:2454, para. 191 [*Opinion 2/13*].

26 *Ibid.*, para. 192.

27 Janssens, *supra* note 9, 167; COM(2000) 495 final, *supra* note 20.

28 E. Brouwer, 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust', in E. Brouwer & D. Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (2016), 59.

2. The Pan-EU Penal Imaginary: Towards Convergence

The presumption of equivalent protection expands to detainees as well; consequently, in EU law, the place of detainee rights is one of assumed convergence.

As known, and despite the original absence of rights from the EU narrative, the CJEU gradually construed a human rights myth,[29] which culminated to a multi-level human rights order in the EU.[30] Human rights are enshrined in the Treaty framework, with Article 2 TEU declaring the Union as "founded on the values of respect for human dignity, freedom, […] and respect for human rights".[31] This provision enshrines the very identify of the EU as a community of values, and is of fundamental importance for the entire EU apparatus.[32] It should be noted that Art. 2 TEU constitutes no mere declaration, but rather a legally binding clause to be given the full primacy and effectiveness in the EU legal order: EU commitment to human rights "is not only a political and symbolic statement. It has concrete legal effects".[33]

29 S. Douglas-Scott, 'The European Union and Human Rights After the Treaty of Lisbon', 11 *Human Rights Law Review* (2011) 4, 645, 646; S. S. Smismans, 'The European Union's Fundamental Rights Myth', 48 *Journal of Common Market Studies* (2010) 1, 45; G. F. Mancini, *Democracy and Constitutionalism in the European Union* (2000), 81; S. Greer, J. Gerards & R. Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (2018), 293; P. Alston, M. Bustelo & J. Heenan, *The EU and Human Rights* (1999); B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in P. Alston (ed.), *The EU and Human Rights* (1999), 859, 890.

30 T. Tridimas, 'Judicial Federalism and the European Court of Justice', in J. Fedtke & B. S. Markesinis (eds), *Patterns of Federalism and Regionalism: Lessons for the UK* (2006), 149, 150; Ambos, *supra* note 13, 74; K. Tuori, 'The Pluralism of European Fundamental Rights Law', in S. Douglas-Scott & N. Hatzis (eds), *Research Handbook on EU Law and Human Rights* (2017), 35; J. Wouters & M. Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials* (2021), 94.

31 TEU Art. 2; see further Arts 3, 6.

32 J. Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?', 5 *European Papers* (2020) 1, 255, 257; A. T. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law', 29 *Oxford Journal of Legal Studies* (2009) 3, 549; M. Klamert & D. Kochenov, 'Article 2 TEU', in M. Kellerbauer, M. Klamert & J. Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (2019), 22, 23; K. Lenaerts & M. Desomer, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means', 27 *European Law Review* (2002) 4, 377.

33 J. C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (2010), 71; Wouters, *supra* note 32, 258.

Of equal value to that of the EU Treaties, the Charter of Fundamental Rights (CFREU, or the Charter) constitutes the flagship rights instrument in EU primary law.[34] The CFREU serves as the Union's own written bill of rights, and considerably enhances the legal clarity and coherence of human rights law in the EU structure.[35] A series of provisions prove relevant for the detention context, including the protection of human dignity, the right to liberty and security, the right to private and family life, the principle of cardinal proportionality, and the prohibition on torture and inhuman or degrading treatment or punishment.[36]

As for secondary law, and while there are a number of Directives relevant to pre-trial detention, their scope expands until the final judgment; they consequently have no effect in post-trial detention regimes.[37] There is, however, a considerable body of CJEU case law. Hence, in *JZ* the CJEU provided for a definition of criminal detention as "covering any measure […] which, on account of the type, duration, effects and manner of implementation […] deprive the person concerned of his liberty in a way that is comparable to imprisonment."[38] The CJEU has further acknowledged the objective of preserving the offender's links with the community and preparing a successful resettlement after imprisonment.[39] Hence, in *Tsakouridis*,[40] AG Bot stated that a measure resulting in the expulsion of an EU citizen from the host Member

34 *Charter of Fundamental Rights of the European Union*, OJ 2016 C 202/391, 389 [CFREU]; Greer, Gerards & Slowe, *supra* note 29, 248; Douglas-Scott, *supra* note 29, 651; Wouters & Ovádek, *supra* note 30, 70.

35 TEU Art. 6 para. 3; Douglas-Scott, *supra* note 29, 645, 648; R. Schütze, 'Three "Bills of Rights" for the European Union', 30 *Yearbook of European Law* (2011) 1, 131; E. O. Eriksen, 'Why a Charter of Fundamental Human Rights in the EU?', 16 *Ratio Juris* (2003) 3, 352, 356.

36 CFREU Arts 1, 6, 7, 49(3), 4.

37 See section C.I.2.

38 *JZ v. Prokuratura Rejonowa* Łódź — Śródmieście, C-294/16 PPU, Judgment of 28 July 2016, ECLI:EU:C:2016:610, para. 47; V. Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice', 57 *Common Market Law Review* (2020) 1, 45 [Mitsilegas 'Autonomous Concepts'].

39 A. Martufi, 'The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal?', 25 *Maastricht Journal of European and Comparative Law* (2018) 6, 672, 683; referring further to *Opinion of Advocate General Mengozzi*, C-42/11, delivered on 20 March 2012, ECLI:EU:C:2012:151.

40 *Land Baden-Württemberg v. Panagiotis Tsakouridis,* C-145/09, Judgment of 23 November 2010, ECLI:EU:C:2010:708 [*Baden-Württemberg Case*]; L. Mancano, 'The Place of Prisoners in European Union Law?', 22 *European Public Law* (2016) 4, 717, 745 [Mancano, 'The Place of Prisoners'].

State must not jeopardize the reintegrative function of criminal sanctions.[41] This rehabilitation-oriented approach was confirmed in the subsequent *P.I.* case.[42] Overall, the CJEU case law demonstrates a judicial willingness to assert a common undertaking of rehabilitation of wrongdoers, one that further enhances the pan-EU penal imaginary, and extends to all EU citizens.[43]

Further, there is a plethora of human rights norms relevant to detention, as deriving from the Council of Europe (CoE, or the Council), and the UN.[44] Indicatively, particular consideration should be paid to the European Convention on Human Rights (ECHR),[45] the rich case law of the European Court of Human Rights (ECtHR),[46] the reports of the Committee for the Prevention of Torture (CPT),[47] the European Prison Rules (EPR),[48] and the CoE White Paper

41 *Baden-Württemberg Case, supra* note 40, para. 51.

42 *P.I. v. Oberbürgermeisterin der Stadt Remscheid,* C-348/09, Judgment of 22 May 2012, ECLI:EU:C:2012:300; case largely unrelated to the scope of this thesis. For further analysis, see Mancano, 'The Place of Prisoners', *supra* note 40, 717, 743.

43 *Ibid.*

44 D. van Zyl Smit & S. Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (2009), 384.

45 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222 (amended by the provisions of Protocol No. 14 (CETS No. 194)) [ECHR].

46 See indicatively *Hirst v. the United Kingdom (No. 2),* ECtHR Application No. 74025/01, Judgment of 6 October 2005, para. 69; *Kudła v. Poland* , ECtHR Application No. 30210/96, Judgment of 26 October 2000, para. 92; *Muršić v. Croatia,* ECtHR Application No. 7334/13, Judgment of 20 October 2016, para. 99.

47 Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'CPT Standards' (2010), available at https://www.refworld.org/reference/themreport/coecpt/2011/en/78171 (last visited 3 October 2024).

48 Council of Europe, Committee of Ministers, 'Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules' (2006), available at https://www.refworld.org/legal/resolution/coeministers/2006/en/11978 (last visited 3 October 2024).

on Overcrowding;[49] but also the Mandela Rules,[50] the UN Convention against Torture (CAT),[51] and the UNODC Handbook on prison overcrowding.[52]

All EU Member States subscribe to the CoE and UN norms, the importance of which may not be understated.[53] Furthermore, the CJEU has acknowledged that "the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety".[54] This is codified under the Treaty framework,[55] and has led scholars to observe that "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".[56] Further, the CJEU often relies on the ECtHR jurisprudence, and the EU itself is legally obliged to accede to the ECHR.[57]

Overall, then, and "by virtue of the set of common values that they share",[58] EU Member States are presumed to provide for equivalent standards of protection, as members to the Union of values. This presumption extends to

49 Council of Europe, European Committee on Crime Problems, 'White Paper on Prison Overcrowding' (2016), available at https://rm.coe.int/16806f9a8a; (last visited 3 October 2024) [Council, 'White Paper on Prison Overcrowding'].

50 'Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977' (1977), available at https://www.refworld.org/legal/resolution/ecosoc/1977/en/91409 (last visited 3 October 2024).

51 GA Res. 39/46, UN Doc. A/RES/39/46, 10 December 1984.

52 United Nations Office on Drugs And Crime, 'Handbook on Strategies to Reduce Overcrowding in Prisons' (October 2013), available at https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf (last visited 3 October 2024).

53 T. Ahmed & I. de Jesus Butler, 'The European Union and Human Rights: An International Law Perspective', 17 *European Journal of International Law* (2006) 5, 771.

54 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change,* C-366/10, Judgment of 21 December 2011, ECLI:EU:C:2011:864, para. 101; referring also to *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.,* C-286/90, Judgment of 24 November 1992, ECLI:EU:C:1992:453, paras 9, 10; *A. Racke GmbH & Co. v. Hauptzollamt Mainz,* C-162/96, Judgment of 16 June 1998, ECLI:EU:C:1998:293, paras 45, 46.

55 TEU Art. 3.

56 J. Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?', 3 *Cambridge International Law Journal* (2014) 3, 696, 702.

57 TEU Art. 6 para. 2; see further *Opinion 2/13*, *supra* note 25.

58 TEU Art. 4 para. 2; K. Lenaerts, 'La Vie Après l'Avis: Exploring the Principle of Mutual (yet not Blind) Trust', 54 *Common Market Law Review* (2017) 3, 805, 809.

include individual rights in post-trial detention. Owing to the efforts of both the EU itself, but also the regulatory norms provided by both CoE and UN, it has been widely regarded that "European prison law and policy based on fundamental human rights principles have become part of a wider European cultural heritage".[59] In turn, this presumption is instrumentalized, transformed into the legal principle of mutual trust, a principle that lies at the core of judicial cooperation in criminal matters, and allows for the functioning of the EU as an AFSJ.

In this fashion, the EU has been using the regulatory framework of prisons to govern the threat of danger of cross-border criminality in the heterotopic AFSJ.

II. Towards Legal Harmonization

In a series of cases, the CJEU was faced with detention regimes that lie in disharmony with the mutual trust principle. To balance between the presumption of equivalent rights protection, and the reality of disparate detention regimes, the Court has qualified trust, admitting that in exceptional cases the executing State may request assurances to be provided by the issuing one. Simultaneously, the Court has called for further harmonization of detention at EU level, a call echoed by EU institutions and scholars.

1. Mutual Trust Qualified

On paper, the EU emerges as a Union of values, with all States presumed to provide for equivalent human rights protection; a presumption that extends to detainee rights, and on the basis of the pan-EU penal imaginary. In the abstract, then, member States are presumed to comply with EU law, and A is to trust B at all times.

Yet what if this abstract notion of equivalence is challenged? Assume the following hypothetical. Member State A seeks to impose a custodial sentence on individual X, who is residing in Member State B; to this end, A submits a mutual recognition request, requesting the surrender of X.[60] In principle, both A and B (are presumed to) abide by the EU human rights framework, as extending in detention. Consequently, the executing State B has to recognize the judicial will of A, and surrender X to be send to prison. Yet, it may be that B is aware of

59 Van Zyl Smit & Snacken, *supra* note 44, 384.

60 On the basis of Council Framework Decision 2002/584/JHA, OJ 2002 L 190/01 [EAW].

certain deficiencies in the prison system of the issuing State, and thus concerned that, in case of surrender, the rights of X shall be endangered. The facts of this specific, concrete case, go against the abstract notion of mutual trust – what is to be done in such a scenario?

This query was posed before the CJEU at the landmark joined case of *Aranyosi/Căldăraru,* issued in 2016.[61] In its facts, the case concerned mutual recognition orders submitted by Poland and Hungary to Germany. Yet the latter was aware of structural deficiencies in the prison systems of both Poland and Hungary, and thus concerned that the surrendered individuals would suffer breaches in regards to their individual rights. Simultaneously, however, Germany had no choice but to surrender, for the alternative would equal to a violation of the binding obligations imposed by the legal principles of mutual recognition and trust. Subsequently, Germany referred the case to the CJEU.

The latter stressed the reliance of mutual recognition on mutual trust, which in turn presumes all member States "are capable of providing equivalent and effective protection of the fundamental rights recognized at EU level, particularly in the Charter".[62] Nevertheless, it acknowledged that in "exceptional circumstances"[63] the presumption of equivalent protection may be deferred. To this end, it forged a two-stage test. In accordance to this test, and if the executing is in possession of evidence suggesting that surrender may result in a violation of the CFREU, it must proceed in the following manner.

Firstly, it must determine whether detention conditions in the issuing State suffer from deficiencies, "which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention".[64] Information that is objective, reliable, specific, and properly updated, may be used as evidentiary basis for this assessment; such information may stem, *inter alia*, from CoE case law and monitoring reports on detention.[65] 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 generally falls in line with the pan-EU penal imaginary and adequately respects individual rights.[66]

61 *Pál Aranyosi and Robert Căldăraru*, C-404/15 and C-659/15 PPU, Judgment of 5 April 2016, ECLI:EU:C:2016:198.
62 *Ibid*., para. 77.
63 *Ibid*., paras 78, 82.
64 *Ibid*., para. 89.
65 *Ibid*., para. 89.
66 *bid*., para. 90.

Should the executing authorities find that there is no "real risk of inhuman or degrading treatment by virtue of general conditions of detention"[67] in the issuing State, then it must fulfil its mutual recognition obligations and surrender. If, instead, such a risk is identified, the executing court 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 generalized risk already identified. In this stage, the executing court must therefore narrow its research scope, and take into account the specific standards envisaged, in case of surrender.[68] In other words, here the question is whether this specific individual to be detained within this specific prison will likely suffer any human rights infringements. To that end, the executing authority must request that the issuing State provides it will all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State.[69] While waiting for the information to arrive, mutual recognition "must be postponed but it cannot be abandoned".[70]

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; though other cases have followed since, including *ML, Dorobantu,* and *E. D. L.*[71] Faced with a concrete case that goes against the abstract presumption of mutual trust and the normative penal imaginary, the CJEU judgment proves an attempt to reconcile trust and rights. While the Court confirms the fundamental importance of mutual trust, it nevertheless allows for fundamental rights considerations to delimit its application, even if only in exceptional circumstances.[72] In this regard, the judgment falls in line with the voices raised in favor of revisiting mutual recognition instruments, to ensure individual prerogatives are accounted for.[73]

67 *Ibid*., para. 91.
68 *Ibid*., para. 92.
69 *Ibid*., para. 95.
70 *Ibid*., para. 98.
71 *ML*., C-220/18 PPU, Judgment of 25 July 2018, ECLI:EU:C:2018:589 [*ML Case*]; *Dumitru-Tudor Dorobantu,* C-128/18, Judgment of 15 October 2019, ECLI:EU:C:2019:857; *E. D. L.,* C-699/21*,* Judgment of 18 April 2023, ECLI:EU:C:2023:295.
72 Bay Larsen, *supra* note 14, 140.
73 V. 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', 31 *Yearbook of European Law* (2012) 1, 319, 363 [Mitsilegas 'The Limits of Mutual Trust'].

2. EU Prison Charter

While maintaining the fundamental importance of mutual trust for the AFSJ *acquis*, the Court nevertheless suggested that further legal harmonization of detention at EU level should be pursued. In his Opinion, AG Bot noted that Article 82 TFEU "presents a legal basis for harmonization of national legislation in order to facilitate mutual recognition",[74] a position further adopted by AG Pitruzzella.[75] The European Parliament has reiterated this point, calling for the adoption of an EU Prison Charter (EPC).[76] In the same line, EU law scholars have been increasingly advocating for the necessity of legally-binding detention standards at EU level.[77] It should be noted that the CoE has further called for similar action.[78]

Now, in the EU context, the point of harmonization measures is to recalibrate the AFSJ, ensuring that individual rights are protected in practice, and thus safeguarding the effective functioning of mutual recognition instruments, and rescuing mutual trust.[79] This utilitarian function of AFSJ measures on

74 *Opinion of Advocate General Bot*, C-404/15 and C-659/15, delivered on 3 March 2016, ECLI:EU:C:2016:140, paras 100, 182.

75 *Opinion of Advocate General Pitruzzella*, C-653/19 PPU, delivered on 19 November 2019, ECLI:EU:C:2019:983; see further *ML Case, supra* note 71, para. 90.

76 European Parliament Resolution 2015/2062(INI), OJ 2018 C 346/94, para. 59 [EP Resolution 2015/2062(INI)].

77 L. Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law', 56 *Common Market Law Review* (2019) 1, 61 [Mancano, 'Storming the Bastille']; T. Marguery, 'Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners Framework Decisions', 25 *Maastricht Journal of European and Comparative Law* (2019) 6, 704 [Marguery, 'Towards the End']; A. Soo, 'Common Standards for Detention and Prison Conditions in the EU: Recommendations and the Need for Legislative Measures', 20 *ERA Forum* (2019) 3, 327; S. Peers, *EU Justice and Home Affairs Law. Volume II EU Criminal Law, Policing, and Civil Law*, 4th ed. (2016); C. Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities', 6 *European Papers* (2021) 1, 311 [Papachristopoulos, 'Shaping the Future'].

78 Council Recommendation 1656(2004) of 27 April 2004, available at https://pace.coe.int/files/17208/pdf (last visited 3 October 2024); Council of Europe, Committee on Legal Affairs and Human Rights, 'Situation of European Prisons and Pre-Trial Detention Centres' (2004), Doc. 10097, available at https://pace.coe.int/files/10459/html (last visited 3 October 2024) [CoE, 'Situation of Prisons']; Council of Europe, Committee on Legal Affairs and Human Rights, 'European Prison Charter' (2006), Doc. 10922, available at https://pace.coe.int/files/11203/pdf (last visited 3 October 2024).

79 V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe* (2016) [Mitsilegas *EU Criminal Law After Lisbon*]; I. Wieczorek, *The*

individual rights is reflected in the second paragraph of Article 82 TFEU, suggested as legal basis for harmonization, which provides that:[80]

> *"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. 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"

In this fashion, disparities between national prison systems are conceptualized as limitations to the functioning of the legal principle of mutual trust, and an issue to be addressed via litigation.

In terms of substance, EU litigation in detention would take the form of an EU Prison Charter. Such a Charter would essentially mirror the soft law standards enshrined in soft-law instruments, such as the European Prison Rules or the Mandela standards, in essence transforming them into hard law (what scholarship dubs the 'hardening' of soft law).[81] What is to be harmonized covers virtually every aspect of prison law.[82] In more detail, harmonization would 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 towards the prevention of suicide; material prison conditions, including accommodation, ventilation, light, and food; the right of access to internal and, if necessary, external medical services; re-education, training, rehabilitation, and reintegration initiatives, that would allow the detainee to return into society and the workforce, and in particular through the provision of information

Legitimacy of EU Criminal Law (2020) [Wieczorek, *The Legitimacy of EU Criminal Law*].

80 TFEU Art. 82 para. 2.

81 F. Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law', 21 *European Law Journal* (2015) 1, 68.

82 D. van Zyl Smit, 'Prison Law', in M. D. Dubber & T. Hörnle (eds), *The Oxford Handbook of Criminal Law* (2015), 988.

to prisoners concerning the resources available to help them prepare for such reintegration.[83]

As already noted, such provisions are already enshrined at European level, in a number of soft law instruments, including the European Prison Rules, and the Mandela standards. In essence, then, an EU Prison Charter would add little in terms of content, or substance; nevertheless, that is not to say the Charter would be without any value. Instead, the key impact of such a Charter would lie in its form. If indeed adopted in accordance to the recommendations suggested by scholars and the European Parliament itself, the EPC will assume the form of a legally binding document, stipulating specific objectives to be achieved by the national authorities. Further, 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 enforcement mechanisms.[84] Indeed, it is exactly the binding nature of such standards, and the enforcement machinery supporting their implementation, that showcase their potential.

An EPC would add clarity. As already stated, there are a number of relevant provisions enshrined under European human rights law (particularly within the CFREU and the ECHR) that encompass rights relevant to the detention setting. However, such provisions are abstract in their design and aspiration, addressed to all individuals, and without accounting for the specific context of detention. To utilize Article 4 CFREU as an example; dictating that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment" may constitute part and parcel of the EU values, yet provides no clarity on the manner in which national authorities should design and manage their prisons, to fall in line with the Article's commands. In this light, a detailed account of every aspect of prison law, provided in the form of the Charter, would provide further clarity.[85] Further, it is well know that legally binding norms have

83 EP Recommendation 2003/2188(INI), OJ 2004 C 102 E/154, 154, 159 [EP Recommendation 2003/2188(INI)].

84 A. Jakab & D. Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (2017); K. W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 3, 421.

85 N. Luhmann, *Law as a Social System* (2004), 148; Mancano, 'Storming the Bastille', *supra* note 77, 61; Marguery, 'Towards the End', *supra* note 77, 704; Papachristopoulos, 'Shaping the Future', *supra* note 77, 311.

an expressive impact that may interact with and influence their recipients; in this sense, the Charter may prove conclusive.[86]

Naturally, one may consider that the same function is already fulfiled by the detailed rundown of documents such as the European Prison Rules, or the Mandela standards. However, such provisions originate from the CoE and UN respectively, institutions lacking the enforcement bite of EU law.[87] The entire CoE apparatus is based on good faith: "[i]n practice, the entire Convention system depends on the willingness of the Contracting States".[88] Further, adopting detention standards at EU level would allow the CJEU to interpret and rule on them, allowing for judicial review to occur at EU level. Allowing for the CJEU to rule on detention standards would potentially be a considerable benefit, especially in light of the heavy workload of the ECtHR.[89] In addition, it has been noted that ECtHR judicial verdicts and mandates are often outright ignored, or implemented with such a delay that often amounts to *de facto* non-implementation.[90] Consequently, and from the perspective of the individual, it seems that the current mechanisms in place provide only for a rather "distant opportunity" for human rights protection.[91]

In light of such observations, and considering the potential added value of further harmonization in terms of clarity and effectiveness, calls for an EU Prison Charter are ever-increasing, with EU scholarship and institutions both seeking to utilize law and doctrine to further strengthen mutual trust. Indeed,

86 C. R. Sunstein, 'On the Expressive Function of Law', 144 *University of Pennsylvania Law Review* (1996) 5, 2021; L. Lessig, 'Social Meaning and Social Norms', 144 *University of Pennsylvania Law Review* (1996) 5, 2181; E. A. Posner, 'Symbols, Signals, and Social Norms in Politics and the Law', 27 *Journal of Legal Studies* (1998) S2, 765.

87 De Witte, *supra* note 29, 859; Soo, *supra* note 77, 327; D. Roper, 'Compliance With the European Convention on Human Rights: Testing Competing Theoretical Perspectives With Post-Communist Countries', 45 *East European Quarterly* (2017) 3-4, 123, 137.

88 B. Rainey, E. Wicks & C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th ed. (2017), 59.

89 S. Flogaitis, T. Zwart & J. Fraser, *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (2013), 26; A. Follesdal, B. Petes & G. Ulfstein, *Constituting Europe* (2013), 43.

90 Jakab & Kochenov, *supra* note 84; L. R. Glas, 'The European Court of Human Rights Supervising the Execution of its Judgments', 37 *Netherlands Quarterly of Human Rights* (2019) 3, 228; A. Szklanna, 'Delays in the Implementation of ECtHR Judgments: The Example of Cases Concerning Electoral Issues', in W. Benedek *et al.* (eds), *European Yearbook on Human Rights 2018* (2019), 445.

91 M. Avbelj, 'Human Rights Inflation in the European Union', in L. Violini & A. Baraggia (eds), *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors* (2018), 7.

the narrative of doctrine as an expressive, clarifying, binding force, as presented in this section, has merit, and should not be discarded.

C. A Story of Multidisciplinary

Doctrine has undoubtedly proven useful for the EU. Transforming normative convergence into legal principle has allowed for efficient governance of cross-border criminality in the heterotopic AFSJ; qualifying mutual trust in light of exceptional fundamental rights violations, and calling for legal assurances to be provided by the executing judiciary, provides for a much-needed balance between the effectiveness of EU law and individual rights; while further legal harmonization of detention at EU level seems the way to ensure further confidence between States, and cement the presumption of equivalent rights.

Nevertheless, this section submits that the EU cannot proceed on doctrine alone. To this end, the analysis uncovers potential pitfalls of the pure doctrinal approach, while drawing attention to the merits of a multidisciplinary, law in context approach.

I. The Limitations of Doctrine

A closer look at the reality of detention across EU States reveals that, despite the existence of comprehensive normative standards at European level, disparities persist – consequently, the effectiveness of further harmonization should not be regarded as panacea. In addition, both the CJEU approach, and the EPC proposal, while seeking to reinforce trust, run the risk of further undermining or even replacing it instead.

1. Law in Action: Towards Divergence

A first hurdle to a purely doctrinal approach may be revealed by assessing the very reality of detention regimes across the Union. An analysis of relevant judicial and monitoring findings demonstrates that, despite the existence of comprehensive normative standards deriving from the pan-EU penal imaginary, protection of individual rights at EU prisons proves disparate, and individual rights violations persist.

The primary issue faced by EU prison systems is that of overcrowding, to be identified as the situation where the number of inmates housed in a

penitentiary eclipses the institution's official capacity.[92] Latest qualitative data from the Council of Europe reveal one third of EU Member States as operating over their design capacity, where inmates housed exceed the number of detention places available.[93] Further, nearly half of EU States are facing a turnover ratio of 50% or less.[94] The importance of the number may not be understated: as the CoE recognizes, "'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".[95]

Judicial findings confirm statistical observations. To this end, it is worth drawing attention to ECtHR *pilot* and *leading* judgments.

Pilot judgments serve to identify "structural problems underlying repetitive cases" and revealing a "systemic problem".[96] Five pilot judgments have been issued regarding overcrowding, against five Member States: Poland (*Orchowski*, and *Norbert Sikorski*);[97] Italy (*Torreggiani*);[98] Bulgaria (*Neshkov*);[99] Hungary (*Varga*);[100] and Romania (*Rezmiveș*).[101] In each of these cases, the Court 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

92 Council, 'White Paper on Prison Overcrowding', *supra* note 49, para. 10.

93 Member States facing overcrowding include Romania, Greece, Cyprus, Belgium, Italy, France, Sweden, and Hungary. There are two more that are perilously close to maximum capacity: Czechia, and Austria. M. F. Aebi *et al., Prisons and Prisoners in Europe 2021: Key Findings of the SPACE I Report* (2023), 10.

94 The turnover ratio allows for an estimation on the potential reduction in prison numbers. Amongst the EU States with a low turnover ratio one finds Hungary, Czechia, Greece, Sweden, Romania, and Belgium repeated; other EU members include Estonia, Lithuania, Spain, Portugal, Slovakia, and Germany. *Ibid.,* 15.

95 *Ibid.,* 14.

96 *European Court of Human Rights, Factsheet – Pilot judgments* (2020) 1; see further L. R. Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice', 34 *Netherlands Quarterly of Human Rights* (2016) 1, 41.

97 *Orchowski v. Poland,* ECtHR Application No. 17885/04, Judgment of 22 October 2009 [*Orchowski Case*].; *Norbert Sikorski v. Poland,* ECtHR Application No. 17599/05, Judgment of 22 October 2009 [*Sikorski Case*].

98 *Torreggiani and Others v. Italy,* ECtHR Application Nos 43517/09, 46882/09, 55400/09 *et al.,* Judgment of 8 January 2013 [*Torreggiani Case*].

99 *Neshkov and Others v. Bulgaria,* ECtHR Application Nos 36925/10, 21487/12, 72893/12 *et al.,* Judgment of 27 January 2015 [*Neshkov Case*].

100 *Varga and Others v. Hungary,* ECtHR Application Nos 14097/12, 45135/12, 73712/12 *et al.,* Judgment of 10 March 2015 [*Varga Case*].

101 *Rezmiveș and Others v. Romania,* ECtHR Application Nos 61467/12, 39516/13, 48213/13 *et al.,* Judgment of 25 April 2017 [*Rezmives Case*].

confirmed by the sheer number of applications received by the Court, ranging in the hundreds. In other words, the issue of overcrowding does not concern a closed group of inmates in a limited number of penitentiaries; instead, it expands and encompasses the entirety of the prison population. This is confirmed in the body of the cases themselves; thus, and by way of example, in *Varga* the Court found a litany of issues "neither prompted by an isolated incident nor attributable to a particular turn of events in those cases, but originated in a widespread problem and […] capable of affecting, a large number of individuals".[102] Analogous observations are to be found in each case.[103]

Similarly, leading cases are understood "as revealing new structural [and] systemic problems, either by the Court directly in its judgment, or by the Committee of Ministers in the course of its supervision of execution".[104] Regarding material conditions of detention, the ECtHR has dealt with leading cases concerning Slovenia (*Mandić and Jović*, and Štrucl);[105] Greece (*Samaras*; *Tzamalis;* and *Al. K.*);[106] Belgium (*Vasilescu*);[107] Portugal (*Petrescu*);[108] and France (*J.M.B*).[109] Once more, in each of these cases, the Court found issues in the prison systems of the respective States, with prison systems burdened by overcrowding, and overall poor and harsh conditions.[110]

102 *Varga Case, supra* note 100, para. 99.

103 *Orchowski Case, supra* note 97, para. 147; *Sikorski Case supra* note 97, para. 132; *Torreggiani Case, supra* note 98, para. 70; *Neshkov Case, supra* note 99, para. 226; *Rezmiveș Case, supra* note 101, para. 106.

104 Council of Europe, *14th Annual Report of the Committee of Ministers* (2021), 12, 83.

105 *Mandić and Jović v. Slovenia,* ECtHR Application Nos 5774/10 and 5985/10, Judgment of 20 October 2011 [*Mandić Case*]; Štrucl *and Others v. Slovenia,* ECtHR Application Nos 5903/10, 6003/10, 6544/10, Judgment of 20 October 2011 [Štruc*l Case*].

106 *Samaras and Others v. Greece,* ECtHR Application No. 11463/09, Judgment of 28 February 2012 [*Samaras Case*]; *Tzamalis and Others v. Greece,* ECtHR Application No. 15894/09, Judgment of 4 December 2012 [*Tzamalis Case*]; *Al. K. v. Greece,* ECtHR Application No. 63542/11, Judgment of 11 December 2014 [*Al. K. Case*].

107 *asilescu v. Belgium*, ECtHR Application No. 64682/12, Judgment of 25 November 2014 [*Vasilescu Case*].

108 *Petrescu v. Portugal*, ECtHR Application No. 23190/17, Judgment of 3 December 2019 [*Petrescu Case*].

109 *J.M.B. and Others v. France*, ECtHR Application No. 9671/15, Judgment of 30 January 2020 [*J.M.B. Case*].

110 *Mandić Case, supra* note 105, para. 77; *Štrucl Case, supra* note 105, para. 81; *Tzamalis Case, supra* note 106, para. 41; *Samaras Case, supra* note 106, para 51; *Al. K Case, supra* note 106, para. 49; *Vasilescu Case, supra* note 106, 111; *Petrescu Case, supra* note 108, 74; *J.M.B. Case, supra* note 109, para. 254.

Accounting, then, for both pilot and leading judgments, the Strasbourg Court has found 10 out of the 27 EU Member States as systematically overcrowded. Further, the Court found a violation of article 3 ECHR in each pilot and leading case. Another right that is in peril is the right to liberty, as enshrined under Article 5 ECHR and Article 6 CFREU.[111] It should also be noted that, in the majority of these cases, the applicants complained that the prison authorities had also failed to respect their right to respect for private life (Article 8 ECHR). Unfortunately, however, such allegations were not dealt with extensively by the Court – instead, the ECtHR deemed the relevant complaints (and related facts) as already examined and considered under the viewpoint of Article 3 ECHR, and chose to refrain from embarking upon an analysis of the theoretical framework of Article 8, and its application regarding detention conditions. Consequently, no official violations in regards to Article 8 ECHR was found, though, in light of the detention conditions underlined above, it is submitted that its violation constitutes more than a theoretical danger.

While overcrowding constitutes the key issue, it is far from the only one. Indicatively, in *Orchowski* the ECtHR considered that detainees forced to share hygiene facilities and showers alongside with a group of strangers, or being constantly moved between cells and facilities, may suffer violations in regards to their individual privacy.[112] Further, in *Torreggiani*, the ECtHR acknowledged that factors such as lack of hot water, sufficient lighting, and ventilation, while not enough to amount to inhuman and degrading treatment on their own, "did not fail to cause the applicants additional suffering".[113] Besides the ECtHR, there are a number of CPT reports that list numerous factors that aggravate the detainee's situation. Indicatively, common problems that emerge seem to be the age and state of buildings,[114] or the lack of day-and-night guaranteed ready access to the toilet.[115] Accordingly, the latest Commission Recommendation on

111 Commission Recommendation C(2022) 8987 final of 8 December 2022, Recital 16 [Commission Recommendation C(2022) 8987 final]; L. Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (2019), 55 [Mancano, *The European Union*].

112 *Orchowski Case, supra* note 97, para. 134.

113 *Torreggiani Case, supra* note 98, para. 77.

114 Council of Europe, *Europees Comité voor de Preventie van Foltering en Onmenselijke of Vernederende Behandeling of Bestraffing, Openbare verklaring betreffende België*, CPT/Inf (2017) 18.

115 Council of Europe, *Report to the Government of Cyprus on the Visit to Cyprus Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 9 February 2017*, CPT/Inf (2018) 16.

detention acknowledges a number of serious and persistent issues facing national prison systems besides overcrowding, including "ill-treatment, the unsuitability of detention facilities as well as a lack of meaningful activities and of appropriate provision of healthcare".[116]

Suicide rates constitute another concerning indicator, with the European Prison Observatory noting that suicide rates of detainees are higher compared to those of the general population in the vast majority of EU States, with the suicide rates of detainees being 4.4 times more than those of the average population.[117]

In light of the nature and scope of such observations, the analysis submits that the reality of detention across EU prison systems frequently poses systemic risks of human rights violations, a finding that stands in stark contradiction to the pan-EU penal imaginary. Indeed, prisons in the EU seem to resemble the faces of Janus: harmonized on paper, disparate in reality. In their duality, prison systems represent a textbook case of doctrine v. reality, where the regulation of norms does not reflect on their enforcement, a classic problem described by R. Pound a century ago:[118]

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.

Once more, it should be noted that structural shortcomings in detention regimes persist despite the common influence of EU, CoE, and UN norms, and despite the *Aranyosi* judgment. Further stressing the latter point, it is submitted that the detention reality reveals a key weakness of the CJEU approach. While seeking to balance between trust and rights, the Kirchberg Court has failed to redress the root cause of the issue: poor detention conditions. Inequivalent, ineffective protection of prisoner rights remains a real, actual, and considerable hurdle for EU law, threatening its anti-crime policies and common human rights values; and the CJEU two-tier approach does not provide for an answer. As acknowledged by the EU Commission:[119]

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

116 Commission Recommendation C(2022) 8987 final, *supra* note 111, Recital 15.
117 European Prison Observatory, Prisons in Europe, 2019 Report on European Prisons and Penitentiary Systems (2020), 16.
118 R. Pound, 'Law in Books and Law in Action', 44 *American Law Review* (1910) 1, 12, 15.
119 Commission Recommendation C(2022) 8987 final, *supra* note 111, Recital 11.

to a real risk of breach of fundamental rights in close to 300 cases, including on the basis of inadequate material conditions of detention.

Consequently, the impact of the two-stage judicial test seems to reflect more in regards to mutual trust and mutual recognition instruments, rather than detention itself.[120] In this light, the CJEU approach seems more like a makeshift response – a response that has the potential to work, but only if national prison systems were actually in a trajectory of convergence. In such a (theoretical) scenario, challenges by the executing State would gradually wane, and mutual trust would be restored to its former glory. Yet, the analysis suggests the contrary: the material problem of detention is not getting better, and States seem to be diverging even further.

In this fashion, and while the EU has been relying on the law in the books (prisons as *ought to be*, according to the normative standards) to govern the threat of cross-border criminality in the heterotopic AFSJ, it has largely ignored the law in action (prisons as *are*, in reality), and has exposed itself to a litany of problems.

2. Legal Doctrine Undermining Trust

It was previously argued that the two-stage test established by the CJEU in *Aranyosi* strives to balance between rights and trust, an approach to be welcomed; it was further submitted that those advocating for the hard-law harmonization of detention at EU level in the form of an EPC center on its potential to bring about clarity and enforcement. While the analysis agrees with the beneficial potential of such points, there are nevertheless certain pitfalls to be considered. In detail, it is submitted that both the *Aranyosi* and the harmonization approach risk having the side effect of further undermining trust: both horizontally (in terms of mutual trust between States), and vertically (in terms of EU law legitimacy).

Regarding the *Aranyosi* two-tier approach, the following should be noted. In essence, the Court appoints States as watchdogs of fellow Member States.[121] Ultimately, however, such a strategy permits (if not actively nudging towards) the gradual erosion of trust. This was observed by AG Bot, who warned against allowing for national authorities to assess the prison systems of their peers,

120 J. Burchett, A. Weyembergh & M. Ramat, *Prisons and Detention Conditions in the EU* (2023).

121 A. von Bogdandy *et al.,* 'Reverse Solange–Protecting the Essence of Fundamental Rights Against EU Member States', 49 *Common Market Law Review* (2012) 2, 489.

as this could undermine mutual trust, while potentially promoting national biases.[122] Indeed, and in the case of *ML*, it has been noted that the sheer number of questions (78 in total) that the German judiciary submitted to its Hungarian counterpart constitutes evidence of limited trust, and a direct contradiction to that principle.[123] Consequently, this weakens mutual recognition mechanisms, further undermining the struggle against criminality and impunity, encouraging forum shopping behavior,[124] weakening the Union as an AFSJ, and ultimately harms the common interests of EU States and citizens – essentially rendering decades of effort null.

In addition, it should be reminded that any qualifications to mutual trust are to be temporary (recognition and execution may be deferred, rather than abandoned), and waived once the issuing State provides adequate assurances. In this fashion, it has been suggested that mutual recognition results in the *de facto* harmonization of EU legal systems,[125] as it forces national orders to convert towards the lowest common denominator of individual rights protection – something that further undermines the legitimacy of the EU as a Union of values.

Furthermore, the adoption of positive law and doctrine carries substantial risks that need to be considered and weighed in advance. As already noted, law has the capacity to encourage trust; yet it can also replace the need for trust altogether, or even encourage States to move in the opposite direction, that of mistrust.

Mutual trust, by definition and design, requires a balance between knowledge and ignorance. Trust without any knowledge proves credulousness; yet trust without any ignorance constitutes a contradiction, for full knowledge would render trust entirely without meaning.[126] As noted by Ribstein:[127]

122 *Opinion of Advocate General Bot*, *supra* note 74, paras 78, 93, 96, 106, 122.

123 A. 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), 18.

124 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 Mancano, *The European Union*, *supra* note 111, 57.

125 Schroeder, *supra* note 17, 145.

126 T. Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"', 17 *German Law Journal* (2019) 3, 340, 346, 347.

127 L. E. Ribstein, 'Law v. Trust', 81 *Boston University Law Review* (2001) 3, 553, 579.

> "The distinct concept of trust requires voluntary subjection to risk, or vulnerability. Legal coercion of faithful behavior therefore reduces the opportunities for trust to develop. Thus, legal coercion not only is irrelevant to the creation of trust, but also can cause a substitution of costly legal constraints for relatively friction-free […] trust."

Now, one may argue that harmonization in the form of an EPC would introduce no more than minimum rules, leaving Member States with the discretion to adopt higher standards. This much is noted in Article 82 TFEU, according to which harmonization "shall not prevent Member States from maintaining or introducing a higher level of protection for individuals".[128] However, it is submitted that there is a real risk that the nature of the EPC rules would be in effect maximum, and hence render mutual trust entirely without meaning. To reinforce this point, the EU standards in pre-trial (remand)[129] criminal detention may be utilized as a case scenario.

While no EU secondary law exists on post-trial detention, the Union has adopted a number of Directives on the basis of Article 82 TFEU, and working towards the objective of strengthening the presumption of mutual trust on the ground. These include the Directive on the right to interpretation and to translation in criminal proceedings;[130] the Directive on the right to information in criminal proceedings;[131] the Directive on the presumption of innocence and of the right to be present at the trial in criminal proceedings;[132] the Directive on legal aid;[133] 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 while deprived of liberty;[134] and the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings.[135] In line with the EPC proposition, each Directive regulates some kind of procedural right, seeking to establish common minimum rules at EU

128 TFEU Art. 2 para. 2.
129 For notes on terminology, see C. Morgenstern, 'Pre-Trial/Remand Detention in Europe: Facts and Figures and the Need for Common Minimum Standards', 9 *ERA Forum* (2009) 4, 527.
130 EP and Council Directive 2010/64/EU, OJ 2010 L 280/1 [Directive 2010/64/EU].
131 EP and Council Directive 2012/13/EU, OJ 2012 L 142/1 [Directive 2012/13/EU].
132 EP and Council Directive (EU) 2016/343, OJ 2016 L 65/1.
133 EP and Council Directive (EU) 2016/1919, OJ 2016 L 297/1.
134 EP and Council Directive 2013/48/EU, OJ 2013 L 294/1.
135 EP and Council Directive (EU) 2016/800, OJ 2016 L 132/1.

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".[136]

The scope of these procedural-rights Directives is delimited to pre-trial detention only. Hence, the Directive on interpretation and translation explicitly states that its protection extends:[137]

> "[…] 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 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."

Similar provisions are included in the remaining Directives, with all defining their scope of application as until the final judgment. Hence, and while applicable to pre-trial detention, they may not shape post-trial detention regimes.

Yet, while these Directives have been enacted to foster a climate of mutual trust on the ground, and consequently facilitate the functioning of mutual recognition instruments, 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. On the basis of Article 82 TFEU, harmonization of rights seems feasible if necessary to facilitate *mutual recognition* in criminal matters having *a cross-border dimension*.[138] Examples of such a scenario include criminals acting as part of a transnational network,[139] or criminals engaging in forum-shopping behavior, committing a crime in one Member State, before fleeing to another, seeking to abuse the variance between the two legal orders to escape punishment.[140] Essentially, Article 82

136 Directive 2010/64/EU, *supra* note 130, 1–7, Recital 9; similar declarations are incorporated in each Directive.

137 *Ibid*., Art. 2.

138 I. Wieczorek, *The Legitimacy of EU Criminal Law*, *supra* note 79.

139 I. Wieczorek, 'The Emerging Role of the EU as a Primary Normative Actor in the EU Area of Criminal Justice', 27 *European Law Journal* (2021) 1-3, 378 [Wieczorek, 'The Emerging Role of the EU'].

140 For an example, see A. E. Kouroutakis, 'The Italian European Arrest Warrants for the Five Greeks Taking Part in Riots and Their Rejection by the Greek Authorities', 7 *New Journal of European Criminal Law* (2016) 3, 295; see further G. Vermeulen, 'Where Do

TFEU seems to envision all instances where (judicial) cooperation between two or more EU Member States proves necessary, to tackle cross-border criminalization.[141] Nevertheless, this criterion of cross-borderness, as emerging from the TFEU, has been deemed irrelevant by CJEU case-law. In the case of *Moro*,[142] concerning the right to information Directive,[143] 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'".[144] However, and due to the wording, context, and objective of the Directive,[145] 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".[146] This is because the Directive should foster a general "climate of mutual trust",[147] so as to "build bridges"[148] that allow judicial cooperation between Member States to thrive in the AFSJ. 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 harmonization 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.[149]

While such a line most likely enhances the effectiveness and reach of the procedural rights safeguarded under the Directives, hence contributing to a

We Currently Stand With Harmonisation in Europe?', in A. Klip & H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (2002), 73.

141 A. Weyembergh, *L'Harmonisation des Législations: Condition de l'Espace Pénal Européen et Révélateur de ses Tensions* (2004), 139, 176; J. R. Spencer, 'Why Is the Harmonisation of Penal Law Necessary?', in Klip & van der Wilt, *supra* note 140, 43, 47; U. Sieber, 'The Forces Behind the Harmonisation of Criminal Law', in M. Delmas-Marty, M. Pieth & U. Sieber (eds), *Les Chemins de l'Harmonisation Pénale* (2008), 385, 393; I. Wieczorek, 'EU Harmonisation of Rules on Detention: Is EU Competence (Article 82(2)b TFEU) Fit for Purpose?', 28 *European Journal of Criminal Policy and Research* (2022) 3, 465 [Wieczorek, 'EU Harmonisation'].

142 *Gianluca Moro,* C-646/17, Judgment of 13 June 2019, ECLI:EU:C:2019:489 [*Moro Case*].

143 Directive 2012/13/EU, *supra* note 131, 1–10.

144 *Moro Case, supra* note 142, para. 36 (emphasis added).

145 *Ibid.,* para. 37.

146 *Ibid.,* para. 41.

147 *Ibid.,* para. 39.

148 *Ibid.,* para. 42.

149 Wieczorek, 'The Emerging Role of the EU', *supra* note 139, 378.

climate of mutual trust, it nonetheless raises legitimacy concerns. Harmonization was never meant to equal unification of law, or turn the AFSJ into a single legal order; rather, the rationale behind harmonization is to approximate each EU legal order under a common minimum standard. The difference between unification and harmonization is explained masterly by Joutsen, who makes the analogy with music theory. Harmonization, he argues, allows the Union to work as an orchestra comprised of various, unique instruments, each performing in harmony with one another. Unification, instead, would be replacing the orchestra with a single synthesizer, which would produce all the sounds of the individual instruments in itself.[150] In this context, trust becomes obsolete, for "if the 'other' becomes much like 'myself', then trust is no longer a real issue".[151]

In light of these observations, one may wonder whether further harmonization would make mutual trust oblique, with law and doctrine serving as a replacement (rather than substitute) for trust.[152]

In addition, relying on legal norms may encourage mistrust – especially against the EU itself. There are two points to be made here.

Firstly, the legitimacy of the Union as a prison actor is disputed.[153] It is not clear whether the EU has the competence to adopt legally binding standards in the field of detention,[154] and Article 82 TFEU itself is not without limitations. From the wording of the provision itself, harmonization concerns individual rights "in criminal procedure". The terminology proves problematic; as already seen, a systematic interpretation of relevant pre-trial Directives reveals a conceptualization of criminal proceedings as extending up until the final judgment, consequently excluding the post-trial phase of sentence implementation.[155] Further, and even if such legal concerns are circumvented, it is doubtful whether EU litigation in post-trial criminal detention (the *sanctum sanctorum* of Westphalian sovereignty, and a highly symbolic area) would be accepted by the Member States. Instead, it is likely that, in such a scenario, the

150 Joutsen, *supra* note 14, 29, 30.

151 N. Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market', 2 *European Papers* (2017) 1, 93, 105.

152 Ribstein, *supra* note 127, 553, 574.

153 C. Papachristopoulos, 'On the Legitimacy of the European Prison Charter' *RIDP Libri* (2023), 285.

154 P. Caeiro, S. Fidalgo & J. P. Rodrigues, 'The Evolving Notion of Mutual Trust', 25 *Maastricht Journal of European and Comparative Law* (2018) 6, 689, 690.

155 Mancano, 'Storming the Bastille', *supra* note 77, 61.

Union would face allegations of competence creep.[156] This holds especially true on consideration of the development of the AFSJ, and the choice made to rely primarily on mutual trust and recognition, and to avoid harmonization.[157]

Secondly, and 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 Member States, and the EU itself.

Overall, law does not operate *in vitro*, and the potential of any further litigation efforts should be assessed *ex ante*.

II. The Potential of Multidisciplinarity

Relying on findings from the disciplines of criminological and political science, a plethora of non-legal factors that have the potential to shape compliance with normative rules on the ground emerges. Such findings should be considered in advance of any EU action in detention, and in line with an overall multidisciplinary, comparative, law in action approach.

1. Political, Fiscal, and Administrative Variables

Examining relevant criminological and political science literature, a plethora of factors that explain non-compliance of States with individual rights norms in prison emerges. In this light, it is submitted that even if an EU-wide binding document on detention is adopted, national authorities may prove unwilling to or incapable of granting it any meaningful effect. This may be due to the following political choices, or management constraints.

156 S. Weatherill, 'Competence Creep and Competence Control', 23 *Yearbook of European Law* (2004), 1, 7; J Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure', 16 *European Constitutional Law Review* (2020) 1, 33.

157 W. Eijsbouts & J. Reestman, 'Editorial: Mutal Trust', 2 *European Constitutional Law Review* (2006) 1, 1; A. Willems, *The Principle of Mutual Trust in EU Criminal Law* (2022), 1; Council of the European Union, *Tampere European Council, 15 and 16 October 1999 – Presidency Conclusions* (1999), para. 33; Ribstein, *supra* note 127, 553, 576, 581, 584.

From a political point of view, prisons are often instrumentalized, proving a useful tool in the State arsenal, used to control populations, secure State legitimacy, and exert an image of control. Hence, the argument goes, it is within the States' interest to maintain prisons in their current (poor) state. Prisons are by governors, to govern: actual crime rates, findings deriving from criminal justice and penology research, human rights aspirations, all assume a secondary role. Instead, the primary purpose and objective of State actors, when regulating and enforcing prison policies, revolve around control and symbolism.[158] In this manner, it is not uncommon for States to simultaneously foster and respond to punitiveness. This holds especially true at the political level, when considering official party ideologies and programs on criminal justice.[159] Tapping into public fears, and utilizing a tough-on-crime narrative, State authorities may end up fostering an overall culture of punitiveness, expressing "greater intolerance of deviance and deviants, and greater support for harsher policies and severer punishments".[160] Overall, a punitive State tends towards excessive punishment, harsh and severe penalties, cruelty, and penal harm.[161] Consequently, an EU Prison Charter with binding effect and enforcement capacities may not appeal to public authorities willing to tap into punitiveness, and craft a narrative of otherness and control – in this manner, the effectiveness of any doctrine is considerably undermined.

In addition, and even if States are politically resolved to give effect to the procedural and material standards proposed at EU level, they may find themselves in a position where they are simply unable to do so. Indeed, and to ensure detention conditions match the required standards, national authorities

158 F. E. Zimring, 'Imprisonment Rates and the New Politics of Criminal Punishment', 3 *Punishment & Society* (2001) 1, 161; D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001), 142; S. Karstedt & R. Endtricht, 'Crime and Punishment: Public Opinion and Political Law-and-Order Rhetoric in Europe 1996–2019', 62 *The British Journal of Criminology* (2022) 5, 1116.

159 B. Kutateladze, 'Measuring State Punitiveness in the United States', in H. Kury & E. Shea (eds), *Punitivity - International Developments Vol. 1: Punitiveness - A Global Phenomenon?* (2011), 151, 155.

160 M. Tonry, 'Determinants of Penal Policies', 36 *Crime and Justice* (2007) 1, 1, 5.

161 R. Matthews, 'The Myth of Punitiveness', 9 *Theoretical Criminology* (2005) 2, 175; M. Lynch, 'Theorizing Punishment: Reflections on Wacquant's Punishing the Poor', 37 *Critical Sociology* (2011) 2, 237; J. Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2003); J. Simon, ''Entitlement to Cruelty': Neo-Liberalism and the Punitive Mentality in the United States', in K. Stenson & R. R. Sullivan (eds), *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (2001), 125; T. R. Clear, *Harm in American Penology* (2014).

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 installed and 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 necessary reforms prove extensive, in order to deal with recurring, structural issues.[162] In other words, it may be that national authorities lack 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 debt crisis, inflation rates, and the global economic slowdown in the aftermath of the pandemic outbreak. The response of the Greek government to CoE findings condemning the Greek prison system summarizes this argument:[163]

> [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.

It should be noted that such domestic (in)capacity arguments often intertwine with the previous argument on political will. Indeed, findings demonstrate that it may not be a lack of funding *per se* that causes non-compliance, but rather the choice of the executive to prioritize other objectives.[164] A further administrative point proves of relevance: even if national authorities find themselves in possession of the required resources, and prove willing to divert them to prisons, it may be that a weak, inefficient legal, judicial, or executive structure delimits any capacity to do so – in this sense, institutional contraints should also be considered.[165]

Overall, then, it is exactly the strengths of an EU-wide Prison Charter – particularly its enforcement mechanisms – that may disincentivize States that

162 Papachristopoulos, 'Shaping the Future', *supra* note 77, 311.

163 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, 75.

164 S. Xenakis & L. 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', 70 *Crime, Law and Social Change* (2018) 1, 37.

165 N. K. Koulouris, *Supervision and Penal Justice: Alternative Sanctions and the Dispersion of the Prison* (2009); D. Anagnostou & A. Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', 25 *European Journal of International Law* (2014) 1, 205.

lack the political will or capacity potential from greenlighting the legislative process on the basis of Article 82(2) TFEU, or giving detention norms at EU level their full effect. In light of such considerations, when pondering on the problem of regulating detention at EU level, one may legitimately wonder whether further litigation shall prove beneficial – or, as stated by Beale in her seminal article, "what's law got to do with it?".[166]

2. Alternative Approaches

Accounting for the limitations of doctrine, the analysis submits that a multidisciplinary approach holds the greatest potential.

Previous sections already demonstrated the benefits of looking beyond the strict trust-detention-harmonization framing. By examining CoE judicial and monitoring findings, the analysis uncovered the multitude of problems facing detention; by utilizing criminological findings, it identified the various (not necessarily legal) potential factors responsible for State divergence from the pan-EU penal imaginary. In this line, one may further examine findings from compliance theory. Besides legislative action that gives rise to enforcement mechanisms, compliance theory suggests there are two core clusters that may be utilized to give EU law and policies full effectiveness: persuasion, and management.[167] As previously underlined, it may be that the willingness and capacity of State actors to give effect to a policy weighs more, compared to the existence or absence of law. Unsurprisingly, compliance theory suggests that initiatives aimed towards knowledge exchange, dialogue, or the provision of resources, may show greater promise, compared to a purely doctrinal approach.[168]

Regarding knowledge-exchange, the Union should strive towards inciting a detention-oriented debate. To this end, it should first raise awareness on the topic via various intra-EU fora, including the Radicalization Awareness Network

166 S. S. 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', 1 *Buffalo Criminal Law Review* (1997) 1, 23.

167 Compliance understood here as a process, or "the whole of ongoing negotiations, political and legal processes, and institutional change that are involved in the execution of EU law and policies and are functionally orientated to give EU law and policies full effectiveness"; E. Chiti, 'The Governance of Compliance', in M. Cremona (ed.), *Compliance and Enforcement of EU Law* (2012), 31, 32.

168 T. Risse, S. C. Ropp & K. Sikkink, *The Power of Human Rights – International Norms and Domestic Change* (1999).

(RAN) working group dealing with detention (RAN prisons);[169] Eurojust; the European Judicial Network (EJN); the European Judicial Training Network (EJTN); the Confederation of European Probation (CEP); the EU Agency for Law Enforcement Training (CEPOL); and the European Organization of Prison and Correctional Services (EuroPris). It should be admitted that there is already a relevant discussion in these groups; however, it has so far focused primarily on addressing the nature of detention as hurdle to criminal cooperation and mutual recognition.[170] The Union should instead strive to orient the debate to focus on detention itself (rather than dealing with the topic incidentally), and seek to initiate knowledge exchange and training efforts towards improving detention standards. As for resources, the EU has a broad array of sources to tap into. These include the EU Justice Programme,[171] the European Regional Development Fund, and the European Social Fund.[172]

Furthermore, the EU could utilize soft law to nudge Member States towards adopting and effectively enforcing individual rights in post-trial detention. To this end, the European Parliament has already adopted a series of Resolutions, explicitly stating that custodial sentences across EU States must have a corrective and reintegrative function.[173] In similar fashion, the EU Commission recently adopted a Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention

169 See dedicated page on the Commission website, https://home-affairs.ec.europa.eu/networks/radicalisation-awareness-network-ran/topics-and-working-groups/prisons-working-group-ran-prisons_en (last visited 4 October 2024).

170 See indicatively 'Expert Group Meeting on Radicalisation and Violent Extremism' (March 2022), available at https://www.cep-probation.org/expert-group-meeting-on-radicalisation-and-violent-extremism-29-march-2022-cologne-germany/ (last visited 4 October 2024); and Europris, 'Results for "Radicalisation"', available at https://www.europris.org/?s=radicalisation (last visited 4 October 2024).

171 EP and Council Regulation (EU) 1382/2013, OJ 2013 L 354/73; see further the STREAM ('Strengthening Trust in the European Criminal Justice Area Through Mutual Recognition and the Streamlined Application of the European Arrest Warrant') project, available at https://stream-eaw.eu/ (last visited 4 October 2024).

172 E. Sellier & A. Weyembergh, *Criminal Procedures and Cross-Border Cooperation in the EU's Area of Criminal Justice – Together but Apart?* (2020), 435; A. Weyembergh & L. 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', 12 *European Criminal Law Review* (2022) 1, 25; EP Resolution 2015/2062(INI), *supra* note 76, paras 49, 64, 67; EP Recommendation 2003/2188(INI), *supra* note 83, 154.

173 European Parliament Resolution A4-0468/98, OJ 1999 C 98/279, para. 78.

conditions.[174] Naturally, such soft law has no legally binding force, places no obligations on its addressees, and holds no enforceability nor justiciability; nevertheless, its expressive function should not be underestimated.[175] It should however be noted that, while rehabilitation and individual rights are explicitly acknowledged by EU institutions, they are nevertheless framed and approached under an effectiveness- and security-oriented angle.[176] In an analogous fashion to knowledge exchange and finance efforts, it is submitted that soft law measures should adopt detention as their core focus, rather than discussing the topic incidentally and within the context of other considerations.

In addition to utilizing non-legislative measures, it is argued that EU scholarship should engage in comparative analysis. At first level, comparisons could be drawn between various areas of EU law: the article already suggested that an analysis of legal harmonization of pre-trial detention may yield useful insights, that may guide future harmonization of post-trial detention. In the same line, future research should focus on analyzing mutual trust in a holistic manner, examining it within the context of criminal justice, but also civil justice in the AFSJ, and free movement of goods in the Single Market. Another area that could benefit from a holistic, comparative approach, is that of enforcement. The issue of detention in the EU may be framed as a question of how to ensure effective compliance with norms. In this fashion, an analysis of EU efforts towards enforcing rule of law standards could provide for a useful baseline. Finally, and while not criminal in nature, immigration and asylum detention is another field, the study of which may reveal useful implications for the future of EU action in prisons. By examining mutual trust, enforcement, and detention in various settings, research efforts may uncover lessons on what works and why, lessons to be transplanted in the area of criminal detention.

174 Commission Recommendation C(2022) 8987 final, *supra* note 111. See for further analysis T. Wahl, 'Commission Recommendation on Detention Conditions in the EU' (2023), available at https://eucrim.eu/news/commission-recommendation-on-detention-conditions-in-the-eu/ (last visited 4 October 2024).

175 TFEU Art. 288; F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 56 *Modern Law Review* (1993) 1, 19, 64; M. Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime', 8 *Journal of European Public Policy* (2001) 2, 192, 194; Jakab & Kochenov, *supra* note 84, 200.

176 *Council Conclusions on Enhancing the Criminal Justice Response to Radicalisation Leading to Terrorism and Violent Extremism*, Document 14419/15, 20 November 2015, Recital 5, 16; EP Resolution 2015/2063(INI), OJ 2017 C 366/101, Recital 10; EP Resolution 2015/2062(INI), *supra* note 76, Recital 66.

Finally, it should be reminded that detention, as part and parcel of criminal justice, is intrinsically linked to the notion of *locus*. In the words of Garland, "the rituals of criminal punishment – the court-room trial, the passage of sentence, the execution of punishment [is] the formalized embodiment and enactment of the conscience collective",[177] a conscience manifesting at local level. In this light, and in line with the principle of subsidiarity, the EU should strive to adopt a bottom-up (rather than top-down) approach, seeking to uncover problems specific to the individual systems of each State; design intervention that adapts to the needs and peculiarities of each system; and engage in dialogue with local governors, who are aware and expressive of the idiosyncrasies and identities of their people. Such initiatives prove paramount before embarking on any journey towards more law, that may have minimal or even counter-productive impact.

D. Conclusion

In light of such observations, plurality proves a core feature of the analysis, manifesting across its every aspect. There are many distinct legal systems across the Union, providing for various levels of individual rights protection; a multitude of (non-legal) factors shapes detention regimes; a rich body of norms comprising a multi-level pan-EU penal imaginary. The issues that emerge cannot be examined as if operating *in vitro* within a watertight, secluded legal environment. Instead, the interaction of multiple actors at various levels, and the interdisciplinary spillover, should both be acknowledged and accounted for in the analysis. Consequently, and rather than adopting a purely doctrinal approach, hoping that mutual trust and detainee rights may be commended by decree alone, a plurality of methodological approaches is to be preferred.[178] Such an approach will allow for the full comprehension of the problematic factors, and identify the best-suited policy options, which may not necessarily be legislative.[179] Indeed, prisons operate *in vivo*, with legal considerations proving

177 D. Garland, *Punishment and Modern Society: A Study in Social Theory* (1990), 67; M. Hildebrandt, 'European Criminal Law and European Identity', 1 *Criminal Law and Philosophy* (2007) 1, 57, 66; S. Miettinen, *Criminal Law and Policy in the European* Union (2012), 9; E. Luna, 'Sentencing', in M. D. Dubber & T. Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014), 964.

178 Wischmeyer, *supra* note 126, 362.

179 L. Barnett, 'The Process of Law Reform: Conditions for Success', 39 *Federal Law Review* (2011) 1, 161.

only part of the overall image – and doctrinal, inwards-looking methodology is only one amongst many tools to be utilized.

In (EU) law, long tradition dictates inward-looking methods, relying on the body of law itself, and examining doctrine through the lens of legal argumentation and reasoning. Anecdotally, most law students remain blissfully ignorant of the term 'multidisciplinary methodology' itself, focusing instead on studying the law, thinking on the law, writing about the law. While such a doctrinal, black-letter approach lies at the core of legal science, it often fails to consider the context in which the law operates, and the plethora of historical, societal, economic, and various other factors which go beyond the law or its interpretation. Law operates *in vivo*, and is simultaneously shaped by and shaping society. This is especially true when considering the function of law-making as policy-making; in other words, the function of law as an answer to a real, concrete, actual problem affecting society.[180] In conjunction with larger Union-level strategies, non-legal initiatives should be considered and promoted as potential routes to a solution. To this end, multidisciplinarity should lie at the core of a thorough *ex-ante* evaluation, to identify the root causes of inhumane prison conditions, and assess the anticipated impact of any legislative action in advance. The sentencing principle of one-size-does-not-fit-all holds true in this context. Intervention close to the ground, identifying and accounting for local needs and peculiarities, shows the greatest promise.

For the basis of its judicial cooperation mechanism, the Union built on the legal presumption of equivalent human rights protection, and on the basis of common normative standards. However, the law in action proved disparate to the law in the books, and the presumption of equivalent protection has been exposed as no more than legal myth. In this light, further efforts towards legal harmonization, while potentially consequential, should not be rushed, nor assumed to be panacea. To avoid erring twice, a multidisciplinary approach in EU prison policy is long overdue.

180 P. Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)', 97 *Georgetown Law Journal* (2009) 3, 803, 821.

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Capabilitarian Social Justice in EU: Care, Dependency, and the Conception of the Person

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Table of Contents

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Abstract

While the European Union (EU) is nominally committed to the promotion of social justice by virtue of Article 3 of the Treaty on the Functioning of the EU (TFEU), the substantive meaning of this objective remains an open question. By first presenting an ideal of social justice for the EU, and then comparing it to the acquis, this paper hopes to make a small contribution to a (necessarily larger) debate about the substantive content of the social justice objective and about the place of political philosophy within legal scholarship more broadly. To do so, Martha Nussbaum's capabilities approach (CA) is used as a starting point. Nussbaum proposes a list of ten central human capabilities, all of which must be ensured (at least) at a threshold level in order for a given polity to be considered minimally just. Rather than considering the individual capabilities, the analysis focuses on the conception of the person underlying Nussbaum's CA, contrasting it with the conception which emerges from the analysis of the legal subject in EU law. It argues that the latter is not only unrealistic but unjust. Focusing on the construction of the disabled legal subject, as well as its intersections with the statuses of 'worker' and 'migrant', the paper contrasts EU law and policy with Nussbaum's normative ideal. It finds that the conception of the person underlying the construction of the EU legal subject is insufficiently receptive to care and vulnerability as constitutively human traits, and moreover struggles to conceive of personhood outside of a productivity framework.

A. Introduction

While the European Union (EU) is nominally committed to the promotion of social justice by virtue of Article 3 of the Treaty on the Functioning of the EU (TFEU), the substantive meaning of this objective remains an open question – a question ill-suited for consideration from a purely doctrinal perspective for two reasons. For one, social justice can be considered an essentially contested concept. It is inherent in the notion of social justice that there are multiple competing and potentially mutually exclusive conceptions. Secondly, there is no official definition of social justice or its implications in either the treaty texts, secondary legislation, or case law; its use in institutional practice is ambiguous. Similarly, the documents of the Convention on the Future of Europe reveal little as to any intended meaning of the objective. Thus, not much can be gleaned from textual or teleological interpretation. Instead, this paper builds on political philosophy and its rich tradition of theorizing social justice. In doing so, it aims to demonstrate the value of normative approaches to EU law and, in particular, of approaches which take as their basis theories of justice, showing how they can embed intuitive diagnoses of injustice in EU law within a coherent normative framework. Moreover, political philosophy can help us consider which ends European integration should ultimately serve, a question which can easily recede into the background in positivist analyses but which is of immense importance at this junction. In times of Euro-skepticism and exit, crises of social legitimacy and of trust in European institutions, it is imperative to ask the question, "Whom is EU law for?"

To do so, the paper utilizes a theory of social justice developed by Martha Nussbaum and, in particular, the understanding of personhood it is based upon. Relying on Nussbaum's theory, this paper argues that the conception of the person underlying EU law is not only unrealistic but unjust. The analysis focuses specifically on the issues of care and dependency, as manifest in the conception of disability. This is because Nussbaum's treatment of these problems constitutes the most pertinent difference between her conception of the person and that which forms the basis of the various contract-based theories of justice predominant in the liberal tradition. Of course, by focusing on what is lacking, the paper cannot provide a full account of how capabilitarian social justice might be implemented in the EU. Instead, highlighting how the conception

of disabled persons[1] specifically fails to do justice to personhood as understood by Nussbaum, it shines a light on the *injustice* inherent in a conception of the person which does not sufficiently consider vulnerability and dependency. It is submitted that this can provide a starting point for thinking about what a legal system which aims to "promote social justice" ought to incorporate. The paper does so by first introducing the capabilities approach more generally before focusing on Nussbaum's iteration (section A), contrasting the conception of the person at the basis of her theory of social justice with those found in other social justice theories (section B). Having established the normative framework for assessing the conception of the person underlying the manner in which EU law constructs its legal subject, the following section argues for the relevance of analyzing EU law from this perspective and presents some general findings about the EU legal subject (section C). Subsequently, the analysis considers the specific case of disabled persons as particularly pertinent both for Nussbaum's theory and social justice in the EU more widely, demonstrating how the definition of disability in EU law betrays a reductionist and instrumentalist understanding of human beings which is not only problematic as a matter of principle but also arguably fails to capture the true nature of human beings (section D). Lastly, it is argued that the conception of the person outlined in this paper has concrete effects in EU (disability) law and policy, using the examples of sheltered employment, care work, and activation policies (section E).

B. The Capability Approach

Martha Nussbaum's theory of justice is based on the capabilities approach (CA), first developed by Amartya Sen in the context of development economics. Objecting to Gross Domestic Product (GDP) being considered the most important measure for quality of life, Sen put forth the CA as an approach which centers the real freedoms of people.[2] The CA holds that the most

1 There is some disagreement within both activist and scholarly communities regarding the correct nomenclature. Some prefer person first language and so speak of (and call themselves) "persons with disabilities". The idea here is to place the focus on the individual rather than their disablement. Others, including myself, use "disabled persons" in order to convey that disablement is an *active process* rather than a static identity. While impairments may of course be innate, the process of disablement is societal, environmental, and political – it occurs in interaction with a world that is ill-prepared to accommodate disabled persons.

2 A. Sen, 'Equality of What?', in *Tanner Lectures on Human Values* (1982) [Sen, 'Equality']; A. Sen, *Inequality Reexamined* (1992) [Sen, *Inequality*]; A. Sen, *Commodities and*

pertinent metric for assessing well-being is "what people are actually able to do and be";[3] that is, their real opportunities for certain 'beings and doings'. These real freedoms or opportunities are termed capabilities. The focus on capabilities rather than income or resources is because not only do humans have varying needs, they also vary in their ability to convert resources into capabilities. For example, a pregnant woman will require more nutrients than the average person, and a person in a wheelchair may not need additional resources to be mobile but rather require changes to the built environment. In focusing on capabilities rather than humans' factual achievements, the CA moreover centers human agency, rendering it a liberal theoretical framework.

Since its origin in human development studies and economics, the CA has been fruitfully applied in a number of scientific fields, including within political philosophy, as the basis for theories of justice.[4] Whereas Sen rejects the possibility of a comprehensive theory of justice based on capabilities,[5] Nussbaum uses the capability framework to develop an account of core human entitlements necessary to lead a life commensurate with human dignity. She reasons that, in order to use capabilities as the basis of a theory of social justice, we must select those capabilities which define the minimum conditions for a dignified life.[6] Thus, she compiles a list of what she considers the ten central human capabilities which are indispensable to this end and should therefore be implemented by governments everywhere, guaranteed to each and every person at a threshold level.[7] The fact that her theory of justice only obliges states to provide each capability up to an appropriate minimum level renders her theory sufficientarian, or minimum theory of justice – that is to say, anything above the threshold may be conducive to the good life but is not required by justice and therefore does not form part of her theory. Human dignity is a foundational

Capabilities (1999) [Sen, *Commodities and Capabilities*]; A. Sen, *The Idea of Justice* (2009) [Sen, *Idea of Justice*].

3 M. Nussbaum, *Frontiers of Justice* (2006), 70 [Nussbaum, *Frontiers of Justice*]; M. Nussbaum, *Creating Capabilities* (2011), 20 [*Creating Capabilities*].

4 The most prominent accounts of justice within the capability framework being E. Anderson, 'What is the Point of Equality?', 109 *Ethics* (1999) 2, 287; Nussbaum, *Frontiers of Justice, supra* note 3; Sen, *Idea of Justice*, *supra* note 2; R. Claassen, *Navigational Agency* (2018). Note, however, that Sen rejects the possibility of a comprehensive theory of justice.

5 Sen, *Idea of Justice*, *supra* note 2.

6 Nussbaum, *Frontiers of Justice*, *supra* note 3, 166.

7 *Ibid.*, 70. The ten capabilities are: 1) Life, 2) Bodily Health, 3) Bodily Integrity, 4) Senses, Imagination and Thought, 5) Emotions, 6) Practical Reason, 7) Affiliation, 8) Other Species, 9) Play, and 10) Control over One's Environment. *Ibid.,* 76-77; Nussbaum, *Creating Capabilities, supra* note 3, 33.

concept to Nussbaum's theory of justice, insofar as it grounds the central human capabilities and legitimizes their presentation as fundamental entitlements. At the same time, she rejects dignity as a starting point in its own right, instead focusing on an account of dignity which emphasizes a life worthy of dignity, where such a life is constituted by the capabilities on her list.

Nussbaum's understanding of dignity is Aristotelian rather than Kantian insofar as she rejects rationality as the singular foundation of human dignity.[8] Instead, she stresses that her CA "sees the rational as simply one aspect of the animal, and […] not the only one that is pertinent to a notion of truly human functioning".[9] To her, the sociability and, crucially, the vulnerability of human beings are equally important characteristics. Nussbaum's concept of personhood understands need and dependency to be intrinsic to the human condition, which is why rationality is viewed not as the necessary condition of dignity but as one temporal characteristic of human beings. Besides capturing the fact that rationality, in all humans, is a feature which grows, matures, and declines,[10] Nussbaum's account of the person can accommodate the mentally and physically impaired as it does not insist on a baseline of rationality or on 'roughly equal abilities' for inclusion in the community of justice. Conversely, theories resting on the assumptions of rough equality and mutual advantage, that is, theories that build on the social contract tradition, cannot.

Moreover, Nussbaum's political person has other motives for cooperation besides mutual advantage, as it is understood to be, with Aristotle, "a political and social animal".[11] The bases of cooperation in Nussbaum's account are thus multiple and include the desire for justice and the pursuit of shared ends — the good of others is viewed as part of one's good. Lastly, and following from this conception of the person, care, as a foundational human activity, pervades the list of capabilities and Nussbaum's theory of justice.

C. Nussbaum's Conception of The Person

Having discussed Nussbaum's capability approach more generally, this section focuses specifically on the conception of the person that forms the basis of her theory. As the remainder of this paper will demonstrate, EU law fails to

8 *Ibid*., 159.
9 *Ibid*.
10 *Ibid*.
11 *Ibid.,* 158.

respect the person as conceived by Nussbaum. While EU law could certainly be fruitfully analyzed with regards to its performance in securing one, several, or all of the central capabilities for its citizenry, the paper at hand focuses on the underlying conception of the person for two reasons. First, it is submitted that, while demonstrating a failure of the EU to provide one or more capabilities at a threshold level would certainly point to the EU not promoting (capabilitiarian) social justice,[12] revealing the divergence between the conceptions of the person in EU law and Nussbaum respectively points towards a more fundamental incompatibility of Nussbaumian justice with the philosophical foundations of EU law. Second, a focus on personhood highlights what renders Nussbaum's theory more convincing than alternative liberal-egalitarian accounts and what is one of its greatest strengths: its ability to include human beings of all abilities in the community of justice and its sensitivity to care and (inter)dependency as central to human nature. These are also features which EU law (along with most, if not all, national legal systems) lacks and which cannot easily be incorporated within conceptions of personhood built on mutual advantage and rough equality, as will be shown below. For now, the core features of Nussbaum's person will be presented.

The starting point of Nussbaum's conception of the person is that all human beings are moral equals. In other words, everyone inherently possesses dignity and equal moral worth, which in turn requires that everyone is treated with the respect that this moral equality demands. Though this conception is widely shared by contemporary political philosophers, Nussbaum refers to the Stoics for this insight.[13] It follows from this that governments are obliged to treat every person as an end in their own right and, crucially, that they must acknowledge everyone's entitlement to the support necessary to realize this inherent moral worth.[14]

However, while Nussbaum shares with the Stoics the foundational belief of equal moral worth originating in intrinsic human dignity, her substantive understanding of dignity differs from the Stoic conception in two important ways, which we will investigate in turn.

12 Such an analysis would consequently have to decide on an appropriate threshold for the relevant capabilities. While this may be possible, such questions should arguably be left to a democratic forum.

13 See e.g. Nussbaum, *Creating Capabilities*, *supra* note 3, 129; M. Nussbaum, 'Human Dignity and Political Entitlements', in A. Schulman (ed.), *Human Dignity and Bioethics* (2008), 355 [Nussbaum, 'Human Dignity'].

14 M. Nussbaum, *Women and Human Development* (2000), 58 [Nussbaum, *Women and Human Development*].

The first difference concerns the distinction between animality and rationality proffered by the Stoics. The Stoics considered rationality, or the human capacity for practical reasoning, to be the basis of each person's equal worth. According to Stoic thought, it is this ability which separates us from animals and thus imbues us with (specifically human) dignity.[15] This line of thinking is by no means exclusive to ancient Greek philosophy – Kant famously makes a similar distinction between the realm of reason and the realm of nature, where humans belong to the former and non-human animals to the latter.[16] Like the Stoics, Kant thus understands human dignity to be a consequence or the product of the (supposedly) uniquely human capacity for practical reason.

Nussbaum, conversely, rejects any sharp distinction between the two realms of animality and rationality. Quite the opposite, she understands "rationality and animality as thoroughly unified."[17] According to her, to attempt any sharp separation between the two is impossible, seeing as our intellect and our rationality are embedded in our physical body (that is, our animal parts) and crucially depend on it. Human nature thus cannot be said to reside only in one facet of our being, such as our rationality, but is characterized precisely by the fact that we are both intellectual beings, and beings characterized by physicality, vulnerability, and need.[18]

More than being only practically unhelpful, Nussbaum argues that any attempt to neatly distinguish between animality and rationality is insulting both to the dignity of non-human animals, as it suggests a categorical difference or superiority, and to the animal parts of ourselves, leading us to devalue vulnerability and interdependence.[19]

Instead, Nussbaum's conception of the person acknowledges that rationality and vulnerability are inseparably intertwined.[20] This requires us to acknowledge that "we are needy temporal animal beings who begin as babies and end, often, in other forms of dependency"[21] whether that is due to old age or disability. It is this understanding of human beings as inherently vulnerable and interdependent, rather than as primarily free and independent, which allows

15 Nussbaum, 'Human Dignity', *supra* note 11, 354.
16 I. Kant, *Metaphysics of Morals* (1797).
17 Nussbaum, *Frontiers of Justice*, supra note 3, 159.
18 P. Bernadini, 'Human Dignity and Human Capabilities in Martha C. Nussbaum', 4 *Justum Aequum Salutare* (2010) 4, 45, 46.
19 Nussbaum, 'Human Dignity', *supra* note 13, 355.
20 J. M. Alexander, 'Social Justice and Nussbaum's Conception of the Person', in F. Comim & M. Nussbaum (eds), *Capabilities, Gender, Equality* (2014), 420.
21 Nussbaum, *Frontiers of Justice*, supra note 3, 160.

Nussbaum's theory to accommodate also severely disabled persons as original members of the community of justice and to better recognize the centrality of care work for human functioning. Other liberal-egalitarian approaches, and in particular those in the social contract tradition, conceive of persons as fully cooperating members of society, who are primarily motivated to engage with one another because it promises to be advantageous to them.[22] These theories thus struggle to include persons who are unable to fully cooperate as original subjects, as members of the constitutive community. They may be entitled to assistance due to principles of charity or benevolence, but they cannot make claims based on justice.[23] Besides being exclusionary towards persons who cannot fully cooperate, such as in particular severely cognitively disabled persons, Nussbaum rightly points out that theories based on full cooperation for mutual advantage paint a rather bleak picture of humanity – any theory based primarily on mutual advantage values human beings first and foremost for their productive potential, or their actual productive contribution, rather than for their equal moral worth, supposedly a foundational value to all these theories. By contrast, Nussbaumian justice insists that "we do not have to win the respect of others by being productive. We have a claim to support in the dignity of our human need itself."[24]

The second difference between Nussbaum's conception of dignity and that of the Stoics connects to the principle of *apatheia*. The Stoics famously held that there is no value to what they term 'external goods', and that therefore we should encounter them from a stance of indifference (*apatheia*).[25] Besides contending that external goods have no intrinsic worth, the Stoics also held that they cannot impact on our inherent dignity. External goods, in Stoic philosophy, refer to anything outside of our own thoughts and actions, including material factors such as wealth or income, but also less tangible goods such as social status, physical and mental health, and even connection and family ties. Since they believed that these external goods cannot diminish our equal dignity, the Stoics also deny any obligation upon government to secure such external goods for their citizenry.[26]

22 This is true in particular of the social contract tradition, going back to Hobbes, but the conception (in a slightly more refined version) is also present in more modern theories, like that of John Rawls: See e.g. J. Rawls, *Justice as Fairness* (2001) [Rawls, *Justice as Fairness*].

23 Alexander, *supra* note 19, 421.

24 Nussbaum, *Frontiers of Justice*, supra note 3, 160.

25 Nussbaum, *Creating Capabilities*, supra note 3, 131.

26 *Ibid.*

Nussbaum rejects this position. She points out that the Stoic view insufficiently distinguishes between human dignity on the one hand and human flourishing or fulfilment on the other. Whereas she shares the contention that external circumstances can never tarnish, reduce, or revoke our inherent dignity, she understands that they matter tremendously for human flourishing.[27] This is also where the two differences between the Nussbaumian and Stoic conceptions of dignity connect: the Stoic principle of *apatheia* follows precisely from their rejection of our animal nature and vulnerability as relevant human characteristics. By contrast, Nussbaum, following Aristotelian thought, conceives of us as social and political animals, whose pervasive need and vulnerability place an obligation on governments to enable the external conditions for flourishing (*eudaemonia*).[28] From this, Nussbaum reasons that, while our dignity is untouched by external ill fortune, a life *commensurate with dignity* requires that governments provide each of the ten central capabilities to each person, up to the minimum threshold.

This leads us to another important feature of Nussbaum's conception of the person which she traces back to Aristotelian thought: the centrality of agency and choice. Indeed, Nussbaum goes so far as to explicitly link human dignity to our capacity for exercising agency, stating that "human beings have a worth that is inalienable, *because* of their capacities for various forms of activity and striving."[29] Clearly, agency is central to Nussbaum's understanding of a life worthy of human dignity, a fact that is reflected in the structure of her capabilities list: the injustice of denying a person any of the central capabilities consists of impeding her ability to exercise active choice and lead a life of her own choosing. This also explains the CA's focus on capabilities over functionings: whereas it is the responsibility of government to guarantee everyone the real opportunity to realize each capability, whether or not to make use of this opportunity is left to the individual. Moreover, Nussbaum's liberal commitment to a plurality of values and the importance of individual agency in devising a conception of the good life is reflected in the fact that the capabilities are plural rather than singular and can neither be traded off against one another nor converted into a single metric such as resources or wealth.

The last feature of Nussbaum's conception of the person discussed here concerns the motives for cooperation ascribed to the person. As touched upon above, whereas contractualist theories confine themselves to derive principles of justice based on rational persons acting exclusively for their own advantage, and

27 Nussbaum, 'Human Dignity', *supra* note 13, 356, 357.
28 Nussbaum, *Creating Capabilities*, supra note 2, 128.
29 Nussbaum, 'Human Dignity', *supra* note 13, 357 (emphasis added).

thus only agree to participate in a cooperative scheme such as society in so far as it can be said to serve their own interests, Nussbaum envisions a greater range of motives for her prototypical person. In her view, while self-interest certainly makes up a good portion of the reasons for human action, to portray this as the only driving force would be reductive. Instead, Nussbaum's person "shares complex ends with others at many levels",[30] ends which include, crucially, the good of others as their own. In this vision, certainly, others' interests may act as constraints on one's own interests but not exclusively. Nussbaumian personhood accounts for a sense of justice which exists alongside humans' proclivity to act only where it is advantageous to themselves. This person, who is by nature interested also in community and connection, thus acts out of a range of motives, which include both self-interest and the good of others.[31]

It should be stressed that contractualist accounts do not rely on cooperation based exclusively on mutual advantage because they deny the existence of altruistic motives in human nature; rather, they consider these sentiments 'less stable' than self-interest and that theories of justice which rely exclusively on advantage-seeking are more convincing for that reason.[32] Essentially, they argue, that principles of justice which do not require persons to act selflessly are less likely to fail due to a lack of selfless behavior. While this sounds intuitively convincing, and it is true that Nussbaum's conception is more demanding insofar as it requires a degree of compassion or other-regarding behavior, it is submitted here that principles of justice which ignore this side of human nature also run the risk of diminishing these behaviors. As Nussbaum points out, there is a mutually reinforcing relationship between the way in which we design our institutions and the development of public compassion: compassion, like other emotions, is socially taught and shaped, both directly through education and indirectly through the social imaginaries in a given society.[33] Thus, "compassionate individuals construct institutions that embody what they imagine; and institutions, in turn, influence the development of compassion in individuals."[34] That is to say that public institutions, including the legal system and public policy, are both shaped by and shape our perception

30 Nussbaum, *Frontiers of Justice, supra* note 3, 85, 158.

31 *Ibid.,* 156.

32 See e.g. Rawls, *A Theory of Justice* (1979), who lets the parties in his original position assume a stance of mutual disinterest. While moral sentiments are supposedly accounted for by other features of his original position, this nevertheless limits the range of motives ascribable to the parties in his theory [Rawls, *Theory of Justice*].

33 Nussbaum, *Frontiers of Justice, supra* note 3, 500.

34 M. Nussbaum, *Upheavals of Thought* (2001), 405.

of who does (not) deserve their misfortune, and who therefore is (or is not) deserving of public compassion and entitled to assistance. To give a very practical example, the manner in which unemployment benefits are structured is a product of societal conceptions of who is at fault in cases of unemployment but also any given system will influence this public understanding of which unemployed persons deserve benefits. Welfare to work programs are a prime example of a framework which reflects the belief that unemployment is largely a consequence of lack of individual motivation or qualifications rather than a reflection of structural problems and it can certainly foster the public perception of unemployed persons as not trying hard enough to find a job or improve their education. In the same way that public disregard for the unemployed, poor, disabled, or persons otherwise in need of assistance fosters punitive and harshly conditional welfare policies, compassion has the potential to create structures which respect the dignity of those in need. Thus, Nussbaum argues, law and policy geared towards ensuring the basic capabilities for each person has the potential to educate and direct our compassion with regards to the things no one should be deprived of. Ultimately, we are therefore confronted with the question of which person we model our legal system and public institutions on, and thus of which values we consider most important to human life – the self-reliant, invulnerable individual only guided by their own interest, or an interdependent and at times vulnerable person who is able to strive both for her own good and that of others.

To summarize, Nussbaum's conception of the person is multifaceted and can occasionally appear contradictory. She starts out from the fundamental tenet of each person being imbued with equal moral worth and therefore with equal dignity and the attendant claims to equal respect. While acknowledging rationality as a central human feature, she adds that human nature is characterized also by (physical, psychological, and social) vulnerability and sociability, which requires accommodation through the guarantee of capabilities. The result is an understanding of personhood which is arguably more realistic than the independent seeker of advantage of liberal theorists. Undoubtedly, it is normatively preferable insofar as it allows for the inclusion of all humans rather than only those who can cooperate fully within the community of justice.

Having examined Nussbaum's conception of the person, the following section turns to the conception of the person underlying EU law and policy, first on a general level and subsequently with regard to disabled persons specifically.

D. The Person in EU Law

Why should we study the conception of the person underlying EU law? The answer is rather straightforward: because the characteristics we assume to be inherent in human nature influence the manner in which we regulate human conduct and relations. The conception of the person can thus have tremendous (even if largely implicit) impact on the law. First, it is an important element in defining the law's personal scope. The definition of a disabled person, a worker, or a citizen, impacts directly on who can fall into those categories. Those who do not fit within any legal categories might be without status and therefore without rights. Defining legal subjects is thus always an exclusionary practice and it is crucial to consider in detail the boundaries of this exclusion.

Second, the imagined addressee shapes *how* we legislate. As mentioned above, Nussbaum, writing about the role of public institutions in the development of compassion, notes that the way we regulate certain social practices informs our thinking about these practices and our judgements concerning the deservingness of those benefiting from them.[35] For example, the structure of a system of unemployment benefits may shape societal ideas about who deserves unemployment benefits (only those that can prove their efforts to find work), and those intuitions will in turn influence the manner in which benefits are regulated. The same is true more broadly speaking: the manner in which we conceive of a worker, a student, or an unemployed person will influence the manner in which we regulate their lives *and vice versa*. Considering in detail the manner in which the EU conceives of the person (and of certain groups of persons) is thus a matter of both the law itself and the underlying philosophical imaginaries.

The EU, in autonomously defining these statuses, is doing more than creating legal categories, it is constitutive of identity. It defines "what it means to live a life of dignity in Europe and a decent life within society."[36] At the same time, it is hard to speak of 'the' legal subject in EU law – the person is not regarded as a whole or as a single concept but rather as her specific status in a given situation. EU law "fragments that concept according to the legal positions

35 Nussbaum, *Upheavals of Thought, supra* note 34, 418, see also section B of this article at 8.

36 L. Azoulai, S. Barbou des Places & E. Pataut, 'Being a Person in the European Union', in L. Azoulai, S. Barbou des Places & E. Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (2016), 11.

the person assumes in the context of legal relations between individuals."[37] For that reason, the analysis at hand focuses on one status under EU law and considers it with respect to the underlying conception of the person.

Nevertheless, some general observations can be made on the EU legal subject. EU law, and in particular internal market law, relies on the person as an active agent; that is, as one that brings about cross-border interactions and engages in transnational activities. This view is certainly compatible with one facet of the Nussbaumian person. As we have seen, Nussbaum values choice and the human capacity for 'active striving' as central to human flourishing.[38] This idea finds expression in the fact that the CA demands that everyone's central *capabilities* (that is, their real opportunities to be or do things) are guaranteed, leaving the choice of whether to take up those opportunities to the individual. In this instance, the ideological underpinnings of EU law line up well with Nussbaum's philosophy: the EU provides free movement rights to its citizens, which allows EU citizens to move freely between member states and take up residence elsewhere, greatly expanding individuals' personal freedom and opportunities. Given the centrality of agency to capabilitarian justice, this is an enormous benefit. As Floris de Witte has highlighted elsewhere, the free movement rights can also have significant emancipatory effects.[39] Specifically, one function of free movement rights is to free individual citizens from the often coercive claims nation-states make over their citizens. By providing the opportunity to relocate to another member state, and by prohibiting discriminatory, exclusionary, or assimilatory norms and practices in the new state of residence,[40] EU law contributes to weakening the authority of individual member states and provides citizens with the possibility of choosing their life path more freely, according to their own beliefs and identity.[41] Additionally, and perhaps even more importantly, free movement rights constitute a significantly enlarged economic opportunity space for individuals. By enabling them to seek

37 G. Alpa, 'The Meaning of 'Natural Person' and the Impact of the Constitution for Europe on the Development of European Private Law', 10 *European Law Journal* (2004) 6, 734, 735.

38 Nussbaum, 'Human Dignity', *supra* note 13, 357.

39 F. de Witte, 'Freedom of Movement Needs to Be Defended as the Core of EU Citizenship', in R. Bauböck (ed.), *Debating European Citizenship* (2019), 93.

40 Previously an interpretation of the general equal treatment principle attached to the free movement rights, this now follows directly from Article 16(1) of the Citizenship Directive with regard to conditions imposed on permanent residency.

41 See D. Kochenov, 'EU Citizenship Without Duties', 20 *European Law Journal* (2014) 4, 482, 486 [Kochenov. 'EU Citizenship Without Duties'].

better work or to establish themselves in another member space, EU citizens can tangibly improve their livelihood. In this way, EU free movement law provides actual material benefits to its citizens – a function which is of particular significance to nationals from the EU's periphery.[42]

The legal subject in free movement law is a clear expression of the value of human agency. It presupposes a person that can form her own life plan and actively pursue it. Crucially, however, in its focus on agency and active choice, the conception of the person in free movement law neglects other important human characteristics such as our vulnerability, our occasional dependency and need for care, and, perhaps most importantly, the tenet of equal worth. This is because free movement law does not benefit all EU citizens equally. The capabilities mentioned above are not deserving of their name or at least not for everyone. Because the notion of capability implies the *real* freedom or opportunity to achieve functionings such as 'moving freely', these capabilities are not in truth realized for every EU citizen. Rather, the EU divides its citizenry into two factions: economically active citizens are still much more capable to move freely as they benefit from the rights attached directly to the relevant economic freedom. Conversely, the situation of economically inactive EU citizens cannot convincingly be construed as one characterized by the capability (the *real* freedom) to move. They do not enjoy full equal treatment rights and this can diminish their capability to move insofar as the act of moving could leave them without any social protection. Similarly, the situation of economically active citizens who happen to have never moved is not comparable to that of economically active mobile citizens.[43] Because, while they are free to move or not move,[44] they are not usually entitled to equal enjoyment of protection from EU law and such freedom (to stay at home) then cannot be a *real* freedom in the capability sense. While equality of EU citizens and the right to move freely are solemnly proclaimed in the treaties,[45] in reality, the citizens are divided into

42 D. Kukovec, 'Law and the Periphery', 21 *European Law Journal* (2015) 3, 406.

43 See e.g. A. Tryfonidou, *Reverse Discrimination in EC Law* (2009).

44 The option not to choose an available functioning being regarded as a valuable functioning in itself. See on this e.g. A. Sen, 'Capability and Well-Being' in M. Nussbaum & A. Sen (eds) *The Quality of Life* (1993) 39: "freedom may have intrinsic importance for the person's well-being achievement. Acting freely and being able to choose may be directly conducive to well-being, not just because more freedom may make better alternatives available" [Sen, 'Capability and Well-Being'].

45 Article 9 TEU: "In all its activities, the Union shall observe the principle of the equality of its citizens", Article 20 TFEU: "Citizens of the Union shall enjoy (…) the right to move and reside freely within the territory of the Member States".

those enjoying the protection of EU law, and thus securing the capability to freely move and enjoy equal treatment and those who are not.

This is even more problematic since the line separating the two groups is more often than not drawn rather arbitrarily. Arguably, this phenomenon can be regarded as a mere symptom of what Weiler has described as "the culture of the market"[46] and Scharpf as the "asymmetry of integration",[47] namely the inherent bias in the logic of EU law towards economic rationales. This is visible in the social *acquis* insofar as most of the genuine social policies adopted at EU level, such as the first non–discrimination provisions and arguably most of modern EU equality law, can be explained by the economic benefits derived from equality rather than by reference to the intrinsic value of equality. As O'Brien highlights, with regard to sex and disability, EU equality legislation appears based on a 'logic of activation', in that it aims at integrating persons into the labor market *as is* rather than at structural reforms which would help accommodate the needs of disadvantaged groups in employment.[48] Similarly, the 'good EU citizen' that emerges from the framework governing social benefits is first and foremost the citizen–worker.[49] This conceptualization of citizens in terms of their economic contribution mirrors the construct of Market Citizenship insofar as the latter restricts access to the enjoyment of EU rights generally to the economically active.[50] It seems, then, that Market Citizenship itself violates the demands of Nussbaum's theory.

46 J. H. H Weiler, *The Constitution of Europe — "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (1999), 89.

47 F. Scharpf, 'The Asymmetry of European Integration, or why the EU Cannot be a 'Social Market Economy', 8 *Socio-Economic Review* (2010), 211.

48 See C. O'Brien, *Unity in Adversity* (2019), chapter 5 [O'Brien, *Unity*].

49 A term borrowed from G. Peebles, '"A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law', 22 *Law & Social Inquiry* (1997) 3, 581, 608.

50 See, on the concept: D. Kochenov, 'The Oxymoron of 'Market Citizenship' and the Future of the Union', in F. Amtenbrink *et al.* (eds), *The Internal Market and the Future of European Integration* (2019) [Kochenov, 'Market Citizenship']; E. Spaventa, 'Earned Citizenship – Understanding Union Citizenship Through Its Scope', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (2017) [Kochenov (ed.), *EU Citizenship and Federalism*]; C. O'Brien, 'Civis Capitalist Sum: Class as the new Guiding Principle of EU Free Movement Rights' 53 *Common Market Law Review* (2016) 4, 937 [O'Brien, 'Civis Capitalist Sum']; P. Caro de Sousa, 'Quest for the Holy Grail — Is a Unified Approach to the Market Freedoms and European Citizenship Justified?', 20 *European Law Journal* (2014) 4, 499; N. N. Shuibhne, 'The Resilience of EU Market Citizenship', 47 *Common Market Law Review* (2010) 6, 1597.

As it currently operates, EU citizenship benefits primarily a small group of (usually already privileged) transnationally mobile citizens and overlooks the most vulnerable and disadvantaged.[51] Similarly, and as already elaborated above, while it is clear that the free movement provisions and EU citizenship generally foster the capabilities of some, many are left behind. The capability to 'move and reside freely' is in truth no capability at all but merely a formal right of no substantive value for many individuals as they are unable to make use of that right. This betrays a reductionist conception of the person in EU law, similar to the instrumentalist tendency Nussbaum recognizes in Rawls' and other contractualist approaches to justice: to conceive of human beings primarily in terms of their productive contribution denies the dignity and equal worth of those that are not productive. While it is certainly logical to some extent that the EU legal subject "was treated as *homo economicus*, the manufacturer or recipient of goods, services and capital",[52] given the origins of the EU as an economic project, it is high time to revisit this conceptualization. It is submitted here that, in light of the nature of today's EU, which is far more than an economic union and which pervasively influences individuals' life paths, it is indeed a matter of justice that the imagined legal subject is more than merely an economic actor. This is why a comparison with the fuller Nussbaumian person can be helpful – her conceptualization of human beings as both animal and rational, as social and political animals, is not only more realistic in the sense that it comes closer to what truly characterizes human beings but it is also normatively desirable.

It is true, of course, that to the extent that EU law engenders non-market driven characteristics, there are hints of the 'fuller' Nussbaumian person. Nevertheless, as long as these entitlements are tied to economic activity, they still betray a legal subject valued in the first instance for her productive contribution to the internal market.

Keeping in mind these observations pertaining to the conception of the person in EU law, the analysis now moves towards an examination of one specific status under EU law and the conception of the person that is revealed by its construction in legislation, policy, and case law. This is because, as we have noted above, EU law rarely addresses the person 'as a whole', but rather the person in her specific function or role – the person as a worker, a student, a consumer, and so on. By examining one of these statuses, we can gain insight into the manner in which EU law understands personhood, the *Menschenbild*

51 Kochenov, 'Market Citizenship', *supra* note 50, 224-225.
52 Alpa, *supra* note 37, 736.

that is constructed through these statuses. The remainder of this paper thus considers one of these statuses: that of disability.

E. The Disabled Person in EU Law

There are several reasons for selecting disability as the status to be examined in this analysis. For one, disability is an integral part of Nussbaum's theory: it is one of four problems she identifies in Rawls' *A Theory of Justice* which led her to formulate an alternative approach to social justice, one that is, among other things, inclusive of disabled people. It is one of the reasons that vulnerability, need, and care are central themes in her theory and built into her conception of the person: only an understanding of personhood which incorporates these characteristics can be truly inclusive of disabled people. Considering the conception of disabled persons underlying EU law can therefore prove revealing as to the manner in which these dimensions of humanness are taken into account (or not) in the construction of the EU legal subject.

Moreover, the status of 'disabled person' intersects with that of both worker and migrant in the context of EU law. Due to EU law's limited personal scope, those disabled persons who come within its ambit will usually be economically active, involved in some cross-border activity, or both. An analysis of the disabled legal subject can thus also shed some light on two other central statuses, as well as how they can intersect to exacerbate their exclusionary effects.

I. Models of Disability

It is prudent to begin with an examination of the definition of disability in EU law since it concerns the essence of our inquiry. The manner in which we define disability for the purpose of EU law reveals much about how EU law conceives of the disabled person herself.

Historically speaking, the prevalent conception of disability (in the West) was heavily informed by a medicalized view of disability. Specifically, disability was considered an individual medical problem, a personal tragedy.[53] Following this medical model, disability is the result of medical conditions or impairments which hinder the disabled person from participating in society on par with non-disabled persons. As Oliver puts it, the medical model "locates the 'problem' of disability within the individual and […] sees the causes of this problem as

53 C. Barnes, 'Understanding the Social Model of Disability - Past, Present and Future', in N. Watson & S. Vehmas (eds), *Routledge Handbook of Disability Studies* (2019), 14.

stemming from the functional limitations or psychological losses which are assumed to arise from disability".[54] This view thus focuses on the medical condition itself, which is contrasted with the 'normal', able-bodied person and which is considered an individual health problem to be cured or alleviated.[55] Leaving aside the fact that such a view perpetuates a negative stigma against disabled people, it also disregards entirely the role of social and environmental barriers in disabling individuals. In response to these deficiencies, disability rights activists in the 1970's introduced the distinction between impairment and disability, where impairment denotes the limitations arising from a physical or mental condition, and disability the loss or limitation of opportunities for participation in society.[56]

Building on this, Oliver first presented the social model of disability, which reframes disability as a form of social oppression.[57] Following the social model, disability arises not from the individual impairment but rather from the interaction of the impairment with the social environment and the way in which society fails to take into account these impairments in designing these environments.[58] Thus, for example, it is not the inability to walk which disables the wheelchair user, but rather the lack of accessible infrastructure such as ramps and lifts. Crucially, the social model does not deny the role of medical intervention in alleviating illness and impairments. Instead, it criticizes the limited usefulness of medical treatment in addressing disability understood as the inability to participate in (all areas of) social and political life.[59] It would be misleading to characterize the social model of disability as a monolith, seeing as there are various conceptions that can be broadly subsumed under the social model. They differ in points such as how much (if any) importance they give to the impairment itself in constituting a disability, or whether disability

54 M. Oliver, 'The Individual and Social Models of Disability' (1990), available at https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Oliver-in-soc-dis.pdf (last visited 19 August 2024).

55 S. Favalli & D. Ferri, 'Defining Disability in the European Union Non-Discrimination Legislation: Judicial Activism and Legislative Restraints', 22 *European Public Law* (2016) 3, 541, 542.

56 UPIAS, 'Fundamental Principles of Disability' (1976) available at https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/UPIAS-fundamental-principles.pdf (last visited 19 August 2024).

57 A. Lawson & A. E. Beckett, 'The Social and Human Rights Models of Disability: Towards a Complementarity Thesis', 25 *The International Journal of Human Rights* (2021) 2, 348.

58 Oliver, *supra* note 54, 2.

59 Barnes, *supra* note 53, 20.

is considered a minority status or rather a universal human condition.[60] For the present purpose, 'the social model of disability' denotes those views which consider disability to be the result of an individual impairment in interaction with various social, environmental, or political barriers.

Already from this brief discussion, the overlaps between the social model of disability and Nussbaum's conception of the person generally, and of disability in particular, become apparent. First, the idea, present in some forms of the social model, that disability is less of an extraordinary affliction that concerns a minority of humans but rather a universal human condition,[61] resonates with Nussbaum's assertion that human beings are fundamentally characterized by vulnerability and dependency. Just as many disability advocates hold that some form of disability will affect most people at some point in their lives, be it due to illness, accidents, or old age, Nussbaum recognizes that, over the course of a lifetime, all human beings experience need and dependency to varying degrees. Secondly, the social model posits that disability, in terms of diminished ability or complete inability to participate in social life on an equal basis with others, arises primarily from the interaction of the individual impairment with societal and environmental factors. Similarly, the concept of 'combined capabilities' describes the relationship between individual attributes and external factors for attaining basic capabilities. Nussbaum differentiates between internal capabilities and combined capabilities: the former refer to characteristics of a person such as "personality traits, intellectual and emotional capacities, states of bodily fitness and health, internalized learning, [and] skills of perception and movement",[62] whereas combined capabilities denote those freedoms or opportunities that arise from such personal abilities in combination with a suitable political, social, and economic environment.[63] It is those combined capabilities that are relevant for an assessment of whether or not a polity can be considered just – all ten central capabilities on Nussbaum's list are combined capabilities. Considering disability within this framework, we can see that Nussbaum's understanding is closely aligned with the social model.

The individual impairment thus reflects a person's internal capabilities, which may be reduced due to the impairment. However, it is the environmental

60 D. Wasserman *et al.*, 'Disability: Definitions, Models, Experience', in E. N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2016), https://plato.stanford.edu/archives/sum2016/entries/disability/ (last visited 19 August 2024).

61 See I. Zola, 'Toward the Necessary Universalizing of a Disability Policy', 67 *The Milbank Quarterly* (1989) 2, 401.

62 Nussbaum, *Creating Capabilities*, *supra* note 3, 21.

63 *Ibid*.

factors (be they social, political, or economic) interacting with the impairment which create the individual's inability to participate in public life on an equal basis with others, thereby creating the disability. As Carolin Harnacke puts it, "disability is thus an (unjust) lack of capability."[64]

The social model of disability was immensely influential in the negotiation of the UN Convention of the Rights of Persons with Disabilities (UNCRPD), to which the EU is a party.[65] UNCRPD's conception of disability is closely modelled on the social model: in its first article, the Convention states that "'[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".[66] It is clear from this article, and a similarly phrased paragraph in the preamble,[67] that the UNCRPD claims to be grounded in a social model of disability. At the same time, it should be noted that the human rights approach to disability, as manifest in the UNCRPD, is not without problems. As highlighted recently by Jan Grue, within the paradigm of the human rights model there remains a 'gap' between what is demanded of the individual disabled person and what the state or private parties are obliged to provide under the concept of reasonable accommodation. If what a disabled person requires to fully participate in all areas of life on equal basis with others is deemed too costly an imposition, employers or other relevant actors are not legally obliged to make the accommodation. As Marta Russel aptly remarked, "the disabled person's theoretical right to an accommodation is really no right at all; it is dependent upon the employer's calculus." The result of this is that the work required to close the gap falls on the disabled individual or their friends, family, or other caregivers. Of course, it would be difficult to argue that any necessary accommodation, no matter how costly or burdensome, ought to be mandated by law: in a world of scarce resources, this would have

64 C. Harnacke, 'Disability and Capability: Exploring the Usefulness of Martha Nussbaum's Capabilities Approach for the UN Disability Rights Convention', 41 *Journal of Law, Medicine and Ethics* (2013) 4, 768, 773.

65 G. de Búrca, 'Experimentalism and the Limits of Uploading – The EU and the UN Disability Convention', in J. Zeitlin (ed.), *Extending Experimentalist Governance? The European Union and Transnational Regulation* (2015), 295, 296.

66 *Convention on the Rights of Persons with Disabilities*, 3 May 2008, Art. 1, 2515 UNTS, 3 [UNCRPD].

67 *Ibid.*, preamble para. e) affirms that: "[d]isability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

the effect of privileging the needs of one person over those of potentially many others. At the same time, it cannot be ignored that the human rights model and disability rights instruments such as the UNCRPD, despite claiming to be the first comprehensive human rights treaties in the 21st century,[68] cannot address this economic injustice. While the present article is first and foremost concerned with highlighting how the conception of disabled persons in EU law falls short even of this standard, we must not forget that, even if the UNCRPD was perfectly implemented within the EU, these gaps would remain, effectively sanctioning a portion of disabled persons (those without sufficient resources, be they material or social) to a life in which they are unable to participate in the world on equal footing with others or indeed at all. Keeping this in mind, the rest of this section considers the development of the conception of disabled persons in EU law.

Prior to the UNCRPD's adoption, the task of defining disability for the purpose of EU law fell to the Court of Justice of the EU (CJEU). As there was no definition in the EU treaties or relevant legislation, national courts asked the Court to clarify what could be considered to fall within the scope of disability.[69]

The first reference of this kind reached the CJEU in 2006, in the *Chacon Navas* judgment.[70] The applicant in the case had been unable to work for a prolonged period due to illness and was subsequently dismissed. The national court made a preliminary reference to the CJEU, asking whether the claimant's illness fell within the scope of the definition of disability in the Employment Equality Directive.[71] The Court held that, in the context of the Directive, disability ought to be understood as "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life."[72] As Waddington

68 See https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-Disabilities.html (last visited 19 August 2024).

69 Note that the present discussion refers primarily to the definition of disability within the context of the Employment Equality Directive. This is both because the majority of preliminary references that reached the Court concerned said Directive and because different fields of law might require different definitions. For example, within the field of social benefits, it may well be sensible to adhere closer to medical facts in assessing disability. However, barriers should certainly be considered in that area as well.

70 *Sonia Chacón Navas v. Eurest Colectividades SA*, Case No. 13/05, Judgment of 11 July 2006, [2006] ECR I-6467 [*Chacón Navas*].

71 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive), OJ 2000 L 303/16.

72 *Ibid.,* para. 43.

points out, the Court's definition of disability in *Chacon Navas* clearly reflects the medical model of disability insofar as it focuses on the individual impairment as the exclusive cause of a person's limitation, thus ignoring the societal and environmental factors which may contribute to, or be the sole cause, of the limitation.[73] In the later *Coleman* case, the Court confirmed this restrictive definition of disability,[74] and it would remain the official definition until after the ratification of the UNCRPD. In the first case which reached the CJEU thereafter, *HK Denmark*, the Court seemed to change its tune.[75] Reconsidering its definition from *Chacon Navas*, it stated that disability is "a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers."[76] This definition is taken almost verbatim from Article 1 of the UNCRPD with two slight (but relevant) differences. First, the Convention refers to participation in society rather than participation in professional life. Second, whereas the Convention speaks of disability as "impairments […] in interaction with various barriers",[77] the Court defines it as a "limitation which results […] from […] impairments." The relevance of these distinctions becomes apparent from some of the subsequent cases concerning the definition of disability.

In *Z,*[78] the issue at stake was whether a woman who had a child through surrogacy, due to her inability to conceive herself, was entitled to maternity leave. The applicant, who because of a medical condition does not have a uterus, became a 'commissioning parent'; that is, she had her genetic child carried to term by a surrogate mother in California, where surrogacy is extensively regulated. While the national legislation in her state of residence, Ireland, provided for both maternity and adoptive leave, the applicant did not qualify for either. In light of this, the Irish court referred to the CJEU the question whether this

73 L. Waddington, 'Saying all the Right Things and Still Getting it Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law', 22 *Maastricht Journal of European and Comparative Law* (2015) 4, 576, 579 [Waddington, 'Definition of Disability'].

74 *S. Coleman v. Attridge Law and Steve Law*, C-303/06, Judgment of 17 July 2008, ECLI:EU:C:2008:415, para. 45 refers to Chacon Navas as the relevant definition of disability.

75 *HK-Danmark v. Dansk Arbejdsgiverforening and Others,* Joined Cases Nos C335/11 and C337/11, Judgment of 11 April 2013, ECLI:EU:C:2013:222.

76 *Ibid.,* para. 38.

77 UNCRPD, *supra* note 66, Art 1.

78 *Z. v. A Government Department and The Board of Management of a Community School,* C-363/12, Judgment of 18 March 2014, ECLI:EU:C:2014:159.

constituted discrimination on the basis of disability, and further, in case that the answer to this question was negative, whether the relevant directive was valid in light of, *inter alia*, the UNCRPD.[79] Considering the question whether the denial of maternity (or adoptive) leave constituted disability discrimination, the CJEU recalled its definition from *HK Denmark* and acknowledged that the woman's condition constituted a limitation arising from an impairment.[80] Crucially, however, the Court added that, for the purpose of the Employment Equality Directive, the limitation at hand must hinder the person's participation in *professional life*.[81] Thus, it reasoned, following the opinion of AG Wahl, that the woman's impairment (i.e. her inability to have a child) did not constitute a disability within the meaning of the Directive as it did not hinder her ability to work *per se*.[82]

As has been pointed out by several authors, this is a rather narrow view of the matter.[83]

It is clear that not being granted surrogacy leave does in fact impact the applicant's participation in professional life. Maternity leave is an employment-related benefit and the inability to take maternity leave leaves the applicant with the choice of sacrificing either her career progression or the ability to personally care for her child. Thus, the Court could have easily come to the conclusion that, for this reason, the impairment does constitute a disability within the professional sphere.

It is only as a result of the CJEU's narrow definition of disability as a limitation, which *in itself* hinders participation in professional life, that the applicant was denied benefits which fall within the material scope of the Directive.[84]

Moreover, the reasoning of the Court, while paying lip service to the social model, focuses on the individual impairment over the interaction of the impairment with barriers created, for example, by social and environmental factors. As Waddington points out, in this case, the barrier is "the absence of a

79 *Ibid*., para. 45.
80 *Ibid*., para. 79.
81 *Ibid*., para. 80.
82 *Ibid*., paras 81-82.
83 Waddington, 'Definition of Disability', *supra* note 73, 585; C. O'Brien, 'Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability', in Kochenov (ed.), *EU Citizenship and Federalism*, *supra* note 50, 519-520 [O'Brien, 'Union Citizenship'].
84 A. Broderick & P. Watson, 'Disability in EU Non-Discrimination Law', in D. Ferri & A. Broderick (eds), *Research Handbook on EU Disability Law* (2020), 14.

statutory regime providing for a period of paid leave following the birth of a child through surrogacy."[85] It is the fact that she is not granted leave, despite being in a comparable situation to other new mothers, which creates the hindrance to her participation in professional life. Instead of recognizing this interplay between the legal framework and the woman's impairment, the CJEU chalked her situation up to personal choice: She is able to participate in professional life, so long as she does not have children. This is patently unjust. As O'Brien puts it, "this relocates the responsibility of creating disability – from society and societal structures, to the person's own choices."[86] Furthermore, the Court is arguably confusing the personal and material scope of the Directive by defining disability with reference to professional life – while the Directive only applies to professional life, it does not inevitably follow from the text that the disability *itself* must hinder participation in professional life.[87] As Bado points out, the aim of anti-discrimination law is compatible with including as many people within its scope as possible, thus there is no prima facie reason for narrowing the personal scope in such a manner.[88] Some have explained the reluctance of the Court to consider the Irish legal framework discriminatory with reference to the diverse legal regimes governing surrogacy in the member states, arguing that extending maternity protection to surrogate parents is a question to be resolved through the political process rather than judicial intervention.[89] While this may well explain the CJEU's assessment, it does not alter the fact that the current state constitutes a clear injustice towards disabled women.

A subsequent case further illustrates how the Court, while nominally adhering to the social model underlying the UNCRPD, and in line with a capabilitarian conception of the person, struggles to apply it to real-life instances of discrimination. In *Kaltoft*,[90] the Court was essentially asked to determine whether obesity could constitute a disability within the scope of the Employment Equality Directive. The case concerned an obese man employed

85 Waddington, 'Definition of Disability', *supra* note 73, 585.

86 O'Brien, 'Union Citizenship', *supra* note 83, 522.

87 Favalli & Ferri, *supra* note 55, 559; Waddington, 'Definition of Disability', *supra* note 73.

88 R. Bedő, 'The Notion of "Person with Disability" in Employment Discrimination Law – An Analysis of Laws in Hungary and the United States', 12 *Romanian Journal of Comparative Law* (2021) 1, 66, 78.

89 G. de Baere, 'Shall I Be Mother? The Prohibition on Sex Discrimination, the UN Disability Convention and the Right to Surrogacy Leave under EU Law', 74 *Cambridge Law Journal* (2015) 1, 44, 47.

90 *Fag og Arbejde (FOA) Acting on Behalf of Karsten Kaltoft v. Kommunernes Landsforening (KL)*, C-354/13, Judgment of 18 December 2014, ECLI:EU:C:2014:2463 [*Kaltoft*].

as a child minder, who was officially dismissed for reasons unrelated to his weight. However, the applicant claimed that the real reason for his dismissal was the employer's prejudice towards his obesity, since they had previously indicated an interest in his weight loss.[91] The national court therefore referred to the CJEU the question whether obesity could qualify as a disability under the Employment Equality Directive. To this, the Court responded that, while obesity is not considered a disability in itself, it might fall within the ambit of disability discrimination if certain circumstances obtain, namely where "the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers".[92] The Court thus focused again on the existence of a limitation arising *from the impairment itself*.[93] It provided some examples of such limitations in the context of obesity, such as reduced mobility or the onset of medical conditions which would prevent the person from working or cause discomfort in carrying out their work.[94] Discrimination might occur, however, not only because of such actual limitations to a person's capacity to work, but also, as in the present case, due to the negative image or stereotypes an employer might hold towards obese people. Indeed, the UNCRPD recognizes the potential for discrimination due to discriminatory attitudes or perceived rather than actual disability, and it specifically obliges its parties "to combat stereotypes, prejudices and harmful practices relating to persons with disabilities […] in all areas of life".[95] While the CJEU did not explicitly exclude the possibility of disability arising from the negative perceptions or stereotypes held by the disabled person's environment, the phrase "limitation arising from an impairment" as well as the fact that, in giving examples, the Court referred solely to limitations which would be a direct result of obesity, such as reduced mobility, strongly suggests that indeed those people that are primarily or exclusively disabled by their environment are not protected from discrimination. Waddington and Broderick come to the same conclusion, namely that the Court "seems to exclude from the definition of disability individuals who are disabled by socially-created barriers, such as

91 *Ibid.*, para. 20.
92 *Ibid.*, para. 59.
93 See also Bado, *supra* note 88, 79.
94 *Ibid.*, para. 60.
95 UNCRPD, *supra* note 66, Art. 8 b.

false assumptions and prejudices about an individual's ability, and possibly even barriers in the physical environment."[96]

Such a stance is worrying for several reasons. Not only does it serve to demonstrate the CJEU's difficulties in adhering to the social model it nominally embraces, and thus, arguably, renders the EU definition of disability incompatible with the UNCRPD but it also has important real-life consequences. Excluding from the ambit of disability discrimination those individuals who suffer limitations due to societal prejudice would exclude *tout court* entire groups of people, namely those with disabilities which do not necessarily entail functional limitations but face severe stigma, such as individuals with HIV or AIDS. As McTique notes, HIV and AIDS are now treatable to the point that individuals may not be hindered at all from participating in professional life due to any functional limitations. However, they remain vulnerable to discrimination based on false assumptions about their condition.[97] Similarly, persons with mental health conditions could plausibly be disabled by the prejudice they face from their environment rather than due to any *actual* loss of capacity caused by their impairment – think of the persistent stigma against individuals with personality disorders, for example. In a similar vein, it seems that non-disabled people who are falsely perceived by their employers as disabled would not receive any protection under this interpretation of the Directive.[98]

II. The Disabled Legal Subject as Construed From The EU Law Definition of Disability

Having discussed some of the cases which, taken together, constitute the current definition of disability for the purpose of EU law,[99] we can collect some initial findings about the manner in which EU law conceives of the disabled legal subject.

96 L. Waddington & A. Broderick, *Combating Disability Discrimination and Realising Equality: A Comparison of the UNCRPD and EU Equality and Non-Discrimination Law* (2018), 58.

97 P. McTigue, 'From *Navas* to *Kaltoft*: The European Court of Justice's Evolving Definition of Disability and the Implications for HIV-Positive Individuals', 15 *International Journal of Discrimination and the Law* (2015) 4, 241, 248.

98 D. Hosking, 'Fat Rights Claim Rebuffed: *Kaltoft v Municipality of Billund* , 44 *Industrial Law Journal* (2015) 3, 460, 470.

99 Note that there are a number of cases pertaining to the distinction between illness and disability, the discussion of which would go beyond the scope of this paper.

We have established that the social model fits well with the Nussbaumian view of the person: both recognize that it is not (only) innate characteristics (i.e. the impairment) which create disability but rather the interplay between impairment and external factors, such as social, environmental or attitudinal barriers. At first glance, therefore, one might think that, with the accession of the EU to the UNCRPD, the matter of disability definition would be resolved satisfactorily from the perspective of Nussbaum's theory.

However, as we have seen, the CJEU, while nominally bringing its own definition in line with that of the Convention, struggles to apply it correctly. An important contrast between the medical and social model pertains to the role of barriers which, according to the social model, create disability in interaction with the impairment. The Court seems to have integrated this when, following the accession of the EU to the UNCRPD, it amended its definition to include a reference to barriers. However, despite changing the official definition, the CJEU fails to take into account the interaction between such barriers and the impairment. Instead, it remains focused on the impairment itself to establish disability. This is evident from *Kaltoft*, where the Court, when establishing whether or not the applicant could be considered disabled for the purpose of the Directive, focused on the medical consequences of the applicant's obesity, citing reduced mobility or the onset of related medical conditions as factors which could render his obesity a disability for the purpose of the Employment Equality Directive, and implicitly denying that the employer's discriminatory attitude towards obesity might be sufficient for that purpose. Similarly, in *Z*, the Court found that the applicant's impairment did not render her disabled for the purpose of the Directive since the fact that she was unable to conceive a child did not in itself impact her capacity to work. Had the Court seriously considered the interplay between her impairment and existing barriers, namely the lack of a system of surrogacy leave, it would likely have found differently. In both cases, the CJEU constructs a person which is innately either capable or disabled, apparently independently from her environment. One is inherently disabled or not. This is in stark contrast not only to the social model of disability but arguably to reality. As Nussbaum recognizes, all human beings depend on their social and political environment to develop and make use of their innate capabilities. Dignity, in a Nussbaumian understanding, is inviolable but not indifferent: our material circumstances do not diminish our dignity, but they are certainly important to dignity's flourishing. It matters, simply put, whether we are poor or do not have to worry about money, whether we are socially well-regarded or shunned, whether our systems are set up with our needs in mind or not. These factors do not change our equal worth and deservingness, but a

life *worthy* of human dignity will require them. One of the ways Nussbaum expresses this idea is through the concept of combined capabilities. Combined capabilities refer to those capabilities which are not only present internally; that is, they are not the capabilities of a person who is only theoretically able to do something (on account of her skills, talent, health), but those of a person also enabled by her social and political environment. They are the relevant capabilities for the pursuit of justice as it would not do for a government to foster a person's internal capabilities, for example by providing her with education and thus nourishing her intellect, but to then deny her combined capability for free speech through failing to protect it in the state's legal system. If disability can be conceptualized as an unjust lack of capability, then we would do well to acknowledge that this refers to *combined* capabilities, that is, innate capabilities in interplay with social, political, and environmental factors. Hence, in defining disability, it is only sensible to consider not only a person's internal capabilities (the impairment itself) but also the manner in which the impairment interacts with environmental, socio-political, or attitudinal barriers to disable that person.

The manner in which the CJEU conceives of disability as related to the professional sphere is telling as well: it is true that the Employment Equality Directive only covers discrimination in that sphere – this is a well-known criticism which concerns many other grounds of discrimination as well.[100] The fact that the envisaged horizontal discrimination directive has stalled in the political process is unfortunate but to demand that this gap be bridged by the Court might legitimately raise concerns of judicial overreach. However, this is not what is suggested here. While the material scope of the directive is explicitly limited to employment, the same cannot be said of the personal scope. Nevertheless, the Court decided to apply the requirement of the disability constituting a hindrance to a person's equal participation in professional life to the definition of disability itself, thereby excluding impairments which do not, in themselves, constitute such a limitation. This reveals something about the imagined addressee of these provisions – the relevant disabled person (that is, the disabled person worthy of protection from discrimination) is disabled

100 See the failed proposal for a Horizontal Equality Directive: EU Commission, *Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, COM(2008) 426 final. See further A. Broderick & D. Ferri, *International and European Disability Law and Policy* (2019), 357; L.Waddington, 'The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law', in U. Belavusau & K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (2019) [Waddington, 'Influence'].

for the purposes of employment. Intentional or not, this is the consequence of defining disability in the manner as it is currently done. And, as we have seen, this outcome is not inevitable from the text of the Employment Equality Directive itself. The Directive speaks of combatting *discrimination* (on the grounds of disability) in the sphere of employment, not of disability concerning the sphere of employment. It follows that the discriminatory act must be related to the employment, not the disability itself. And, as is evident from the *Z* case, it is indeed possible to be disabled by a condition which is not directly impacting negatively on one's capacity to work, but still be discriminated against in the employment sphere. The protection of people whose disability does not directly restrict their productivity is thus being denied by the exclusionary manner in which the CJEU applies its definition of disability.

This is telling – it constructs a deserving (and an undeserving) disabled legal subject. The disabled person only appears for the purposes of EU law where she is disabled with respect to her ability to work. To put it more pointedly, the only relevant person for the purpose of discrimination law is the economically productive disabled person, or rather the potentially productive disabled person who, through discrimination legislation, can be restored to productivity. Those who are able to work but are forced to make sacrifices in their personal life due to discriminatory conditions fall through the cracks. As O'Brien put it, this "fixation upon people with impairments suffering direct work function-effects reflects the Union's expectations of labor market conformity and unwillingness to re-evaluate social structures."[101] By defining disability as it does, that is, as directly related to one's employability, the Court thus perpetuates a reductive conception of the person, one which ignores the plurality of ends which is characteristically human, the fact that we strive for a multiplicity of worthy goals, and require this plurality for a life worthy of human dignity. In Nussbaumian terms, the CJEU promulgates an instrumental view of the person insofar as it appears to value a person primarily for her productive contribution towards the cooperative scheme that is the EU.[102] This is not only reductive and insulting towards the dignity of disabled persons but has real consequences in law and policy as will be shown in the next section.

101 O'Brien, 'Union Citizenship', *supra* note 83.
102 Nussbaum, *Frontiers of Justice*, *supra* note 3, 160.

III. Pitfalls of Constructing the Disabled Legal Subject Along Productivity Lines

We have seen that EU law struggles to conceive of the disabled legal subject in terms other than of economic productivity and to give proper significance to environmental, social, or attitudinal barriers in defining disability. This section demonstrates some consequences of this conception of the person, using the examples of sheltered employment, care work, and activation policies.

1. Sheltered Employment

Sheltered or rehabilitative employment are those forms of work specifically designed to support people who are unable to participate in the 'normal labor market' - disabled persons frequently make up the majority of employees in such schemes.[103] Usually, two types are distinguished: those schemes aimed at helping persons to reintegrate into the ordinary labor market (rehabilitative employment), and those which provide permanent employment for those unable to find work on the open market (sheltered employment).

There is some discussion as to whether sheltered employment is actually desirable from a disability rights perspective or whether it can contribute to the 'ghettoization' of disabled workers, thus further exacerbating the exclusion of disabled persons from social and economic life.[104]

While those who argue that it is contrary to the aim of inclusion of disabled persons to permanently employ them in schemes which will often lead to segregation from the normal workforce certainly have a point, it must be recognized that there are persons who may never be able to be in ordinary employment. That is why it is of great importance that sheltered employment is recognized as work, with all the rights that derive from this status. However, under current EU law, sheltered employment is only recognized as conferring worker status under narrow conditions, namely where it is 'of some economic

103 M. Jesús Segovia-Vargas *et al.*, 'Sheltered Employment Centres: Sustainability and Social Value', 13 *Sustainability* (2021) 14, 7900; S. Beyer, F. de Borja Jordán de Urríes, M. A. Verdugo ,'A Comparative Study of the Situation of Supported Employment in Europe', 7 *Journal of Policy and Practice in Intellectual Disabilities* (2010) 2, 130.

104 See e.g. M. Bell, 'People with Intellectual Disabilities and Labour Market Inclusion: What Role for EU Labour Law?' (2019), 11 *European Labour Law Journal* (2020) 1, 3, 10 [Bell, 'EU Labour Law']; L. Waddington, 'Evolving Disability Policies: From Social Welfare to Human Rights: An International Trend from a European Perspective', 19 *Netherlands Quarterly of Human Rights* (2001) 2, 142 [Waddington, 'Evolving Disability Policies'].

value'. As the term 'worker' has autonomous meaning in the EU legal system but is not defined in any legislation or treaty provision, the task of defining the concept has fallen to the CJEU. The result is an amalgamation of criteria which make up the EU worker with the basic formula being that they must perform services under the direction of another for remuneration.[105] An exception from these criteria was carved out already in the 1989 *Bettray* case,[106] which concerned employment for individuals unable to work in the normal labor market for an indefinite time. The Court held that the employment relationship could not be considered "effective and genuine economic activity" and could therefore not qualify the applicant for protection under the free movement of workers provisions.[107] In the later *Trojani* case, the Court seemed to reconsider the possibility of sheltered or rehabilitative work leading to worker status, ultimately leaving the assessment up to the referring court. It did, however, add that, for such work to be considered genuine and effective, it would have to be "capable of being regarded as forming part of the normal labor market".[108] More recently, in *Fenoll*, the CJEU appeared to reconsider its ruling in *Bettray* insofar as it did find the applicant (working in sheltered employment) to be a worker for the purposes of EU law.[109] Importantly, however, the Court based this finding on the fact that the work carried out within the sheltered employment scheme was not merely "marginal and ancillary" but had "a certain economic value" as the organization derived some economic benefit from the activities carried out under the scheme.[110] Thus, while the Court appears to be more willing to recognize work performed outside of the open labor market, it continues to rely on an assessment of economic value for recognizing an activity as work.[111]

This is concerning for several reasons. First, it seems at odds with the normally broad interpretation of the worker status by the CJEU. For example, those undergoing vocational training have regularly been recognized as workers

105 *Deborah Lawrie-Blum v. Land Baden-Württemberg*, C-66/85, Judgment of 3 July 1986, ECLI:EU:C:1986:284, para. 17.

106 *I. Bettray v Staatssecretaris van Justitie*, C-344/87, Judgment of 31 May 1989, ECLI:EU:C:1989:226 [*Bettray*].

107 *Ibid.*, para. 17.

108 *Michel Trojani v Centre Public d'Aide Sociale de Bruxelles*, C-456/02, Judgment of 7 September 2004, ECLI:EU:C:2004:488 [*Trojani*].

109 *Gérard Fenoll v Centre d'Aide par le Travail „La Jouvene" and Association de Parents et Personnes Handicapées Mentales (APEI) d'Avignon*, C-316/13, Judgment of 26 March 2015, ECLI:EU:C:2015:200 [*Fenoll*].

110 *Ibid.*, para. 40.

111 M. Bell, 'Disability, Rehabilitation and the Status of Worker in EU Law: Fenoll' 53 *CMLRev* (2016) 197, 204 [Bell, 'Fenoll'].

in free movement provisions, even though they will usually not be of significant economic benefit to their employer during that period. Nevertheless, the Court in *Fenoll* was at pains to differentiate the case from the facts of *Bettray*, suggesting that, without economic value, sheltered or rehabilitative employment cannot confer worker status.[112] The disparity in treatment between trainees and those in sheltered employment is in stark contrast to the general principle of equal treatment - non-disabled workers do not have to convince the Court of the economic value of their employment relationship to receive worker status and the protections afforded thereunder.[113] Moreover, even if the criteria were consistently applied to both disabled and non-disabled persons, this would nevertheless ignore the barriers disabled persons face which may prevent them from taking up 'ordinary employment' in the open labor market. Again, EU law is 'disability blind' as it applies a model of work which is ill-suited for many disabled persons and it appears to overlook the manner in which disability is created through the interplay of impairment and various environmental, social, or attitudinal barriers.[114]

Secondly, and more generally, it can be questioned whether economic value should be the guiding line demarcating if someone engaged in occupational activity is worthy of the law's protection. Some disabled persons may never be able to work in the 'normal labor market' due to the nature of their impairment or because their accommodation would be too onerous. This should not mean, however, that they are not entitled to equal protection. Again, such an approach betrays a conception of the person which values human beings first and foremost for their productive contribution. Instead of considering the many valuable ends that may be attained through sheltered employment, such as social integration and community, as well as engaging disabled person's skills and talents, the differentiation along lines of economic value reduces human worthiness to economic productivity. Arguably, the same ends could be achieved by affording equal protection rights to all EU citizens, regardless of economic status, and indeed this would be preferable from the perspective of Nussbaumian social justice. For those who would nevertheless uphold the worker/non-worker distinction, Bell suggests an alternative way of assessing what constitutes

112 See *Fenoll*, *supra* note 109, para. 38.

113 Consider e.g. the facts in *Udo Steymann v Staatssecretaris van Justitie*, C-196/87, Judgment of 5 October 1988, ECLI:EU:C:1988:475 [*Steymann*], which concerned someone in a religious community essentially performing plumbing services for room and board, who was nevertheless considered a worker for the purposes of EU law.

114 C. O'Brien, 'Social Blind Spots and Monocular Policy Making', 46 *Common Market Law Review* (2009) 4, 1107 [O'Brien, 'Social Blind Spots'].

work, which could rely on an assessment of social utility instead of economic value, giving regard to the benefit derived both by the individual in sheltered employment and society as a whole.[115]

It is clear how the conception of the disabled person we have identified above impacts on the (non-) recognition of sheltered employment. Such a conception is blind to the fact that disability is the result of the interaction of an impairment and a person's environment, thus necessitating accommodations to be made for enabling equal capabilities up to a threshold. Instead, current EU law uses those accommodations (in this case, sheltered employment) as a disqualifying reason for recognizing the equal status of disabled workers. Moreover, the fact that the CJEU has proven more willing to recognize sheltered employment where it is convinced of its economic value demonstrates an understanding of the (disabled) legal subject primarily in terms of productive contribution.

2. Care Work and Dependency

The issue of care work and the legal status of dependent (or conversely, primary carer) are closely connected to disability rights. Some disabled persons require part-time or full-time care and often this task falls to close family members who reduce their work hours or leave employment entirely to care for their relatives. Of course, the relevance of these issues goes beyond the sphere of disability – care for non-disabled children and the elderly are of equal significance from the perspective of Nussbaumian social justice. Thus, while the present discussion examines the topic primarily from the perspective of disability, many of the findings are applicable to other care-giving and care-receiving statuses as well.

The central issue with regard to care work and EU law concerns the rights of the care-giver. While this section therefore focuses on their legal position, the legal construction of the care relationship can provide insights with respect to the conception of the person and of disability and the importance that care and vulnerability are afforded more generally. This also shows how the treatment of disability can reveal more fundamental beliefs about personhood, such as precisely whether vulnerability and dependency are considered part of the human condition or an aberration. The most pertinent situation with regard to care-givers and EU law occurs where the person in need of care is an

115 Bell, *supra* note 111, 204. Note that also from an economic perspective, economic value is usually defined as utility or welfare, rather than exclusively monetary value.

EU citizen but their care-giver is not. For safeguarding the capabilities of the person requiring care, it is crucial that their carer enjoys residence and equal treatment rights. These rights are primarily regulated under the Citizenship Directive, which determines, *inter alia*, the conditions for obtaining residence and equal treatment rights for family members of EU citizens.[116] Usually, such rights are tied to requirements of economic activity or financial self-sufficiency, dependency, and cross-border movement.[117] Already, this is problematic from the Nussbaumian perspective: disabled persons (and others requiring care) are entitled to have their capabilities to be emotionally and physically nourished and taken care of realized, regardless whether they themselves or their care-givers are economically productive. Indeed, EU law is not entirely blind to the importance of care: in the seminal *Ruiz Zambrano* case, it granted residence rights to the parents of an EU national despite the conditions laid out in the Citizenship Directive not being satisfied, on the basis of ensuring the enjoyment of the 'substance' of EU citizenship rights to said EU national.[118] While this is a positive development from the perspective of Nussbaumian social justice, the manner in which the Court has construed such relationships of care must be assessed critically. The CJEU has interpreted the dependency requirement to mean exclusively financial dependency, resulting in overly narrow conditions under which disabled persons can rely on EU law to extend protection to their care-givers. While dependency in life can manifest in various dimensions, such as emotional or physical dependency, the CJEU has construed the dependency requirement as found in Article 2 of the Citizenship Directive to be (exclusively) material.[119] Such an understanding of the care-dependency relationship again betrays a reductive view of the person: it supposes that, where a person is

116 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, OJ 2004 L 158/77.

117 *Ibid.*, Art 7; N. Cambien, 'EU Citizenship and the Right to Care', in Kochenov (ed.), *EU Citizenship and Federalism*, *supra* note 50.

118 *Gerardo Ruiz Zambrano, v. Office National de l'Emploi (ONEm)*, C-34/09, Judgment of 8 March 2011, ECLI:EU:C:2011:124 [*Ruiz Zambrano*].

119 *Yunying Jia v Migrationsverket*, C-1/05, Judment of 9 January 2007, ECLI:EU:C:2007:1, para. 35 [*Jia*]; Flora May Reyes v Migrationsverket, C-423/12, Judgment of 16 January 2014, ECLI:EU:C:2014:16, para. 21 [Reyez]; see also *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C-200/02, Judgment of 19 October 2004, ECLI:EU:C:2004:639, paras 43-46 [*Zhu and Chen*, Judgment]; the AG opinion of the latter case explicitly excludes emotional dependency: *ibid.*, Opinion of AG Tizziano delivered on 18 May 2004, ECLI:EU:C:2004:307, para. 84 [*Zhu and Chen*, Opinion Tizziano].

financially secure, they are sufficiently cared for. Nussbaum helps us understand that our needs are instead plural and incommensurable, that they cannot be substituted by a single metric such as financial means. Care relationships are emotionally complex and, besides providing financial stability, the more important attributes of a care-giver may be their capacity to ensure emotional stability and the social ties they have with the dependent. Nussbaum's conception of the person does not disregard the importance of material security. Indeed, it emphasizes that dignity is not indifferent, meaning that it is of great importance for its flourishing that a person has the material preconditions for living well. Nevertheless, she recognizes that the lack of one capability (in this case, the capability for emotion) cannot be remedied by a sufficient amount (or even a surplus) of another. To deny someone the care they require, even if this concerns emotional rather than financial care, is thus unacceptable from the perspective of the CA. Moreover, the refusal to recognize care work as work proper (which would then engender the application of more favorable provisions for residence and equal treatment rights) is an injustice towards those engaged in unpaid care work. Not only does EU law deny them equal treatment *vis-a-vis* workers in the traditional sense, but it arguably impinges on the social recognition and, ultimately, the dignity of those engaged in unpaid care work.[120] There are two plausible solutions to this. Care work could be recognized as work, with those providing care then enjoying the more extensive rights afforded under the free movement of workers provisions.[121] Alternatively, as argued by Cambien, the 'substance of rights' enjoyed by EU citizens as first pronounced in *Ruiz Zambrano* could be understood to encompass a right to care, thus engendering residence and equal treatment rights for the primary carers of EU citizens, irrespective of the conditions enumerated in the Citizenship Directive.[122] While they would achieve virtually the same outcome, it is submitted here that it would be preferable, in terms of Nussbaumian justice, to reconsider the concept of work in EU law so as to include care work. This is because, in the alternative, the rights of care-givers would be derivative: their rights (to residency, to equal treatment) are granted so that the EU citizen they care for is not deprived of the genuine enjoyment of the substance of rights attached to citizenship. They are thus not accepted as full subjects in their own right but rather are conceived of as a means to an end.

120 See Nussbaum, *Frontiers of Justice, supra* note 3, 212; E. Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (1999).

121 M. Bell, *supra* note 111, 204.

122 As Argued by Cambien, *supra* note 117.

3. Activation Policies

Lastly, activation policies aimed at increasing the participation of disabled persons in the open or 'normal' labor market are further indicative of the narrow definition of personhood that EU law affords disabled persons. Labor market activation policies constitute a general trend observable in EU social policy – whereas early social policy on the EU level was primarily concerned with harmonizing workers' rights and introducing health and safety regulations,[123] EU social and, in particular, labor policy has transformed in the 21st century. Informed both by an increasingly globalized economic environment and the crisis of the welfare state, political emphasis shifted from demand-side policies to supply-side policies.[124] This move from harmonizing employees' rights towards coordinating employment policies was first visible in the European Employment Strategy (EES), continued to be central to the Lisbon Strategy and which also underlies the Europe 2020 strategy.[125]

There is, however, some concern relating to the shift away from ensuring individual rights at a European level towards coordination of member state employment strategies. This is because, as Börner points out, "individuals are not legally entitled to any active labor-market policies".[126] Thus, whether the adopted policies will in fact 'reach' those citizens in greatest need are left to the discretion of national legislators. Furthermore, the tandem of labor market activation on the one hand and reform of the welfare state on the other is frequently implemented by recourse to punitive strategies rather than by investment in positive activation. That is, activation measures are linked to welfare entitlements and, where

123 See e.g. Council Directive (EEC) 91/533 on an Employer's Obligation to Inform Employees of the Conditions Applicable to the Contract or Employment Relationship, OJ 1991 L 288/32; Council Directive (EEC) 92/85 on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who Have Recently Given Birth or are Breastfeeding , OJ 1992 L 348/1; Council Directive (EC) 93/104 Concerning Certain Aspects of the Organization of Working Time, OJ 1993 L 307/18; Council Directive (EC) 94/33 on the Protection of Young People at Work, OJ 1994 L 216/12.

124 C. Barnard, 'EU Social Policy: From Employment Law to Labour Market Reform', in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (2011), 657.

125 See e.g. Commission, 'Green Paper – Modernising Labour Law to Meet the Challenges of the 21st Century', COM(2006) 708 final, 7-9; Commission, 'Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth', COM(2010) 2020 final, 17-19.

126 S. Börner, 'Marshall Revisited: EU Social Policy From a Social-Rights Perspective', 30 *Journal of European Social Policy* (2020) 4, 421, 429.

individuals do not comply with requirements aimed at their reintegration into the labor market (frequently, this consists simply of an obligation to search and apply for employment), this will entail sanctions in the form of cuts to social benefits.[127]

The trend towards activation is also observable in the Union's disability strategy. The European Commission's 2010-2020 Disability Strategy bemoans the fact that only about 50% of disabled persons are employed and suggests that, for the EU to hit its growth targets, more disabled persons need to be employed in the open labor market.[128] Similarly, the 2021-2030 strategy asserts that increased labor market participation of disabled persons will be "for the benefit of the individuals, the economy, and society as a whole".[129] Notably, both documents stress the economic value to be derived from integrating disabled persons into the labor market. This is not in itself problematic, but there is reason to be cautious with regard to activation policies where they are considered as an alternative for the provision of social benefits. The 2010-2020 strategy spoke of helping member states to "fight those disability benefit cultures and traps that discourage [disabled persons] from entering the labor market".[130] Such rhetoric is worrisome in that it frames benefit recipients as deviant and suggests that the provision of social benefits is responsible for low labor market participation rather than the continued existence of barriers and the lack of accommodation. While the direct reference to 'benefit cultures' is absent in the most recent strategy, the general tenor remains one of activation as the natural solution to low employment of disabled persons. Not only does this betray an instrumental attitude towards disabled persons, it suggests that the low labor

127 This approach has been advocated at EU level since the Amsterdam Treaty, and still persists, Cf. European Commission, 'Proposal for Guidelines for Member States Employment Policies 1998' (1997), D/97/22, available at https://ec.europa.eu/commission/presscorner/detail/en/DOC_97_22 (last visited 7 September 2024) and European Commission, 'Making Work Pay – A Conceptual Paper' (2016), Research Note 3/2016, available at https://ec.europa.eu/social/BlobServlet?docId=16330&langId=en (last visited 7 September 2024). See further S. Betzelt & S. Bothfeld (eds), *Activation and Labour Market Reforms in Europe: Challenges to Social Citizenship* (2011); A. Daguerre, 'Activation Policies at the EU Level: A Workfarist Turn?', in A. Daguerre, *Active Labour Market Policies and Welfare Reform* (2007), 130-150.

128 EU Commission, *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, COM/2010/0636 final, 7, section 4: Employment [EU Commission, *European Disability Strategy 2010-2020*].

129 EU Commission, *Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030*, COM(2021)101 final, 13-14.

130 EU Commission, *European Disability Strategy 2010-2020*, *supra* note 128, 7, section 4.

market participation of disabled persons is ultimately a matter of personal choice rather than of their disabling environment. This is painfully ignorant of the of the systemic barriers faced by marginalized groups, such as disabled persons, and contributes to the further stigmatization of those in need of social support. It entirely disregards that we all depend on our environment for realizing our capabilities – our environment just happens to be built with non-disabled persons in mind.

Hence, the turn toward active labor market policies merits some skepticism from the vantage point of the CA. This is so in particular where these policies are implemented through a regime of sanctions, which prioritizes (any) employment. It is appropriate to ask *which* capabilities are promoted and whether they come at the expense of other, equally valuable capabilities. Indeed, frequently such measures "emphasize employability, competitiveness and economic return" rather than fostering "individual autonomy and capability to be active citizens".[131] While one's evaluation of these effects will necessarily depend on one's understanding of the purpose of social policy, this does not mean the evaluation should not be undertaken in the first place. Moreover, labor market activation policies do not truly aim at ensuring capabilities, but rather at *functioning* – activation policies are successful where they result in actual labor market participation as opposed to enabling individuals to choose whether or not they want to pursue 'normal' employment. Not only is this arguably illiberal, insofar as it imposes an understanding of the good life (one characterized by economic productivity), but it again implies that a (disabled) person is worthy only in terms of their productive contribution. This is true in any case where such policies function with the threat of punitive consequences if the desired outcome (i.e. employment) is not achieved. This is not to argue against activation policies *per se*, but rather to stress the importance of multi-pronged approaches, which do not promote work on the normal labor market as the only sensible choice but are considerate of the fact that it is one option out of many, none of which determine a person's worthiness. In particular with regard to disabled persons, but also more generally, if we conceive of human beings as inherently vulnerable, we can more easily allow for mechanisms of care and support without demonizing those that have to rely on them.

131 M. A. Yerkes *et al.*, 'From the Capability Approach to Capability-Based Social Policy', in M. A. Yerkes, J. Javornik & A. Kurowska (eds), *Social Policy and the Capability Approach* (2019), 148.

F. Who is EU Law For?

As we have seen, the manner in which we conceptualize human beings determines what we consider to be the requirements of justice. An approach based on an understanding of persons as essentially rational, self-interested, and independent from their social and political environment will prescribe different demands and entitlements than one based on the idea that we are social animals characterized by our rationality as much as by our pervasive vulnerability and dependency.

It is argued here that the latter approach is not only normatively more desirable, as it can include also the most marginalized groups, but it is also a closer approximation of human nature. Indeed, most of us would recognize that we flourish in social relations, that we experience periods of dependency and of care-giving, and that we are motivated by our self-interest as well as by a desire for community and a sense of justice. Thus, it is sensible to construct and regulate society with such a person in mind, rather than with the rational profit-maximizer described above. Indeed, it becomes an imperative to do so when we realize that not only are our social institutions a product of our understanding of human nature but that the relationship is cyclical: our judgements of deservingness, worthiness, and justice are deeply influenced by the social order as we have constructed it.

In the context of EU law, we have seen how the person is constructed through the legal statuses she is afforded – or indeed, rather than a whole person, what is constructed are fragments, specific identities which determine access to and benefits from EU law. The conception of the person which emerges from these statuses is reductive – it appears overly focused on human beings as economic actors, disregarding our multi-faceted nature, our capacity to engage in relationships characterized by justice, and our complex dynamics of care and dependency. The construction of the disabled legal subject is a pertinent example of this. Disabled persons are reduced to their impairment in so far as EU law still fails to account for the importance of external (environmental, social, or political) factors in their disablement, maintaining a false distinction between them and able-bodied persons. Moreover, the disabled legal subject is conceived of in an instrumental manner insofar as EU law is primarily concerned with the reduced economic productivity that may follow from their disability and with providing avenues for restoring their productive potential. We have seen how these conceptions pervade in EU law and policy, as well as how they produce real consequences for disabled persons and their care-givers.

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Thus, we are confronted with a simple question: who do we want EU law to serve? Those that fit more or less comfortably within the inherently reductionist conception of the person presented above? Or do we want to consider reforming EU law so as to address human beings that can be economically productive as well as dependent on care and assistance, who are both self-interested and deeply invested in sustaining social and communal relationships? Admittedly, doing so would require radical change at both the EU and member state levels, but this in itself should not be a reason to not consider these questions. Ultimately, we will have to decide whether we want EU law to address and benefit only those who fit the profile underlying current EU law, thereby excluding all those who do not (often the most marginalized), or whether we are willing to reconsider fundamentally whom EU law is for.