Foreword

The automatic corollary of agreeing to write the introduction to a book is that one then has to sit down to read it. In the case of the present work, this has been a pleasant duty. With the odd exception, my practice at the Bar did not lead me to do much criminal work. I was a dyed-in-the-wool Euro-lawyer. After two years at the Court of Justice of the EC, I found myself awaiting (with a certain degree of trepidation, it must be said) the entry into force on 1 March 2008 of the new ‘urgent preliminary ruling’ procedure that has been put in place to deal with references under Part IV of the EC Treaty (immigration, asylum and certain civil law matters) and Title VI of the TEU (police and judicial cooperation). I decided that, before the first references under the new procedure hit the Court like unfamiliar express trains, it would be eminently sensible to improve my level of background knowledge. A pre-proof copy of this book therefore found its way both immediately and painlessly onto my reading list.

Because of its sensitivity (it is, after all, traditionally closely associated with the exercise of sovereignty), criminal law was packaged at Maastricht, together with immigration and asylum issues, within ‘justice and home affairs’ (‘JHA’), safely away from ‘mainstream’ EC law. Subsequently, it has been maintained in lonely splendour within Title VI of the ‘third pillar’. If the Lisbon Treaty is ratified, it will move into the ‘area of freedom, security and justice’1 (‘AFSJ’) – an umbrella Title IV within the Treaty on the Functioning of the European Union (‘TFEU’) – albeit with important reservations for the United Kingdom and Ireland. Possibly because EC criminal law has tended to move around in company with other big, sensitive topics, there have been relatively few attempts to treat it coherently, as a free-standing and major topic that is worthy of proper analysis in its own right. This book addresses and fills that lacuna.

The authors begin, like all good storytellers, at the beginning. They point out that ‘people have always moved, travelled, migrated’ and that ‘as an inevitable consequence, systems of criminal justice have always had to deal with the existence of, and claims by, other systems of criminal justice’. Covert (and not so covert) historians will enjoy finding an early example of harmonised, Europe-wide criminal procedure (trial by ordeal, in which the Church was an active institutional participant until Pope Innocent III decided otherwise at the Fourth Lateran Council in 1215) rubbing

vi
shoulders with references to the von Clausewitzean conception of a constant ‘state of nature’ to describe relations between sovereign States in dealing with requests for inter-State cooperation such as applications for extradition or letters rogatory. It is likewise salutary to be reminded that the conventional division of criminal law systems in Europe into the adversarial and the inquisitorial is in fact a rather artificial classification that did not come about by conscious design and that is, in some respects, in the process of being broken down anyway as new national criminal laws borrow from the neighbours’ good ideas. And I can only agree wholeheartedly with the proposition that as, when or if there is going to be a conceptual shift in the system of criminal justice, ‘what one would wish is for it to be made consciously and with consideration given to the analytical consequences which necessarily flow from it’.

In successive chapters, the authors get down to business and present the institutional actors before moving on to police cooperation, judicial cooperation, external cooperation in matters of criminal justice and substantive criminal law (in respect of those offences for which EU law, rather than individual national criminal laws, provides the definition). The analysis is sharp, well-informed and thoughtful. To pick out examples from a good book is always slightly invidious, but the explanation offered of the travails of the European Arrest Warrant (‘EAW’), the description of the long and ultimately fruitless attempt by the Commission to push through a framework decision on certain procedural rights applying in criminal matters throughout the European Union (the ‘FDPR’) as the logical counterbalance to other mutual recognition measures, and the critique of the Court’s judgments in Ship-source Pollution and Environmental Crimes all make for compelling reading.

The authors conclude by trying to highlight some of the common threads and concerns that have pervaded the complex agenda for EU criminal law and justice. They make a strong case for thinking that ‘the actual framing of the AFSJ suffers from a failure properly to consider the theoretical implications of providing the “good” of criminal justice at the EU level’ and that:

EU criminal law and justice currently uncomfortably straddles two not entirely compatible logics . . . the Member States and the EU institutions alike . . . fully subscribe to the view that the EU can provide practical benefits . . . on the other hand, these same actors seem to be of the opinion that ground-breaking advances in cooperative practices as a result of common EU legislation can be introduced without changing the classical concept of criminal justice as the sharp end of national sovereignty.

They are not likewise afraid to stick their necks out and offer some predictions as to what may, or should, be the future of criminal justice in the
EU. They plead eloquently for proper involvement of the European Parliament as the natural forum for discussions on the rationale of the system and on core issues such as how real mutual trust (the necessary underpinning for continued widespread reliance on the principle of mutual recognition rather than (more intrusive) harmonisation) is to be fostered, whilst emphasising that ‘the most important effect of giving the European Parliament a decisive role in EC legislation in matters of criminal justice is that it would serve to balance the preponderance of executive power’. They highlight – sometimes, with disconcerting acuity – issues such as weak structures for judicial supervision, problems of competence and legal base, extra-EU cooperation subsequently integrated into the EU (Schengen in the past, Prüm in the immediate future) and what will (and will not) change if the Lisbon (Reform) Treaty is ratified. I hope that they are already earmarking time to monitor the breaking news on the AFSJ and that they have scheduled when they will need to sit down again together to write the second edition.

Many other Members of the Court are, like myself, not particularly specialist in criminal law or procedure (there are, of course, honourable exceptions, like Judge Cuñha Rodrigues and Advocate General Bot, whose experience before coming to the Court gives them a significantly better overview of the issues and the likely problems). Many EU law practitioners do few criminal cases. Many criminal law practitioners have had relatively little exposure to EU law. Academics working on EU law tend to have left criminal law behind with their undergraduate days (and vice versa). Civil servants working on AFSJ questions will tend to have in mind established national practice and immediate policy concerns rather than the wider picture. This book will therefore be immensely useful to a number of different readerships. The only prerequisite is, I think, that the reader must be willing to look thoughtfully at the subject-matter rather than merely wanting to look up a particular point in two minutes in order to stuff it into his draft.

Of course I have found places where I do not necessarily instantly agree with the authors’ perspective. When does one not have that reaction, reading oneself into an area where law, sociology, moral philosophy and political theory overlap? I suspect my questions stem precisely from the fact that this is an imaginative, helpful and stimulating attempt to present EU criminal law ‘in the round’. As such, it is warmly to be welcomed as an important and provocative contribution to a debate that is just beginning to gain real impetus about an area of law of fundamental importance. And those who – like myself – cannot resist the less serious moments in the middle of studying a serious subject will be enchanted, along the way, to discover little snippets such as that, every six months, at the last meeting in
a presidency of the Comité de l’Article Trente-Six⁵ (CATS), the outgoing presidency hands over two porcelain cats, one white and one black, representing the police and the judiciary (it has not been decided which is which) to its successor.

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NOTES

1. Or, as a younger colleague of mine has delightfully and memorably re-christened it, the ‘area of peace, love and understanding’ – currently Part IV of the EC Treaty.
3. Case C-440/05 Commission v Council (Ship-source Pollution), Grand Chamber, 23 October 2007.
4. Case C-176/03 Commission v Council (Environmental Crimes), (Grand Chamber) [2005] ECR I-7879.
5. Named after the article of the TEU that makes provision for its existence.