

Introduction

WHY 'EU CRIMINAL LAW AND JUSTICE'?

Within the confines of legal commentary on the EU institutions dealing with what has become known as EU Justice and Home Affairs (JHA) law, it can perhaps seem unduly limitative to restrict the ambit of the present book to EU criminal law and justice. However, there are two reasons why we feel that this approach is justified. First, the legislative achievements of the EU in the specific field of criminal law and justice are now significant both in scope and in depth and are in many ways revolutionising the day-to-day practice of criminal law in the EU. A field of such growing importance deserves separate and dedicated treatment. Second, there never was a logical or analytical necessity to link those topics dealt with within the confines of EU JHA law. Rather, their linking is a consequence of the history of the EU Treaties. When the EU Treaty was first drafted and signed in Maastricht in 1992, the EU was restructured into 'Pillars'. The traditional European Community (EC) was put in the 'first pillar' and retained those characteristics which had made the EC such a successful and innovative organisation: monopoly on legislative initiatives in the Commission, qualified majority voting in the Council of Ministers, extensive input from a supranational, popularly elected European Parliament (EP), and an effective and well-developed system of judicial oversight. So much for confirming and restating what was already a reality. The importance of Maastricht, however, was that there the Member States decided that there was a need for EU cooperation with respect to a number of politically more sensitive matters: defence and foreign policy, immigration and asylum, and criminal justice. But, as a result of their sensitive nature, the Member States were unwilling to organise their cooperation in these matters along the lines of the supranational 'Community method'. Therefore, these matters were put in separate pillars subject to separate institutional arrangements taking into account their close affinity with issues of national sovereignty. As it happens, it was deemed proper to put the provisions pertaining to immigration and asylum together with those pertaining to criminal justice in the 'third pillar'. EU JHA law was born. Whether this was a result of a conscious linking of immigration with criminal justice or whether it was simply the result of a political compromise which led to that similar institutional arrangements were deemed proper for

decisions in the two fields we can leave to one side because these arrangements were drastically changed with the entry into force of the Treaty of Amsterdam. This treaty 'communitarised' that part of the third pillar dealing with immigration and asylum placing it in the first pillar, namely in Title IV EC. Left in the third pillar is now only criminal justice.

Even though the institutional arrangements which gave rise to the habit of dealing with EU activity in matters of immigration and asylum together with EU activity in matters of criminal justice no longer exist, the practice of dealing with them in conjunction nevertheless persists.¹ We believe that this approach needs revising. There is the practical consideration that the amount of normative output is now such that dealing with these two fields separately is convenient, both for the readers and, perhaps more critically, for the authors. More important, however, is the fact that these are fields which are fundamentally different and which, therefore, deserve to be dealt with separately. At least the field of EU criminal justice has now developed to a degree of complexity which makes it a field of study in its own right, where some of the difficulties and issues will be familiar from national criminal legislations but where, at the same time, the very particular context that is the EU gives rise to a plethora of challenges new to the field of criminal justice. The present book aims to provide an overview of the achievements of the EU in the field of criminal justice while at the same time highlighting and discussing some of the more important issues thrown up by the administration of criminal justice at the EU level. This is why we have chosen to call this book 'EU Criminal Law and Justice'. We want to indicate that, in addition to providing a reference guide to EU criminal legislation, in the positivist sense, we also aim to discuss the 'justice' of this legislation. In short, in addition to attempting to provide answers to the 'What?' and the 'How?', we also aim to deal with the 'Why?'

BOOK OUTLINE

The chapters in this book are organised so that the reader who wishes to get a quick insight into one particular aspect of EU criminal law can read them individually. However, all chapters build upon the general analyses and discussions in this introduction, as well as the first two chapters. It is therefore recommended for all readers to read these three parts before moving on to any of the more specific chapters.

The remainder of this Introduction seeks to put EU criminal justice in a broad historical context focusing on the age-old question of the link between state sovereignty and the provision of criminal justice. Chapter 1 discusses the possible justifications for the EU to get involved in matters of

criminal justice and the objectives which the EU has set itself in this regard, notably the creation of the *Area of Freedom, Security and Justice*. In this chapter you will also find an outline of the institutional structure of the third pillar: competences, legal instruments and the available judicial interpretations of these instruments. Chapter 2 provides a review of the institutional actors in the field of EU criminal justice. Chapter 3, the first field-specific chapter, explains and discusses police cooperation in the EU. Chapter 4 is an essential chapter as it deals with what has become the normatively most emblematic aspect of EU criminal justice: judicial cooperation. Here you will find the discussion relating to the principle of *mutual recognition* and its applications, most notably the European Arrest Warrant (EAW). Chapter 5 discusses that aspect of EU criminal justice affecting the EU's relationship with the rest of the world, or, put simply, external cooperation in matters of criminal justice. Chapter 6 reviews and discusses the EU's efforts in the area of substantive criminal law, i.e. those offences for which the EU has provided the definition.

The Conclusion seeks to highlight some of the common threads and concerns that have pervaded the complex agenda that is EU criminal law and justice. Here we will also attempt to provide cautious predictions for the future of criminal justice in the EU.

BOX 1 REFORM TREATY – TREATY REFORMS

This book is published as the EU yet again tries to redraft its foundational legal documents. As the manuscript for this book was being finalised, on 18 October 2007, the heads of state and government of the 27 Member States agreed to the Treaty of Lisbon (known as the 'Reform Treaty') to be signed, again in Lisbon, on 13 December 2007.² This treaty significantly modifies the institutional set-up of the whole EU and one of the areas most affected is precisely EU criminal justice. During the next couple of years the Reform Treaty will be subjected to the various ratification procedures applicable in the 27 Member States with a view to its entry into force on 30 June 2009. Although it seems that the number of popular referenda will be lower than for the now defunct Constitutional Treaty with, *inter alia*, France and the Netherlands both claiming that no referendum is necessary this time, the institutional concern is that, where referenda are held, they might again result in the blocking of the Reform Treaty and a continuation of the EU's institutional 'crisis'. All in all, the future of the Reform Treaty is very uncertain.

Even if the Reform Treaty becomes a reality, most of what is said in this book remains valid: the instruments adopted to date will remain good law³ and the more principled discussions as to the proper role of the EU in the provision of criminal justice will not be exhausted by the entry into force of the new treaty. However, matters of competence, legal instruments and institutional arrangements will of course be the subjects of sometimes fundamental change. In order to take these probable developments into account, we have gone through the provisions of the Reform Treaty applicable to EU criminal justice to try to predict the legal landscape after its potential entry into force. These discussions will be found highlighted throughout the book in the same manner as the present section.

We have included as a separate annex attached to the end of the book an explanation of the special position of the UK and Ireland in relation to EU criminal justice if the Reform Treaty enters into force.

It is worth explaining at this point that the Reform Treaty will amend both the existing EC and EU treaties. It will also rename the EC Treaty, the Treaty on the Functioning of the EU (TFEU) and all references to the 'Community' or 'European Community' will be replaced by references to the 'Union'. The Reform Treaty contains 11 Protocols which will be annexed to the EU Treaty, the TFEU, and where applicable, to the European Atomic Energy Community. As will become clear, several of these Protocols contain provisions that impact in some way upon EU criminal law.

In general structural terms the Reform Treaty shifts the entire current third pillar into the TFEU, thereby, in effect, putting an end to the existing situation whereby AFSJ matters are scattered across different pillars. Consequently, under the TFEU, the AFSJ becomes an umbrella Title IV under which are inserted four specific policy chapters:

- 'borders and immigration';
- '[j]udicial cooperation in civil matters';
- '[j]udicial cooperation in criminal matters'; and
- '[p]olice cooperation.'

With the undeniable extension of EU competence in criminal matters (as will be revealed later in the book), we would argue that EU criminal law will remain and grow an area worthy of specific academic attention, distinct from the other AFSJ policy areas in Title IV TFEU.

EU CRIMINAL LAW AND JUSTICE IN CONTEXT

It has already been hinted at that the provision of criminal justice including the enforcement of criminal law has traditionally been intimately tied to sovereignty in the sense that the right to punish according to more or less uniform criteria is among the defining features of an organised and independent polity. From the moment polities became sufficiently durable and bureaucratised to qualify as 'states', they have jealously guarded their exclusive right to exercise coercion to punish breaches of the rules of social interaction on their territory. Be that as it may, people have always moved, travelled, migrated and, 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. The traditional conception of the interaction and, sometimes, cooperation between systems of criminal justice has been as an aspect of international relations. Sovereign states have decided to assist other sovereign states with various aspects of the provision of criminal justice depending on purely political considerations. In his seminal work, *On the Nature of War*,⁴ the Prussian theorist Carl von Clausewitz describes the relationship between sovereign states as a constant 'state of nature' in which no party can be said to be bound to any course of action but that which it itself deems it is in its own interest to pursue. In this conception, the only limit to a sovereign state's total freedom of action in relation to its neighbours in matters of international relations in general, and cooperation in matters of criminal justice in particular, is the risk of so angering a neighbouring state as to cause the outbreak of war. Of course, these days international relations are to a greater or lesser extent governed by various forms of international law, which at least tends to diminish the persuasive force of the von clausewitzian conception of international relations. This is certainly the case of Europe since World War II. However, one does not have to look very far back in the history books for examples testifying to the continued relevance of the von clausewitzian notion of international relations as a 'state of nature'. In fact, was it not the refusal of the Taleban leadership in Afghanistan to cooperate in the apprehension and bringing to justice of the masterminds behind the 9-11 attacks which provided the US with the *casus belli* for the invasion of Afghanistan and the forced displacement of the Taleban regime? Von Clausewitz no doubt smiles in his grave.

While the international cooperation in matters of criminal justice can thus seem an almost savage game played in the arena of the greater national interest, criminal justice, as it is most commonly perceived, on the ground, is very much a question of the *individual* interest. At the most basic level, the criminal law is justified by the existence of absolute individual interests

which society has decided merit collective protection. Thus, for the most part, the substantive criminal law lays down those actions which constitute violations of certain individual interests such as our physical bodily integrity and our property interests.⁵ It needs to be stated that there are many ways of viewing and justifying the criminal law. Some, more utilitarian-orientated, conceptions tend to emphasize the danger to society as a whole posed by individuals who commit crimes and will therefore conceive of the criminal law more as a way of protecting the future of a particular society than the vindication of a past violation of an individual interest. But whichever conception one adopts, at the very least it can be agreed by all that the starting point for most criminal processes is the violation of an individual interest. Further on, the criminal process itself is generally seen as a delicate structure designed to tutor and to restrain the punitive might of society in order to protect the interests of the not yet judged defendant. This confluence of individual interests which constitutes criminal justice in the Western world is thus made up of binding rules which apply *irrespective of any contrary national interest*. The eventual circumstances in which that is not the case are regarded with much suspicion and are generally both exceptional and temporary.

When looked at from the point of view of the interests protected, it seems clear that criminal justice *simpliciter* and international cooperation in matters of criminal justice belong to completely different disciplines. And just as there can probably be said to be a near-global agreement on the centrality of the individual interest in criminal justice, globally the traditional conception of international cooperation in matters of criminal justice remains the paradigm: an aspect of international relations and therefore a relationship purely between sovereignties in which the only principle of action is opportunity and in which the ultimate and sometimes only sanction is war. As we shall see, this traditional paradigm has been displaced as regards certain aspects of criminal justice and in certain parts of the world, in particular in the area with which we are concerned, Europe and the EU. Nevertheless, it is important to keep the basic starting point of the von Clausewitzian 'state of nature' in mind when discussing the very recent developments in the EU. These developments are most definitely an improvement on what went before, but they are nonetheless a drastic change away from a system which has developed over centuries. Such weighty tradition, ingrained as it is in the institutional memories of governments everywhere, is difficult to displace. Add to this the additional difficulty that the various criminal justice systems in Europe have until relatively recently evolved according to very separate traditions and the complexity of the task the EU has set for itself becomes abundantly clear.

Criminal Justice and the Vagaries of History

It has become fairly standard, and somewhat populist, to point to the sometimes important differences between systems of criminal justice, and the deep, cultural meaning they supposedly have,⁶ only then to conclude that harmonisation and sometimes even cooperation is neither possible nor desirable. Commonly, the main distinction is made between the systems inspired by the common law tradition, said to be ‘adversarial’, and the systems said to belong to the Continental, ‘inquisitorial’ tradition. To this it is probably proper to add the ex-socialist systems in Central and Eastern Europe because, while they will have been inspired by the two abovementioned traditions, it can only with difficulty be said that they are as ingrained culturally there as the ‘adversarial’ procedure is in England and Wales and the ‘inquisitorial’ is in, for example, France. However, while it is true that there are significant differences between the systems of criminal justice in existence within the confines of the EU, modern thinking tends to be sceptical of such cut-and-dried divisions.⁷ It is pointed out, first, that it is difficult conclusively to settle which features are typical of an ‘adversarial’ or of an ‘inquisitorial’ system. Further, many systems of criminal justice have undergone quite extensive reforms which have tended to bring them closer together, especially under the influence of the ECHR and the case law of the ECtHR. As noteworthy examples of this latter trend can be cited *il Codice di Procedura Penale* adopted in Italy in 1988 and *le Nouveau Code de Procédure Pénale* adopted in France in 1992. Both these reforms incorporated significant elements traditionally associated with ‘adversarial’ procedures. In the UK, on the other hand, although the ‘geography’ of the legal system renders such sweeping reforms of the kind introduced in France and in Italy extremely difficult and therefore highly unlikely, recent discussions on restricting trial by jury, special counsel, etc. go in the direction, if not of ‘inquisitorial’ procedures, then at least away from some of the most emblematic facets of the ‘adversarial’ tradition.

In addition to this empirical argument that differences between systems of criminal justice are less a matter of kind than of degree, there is also the fact that the appearance of the two main traditions (the ‘adversarial’ and the ‘inquisitorial’) was by no means the result of a principled standpoint on how to organise a ‘just’ criminal procedure. Until fairly late medieval times, a criminal ‘trial’ looked pretty much the same all over the Christian world. *Ordeals* were the order of the day: by water, by iron, by combat. The pivotal idea was that, when the priest in charge of the ‘ordeal pit’ consecrated the event, God would intervene in the ordeal to show the guilt or the innocence of the accused. Then, at the Fourth Lateran Council in 1215, Pope Innocent III decided that Holy Mother Church would no longer participate

in the organisation of ordeals. It is to be noted that this was not a decision which based itself on some idea that it was unduly harsh to expect guilt or innocence to be shown by throwing old ladies in ponds to see if they floated or by having people carry red hot irons around to see if they healed without infections. No, the decision was one based on purely theological grounds:

For Christian theologians there was no doubt that God could work miracles. He could, for example, make a guilty man's body stay on the water's surface. The problem was, however, that the basis of the ordeal was that God was required to work a miracle every time he was asked to do so, but since a miracle was surely a free act of God, this was theologically unacceptable unless the ordeal was, like the Mass, a sacrament.⁸

It followed that, since ordeals were not a sacrament they constituted an abuse of God's time and the Church would have nothing to do with them.

At this point, the administration of criminal justice was in a pickle to say the least: the whole basis for the way guilt and innocence were determined was suddenly removed. Although the much less religious ordeal by battle continued to be used in some circumstances – in the UK, under certain circumstances, it remained a statutory option until 1819⁹ – it was clear that new procedures would have to be invented. In the UK and in Denmark, some form of trial by jury was instituted, whereas on the continent the emphasis was placed on 'persuading' the accused to confess, something which usually involved what would today be referred to, somewhat euphemistically, as 'exceptional methods of interrogation'. But before we jump to the conclusion that the freedom-loving Britons placed their trust in the judgment of 'twelve good men and true' whereas the evil continentals were somehow predisposed to torturing people, we should remember that in the UK torture was permitted in proceedings for treason *and*, more commonly, in the guise of what was known as *peine forte et dure*: essentially slowly and incrementally crushing a recalcitrant defendant in order to make her or him 'choose' to put her- or himself before the jury of her or his peers in the first place.¹⁰

If the origins of the first divisions between the 'adversarial' and 'inquisitorial' traditions, however random and unprincipled they seem, can thus be traced some 800 years back, it was surprisingly late that they acquired some of their most emblematic features. For instance, in the common law tradition, prosecution and defence counsel only became a regular feature of criminal proceedings during the second half of the eighteenth century¹¹ and, unlike today, juries were generally 'self-informing' and therefore expected to have prior knowledge of the case. The present insistence on no previous bias in jurors and the jury's modern status as the passive

representation of the people and objective trier of fact would have seemed very alien to Englishmen until relatively recently.

Nevertheless, there is no doubt that criminal procedure is an important part of how a society sees itself and relates to others. Whether or not such far-reaching conclusions are justified from a historical perspective, it is pointless to contest that the diversity in the systems of criminal justice in Europe are a present-day fact and that this became a distinct source of difficulties for cross-border cooperation in matters of criminal justice. Such cooperation was, as we have discussed, already rendered difficult by the conception of cross-border criminal cooperation as a facet of international relations.

Normative Convergence and Institutional Formalisation

Even after World War II, when it became the general consensus that one of the main objectives of the criminal procedure was to safeguard the rights of the individuals involved, this dichotomy between the individual-centred internal procedure, and the state-centred external procedure persisted. The CoE formalised the new consensus on the primacy of the individual in the post-World War II European legal culture. But even in the CoE conventions, the dichotomy appears clearly. On the one hand, the increasingly important ECHR very much places the individual at the heart of state action, in particular in matters of criminal justice. On the other hand, the many CoE conventions formalising the rules of international cooperation in matters of criminal justice very much retain the international relations approach. The obvious example is extradition, where the rule has always been that the ultimate decision of whether to extradite or not lies with the political authorities.¹² Those familiar with the now most common organisation of extradition proceedings will object that national courts have an increasing influence in these matters and that their rulings are generally followed by the political decision makers. This is true, but it should be recalled that the powers of the national courts are essentially negative in the sense that, while extradition can be effectively prevented by a court, in the alternative situation the court can only declare that the executive is free to extradite should it wish to do so. Thus, the positive decision to extradite is always one made by the executive in the national interest. The same goes for requests for mutual legal assistance and the system of letters rogatory sent between ministries of justice. In short, the ultimate decision on whether to provide assistance to another country in matters of criminal justice was made on the basis of considerations of political expediency rather than doing justice by the individuals concerned, which is the prime concern of a court of law. In this sense, although increasingly covered up in the clothes

of international law in the form of international conventions, international cooperation in matters of criminal justice – even in Europe – in many ways still conformed to the von Clausewitzian conception of a relationship between sovereignties well into the final years of the twentieth century.

When the EU first started to act in the field of cooperation in matters of criminal justice, it sought to build on and increase the effectiveness of the CoE achievements as between the Member States of the EU. This can be seen by observing that the instruments made available to the EU legislator in the Treaty of Maastricht, in what became known as the ‘third pillar’, were more reminiscent of traditional, international cooperation than the advanced integration of the EC. At this point of its development, in the field of cooperation in matters of criminal justice the EU seemed intent on becoming an area of enhanced cooperation within the system built up by the CoE.

The position in the EU as regards criminal justice in general and cooperation in matters of criminal justice in particular at the end of the twentieth century can thus be described as follows. As far as the objectives of the criminal procedure were concerned, there was a broad consensus that the main features of the system ought to be the safeguarding of the individual interests involved. On the other hand, while international cooperation was increasingly formalised through a network of conventions and special procedures, the fact that ultimate control over such cooperation rested with the political authorities ensured the continued predominance of the von Clausewitzian theoretical position that international cooperation in matters of criminal justice belonged in the realm of international relations. This position was about to change dramatically.

The EU post-Amsterdam and beyond

In principle, there is little to criticise in the strict distinction of perspectives between criminal justice *simpliciter* and international cooperation in matters of criminal justice. Just as it seems entirely right that individual interests ought to be put front and centre of the criminal procedure in the purely internal context, it can easily be justified that those interests be subordinated to the interests of the state as a sovereign political entity when it comes to cooperating, or not, with other states. The protection of the identity and coherence of the national system of criminal justice *is* a political issue. This is not to say, however, that things could not be different. A system of criminal justice where the protection of individual interests is at the forefront also in those aspects relating to international cooperation is indeed conceivable. It would be a significant conceptual shift but, again, there would be little to object to in principle. If such a shift is to be

made, what one would wish is for it to be made consciously and with consideration given to the analytical consequences which necessarily flow from it.

With the Treaty of Amsterdam, the EU was given more effective legislative instruments with which to pursue greater coordination between the systems of criminal justice of the Member States. Most notably, the framework decision was introduced which gave to the EU in the third pillar an instrument very similar to the first pillar directive; we all know how important an integrationist tool the EC directive has been. Parallel to this purely institutional development, there was a political development in that it became an established truth that the (for all practical purposes) disappearance of internal borders in the EU gave rise to a situation where intense supranational cooperation was required if crime was to be fought successfully. We will look into these justifications in some detail in Chapter 1 but, somewhat simplified, the logic was that the internal market created an open and borderless zone for legitimate business as well as for criminal organisations. It was thought that the combination of no borders for personal and business-related movement, with a system of cooperation in matters of criminal justice where borders still constituted significant obstacles to law enforcement authorities resulted in both an increase in cross-border criminality and the risk that astute criminal organisations use the differences in the various systems of criminal justice to their advantage. And so, at the JHA summit in the little Finnish town of Tampere in October 1999, the EU's highest political organ which sets the political direction for the EU as a whole, the European Council, declared that henceforth the principle of *mutual recognition* would be the 'cornerstone' of the EU's action to promote cooperation in matters of criminal justice.

Mutual recognition as such was not a new concept in the EU context; it had already played an important role in the 'new approach' to common market integration and the EC treaty already stated that it was to be the governing principle in judicial cooperation in civil and commercial matters. What made the Tampere declaration so remarkable was that it was a political declaration which became the guiding legislative methodology in the third pillar and as such rigorously applied by *all* the institutional actors of the EU. The flagship legislative example is the EAW¹³ but perhaps more remarkable is the adoption by the European Court of Justice (ECJ) of mutual recognition as an interpretative tool not only when interpreting legislative acts, such as the EAW, adopted expressly under the mutual recognition agenda, but also when interpreting legislation ante-dating the Tampere declaration. Most notable in this respect is the rather substantive case law on Article 54 of the Convention Implementing the Schengen Agreement (CISA) on the principle of *ne bis in idem*.¹⁴ The CISA itself was signed

in 1990 to implement the original 1985 Schengen convention whereby Belgium, France, Germany, Luxembourg and the Netherlands agreed between them, and outside of the then EC framework, to implement the complete freedom of movement across their mutual borders. In 1990, the third pillar had yet to be instituted, let alone the principle of mutual recognition. At first glance then, it is at the very least eyebrow-raising that the ECJ uses mutual recognition as the concept with reference to which to interpret Article 54 CISA. The most plausible explanation for this course of action is the incorporation of the CISA into the EU treaty framework which was effected by a 1999 Council decision assigning third pillar legal bases to the CISA provisions.¹⁵ From then on it is at least arguable that the CISA was to be interpreted using the same interpretative tool as applies generally to the third pillar, i.e. mutual recognition. Nevertheless, the complete success of mutual recognition as the methodological and conceptual centre of gravity for EU action in the context of EU criminal justice is fascinating.

Whether the abovementioned institutional effects of introducing mutual recognition to the third pillar had been predicted or not is difficult to tell. Simplifying ever so slightly, it can probably be said that the EU project has been propelled by political initiatives which the EU's own institutions have appropriated and built upon in ways which, with hindsight, seem entirely logical but which are unlikely to have been within the intentions of the original authors of the initiatives. It is the stuff of clichés but it still deserves mentioning that the arguably most important constitutional events in the history of the EU and which set it apart from public international law generally were the result of the ECJ drawing the logical conclusions from what the politicians had decided but which nevertheless seemed to catch those same politicians by surprise. We are of course referring to the famous decisions in *Costa v. E.N.E.L.* and *Van Gend en Loos* which instituted, respectively, the principles of primacy and direct effect. Today it is difficult to imagine the EU, or, rather, the EC without them. At the time however, the solutions these cases provided were not obvious. So, when the political leaders at Tampere decided to make mutual recognition the 'cornerstone' of EU action in the third pillar, the historically more astute of them probably had a hunch that they were letting a rather large cat out of the bag.

EU Criminal Law and Justice: between Legislative Pragmatism and Legal Consequentialism

Although there is considerable controversy over how to conceptualise the act of judicial interpretation, we will go out on a limb and claim that, when lawyers are faced with a legal issue, they seek to find a solution which is conceptually consistent with the guiding principles of the system within which

they operate. Thus, no legal issue is 'an island' but needs to be approached as part of a larger whole. Usually, there is some sort of 'higher law' which serves as the reference for this 'larger whole'. If we imagine that a law were to be passed laying down that permanently depriving a person of her or his car is not theft if the keys were in it, we would, presumably, be upset not only because it would be a stupid and unfair law but also because it would have repercussions for the conception of property pertaining in that legal system. If then, as is usually the case, national constitutions (or, if all else fails, Article 1 of Protocol 1 to the ECHR) contain a provision protecting private property, we would have a reference by which to hold such a legislative provision unlawful. Thus the protection of private property acts as a higher law or principle which permeates a number of more specific legislative areas, one of which is the penal law of theft.

In the EU context, there are a certain number of principles which permeate the system as a whole and with which any individual piece of legislation needs to be in conformity. Some of these principles are formally higher law in that they are explicit in the treaties. One of the most important of these is the principle of non-discrimination on the grounds of nationality.¹⁶ Others can only indirectly be linked to the treaties and are rather explicable on the grounds that no European judge could imagine giving effect to a legal system which does not respect them. Here the obvious example is the famous 'general principles of EU law' of which the ECJ has formulated a few. We expect judges applying EU law to respect these tenets of higher law in the sense that the outcomes in particular cases should be in conformity with the principles enshrined in them.

We cannot know to what extent the political leaders at Tampere were planning on introducing a new such higher principle into EU law when they decided to consecrate the principle of mutual recognition. It seems highly unlikely, however, that they predicted the paradigmatic shift which they had thereby set in motion. Mutual recognition, as defined in the guidance documents, implies that 'while another state may not deal with a certain matter in the same or even a similar way as one's own state, the results will be such that they are accepted as equivalent to decisions by one's own state'.¹⁷ For the Commission, this implied a transfer of the ultimate responsibility for requesting of, as well as dealing with requests from, foreign authorities from the political to the judicial authorities. Before, as was briefly outlined above, a judge wanting a person extradited from a neighbouring country would have had to ask her or his national ministry of justice (or perhaps the ministry of foreign affairs) to send a request to the political counterparts in the requested country who would then have had to go through the inverse juridico-political procedure before deciding whether to accede to the request or not. Now, with the advent of mutual recognition, the idea

was that a judge simply rules on a matter and that that ruling be recognised by her or his counterparts throughout the EU, and this without the cumbersome intervention of political authorities.

This change, again seen most clearly in the EAW, implies a much more fundamental change than a mere increase in efficiency and speed. As was discussed above, the 'science' of criminal justice had evolved to the point where internal criminal justice was animated by the concern for individual interests and cooperation in criminal matters was animated by the concern for the systemic sovereignty and coherence of the national system of criminal justice. This was reflected in the institutional actors ultimately responsible for the two aspects of criminal justice. In the Western legal tradition, courts are the ultimate guarantors of individual rights and freedoms, whereas national executives are the ultimate guarantors of the national interest. Shifting the responsibility for international cooperation in matters of criminal justice from national executives to national judiciaries not only shifted administrative burdens from one governmental power to another. More than anything it also shifted the whole rationale of the system. With courts responsible for international cooperation in matters of criminal justice, the individual interest is put front and centre also in this facet of criminal justice *and* it is consequently aligned with the principles animating internal criminal proceedings.

When a court is faced with an EU instrument based on the principle of mutual recognition, that instrument cannot be treated as 'an island'. It needs to be read in conformity with the principle of which it is a sub-species. Now, the principle of mutual recognition does not figure in the EU treaty, nor has it been declared a general principle of EU law by the ECJ. Nevertheless, the ECJ treats it much as it does other principles of higher law in that it serves as the prism through which more specific legislative instruments are read, interpreted and applied. In this way, the ECJ has adopted the logic of the new conceptual paradigm that was ushered in with the adoption of mutual recognition as the guiding principle of EU action in the field of cooperation between the Member States in matters of criminal justice: the primacy of the individual interest over the national interest. On the other hand, the EU legislator does not seem to have realised that the adoption of the principle of mutual recognition as the guiding principle in this field had this implication. The result is that we have a legal logic applied and reinforced by the ECJ and, unfortunately somewhat inconsistently, by the Commission and the European Parliament (EP), while the true masters of the EU's legislative agenda in matters of criminal justice, the Member States and the Council, seem to continue to reason as though it were possible to combine mutual recognition with the continued primacy of the national interest.

BOX 2

Perhaps by way of recognition that that had not always been the case, Article 2F TFEU lays down that '[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'.

The consequence of this conflict is that EU action in matters of criminal justice can sometimes appear somewhat schizophrenic. The EAW is a perfect example of this. The framework decision itself is a very coherent application of the principle of mutual recognition under which the judge in the executing state is to do little more than to make sure that the certificate sent to her or him by her or his counterpart in the issuing state is correctly filled out. No investigation into the merits, no objections based on national standards of evidence or procedure should prevent the surrender of an individual who is suspected of having committed a crime over which the authorities in the issuing state have recognised jurisdiction. Simple and straightforward. Despite the fact that these were principles unanimously agreed to in Council, it proved a vain hope that the transposition of the framework decision in the various Member States should follow the same simple and straightforward pattern. As will be discussed at greater length in Chapter 4, the transposition of the EAW in the legislation of the Member States has been anything but simple and straightforward.

The EAW is an example of a discrepancy between Member State action as part of the Council and Member State action as national legislator. Unfortunately, there are also examples of persisting inconsistencies at the EU level. One example is Article 54 CISA mentioned above which, again, will be the subject of lengthier discussions in Chapter 4. In its first part, this article lays down the principle that 'a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts'. In a system of mutual recognition, this is very easy to understand: a final judgment in a criminal trial in one Member State should be recognised as final in the other Member States in the same way as a final judgment from one of their 'own' courts. This is also the manner in which the ECJ has interpreted this provision which has resulted in a series of judgments clearly stating the consequences of the practical application of the principle of mutual recognition.¹⁸ The problem is that the second part of Article 54 CISA qualifies the principle in a manner rather difficult to understand. It states that the principle of one

prosecution per set of facts applies 'provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'. What this means is that a fugitive and even, in all probability, a person awaiting execution of her or his sentence, can be tried again for the same facts in a different Member State. It is very hard to see how this can be anything but inconsistent with the principle of mutual recognition. What if the latter court reaches a different result? Which Member State's judicial authorities are then obliged to recognise the other's final decision? Especially after the adoption of the EAW under which the first Member State could have the convicted person surrendered whenever it wants, it is difficult to avoid the conclusion that the only interest this provision serves is some national interest of a Member State retaining as much power as possible over individuals on its territory. In any case, however narrowly interpreted, this provision can cause nothing but conflict with the general logic of the principle of mutual recognition. This was seen in the recent case of *Kretzinger*.¹⁹

As we hope to have shown with this brief discussion, there are many aspects of EU criminal law and justice which offend against the legal sense of consistency in principle. We would argue that one of the main reasons for this is the general failure to understand that the adoption of mutual recognition as the guiding principle of EU action in matters of criminal justice constituted a massive conceptual shift in the realm of international cooperation in this area. With the autonomous EU institutions doing their best to consolidate the principle of mutual recognition and the Member States and Council still clinging on to the old von Clausewitzian conception of cooperation in matters of criminal justice, there is a tension at the heart of the EU project as it relates to criminal law and justice. Again, we would argue, this is why the identity of the EU as an institutional actor in this field is so difficult to grasp. Starting with the Tampere Declaration, the EU seems to have expressed an implicit wish to change paradigms for its internal system of cooperation in matters of criminal law and justice. But having done this without properly discussing the theoretical justifications and ramifications of this choice, the EU is now hovering somewhere in between, with the result that legislative action, policy statements and implementation practices quite often betray a fundamental confusion of what kind of system it is that the EU is constructing.

In this book we will not attempt to provide the theoretical justification for EU action in matters of criminal law and justice which is so sorely lacking. We merely seek to point to the fact that no such justification has been provided and that the roots of many of the difficulties besetting the EU's efforts to construct a strong and coherent *Area of Freedom, Security*

and Justice (AFSJ) can be traced to this basic theoretical *lacuna*. In this interinstitutional ‘struggle’ between the old, international relations-inspired view of cooperation in matters of criminal justice, and the new, individual-centred principle of mutual recognition, there are no absolutes. Each system brings with it consequences (advantages and drawbacks) which need to be compared, assessed and evaluated. What needs to be understood, however, is that these are two conflicting paradigms, each with its own theoretical justifications and history.

It can of course be said that this development is in line with the EU’s earliest ambitions to be a legal system which applies directly to the individual citizens, bypassing the eventual hurdles set up by the narrower, national interests of the Member States. That is probably correct and, in any case, lest any of our readers misunderstand, we welcome this development; in an area of complete freedom of movement, it seems almost perverse that a person could not be brought to justice, that a central witness could not be heard, or, consequently, that a victim of a crime (or the victim’s family) could not receive the solace and comfort of knowing that justice had been done simply because of a red line on a map of no consequence to anyone but to law enforcement authorities. However, and this is the central point, that does not mean that the old system was completely erratic and incomprehensible. There *was* a logic to the old ‘order’ and that was that, in matters central to national sovereignty, individual interests in justice had to take a step back in favour of the national interest. The common argumentations used to justify, first, the EU’s initial involvement in matters of criminal justice and then, second, to justify mutual recognition, all focus on the practical consequences of the old ‘order’: the internal market is said to have caused increases in cross-border crime, terrorism is a cross-border problem, the CoE instruments lack teeth, etc.²⁰ While these may certainly be valid arguments, nowhere do they acknowledge that dealing with this problem meant changing the normative logic of the cooperation between EU Member States in matters of criminal justice. The prime concern of the political decision makers was with increasing the effectiveness of their national law enforcement authorities. Mutual recognition certainly achieves this objective but it also entails the important normative changes described above. In short, no one seemed properly to have grasped that such massive changes to the very foundations of the way the system is run necessarily imply, in order to function, significant shifts at the level of principle as well as on the level of application.

From an institutional perspective, this debate on the conceptualisation of EU criminal justice can seem a simple variant of the traditional cooperation versus integration debate. Superficially, this may indeed be the case. There are, however, some aspects of the present debate which set it apart.

A traditional move from cooperation to integration will start with an argument for integration being necessary or desirable, followed by the introduction of the institutional instruments necessary to effect the change. In the context of the third pillar, this natural order of things seems to have been reversed. While the third pillar is still referred to as an ‘intergovernmental pillar’, to distinguish it from the ‘supranational’ EC pillar, the institutional reality of the third pillar is very much supranational. This discrepancy between the integrationist potential of the third pillar’s institutional framework and the almost automated intergovernmentalist justifications offered for it has turned EU criminal justice into a field of extreme constitutional uncertainty. There is, from a legislative perspective, precious little theoretical direction. In this context, the fact that the third pillar has a certain, if incomplete and unsatisfactory,²¹ judicial autonomy again leaves the field open for the interplay between the national courts and the ECJ to provide some of the answers the legislative organs of the EU seem unable to deliver. The available indications from the ECJ seem to point in the direction of conceptual and therefore institutional harmonisation as between the first and third pillars, i.e. the introduction into and use of concepts in the third pillar which are already familiar from the first, Community pillar. For these reasons, the study of the justifications for and the development of EU criminal justice should be of interest to those interested in the institutional development of the EU as a whole.

It is very possible that inter-Member State cooperation in matters of criminal justice could not be rendered more effective within the confines of the old, von Clausewitzian system. Perhaps greater effectiveness could only be achieved via a complete change of the theoretical bases and the institutional reform of the system. We would argue that that was the case, but that the general tendency not to deal with matters of criminal law in theoretical terms has deprived the EU as a political entity of the vocabulary and thus the instruments necessary to construct a theoretically coherent and practically just system of criminal justice. Without an understanding of these theoretical starting points, which will be further developed in Chapter 1, it is very difficult to make sense of EU criminal law and justice as a project and we would ask our readers to keep these difficulties in mind when reading the subject-matter specific chapters in this book.

NOTES

1. Not only in academic writings. At the European Commission, the two issues share a directorate general (DG Justice, *Liberté et Sécurité*) and their in-house counsel at the Commission Legal Service are also in the same unit.
2. OJ C 306, 17.12.2007, p. 1 et s.

3. Note that a new Protocol on Transitional Provisions confirms at Article 9 that the legal effects of pre-existing third pillar instruments 'shall be preserved until those acts are repealed, annulled or amended'. Article 10 clarifies that for a five year period after the entry into force of the Treaty of Lisbon the pre-existing limits on the powers of the Commission (*vis-à-vis* infringement proceedings) and the ECJ (*vis-à-vis* jurisdiction) shall continue to apply in respect of pre-existing third pillar measures. The extent to which there will be a conversion of third pillar instruments into appropriate 'first pillar' instruments during this transitional period remains to be seen, as does the extent to which this will be used as an opportunity to renegotiate the wording of existing instruments.
4. C. von Clausewitz (2005), *On the Nature of War*, London: Penguin Books.
5. We say 'for the most part' because, traditionally, parts of the criminal law also protect the national interest. Offences such as treason, espionage and desertion have only a contingent link to the individual interest. More recently, the criminal law has also been called upon to protect certain 'policies' which a society may adopt. This is also a facet of EU criminal law and will be dealt with fully in Chapter 6.
6. For a historical, now perhaps slightly quaint example, see C.J. Hamsoun and R. Vouin (1952), 'Le procès criminel en Angleterre et en France', *Revue Internationale de Droit Pénal*, **23**, 177–90.
7. See, e.g., J.D. Jackson (2005), 'The effect of human rights on the criminal evidentiary process: towards convergence, divergence or realignment?', *Modern Law Review*, **68**(5), 737–64.
8. D. Danziger and J. Gillingham (2003), *1215 – The Year of Magna Carta*, London: Hodder and Stoughton, at p. 196.
9. *Ibid.*
10. *Ibid.*
11. See J.H. Langbein (1977), 'The criminal trial before the lawyers', *The University of Chicago Law Review*, **45**(2), 263–316; also J.H. Langbein (1999), 'The prosecutorial origins of defence counsel in the eighteenth century: the appearance of solicitors', *Cambridge Law Journal*, **58**(2), 314–65.
12. See, e.g., M. Mackarel and S. Nash (1997), 'Extradition and the European Union', *International and Comparative Law Quarterly*, **46**, 948–57.
13. See below, Chapter 4.
14. See below, *ibid.*
15. Council Decision 1999/436/EC of 20 May 1999 (OJ L 176, 10.7.1999, pp. 17–30).
16. Article 12 EC.
17. Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final, 26.7.2000.
18. See, e.g., joined cases C-187 and 385/01, *Gözütok and Brügge*, judgment of 11 February 2003.
19. C-288/05, judgment of 18 July 2007.
20. For a more extensive discussion, see Chapter 1 below.
21. See below, Chapter 1.