European Criminal Law

Kimmo Nuotio

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Edited by Markus D. Dubber and Tatjana Hörnle

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Abstract and Keywords

This chapter deals with European criminal law and its relation to domestic law, international law, transnational law, and criminal justice. It begins with an introduction to general institutional developments in the structures of the European Union that resulted in the emergence of a fragmentary transnational criminal law. In particular, it traces the development of European criminal law to deal with crime control involving terrorism and other crimes of an international character, from the Amsterdam Treaty (1997/1999) to the Framework Decision. It also discusses cooperation in the field of criminal law among the Member States of the European Union. Attention then turns to the general traits of international criminal law. In the EU setting, the adoption of the mutual recognition principle as the cornerstone of criminal law cooperation is given consideration.

Keywords: European criminal law, domestic law, international law, transnational law, criminal justice, European Union, crime control, terrorism, crime, mutual recognition principle

I. What Do We Mean by European Criminal Law?

THE editors of this Handbook have included a chapter on European criminal law under the heading “Beyond Domestic Criminal Law”: the other two chapters under this heading deal with comparative criminal law and international criminal law. Both of those chapters discuss areas of criminal law that have established themselves quite firmly; however, European criminal law is a more fluid entity. This chapter does not aim to do away with this fluidity, but rather tries to exploit it. As this topic currently attracts an enormous amount of practical and scholarly interest, I will seek to avoid simply repeating what is generally known to both scholars and practitioners active in the field. I will also try to open this magic world to those who have not so far worked in this area.

European criminal law borrows from many areas, including both of its neighbors. Although it goes beyond domestic law, European criminal law necessitates a comparative

European approach. Since European criminal law works through the legal orders of the Member States of the European Union (EU) the domestic legal systems are a very significant part of that law and, at the same time, a good measure of domestic law is European law. (p. 1116)

Even though European criminal law extends beyond the single-state domestic law perspective, in its way it establishes the perspective of a European domestic criminal law and criminal justice and thus reproduces some of the single-state perspective, albeit on a higher level. As with domestic law, European criminal law currently deals increasingly with crimes of an international character, such as terrorism. International law also works through domestic law, and sometimes European regulation stands between the two.

Today the EU is a very important site of European criminal law. In the first phase, when the EU with its three-pillar structure was founded by the adoption of the Maastricht Treaty (1992/1993), this area was called Justice and Home Affairs (JHA) cooperation[1] but, since this cooperation between the Member States was intergovernmental in nature, the EU bodies had only a marginal role to play. The Member States negotiated two treaties in 1995, one on Europol and the other on fraud against the financial interests of the EU (the PIF Convention). Generally the development was regarded as slow, with the next institutional reform of the EU intended to improve the general ability of the EU to take action in this field.

Development of the Schengen area during the 1980s, which abolished border controls between some of the European states, created the need to raise issues about complementary measures as free movement of persons might not only benefit economic growth, but also increase the risk of organized criminality. The Schengen arrangement originally also grew outside the European Community (EC) law framework, but later became part of EU law.

Since the Amsterdam Treaty (1997/1999) came into force, the EU has developed an extensive regulatory framework for dealing with crime control. The former JHA cooperation was now spoken of in more substantive terms such as building an Area of Freedom, Security and Justice. Asylum and visa matters, like private law cooperation, were communitarized, becoming part of Community law (EC law), which opened the way for the use of the usual EC law legal instruments. However, the Member States were not yet ready to let this happen to either criminal law cooperation or police cooperation. That said, the pressing need to move forward resulted in the creation of an equivalent to the EC Directive—a Framework Decision—for the purpose of approximating the legal rules of the Member States in these fields. As the Member States continued to be somewhat cautious as regards efforts to approximate their criminal laws, albeit on specific points regarding severe cross-border crimes, the idea was to limit approximation of substantive norms to those situations where it was necessary for the functioning of the principle of mutual recognition.

To cut a long story short, it was this new type of instrument, the Framework Decision, which then let the EU erect a mass of binding framework rules on how crime definitions should look, how national rules should provide for sufficiently (p. 1117) long prison sentences (minimum rules for the longest sentences according to the penalty scale), and how national authorities should enforce judgments and decisions that had been given by the courts and other authorities in other Member States. This method allowed the EU quickly to address all those criminal issues that had been listed as part of the EU competence, by introducing more than 30 Framework Decisions.

The EU is like a moving target which continuously redefines itself and the Lisbon Treaty, which entered into force in 2009, once again reformulated the setting. Cooperation in the field of criminal law continues to be the shared competence of the EU and its Member States, with the subsidiarity principle restricting the exercise of Union competence. Almost all features marking the substantive difference between criminal law cooperation and police cooperation from other policy areas have now been abolished and Directives are applied instead of Framework Decisions. The role of the European Parliament and the European Court of Justice (ECJ) as well as the European Commission have been highlighted further, and the European Council has become a body of the EU. Procedural rights and, generally, fundamental rights received more open recognition in the Union setting and, in addition, the renewed Treaty framework also mentions the aspiration to move further in qualitative terms. The EU could now, if the Member States give it sufficient support, establish a European Public Prosecutors' Office for the purpose of prosecuting certain financial crimes threatening the Union budget. In that field, as in the field of customs offences, the Union could also try to enact transnational criminal law proper.

We will return later to some of these issues. This brief introduction only serves the purpose of informing the reader of certain general institutional developments in the structures of the EU which were necessary in order to make it a site capable of producing a fragmentary transnational criminal law of a specific kind. It was perhaps not a process which was completely planned beforehand or even foreseen, but rather was influenced by many incidental factors. In any event, if we look at the product only, the outcome was something that begins to deserve the name of European criminal law. International criminal law is institutionalized in that it has its courts and conventions, and it focuses on offenses that are particularly severe and threaten the common values of mankind, especially where so-called international core crimes are concerned. Comparative criminal law, however, is only institutionalized academically. Comparative criminal law goes beyond the domestic setting by the power of thought only. The transnationalization of law has changed the significance of comparative law scholarship and, in the European context, comparative criminal law almost finds an institutional setting already in place, since European criminal law is a testing ground for comparative knowledge as any effort to create a working European criminal justice capable of addressing offenses threatening the lives of European people must build on comparative insights into the commonalities and differences between (p. 1118) the various domestic systems. European law could also be looked at from a comparative perspective as a new emergent form of law.

In fact, in the early days if the concept of European criminal law was used, it simply referred to the comparative law of Europe in the criminal law domain. We recall many studies of European criminal law and European criminal justice which did not look at transnational issues at all. Typically, in the earlier literature, the talk was about criminal justice systems in the plural. Today we increasingly speak about it in the singular. I would say that for European criminal law to establish itself and to distinguish itself from both international criminal law and comparative criminal law, the second differentiation is the more demanding. Differentiation is not important for its own sake either, and some differentiation may be helpful even if it is not complete.

As an academic discipline, comparative law is a product of the early twentieth century. Since the beginning, indeed especially at the beginning, the academic comparative law community believed that such studies would also serve the interests of legal and social development; they even dreamed of a world law that could be created through comparative studies.[2] Interestingly, one of the pioneers in comparative criminal law was the renowned P. J. A. Feuerbach, working a century earlier.[3]

The term “European” may also cause confusion. As indicated previously, European law is most often simply used to refer to the laws of the European Member States. In a broader sense, it could refer to European legal tradition more generally, as is demonstrated by many examples: “European law builds on Roman law.” “International law has European roots as it has grown out from the Peace of Westphalia.”

In rethinking the roots of European criminal law, it is important to look at the actors as well. The Council of Europe was the body which started working with the European criminal justice systems in the 1950s, giving this policy work an institutional site, and building on the shared values of its state parties. It was not a site created so much for comparative law activity, but rather as a site for practical cooperation and common policymaking. The EU has taken the lead since 1990, and today we increasingly understand European criminal law as criminal law in the context of the EU. Academic theorizing about the common roots of the European criminal justice systems has perhaps not had a very obvious role in the workings of the Council of Europe. The shift toward the EU as the leading site in European criminal law results from the rapid development of the law itself.

Gert Corstens and Jean Pradel (1999/2002) noted the difficulty in defining European criminal law precisely. They avoid using the term “European criminal law” in the definition they have elaborated, talking instead about “European criminal justice.” The definition “consists of a *collection of criminal standards (substantive,* *(p. 1119)* *procedural, and penitentiary), common to various European States, with the aim of better combating criminal activity in general, and transnational organised crime in particular*.”[4] This definition is quite helpful in that it makes the central point about having European criminal law in the first place, and it is neutral as it suggests only vaguely *why* but not *how* and by *whom*. Nor does it link European criminal law to any site such as the Council of Europe or the EU. The word “collection” lacks any normativity, as if we could simply identify the common European features using the methods of comparative law. In its vagueness, how-

ever, it leaves room, if not for a European criminal policy, then for normative regulations that increase the efficiency of crime control. It also particularly mentions transnational organized crime, which in fact was also one of the reasons for creating European criminal law in the first place.

Since 1999/2002, the world has changed and European criminal law has gained a much more normative backbone, with the common-value basis facilitating this process and giving it a nature of being more than just policymaking. Cooperation in practice is also a very good promoter of common policies. Nordic cooperation, coordinated since 1952 by the Nordic Council, has been marked by its informal nature compared to the workings of the European sites.

In the EU setting, the adoption of the mutual recognition principle as the cornerstone of criminal law cooperation has been an extremely influential move, creating a European system of enforcement of decisions and judgments. Replacing extradition procedures by a European Arrest Warrant (EAW) has been revolutionary, even though the Member States have not always implemented the European norms completely,[5] and it has also triggered a lot of concern about the protection of the fundamental rights of those arrested and surrendered.[6] Approximation of constitutive rules of crime definitions and punishment has further highlighted the European approach, resulting in hundreds of amendments to the national criminal codes.

Much of what has happened concerns the globalization of law, with the development of the European system of protecting human rights as well as developments in the law of the EU. Mireille Delmas-Marty, herself one of the masterminds behind building up a European capacity to address fraud against the budget of the EC/EU, has spoken about Europe as a laboratory of legal pluralism. She has noted precisely this search for a *ius commune* in Europe, commenting that both the progress in legal regulations as well as several academic studies and proposals give flesh and blood to such aspirations.[7] **(p. 1120)**

We do not usually have to think about what criminal law is and what actually makes it what it is, but European criminal law is different in that it really forces us to rethink both criminal law and European law. European criminal law is a very helpful context for discussing what criminal law today is actually about; it is a unique example of how regional interstate cooperation may deepen into a multifaceted system that deserves be called by a new name, in this case: European criminal law. The name captures a great many interrelations between seemingly unconnected normative frameworks. It also relativizes the idea that criminal law can be grasped as a separate and autonomous discipline.

In every decent academic library you will find a section on criminal law, one often further divided into subsections on the general part and the special part. Under the general part, you will find books dealing by and large with the structures and prerequisites of criminal liability—this is the academic part, which law students need to master and which often builds on a long tradition of scholarship. In the special part, you will find studies dealing with particular offenses. The general part, that is, treatises on basic concepts and on basic legal principles of criminal liability, mark the core of the identity of criminal law as a

subject. Even though criminal law is very much written and codified law, it is not the legal provisions and the criminal codes which make criminal law, but rather the underlying concepts, principles, and theorizing about justified state punishment. Under the fast-moving surface we encounter the deeper layers of law, in which the comparatists are also so interested. The structure of this Handbook reproduces such an understanding.

Should we then ask whether European criminal law really is criminal law and whether it comes close to presenting itself as criminal law proper, we face the central problem that European criminal law, as it is today, would not pass the test. European criminal law is a patchwork which does not present itself in a systematic way in the same sense as criminal law does in a national setting. European law is not particularly about developing a European concept of crime and punishment. In fact, the EU—with only minor exceptions—lacks the authority to originate legislation on criminalization or the authority to carry out criminal proceedings.

European criminal law contains fragments, but these fragments again are situated within a legal framework which is a legal order *sui generis*. European law speaks about terrorism and counterfeiting the euro and trafficking of human beings, but it does so in a very specific way; the way European law can do it. European criminal law is not independent in the sense that it could make sense without also incorporating the Member States' criminal laws and other laws into the picture. Not only is the implementation of European criminal law measures necessary in the Member States, but the efficient enforcement of European law more generally is also the duty of the Member States. Sometimes the Member states enforce European law of a non-criminal nature by resorting to criminal measures at the national level. European law may also require the domestic criminal law of a Member State to step back and give it primacy. (p. 1121)

It should be clear by now that European criminal law cannot easily be pressed into one single package. As the Member States' legal orders differ significantly in their criminal law, every Member State has to a certain extent its own *problematique* concerning the Europeanization of its criminal law. In 2002, the first study on EU and criminal law in Sweden was published by Petter Asp. His observation was simply that EU law had started to have an influence on how Swedish criminal law should be applied, and he wanted to work out in detail the ways in which this impact was felt. He did not yet speak about European criminal law, his focus being on domestic criminal law in the context of the Europeanization of law.[8]

The terms "EU criminal law" or "European criminal law" have only recently figured in the titles of the leading textbooks, such as André Klip (*European Criminal Law*) and Valsamis Mitsilegas (*EU Criminal Law*), both from 2009, and the *Europäisches Strafrecht* by Bernd Hecker from 2007. Since then the literature has exploded and one or more studies are likely to be found in every Member State.

There could be many European criminal laws if we start from the domestic criminal law and reach beyond it and the notion of perspective is essential for the legal pluralist view. The point is that what route we take to the legal materials may make a difference as we

have learned through the debates on sovereignty and constitutional authority in Europe. I would say that European criminal law generally adopts a transnational perspective, in the same way as does European law. But it leaves room for national studies about European criminal law; studies which elaborate on the impacts of Europeanization in that individual legal system.

The emergence of European criminal law is a product of debate and crisis. Its creation is a reaction to perceived security risks, rather than anything else—provision of security having been the driver in the creation of European criminal law.[9] Kaarlo Tuori has talked about the security constitution as an anti-constitution, because the security orientation of EU activities has, in turn, risked the level of protection of the fundamental and human rights of the individual.[10] This tension is palpable, and the measures adopted in the field of crime control have had precisely these repercussions. The broader issue of the constitutional dimension of European criminal law has been dealt with by Ester Herlin-Karnell, who discusses the problems stemming from the effective enforcement duties in particular.[11]

The European Council, the top-level meeting of the representatives of the Member States, has agreed on the Stockholm Programme, which seeks to restore the balance between the protection of rights of the individual and that of effective crime control. The Lisbon Treaty broadened the powers of the ECJ to review (p. 1122) the legality of secondary legislation in these fields as well as to issue preliminary rulings concerning the correct application of these measures. The aim is to consolidate the situation, as the Charter of Fundamental Rights and Freedoms of the European Union has now also become formally binding. Interestingly, the Stockholm Programme emphasizes the need for better policy coherence. Insofar as it concerns the principles of criminalization, which have thus far been rather non-existent in EU criminal law, the *ultima ratio* principle seems to have gained some recognition.[12]

European criminal law has offered a scene for comprehensive discussions about how the rather practical needs of crime control within the European setting should best be dealt with. The discussions have dealt with a wide variety of topics stretching from the criminal law competence of the EU to issues such as the need for a European *corpus iuris* for combating some core European offences, to challenges to the EAW and problems with anti-terrorist measures.

In 2011, the European Commission published an important communication on EU criminal policy, which is perhaps the first official EU document openly discussing EU criminal law from a policy perspective.[13] It focuses especially on the use of criminal law measures to implement other EU policy goals. The view of the Commission is that there is general scope for obliging the Member States to resort to criminal law measures when implementing EU law nationally. This question concerns the use of the so-called ancillary competence, when the EU legislature adds provisions on the use of criminal law measures to Directives in other fields than those *euro crimes* for which the matter has been specifically regulated in Art. 83(2) of the Treaty on the Functioning of the European Union (TFEU).

The Commission also highlights that the aim cannot be to do away with national differences in the criminal law systems, because criminal law reflects the values of a particular society, and the societies of the Member States are different. On the other hand, the added value of EU criminal law measures depend on EU criminal law being coherent and consistent. This view, stressing the need for increased coherence in EU criminal law, appeared, for instance, in a "Manifesto on the EU Criminal Policy" of 2009, a document produced by a group of scholars.[14]

We could also formulate the matter otherwise, by asking whether criminal law as a field enjoys a special position in the EU context, or whether it is just one way among many of sanctioning human conduct. Advocate General Mazak highlighted the distinctive character of criminal law in his opinion in *Commission v. Council* (2007), a case concerning the Framework Decision on Ship-Source Pollution.[15] In his view, (p. 1123) criminal law goes far beyond just a mere sanctioning mechanism and stands out from other areas of law. It "delineates the outer limits of acceptable behaviour and in that way protects the values held dearest by the community at large."

A similar struggle with the concept of criminal law in an EU setting can be observed in the domestic setting. In its Lisbon judgment,[16] the German Federal Constitutional Court likewise emphasized the particular nature of criminal law, stating that the extent to which and the areas in which a polity uses the means of criminal law as an instrument of social control is a fundamental decision. According to the judges in Karlsruhe, the substance of criminal law does not serve as a technical instrument for effectuating international cooperation but stands for the particularly sensitive democratic decision on the minimum standard according to legal ethics. This, in turn, is explicitly recognized by the Treaty of Lisbon where it introduces an emergency brake in order to prevent Directives with relevance to criminal law invoking fundamental aspects of its criminal justice system. The German Federal Constitutional Court held that the EU criminal law competence must be interpreted narrowly and consistent with the constitutionally protected specificities of criminal law.

If national law is regarded as the enforcement mechanism for EU law, an instrumental outlook on the national sanctioning law may follow. A similar problem follows from the fact that no mature doctrine on the principles of criminalization has been developed as part of EU criminal law. When the EU law perspective—with a certain teleological general approach—dominates, criminal law will be seen in instrumental terms rather than in moral and ethical terms. It is no wonder that Europeanization has often been feared for introducing a more instrumental and technical understanding of criminal law into national settings.

Another aspect, which usually does not cause problems in the national setting, concerns the choice of legal basis in the foundational treaties. In the history of European criminal law this question has been particularly relevant. The EC Treaty did not expressly grant the EC any powers to approximate criminal legislation; on the other hand, the doctrine developed that the enforcement of EC law belonged to the Member States which had ef-

fectively to sanction breaches of EC law. It was an open question whether Community law could require this sanctioning to be carried out by reference to criminal law measures, or whether such competence could only be exercised by resorting to the powers granted according to the third-pillar provisions.

The ECJ had to tackle this issue in two cases. In *Commission v. Council* (2005),[17] the European Commission requested annulment of Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law. The Commission was of the opinion that sanctioning by means of criminal (p. 1124) legislation could be required by the ordinary means of approximation according to Community law, whereas the Council, which consists of representatives of the Member States, was of the view that the Community lacked such competence. Therefore, the correct way to proceed was, they thought, to adopt a Framework Decision.

The ECJ decided to follow the line of argument put forward by the Commission. According to the Court, some of the provisions included in the Framework Decision could have been issued on the basis of ordinary Community competence. Therefore it annulled the Framework Decision, and the matter was later regulated by resorting to a Directive. Certain provisions had to be given, in any event, by a Framework Decision, therefore the judgment did not completely transfer the matter to being an issue of Community law. The reasoning of the Court was based on the idea that the Maastricht Treaty had not in any way limited the powers of the Community that it had so far enjoyed.

Another case followed—*Commission v. Council* (2007) mentioned earlier[18]—in which the Commission similarly requested the annulment of a Framework Decision on enforcement of the law against ship-source pollution. Here the Court also followed the view of the Commission that the Framework Decision in fact infringed the powers of the Community as some of the provisions included in the Framework Decision could have been issued by adopting a Directive. In this judgment, however, the Court concluded that the Community competence could only be exercised so that the Member States were required to sanction certain forms of behavior by resorting to criminal sanctions, but “the determination of the type and level of the criminal penalties to be applied” did not fall within the Community’s sphere of competence.

These disputes were also significant because they paved the way for the post-Lisbon model, according to which the implementation of various Union policies may render it necessary to require Member States to sanction breaches by resorting to criminal sanctions. This so-called ancillary competence broadens the sphere of European criminal law significantly, since it is not only the specific lists of types of offense which demarcate the outer limits of criminal law at the European level, when seen from the point of view of transnational law.

The development of European criminal law also has very strong links with the institutional structure and system of division of powers and competences between the various bodies which constitute the EU. This tells us that European criminal law is not yet a mature entity. Therefore, as Bernd Hecker has pointed out, the policy debate about what role

criminal law should play in the EU setting may often dominate over the dogmatic analysis of existing legal materials. He also refers to the related debate about the democratic legitimacy of European criminal law as well as (p. 1125) the question of how constitutional and other courts can review European criminal law and its actors.[19]

As a concept, European criminal law resembles that of European law, in the sense that we know roughly what we mean by it even if it may refer to somewhat varying contents. European law, of course, primarily refers to the law of the EU but, in addition to that, the law of another international organization, the Council of Europe, may be included. The Council of Europe has been the site for drafting many European conventions and recommendations in matters of criminal policy and interstate legal cooperation and European human rights law is also a product of activities within the remit of the Council of Europe. In the EU to come, European human rights law will increasingly converge with the law of the EU as the two regimes have ever more in common.

It has been noted by André Klip that in approaching European criminal law we should use the definition of criminal law developed by the European Court of Human Rights (ECtHR) in *Öztürk v. Germany*, instead of following a national definition of the concept. The human rights law-based definition is broader than that of most national legal systems. This brings European competition law, for instance, into the realm of criminal law.[20] According to Klip, there is also more generally much more criminal law content in European law than we would imagine if we look at it simply from a traditional national perspective. This relevance of hidden connections is a sign of a systematic nature: the study of a criminal law principle may require studying the same principle, such as the mutual recognition principle, in a completely different legal context.[21]

European law has developed gradually from EC law into EU law, from economic law to a legal order covering most fields of law. European criminal law is a product of the same Europeanization of law as is European law generally, albeit with some special characteristics. European criminal law is a summarizing concept representing as a more or less coherent whole the ways in which European law effects and organizes criminal law as part of the Area of Freedom, Security and Justice, one of the aims of the EU. But as the law stemming from the Council of Europe may also be regarded as being part of European law, European criminal law may pick on the same source. Boundaries are no longer clear.

Perhaps we should not worry too much about blurred boundaries and identities. Many questions are posed because at the European level we lack anything which looks like a criminal code comparable to those which exist at state level. European law works through the national legal order which renders it difficult or even nonsensical to limit the sphere of European law only to the European level. With the (p. 1126) Lisbon Treaty, the path has been opened for transnational criminal law in EU fraud (Art. 325 TFEU) and customs offenses (Art. 33 TFEU).

It would not be at all helpful to think of European criminal law as some kind of federal law. The European legal order, or an order of orders, is based on hierarchies, but not in the way that federal laws relate to state law. According to European law, the main legal

instruments for organizing the European legal order are Regulations and (Framework Decisions and) Directives. Regulations may be relevant for criminal justice, but as a rule Regulations have not been used where criminal law is concerned.

The peculiarities of European law strongly dictate the role criminal law plays, since European law comes with its own history. During the earlier stages of that history, criminal law was almost non-existent as a substantive matter of European law. Sometimes the criminal cases in national courts dealt with matters that had been regulated at European level; the European connection then most often appeared to challenge the validity of some domestic criminal law rules.

The European common market was created by imposing an economic constitution and a great amount of other European regulation on the Member States and sometimes the new rights and freedoms required national criminal laws to step back. Where the legislature had not acted accordingly and modified its local legal rules, such adjustments had to be made by the courts. At that stage, the points of contact between European law and national criminal law were to a certain extent accidental. However, European law grew in its ability to impose itself on the national legal order and, even though criminal law was not specifically meant to be part of the Europeanization process, it could not help being affected by the process.

European criminal law can broadly be understood as the way in which the various criminal justice systems in Europe cooperate and how they work jointly when they face cases with a European dimension, and judicial cooperation between the Member States in the field of criminal law is one important feature of that law. In one of its basic senses, European criminal law is about legislation aiming at approximating legal rules on offenses and criminal sanctions in Europe. The cases may concern this aspect, but equally European criminal law is about how European law affects the interpretation and application of national laws in a criminal case. European criminal law concerns the introduction of mechanisms for making the Member State criminal justice systems work in cross-border cases; thus, European criminal law contains many elements that are of a procedural nature rather than a substantive criminal law character.

The EU was redefined in the Treaty of Amsterdam, and that reform was meaningful for many aspects of criminal law. The new Area of Freedom, Security and Justice concept was launched to highlight the new aspirations, since cooperation in the field of justice and home affairs was no longer simply a complementary measure to address cross-border criminality and other problems originating from the establishment of the common market and the abolition of border controls in the (p. 1127) Schengen area. It was simply one of the tasks of the EU to provide citizens with a Europe that was built on the values of freedom, security, and justice. Quite rightly, this renaming was meant to give special constitutional significance to this process. The EU and the Member States wanted to rename the new activities accordingly, in order for them to make the entire progress of what had been achieved more apparent, and more importantly, for what was to follow.[22]

The new instrument, the Framework Decision, soon came to be needed. The first topic to be addressed was counterfeiting of the euro, the new currency that had been launched in 1999 but was not introduced as legal tender until the beginning of 2002. A Framework Decision was adopted in 2000 to ensure that introduction of the euro would go smoothly.

The second topic was more spectacular, since immediately after the 9/11 terrorist attacks in the United States the EU wanted to address terrorist offenses by adopting a Framework Decision requiring the Member States to adjust their laws and introduce provisions on that issue. The duty to criminalize terrorist offenses had been recently reconfirmed by the U.N. Security Council in its influential Security Council Resolution 1373, and the relevant international conventions also required action. In June 2002, the EU was ready to adopt the Framework Decision on Terrorist Offences. This was a milestone as the Framework Decision on the European Arrest Warrant was adopted on the same day. The need to replace classical extradition instruments which built on traditional diplomatic procedures by a directly enforceable arrest warrant was obvious, and the months after the 9/11 attack were the window of opportunity for such a leap. Here we see the logic that approximation of rules on substantive criminal law mainly served the aim of facilitating proceedings in a cross-border case. Thus, the idea was not so much to create a new European criminal law but to ensure a good level of security by means of enhanced cooperation supported by the establishment of the necessary institutes and bodies at the European level to make this happen. Europol was soon followed by Eurojust, the European body which coordinates investigation and prosecution in cross-border cases.

Interestingly, European criminal law is actually a byproduct of European integration. In a Europe which strives to establish a common market, the differences between the legal orders of the Member States may on occasion be seen as harmful. Economic integration should be followed by legal integration, at least up to a point; and the concept of an Area of Freedom, Security and Justice also pointed in this direction. Because the nature of criminal law is to manifest the core powers of a sovereign state, the option for any part of criminal law to belong to the exclusive competence of the EU was rejected. Since judicial cooperation is a competence shared between the Member States and the Union, they exercise those powers (p. 1128) together. This fact renders principles such as subsidiarity particularly relevant, since the Union should only take action when the Member States cannot deal with the matter by themselves.

EU criminal law is a patchwork which contains more of the special part of criminal law than the general part, but not all matters have been dealt with. It is, however, increasingly difficult to find areas of criminal law in a national setting that would not fall under any European setting. Since the Members States' legal orders seldom entail separate provisions addressing cross-border criminality, approximation measures can easily have an impact well beyond their original scope.

II. European Criminal Law as a Form of Transnational Law

European criminal law is a form of transnational law, going beyond the traditional boundaries of national legal orders in many senses. Much of it consists of “second order” rules organizing the way that the normative orders should look like in the individual Member States responsible for dealing with the subject matter. This is mainly carried out by the many Framework Decisions, Directives, and Conventions.

It would make things simple if we could say, for instance, that European criminal law encompasses all the transnational regulation stemming from the EU and the Council of Europe, which normatively orders the domestic criminal law systems necessary for the handling of criminal cases. Unfortunately, the legal world is not that simple. Rather, we should say that European criminal law, besides the European level norms and principles, contains those parts of domestic legal orders that do the actual job, that is, most often, the legislation implementing the regulations that are of transnational origin. We also know this phenomenon from the context of general European law, but in the field of European criminal law the lack of regulations proper—that is, legislative acts which are immediately enforceable throughout the Union—further stresses the role of Member States’ jurisdictions.

Transnationally, European criminal law can be identified relatively easily. It expressly calls for actions and sets goals and purposes, thus guiding the acts of various subjects, national and transnational, jointly forming the European system.

What again makes things more complex is the fact that often other norms than those with a criminal law character also need to be taken into account in deciding a case in a domestic setting. For instance, in cases involving safety at work, whether the dangerous machine was approved by the relevant authorities in the country of origin may be relevant, because a specific Directive sets out the obligations of (p. 1129) producers and dealers, and it is a duty of Member States not to place any additional burdens on importers to test machines that have lawfully been brought into the common market in another Member State. In addition, in many cases the rules of the internal market set limits on national authorities for prosecution and conviction and local authorities also act in a dual role as they need to take into account the applicable European law, not only their domestic criminal law.

The European dimension may crop up rather surprisingly in criminal cases. In Finnish case law, it is quite normal for such issues to be raised at a later stage of the proceedings, such as at the appeal court level or even in the Supreme Court. Criminal cases are more frequent where the European dimension is latent than those dealing with matters which are manifestly of a criminal law character in the European dimension.

Thus, European criminal law both is and is not transnational. It is transnational in the sense that it has a transnational layer; but the transnational layer is not directly operational, since it could not do much without a Member State's legal order.

The transnational layer is, however, increasingly powerful in its ability to shape the national criminal laws in many ways and to an extent that would have been unthinkable just a couple of decades ago. We might consider measures concerning sexual abuse of children, for instance. The Treaty of Amsterdam (1997/1999) specifically mentioned trafficking in persons and offences against children as fields of action in its Title VI, in which approximation of rules on criminal matters in the Member States could also be considered.

Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography was one of the early instruments adopted. This was followed in 2007 by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[23] which contains detailed articles requiring the state parties to criminalize the sexual abuse of children, offenses concerning child prostitution, child pornography, and grooming, among others. Some of these matters had already been addressed in the Council of Europe Convention on Cybercrime in 2001, which specifically looks at these matters from the point of view of pursuing a common criminal policy aimed at the protection of society against cybercrime.

The comprehensive approach has recently matured in the adoption of Directive 2011/92/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, which will replace Council Framework Decision 2004/68/JHA.

We see here a pattern of development in which U.N.-level action concerning the rights of the child meet new concerns, because the risks of Internet-related criminality—together with its connection with organized crime and the risk of (p. 1130) pedophilia and trafficking of human beings—created a web of criminal policy activities that jointly set rather detailed requirements for how these matters should be treated nationally. International law and European law put together formulated the rights of the child and transformed them into the vocabulary of criminal law. The mandate of the EU to look at these issues was originally somewhat restricted, but the Council of Europe was able to compensate for that, because the nature of its character as an international organization meant that it could address issues in a comprehensive manner, as long as the state parties agreed. The EU is also developing a wider perspective because it seeks to raise the level of protection of the rights of the child across all policy fields. Such an effort will require that the criminal policy perspective is extended to cover the matters of the rights of the children generally. Hard law will be supplemented by soft law.

In Art. 83 TFEU, the formulation of the Union mandate reads:

> The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particular-

> ly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

Article 24 of the Charter of Fundamental Rights of the European Union concerns the rights of the child. The Stockholm Programme also states that:

> The rights of the child, namely the principle of the best interest of the child being the child's right to life, survival and development, non-discrimination and respect for the children's right to express their opinion and be genuinely heard in all matters concerning them according to their age and level of development as proclaimed in the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child, concern all Union policies. They must be systematically and strategically taken into account with a view to ensuring an integrated approach.

The development of the web of transnational law in both its human rights dimension and its criminal policy dimension has had a remarkable net effect in national criminal laws reaching far beyond the letter of the law. We see this process transforming the national criminal law systems in terms of values and principles, producing new commonalities. Approximation may, under such circumstances, in its manifest forms be minimum harmonization, but as a long-term approximation practice it produces new convergences.

International agendas concerning anti-terrorist measures as well as those against organized crime have had a massive influence on the formation and development of European criminal law in this setting. In Europe, the Framework Decision on terrorist offences of 2002 was basically the first substantive regional instrument defining terrorist offenses. The Council of Europe went ahead with its convention in 2005, but the EU Framework Decision was also amended accordingly in 2008. (p. 1131)

As regards international organized crime, the Palermo Convention, which was strongly supported by European governments, also became the model for the unified EU approach. It would be very hard to imagine post-Amsterdam legal developments without including the impact of these international policies and instruments. This is not to say that Europe has only served as a platform for international policymaking; quite the contrary, Europe has also formulated its own priorities and developed a legal regulatory framework of its own.

Because of this complex, dialogical, and process-oriented approach of the European actors to several pressing regulatory problems, European criminal law has the potential to grow a deeper legal culture than that foreseen in the first years of this process. We have already pointed out the role of the Council of Europe, but we should stress that experience from that cooperation has certainly been a major factor behind the success of the harmonization of certain parts of the criminal laws of the Member States in the EU setting. The various concurring and completing instruments form what we could call regimes that work in an integrative manner. An integrative approach should therefore also be promoted in scholarship. On the other hand, we should additionally remember that

European law itself provides some safeguards against overly substantial approximation that would ruin the central legal principles of the Member States.

To cover such an event, the so-called emergency brake mechanism has been provided in Art. 83(3) TFEU, which is important as a guarantee that European criminal law does not go too far when seen from an individual Member State's point of view. An individual Member State can only achieve a suspension of the process, which will then be referred to the European Council for further negotiations.

Another precondition for its success has certainly been that the different European legal systems have over a long period of time had at least some basic views in common and that many of the legal systems have much more in common than those basic views. We could tentatively say that the term "European criminal law" could perhaps be used to cover this commonality that, should it exist, could then facilitate efforts to approximate the different laws by initially providing some commonalities. We should perhaps also speak about European criminal law in this broadest sense, if not as a very well-defined concept and category, then as a reminder of the commonalities that have their roots in tradition and in long-term exchange and cooperation. At least if we look at law as academic scholarship, we should be aware that the ideas have travelled over the years and that not all legal tradition can be explained as only being domestic and national. In that sense, the idea that European criminal law is a product of the Europeanization of criminal law builds on the paradoxical premise that the law was not European from the start.

We may let comparative lawyers debate whether the criminal law systems in Europe are too far removed from each other to deserve being incorporated in any meaningful sense into the term "European criminal law." Should this make sense, the commonalities would be found most evidently as general legal principles and (p. 1132) perhaps general legal concepts. Since common general legal principles can certainly be found in constitutional traditions, why then not in criminal law traditions? The principle of legality (*nullum crimen sine lege*), and the principle of culpability play a significant role in all European legal traditions, and much of this connects with European human rights law.

In the development of European criminal law, the Member States have been hesitant to allow EU law to intrude too far into their national legal orders. The competence to issue criminal law symbolizes sovereign state powers, which the Member States themselves wish to hold. The Member States have sought to keep control over the process of the Europeanization of criminal law by limiting the legal powers of the Union to adopt measures addressing the systemic qualities of the national legal orders. As stated by André Klip, national criminal law influences Union law rather than the reverse, because "Union law does not require Member States to alter the fundamental characteristics of their criminal law, when implementing Union law." This follows from the fragmentary nature of the instruments the Union uses in approximation. This fragmentary nature is most clearly seen in the lack of a developed general part because a general part would have the effect of increasing coherence.

Criminal liability for legal entities has been introduced in Union instruments, this being an exception to the rule of excluding a general part. It would, however, be naïve to think that the absence of a general part will be a permanent state of affairs, because the fragmentary instruments always contain elements of principle as well. Individual concepts may be interpreted by the national courts and also by the ECJ.

III. European Criminal Law: From *Gesetz* to *Recht*?

Many of the previous observations have been quite closely tied to the presupposition that we take the rule-making legislative level to be the decisive entry level. It is at this level that the dualistic model operates in many constitutional settings, since the international obligations of state parties need to be converted into binding national laws. And it is this model of legislative mediation that even holds in the developed EU law setting as far as criminal law is concerned. The power of EU law to shape a national legal system becomes much more obvious when we take the full context of the application of law into account.

We should first say a few words about a "complete" legal system, and a full concept of law, because this is rather important for our analysis, being relevant both (p. 1133) to our findings concerning supranational elements of law as well as to an understanding of the remaining differences between criminal law in the supranational European criminal law in a narrow sense, and as part of the national criminal law.

Criminal law in the full sense consists of a set of normative structures. In the surface structure, we have pieces of legislation and individual court decisions—the raw materials of the legal order, so to speak. By adding the context of doctrines specific to the general principles of criminal law and the conceptual structure underlying the various elements of an offense, we get a much fuller picture. The academically researched criminal law presents itself as organized to a much deeper level than just as a body of cases or a body of pieces of legislation.

This richer view of law pertains to the law as "*Recht*," not just as "*Gesetz*." Even though there is certainly a continental emphasis here, as pointed out by George P. Fletcher, it would not make sense in the common law tradition to define criminal law only as statutes and cases either.[24]

We should thus emphasize the role of concepts and principles in contributing to the systemic nature of the object of our study. The systemic nature of criminal law as a system not only presupposes an elaboration of specific legal principles and legal concepts, but also requires doctrines concerning the use of legal sources and the principles governing the interpretation and application of law.

In the national context, the systematic nature of criminal law as an object of knowledge is a product of scholarly work that has elaborated the tools necessary for this enterprise.

Trained lawyers reproduce law as a systematic enterprise and contribute to the development of this system.

International treaty law as a source of national criminal law does not challenge the traditional view on criminal law very much; it mainly contributes to crime policy orientation and may cause conceptual difficulties during the necessary national processes of amending domestic laws. International treaties may regulate a field quite thoroughly, but what is crucial is that international treaty law does not impose duties on the courts to interpret national laws in a profoundly new way. National judges may still continue to seek to construct their domestic system by resorting to their ordinary tools and largely neglecting the original source of the international obligation. This is also what makes international treaty law so easy to adopt, because it leaves national legal orders "national" in this deeper sense.

The development of European criminal law has clearly left this phase behind. We find traces of concept-building and of commitments to foundational principles at the European level. We also find the evolution of doctrines that necessitates rethinking of legal sources and the doctrines of interpretation and application. EU law is starting to adumbrate its criminal law increasingly closely. **(p. 1134)**

The ECJ has for some decades elaborated on the principle of legality in criminal law, stating that it is a general principle of EU law, but European law has not been able to avoid the interpretation of relevant criminal law concepts fully, even though this has certainly not been a high priority.

In relation to the principle of legality in the context of transnational law, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*[25] is a highly interesting which concerned the Belgian national law implementing the EAW Framework Decision, which introduced the surrender procedures for a set of offenses which were listed but not properly defined. The ECJ took the stance that even though the principle of legality was binding and part of EU law, the responsibility for defining the offenses properly was on the Member States themselves.

It follows from the logic of the EU law instrument that it can neither harm the legality of national criminal law nor guarantee it, since European law does not impose the principle of legality in criminal law on its own legal instruments. We might even consider the following: this principle of criminal law has validity as a principle of European law, but it does not apply to European criminal legislative instruments as these are not directly applicable. The shared competence leads to the Member States having responsibility for their part, and only by misunderstanding the role of the Framework Decisions could it be concluded otherwise. We do not have to work this out in detail: Framework Decisions are about frameworks, and frameworks are not applicable without substantial national legislation. The principle of legality is, so to speak, firmly rooted in international and transnational law, but it largely continues to address issues of full criminal law systems and thus the domestic setting.

We should continue this line of thought by citing another example, the *Pupino* case.[26] *Pupino* is about leaving inter-governmentalism behind and reaching beyond it. This was the case of a request for a preliminary ruling which concerned whether a group of small children who had been victims of ill-treatment should be allowed to give their testimony outside the courtroom, following special rules. The Italian legislature had not provided such a scheme for crimes of violence. The case basically came under the articles of the Framework Decision on the standing of victims in criminal proceedings.[27]

The crucial point was whether Framework Decisions should guide the interpretation of national laws when applied in a case in which the national law fell under the articles of the Framework Decision. Had the solution been that Framework Decisions are part of intergovernmental cooperation, such an interpretative effect would most likely have been excluded. (p. 1135)

The Court referred to Art. 1 of the Amsterdam Treaty, which provides that the Treaty "marks a new stage in the process of creating an ever closer union." It also held that it would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation—requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under EU law—was not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the EU institutions. Accordingly, when applying national law, the national court must interpret it "as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU."[28]

The *Pupino* ruling is significant because it touches upon phenomena at a deeper cultural level. It reorganizes the legal sources, as it elaborates on the duty of national courts to take into account the provisions of a Framework Decision in actual cases. It does so in rather a moderate way, because of course it does not command the national court to apply the Directive directly. That is to say, the national law needs to deliver the decision, so to speak. The national court, however, receives instructions on how to strike the necessary balance, as consistent interpretation may not be *contra legem* either and may not risk the legal protection of the other party (in this case the accused, Ms. Pupino).

The case concerned the interpretation of procedural rules, but as Framework Decisions also deal with substantial criminal law matters, the rule of consistent interpretation also applies as far as these are concerned.

Thus the *Pupino* doctrine emphasizes the need for the principle of legality since, according to a well-established doctrine concerning the promotion of legal certainty, Framework Decisions and Directives, in the case of a failure in national implementation, should not lead to aggravated criminal liability. Therefore, the obligation on the national court to refer to the substance of a Framework Decision in interpreting the relevant rules of its national law "was limited by general principles of law."[29]

The reason why this example was discussed concerns its further implications. As we may presume, these resultant obligations will be experienced differently by different actors from one jurisdiction to another. How radical the change is depends on the national doctrines that need to incorporate the new doctrine. This duty raises numerous new issues from the point of view of many national actors. Now that the articles need to be taken into account, how do you specify the content of the binding provisions, the exact form of the duty? National judges need to start thinking about the interpretation of articles of a Framework Decision, of the significance of the preambles stating the aims of the Framework Decision, etc. This is certainly fertile ground for new preliminary rulings. (p. 1136)

The European frame touches the level of *Recht*, not only that of *Gesetz*. We find that transnational EU law starts to shape the criminal law in a way which introduces substantial links and connections between the various layers and it is increasingly difficult to force it into the form of intergovernmental cooperation. Seen from the national angle, or from both, the monistic features actually gain more significance. The local judge becomes a truly European judge.

We see that European criminal law escapes the paradigm of interstate cooperation and gains a new identity. We might say that European criminal law departs from that specific paradigm of transnational criminal law which could be regarded mainly as a regime of enforcement and cooperation, and takes on features that mark its specificity.

European criminal law is, however, in a bind. It simply does not have the means of proceeding toward fuller identity as a body of law, because it is so dependent on the national courts for its development. The case law of the ECJ and the ECtHR may proceed significantly toward interpreting the foundation of European criminal law, but the national elements in criminal cases will continue to dominate. A qualitative jump would require that a truly transnational embryo of criminal law is created, which could occur for either offenses against the financial interests of the EU or for customs offenses.

Obstacles to progress toward full and comprehensive European criminal law are many. Approximation of criminal laws serves the interest of mutual recognition and is not a goal in itself. This stresses the enforcement paradigm. Respect for disparate legal traditions has been expressly granted at treaty level. The emergency brake procedure can be activated should the European legislature require excessively sharp turns. We should also be mindful of the Lisbon decision of the German Federal Constitutional Court with its notice that EU competence in this field should be interpreted strictly and that criminal law belongs to the core areas of legislation in which the national legislature must be given enough room to shape its content.[30]

If we read the distinction between European criminal law and transnational criminal law as outlined previously, one interesting implication is that international treaty law—the typical form of transnational criminal law—may be channeled regionally through European criminal law. *Kadi* would also be a case for European criminal law,[31] manifesting the European foundations of European criminal law.

Within this general framework we might even say that the Treaty law of the Council of Europe and the body of law of the EU may be regarded as belonging together in the sense that the particular touch of the Council of Europe colors its activities and renders them different from other actors operating with international instruments. Most certainly, the supranational ECtHR further illustrates this (p. 1137) development of a European character. The human-rights-friendly interpretation of national laws represents a kind of parallel to the *Pupino* doctrine.

A conclusion I wish to draw is that it makes a huge difference whether we theorize about criminal law beyond the state by focusing on treaty-making and legislative activities only, or whether we extend our scrutiny to cover law in a thicker sense, as interpreted and applied law in a domestic setting. If we do this, we go beyond domestic criminal law by looking at the domestic law first. The latter option completes the picture and enables us to look at the systematic connections and legal cultural phenomena so important to a full analysis. It renders visible both the tendencies toward a European criminal law, be it artificial or natural, but it also demonstrates the reasons why European criminal law can hardly be expected to be able to solve the underlying tensions that have followed it since its very beginnings. Perhaps the first decade of the millennium in European criminal law, the Amsterdam decade, was simply so focused on putting in place secondary legislation that we almost forgot the matters of application and interpretation. With this shift in focus, we may address the true processes of the formation of European criminal law, a process which is still very much in the making.

European criminal law will also have to struggle with certain structural deficits in the future. It will continue to be a system based on differences between laws around Europe. But the European framework has all the potential to develop further, granting the common laws a greater role in the totality of this pluralistic order.

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Kimmo Nuotio

Professor of Criminal Law, University of Helsinki