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Baker, Estella; Harding, Christopher

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**From past imperfect to future perfect? A
longitudinal study of the Third Pillar**

By

Estella Baker and Christopher Harding

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From past imperfect to future perfect? A longitudinal study of the Third Pillar

Estella Baker and Christopher Harding*

 Competence; Criminal law; EC law; European Community; Justice and home affairs

This discussion pursues a “longitudinal” analysis of the development of European level efforts at crime control, looking at some of the past to inform an understanding of both the present Third Pillar centre of such policy and measures, and the prospects for future action in the wake of the Lisbon Treaty. It challenges the idea that this is a relatively new (post-Maastricht) area of European activity by emphasising a well-established history and dynamic of intergovernmental co-operation, and argues that this momentum will not decrease in the near future. The discussion also probes what may be seen as problematic within the method of the Third Pillar, and then what may prove to be the legacy of the Third Pillar, even in the event of its possible collapse should what is envisaged in the Lisbon Treaty actually take place.

Introduction

To a large extent the Third Pillar has remained an unremarked feature of EU history. It is still marginal in much legal discussion,¹ and public awareness and understanding of the pillar structure generally, let alone the specific features of the Third Pillar, appear to be vague. Thus the Third Pillar has been a subject of minority interest. But for that interested minority it has been a significant laboratory for the nurturing of supranational European-wide crime control and a source of worry because it “has major implications for the lives of European citizens”.² The very fact of its obscurity, reinforced by the lack of transparency inherent in its predominantly intergovernmental method, has helped to foster the development of a half-hidden and imperfectly accountable crime control regime—the evolution of a kind of criminal law by stealth.³ Indeed, the Third Pillar has

* University of Sheffield and Aberystwyth University respectively. This is a revised version of a paper given at “The Next 50 Years: The Future of European Law & Policy” conference held at the University of Birmingham, July 3–4, 2008.

¹ In particular, little attention has been given to Third Pillar activity in conventional textbook accounts of EU law. As Denza remarked in 2002, “the intergovernmental pillars are not well understood even by Community lawyers” (Denza, *The Intergovernmental Pillars of the European Union* (OUP, 2002), p.3).

² Valsamis Mitsilegas, Jörg Monar and Wyn Rees, *The European Union and Internal Security* (Palgrave Macmillan, 2003), p.1.

³ For earlier more critical accounts see, for instance, Mitsilegas, Monar and Rees, *The European Union and Internal Security*; Sionaidh Douglas-Scott, “The rule of law in the European Union—putting security into ‘the area of freedom, security and justice’” (2004) 29 E.L. Rev. 219; Jörg Monar, “Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation” (1998) 23 E.L. Rev. 320; Bernd Meyring, “Intergovernmentalism and Supranationality: Two Stereotypes for a Complex Reality”, (1997) 22 E.L. Rev. 221; Christopher Harding, “European Regimes of Crime Control: Objectives, Legal Bases and Accountability” (2000) 7 *Maastricht Journal of European and Comparative Law* 224.

played host to what is now a significant body of European criminal law and criminal justice activity, but one which has an uncertain constitutional character and basis.

Now, however, the Third Pillar may be poised to merge its identity with that of the Community. This is because one of the genuine reforms that is proposed under the Treaty of Lisbon is the dissolution of the distinction between these parts of the Union's legal architecture. The severed parts of the original "Justice and Home Affairs" (JHA) Third Pillar would be reunited under a new title on the "Area of Freedom, Security and Justice" (AFSJ), housed within the Treaty on the Functioning of the European Union (TFEU). Consequently, the *acquis* that has been built up under the Third Pillar would be merged with that of the Community, turning the AFSJ into an entirely supranational affair.⁴

For anybody who has monitored the development of European integration in the crime control field, this would be a momentous development. Until November 1993, criminal law was an aspect of governmental activity that stood outside the Treaties altogether.⁵ And, even when the EU Treaty (TEU) then established the Third Pillar, co-operation between the Member States took place on an intergovernmental basis because concerns about pooling sovereignty over such a politically and culturally sensitive sphere precluded the option of providing the Community with a criminal legal base.⁶ Compared with the situation that may now be in prospect it is apparent that the Union has travelled an extraordinarily long way in a very short space of time.

Nevertheless, it would be premature to conclude that the effect of the Lisbon Treaty will be to complete a long-term trajectory through which this important body of Union law and policy has travelled from an unequivocally intergovernmental past to a similarly unequivocal supranational future. There are signs that the heritage of complicated and obscure method represented by the Third Pillar approach may still be resilient and influential. For instance, the appearance of fresh intergovernmental initiatives⁷ suggests a prospective vision that is neither so straightforward nor so neat. Meanwhile, their emergence testifies to the way in which the criminal law field is assuming importance as an increasingly intense and lively site of integration within, and in parallel with, the Union. That phenomenon is likely to continue, regardless of the immediate fate of the Treaty of Lisbon, and underlines the reasons why this is a particularly opportune moment to reflect critically upon the ongoing progress of European crime control efforts.

The discussion will begin by tracing the evolutionary process through which the Union has acquired competence over criminal law affairs, clarifying the longer term trends that

⁴ Although it will, of course, be subject to the "opt in" arrangements that have been negotiated by Denmark, Ireland and the United Kingdom, discussed below.

⁵ At least, that was the position formally speaking. But the true state of affairs has always been more equivocal because of the role played by the criminal law in regulating economic activity.

⁶ This preoccupation is not shared to the same degree by the Member States: see L.F.M. Besselink, "Sovereignty, Criminal Law and the New European Context" in P. Alldridge and C. Brandts (eds), *Personal Autonomy, the Private Sphere and the Criminal Law* (Hart, 2001), pp.94-96.

⁷ The Prüm Convention and meetings of the "G6 Group", discussed below; and see also the recent note to the Council concerning the Salzburg Forum: Council of the European Union, *Note from Austria, Bulgaria, the Czech Republic, Hungary, Poland, Romania, Slovakia and Slovenia to the Council, Police Cooperation within the Salzburg Forum -an Example for Successful Regional Cooperation*, Paper 14304/08 (Brussels, October 15, 2008).

lie embedded within that process, and providing a basis for an appraisal of the strengths and weaknesses of that competence.

The long-term trajectory of the European crime control and criminal law regime

Currently, EU competence with respect to criminal law matters spans the First and Third Pillars. Recently, the demarcation between the two has fallen under particular scrutiny thanks to the Court of Justice's rulings in what are commonly referred to as the "environmental offences"⁸ and "ship source pollution"⁹ cases. Although the focus here is the Third Pillar, this section will start by saying a little about the Community's powers because they become relevant later on. It will then proceed to a historical overview of the evolution of the Third Pillar, delineating the three key phases in its development to date, and identifying a number of long term trends with which it seems to be associated. These will then be reconsidered in the last section of the article, which concerns the prospects for the future.

Community competence

With one minor exception,¹⁰ the founding Treaties did not refer to the criminal law. Nevertheless, a more than negligible *acquis* that affects criminal law in one way or another has grown up under the First Pillar.¹¹ Consequently, there is no doubt that the Community is seised of some competence over criminal law matters, notwithstanding the fact that the EC Treaty still does not include a dedicated legal base to enable its exercise. Simultaneously, however, despite the Court's rulings in the environmental offences and ship source pollution cases, its precise scope remains unclear. Furthermore, disagreements have continued as to whether the relevant body of case law and legislation remains a mere "working title" under which to categorise a miscellaneous bundle of loosely associated measures¹² or should be regarded instead as a more ambitious enterprise with the potential to coalesce into a coherent body of Community criminal law. Moreover, even if the latter is assumed, precisely because of the absence of a bona fide criminal legal base to provide the process with more momentum, progress towards the realisation of this promise has been piecemeal and relatively slow.

Under these circumstances, Community intervention in the crime sphere has been confined to situations that can be classified as parasitic upon the exercise of powers

⁸ *Commission v Council* (C-176/03) [2005] E.C.R. I-7879; [2005] 3 C.M.L.R. 20.

⁹ *Commission v Council* (C-440/05) [2007] E.C.R. I-9097; [2008] 1 C.M.L.R. 22.

¹⁰ Euratom Treaty Art.194(1) which dealt with breach of secrecy. See further J.W. Bridge, "The European Communities and the Criminal Law" [1976] *Crim. L.R.* 88.

¹¹ For discussion see, inter alia, E. Baker, "Taking European Criminal Law Seriously" [1998] *Crim. L.R.* 361; G. Corstens and J. Pradel, *European Criminal Law* (Kluwer, 2002), Part Three; M. Delmas-Marty, "The European Union and Penal Law" (1998) 4(1) *E.L.J.* 87; René Guldenmund, Christopher Harding and Ann Sherlock, "The European Community and Criminal Law" in Christopher Harding et al. (eds), *Criminal Justice in Europe: A Comparative Study* (Clarendon Press, 1995); Steve Peers, *EU Justice and Home Affairs Law*, 2nd edn (OUP, 2006), Ch.8.

¹² P.-A. Albrecht and S. Braum, "Deficiencies in the Development of European Criminal Law" (1999) 5(3) *E.L.J.* 293, 297. See also A. Weyembergh, "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme" (2005) 42 *C.M.L. Rev.* 1567, 1571.

that lie within its legitimate areas of competence.¹³ Consequently, Community law has proved to be a relatively potent catalyst in promoting the protection of shared economic assets such as the Union's budget and the Single Market,¹⁴ but not in addressing the problem of crime more generally. Contrasting with this subdued, but stable, background of a relatively selective and opportunistic method of construction is the historical mushrooming of fragmented intergovernmental initiatives that have amalgamated into the Third Pillar.

Competence under the Third Pillar

The Third Pillar was formally created by the TEU and substantially amended by the Treaty of Amsterdam in 1999. However, it was not invented from scratch in 1993, but was forged out of the pre-existing Trevi structure. Therefore, the first phase of Third Pillar development occurred prior to the Union's foundation, and so before "justice and home affairs", including matters of criminal law, were incorporated within the Treaty framework.

Trevi (Terrorism, Radicalism, Extremism, Political Violence) was set up by the Rome European Council in 1975, and was an intergovernmental network of national officials. Initially dedicated to combating terrorism,¹⁵ by the early 1990s its remit and organisational structure had grown to cover a wider range of crime control and public order matters.¹⁶ When the TEU entered into force, these existing arrangements were absorbed into the single institutional framework of the Union. Accordingly, Trevi's organisational infrastructure was transformed into the organisational platform of the Third Pillar¹⁷ and its accumulated *acquis* became the founding contribution to what we now know as the Third Pillar *acquis*.¹⁸ A similar pattern was followed with regard to competence. None of the areas of co-operation in policing and criminal justice matters¹⁹ that was at that time

¹³The consequences have the potential to be far reaching: see E. Baker, "Criminal Jurisdiction, the Public Dimension to 'Effective Protection' and the Construction of Community-Citizen Relations" in A.A. Dashwood et al. (eds), *The Cambridge Yearbook of European Legal Studies Volume 4, 2001* (Hart, 2002).

¹⁴e.g. Regulation 974/98 on the introduction of the Euro [1998] OJ L139/1; Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering [1999] OJ L166/77; Directive 2001/97 amending Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering [2001] OJ L344/76. See: Simone White, *Protection of the Financial Interests of the European Communities: The Fight against Fraud and Corruption* (Kluwer, 1998).

¹⁵It is interesting that the desire to combat terrorism should have been so influential at this relatively early juncture given that the terrorist attacks of 9/11 are commonly cited as a major catalyst for contemporary initiatives: see, for example, the discussion by Douglas-Scott, "The rule of law in the European Union—putting security into 'the area of freedom, security and justice'" (2004) 29 E.L. Rev. 219–242.

¹⁶J. Lodge, "Internal Security and Judicial Cooperation" in J. Lodge (ed.), *The European Community and the Challenge of the Future*, 2nd edn (Palgrave MacMillan, 1993), p.318; P.A. Weber-Panariello, "The Integration of Matters of Justice and Home Affairs into Title VI of the Treaty on European Union—a Step Towards more Democracy?" EUI Working Paper RSC No.95/32 (European University Institute, 1995), p.10.

¹⁷Denza, *The Intergovernmental Pillars of the European Union*, p.76.

¹⁸Denza, *The Intergovernmental Pillars of the European Union*, pp.74–75; S. Lavenex and W. Wallace, "Justice and Home Affairs: Towards a 'European Public Order'" in H. Wallace, W. Wallace and M.A. Pollack (eds), *Policy-Making in the European Union*, 5th edn (OUP, 2005), p.461; R. Morgan, "The Third Pillar: An Introduction" in J. Monar and R. Morgan (eds), *The Third Pillar of the European Union: Cooperation in the Fields of Justice and Home Affairs* (European Interuniversity Press, 1994), p.14.

¹⁹They included combating drug addiction; combating fraud on an international scale; judicial co-operation in criminal matters; customs co-operation; and police co-operation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime.

listed in Art.K.1 TEU was new; all had already been the subject of joint action between the Member States.²⁰ It follows that, whereas the entry into force of the TEU appeared to trigger collaboration in this field, it actually marked the start of its second phase.

The introduction of the Third Pillar constituted a tangible step towards the formalisation of co-operation. However, not all Member States were so convinced of its wisdom as to be willing to confer relevant competence upon the Community. Had they been, the Third Pillar would never have come into existence at all. Instead, concerns about limitations on national sovereignty²¹ meant that the JHA Pillar was established on an intergovernmental basis, which ensured that a significant degree of control remained vested in the Member States. Accordingly, the Council of Ministers was the dominant institution and most of the Commission's First Pillar powers were denied it under Title VI TEU. Likewise, the Parliament had no decision-making authority, and the Court of Justice was virtually excluded from having any jurisdiction.²² Complementing these departures from the Community regime, the Treaty empowered the Union to act by means of a distinct set of legal instruments. As a general rule, a unanimous vote of the Council was required for adoption and, owing to their intergovernmental character, they then had to be ratified by the Member States to take effect.²³ Inevitably, this meant that the legislative process was very inefficient compared with that for Community measures and little tangible progress was made in implementing any action that was agreed.

Entirely independently of Trevi, the three Benelux countries, France and Germany (half of the then 10 Member States) signed the first Schengen Agreement in 1985.²⁴ Although also outside the framework of the Community Treaties, the project had strong connections with the programme to establish the Single Market²⁵ because its principal aim was to create a common travel area by abolishing barriers to the free movement of persons. That objective, though, carried obvious security implications, making it necessary simultaneously to implement a package of compensatory measures to combat crime and to control those whose movement was undesirable or positively unwanted. It took a further five years to finalise the details, resulting in the Schengen Implementing Convention (CISA) of 1990.²⁶

²⁰ Denza, *The Intergovernmental Pillars of the European Union*, pp.75–76.

²¹ See further *The Intergovernmental Pillars of the European Union*, pp.74–75; Lavenex and Wallace, "Justice and Home Affairs: Towards a 'European Public Order'" in Wallace, Wallace and Pollack (eds), *Policy-Making in the European Union*, p.461; Morgan, "The Third Pillar: An Introduction" in Monar and Morgan (eds), *The Third Pillar of the European Union*, p.14.

²² TEU Arts K.3–K.6. The Court, though, did assert the right to "police" the boundary between the First and Third Pillars: *Commission v Council* (C-170/96) [1998] E.C.R. I-2763; [1998] 2 C.M.L.R. 1092 and also now *Commission v Council* (C-176/03) [2005] E.C.R. I-7879 and *Commission v Council* (C-440/05) [2007] E.C.R. I-9097. For general discussion see M. Anderson et al., *Policing the European Union: Theory, Law and Practice* (Clarendon Press, 1995), p.68; Denza, *The Intergovernmental Pillars of the European Union*, p.76; Lavenex and Wallace, "Justice and Home Affairs: Towards a 'European Public Order'" in Wallace, Wallace and Pollack (eds), *Policy-Making in the European Union*, p.462.

²³ TEU Arts K.3(2), K.4(3).

²⁴ The Schengen Agreement of June 14, 1985. For background discussion see Anderson et al., *Policing the European Union*, pp.59–61; C. Fijnaut, "The Schengen Treaties and European Police Co-operation" (1993) 1 *European Journal of Crime, Criminal Law and Criminal Justice* 37, especially 48–49.

²⁵ J. Lodge, "Internal Security and Judicial Cooperation" in Lodge (ed), *The European Community and the Challenge of the Future*, p.320; D. O'Keefe, "The Schengen Convention: A Suitable Model for European Integration?" (1991) 11 *Yearbook of European Law* 185, 186.

²⁶ Convention applying the Schengen Agreement of June 14, 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on

Given the common subject matter and sympathy in objectives, there was considerable scope for overlap between the activities of the Schengen states and those of the totality of Member States operating within the framework of Trevi and, subsequently, the Third Pillar. Nevertheless, the Schengen Zone continued to evolve in parallel with the Union and its membership steadily expanded, partly because of the Union's own enlargement. By the mid-1990s, 13 of the, by then, 15 Member States had acceded to Schengen, the exceptions being Ireland and the United Kingdom. But a complication regarding membership had also arisen. In order to keep intact the pre-existing common travel area of the Nordic Union, two non-EU Member States, Iceland and Norway, had also become party to the Schengen arrangements by means of a bilateral agreement.²⁷

Justice and Home Affairs emerged as a primary target for reform at the 1996/7 IGC. Apparently, it was not planned that way²⁸ but, bearing in mind the problems that were catalogued above, it does not seem that surprising in hindsight. The resulting reforms were so significant that the Treaty of Amsterdam should be regarded as triggering the third phase of Third Pillar development. The most prominent were as follows:

- The part of the Third Pillar that related to population movement was transferred to a new Title of the Community Treaty²⁹ and the remainder renamed "Police and Judicial Cooperation in Criminal Matters".
- A horizontal connection was established between the freshly severed parts through the device of linking both Titles to a new objective, inserted into Art.2 TEU, to "maintain and develop the Union as an area of freedom, security and justice". Thus, Art.29 TEU, the opening provision of Title VI, proclaims that,

"without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice".³⁰

the Gradual Abolition of Checks at their Common Borders of June 19, 1990. See generally Fijnaut, "The Schengen Treaties and European Police Co-operation" (1993) 1 *European Journal of Crime, Criminal Law and Criminal Justice* 37; R. Genson, "The Schengen Agreements—Police Cooperation and Security Aspects" in P.J. Cullen and W. Gilmore (eds), *Crime Sans Frontières: International and European Legal Approaches*, Hume Papers on Public Policy (Edinburgh University Press, 1998), Vol.6, Nos 1 and 2; O'Keefe, "The Schengen Convention: A Suitable Model for European Integration?" (1991) 11 *Yearbook of European Law* 185; A. Woltjer, "Schengen: The Way of No Return?" (1995) 2 *Maastricht Journal of European and Comparative Law* 256.

²⁷For further discussion see Peers, *EU Justice and Home Affairs Law*, pp.62–64. In the meantime, difficulties with implementation sometimes meant that it took several years for the accession treaties with new participants to come fully into force: see Woltjer, "Schengen: The Way of No Return?" (1995) 2 *Maastricht Journal of European and Comparative Law* 256, 258–260.

²⁸Monar, "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation" (1998) 23 *E.L. Rev.* 320, 321.

²⁹Title IV on "Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons". For discussion see, inter alia, J. Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement* (Edward Elgar, 2004), Part III; M. den Boer, "Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity Despite Communautarization" (1997) 4 *Maastricht Journal* 310, 311–313; P.J. Kuijper, "The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects" (2004) 41 *C.M.L. Rev.* 609; Peers, *EU Justice and Home Affairs Law*, Chs 3–6; S. Peers, "Who's Judging the Watchmen? The Judicial System of the 'Area of Freedom, Security and Justice'" (1998) 18 *Yearbook of European Law* 337, 351–365; N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (OUP, 2004), part two.

³⁰It then provides that one of the ways by which the objective is to be attained is, "by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters".

- The Schengen infrastructure and *acquis* was absorbed into the institutional and legal framework of the Union³¹ in a manner that was consistent with the new division in competence between the Community and the Third Pillar.³²
- The Commission, the Parliament and the Court of Justice were all afforded an increased presence in Third Pillar affairs.³³
- A revised set of instruments was introduced for use under the Third Pillar that were more akin to those already provided to the Community.³⁴ In particular, a Third Pillar version of the directive was introduced in the guise of the framework decision. Like a directive, it binds Member States as to the result to be achieved, but reserves the choice of form and methods to national level. Crucially though, unlike a directive, it cannot have direct effect.³⁵

On the surface, these reforms were indicative of a commitment to more intensive integration. However, consensus among the Member States that change was needed did not translate into agreement as to exactly what form it should take.³⁶ Therefore, the impression of progress was won at a significant price because the previous “relatively simple” division between the First and Third Pillars³⁷ was eroded and the Third Pillar acquired features that threatened the consistency, solidarity and uniformity of the Union’s legal order.³⁸

First, it was necessary to accommodate the continuing mismatch between the membership of the Union and the participants in Schengen. Therefore, the Treaty included a Protocol to protect the right of Ireland and the United Kingdom not to be bound by the Schengen

That objective in turn, “shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud” through a specified set of means that include, “approximation, where necessary, or rules on criminal matters in the Member States”.

³¹ Described as the “greatest surprise” among the Treaty of Amsterdam changes: Lavenex and Wallace, “Justice and Home Affairs: Towards a ‘European Public Order’” in Wallace, Wallace and Pollack (eds), *Policy-Making in the European Union*, p.464.

³² Primarily between Title IV EC and Title VI TEU. For discussion see N. Bracke, “The Amsterdam Treaty Framework with Special Reference to the Incorporation of the Schengen Acquis” in P.J. Cullen and S. Jund (eds), *Criminal Justice Co-operation in the European Union after Tampere* (Bundesanzeiger, 2002); M. den Boer, “Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity Despite Communautarization” (1997) 4 *Maastricht Journal* 310, 313–314; P.J. Kuijper, “The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects” (2004) 41 *C.M.L. Rev.* 609; J.J.E. Schutte, “The Incorporation of the Schengen Acquis in the European Union” in Cullen and Gilmore (eds), *Crime Sans Frontières*.

³³ TEU Arts 34(2), 35 and 39. For discussion of the Court’s jurisdiction see Peers, *EU Justice and Home Affairs Law*, pp.365–393, 404–409.

³⁴ TEU Art.34(2).

³⁵ TEU Art.34(2)(b). Apparently, however, framework decisions may have indirect effect: *Criminal Proceedings against Maria Pupino* (C-105/03) [2005] E.C.R. I-5285; [2005] 2 *C.M.L.R.* 63.

³⁶ See, inter alia, Lavenex and Wallace, “Justice and Home Affairs: Towards a ‘European Public Order’” in Wallace, Wallace and Pollack (eds), *Policy-Making in the European Union*, p.464; J. Monar, “Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation” (1998) 23 *E.L. Rev.* 320, 321–322; Peers, *EU Justice and Home Affairs Law*, pp.7–8.

³⁷ S. Peers, *EU Justice and Home Affairs Law* (Pearson Education, 2000), p.39. See also M. den Boer, “Justice and Home Affairs Cooperation in the Treaty on European Union: More Complexity Despite Communautarization” (1997) 4 *Maastricht Journal of European and Comparative Law* 310.

³⁸ J. Monar, “Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation” (1998) 23 *E.L. Rev.* 320; N. Walker, “Current Developments: Justice and Home Affairs” (1998) 47 *I.C.L.Q.* 231, 238.

acquis.³⁹ Secondly, contrary to the premium that has always been placed on the uniform interpretation of Community law, an optional element was introduced with respect to the Court's newly acquired jurisdiction to provide preliminary rulings on the validity and interpretation of certain Third Pillar instruments.⁴⁰ Jurisdiction was made contingent upon a declaration by a Member State, and the declaration could be made in two alternative forms. Consequently, even where Member States have signed up, the terms of what they have agreed to varies.⁴¹ Overall, it is little wonder that a previous commentator described the Amsterdam reforms as embodying an "amazing range" of flexibility.⁴²

In terms of Treaty development, the story is now up to date.⁴³ Before proceeding to identify the long-term trends that lie embedded in this process of evolution, however, it is appropriate to say something about the "Area of Freedom, Security and Justice". Swiftly portrayed as being on a par with the earlier economic projects to establish the Single Market and the Euro in terms of its importance, words were accompanied by deeds. The Commission and the Council of Ministers began the preparatory work to turn ambition into reality even before the Treaty of Amsterdam entered into force⁴⁴ and a Special European Council meeting was held at Tampere in October 1999 which agreed the first in the series of multi-annual programmes of action that are designed to put the Area in place. Superseded in 2004 by the current Hague Programme,⁴⁵ work is already underway to construct a third programme to follow its expiry in 2009.

The Hague Programme identifies 10 areas as priorities for action. Those relating to criminal law are the fight against terrorism, migration management (which includes strengthening the fight against illegal immigration and trafficking in human beings), the fight against organised crime, the guarantee of an effective European area of criminal justice and, arguably, the full development of policies enhancing citizenship, monitoring and promoting respect for fundamental rights.⁴⁶ An interesting feature of the original programme documentation is that it was premised explicitly on the expectation that the Union's competence in criminal law matters would soon be enlarged by the Treaty

³⁹ Protocol No.2 Schengen *Acquis*, annexed by the Treaty of Amsterdam to the EC Treaty and EU Treaty.

⁴⁰ TEU Art.35(1). This includes those rooted in the Schengen Conventions: see *Criminal proceedings against Gözütkök* (C-187/01 and C-385/01) [2003] E.C.R. I-1345; [2003] 2 C.M.L.R. 2, the very first cases in which the Court was asked for a preliminary ruling under Art.35 TEU.

⁴¹ TEU Art.35(2) and (3). Currently, 17 Member States have accepted the Court's jurisdiction: Austria, Belgium, the Czech Republic, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Slovenia, Spain and Sweden. Of these, only Spain has made a declaration in the narrow form [2008] OJ C69/1.

⁴² J. Monar, "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation" (1998) 23 E.L. Rev. 320, 334. Further potential flexibility is added by the "enhanced cooperation" provisions: Arts 43–45 TEU.

⁴³ The Treaty of Nice made minor changes to the Third Pillar that are not relevant here.

⁴⁴ Commission of the European Communities, *Towards an Area of Freedom, Security and Justice*, MEMO/98/55, Brussels, July 15, 1998; Council of Ministers, *Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam establishing an Area of Freedom, Security and Justice*, 13844/98, Brussels, December 4, 1998; European Council, Presidency Conclusions of the Tampere European Council on the Creation of the Area of Freedom, Security and Justice, October 15 and 16, 1999.

⁴⁵ Council of the European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 16054/04, Brussels, December 13, 2004 [2005] OJ C53/01.

⁴⁶ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament—The Hague Programme: Ten Priorities for the Next Five Years COM(2005) 184 final.

establishing a Constitution for Europe.⁴⁷ Despite the fact that the Treaty was abandoned, official documents suggest that the Union has found the means to press ahead with most, if not all, of the proposed measures.⁴⁸ Disregarding any issues that may arise as to legality, the political message is clear. Not only does the construction of the AFSJ remain the target of intensive action by the Union almost a decade after the idea first surfaced, but it constitutes a critical conceptual component of the Union's ongoing vision as to where criminal law matters sit in the scheme of its affairs.

Long-term trends, themes and patterns

Although the historical account above is heavily summarised, it is detailed enough to disclose the existence of a number of long term trends, themes and patterns. To start, it contradicts the common impression that collaboration in the criminal law field only began in 1993; in fact, Member States have been actively engaged in such co-operation for several decades.⁴⁹ That is not to suggest that the founding of the Third Pillar was unimportant as a starting point for significant change; just that the nature of that change was something different. Specifically, its advent constituted the first tangible stage in the transition from treating criminal law matters as:

- lying at the periphery of the Union's affairs;
- properly the subject of "traditional" intergovernmental co-operation⁵⁰ outside the Union's formal legal and institutional framework; and
- executed as a matter of executive and administrative co-operation,

to the current state of affairs in which:

- they occupy a position at the top of the Union's agenda;
- action is taken almost entirely within the context of the Union's legal and institutional framework;
- by means of a methodology that has matured towards a full embrace of the supranational approach; and
- underpinned by the Union's evolving constitution and commitment to the rule of law.

This transformation can be interpreted as a genuine achievement, yet those who find the current arrangements satisfactory are in a rare minority. By necessary implication,

⁴⁷ Council of the European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 16054/04, Brussels, December 13, 2004 [2005] OJ C53/01; Commission of the European Communities, Communication from the Commission to the Council and the European Parliament—Evaluation of European Union Policies on Freedom, Security and Justice COM(2006) 332 final. See also Commission of the European Communities, Communication from the Commission to the Council and the European Parliament—The Hague Programme: Ten Priorities for the Next Five Years; the Partnership for European Renewal in the Field of Freedom, Security and Justice COM(2005) 184 final, and the discussion in A. Weyembergh, "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme" (2005) 42 C.M.L. Rev. 1567.

⁴⁸ See, for example, Commission of the European Communities, Communication from the Commission to the Council and the European Parliament: Report on the Implementation of the Hague Programme for 2005 COM(2006) 333 final.

⁴⁹ Particularly if collaborative ventures that involve states outside the EU are included, co-operation in the criminal justice field can be argued to *pre-date* the founding Treaties of the Union.

⁵⁰ K. Kittichaisaree, *International Criminal Law* (OUP, 2001), pp.4–6.

they do not include the Member States themselves; otherwise the Treaty of Lisbon would not provide the means to effect wholesale changes. From an academic perspective, criticism tends to coalesce around two principal themes. One, to be developed below, is the complaint that (even) more than in other fields of competence, the Union fails to conduct its criminal law affairs in accordance with the strictures of “good governance”. Consequently, its interventions are lacking in the desirable measure of legitimacy.⁵¹ Perhaps because the supporting arguments are so well-founded, little space has been devoted to an alternative perspective, but regarded historically a rather more contingent picture emerges.

As the transformation in treatment of criminal law matters has taken place, it is undeniable that it has brought improvements in governance in its wake. These days, when the Union acts in the criminal law field, it complies with the principles of “openness, participation, accountability, effectiveness and coherence”⁵² in a manner that was totally out of the question in, for example, the days of Trevi or the early operation of Schengen. Yet, at that time, there was nothing like the same degree of criticism of these arrangements as now affects the Union’s activities. Ironically, the reason seems to lie in the very fact that governance has improved. Both Trevi and Schengen were established under conditions of great secrecy, a factor that was to set the cultural tone for their operations.⁵³ Therefore, their existence was known to relatively few and it was hard to obtain information about their ongoing affairs, making scrutiny of any kind nigh on impossible. It is only as their organisational structures have moved into the declared zone of Member State collaboration, thereby becoming more visible, that a lively debate on governance questions has become viable. Viewed this way, the fact that such a debate exists is as much a barometer of improved circumstances as it is of continuing deficiency.

The other main focus of criticism in the literature is the striking imbalance between the Union’s enthusiasm for investing in crime control and its reticence about ensuring appropriate protections for defence rights. For example, all but one of the framework decisions that have been adopted under the Third Pillar concern crime control in some guise or other, the exception being an instrument to protect victims’ rights.⁵⁴ Meanwhile, a longstanding proposal for a framework decision on defence rights remains stalled in the Council of Ministers, even though its contents have been substantially diluted in the quest for the necessary unanimous backing for its adoption to go ahead.⁵⁵

⁵¹ See, for example, Douglas-Scott, “The rule of law in the European Union—putting security into ‘the area of freedom, security and justice’” (2004) 29 E.L. Rev. 219.

⁵² Commission of the European Communities, European Governance—A White Paper COM(2001) 428 final, p.8.

⁵³ It has been claimed, for example, that the European Parliament only “belatedly ‘discovered’” the existence of Trevi: Lodge, “Internal Security and Judicial Cooperation” in J. Lodge (ed.), *The European Community and the Challenge of the Future*, p.319; and that, “for a long time”, the existence of the Schengen Agreement “was known only in select gatherings” in four of the original signatory states: Weber-Panariello, “The Integration of Matters of Justice and Home Affairs into Title VI of the Treaty on European Union—a Step Towards more Democracy?” EUI Working Paper RSC No.95/32, pp.16–17.

⁵⁴ Framework Decision 2001/220 on the standing of victims in criminal proceedings [2001] OJ L82/1. The exception is symptomatic of trends in broader contemporary criminal justice discourse. See also Directive 2004/80 relating to compensation to crime victims [2004] OJ L261/15.

⁵⁵ European Commission, Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union COM(2004) 328 final; Council of the European Union, Note from the Presidency to COREPER/Council, *Proposal for a Council Framework Decision on Certain*

On the institutional side the picture is similar. Three EU agencies have been created under the auspices of the Third Pillar. Two, Europol and Cepol (the European Police College), facilitate police co-operation; the third, Eurojust, is concerned with co-operation in relation to criminal investigations and prosecutions. In addition, the Commission has a specialist unit, OLAF, that is tasked with combating fraud.⁵⁶ Plainly, all of these bodies have a remit that is linked to crime control. By contrast, there is no agency that is charged with the safeguard of defence rights.⁵⁷ The reasons for the discrepancy are many and various, and beyond the scope of the current paper; suffice it to say that they point to a state of affairs in which the “security” limb of the AFSJ attracts greater priority for action than the others. This is among the points that will be enlarged upon below.

The Third Pillar as a problematical site for European crime control

The Third Pillar is a strange creature. In its “present imperfect” post-Amsterdam phase of existence, it appears to possess a transitional and intermediate identity, occupying a space somewhere between the genuinely supranational EC and traditional intergovernmental arrangements, such as the Council of Europe and the EU Second Pillar. Two of its features mark it out in this way. One is the established *passerelle* to the Community Pillar: the real possibility (to mix metaphors) that its subject matter might break off, like sheets of polar ice, and flow into warmer supranational waters. The second is the quasi-supranational character of some aspects of Third Pillar organisation, already noted and manifest in particular in the framework decision. In these two respects, from the perspective of those in the Member States, the Third Pillar has a real legal significance which goes beyond intergovernmental rhetoric and political posturing. The possibility alone of “approximation” (or harmonisation as it is sometimes termed) of national criminal law via commonly binding framework decisions, instead of on the optional basis of intergovernmental treaties, provides the regime with an enhanced credibility.⁵⁸ In short, once there is the requisite political will (as happened, for instance, in the aftermath of the September 11 attacks on New York) the instrument is waiting and ready. With the possibility of harmonised substantive criminal law rules and a growing network of procedural co-operation, European criminal law begins to appear as a phenomenon of substance rather than just a “working title”.⁵⁹ Finally, these supranational tendencies have been coupled with the evident political activation of AFSJ matters mentioned above, providing elements of agenda and timetable to energise the institutional framework.⁶⁰

Procedural Rights in Criminal Proceedings throughout the European Union, Paper 10287/07, Brussels, June 5, 2007.

⁵⁶ The acronyms CEPOL and OLAF stand respectively for Collège Européen de Police and Office Européen de la Lutte Anti-Fraude. OLAF was formerly known as UCLAF (Unité de Coopération de la Lutte Anti-Fraude), set up in 1988. See further Peers, *EU Justice and Home Affairs Law*, pp.487–489, 535–542.

⁵⁷ Although the Union has had its own Agency for Fundamental Rights since March 1, 2007, its remit extends across the fundamental rights field; it does not have any special responsibilities with respect to criminal justice.

⁵⁸ Note for instance the extent to which the House of Commons Scrutiny Committee was exercised about the prospect of criminal law harmonisation under the proposed First Pillar version of AFSJ: 26th Report, Session 2002–2003, paras 43–58.

⁵⁹ Albrecht and Braum, “Deficiencies in the Development of European Criminal Law” (1999) 5(3) E.L.J. 293.

⁶⁰ Achieved, for example, through the Council Action Plan to combat organised crime [1997] OJ C251/1, the Tampere and Hague Programmes (discussed above) and the Millennium Action Plan on organised crime:

Yet, as stated already, the emergence of this new order has produced a number of misgivings. Such doubts have both a political and a legal character, but fuse together to pose a number of fundamental questions relating to the whole crime control enterprise that has become encapsulated in the Third Pillar. What is the legal identity of this regime of EU activity in terms of its constitutional structure, legal basis and legitimacy? Whose and what interests are being served by Third Pillar policy? And who is driving the political and legal agenda of this Pillar? These questions may be discussed around four main problematic issues:

- the constitutional structure of the third pillar;
- its frangible and mobile content;
- its reliance on ill-defined and “orphaned” concepts;
- its low visibility and opportunity for scrutiny.

The constitutional structure of the third pillar

Instructive lessons can be drawn from a comparison of the respective constitutional structures of the First and Third Pillars of the European Union. Although at first sight the Third Pillar may appear to be more easily defined on account of its more limited and specific content, on closer inspection there is a relative lack of focus which has proven problematical.

There has never been any doubt regarding the underlying purpose of the First Pillar, although it has evolved from the “common” to the “single market”, from the EEC to the EC and from a free-standing Community to one pillar of a Union.⁶¹ The establishment of a larger but single European market area and organisation, with its clearly enunciated benefits, was a well-debated and clearly-directed project. The single overriding imperative of free movement of economic activity within that larger but defined geographical space has remained the governing concept and substantive constitutional basis for the EC. Moreover, as a governing concept it has benefited from its justiciability—the fact that the Court of Justice has been able to supply an authoritative and legitimating constitutional gloss through its interpretation of the EC Treaty. In time of course, this project has evolved into something more than simply economic, encompassing policies relating to various aspects of human mobility, individual entitlements, social protection and environmental welfare. Yet the underlying purpose remains consistent and perhaps may be summarised, in its most evolved expression, as the guarantee of the EC space and of the freedoms and opportunities that are implicit in the wider and deeper space. In more legalistic terms, the EC project is constructed around a number of prohibitions—of activities which hinder or threaten the achievement of the project, whether they are public or private in character. Thus, while the single market idea has triggered progressively more integration, the content of such integration has been essentially *expansive* for those within the single market area.

The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium [2000] OJ C124/1.

⁶¹For useful overviews of the evolution of the Community project, see Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Longman, 2002), Ch.1; J. Weiler, “The Transformation of Europe” (1991) 100 *Yale Law Journal* 2403.

Moreover, the *means* for achieving this new European space were clearly defined in the conferral and pooling of sovereign powers to a supranational entity charged with the development and management of its regime. These transferred powers were also regulated through a system of judicial control. Thus the EC possesses a “tight” constitutional structure in terms of objectives, method and balance of powers. While it has always been possible to argue about the precise substance and exercise of Community competence, it is difficult to deny that there is a constitutional law and structure of the EC.⁶²

In contrast, the Third Pillar has never possessed such a clarity of purpose or structure, but has always had a more *reactive*, more traditional and politically very different role that is almost a kickback against the opportunities and freedoms unleashed by the bigger European space. It addresses not so much the “good” that the EC generates, but the problems that beset it or that it may itself have given rise to. Greater human mobility and more potent economic flows have their own darker side in the form of facilitating transnational criminality. In some respects this was an inevitable reaction to the process of dismantling the frontiers managed by sovereign States, and is the product of both *intended* EC integration and also (since 1989) post-Westphalian, post-Cold War decline in the regulating power of sovereign states.⁶³ During the 1990s there thus emerged a governmental and more broadly public concern about the dark underbelly of European integration, post-Cold War change, and globalisation. The genie was out of the lamp and it was assuming shapes similar to those of the international mafia and terrorist groups.⁶⁴

The Third Pillar can in this way be seen as an attempt by Member States’ governments to reassert control over the spectre of transnational crime. They cannot do this individually and thus need to act together. But, on the other hand, since the task touches so closely upon their own vital interests in maintaining political stability and security, and the viability of their own structures, they have not wished to hand the matter over to a supranational institution. The Third Pillar therefore represents a traditional and conservative political methodology in its emphasis on intergovernmental processes. Its underlying rationale is reactive rather than aspirational, restrictive rather than rights-enhancing, and protective of “old order” political interests: hardly the stuff for a new constitution. Indeed, on this interpretation a new constitution would (from the perspective of at least some national governments) be best avoided as it may serve to limit the exercise of powers across the uncertain transnational domain.

The insertion of the idea of an AFSJ in Art.29 TEU may be viewed in the same light. Although, at first sight, the AFSJ may look like a focal point and objective for the Third Pillar, providing some coherence and unity, on further reflection it may be seen as adding little. The provision of freedom, security and justice is the traditional function of the modern democratic state, and again comprises a reactive rather than expansive role. Unlike the forward-looking and developmental EC, the AFSJ objectives do not tread new ground but express a truism of governance, stating the minimum that citizens expect from their governments in any case. Other problematical aspects of the character of the Third Pillar follow on from these basic observations.

⁶² See further Douglas-Scott, *Constitutional Law of the European Union*, Ch.15

⁶³ On this see also D. Garland, “The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society” (1996) 36(4) *British Journal of Criminology* 445.

⁶⁴ See also Valsamis Mitsilegas, “Defining Organised Crime in the EU: The Limits of European Criminal Law in the Area of Freedom, Security and Justice” (2001) 26 E.L. Rev. 565, 566.

A frangible and mobile content

What was “justice and home affairs” all about? Crudely, the answer may be: controlling human mobility. Between the Treaties of Maastricht and Amsterdam there were two main areas of this policy—the regulation of migration, and crime control. Post-Amsterdam, the former has crossed the *passerelle* to the First Pillar, a partial⁶⁵ triumph for the argument that “visas, asylum and immigration” is better regulated as an EC issue. Crime control, on the other hand, has remained in principle a Third Pillar, intergovernmental matter.

These developments illustrate the frangible and mobile character of Third Pillar activity. The possibility of movement, or partial movement (in terms of Member State participation), in or out of the range of the pillar has itself complicated and rendered unstable the substantive content of its regime, in turn obfuscating its constitutional objectives and coherence. Conventionally, the *passerelle* is seen as a device for flexibility, but with hindsight and regarded from within the Third Pillar, it is a source of instability. The impression that results is of the Third Pillar as a kind of temporary antechamber—a loose zone of convenience, where politically sensitive areas of policy are opportunistically collected together for intergovernmental handling until mature enough for Community treatment. Indeed, this appears to be the emerging history of the pillar, with a first major crossing of the *passerelle* under the Amsterdam Treaty and a final crossing later planned under the Constitutional and Lisbon Treaties.

Even in its present incarnation as a “crime control” regime, the Third Pillar is not clearly distinct from the First Pillar. The boundary between the two is ambiguous because certain crime control issues can justifiably be regarded as relevant to the protection of the Single Market (e.g. money laundering,⁶⁶ transnational subsidy fraud,⁶⁷ the prosecution of business cartels,⁶⁸ environmental offending⁶⁹). Sometimes such subject matter has been dealt with under both pillars.⁷⁰ Similarly, significant national interest or security limitations on common European policies have also been a long term (negative) feature of Community policy and law making.⁷¹ In a number of ways, therefore, it is not the *content* of Third Pillar activity that is distinctive, but the reason for using it instead of the First Pillar; that is to say, Member State preference for the intergovernmental method, discussed further below.

⁶⁵ Some Member States have the option to stay out of this regime.

⁶⁶ See, e.g. the Directive 91/308 on money laundering [1991] OJ L166/77.

⁶⁷ On the protection of the EC against fraud, see Art.280 EC and Regulation 3289/91 fixing the import levies on cereals and on wheat or rye flour, groats and meal (the PIF Regulation) [1995] OJ L312/1.

⁶⁸ As “administrative” offences on the basis of Art.81 EC, but now accompanied by criminalisation of the same cartel activity under some Member State law: see Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (Oxford University Press, 2003).

⁶⁹ Requiring Member States to criminalise certain kinds of activity damaging to the environment, e.g. Regulation 259/93 on waste [1993] OJ L30/1; Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law COM(2007) 51 final (adopted by the JHA Council, October 24, 2008).

⁷⁰ See Harding, “European Regimes of Crime Control: Objectives, Legal Bases and Accountability” (2000) 7 *Maastricht Journal of European and Comparative Law* 224, 233.

⁷¹ Such as the public policy and public security limitations under Art.39(3)EC.

Ill-defined and “orphaned” concepts and the problem of cross-pillar interpretation

A further, related issue is the Third Pillar’s reliance on ill-defined governing concepts which are also “orphaned” in the sense of having an uncertain relationship to governing (but also more mature and more fully worked out) concepts under the First Pillar. Article 29 TEU, laying down the goal of safety “within an area of freedom, security and justice”, supplies a good example of such a concept. This phrase has many of the hallmarks of politically desirable ambiguity: unimpeachable rhetoric (who would argue against any of these values?) coupled with legal vagueness (what do they signify more precisely?). The possibility of authoritative legal interpretation was limited in the first phase of the Third Pillar’s history by the general exclusion of the jurisdiction of the Court of Justice.⁷² However, the same phrase was transposed simultaneously to the new Title IV of the EC Treaty, where it may be interpreted by the Court.⁷³ Should any such *Community* interpretation then inform the sense in which the term should be understood in the context of the Third Pillar?

Any attempts at such cross-pillar interpretation are challenging, since an inquiry into the meaning of the AFSJ and its constituent concepts leads to fundamental queries concerning the rationale and purposes of the Third Pillar and its relationship to the Community. And so we return to the question of constitutional foundations. Two related questions arise in particular from this—first, whether such terms and concepts should be interpreted similarly or differently under the two pillars; and, secondly, whether it is the same sense of “freedom”, “security” and “justice” that is being protected under each of the pillars.

Regarding the first point, the issue of unity of interpretation across the three pillars of the Union has been highlighted by the Court of Justice itself.⁷⁴ In the context of the EC, the Court has stressed the need to consider the specific objectives of the Community system in interpreting Community measures and principles. The still unresolved question concerns the extent to which the different pillars may be considered to have sufficiently distinct objectives so as to justify some different interpretation of the same terms and concepts. In short, is the cross-pillar vocabulary of the AFSJ similar after all? On the one hand, Art.47 TEU safeguards the primacy of the First Pillar vis-à-vis the other two pillars. On the other, it could be argued that there is—in the context of legal protection and human rights—a uniformity imperative for the whole of the European Union, based upon Art.6 TEU, and reinforced by the appearance of the Charter of Fundamental Rights and later by the Treaty establishing a Constitution for Europe and by the Lisbon Treaty.

On the second point, prior to the Amsterdam reforms, in the sense employed in Art.29, neither “freedom”, nor “security”, nor “justice” had been terms of legal art under the EC Treaty or its secondary rules. That Treaty has of course always referred to “freedom” in the sense of the Single Market “freedoms”, and “security” in the sense of national security as a ground for derogation, but the Art.29 package is clearly different in its orientation, especially when read *in the light of the remainder of that Article and its objective of “providing citizens with a high level of safety”*. The connotation is one of

⁷² See Denza, *The Intergovernmental Pillars of the European Union*, pp.313 et seq.; European Court of Justice, *Report on Certain Aspects of the Application of the TEU* (1995).

⁷³ EC Treaty Art.61.

⁷⁴ European Court of Justice, *Report on Certain Aspects of the Application of the TEU*, para.4.

public protection and, in so far as this language (either under Art.61 EC or Art.29 TEU) now requires interpretation, it is likely to lead the ECJ into some uncharted territory. A key question is that of equivalence for the three governing concepts. For instance, would Douglas-Scott's argument that, "in the post-September 11 haste to pass security measures, the other elements of the AFSJ—freedom and justice—have been ignored"⁷⁵ be easily justiciable as a means of ensuring equilibrium within the over-arching concept?

Some intriguing answers to these questions have begun to appear. For instance, the Luxembourg Courts have been bold in asserting First Pillar legal protection in the Third Pillar domain. The most striking example is the ECJ's ruling in *Pupino* that imported the notion of "effectiveness" into the Third Pillar by stating that national courts should interpret national rules in the light of the wording and purpose of framework decisions, thereby enhancing the instrument's role.⁷⁶ Arguably, the audacity of this particular judgment only serves to underline the present uncertainty surrounding the distinction between the two pillars.

Low visibility and opportunity for scrutiny

Most of what has been said so far relates to structural and functional deficiencies. Visibility and scrutiny is a more substantive critical point and is probably the most widely debated of the Third Pillar's problematical features. Unease has centred on a cluster of issues: the lack of a democratic basis for third pillar measures, poor transparency, more limited judicial and parliamentary scrutiny, and, as a consequence of all of these, a lower level of legal protection for individual basic rights. Such concerns strike an especially ironic note when we recall that two of the three elements of the AFSJ are "freedom" and "justice".

There has been a steady criticism of this aspect of the Third Pillar in academic writing and on the part of representative and parliamentary groups.⁷⁷ Two related explanatory themes inform these critical accounts. First, there has been a sense that Third Pillar measures have been more effectively developed in a low-visibility intergovernmental decision-making environment. Thus Harding argued,

⁷⁵ Douglas-Scott, "The rule of law in the European Union—putting security into 'the area of freedom, security and justice'" (2004) 29 E.L. Rev. 219.

⁷⁶ *Criminal Proceedings against Pupino* [2005] E.C.R. 1-5285. See also *Svenska Journalistförbundet v Council* (T-174/95) [1998] E.C.R. II-2289; [1998] 3 C.M.L.R. 645 on the disclosure of documents and the discussion in Peers, *EU Justice and Home Affairs Law*, pp.32–33.

⁷⁷ See for instance: P.-C. Müller-Graff, "The Legal Basis of the Third Pillar and its Provisions in the Framework of the Union Treaty" (1994) 31 C.M.L. Rev. 493; Monar, "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation" (1998) 23 E.L. Rev. 320; House of Lords Select Committee on the European Communities, 14th Report (1997–1998), HL 72 and 21st Report (1997–1998), HL 139; Harding, "European Regimes of Crime Control: Objectives, Legal Bases and Accountability" (2000) 7 *Maastricht Journal of European and Comparative Law* 224; Mitsilegas, "Defining Organised Crime in the EU: The Limits of European Criminal Law in the Area of Freedom, Security and Justice" (2001) 26 E.L. Rev. 565; Douglas-Scott, "The rule of law in the European Union—putting security into 'the area of freedom, security and justice'" (2004) 29 E.L. Rev. 219.

“a kind of operational shadiness provides a cloak for informal action which may thereby prove relatively effective, but from a civil libertarian viewpoint the consequences of informal official action may not be desirable”.⁷⁸

Secondly, the Third Pillar has been energised by security needs and the security element within the AFSJ; a tendency that has become more pronounced since the terrorist attacks of September 2001. Even before they occurred, Mitsilegas had referred to the “predominance of the ‘security’ logic in the Amsterdam Treaty and the subsequent Tampere conclusions”.⁷⁹ More recently, Douglas-Scott has gone further. She suggests that the Third Pillar has provided national governments with an attractive working environment for the development of security policy because of the remarkable lack of democratic controls at national and European levels.⁸⁰ Such comments verge towards an accusation that the Third Pillar has been collectively hijacked by Member State executive organs. From that vantage point, the reforms that are envisaged under the Lisbon Treaty are a means of rescuing Third Pillar action from this form of democratic deficit by moving it to the realm of European, rather than national, democratic legitimacy.

But, accepting that there have been real shortcomings of democratic basis, transparency and legal scrutiny, it is necessary still to pose some more specific questions regarding the nature of the interests to be protected by any democracy and visibility-enhancing processes. There has been some fuzziness in the discussion of democratic basis in the context of the European Union. Part of the problem lies in the need to clarify further the notion of democratic policy and law-making processes and raises the more specific question: precisely *whose* democratic input is restricted or insufficiently taken into account? ⁸¹ If “democratic” here refers to broader public opinion, then it is questionable how critical this is likely to be of the content of Third Pillar crime control measures. Eurobarometer surveys, for instance, have suggested support for a “stronger” approach to crime control,⁸² perhaps implying less concern about (or even hostility towards) the provision of due process safeguards for suspects, defendants and offenders. On the other hand, “informed” public opinion (represented, for example, by NGOs, pressure groups and processes of parliamentary scrutiny) may well doubt the necessity for and cogency of a number of crime control measures. The broader question of democratic basis and consequent legitimacy remains unclear in this sense: who owns the process of testing such legitimacy?

To the extent that it may be accepted that “informed” opinion needs to be properly and quickly informed and to have the opportunity to challenge proposals (arguably a

⁷⁸ Harding, “European Regimes of Crime Control: Objectives, Legal Bases and Accountability” (2000) 7 *Maastricht Journal of European and Comparative Law* 224, 238—this argument was triggered by the UK Government’s admission to the House of Lords Select Committee that it preferred to work within the environment of the Third Pillar.

⁷⁹ Mitsilegas, “Defining Organised Crime in the EU: The Limits of European Criminal Law in the Area of Freedom, Security and Justice” (2001) 26 *E.L. Rev.* 565, 580.

⁸⁰ Douglas-Scott, “The rule of law in the European Union” (2004) 29 *E.L. Rev.* 219, 221.

⁸¹ See Thomas Christiansen, “The Limits of Legitimizing European Integration” (1997) 8 *Irish Studies International Affairs* 35, 47; and also Monar, “Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation” (1998) 23 *E.L. Rev.* 320.

⁸² A survey conducted in 2003 also found that 71% of respondents supported the proposition that policy on the prevention and fight against crime would be more effective if it were decided at EU, rather than national, level: Flash Eurobarometer 156, *Justice and Home Affairs* (March 2004).

persuasive conception of legitimacy⁸³), then the crucial issue becomes one of access to policy initiatives and procedures relating to the adoption of measures, and information regarding their operation.⁸⁴ It is clear that in this regard the role of representative NGOs and parliamentary bodies is of central importance. In particular, the European Parliament and national parliamentary committees are *potentially* very effective sites for scrutiny. They are themselves accessible to wider informed opinion, especially pressure groups and NGOs, and may act as a filter for this latter level of surveillance. Moreover, assuming that such parliamentary scrutiny is alert and efficient, it is possible that it may influence the policy and law making processes (i.e. within the Council) within the Third Pillar. But it is not easy to judge the effectiveness of this form of scrutiny. On the one hand, the vigilance and energy of national parliaments is likely to vary as between the Member States. On the other, if even a minority can demonstrate the standard of scrutiny carried out, for instance, by the UK House of Lords Select Committee on the European Union, that may prove overall to be fairly effective at the European level.

On the whole, the evidence to date is that Third Pillar activities have proven relatively impenetrable to parliamentary examination. For example, at first sight it appears that the adoption of the framework decisions on the European Arrest Warrant and common definition of terrorism was materially influenced by parliamentary intervention. Both measures were given considerable political momentum following the September 11 attacks on New York and a strict timetable was set within the Council for their adoption by December 2001. In the event, agreement was not reached at the JHA Council of December 6–7 and the “proclamation” of the two measures at the Laeken Council on December 14–15 was in fact a “provisional agreement”. This was in part due to a requirement to re-consult the European Parliament and to a number of parliamentary scrutiny reserves made by some national parliaments.⁸⁵ But what was achieved in this instance appears on closer examination to have been hard-going due to the combination of a short time-scale and other factors that impeded meaningful discussion.⁸⁶

More generally, however, the ability of even an alert and informed parliamentary scrutiny body to penetrate Third Pillar activity might be doubted. Back in 1998, the House of Lords Select Committee⁸⁷ noted that complex working practices had developed that made it difficult to keep track of business transacted under the Third Pillar.⁸⁸ The same report observed the significance of low-key, informal, practical co-operation which has been promoted and facilitated in this forum, and there was evidence that the pattern of work

⁸³ See, e.g. Giandomenico Majone, “Europe’s ‘Democratic Deficit’: the Question of Standards” (1998) 4 E.L.J. 5 and especially his argument at p.28 that the appropriate criteria for assessing the legitimacy of European Community policy are not so much, or only, the tests of popular or majority support and approval but also more “outcome-oriented” factors of “expertise, procedural rationality, transparency and accountability by results”.

⁸⁴ For a pertinent illustration, see (1996) (March–April) *Statewatch* 22–23 and (1996) (May–June) *Statewatch* 1, 21–22.

⁸⁵ See the House of Lords Select Committee on the European Union, 16th Report, February 26, 2002.

⁸⁶ House of Commons Select Committee on European Scrutiny, 33rd Report, *Democracy and Accountability and the Role of National Parliaments*.

⁸⁷ House of Lords Select Committee, 15th Report, February 17, 1998.

⁸⁸ House of Lords Select Committee, 15th Report, para.5.

was gradually changing from the formation of legislative texts to the discussion of operational matters.⁸⁹ Further insights derive from the views expressed on the impact of the Joint Action on organised crime,⁹⁰ a “soft law” measure adopted under the Third Pillar during its first JHA incarnation. The Home Office confirmed that efforts to implement the relevant Action Plan had dominated its Third Pillar work,⁹¹ and what it was referring to was ground-level administrative action. In this sense, therefore, Third Pillar initiatives may be taken forward, but in a way that is not easily visible to any body charged with the scrutiny of legal developments. Moreover, the actual impact of “soft” measures such as recommendations and the earlier Third Pillar joint actions ought not to be under-estimated. As non-binding legal texts, they may receive less attention compared to other measures. Furthermore, being “soft”, they may be more easily adopted and then implemented without much fanfare.

In such ways, therefore, Third Pillar activity has not proven to be easily visible and so subject to effective scrutiny, even when there is considerable will to carry out the latter, at either national or European levels. Consequently, there have been enduring grounds for concern.

Lisbon: the collapse of the Third Pillar and signs for the future

The Lisbon reforms

Like the abortive Constitutional Treaty before it, two areas in which the Treaty of Lisbon would make far reaching changes are the Third Pillar and the protection of fundamental rights. The key points for present purposes are as follows⁹²:

- it would remain an objective of the Union to “offer its citizens an area of freedom, security and justice without internal frontiers”,⁹³ and the Treaty would state explicitly that this is a policy area in which the Union shares competence with the Member States⁹⁴;
- the Third Pillar would be reunited with rest of the original JHA Pillar within a new Title of the TFEU on the AFSJ, thereby introducing the supranational method into those parts of the new Title that are currently housed in Title VI TEU⁹⁵;

⁸⁹ In its evidence, the Home Office had suggested to the Committee that such practical co-operation was “probably more important” than the number of legal texts produced: House of Lords Select Committee, 15th Report, para.22.

⁹⁰ Joint Action on organised crime [1997] OJ C251/1. For more detailed discussion of this measure, see Mitsilegas, “Defining Organised Crime in the EU: The Limits of European Criminal Law in the Area of Freedom, Security and Justice” (2001) 26 E.L. Rev. 565.

⁹¹ House of Lords Select Committee, 15th Report, para.14.

⁹² For fuller discussion see House of Lords European Union Committee, *The Treaty of Lisbon: An Impact Assessment, 10th Report of Session 2007–08*, Stationery Office, 2008, HL Paper No.62; Steve Peers, “EU Criminal Law and the Treaty of Lisbon” (2008) 33 E.L. Rev. 507.

⁹³ TEU Art.3(2).

⁹⁴ TFEU Art.4(2)(j).

⁹⁵ TFEU Pt 3 Title V.

- consistent with that change, the Union would act by means of the instruments that have hitherto only been available to the Community⁹⁶; and there would be a commensurate extension of the jurisdiction of the Court of Justice⁹⁷;
- fundamental rights protection would be improved as the Charter of Fundamental Rights would become fully justiciable and the Union would acquire the competence to accede to the European Convention on Human Rights.⁹⁸

All told, this amounts to a significant package of reforms which furthers the long-term trends that were identified previously and has the capacity to trigger a new, fourth, phase in the development of the Union's competence. However, its impact threatens to be blunted, if not undermined, by an even more "amazing range" of flexibility⁹⁹ than was permitted by the Treaty of Amsterdam, tangentially raising the question of whether "flexibility" is itself a feature that is becoming an embedded trend of integration in this field.

Both the arrangements to accommodate the mismatch between the participants in Schengen¹⁰⁰ and membership of the Union, and also provision for "enhanced cooperation" within the framework of the Treaties,¹⁰¹ would continue. But in addition, certain Member States have negotiated individual arrangements regarding the application of certain parts of the Treaty to them. Under one Protocol, the AFSJ Title does not apply to Ireland or the United Kingdom, but each is able to opt into measures that are adopted under the Title's provisions; similar provision is also made for Denmark but by means of a separate Protocol. A third Protocol, which applies to the United Kingdom and to Poland, is designed to prevent the Treaty from being used as a basis for creating newly justiciable rights with respect to the Charter of Fundamental Rights. Taking these arrangements together, it is obvious that the Treaty reforms will do nothing to make the Union's criminal law affairs any less complex than at present. How successfully though would it address the current shortcomings of the Third Pillar that were identified earlier on in this paper?

Will the Lisbon reforms address the problems of the Third Pillar?

Constitutional structure

Although tempered by the complex of flexibility arrangements, the Lisbon reforms would go some way to addressing the issues to which the current format of the Third Pillar gives rise. Merely by virtue of the transition from intergovernmental to supranational method, the means through which the Union acts would be clarified and the potential for marked improvements in democratic and judicial control would be created. Furthermore,

⁹⁶ TFEU Art.288.

⁹⁷ TFEU Pt 6 Title I Ch.1 Section 5.

⁹⁸ TEU Art.6 and the Protocol relating to Art.6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on Human Rights and Fundamental Freedoms.

⁹⁹ Monar, "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation" (1998) 23 E.L. Rev. 320, 334.

¹⁰⁰ Protocol on the Schengen *Acquis* Integrated into the Framework of the European Union; Protocol on the Position of Denmark.

¹⁰¹ TFEU Pt 6 Title III.

the Treaty would enhance the roles of the European and national Parliaments,¹⁰² thereby promising to improve democratic accountability. What is more debateable is the extent to which the Treaty has the capacity to clarify the constitutional purpose and objectives of the Union's interventions in the criminal law sphere. Would they remain essentially reactive in nature? Or would the rejuvenated legal environment provide the impetus for adopting a more proactive approach that could underpin the achievement of something more ambitious; in particular, could it lead to the establishment of a genuine AFSJ across the Union's territories?

On one view, the answer would appear to be negative. Not only can it be argued that criminal law is *inherently* negative and reactive in nature, but certain of the factors that lend this same character to the Third Pillar would necessarily remain unaffected by the new Treaty: the need to combat the undesired consequences of broader integration processes or to respond to the pressures being created by globalisation, for example. Accordingly, there are at least some grounds for assuming that the present security bias would continue.

Matters do not look quite so clear cut though if the question is approached from a broader constitutional perspective that regards criminal law as prominent amongst the set of cultural, political and social institutions through which the governance relationship between citizens and state is constructed.¹⁰³ From this stance, the explanation for the way that the Third Pillar has developed to date owes more to the uncoordinated and incoherent way in which the Union's criminal law competence is distributed across the Treaties, which acts as a barrier to the fulfilment of its natural constitutional role, than to the innate character of criminal law itself. Not only does this fragmentation encourage the negativity that was criticised above, but it hinders the development of any kind of holistic vision (not to mention debate) as to the proper purposes and parameters of the Union's evolving criminal jurisdiction. Furthermore, any impetus for such a discussion that might have been provided by the Union's (theoretical) obligation to respect fundamental rights and the constitutional traditions of the Member States is also almost entirely blocked by the current distribution of competences under the Treaties. In a context where the Union's legal regime to protect fundamental rights is widely regarded as inadequate,¹⁰⁴ its deficiencies with respect to the Third Pillar are particularly acute.¹⁰⁵ As for the Member States, the pivotal role of the Council with respect to Third Pillar affairs acts as a barrier to democratic accountability at national level. In short, even absent a wider political context that has served to push security concerns to the top of the Union's policy agenda, these structural factors would have been liable to have a similar effect.

Without in any way contradicting that conclusion though, it should be noticed that the version of "security" that is being promoted is a limited and obvious one that is strongly associated with the administrative and institutional (re)organisation of the exercise of oppressive power. Admittedly, coordinated measures to address issues of

¹⁰² See Art.69 TFEU on the role of national parliaments and the use of co-decision as the "ordinary legislative procedure": Art.294 TFEU.

¹⁰³ Such an understanding may help to explain why certain Member States have proved particularly reticent about pooling sovereignty in the crime field.

¹⁰⁴ See, for example, A. Williams, *European Union Human Rights Policies: A Study in Irony* (OUP, 2004).

¹⁰⁵ See, for example, S. Peers, "Human Rights and the Third Pillar" in P. Alston (ed.), *The EU and Human Rights* (OUP, 1999).

common concern, and efforts to harmonise national rules or to promote their mutual recognition so as to facilitate the free flow of criminal justice across borders, may be highly beneficial as far as the efficient management of the Union's criminal justice space is concerned, but security can also be understood in a deeper social, structural and systemic sense.

In this more conceptual guise, it encapsulates notions of social and political good such as the promotion of a positive state of being and welfare, both psychological and physical; sensations of safety and stability; the ability to exercise freedom of choice and of speech without fear of recrimination; confidence in individual, collective and cultural identities; and freedom from abuse and mistreatment, including that at the hands of the state itself.¹⁰⁶ Seen through this liberal-democratic lens, the delivery of security through criminal justice looks much more convincingly like a constitutional concept which, properly to function, must be subject to an appropriate scheme of checks and balances to ensure that it does not start to trump the very cultural, economic, political and social interests that it is meant to protect. This is a vision that sits well with the nature and ethos of the Union as portrayed by the current and prospective Treaties.¹⁰⁷ Furthermore, it supplies a line of reasoning that both justifies the objective to transform the Union into an "Area of Freedom, Security and Justice" as a coherent constitutional ambition, and highlights the intrinsic importance to the integration project as a whole of the implicit mission to fuse the pursuit of "limited and obvious" security interests with the other two elements. In other words, security in a "deep" sense is dependent upon the nurture of freedom and the guarantee of justice (both substantive and procedural), as well as upon measures that are explicitly designed directly to respond to threats to assets, interests and values. If, then, the argument is that, as they currently stand, the Treaties are liable to thwart the ambition to form the Union into an AFSJ in a true, constitutional sense, the question becomes whether the project would fare any better in the light of the reconfiguration that would occur as a result of the Lisbon reforms?

Although the substantive content of the criminal law provisions that would form part of the AFSJ Title does not differ dramatically from those that are already found in the TEU, their operational context certainly does. In addition to their presence within a "tighter" constitutional structure, with its clarity of methods and its attendant checks and balances, their location within the TFEU would make them newly proximate to the measures that now govern the Community, and subject to a common legal regime. Added to these novelties, the effect of making the Charter of Fundamental Rights justiciable and, in due course, of accession to the European Convention on Human Rights, would be to render the Union under an obligation to ensure that relevant policies and practices comply with applicable fundamental rights' guarantees.¹⁰⁸ Subject, of course, to the special rules that would apply to certain Member States, this package of reforms ought to provide a far more auspicious set of conditions for turning the Union into an AFSJ in the "deep" constitutional sense than exists at present.

¹⁰⁶For a conceptual discussion of "security" see: L. Zedner, 'The Concept of Security: An Agenda for Comparative Analysis' (2003) 23 *Legal Studies* 153.

¹⁰⁷See the current Art.6 TEU and the prospective, post-Lisbon Art.2 TEU.

¹⁰⁸In addition to the generic changes that have already been mentioned, Art.67(1) TFEU, the opening provision of the AFSJ Title, states that the area shall be constituted "with respect for fundamental rights and the different legal systems and traditions of the Member States".

Whether or not this potential would actually be realised, however, would depend upon political will and vision, on the one hand, and judicial appetite on the part of the Court of Justice for assimilating the AFSJ into the body of existing Community policies, on the other.¹⁰⁹ Given the political sensitivities that continue to surround the prospect of the Union's continuing development of competence in the criminal law field, it is probably unrealistic to anticipate any rapid political seizure of initiative to capitalise upon the new Treaty capacity. But it is possible that the Court of Justice might use its accumulating bodies of case law in the field of "Community criminal law" and under the Third Pillar as a basis for adopting a role that is more pioneering.¹¹⁰

Frangible and mobile content

As three Member States have negotiated special arrangements to prevent the new AFSJ Title of the TFEU from applying automatically to them, it seems highly unlikely that the Treaty of Lisbon would fully resolve those difficulties that arise from the Third Pillar's frangible and mobile content, and associated instability. While the majority now wish to provide an emphatic and enduring answer to the doubts that surround the Union's involvement in criminal law matters, it seems that a minority do not. Furthermore, this lack of unanimity is not the only source of instability that has the potential to distort the smooth and consistent operation of the regime that would be put in place by the Lisbon Treaty. As noted above, the problematic issue of the mismatch between Union membership and participation in Schengen remains unresolved¹¹¹ and the TFEU would carry on the tradition of including a dedicated set of provisions which permit "enhanced cooperation".¹¹² Therefore, albeit subject to certain procedural conditions, it will remain an option for sub-groups of Member States to embark upon criminal law integration at a faster pace than others within the confines of the Treaty framework. Just as they have done ever since the Treaty of Amsterdam entered into force, both of these attempts at reconciling consistency and solidarity, on the one hand, with flexibility, on the other, are liable to provoke tensions and uncertainty. Moreover, similar concerns arise from another source that is wholly external to both the current and prospective Treaties.

On two relatively recent occasions separate sub-sets of Member States have embarked upon brand new intergovernmental initiatives within the JHA field. In the one case, the

¹⁰⁹This might be conceptualised as a "line drawing" issue. As one commentator has recently pointed out, politics and law do not have to ride in tandem when it comes to performing this task: see M.G. Ross, "Effectiveness in the European Legal Order(s): Beyond Supremacy to Constitutional Proportionality" (2006) 31(4) E.L. Rev. 476.

¹¹⁰What, for example, are the implications of the Lisbon reforms for such decisions as *Commission v France* (C-265/95) [1997] E.C.R. I-6959 and *Criminal Proceedings against Pupino* [2005] E.C.R. I-5285?

¹¹¹Exacerbated since 2004 by a further association agreement with Switzerland: see further Peers, *EU Justice and Home Affairs Law*, pp.63–64.

¹¹²TFEU Pt Six Title III.

result was the so-called Prüm Convention¹¹³; in the other, it was the formation of the so-called “G6 group”.¹¹⁴ Both occurred outside the framework of the Treaties and regardless of the existing enhanced co-operation provisions. Although work is now proceeding to absorb the substance of the Prüm Convention into the fabric of the Union, meaning that its external existence will be short-lived, this implies that even those Member States that propose to be governed by the new AFSJ Title have not lost their taste for (conventional) intergovernmentalism. Therefore, it is impossible to be certain that further, similarly-founded initiatives will not be launched in future.

A further problem arises with regard to the forum of the G6 because of its potential to act as a vehicle for subverting the democratic features (such as they are) of the Union’s decision-making. Before the 2007 enlargement the G6 countries accounted for three quarters of the Union’s population.¹¹⁵ In its aftermath, that proportion will not have been disturbed much because the combined populations of Bulgaria and Romania are relatively small. Therefore, even under the current Treaties, when unanimity is still required within the Council for most Third Pillar measures to be adopted,¹¹⁶ if the six largest Member States act in concert, they can bring very considerable weight to bear in negotiations.¹¹⁷ To add to that concern, there is a risk that they may be tempted to cultivate G6 meetings as a rival environment to that of the Union for the development of policy. Moreover, such fears are hardly allayed by the fact that, thus far, the G6 participants have replicated the early culture of Trevi and of Schengen and pursued their activities in conditions of secrecy that lie outside the confines of any kind of democratic or judicial accountability.¹¹⁸ This may make their meetings an attractive tactical setting for formulating commonly agreed proposals that are then propagated so as to circumvent any evolving agenda of the twenty seven Member States as a whole.¹¹⁹

Following the Lisbon reforms, these dangers might well be exacerbated. Although a unanimous vote of the Council would still be required for some sensitive decisions under the AFSJ Title, most would be governed by the co-decision procedure¹²⁰ and need only a qualified majority vote by the Council to go ahead.¹²¹ Therefore, although the six¹²² could

¹¹³ Council of the European Union, Note from the Council Secretariat on the Prüm Convention signed in Prüm, Germany on May 27, 2005, Paper 10900/05, Brussels, July 7, 2005. The five initial signatories were Austria, Belgium, Germany, Luxembourg and the Netherlands: House of Lords European Union Committee, *Behind Closed Doors: the Meeting of the G6 Interior Ministers at Heiligendamm, 40th Report of Session 2005-06*, Stationery Office, 2006, HL Paper 221, para.16.

¹¹⁴ Namely, France, Germany, Italy, Poland, Spain and the United Kingdom: see generally House of Lords European Union Committee, *Behind Closed Doors*.

¹¹⁵ House of Lords European Union Committee, *Behind Closed Doors*, para.1.

¹¹⁶ TEU Art.34(2).

¹¹⁷ House of Lords European Union Committee, *Behind Closed Doors*, para.6.

¹¹⁸ For damning criticism of this aspect of the G6 arrangements see House of Lords European Union Committee, *Behind Closed Doors*, Foreword and Ch.1. A second, follow up report is slightly less critical: House of Lords European Union Committee, *After Heiligendamm: Doors Ajar at Stratford-upon-Avon, 5th Report of Session 2006-07*, Stationery Office, 2007, HL Paper No.32.

¹¹⁹ House of Lords European Union Committee, *Behind Closed Doors*, para.7.

¹²⁰ TFEU Arts 289 and 294.

¹²¹ TEU Art.16(3) would in future declare that: “The Council shall act by a qualified majority except where the Treaties provide otherwise.”

¹²² There is scope for complication here because of the unique position of the UK, which is a member of the G6 but has negotiated a Protocol to permit it selectively to “opt in” to measures adopted under the AFSJ Title.

not force a measure through by acting alone,¹²³ the task of securing sufficient support to ensure the Council's backing would become easier than it is now. All-in-all, the advent of the G6 group represents a significant retrograde step in terms of the challenge that it presents to the stability of the present Third Pillar and to the prospective AFSJ Title, should it come into being.

Reliance on ill-defined and "orphaned" concepts

The Lisbon reforms would resolve some of the conceptual issues that afflict the Third Pillar. For example, it appears from the English language version of the consolidated Treaties that some of the drafting has been tidied up in ways that may be beneficial.¹²⁴

Secondly, the TFEU would in future place an explicit duty upon the Union to "ensure consistency between its policies and activities".¹²⁵ Therefore, even if the collapse of the Pillar structure did not imply that discussion of cross-Pillar interpretation will become redundant, surely such a debate could not have purchase following the Lisbon Treaty's entry into force. Furthermore, even under the present Treaties, recent decisions of the Court of Justice can be read to mean that, at least as far as the Court is concerned, unity of interpretation is the name of the game.¹²⁶ This leaves as the principal remaining issue the question of equivalence between the AFSJ's three governing concepts.

It has already been suggested that the Lisbon reforms might encourage a better balance between the constituent elements of "freedom", "security" and "justice". Adding to those reasons that were previously cited is the further one that the merger of the First and Third Pillars should trigger a convergence between the case law that the Court has developed under these, hitherto separate, parts of the Union's structure. This is significant because, when it comes to "Community criminal law", the Court has a respectable track record of respecting tenets and principles that criminal lawyers tend to hold dear¹²⁷ and of applying Community law doctrines in a manner that comes close to reinventing them¹²⁸ or to achieve broader goals of criminal justice.¹²⁹ Although the significance of

¹²³The rules governing qualified majority voting are set out in Art.238 TFEU.

¹²⁴For example, Art.67 TFEU (the opening provision of the AFSJ Title) provides that the Union "shall endeavour to ensure a high level of security" rather than the "high level of safety" that is mentioned in Art.29 TEU, heading off potential discussions as to whether security and safety are synonymous. Of course, such potential for argument may not exist in all official languages of the Union.

¹²⁵TFEU Art.7.

¹²⁶See, for example, *Pupino* (C-105/03) [2005] E.C.R. I-5285; *Commission v Council* (C-176/03) [2005] E.C.R. I-7879; *Commission v Council* (C-440/05) [2007] E.C.R. I-9097.

¹²⁷For example, the guarantees of legal certainty and non-retroactivity that are provided by Art.7 ECHR (and Art.49 of the Charter of Fundamental Rights): *Pubblico Ministero v Ratti* (148/78) [1979] E.C.R. 1629; [1980] 1 C.M.L.R. 96; *Officier van Justitie v Kolpinghuis Nijmegen BV* (C-80/86) [1987] E.C.R. 3969; [1989] 2 C.M.L.R. 18; *Criminal Proceedings against Arcaro* (C-168/95) [1996] E.C.R. I-4705; [1997] 1 C.M.L.R. 179 (and *Pupino* [2005] E.C.R. I-5285 under the Third Pillar).

¹²⁸For example, *Criminal proceedings against Calfa* (C-348/96) [1999] E.C.R. I-11; [1999] 2 C.M.L.R. 1138 (in penological terms, confirming the preference for "special", rather than "general" incapacitation); *Criminal proceedings against Skanavi* (C-193/94) [1996] E.C.R. I-929; [1996] 2 C.M.L.R. 372 (implying that a principle akin to "fair labelling" is inherent in Community law).

¹²⁹For example, *Criminal proceedings against Bickel* (C-274/96) [1998] E.C.R. I-2629; [1999] 1 C.M.L.R. 348 and *Cowan v Tesor Public* (C-186/87) [1989] E.C.R. I-195; [1990] 2 C.M.L.R. 613, applying the prohibition on discrimination on the grounds of nationality.

relevant decisions should not be exaggerated, they suggest that, through the operation of its fundamental principles, there is some innate capacity within Community law to achieve a better balance between law enforcement and competing interests than is resulting currently from the Union's legislative programme of measures to establish the AFSJ.

Low visibility and opportunity for scrutiny

The effect of the Lisbon reforms regarding visibility and scrutiny would be mixed. On the positive side, because the supranational method is inherently more open than the intergovernmental method of the Third Pillar, the merger with the Community should bring about greater transparency. Nor would that be the sole gain. In a number of ways, the Treaty would shift the centre of gravity of control over Third Pillar matters away from Member States' executive organs by placing the exercise of competence under more effective supervision from the Union's legislative and judicial arms. These include the move to make co-decision the norm, the new role for national parliaments in monitoring compliance with subsidiarity,¹³⁰ the extended jurisdiction of the Court, justiciability of the Charter of Fundamental Rights, and the introduction of flanking measures that are designed to shore up fundamental rights protection.

On the negative side, however, these gains would be off-set by the increased complexity of the new flexibility arrangements which contradict the general improvements in transparency and in accountability. There is also the troubling signal that has been sent by the advent of the Prüm and G6 initiatives, both of which buck the long-term trends towards greater formalisation and a growing emphasis upon the principle of legality in the conduct of the Union's crime control affairs. Individually, each also raises further legitimacy concerns. The danger that the G6 might become a forum for subverting the Union's AFSJ agenda has already been noted. Regarding Prüm, the problem is different. Just as with Schengen before it, the methodology that the small number of initial signatory states adopted in seeking the incorporation of the Convention's contents into the Union's *acquis* was fundamentally undemocratic. In essence, all Member States will become bound by terms that they have not had a genuine opportunity to influence.¹³¹ As with the G6, this is fundamentally subversive of the Union's values and processes.

Finally, there is the further issue that there is no logical connection between improvements in legitimacy at the level of the Union and perceived improvements "on the ground". Perspectives on such matters as the appropriate content of criminal law and desirable punishment levels have a significant cultural content and are therefore variable as between communities. If not respected, problems such as loss of trust and decreased acceptance of the legitimacy of relevant measures are almost bound to arise. The opening provision of the AFSJ Title of the TFEU promises that the Union "shall... respect... the different legal systems and traditions of the Member States".¹³² However, steering an unblemished course between the policies and practices that the Union would like to see implemented from its vantage point at macro level and those which individual, regional, and even

¹³⁰ TFEU Art.69.

¹³¹ House of Lords European Union Committee, *Behind Closed Doors*.

¹³² TFEU Art.67(1).

national, communities may wish to pursue is liable to require a high degree of dexterity. This is partly because the nature of the challenge extends beyond the parochial affairs of the EU and has dimensions that touch upon a deeper set of issues that affect contemporary criminal justice debate more generally. These include, for example, the trend towards “democratisation” across a wide variety of public policy domains that is said to be associated with globalisation¹³³ and the vexed consequential question of who has the superior claim to ownership of criminal justice policy: elites and professionals, whose case is predicated upon scientific evidence, or the electorate at large, whose rival claim derives from the utilitarian “common sense” that is “public opinion”.

The future in the absence of ratification

At the time of writing it is a moot point whether the Lisbon Treaty will enter into force. Therefore, it is worth considering briefly what the future might look like in its absence or that of any alternative package of reforms that would have a similar impact on the Third Pillar.

On this scenario, the Treaty framework would remain static, creating a natural expectation that the current set of problems would simply be perpetuated. However, there are reasons to think that the evolutionary story that has been traced here would not come to an abrupt end. One is the potential for the Court of Justice to make further contributions to the developing body of Third Pillar law. Judging from the recent influx of relevant cases, the full extent and potency of the Union’s powers in the criminal sphere under the existing Treaties has not yet been fully established.¹³⁴ Aside from this, it is evident that the Union remains committed to its ambition to construct the AFSJ, and it is in this context that the determination of the Union to press on with implementation of the Hague Programme¹³⁵ despite the demise of the Constitutional Treaty is so telling.¹³⁶ Provided the political will is there, and the fact that preparatory work to draw up the next Programme began as early as 2007 provides compelling evidence that it is, integration in the crime control field will continue to intensify, with or without the Lisbon reforms. In short, the Union’s gaze is in any event already shifting to 2010 and beyond. Meanwhile the prospects for remedying the defects in the Third Pillar that have been identified here do not look terribly promising in the absence of further Treaty reform.

Regarding constitutional structure, theoretically it would be possible to merge the Third Pillar *acquis* with that of the Community by invoking the existing “*passerelle*” clause

¹³³ See further, inter alia, E. Baker and J.V. Roberts, “Globalization and the New Punitiveness” in J. Pratt et al. (eds), *The New Punitiveness: Trends, Theories, Perspectives* (Willan, 2005); I. Loader and R. Sparks, “Contemporary Landscapes of Crime, Order and Social Control—Governance, Risk and Globalisation” in M. Maguire, R. Morgan and R. Reiner (eds), *The Oxford Handbook of Criminology*, 3rd edn (OUP, 2002).

¹³⁴ See, for example, the controversial rulings in *Pupino* [2005] E.C.R. I-5285, and in *Commission v Council* (C-176/03) [2005] E.C.R. I-7879 which were discussed above.

¹³⁵ Council of the European Union, Note from the General Secretariat to Delegations on the Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1.

¹³⁶ Commission of the European Communities, Communication from the Commission to the Council and the European Parliament, The Hague Programme: Ten Priorities for the Next Five Years; The Partnership for European Renewal in the Field of Freedom, Security and Justice COM(2005) 184 final, para.2.2.

to transfer the provisions of Title VI TEU to the EC Treaty.¹³⁷ Politically however, especially having been doubly rejected as a manoeuvre to be executed through formal Treaty reform,¹³⁸ such a course of action would be likely to prove so contentious as to be tantamount to impossible. Therefore, the Pillar would be liable to remain as a destabilising influence on the Union's affairs. Furthermore, unless the Court of Justice managed to acquire sufficient purchase over its operation as to start to correct the imbalance in favour of law enforcement and the promotion of security,¹³⁹ it would also retain its reactive and negative character. That means too that it would continue not to fulfil its potential constitutional role in building robust relations with citizens.

More optimistically, the failure to implement the Lisbon Treaty would be far less detrimental when it comes to tackling the problems that are associated with the ill-defined and "orphaned" concepts upon which the Third Pillar is built. Again, the Court has a role to play here, and it has already been noted that recent judgments suggest it is concerned to promote unity of interpretation as between the First and Third Pillars.¹⁴⁰ Key policy documents that relate to the AFSJ are also relevant. It is notable that, dating as far back as the Commission's initial Memorandum on the AFSJ,¹⁴¹ the practice has developed of differentiating those aspects that relate to "freedom", from those that relate to "security", from those that relate to "justice". Although this could be regarded as a mere matter of presentation since the different elements clearly inter-relate and interact,¹⁴² there is some reason to suppose that the way in which they are delineated may turn out to have a greater significance.¹⁴³

¹³⁷ TEU Art.42.

¹³⁸ The Constitutional Treaty would have executed a full merger of the First and Third Pillars for all Member States.

¹³⁹ The recent run of cases under the Third Pillar that concern the *ne bis in idem* principle that is written into Art.54 CISA is relevant here. In the majority of its rulings the Court has "giv[en] priority to free movement of persons objectives over those relating to the repression of crime and the protection of public safety": *Criminal Proceedings against Gasparini* (C-467/04) [2006] E.C.R. I-9199; [2007] 1 C.M.L.R. 12, Opinion of A.G. Sharpston at [61]; see *Gözütök* [2003] E.C.R. I-1345; *Criminal Proceedings against Van Esbroeck* (C-436/04) [2006] E.C.R. I-2333; [2006] 3 C.M.L.R. 6; *Van Straaten v Netherlands* (C-150/05) [2006] E.C.R. I-9327 and *Gasparini* itself. But compare *Criminal Proceedings against Miraglia* (C-469/03) [2005] E.C.R. I-2009; [2005] 2 C.M.L.R. 6 where the Court did the opposite.

¹⁴⁰ See the discussion of *Pupino* (C-105/03) [2005] E.C.R. I-5285 and *Commission v Council* (C-176/03) [2005] E.C.R. I-7879 above.

¹⁴¹ European Commission, Towards an Area of Freedom, Security and Justice, MEMO/98/55, Brussels, July 15, 1998. See also, successively, Presidency Conclusions, Tampere European Council, October 15 and 16, 1999; Council of the European Union, Note from the General Secretariat to Delegations on the Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1.

¹⁴² See, for example, European Commission, Towards an Area of Freedom, Security and Justice, MEMO/98/55, p.9, where it is stated that, "in the framework of the consolidation of an area of freedom, security and justice... the concept of public order appears as a common denominator in a society based on democracy and the rule of law". It continues: "Independently of the responsibilities of Member States for maintaining public order, we will gradually have to shape a 'European public order' based on an assessment of shared fundamental interests."

¹⁴³ See Commission of the European Communities, The Hague Programme: Ten Priorities for the Next Five Years; The Partnership for European Renewal in the Field of Freedom, Security and Justice COM(2005) 184 final, p.4, where fn.3 reads that, "the notion of freedom covers all parts of this Action Plan. For the purposes of this document, however, *freedom reflects the specific meaning contained in the Hague Programme*" (emphasis added).

Regarding visibility and scrutiny, there is very little that is fresh to be said as Treaty reform is the real key to addressing the shortcomings of the Third Pillar.¹⁴⁴ In the meantime, however, should small groups of Member States seek to launch any further initiatives that are similar in kind to the Prüm Convention, it would be preferable for pressure to be exerted upon them to gather sufficient support to make use of the “enhanced cooperation” provisions in the TEU. While the environment of the Third Pillar may not be perfect, it provides greater legitimacy than does action outside the Treaty framework and the mechanism is explicitly designed to promote the Union’s development into an AFSJ without encroachment upon the powers of the Community.¹⁴⁵

Conclusion

The view that “police and judicial cooperation in criminal matters” is a “new” field of integration has a surprisingly tenacious hold in many discussions of the Third Pillar. In and of itself, its continuing prevalence may well be symptomatic of the Pillar’s characteristic obscurity referred to at the start of the discussion. Nevertheless, it is an impression that ought to be corrected because, as shown here, the history of such co-operation between the Member States in fact spans several decades. In so far as there have been changes of late, they are to do with the characteristics of this collaborative activity: co-operation has become more strongly rooted in the rule of law, increasingly formalised within the legal and institutional framework of the Union and, consequently, more visible and transparent. It has also become noticeably more intense during the most recent period of development, as crime control matters have moved from the periphery to the mainstream of Union activity.

At the same time as this progress has been made, however, it is clear that the Member States are not yet satisfied with the infrastructure that has been created to support their efforts. Therefore, even if the Treaty of Lisbon meets the same fate as the Treaty establishing a Constitution for Europe, it seems wise to anticipate that there will a further attempt at fundamental reform to the legal basis and content of the Third Pillar in the relatively near future. What can be predicted with less confidence is quite how far that reform will go, particularly with regard to the question of unity among the Member States.

In the interval between negotiation of the Treaty establishing a Constitution for Europe and that of the Treaty of Lisbon, it is evident that there was some “backtracking” by certain states. When the Constitutional Treaty was signed, the Third Pillar seemed about to complete its long-term trajectory towards the supranational governance of criminal law matters. But by Lisbon the intention of bringing the whole of the AFSJ fully within Community competence had become thwarted by the insistence of three States on securing arrangements for their flexible participation. Bearing in mind as well the institution of the G6 group, one possible interpretation of this development is that the Treaty establishing a Constitution for Europe represented a “high water mark” of enthusiasm for the adoption of the supranational method, and that we are now witnessing

¹⁴⁴ Barring any potential to identify applicable “new governance” solutions: see Commission of the European Communities, *European Governance: A White Paper COM(2001) 428 final*.

¹⁴⁵ See TEU Art.40–40b.

a returning preference for intergovernmentalism. Whether or not that is right, a competing conclusion, that it is the enthusiasm for collaboration itself that is waning, must surely be untenable. Even if the legal framework that currently supports it is not as entrenched, the habit of co-operation has become progressively well embedded over the half century with which this article has been concerned. Furthermore, such information as is available regarding the potential content of the new AFSJ programme suggests that uncertainty over the prospects for Treaty reform is no barrier to future ambition.¹⁴⁶

¹⁴⁶High-Level Advisory Group on the Future of European Justice Policy, *Freedom, Security, Privacy—European Home Affairs in an Open World* (June 2008); High-Level Advisory Group on the Future of European Justice Policy, *Proposed Solutions for the Future EU Justice Programme* (June 2008).