

The “European constitution” and the space of freedom, security and justice^(*)

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Abstract:

The Genesis of a Space of Freedom, Security and Justice or the Genesis of a Space of Security, Freedom or Justice? What is the correct terminology? The right terminology is the latter, since “(...) These three notions are closely interlinked. Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one “common denominator” – people – and one cannot be achieved in full without the other two. Maintaining the right balance between them must be the guiding thread for Union action.”

Key words: Evolution, Common Space of Freedom, Security and Justice, the European Constitution

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Introduction:

The process of European integration is presently at a critical juncture, similar to that which is commonly associated to ageing individuals. Several symptoms have been diagnosed: indecision, uncertainty, doubts and fear. In truth, it is evident that we urgently need an effective, well coordinated and uniform common space of freedom, security and justice (SFSJ) and/or a common space of security, freedom and justice (SSFJ) within the European Union. The free circulation so desired in the 1950's has become a reality, with all its virtues and faults. Presently, crime and/or insecurity displace in the European Union at the same speed with which we move in the continent, transforming it in a risk society, a gunpowder fuse and a potential surgical target for endless threats. We have established the pillars of freedom without having first institutionalized the necessary concomitant conditions in the domains of security and justice. On the twentieth century, we opted for a "policy of small steps," of "progresses and regresses", "gradual or residual yielding of competencies", for an "uncertain destiny policy" and for a "policy of variable geometry." Hopefully, in the twentieth century, we shall have the courage to opt for a "uniform policy of the European citizen" given that the questions pertaining to freedom, security and justice, as well as all other policies of the European Union (EU), are transversal in nature and concern, directly or indirectly, the twenty-seven Member-States. To address these pressing concerns we need more than mere policy harmonization. They require the institutionalization of common procedures and legislative structures in the EU. This paper is divided into three parts. In the first, we shall provide a brief historical overview of the evolution of the space for freedom, security and justice. We will emphasise some of the virtues of the reforms that were undertaken in this domain by the adoption of several European and/or International treaties (Paris, Rome, the Single European Act, the Schengen Agreement, the Convention implementing the Schengen Agreement and the Maastricht Treaty). In the second part of the paper, we will briefly consider the recently conceived "space of freedom, security and justice." With that end in mind, we shall consider the pertinent aspects of the Treaties of Amsterdam and Nice as well as other juridical mechanisms that, directly or indirectly, introduced small contributions for the consolidation of the SFSJ. Finally, in the third part we shall address the alterations that were introduced in this ambit by the Treaty establishing a Constitution for Europe, notwithstanding the fact that it is known that this Constitutional Treaty will "probably never" be adopted, at least in its actual form, given that France (29th May 2006) and the Netherlands (1st June 2006) both refused to ratify it.

The Genesis of a Space of Freedom, Security and Justice

The genesis of a space of freedom, security and justice or the genesis of a space of security, freedom and justice? What is the correct terminology? Undeniably, if we wish to be rigorous, it is the first formulation that concerns us more directly¹⁶⁰. This objective was first formulated in the Amsterdam Treaty and then developed in Title IV of Part III of the European Constitutional Treaty (ECT) (art. 61° to 69°) with the provisions relating to visas, asylum, immigration and other policies pertaining to the free circulation of people. However, what we are attempting here, in addition to the scientific rigour that should accompany such endeavours, is to stimulate the debate and to demystify certain juridical/doctrinal conceptions concerning the genesis of the SFSJ. We consider that the appropriate terminology should be "the Genesis of a Space of Security, Freedom and Justice" and not the "the Genesis of a Space of Freedom, Security and Justice." It should be noted that this is not a mere *lapsus linguae* or a mistake in writing but an intentional and purposeful act, with the objective of stimulating debate. It may seem that these different orderings of vocabulary are trivial. However, in our view, the correct sequence of terms is of crucial importance to adequately understand the genesis, options, history¹⁶¹ and the real motivations of the existing space of freedom, security and justice in the European Union. The "Founding Fathers of Europe"¹⁶², the European States/European

¹⁶⁰ VITORINO, António, "A construção de um Espaço de Liberdade, de Segurança e Justiça: novas fronteiras da política europeia" in *Europa Novas Fronteiras*, nº 16/17 – Espaço de Liberdade, Segurança e Justiça, Lisboa, ed. Centro de Informação Europeia Jacques Delors, 2005, p. 11: "Thus, the history of the space of freedom, security and justice begins in truth with the adoption of the Treaty of Amsterdam in 1999."

¹⁶¹ DUROSELLE, Jean Baptiste, *L'Idée d'Europe dans l'histoire*, Paris, ed. Denoël, 1965, p. 17: "In the beginning of his brilliant work, which he entitled *Vingt-huit siècles d'Europe*, Denis de Rougemont believes he can formulate some "general themes" that are working hypotheses. I quote the following: "1. That Europe is much older than its nations. Europe risks perishing from their disunion and their ambitions - ever more illusory – to maintain absolute sovereignty. 2. From its birth, Europe has exercised a function that is not merely universal but also universalizing. Europe has fomented the world...3. A united Europe is not a modern economical or political undertaking but rather an ideal that was contemplated for more than a thousand years by its brightest minds..."

¹⁶² This is evident in Winston Churchill's speech of the 19th of September 1946 at the University of Zurich, in CAMPOS, João Mota de, *Direito Comunitário*, Lisboa, 5^a ed. Fundação Calouste Gulbenkian, V-I, 1989, p. 44 to 45: "(...) If Europe were once united in the sharing of its common inheritance, there would be no limit to the happiness, to the prosperity and the glory which its three or four hundred million people would enjoy (...). [the war ruins and hatred] they may still return. Yet all the while there is a remedy (...). What is this sovereign remedy? It is to re-create the European fabric (...) and to provide it with a structure under which it can dwell in peace, in safety and in freedom. In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which life worth living. (...) And why there not be a European group which could give a sense of enlarged patriotism and common citizenship to the distracted peoples of this mighty continent? And why should it not take its rightful place with other great groupings and help to shape the honourable destiny of man? (...) Under and within the world concept we must re-create the European family in a regional structure called, it be may be, the United States of Europe."

Community¹⁶³, at the moment of their conception, implicitly sought the establishment of a space/zone of security (given the catastrophic results of the two Great Wars)¹⁶⁴ which gradually evolved to a space of freedom and justice. Indeed, if we bear in mind the preamble of the Treaty of Paris¹⁶⁵, we can ascertain that concerns with security were always a subjacent consideration¹⁶⁶. Even though we know that the real motivations that led to the establishment of the European Coal and Steel Community were economic in nature, "Conscious of the fact that European can only by concrete actions which create a real solidarity and by the establishment of common bases for economic development."¹⁶⁷

At the time, the founders of the EU were convinced that the control and redistribution of the most important raw materials of the war industry (coal and steel)¹⁶⁸ should be under the responsibility of a supra-national entity - The High Authority. This would promote the sustainable economic development of the Member-States and would concomitantly condition/impede the resurgence of new conflicts in Europe, especially in the midst of the recently created European Coal and Steel Community. It is in this context that we argue that, when the European Community was established, the formation of a security zone/space was always an implicit and/or subjacent objective. Security was and still is¹⁶⁹ one the main concerns of citizens. We

¹⁶³ The expression "European Community" that replaced "European Communities" resulted from a resolution adopted by the European Parliament (OJ n.º C 63 de 13.3.1978, p. 36) and was used in a letter that the President of the Council sent to the President of the European Parliament, dated of 26.7.1978.

¹⁶⁴ As argued by MOREIRA, Adriano, *Teorias das Relações Internacionais*, Coimbra, 5ª ed. Almedina, 2005, p. 15: "The law of the growing complexity in international life": "Both wars, that of 1914-1918 and that of 1939-1945, were considered world wars but it was forgotten that they were worldly in their effects but exclusively western in their causes." Regarding the Euroworld and its end, see MOREIRA, Adriano, *Ciência Política*, Coimbra, 6ª reimpressão, Almedina, 2001, pp. 405-416.

¹⁶⁵ The Treaty of Paris was signed by four European States (Germany, Belgium, France, Italy, Luxembourg and the Netherlands) on the 18th of April of 1951. It came into place in the 23th of July of 1952 and was declared null on the 23th of the July 2002.

¹⁶⁶ See Preamble of the Treaty of Paris, in "Tratado de la Unión Europea, Tratados constitutivos de las Comunidades Europeas y otros actos básicos de Derecho Comunitario", Madrid, ed. Tecnos, séptima edición, 1999, p. 261: "Considering that world peace may be safeguarded only by creative efforts equal to the dangers which menace it; Convinced that the contribution which an organized and vital Europe can bring to civilization is indispensable to the maintenance of peaceful relations; (...) Desirous of assisting through the expansion of their basic production in raising the standard of living and in furthering the works of peace; Resolved to substitute for historic rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts; and to lay the bases of institutions capable of giving direction to their future common destiny (...)."

¹⁶⁷ *Ibidem*.

¹⁶⁸ See Article 3, Treaty of Paris of 1951.

¹⁶⁹ See Special Eurobarometer - "The role of the European Union in Justice, Freedom and Security policy areas" in http://ec.europa.eu/public_opinion/archives/ebs/ebs_266_en.pdf: "A vast majority of the EU25 population would favour a more extensive role being played by the European Union in all fields covered by the survey. These results confirm that citizens perceive EU activities in these areas as legitimate. Respondents believe first and foremost that there should be more decision-making at EU level regarding the fight against organized crime and trafficking, as well as against terrorism (both 86%). This indicates that interviewees are concerned about their security and hence believe that EU-wide action could provide them with a higher level of security. Around eight out of ten citizens across the EU consider that the Union should play a more significant role in the fight against drug abuse (81%) and in the exchange of police and judicial information between Member States (78%). A great majority also want more decision-making at European level regarding the promotion and protection of fundamental rights (73%), the control of external borders (72%), as well as asylum and migration policy (65%)".

reiterate this thesis, regardless of the juridical, cultural, social and military interpretations of such expressions as "world peace", "dangers", "peaceful relations", "furthering the works of peace", "substituting for historic rivalries a fusion of (...) essential interests" and "bloody conflicts", among others. We hold the view that these terms represent the possible interpretations of the "security" vector in its plenitude, thus insuring the security of Member-States as well as the personal security of each citizen.

Given the success¹⁷⁰ of the ECSC, in 1955, at the Conference of Messina, the founding Member-States of the "European Community"¹⁷¹ decided to re-launch the process of integration. They requested that a commission, presided by the then Belgian Minister of Foreign Affairs Paul-Henri Spaak, produce a report on how to secure this objective. On the 21st of April of 1956, the so-called "Spaak Report" is presented. Among its recommendations are the establishment of a common general market - The European Economic Community (EEC) – and of a sector market - the European Atomic Energy Community (EAEC). On the 25th of March of 1957, the Treaty of Rome is signed and through it the European Atomic Energy Community (EAEC or EURATOM) and the European Economic Community (EEC) are established. If we analyze the preamble of this Treaty, we will ascertain that concerns with security remain at the forefront of policy considerations: "Realizing that nuclear energy constitutes the essential resource for ensuring the expansion and invigoration of production and for effecting progress in peaceful achievement; (...) Anxious to establish conditions of safety which will eliminate danger to the life and health of the people; Desirous of associating other countries with them in their work and of co-operating with international organizations concerned with the peaceful development of atomic energy (...)"¹⁷². In addition to this, it should be noted that, for the first time, matters relating to security and freedom are associated to: "For the attainment of its aims the Community shall; (...) (d) ensure a regular and equitable supply of ores and nuclear fuels to all users in the Community; (...) (g) ensure extensive markets and access to the best technical means by the creation of a common market for specialized materials and equipment, by the free movement of capital for nuclear investment, and by freedom of employment for specialists

¹⁷⁰ RODRIGUES, José Noronha, "Asylum Policies and the Right to Asylum in the European Union", Master's Dissertation in International Relations, University of the Azores, 2006, p.61: "[The Treaty of Paris] was the experiment that was necessary to proceed with further integration and with the development of European construction which took place in phases of stagnation, dynamism and crises(...)."

¹⁷¹ At this time only the European Coal and Steel Community existed.

¹⁷² See Preamble of the Treaty of Rome that instituted the European Atomic Energy Community in "Tratado de la Unión Europea. Tratados constitutivos de las Comunidades Europeas y otros actos básicos de Derecho Comunitario", Madrid, ed. Tecnos, 9ª edición, 2001, p.311: "For the attainment of its aims the Community shall, in accordance with the provisions set out in this Treaty: (...) b) establish, and ensure the application of, uniform safety standards to protect the health of workers and of the general public, (...) e) guarantee, by appropriate measures of control, that nuclear materials are not diverted for purposes other than those for which they are intended (...)."

within the Community; (h) establish with other countries and with international organizations any contacts likely to promote progress in the peaceful uses of nuclear energy."¹⁷³

The second Treaty, which institutionalized the European Economic Community (EEC)¹⁷⁴, established a clear linkage between questions related to security with those pertaining to freedom: "Recognizing that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition; Resolved to strengthen the safeguards of peace and liberty by establishing this combination of resources, and calling upon the other peoples of Europe who share their ideal to join in their efforts (...)"¹⁷⁵ Member-States gradually came to the realization that questions relating to security and freedom were not opposed but rather complementary and, as a consequence, they decided to undertake concerted actions given that one of the objectives of the Community was to promote the establishment of a Common Market¹⁷⁶ characterized by "(...) the abolition, as between Member States, of the obstacles to the free movement of persons, services and capital"¹⁷⁷. However, these States did not succeed with the promotion and implementation of the mission that had been entrusted to them - the establishment of a Common Market - due mainly to the fact that decisions in this domain were subject to the rule of unanimity. The rule of majority voting that was applied at the Council was not, at the time, accepted by France because Paris feared being subjected to decisions with which it did not agree.¹⁷⁸

¹⁷³ *Idem*, art.2, p. 313.

¹⁷⁴ This Treaty was adopted on the 1st of January of 1958 with an unlimited duration while the Treaty of Paris was meant to expire in fifty years.

¹⁷⁵ *In Op. cit.*, Preamble of the Treaty establishing the European Economic Community, p.105.

¹⁷⁶ See Treaty on European Union, Lisboa, ed. Assembleia da República, 1994, p. 23-28, article 2 of the TEEC: "It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States;" art.8: 1. The Common Market shall be progressively established in the course of a transitional period of twelve years. The transitional period shall be divided into three stages of four years each; (...)"

¹⁷⁷ *Id.*, paragraph c) article 3 of the TEEC, p.24.

¹⁷⁸ See <http://gaullisme.free.fr/GEIBL/limites.htm>: "Les Limites de L'acceptation du Traité de Rome: La crise de la Chaise Vide et les compromis de Luxembourg"; "Starting in 1965, France opposed the European Commission, presided by Walter Hallstein (1958-1967). Charles de Gaulle opposed two institutional reforms of the European Economic Community (EEC). The first reform concerned the modalities of voting employed by the Council of Ministers. The Treaty of Rome, in effect since the 1st of January of 1996, stipulated that unanimity rule in voting would replace the rule of qualified majority. The second reform concerns the reinforcement of the competencies of the European Parliament and Commission.(...) This institutional reform was envisaged as a result of the implementation of new modalities of financing of the European Economic Community (EEC), that is to say of the Common Agricultural Policy (CAP) that was to follow from the Customs Union (...). Charles de Gaulle rejected the proposals of the Commission for various reasons that had to do with form and substance (...). At the end of the French Presidency of the Council of Ministers on the 30th of January 1965, Maurice de Couve de Murville, Minister for Foreign Affairs, declared: "The promises were not honoured, I close the meeting." This was the beginning of the "Chaise Vide" crisis that opposed France to its five European partners and to the European Commission. For a more detailed study of the "Chaise Vide" crisis, see Campos, João Mota de, *Direito Comunitário*, Lisboa, Volume I, 5^a ed., Fundação Calouste Gulbenkian, 1989, pp. 232 to 256: "It thus seemed evident that at the same time that the French government, with its policy of "chaise vide", intended, in a truculent

In this manner, and in accordance with paragraph h) of article 3 of the Treaty of the European Economic Community¹⁷⁹, from 1957 to 1970, there was an attempt to introduce a programme for promoting the legislative harmonization of the six founding Member-States of the EEC, so as to increment the four freedoms of the European Community: free circulation of persons, services, capital and merchandise¹⁸⁰. Initially, the Member-States considered this principle from a mainly economical perspective and related to dependent and independent workers. Gradually, the Member-States recognized the need to extend the principle of free circulation to all social strata, even if in an embryonic, experimental and/or casuistic form. Nevertheless, the gradual implementation of the principle of free circulation, considered not only from a social perspective but also from an economic one¹⁸¹, meant that, concomitantly, there was an upsurge in criminality, such as trans-national organized crime and the trafficking of drugs, arms, munitions, explosives, cultural goods, human beings, clandestine immigration and terrorism, among others.

In the 1970's, Europe faced other social problems, such as the surge of political and economic refugees, dislocated persons and/or immigrants originating from diverse parts of the world and escaping from poverty, violations of the most elementary human rights, racial discrimination, political, social, cultural and religious crises and dictatorial regimes, among other possible reasons. The emergence of these new social problems and the efforts of the Member-States towards incrementing the four communitarian freedoms (considering even the possibility of abolishing the internal borders), provided the impetus for the Member-States to gather informally, at the margins of the Community, with the objective of fomenting an ever more effective and pragmatic cooperation in the domains of justice and internal affairs. On the 7th of September of 1967, in Rome, the six founding-members of the European Economic Community signed the Naples Convention on Mutual Assistance and Cooperation between Customs Administrations. In this manner, the embryo of the first framework for exchange, intergovernmental cooperation and informal European Political Cooperation (EPC) was established¹⁸². The gradual consolidation of the principle of freedom in the midst of the

manner, to escape the rule of unanimity (and) reduce the freedom of action, powers, authority and even the prestige of the Commission in the domain of foreign relations and within the Community itself. (...)"

¹⁷⁹ See Treaty on the European Union, *op.cit.*, paragraph h), article 3 of the TEEC: "For the purposes set out in the preceding Article, the activities of the Community shall include (...): (h) the approximation of their respective municipal law to the extent necessary for the functioning of the Common Market."

¹⁸⁰ For a more detailed study of this matter, see DUARTE, Maria Luísa, *A Liberdade de Circulação de Pessoas e a Ordem Pública no Direito Comunitário*, Coimbra, Coimbra Editora, 1992, p. 67 and following.

¹⁸¹ The principle of free circulation, from a social perspective, has the citizen as its object, his/her personal wishes, well-being, leisure and the aspects of mobility that are not exclusively economic.

¹⁸² Although we can only speak of informal European Political Cooperation after the 27th of October 1970, when the Davignon Report is approved by the Ministers of Foreign Affairs of the six in the form of a resolution on the 20th of July 1970; the Ministers

Community brought new surges in criminality. Thus, "From 1975, intergovernmental cooperation gains momentum, at the margin of the juridical framework of the European Communities in the domains of immigration, asylum rights and police and judicial cooperation. In essence, it is an informal exchange of experiences, information and competencies, by creating networks to facilitate this exchange among the Member-States."¹⁸³ In practice, this informal intergovernmental cooperation aimed at establishing "(...) an information and exchange network between the Member-States, related to (questions concerning) Justice and Internal Affairs. (...) [With this end in mind], workgroups are created, such as the TREVI group¹⁸⁴ [which was responsible for matters related to Terrorism and Security, (...) [and which] in 1985 [extended] its competencies to illegal immigration and to organized crime] and the Ad Hoc Group¹⁸⁵ which focused on matters related to immigration."¹⁸⁶ However, much like the European process of integration, this group also evolved erratically, with small steps, regresses¹⁸⁷ and advances. In

propose that: Being concerned to achieve progress towards political unification, the Governments should decide to cooperate in the field of foreign policy (...) This cooperation has two objectives: a) to ensure greater mutual understanding with respect to the major issues of international politics, by exchanging information and consulting regularly; b) to increase their solidarity by working for harmonization of views, harmonization of attitudes and joint action when it appears feasible and desirable (...)" and the Davignon Report presented on 23 July 1973, Part II "(...) Governments will consult each other on all important foreign policy questions and will work out priorities, observing the following criteria: (1) the purpose of the consultation is to seek common policies on practical problems; (2) the subjects dealt with must concern European interests whether in Europe itself or elsewhere where the adoption of a common position is necessary or desirable (...)" in, *CDs dos 50 Anos de Europa, Os Grandes Textos da Construção Europeia*, 1998, Gabinete em Portugal do Parlamento Europeu e Representação da Comissão Europeia em Portugal. For a more detailed study of this matter see also MARTINS, Ana Maria Guerra, *Curso de Direito Constitucional da União Europeia*, Coimbra, ed. Almedina, 2004, p. 57: "On the 27th of October 1970 the Davignon Report, which addresses the institutionalisation of European Political Cooperation in modest terms, is approved by the Ministers of Foreign Affairs of the six. This report was later completed by the Copenhagen Report, of the 23th of July of 1973 and by the Paris Summit II of 1974, which created the institutional framework for such cooperation - the European Council".

¹⁸³ See Justice, Freedom and Security in <http://europa.eu/scadplus/leg/pt/lvb/l33022.htm>.

¹⁸⁴ ELSEN, Charles, «Les mécanismes institutionnels: Trévi, Schengen, Dublin, Maastricht», in Pauly, A. (ed.), *Schengen en panne*, I.E.A.P., 1994, pp. 43-54, especially p.44: "The TREVI Group was created by the Member-States of the European Communities, acting at the Ministerial level at the Rome Summit in 1975. Its stated purpose was to combat terrorism and its activities were progressively extended to related domains, mainly to training and equipping of police forces, to combating problems of public order, to police cooperation and, later, to the establishment of Europol. The Trevi Group is therefore directly related to the adoption of measures to combat clandestine immigration. The meaning of this acronym is shrouded in mystery. According to a retired member of the Group of Coordinators of "free circulation of persons", the letters of TREVI "are not abbreviations for the words Terrorism, Repression and International Violence but rather are, in reality, a reference to the famous Roman fountain. Hence the creation of Trevi was decided in Rome and the Dutch member responsible for choosing a name for the ad hoc telex system connecting the European capitals was called Fonteijn."

¹⁸⁵ HAINZ, Michael, «Una Europa cerrada o una Europa de los derechos», in *Revista de Fomento Social*, n. 179, J, July - September, 1990, p. 306: "However, we should not confuse the Trevi Group with the Ad Hoc Group on Immigration: the first gathered Ministers of Internal Affairs and Justice of the Community to address questions of "public order", such as terrorism, drug-trafficking etc, whilst the Ad Hoc Group convoked the Ministers in charge of public order and had a special sub-group called "asylum." The confusion between the groups results from the fact that they often met at the same time and that the Commission stated (Doc Com (88) 640, 7, 11. Brussels 7-12-88) that both groups were concerned with intensifying the control of persons in the external frontiers of the European Community."

¹⁸⁶ RODRIGUES, *op. cit.*, p. 66.

¹⁸⁷ *Ibid.*: "(...) But with the depression that took place in Europe in the 1970's, the situation was not favourable: difficult economic circumstances; diminution of economic growth and the increase of unemployment; oil-price shocks; the end of the Bretton

the 1980's, Europe gradually begun to revitalize its economy. In 1979, the Court of Justice issued the "Cassis de Dijon"¹⁸⁸ judgment, which established the principle of the mutual recognition of national rules¹⁸⁹. In 1982, the European Heads of State that met at the Council of Copenhagen¹⁹⁰ decided that the establishment of the internal market was a priority and defined other objectives in the economic and social domains, thus reaffirming their political consensus regarding enlargement. In 1984, at the European Councils of Fontainebleau¹⁹¹ and Dublin¹⁹² this objective of creating an internal market was reiterated. Thenceforth, the Ministers of Internal Affairs and Justice of the Member-States started meeting every six months to address specific questions relating to judicial, policing and cross-border cooperation and the free circulation of persons (these meetings began taking place informally since 1975). In 1985, the European Council of Brussels¹⁹³ reinforced the aim of establishing an internal market and President Jacques Delors presented, on behalf of the Commission, the White Paper¹⁹⁴ on the completion of the internal market; this process should be completed by the 1st of January of 1993¹⁹⁵. In the

Woods system; the failure of the first attempt at an economic and monetary union and the spontaneous arrival of a larger number of refugees, asylum seekers and immigrants. Facing this scenario, each Member-state started adopting new protectionist measures, in order to avoid the arrival of unwanted workforce, poor migrants and asylum seekers with dubious motivations; in this manner, the Member-states were trying to protect the economies and the national markets as well as its industries and other sectors of activity. These protectionist measures were applied not only in relation to third countries but also against the partners of the Community."

¹⁸⁸ Judgment of the Court of Justice of the European Communities, in process 120/78, 20th February 1979: "1 - By order of 28 April 1978, which was received at the Court on 22 May, the Hessisches Finanzgericht referred two questions to the Court under Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Articles 30 and 37 of the EEC Treaty, for the purpose of assessing the compatibility with Community law of a provision of the German rules relating to the marketing of alcoholic beverages fixing a minimum alcoholic strength for various categories of alcoholic products."

¹⁸⁹ Cassis de Dijon Judgment (CJEC 120/78 of 20/02/79). This process refers to German regulations concerning the minimum content of alcohol in liqueurs of fruits. The Court of Justice imposed equivalent measures, that is, a product that was legally imported to and marketed in a Member-State of the Community should be accepted in other Member-States.

¹⁹⁰ Declarations by the European Council relating to the Internal Market: "The European Council... instructs the Council: - to decide, before the end of March 1983, on the priority measures proposed by the Commission to reinforce the internal market" - Copenhagen, 3-4 December 1982.

¹⁹¹ Declarations by the European Council relating to the Internal Market: "It asks the Council and the Member States to put in hand without delay a study of measures which could be taken to bring about in the near future... the abolition of all police and customs formalities for people crossing intra-Community frontiers..." - Fontainebleau, 25/26 June 1984.

¹⁹² Declarations by the European Council relating to the Internal Market: "The European Council... agreed that the Council, in its appropriate formations: ...should take steps to complete the Internal Market, including implementation of European standards" - Dublin, 3-4 December 1984.

¹⁹³ Declarations by the European Council relating to the Internal Market: "...the European Council laid particular emphasis on the following... fields of action: a) action to achieve a single large market by 1992 thereby creating a more favourable environment for stimulating enterprise, competition and trade; it called upon the Commission to draw up a detailed programme with a specific timetable before its next meeting" - Brussels, 29/30 March 1985.

¹⁹⁴ European Commission, Completing the Internal Market. White Paper from the Commission to the European Council (COM (85) 310 final) and in Bulletin n.º 6/1985 of the EEC.

¹⁹⁵ RODRIGUES, *op. cit.*, p. 69-70: "(...) The White Paper, as a condition for the construction of a common internal market, proposed 280 directives of general character in the scope of free circulation. In this manner, it regrouped the measures to be implemented in three themes: "Elimination of physical frontiers", "Elimination of technical frontiers" and "Elimination of fiscal frontiers." The first of the themes, "The elimination of physical frontiers" had the greatest impact on Europeans, given that they were accustomed to age-old barriers, physical and/or artificial, between States. These barriers, more than dividing them,

same year, the European Council of Milan¹⁹⁶ approved the White Paper of the Commission and decided to implement the internal market. In 1986, the first revision of the Treaty of Rome was undertaken with the adoption of the Single European Act (SEA)¹⁹⁷. This act institutionalized the European Political Cooperation¹⁹⁸ (a process that began informally in the 1970's) and set a deadline for the establishment of an internal market¹⁹⁹ that would be characterized by the abolition of the obstacles to the free circulation²⁰⁰ of goods, persons, services and capital" within the EEC²⁰¹. The deadline was set for 31st of December of 1992²⁰². However, in 1985, outside the scope of the EEC²⁰³, the Schengen Agreement²⁰⁴ was signed, thus institutionalizing the

differentiated them and stopped them from freely accessing the intended common market. This possibility was seen by the Europeans as an effective and paradigmatic example of the internal market, given that it proclaimed the free circulation of goods, persons, services and capital between the Member-States. This free circulation was assured with the elimination of physical frontiers, the abolition of border posts and controls on goods and persons in the internal borders. As to the second theme, "The elimination of technical frontiers", which had as an objective the end of national regulations which acted as obstacles, proposed the harmonization of legislation and/or the practice of mutual recognition. Finally, the theme "Elimination of fiscal frontiers" sought to suppress obstacles created by the disparity in indirect taxation between the Member-States, thus promoting the harmonization or approximation of VAT and/or taxes on specific products. Its most important success was the unanimous adoption of the Sixth VAT Directive by the European Council in 1977."

¹⁹⁶ Took place on the 28th and 29th of June 1985.

¹⁹⁷ The Single European Act was signed on the 17th of February 1986. For a more detailed study of this subject, see DE RUYT, Jean, *L'Acte Unique Européen*, Brussels, Éditions de l'Université de Bruxelles, 1987.

¹⁹⁸ See Preamble of the Single European Act "(...) Aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter."

¹⁹⁹ In 1972 the Tindemans Report already proposed the abolition of internal borders for economical efficiency reasons.

²⁰⁰ This is a principle developed as time progressed. See, for instance, Directive 2004/38/EC of the European Parliament and Council on the 29th of April of 2004, concerning the right of the European Union citizens and their families to circulate freely and establish residence in the territories of Member-States, an alteration of regulation (EEC) n.º 1612/68 and which annuls the Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158 of 30.04.2004, p. 77).

²⁰¹ See paragraph c) or articles 3 and 8-A of TEEC.

²⁰² RODRIGUES, *op .cit.*, p. 72-73: "(...) The Political Declaration of the Governments of the Member-States (n.º13) concerning free circulation, annexed to the Single European Act, demonstrates clearly the form that justice and internal affairs policies will take in the future: "In order to promote the free movement of persons, the Member-States shall cooperate, without prejudice to the powers of the Community, in particular as regards entry, movement and residence of nationals in third countries. They shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques." This form of cooperation in the fields of justice and internal affairs had its faults, for, although the policies resulting from European Political Cooperation ought to be coherent with the external policies of the European Community, that was not always the case and there was, sometimes, duplication of efforts and lack of coordination between them. Hence, there was a need to integrate this cooperation within the juridical framework of the European Community."

²⁰³ *Ibid.*: "(...) It should be noted that the Schengen Agreement were signed by some Member-States of the European Economic Community. Principally because it was not possible to reach an agreement within the Community as to the amplitude of the principle of the free circulation of persons. a) Some defended that this principle should only be applied to European citizens and this implied the preservation of the physical barriers whose elimination was proposed in the White Paper of the Internal Market; b) Other Member-States were committed to the total freedom of circulation regardless of whether one was a European citizen or a national of a third country."

²⁰⁴ Signed on the 14th June of 1985 in the Luxembourgish city of Schengen.

gradual suppression of border controls²⁰⁵. In this manner, the normative principle put forth in paragraph c) of article 3 of the Treaty of Rome and the alterations introduced by the Single European Act of "[abolishing], between Member-States, [the] obstacles to the free circulation of persons, goods and capital" were first²⁰⁶ implemented in the Schengen Area²⁰⁷. We refrain from addressing here the short-term (articles 1 to 16 - Title I) and the long-term measures (articles 17 to 33 - Title II) for the effective implementation of the four communitarian freedoms that were proposed in the Schengen Agreement. On the 19th of June of 1990, the Convention implementing the Schengen Agreement was signed²⁰⁸: "Taking as their basis the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders; Having decided to fulfill the resolve expressed in that Agreement to abolish checks at their common borders on the movement of persons and facilitate the transport and movement of goods at those borders; Whereas the Treaty establishing the European Communities, supplemented by the Single European Act, provides that the internal market shall comprise an area without internal frontiers (...)"²⁰⁹. The most meritorious aspect of this Convention was the definitive elimination of the internal frontiers that still existed between the Member-States that signed the Schengen Agreement and the creation of a common external frontier where all border controls (entry and/or exit) are undertaken. In addition, it outlined compensatory measures and policies of co-ordination for the effective implementation of the free circulation or movement of persons, services, goods and capital, as well as defined essential concepts, such as: "internal border", "external border", "internal flight", "third state", "alien", "alien for whom an alert has been issued for the purposes of refusing entry", "border crossing point", "border check", "carrier", "residence

²⁰⁵ See Preamble of the Schengen Agreement, in *Textos Fundamentais*, Lisboa, ed. Ministério dos Negócios Estrangeiros, 1998: "Aware that the ever closer union of the peoples of the Member States of the European Communities should find its expression in the freedom to cross internal borders for all nationals of the Member States and in the free movement of goods and services; (...) Considering the progress already achieved within the European Communities with a view to ensuring the free movement of persons, goods and services; Prompted by the resolve to achieve the abolition of checks at their common borders on the movement of nationals of the Member States of the European Communities and to facilitate the movement of goods and services at those borders."

²⁰⁶ *Id.*, article 30 of the Schengen Agreement: "The measures provided for in this agreement which are not applicable as soon as it enters into force shall be applied by 1 January 1986 as regards the measures provided for in Title I and if possible by 1 January 1990 as regards the measures provided for in Title II, unless other deadlines are laid down in this agreement."

²⁰⁷ RODRIGUES, *op. cit.*, p. 75

²⁰⁸ This convention was adopted in 1995. The Schengen Agreement was signed by France, Germany, Belgium, Luxembourg and the Netherlands. However, other Member-States gradually adhered to the Schengen Area: on the 27th of November of 1990, Italy joined; on the 25th of June of 1991 Spain and Portugal; on the 6th of November of 1992, Greece; on the 28th of April of 1995, Austria; on the 19th of December of 1996, Denmark, Finland and Sweden. Iceland and Norway hold the status of associate whilst "Ireland and the United Kingdom of Great Britain and Northern Ireland, which are not covered by the Schengen *Acquis*, may at any time request the whole or partial application of this *acquis*." See article 4 of the Protocol integrating the Schengen *Acquis* into the framework of the European Union.

²⁰⁹ Preamble of the Convention implementing the Schengen Agreement, signed in 1990.

permit", "application for asylum", "asylum seeker", "processing application for asylum"²¹⁰, among others. The States that subscribed this convention committed themselves to cooperate on matters of vital social importance, such as Justice and Internal Affairs. With that end in mind, they adopted new procedures and regulatory and/or administrative provisions and stated their intentions to cooperate in policing and security matters²¹¹; to reach agreements and/or sign bilateral and/or multi-lateral conventions to implement juridical cooperation on criminal matters²¹²; they agreed on the application of the *ne bis in idem* principle²¹³; agreed to set in place rapid procedures of extradition²¹⁴; among other procedures. However, we consider that the most effective and notable procedure for cooperation that was established was the common information system, the so-called Schengen Information System (SIS)²¹⁵: "The Contracting Parties shall set up and maintain a joint information system, hereinafter referred to as "the Schengen Information System", consisting of a national section in each of the Contracting Parties and a technical support function. The Schengen Information System shall enable the authorities designated by the Contracting Parties, by means of an automated search procedure, to have access to alerts on persons and property for the purposes of border checks and other police and customs checks carried out within the country in accordance with national law and, in the case of the specific category of alerts referred to in Article 96, for the purposes of issuing visas, residence permits and the administration of legislation on aliens in the context of the application of the provisions of this Convention relating to the movement of persons."²¹⁶ The "Schengen Acquis"²¹⁷ was, without a doubt, the indispensable experiment that enabled the European Community to move forward with new processes of integration and, concomitantly, with new policies. Although the Single European Act "[introduced] very timid innovations, [it generated] a dynamic of development in the process of European integration, given that the internal market [that was to come into place in 1993] imposed, on the one hand, the creation of new policies and, on the other, the provision of the means that were necessary to undertake that integration. In addition, the internal market proved to be an impetus towards new and more evolved stages of economic integration, such as the economic and monetary union, which

²¹⁰ See article 1 Title I of the Convention implementing the Schengen Agreement, 1990.

²¹¹ *Id.*, articles 39 to 47, Title III, Chapter I.

²¹² *Id.*, articles 48 to 53, Title III, Chapter I.

²¹³ *Id.*, articles 54 to 58: "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a criminality has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

²¹⁴ *Id.*, see article 59 to 66.

²¹⁵ *Id.*, see Title IV, Chapter I.

²¹⁶ *Id.*, see n.1, article 92.

²¹⁷ The "Schengen Acquis" consists of the Schengen Agreement, the Convention implementing the Schengen Agreement and of all acts and decisions of the Executive Committee and/or entities created by it.

requires new institutional frameworks (...). The development of an economic and monetary union, [the idea of a Political Union, the implementation of a Common Security and Foreign Policy (CSFP), the cooperation in the fields of Justice and Home Affairs (JHA), the reinforcement of the democratic legitimacy of institutions (paragraph b) and c) of article 189 of the TEU) and of the status of the citizen and of citizenship in the Union (article 8 to 8E of the TEU), the protection of fundamental rights (article F of the TEU), the enlargement of the communitarian competencies to other areas beyond the economical matters (article B of the TEU) and the clarification of the role of the European Council²¹⁸, are only some of the factors that led] to the [second] revision [of the Treaty of Rome]."²¹⁹ On the 7th of February of 1992, the Treaty on the European Union²²⁰, known as the Maastricht Treaty²²¹, was signed. This was a new stage in the process of integration and the fundamental pillar of the "new" juridical framework of the community in which the "(...) the High Contracting Parties establish among themselves a European Union"²²², build upon the structure of a Greek temple supported by three pillars: a) the communitarian pillar (the first pillar)²²³ where the so-called "community method" is applied²²⁴; b) a Common Security and Foreign Policy - CSFP (second Pillar, Title V,

²¹⁸ See Treaty on the European Union, article D: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof."

²¹⁹ MARTINS, *op. cit.*, p. 68-69.

²²⁰ See Preamble of the Treaty on European Union, in *Tratado de la Unión Europea. Tratados Constitutivos de las Comunidades Europeas*, *op. cit.*, p. 57: "(...) Resolved to mark a new stage in the process of European integration undertaken with the establishment of the European Communities; (...) Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law; (...) Resolved to establish a citizenship common to nationals of their countries (...)"

²²¹ QUADROS, Fausto de, *Direito da União Europeia*, Coimbra, ed. Almedina, 2004, p. 45: " (...) We may resume the novelties of the TEU as the following: the Treaty foreseen the conclusion of Economic and Monetary Union for 1999-2002; the integration features established until then mainly on article 2 of the EEC Treaty would no longer be essentially economical but should also extend to the social and cultural domains, as can be ascertained in the articles 2 and 3 of the EC as modified by the Maastricht Treaty (hence the dropping of the adjective "economic" from the former European Economic Community); "Union citizenship" was then created (Part II of the EC Treaty); a Common Security and Foreign Policy (CSFP) was instituted, notwithstanding its intergovernmental character, but already anticipating the future implementation of a common defense policy (Title V of the TEU); a mechanism of intergovernmental cooperation in matters of justice and home affairs, the JHA (Title VI of TEU), was also established; integration was deepened in the decision-making procedures of the Community (the so-called institutional "reform" of the Communities), attributing to the European Parliament co-decision powers in relation to the Council and the power to appoint the Commission as well as extending the rule of majority voting to the Council in detriment of the rule of unanimity. The Treaty of Maastricht was adopted on the 1st of November of 1993."

²²² See Article A of the TEU. The term "European Union" had been used before in other documents, such as the Fouchet Project, The Solemn Declaration of Stuttgart, the Single European Act and other reports concerning Political Union.

²²³ The community pillar comprises three communities (ECSC, AEEC and EEC), its adhesion Treaties, its reforms and derived legislation.

²²⁴ PIÇARRA, Nuno, "O espaço de liberdade, segurança e justiça após a assinatura do Tratado que estabelece uma Constituição para a Europa: Balanço e perspectivas", in *Polícia e Justiça*, III Série, January – June, n° 5, 2005, p. 23-24: "(...) the community method, that is, to develop through the control and the decision-making procedures that are embodied in the TEU, in which the Council, the Commission, the European Parliament (procedure of consultation and co-decision) and the European Court of Justice participate. This participation takes the form of diverse juridical acts that are typified in the Treaty (rules,

article J to J11)²²⁵; and c) cooperation in the fields of justice and home affairs - JHA (third Pillar - Title VI - article K²²⁶ to K9).

With regard to the last two pillars, Member-States can cooperate more closely²²⁷ notwithstanding the fact that they are subjected to the rule of unanimity and to the "intergovernmental method." In this part of this paper we shall abstain from further considering the Maastricht Treaty²²⁸. However, it should be mentioned that, with this Treaty, concerns pertaining to justice and home affairs (article K1) were henceforth considered matters of common interest to the Member-States.

directives) that are endowed with their own juridical efficacy (direct applicability, direct effect). The material elements of the space of freedom, security and justice that fall under the "community method" were summarized in Title IV of Part III of the TEC and are enumerated in article 61: 1) free circulation of persons as they pass in the internal borders without controls of Member-States concomitantly with related follow-up measures on control in external borders, asylum and immigration; 2) other measures in matters of asylum, immigration and protection of the rights of nationals of third countries not directly related to the right of free circulation as it is conceived above; 3) measures in the domain of judicial cooperation in civil matters; 4) measures intended to promote and reinforce administrative cooperation in those fields between the pertinent services of the Member-States and between these services and the Commission. Underlying the decision to opt for the community method were "reasons of efficiency".

²²⁵ BUSTAMANTE, Rogelio Pérez, COLSA, Juan Manuel Uruburu, *História da União Europeia*, Coimbra, ed. Coimbra Editora, 2004, p. 178: "(...) The Common Foreign and Security Policy (CFSP) represents a continuation of the provisions of article 30 of Title III of the SEA, where the "Treaty Provisions on European Co-operation in the Sphere of Foreign Policy" are expressed; indeed, both in the SEA and in the TEU, the CFSP is defined, as the corresponding title attests, as a domain of cooperation regulated by the Member-States and, therefore, not submitted to the habitual community procedures, remaining outside the juridical competence of the European Court of Justice - Title VII, article L."

²²⁶ See article K.1, Title VI (Provisions on Cooperation in the fields of Justice and Home Affairs) "For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: 1. asylum policy; 2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; 3. immigration policy and policy regarding nationals of third countries: (a) conditions of entry and movement by nationals of third countries on the territory of Member States; (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment; (c) combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States; 4. combating drug addiction in so far as this is not covered by 7 to 9; 5. combating fraud on an international scale in so far as this is not covered by 7 to 9; 6. judicial cooperation in civil matters; 7. judicial cooperation in criminal matters; 8. customs cooperation; 9. police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol)."

²²⁷ See Joint Action 98/428/JAI, of the 29th of June of 1998 (DOUE L 191 of 7th of July of 1998), that established the European Judicial Network for criminal cooperation, enabling the magistrates of Member-States to organize themselves for the first time.

²²⁸ PRADO, Pilar Mellado, "El funcionamiento de las Instituciones en el espacio de libertad, seguridad y justicia", in *Revista de Derecho de la Unión Europea*, nº 10-1st semestre, Madrid, ed. COLEX, 2006, p.36: "However, the institutional design of Cooperation in the fields of Justice and Home Affairs that the Treaty of Maastricht brought into place was insufficient, rather rigid and ineffective for several reasons: a) the juridical debility of its two main mechanisms (the joint positions and actions) (...); b) The slow implementation of the convention (Europol was created in 1995 but it only came into place on the 1st of October of 1998 and was only effectively implemented on the 1st of July of 1999); c) The growing utilization - as a consequence of the aforementioned - of mechanisms of implementation different from those foreseen in the Treaty and consequently lacking a proper juridical basis (Resolutions, Recommendations...); d) For the limited role attributed to the genuinely communitarian institutions, that is, the Commission, the European Parliament and the European Court of Justice; e) The demand of unanimity as a voting rule in the Council of Europe, responsible for the frequent paralysis of the decision-making process."

From Amsterdam to Nice

On the 2nd of October of 1997 the Treaty of Amsterdam was signed²²⁹, conferring a revolutionary²³⁰ impetus to the subject that we are addressing: "Resolved to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty; (...) This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe(...)"²³¹ The High Contracting Parties decided to: a) "*communitarianise*"²³²; b) incorporate the "Schengen Acquis"²³³; c) set out as a primordial objective of the European Union the

²²⁹ The Treaty of Amsterdam reviewed for the third time the Treaty of Rome and was signed by fifteen Member-States (Germany, Belgium, France, Italy, Luxembourg, Holland (1951), Denmark, Ireland, United Kingdom (1973), Greece (1981), Spain, Portugal (1986), Austria, Finland and Sweden (1995) and came into place on the 1st of May of 1999). This is the result of the Intergovernmental Conference/European Council of Turin (29th of March of 1996), as well as the European Council of Amsterdam (16-17th June of 1997).

²³⁰ See Treaty of Amsterdam, Lisboa, ed. Assembleia da República, 1998, article 2: "The Union shall set itself the following objectives: (...) the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union (...); to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defense (...); to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime (...); to maintain in full the *acquis communautaire* and build on it (...)"

²³¹ See Preamble of Treaty of Amsterdam, *id.*, p.17-18

²³² PRADO, *op. cit.*, p. 37: "(...) The Treaty of Amsterdam of 1997 aimed to correct the deficiencies of the system that was institutionalized at Maastricht in 1992, incorporating a new Title in Part III of the Treaty (Community Policies) concerning those aspects that had to do with the free circulation of persons within the European Union. This new Title was formulated with the objective of "communitarianising" everything that is related to the free circulation of persons in the internal market, which meant not only the adoption of measures directly linked to the free circulation (intersection of internal and external borders by citizens of the Union and of third countries), but also the adoption of measures indirectly linked to the same objective, such as the establishment of a common regime for alien condition, sojourn and residence as well as judicial cooperation in civil and administrative matters. (...) The Treaty of Amsterdam reformulated the third pillar of the European Union – gradually dissociating it from the CFSP without, however, losing its intergovernmental nature. This pillar was reduced to the "police and judicial cooperation in the criminal field". In addition, the Treaty of Amsterdam expressly foresees (article 42 of EUT) the passing of a clause that allows for the possibility of the Council, by unanimous vote and at the initiative of the Commission or of a Member-State, with the previous consultation of the European Parliament, decides to include judicial and police cooperation in criminal matters in Title IV of the EUT. It is a act in which the institutions of the Union and those of the Member-States can participate, in conformity with their respective constitutional norms." Here we can discern a "communitarian fissure" given that the United Kingdom, Ireland and Denmark have taken their own positions on this matter. See Protocols annexed to the Treaty of Amsterdam.

²³³ See Treaty of Amsterdam, *op.cit.*, p. 308-309: "Protocol integrating the Schengen acquis into the framework of the European Union; "The High Contracting Parties: Noting that the Agreements on the gradual abolition of checks at common borders signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990, as well as related agreements and the rules adopted on the basis of these agreements, are aimed at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice; Desiring to incorporate the abovementioned agreements and rules into the framework of the European Union; (...) Article 1 "The Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden, signatories to the Schengen agreements, are

creation of a Space of Freedom, Security and Justice (SFSJ)²³⁴. In this manner, European policies in matters pertaining to justice and home affairs (JHA) were divided between the first and third pillars, with different rules concerning the legislation approving methods, the legislative and non-legislative acts²³⁵, and the jurisdiction of the Court of Justice. On the 15th and 16th of June of 1998, "(the) Cardiff European Council called on the Council and the Commission to submit at its meeting in Vienna an action plan [the so-called Vienna Action Plan]²³⁶ on defining «how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice.»²³⁷. Vienna's action plan was notorious for having defined elementary concepts such as: "space of freedom"²³⁸, "space of security"²³⁹ and "space of justice"²⁴⁰ as well as for considering that "(...) These three notions are closely interlinked. Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system

authorized to establish closer cooperation among themselves within the scope of those agreements and related provisions, as they are listed in the Annex to this Protocol, hereinafter referred to as the 'Schengen acquis' (consists of) 1. The Agreement, signed in Schengen on 14 June 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. 2. The Convention, signed in Schengen on 19 June 1990, between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, implementing the Agreement on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985, with related Final Act and common declarations. 3. The Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementation Convention with Italy (signed in Paris on 27 November 1990), Spain and Portugal (signed in Bonn on 25 June 1991), Greece (signed in Madrid on 6 November 1992), Austria (signed in Brussels on 28 April 1995) and Denmark, Finland and Sweden (signed in Luxembourg on 19 December 1996), with related Final Acts and declarations. 4. Decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making powers." This cooperation shall take place in the institutional and judicial framework of the European Union and in strict observance of the pertinent provisions of the Treaty on the European Union and of the Treaty that institutes the European Community.

²³⁴ See EC Treaty, Title IV - "Visas, asylum, immigration and other policies related to the free movement of persons", article 73-I to 73-P.

²³⁵ MARTÍN, Araceli Mangas, NOGUERAS, Diogo J. Liñán, *Instituciones y Derecho de la Unión Europea*, Madrid, 5ª Ed. Tecnos, 2005, p. 743: "[It should be emphasized that only the] Constitutional Treaty (TEU) considers the unification of the acts, distinguishing between legislative and non-legislative acts. This presupposes an important advance with regard to their efficacy and their political and jurisdictional control. In this manner, the number of juridical acts that can be adapted into laws, regulations, decisions, recommendations and directives have been reduced and acts with atypical legislative contents (article I-33 TEU) have been proscribed, which implies the reinforcement of juridical security. Such an option is of particular relevance given that it concerns the disappearance of specific acts on criminal judicial and police cooperation."

²³⁶ The text of this Plan was approved on the 3th of December of 1998 by the Council of Justice and Home Affairs.

²³⁷ See Official Journal n° C019 of 23/01/1999 p.0001-0015, Part I, point 1.

²³⁸ *Id.*, point 6: "However, the Treaty of Amsterdam also opens the way to giving 'freedom' a meaning beyond free movement of people across internal borders. It is also freedom to live in a law abiding environment in the knowledge that public authorities are using everything in their individual and collective power (nationally, at the level of the Union and beyond) to combat and contain those who seek to deny or abuse that freedom. Freedom must also be complemented by the full range of fundamental human rights, including protection from any form of discrimination as foreseen by Articles 12 and 13 of TEC and 6 of the TEU."

²³⁹ *Id.*, point 9: "(...) The full benefits of any area of freedom will never be enjoyed unless they are exercised in an area where people can feel safe and secure."

²⁴⁰ *Id.*, point 15: "(...) The ambition is to give citizens a common sense of justice throughout the Union. Justice must be seen as facilitating the day to day life of people and bringing to justice those who threaten the freedom and security of individuals and society. This includes both access to justice and full judicial cooperation among Member States. What Amsterdam provides is a conceptual and institutional framework to make sure that those values are defended throughout the Union."

of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one “common denominator” – people – and one cannot be achieved in full without the other two. Maintaining the right balance between them must be the guiding thread for Union action.”²⁴¹ In 1998, the Heads of State and Government met in Pörschach (Austria)²⁴² and reiterated the importance of the topic "Space of Freedom, Security and Justice" and agreed to participate in an extraordinary European Council at Tampere²⁴³. In 1999, the European Council of Tampere (Finland) outlined a certain number of political guidelines and priorities²⁴⁴, the so-called "Tampere Milestones"²⁴⁵, so as to insure the materialization of the Space of Freedom, Security and Justice in the European Union by 2004. On the 26th of February of 2001 the fourth revision of the Treaty of Rome was undertaken with the signing of the Treaty of Nice²⁴⁶. In effect, "(the) intergovernmental conference that led to the adoption of the Treaty of Nice had the least ambitious political agenda of all the founding events of the Union. In truth, the realization of the intergovernmental conference had as an objective to

²⁴¹ *Id.*, point 5.

²⁴² This informal meeting took place on the 24 and 25th of October of 1998.

²⁴³ See Conclusions of the Presidency of the European Council of Tampere of the 15 and 16th of October of 1999.

²⁴⁴ *Id.*, "Towards a Union of Freedom, Security and Justice: The Tampere Milestones." A Common EU Asylum and Migration Policy; I. Partnership with countries of origin; II. A Common European Asylum System; III. Fair treatment of third country nationals; IV. Management of migration flows; B. A Genuine European Area of Justice; V. Better access to justice in Europe; VI. Mutual recognition of judicial decisions; VII. Greater convergence in civil law; C. A Union-wide fight against crime; VIII. Preventing crime at the level of the Union; IX. Stepping up co-operation against crime; X. Special action against money laundering; D. Stronger External Action."

²⁴⁵ ALMEIDA, Maria Cândida, «A Cooperação policial na luta contra o terrorismo e o crime organizado», in *Europa Novas Fronteiras*, nº 16/17 – Espaço de Liberdade, Segurança e Justiça, Lisboa, ed. Centro de Informação Europeia Jacques Delors, 2005, p. 216 – 219. Some priorities of Tampere: "a) adoption of minimum standards on the protection of victims; b) the mutual recognition of judicial decisions; c) establishment of a European Police Chiefs operational Task Force to exchange experiences and information; d) establishment of joint investigative teams; e) creation of a unit of judicial cooperation in criminal matters or Eurojust; f) reinforcement of Europol; g) establishment of a European Police College; 2-Adopted Measures: "a) effective establishment of the Eurojust (Council Decision of the 28th February of 2002 (OJ L063 6.3.2002); b) reinforcement of the European Judicial Network; c) Convention on Mutual Legal Assistance in Criminal Matters between the Member-States of May 2000; d) decision on joint investigative teams (Council Framework Decision of the 13th June of 2002 (OJ L162, 20.6.2002); e) the adoption of legislative measures (common definitions and sanctions) relating to certain legal transgressions; f) adoption of a programme of measures founded on the principle of mutual recognition (Council Framework Decision of the 13th of June of 2002 on the European Arrest Warrant and the surrender procedures between Member-States (OJ L190 18.7.2002); g) Council Framework Decision against terrorism of the 13th of June of 2002 (OJ L164 22.6.2002); h) Council Framework Decision 2003/57777 JAI of the 22nd of July of 2003 on the execution in the European Union of orders freezing property or evidence (OJ L196 2.8.2003); i) Charter of Fundamental Rights of the European Union; j) Convention on the protection of the European Communities financial interest; l) Convention on extradition between Member-States of the European Union; m) Convention against corruption involving officials of the European Communities or officials of Member-States of the European Union; n) Framework Decision on the status of the victim in the criminal process; o) Council Framework Decision of the 26th of June of 2001 relating to money laundering, identification, tracing, freezing or seizing and confiscation of the instrumentalities and proceeds from crime; p) Joint action of the 21st of December of 1998, adopted by the Council relating to the incrimination of participation in a criminal organization in the Member-States of the European Union; r) Council Resolution of the 23rd of November of 1995 relating to the protection of witnesses in the scope of the fight against international organized crime; s) Council Resolution of the 20th of December of 1995 relating to the persons who collaborated with the justice system against international organized crime.

²⁴⁶ This treaty entered into force on the 1st of February of 2003. Published on the OJ C 80 of 10.03.2001.

deal with issues that the Member-States were nor capable of resolving at the time of the conclusion of the Treaty of Amsterdam but which they identified as questions that would be pertinent to the institutional transformations that were required for the enlargement of the European Union. The so-called "Amsterdam Leftovers" (...). In practice, [Nice prepared the European Union, at the institutional level, for future enlargement]"²⁴⁷. However, in what concerns our theme of study, the Treaty of Nice "(...) introduced a single"²⁴⁸ novelty in the domain of intergovernmental cooperation in criminal matters: the so-called Judicial Cooperation Unit (EUROJUST)²⁴⁹. Established in 2002²⁵⁰ and composed at the present time of 25 members - one per each Member-State - appointed from a pool of notable judges and inspectors, EUROJUST's primordial function is to contribute to the greater co-ordination of the competent national authorities of the Member-States in the investigation and prosecution of serious cross-border crimes. Headquartered in The Hague, EUROJUST works closely with EUROPOL (European Police Office) and with OLAF (European Anti-Fraud Office)²⁵¹ and with the European Judicial Network."²⁵²

Four months later, in June of 2002, the European Arrest Warrant²⁵³, a corollary of EUROJUST, was established with the aim of "(...) ending the slow process of extradition"²⁵⁴ in all

²⁴⁷ SOARES, António Goucha, *A União Europeia*, Coimbra, ed. Almedina, 2006, pp. 43 and 44.

²⁴⁸ In addition, the matters relating to judicial cooperation in civil matters (article 65 of TEC) are now decided by qualified majority, except on matters concerning family law.

²⁴⁹ MOTA, José Luís Lopes da, "As dimensões institucionais da cooperação judiciária em matéria criminal na União Europeia: a Eurojust e os seus parceiros europeus", in *Revista Europa Novas Fronteiras*, nº 16/17, Lisboa, ed. Centro de Informação Europeia Jacques Delors, 2005, p. 168: "(...) The inclusion of Eurojust in the Treaty on European Union, through the Treaty of Nice, placed judicial cooperation at the institutional level of police cooperation and established the juridical basis that insure a balanced and consistent approach to judicial and police cooperation. Eurojust thus emerged as the judicial partner of Europol in the sense that the activities of the latter need to be supported and complemented by coordination between judicial authorities (...). The competencies of Eurojust were based on the competencies of Europol (article 4 of the Eurojust Decision). The competencies of Eurojust encompass the types of crime included in the competencies of Europol, as stated in article 2 of the Europol Convention, a particularly significant fact. Acting at several levels - police and judicial cooperation - Europol and Eurojust should pursue a common objective: to fight against trans-national organized crime."

²⁵⁰ Created by Council Decision 2002/187/JHA of 28th February of 2002 (OJ L063, 22nd November of 2002) and modified by Council Decision 2003/659/JHA of 18th June of 2003 (OJ L245 of 29th September of 2003) (Council decision of the 28th of February of 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [OJ L063, 6.3.2002]).

²⁵¹ Created by Council Decision 1999/352/EC of the Commission of 28th of April of 1999 (OJ L163, of the 31st of May of 1999).

²⁵² Prado, *op.cit.*, p.36

²⁵³ Council Framework Decision 2002/548/JHA, of the 13th June of 2002 relating to the European Arrest Warrant and the surrender procedures between Member States (OJ L 190, 18th July of 2002) Spain, France, Germany, the United Kingdom, Portugal, Belgium and Luxembourg decided to institute the European Arrest Warrant in 2003. However, this entered into force in all of the Member-States of the European Union on the 1st of January of 2004. It substituted the: a) European Convention on Extradition of 1957; b) The European Convention on the Suppression of Terrorism of 1978; c) Agreement on Simplification of Transmission of Extradition Requests; d) Convention on Simplified Extradition Procedures of 1995; e) Convention on Extradition of 1996; and f) Provisions on the Schengen Agreement that relate to these matters.

²⁵⁴ See Council Framework decision of the 13th of June on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), p.5 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF>: "(...) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new

serious crimes such as terrorism, drug-trafficking and organized crime. For these reasons, this European Arrest Warrant system for searching, capturing, detaining²⁵⁵ and judging terrorists and delinquents of the Member-States was established. This European Arrest Warrant (EAW) presupposes a new framework for judicial co-operation between the Member-States so as to end trans-national crimes. Initially only terrorism, organized crime, drug-trafficking, traffic of human beings, sexual abuse of minors and illegal arms trafficking were considered in this measure. Yet, finally, now there are thirty-two crimes²⁵⁶ that fall within the scope of the EAW."²⁵⁷ In 2004, the European Council of Brussels²⁵⁸, impelled by preceding juridical mechanisms, by the need to re-evaluate the five years that had passed since the European Council of Tampere

simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice."

²⁵⁵ *Id.*, Council Framework Decision, General Principles - Article 1 Definition of the European arrest warrant and obligation to execute it; 1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. 2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision. 3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

²⁵⁶ *Id.*, The following crimes: "1) participation in a criminal organization; 2) terrorism; 3) trafficking in human beings; 4) sexual exploitation of children and child pornography; 5) illicit trafficking in narcotic drugs and psychotropic substances; 6) illicit trafficking in weapons, munitions and explosives; 7) corruption; 8) fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests; 9) laundering of the proceeds of crime, 10) counterfeiting currency, including of the euro; 11) computer-related crime; 12) environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; 13) facilitation of unauthorized entry and residence; 14) murder, grievous bodily injury; 15) illicit trade in human organs and tissue; 16) kidnapping, illegal restraint and hostage-taking; 17) racism and xenophobia; 18) organized or armed robbery; 19) illicit trafficking in cultural goods, including antiques and works of art; 20) swindling; 21) racketeering and extortion, 22) counterfeiting and piracy of products; 23) forgery of administrative documents and trafficking therein; 24) forgery of means of payment; 25) illicit trafficking in hormonal substances and other growth promoters; 26) illicit trafficking in nuclear or radioactive materials; 27) trafficking in stolen vehicles; 28) rape; 29) arson; 30) crimes within the jurisdiction of the International Criminal Court; 31) unlawful seizure of aircraft/ships; 32) sabotage."

²⁵⁷ See <http://www.abc.es/especiales/index.asp?cid=275>.

²⁵⁸ See Presidency Conclusions of the European Council of Brussels, 4-5 November of 2004 in http://ue.eu.int/ueDocs/cms_Data/docs/pressData/pt/ec/82547.pdf: II: "Area of Freedom, Security and Justice. 14. The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organized crime (...) 15.(...) It reflects the ambitions as expressed in the Treaty establishing a Constitution for Europe (...) 16 The Hague Programme deals with all aspects of policies relating to the area of freedom, security and justice, including their external dimension, notably fundamental rights and citizenship, asylum and migration, border management, integration, the fight against terrorism and organized crime, justice and police cooperation, and civil law, while a drugs strategy will be added in December 2004. In conjunction, the European Council considers that creating appropriate European legal instruments and strengthening practical and operational cooperation between relevant national agencies, as well as timely implementation of agreed measures, are of vital importance."

and by the tragic events of 9/11 (US) and 11/3 (Spain), approved The Hague Programme²⁵⁹. This programme particularly emphasises security concerns as well as immigration questions: "(...) The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organized crime, as well as the prevention thereof. Notably in the field of security²⁶⁰, the coordination and coherence between the internal and the external dimension has been growing in importance and needs to continue to be vigorously pursued."²⁶¹

In addition, it had as its benchmark the level of ambition of the treaty that established a Constitution for Europe; consequently, it helped the Union to prepare itself for its coming into place²⁶².

²⁵⁹ The Hague Programme "Strengthening Freedom, Security and Justice in the European Union" Annex I to the Presidency Conclusions of the European Council of Brussels of the 4th and 5th of November 2004: "(...) Over the past years the European Union has increased its role in securing police, customs and judicial cooperation and in developing a coordinated policy with regard to asylum, immigration and external border controls. This development will continue with the firmer establishment of a common area of freedom, security and justice by the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004. This Treaty and the preceding Treaties of Maastricht, Amsterdam and Nice have progressively brought about a common legal framework in the field of justice and home affairs, and the integration of this policy area with other policy areas of the Union. Since the Tampere European Council in 1999, the Union's policy in the area of justice and home affairs has been developed in the framework of a general programme. Even if not all of the original aims were achieved, comprehensive and coordinated progress has been made. The European Council welcomes the results that have been achieved in the first five-year period: the foundations for a common asylum and immigration policy have been laid, the harmonization of border controls has been prepared, police cooperation has been improved, and the groundwork for judicial cooperation on the basis of the principle of mutual recognition of judicial decisions and judgements has advanced." The Hague Programme foresees the possibility of its revision on the 1st of November 2006, the date in which the Constitutional Treaty comes into force; (Revision 4) "Since the programme will run for a period during which the Constitutional Treaty will enter into force, a review of its implementation is considered to be useful. To that end, the Commission is invited to report by the entry into force of the Constitutional Treaty (1 November 2006) to the European Council on the progress made and to propose the necessary additions to the programme, taking into account the changing legal basis as a consequence of its entry into force."

²⁶⁰ We should not forget the terrorist attack in London on the 7th of July of 2005.

²⁶¹ *Ibid.*, See Annex I of The Hague Programme: "(...) The objective of the Hague programme is to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organized cross-border crime and repress the threat of terrorism, to realize the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications. This is an objective that has to be achieved in the interests of our citizens by the development of a Common Asylum System and by improving access to the courts, practical police and judicial cooperation, the approximation of laws and the development of common policies."

²⁶² The "Constitutional Treaty" and/or "The Treaty establishing a Constitution for Europe", should have come into force until the 1st of November of 2006. However, as it is well-known, this Treaty had to be ratified by all Member-States. Given that two Member-States (France on the 29th of May of 2006) and the Netherlands (on the 1st of June of 2006) voted no in the referendum, this Treaty will not come into force despite the fact that fifteen Member-States have already ratified it (Germany, Austria, Belgium, Cyprus, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia and Spain).

The "European Constitution" and the Area for Freedom, Security and Justice

On the 20th of June of 2003, at the European Council of Salonika²⁶³, the Draft Treaty establishing a Constitution for Europe was presented. On the 29th of October 2004, in Rome, the Treaty establishing a Constitution for Europe²⁶⁴ was signed (henceforth designated as Constitutional Treaty or CT). It should be emphasised that the CT is not a revision of the Treaty of Rome, nor a revision of any other treaty. It is an autonomous treaty, conceived *ab initio* to be applied in Europe²⁶⁵. However, it has not been adopted yet for it still has to be ratified, with or without referendum, by the Member-States²⁶⁶. This document follows the logic of deepening that had been developed in previous treaties (Maastricht, Amsterdam and Nice), establishing, in this manner, a common juridical framework in the domain of justice and home affairs, with a view to insuring the security of the communities, mutual trust and the primacy of the rule of law throughout the Union. In our view, the most significant aspects of the CT were, unquestionably,

²⁶³ See Preface of the Draft Treaty establishing a Constitution for Europe, Luxembourg, European Union Official Publications, 2003: "Noting that the European Union was coming to a turning point in its existence, the European Council which met in Laeken, Belgium, on 14 and 15 December 2001 convened the European Convention on the Future of Europe. [For a second time in the history of Europe, Europeans are called upon to decide on their future. The first time was at the Hague Congress in 1947] (...) The Convention was asked to draw up proposals on three subjects: how to bring citizens closer to the European design and European Institutions; how to organize politics and the European political area in an enlarged Union; and how to develop the Union into a stabilizing factor and a model in the new world order.(...) The Laeken declaration also asked whether the simplification and reorganization of the Treaties should not pave the way for the adoption of a constitutional text. The Convention's proceedings ultimately led to the drawing up of a draft Treaty establishing a Constitution for Europe, which achieved a broad consensus at the plenary session on 13 June 2003." This was the text presented at the European Council of Salonika.

²⁶⁴ Preamble of the Treaty establishing a Constitution for Europe, Luxembourg, European Union Official Publications, 2005, p.10: "Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law; Believing that Europe, reunited after bitter experiences, intends to continue along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world; Convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny; Convinced that, thus 'United in diversity', Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope; Determined to continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on European Union, by ensuring the continuity of the Community acquis; Grateful to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe."

²⁶⁵ It should be emphasised that the Constitutional Treaty incorporates only one of the European Communities established by the Treaty of Rome (EEC/EC/EU), given that the European Atomic Energy Community (Euratom) is still in force (see 36. Protocol amending the Treaty establishing the European Atomic Energy Community, annexed to the Treaty Establishing a Constitution for Europe) and that the European Coal and Steel Community ceased in 2001.

²⁶⁶ It was expected that the Constitutional Treaty would come into force in 2007. However, for that to happen it was necessary that all Member-States ratified it. Until the present time only fifteen Member-States have ratified it (Germany, Austria, Belgium, Cyprus, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia, and Spain) and two Member-States (France on the 29th of May of 2006) and the Netherlands (on the 1st of June of 2006) voted no in the referendum.

the: a) the inclusion in the Constitution of the Charter of Fundamental Rights of the European Union²⁶⁷. It is based on these principles²⁶⁸, which emanate from the different legal systems and juridical traditions of the Member-States, that the European Union constitutes an area of freedom, security and justice. We should not forget that the Charter of Fundamental Rights has a specific Title addressing freedoms (Part II, Title II, article II-66 to article II-79) and another for justice (Part II, Title VI, article II-107 to article II-110). Security is inextricably linked to freedom, "Everyone has the right to freedom and security of person"²⁶⁹; b) the Union ratified the European Convention on the Protection of Human Rights and Fundamental Freedoms²⁷⁰ (n° 2 of article I.9, Title II, Part I). We should mention, in this ambit, that the previous European Treaties proclaimed, in equal manner, respect for this convention although they never adopted it because it lacked legitimacy; c) the inclusion of the "flexibility clause" was, without a doubt, the lever that the European Union required to autonomously foment new policies, "(if) action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures"²⁷¹; d) the creation of an Union Minister for Foreign Affairs²⁷² is, from our point of view, a decisive and fundamental step in the affirmation of the European Union in the International Community (in spite of the fact that this position is not yet institutionalized in the European Union, given the fact that one of the Vice-Presidents of the Commission is appointed to exercise this role). However, the competencies that are entrusted to this position (insuring the coherence of the external actions of the Union and implementing the Common Security and Foreign Policy of the Union²⁷³) are of central importance to a supra-national power that seeks international recognition; e) the amplitude afforded by the concept of "variable

²⁶⁷ See Part I, Article I-2 (The Union's Values); Article I-9 (Fundamental Rights); and Part II (Charter of the Fundamental Rights of the Union) Article II-61 to article II-114.

²⁶⁸ See n° 1 of article III-257.

²⁶⁹ See Article II-66 (Right to Freedom and Security)

²⁷⁰ See Protocol (A) n° 32 - Protocol n° 2 of article I-9 of the Constitution on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

²⁷¹ See n° 1 of article I-18.

²⁷² ROQUE, Miguel Prata, *O Ministro dos Negócios Estrangeiros da União na Constituição Europeia – A Caminho de uma Política Externa Europeia?*, Coimbra, ed. Almedina, 2005, p. 11: "Apparently, the institutionalization of a Minister for Foreign Affairs by the European Constitution is a significant step forward of the Laws of the European Union about one of the last bastions of the national sovereignty of Member-States: Foreign Policy (one of the quintessential domains of state sovereignty)."

²⁷³ See article I.28 (The Union Minister for Foreign Affairs)

geometry"²⁷⁴ and/or "reinforced cooperation" in the midst of the European Union²⁷⁵ is a symbol of the continuity of policies that were sought in previous Treaties. Not all provisions of the CT are applicable to all Member-States uniformly, some are still under regimes of exception, such as the United Kingdom, Ireland and Denmark²⁷⁶. In this context, we should mention the Protocol (17) on the Schengen Acquis integrated into the framework of the European Union: "Desiring to preserve the Schengen Acquis, as developed since the entry into force of the abovementioned Protocol, within the framework of the Constitution, and to develop this acquis in order to contribute towards achieving the objective of offering citizens of the Union an area of freedom, security and justice without internal borders; Taking into account the special position of Denmark; Taking into account the fact that Ireland and the United Kingdom of Great Britain and Northern Ireland do not participate in all the provisions of the Schengen acquis; Provision should, however, be made to allow those Member States to accept other provisions of this acquis in full or in part."²⁷⁷ We consider that this "clause of exception" is a sign of the vitality, trust and firmness of the values of the Union, united in and by diversity. The values of the European Union should be assimilated by the Member-States on their merit, efficacy and never by legislative imposition; f) the establishment of the European Council as an institution of the Union that confers the necessary impetus to its development and defines its guidelines and its general political priorities²⁷⁸. The European Council henceforth has a preponderant institutional role²⁷⁹ in the definition of legislative and operational strategic orientations in the area of freedom, security and justice²⁸⁰; g) the amends of the juridical acts of the Union, which henceforth has new juridical procedures for the exercise of its competencies; European Laws, European Framework Laws, European Regulations, European Decision, Recommendations and Opinions²⁸¹. Our contention is that this legislative measure was merely cosmetic given that these juridical procedures have the same legislative amplitude as the preceding: regulations, directives, decisions, recommendations and opinions. Understandably, the relevant novelty was

²⁷⁴ See Protocols (A) n° 8,9,13,14,17 to 20, 31, see Part I, Title V (Exercise of Union Competence), Chapter III (Enhanced Cooperation), article I-44 and Part III (The Policies and Functioning of the Union), Title IV (Functioning of the Union), Chapter III (Enhanced Cooperation), article III-416 to article III-423.

²⁷⁵ We should not forget that the Area of Freedom, Security and Justice integrates States that are not members of the European Union, such as Iceland, Norway and Switzerland, which however adopted the Schengen Acquis.

²⁷⁶ See Protocol (A), n°8,9,13,14,15,17,18,19,20, 26 and 31.

²⁷⁷ See Preamble of Protocol (17) on the Schengen Acquis integrated into the framework of the European Union, in Treaty Establishing a Constitution for Europe, Luxembourg, European Union Official Publications, 2005, p.355.

²⁷⁸ See Part I, Title IV (The Union's Institutions and Bodies), Chapter I (The Institutional Framework), article I-19 (Union's Institutions), article I-21 (The European Council).

²⁷⁹ Indeed, the European Council had been assuming this roles in preceding European Councils.

²⁸⁰ See article III-258.

²⁸¹ See definition of these acts in n° 1 of article I-33 (The Legal Acts of the Union).

its inclusion in the European Regulation²⁸²; h) the submission of justice and home affairs matters to qualified-majority voting in the Council, to co-decision with the European Parliament and to the jurisdiction of the Court of Justice, with the exclusion²⁸³ of some areas (family law)²⁸⁴; (volume of admission of nationals from third states)²⁸⁵ and/or questions relating to (criminal and police cooperation)²⁸⁶; i) the suppression of the pillar-structure of the EU and/or the unification of the 1st (TEC) and 3rd (TEU) pillars of the European Union, turning the decision-making process more perceptible to the citizen and concomitantly more coherent and efficient, thus extending the "community method" to the Common Space of Freedom, Security and Justice (CSFSJ)²⁸⁷. In fact, this became one of the objectives of the Union, "[which shall provide] its citizens²⁸⁸ with a space of freedom, security [these being fundamental rights²⁸⁹, concomitantly with the right to circulate and to freely establish residence in the territories of the Member-States²⁹⁰], the right to

²⁸² "A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

²⁸³ See article III-377 (Specific Provisions Relating to Area of Freedom, Security and Justice) "In exercising its powers regarding the provisions of Sections 4 and 5 of Chapter IV of Title III relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

²⁸⁴ See n°3 of article III-269: "Notwithstanding paragraph 2, a European law or framework law of the Council shall establish measures concerning family law with cross-border implications. The Council shall act unanimously after consulting the European Parliament."

²⁸⁵ See n°5 of article III-267.

²⁸⁶ See n°3 of article I-42 (Specific Provisions Relating to the Area of Freedom, Security and Justice) " Member States shall have a right of initiative in the field of police and judicial cooperation in criminal matters, in accordance with article III-264; article III-262 "This Chapter shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security."

²⁸⁷ PANIAGUA, Enrique Linde, "El significado del espacio de libertad, seguridad y justicia de la Unión en la Constitución Europea", in *Revista de Derecho de la Unión Europea*, n° 10-1° semestre, Madrid, ed. Colex, 2006, p19. Interestingly, this author argues that "the precedents that inspired the formulation of the European Constitution, in particular the domain under consideration [area of freedom, security and justice] were the Portuguese and Spanish Constitutions, the only European constitutions that explicitly state the values that founded them. The characterization of justice, freedom and security as values to sincere constituents that know that their realization is an aspiration, an utopia, that should guide public policies. (...) The European constituents has perplexingly forgotten that the central aspects of freedom, security and justice are expressed in the Union Charter of Fundamental Rights (...) Title II addresses freedoms, Title III deals with equality and Title IV considers justice (...). However, what differentiates the constitutional text of the Union from the Portuguese and Spanish Constitutions and from the other European constitutions is that the European Constitution dedicates Chapter IV (Title III of Part III) exclusively to the "Area of Freedom, Security and Justice (...)."

²⁸⁸ See Part I, Title I, Chapter 2, n° 1 and paragraph a) of article I-10 of The Treaty Establishing a Constitution for Europe "1. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it [this aspect remained unchanged in the Treaty of Amsterdam]. 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution. They shall have: (a) the right to move and reside freely within the territory of the Member States."

²⁸⁹ *Id.*, Part II, Title II (Freedoms), article II-66 (Right to Liberty and Security).

²⁹⁰ *Id.*, Part II, Title V, article II-105 (Freedom of Movement and of Residence).

justice²⁹¹ [²⁹² “[thus placing] the human being at the centre of its policies”²⁹³] without internal borders [since the Union insures the free circulation of persons/workers in its territory [article III-133 to article III-136 of the CT], services [article III-144 to article III-150 of the CT], goods [article III-151 to article III-155 of the CT], and capital [article III-156 to article 160 of the CT], the freedom to establish residence [article III-137 to article III-143 of the CT]²⁹⁴, an internal market²⁹⁵ wherein competition is free and non-phased [article III-161 to article III-169]²⁹⁶, even though this Common Space of Freedom, Security and Justice (SFSJ) is a domain of competencies shared²⁹⁷ with the Member-States²⁹⁸.

In its very structure, the CT addresses the "Area of Freedom, Security and Justice" in Part I, Title V (Exercise of Union Competence), Chapter II (Specific Provisions), article I-42²⁹⁹

²⁹¹ *Ibid.*, despite the fact that the theme of justice is considered in Part II, Title VI, article II-107, of the Treaty Establishing a Constitution for Europe. We should note that we only have the right to undertake legal action and the right to an impartial court.

²⁹² See Part I, Title I, Chapter II, article I-42 (Specific Provisions Relating to the Area of Freedom, Security and Justice): "1. The Union shall constitute an area of freedom, security and justice: (a) by adopting European laws and framework laws intended, where necessary, to approximate laws and regulations of the Member States in the areas referred to in Part III; (b) by promoting mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions; (c) by operational cooperation between the competent authorities of the Member States, including the police, customs and other services specializing in the prevention and detection of criminal offences. 2. National Parliaments may, within the framework of the area of freedom, security and justice, participate in the evaluation mechanisms provided for in Article III-260. They shall be involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles III-276 and III-273."

²⁹³ *Id.*, Part II, Preamble of the Union Charter of Fundamental Rights.

²⁹⁴ *Id.*, Part I, Title I, n° 1 of article I-4.

²⁹⁵ *Id.*, Part III, Title III (Internal Policies and Action), Chapter I (Internal Market), Section I (Establishment and Functioning of the Internal Market), n°2 of article III-130: "The internal market shall comprise an area without internal frontiers in which the free movement of persons, services, goods and capital is ensured in accordance with the Constitution."

²⁹⁶ MARTÍN, *op. cit.*, p. 743: "Another particularity to consider is that the Constitutional Treaty maintains the normative initiative that was shared among Member-States (before the initiatives of a single Member-State) and will only comprise those acts foreseen in Sections 4 and 5 (Judicial Cooperation in Criminal Matters and Police Cooperation), as well as the European regulations of article III-263 that guarantees administrative cooperation in the scopes mentioned in these Sections." See also, *Id.*, Part I, Title I, n°2 or article I-3.

²⁹⁷ *Id.*, Part I, Title I, paragraph j) of n° 2 of article I-14.

²⁹⁸ *Id.*, "The functioning of institutions in the area of freedom, security and justice", p.38: "(...) maybe it would be more accurate of speaking about concurrent competencies, in so far as the European Union and its Member-States exercise identical functional competencies in the same domains."; see also Carrillo, López Marc, "El espacio de Libertad, seguridad y justicia" in E. Alberti, *El proyecto de nueva Constitución Europea. Balance de los trabajos de la Convención sobre el futuro de Europa*, València, Tirant lo Blanch, 2004, p. 409-410.

²⁹⁹ 1) "The Union shall constitute an area of freedom, security and justice: (a) by adopting European laws and framework laws intended, where necessary, to approximate laws and regulations of the Member States in the areas referred to in Part III; (b) by promoting mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions; (c) by operational cooperation between the competent authorities of the Member States, including the police, customs and other services specializing in the prevention and detection of criminal offences. 2. National Parliaments may, within the framework of the area of freedom, security and justice, participate in the evaluation mechanisms provided for in Article III-260. They shall be involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles III-276 and III-273. 3. Member States shall have a right of initiative in the field of police and judicial cooperation in criminal matters, in accordance with Article III-264".

(Specific Provisions relating to the Area of Freedom, Security and Justice) and Part III (The Policies and Functioning of the Union), Title III (Internal Policies and Action), Chapter IV, which is subdivided into five sections: a) Section 1 (General Provisions - article III-257 to article-264); b) Section 2 (Policies on Border Checks, Asylum and Immigration - article III-265 to article 268); c) Section 3 (Judicial Cooperation in Civil Matters - article III-269); d) Section 4 (Judicial Cooperation in Criminal Matters - article III-270 to article III-274); and e) Section 5 (Police Cooperation - article III-275 to article III-277).

We shall try to succinctly emphasise and systematize the principal measures, policies and/or principles mentioned in the five sections of Chapter IV "Area of Freedom, Security and Justice". Thus, in Section 1 of the CT, under the epigraph "General Provisions", the most noteworthy aspects are: a) the reiteration of the respect for fundamental rights and for the different legal systems and judicial traditions of the Member-States in the formation of the area of freedom, security and justice; b) the reaffirmation of the principle of a single market without controls of persons at the internal borders but with controls at the external borders and the development of common policies in matters of asylum and immigration, the equivalence of the status of stateless persons and nationals of third states and, finally, the solidarity of Member-States in this domain; c) the commitment of the Union to endeavour to assure a high level of security, through the adoption of measures to prevent crime, racism and xenophobia, among others, through the coordination and cooperation of judicial and police authorities and/or other relevant authorities, through the mutual recognition of judicial decisions in civil and criminal matters, as well as through the harmonization of criminal legislation. These provisions are elaborated in greater detail in sections 3, 4 and 5; d) a Permanent Committee was established in the Council with the objective of insuring the promotion, in the Union, of the reinforcement of the operational cooperation in matters of internal security as well as fomenting the coordination of the actions of the competent authorities of Member-States, a concept that was addressed by the Hague Programme³⁰⁰; e) the reiteration of the principle that freedom, security and justice are not the an exclusive competence of the European Union "This Chapter shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance

³⁰⁰ See Presidency Conclusions of the European Council of the 4-5 November 2004: "2.5 Operational cooperation - Coordination of operational activities by law enforcement agencies and other agencies in all parts of the area of freedom, security and justice, and monitoring of the strategic priorities set by the Council, must be ensured. To that end, the Council is invited to prepare for the setting up of the Committee on Internal Security, envisaged in Article III-261 of the Constitutional Treaty, in particular by determining its field of activity, tasks, competences and composition, with a view to its establishment as soon as possible after the Constitutional Treaty has entered into force. To gain practical experience with coordination in the meantime, the Council is invited to organize a joint meeting every six months between the chairpersons of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and the Article 36 Committee (CATS) and representatives of the Commission, Europol, Eurojust, the EBA, the Police Chiefs' Task Force, and the SitCEN."

of law and order and the safeguarding of internal security."³⁰¹; f) the implementation of administrative cooperation between the relevant departments of the Member-States in matters relating to the Area of Freedom, Security and Justice, as well as between those departments and the Commission.

In Section 2 of the CT, under the epigraph "Policies on Border Checks, Asylum and Immigration" there are several aspects that ought to be emphasised: a) The CT foresees the possibility of the gradual introduction of an integrated management system at external border controls (paragraphs a) and c) of n° 1 of article III-265)³⁰²; this policy has been recovered by the Hague Programme (1.7- Management of Migration Flows – 1.71 Border checks and the fight against illegal immigration) "The European Council stresses the importance of swift abolition of internal border controls, the further gradual establishment of the integrated management system for external borders and the strengthening of controls at and surveillance of the external borders of the Union. (...) The European Council welcomes the establishment of the European Agency for the Management of Operational Cooperation at the External Borders, on 1 May 2005. It requests the Commission to submit an evaluation of the Agency to the Council before the end of 2007."³⁰³; b) The CT, in paragraph a) n° 2 of article III-265, considers the possibility that "European laws or framework laws shall establish measures concerning: (a) the common policy on visas and other short stay residence permits;" and, similarly, the Hague Programme³⁰⁴

³⁰¹ See article III-262.

³⁰² "1. The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders."

³⁰³ See Presidency Conclusions of the European Council of Brussels 4-5 November of 2004.

³⁰⁴ *Id.*, "1.7.3 Visa policy: The European Council underlines the need for further development of the common visa policy as part of a multi-layered system aimed at facilitating legitimate travel and tackling illegal immigration through further harmonization of national legislation and handling practices at local consular missions. Common visa offices should be established in the long term, taking into account discussions on the establishment of an European External Action Service. The European Council welcomes initiatives by individual Member States which, on a voluntary basis, cooperate at pooling of staff and means for visa issuance. The European Council: • invites the Commission, as a first step, to propose the necessary amendments to further enhance visa policies and to submit in 2005 a proposal on the establishment of common application centres focusing inter alia on possible synergies linked with the development of the VIS, to review the Common Consular Instructions and table the appropriate proposal by early 2006 at the latest; • stresses the importance of swift implementation of the VIS starting with the incorporation of among others alphanumeric data and photographs by the end of 2006 and biometrics by the end of 2007 at the latest; • invites the Commission to submit without delay the necessary proposal in order to comply with the agreed time frame for implementation of the VIS; • calls on the Commission to continue its efforts to ensure that the citizens of all Member States can travel without a short-stay visa to all third countries whose nationals can travel to the EU without a visa as soon as possible; • invites the Council and the Commission to examine, with a view to developing a common approach, whether in the context of the EC readmission policy it would be opportune to facilitate, on a case by case basis, the issuance of short-stay visas to third-country nationals, where possible and on a basis of reciprocity, as part of a real partnership in external relations, including migration-related issues."

develops this concept; c) The CT mentions, in nº1 of article III-266³⁰⁵, the possibility of developing a common policy in asylum matters. Again, this policy was also analyzed and perfected by the Hague Programme: "The aims of the Common European Asylum System in its second phase will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection (...); 1.6 - The external dimension of asylum and migration; 1.6.1 - Partnership with third countries - asylum and migration are by their very nature international issues (...); 1.6.2 - Partnership with countries and regions of origin; 1.6.3 - Partnership with countries and regions of transit; 1.6.4 - Return and re-admission policy (...)." ³⁰⁶ However, it should be mentioned that the CT did not lead to any substantial innovation regarding the topic of asylum because, in truth, all of these policies/measures were already in place in the European Union³⁰⁷. The CT had the merit of enshrining these policies and measures in the Constitution thus making it possible, by laws or framework laws, to implement measures towards the establishment of a common European asylum system that includes: 1) a uniform asylum status for nationals of third countries valid throughout the Union; 2) a uniform status of subsidiary protection for nationals of third countries that did not secure European asylum and therefore need international protection; 3) a common system that, in case of a massive flow of asylum-seekers, provides temporary protection for dislocates persons; 4) common procedures in the attribution and cancellation of the asylum uniform status or of subsidiary protection; 5) criteria and procedures for determining the Member-State that is responsible for the analysis of requests for asylum and subsidiary protection; 6) norms relating to the accommodation of those that require asylum or subsidiary protection; and 7) partnership and cooperation with third countries for the better management of asylum-seekers flows and of those that require subsidiary or temporary protection; d) the CT mentions, in nº1 of article III-267, the possibility of the EU developing a common migration policy "(...) The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings." The Union can, through laws or framework laws, establish and

³⁰⁵ "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."

³⁰⁶ *Ibid.*

³⁰⁷ See RODRIGUES, *op. cit.*, and RODRIGUES, "A História do Direito de Asilo no Direito Internacional", working paper nº 18/2006, CEEApla – Centro de Estudos de Economia Aplicada do Atlântico, Universidade dos Açores.

promote measures in the following domains: 1) conditions of entry and residence; 2) norms concerning the emission, by Member-States, of visas, long-term residence and family reunion permits; 3) defining the rights and conditions of free circulation and the permanence of nationals of third countries that reside legally in a Member-State; 4) measures in the ambit of illegal immigration, illegal residence, removal and deportation; 5) measures to combat human trafficking, especially women and children; 6) to conclude re-admission agreements with third countries (of origin and/or provenance); 7) measures to promote and support the actions of Member-States to foment the integration of nationals from third countries that reside legally in their territories. The CT, however, did not introduce any substantial innovation in the domain of immigration, except integrating into the constitution the policies and measures that had already been adopted by the EU; 2) the CT introduced in n° 5 of article III-267 a "perilous measure" in the scope of immigration: "This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed." By tolerating these discretionary powers of the Member-States, the Union will rapidly lose control over immigration policy even though it has none at the moment. However, only the integral transference of these competences (immigration/asylum) to the European Union and with a resulting uniform policy (the inclusion of "maximum migration quotas for the European Union" and the establishment of a single "institution responsible for the management of migration") can we ever hope to effectively manage migration flows and concomitantly make Member-States co-responsible³⁰⁸ for this human tragedy. Much like the preceding paragraphs, the paragraph on migration was also formulated in the Hague Programme "(1.2 - Asylum, migration and border policy) International migration will continue. A comprehensive approach, involving all stages of migration, with respect to the root causes of migration, entry and admission policies and integration and return policies is needed."

In section 3 of the CT, on paragraph "Judicial Cooperation in Civil Matters", there are two essential aspects that must be considered: a) the Union shall undertake cross-border judicial cooperation in civil matters, based on the principle of the mutual recognition of judicial and extra-judicial decisions. This principle of mutual recognition is in fact the "cornerstone" of the judicial cooperation in civil and criminal matters, as mentioned in section 4; b) this cooperation requires that the Union adopt measures to approximate the legislative and regulatory provisions

³⁰⁸ See article III-268: "The [common asylum and migration] policies of the Union set out in this Section and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Section shall contain appropriate measures to give effect to this principle."

of Member-States. With this end in mind, the Union, in endeavouring to insure a well-functioning internal market, could, by law or framework-law, implement the following measures: 1) the mutual recognition between Member-States of judicial and extra-judicial decisions and their respective execution; 2) cross-border notification of judicial and extra-judicial acts; 3) the compatibility of norms applicable to Member-States in matters of conflict of laws and jurisdiction, 4) the cooperation in the matters related to proof-collection; 5) effective access to justice; 6) the elimination of obstacles to the implementation of civil actions and promoting, if necessary, the compatibility of norms of the civil process that are applicable in Member-States; 7) the development of alternative methods to resolve litigation; 8) the assistance of magistrates, workers and agents of justice with their professional development.

With regard to section 4 of the CT, relating to "Judicial Cooperation in Criminal Matters", the essential points to consider are: a) judicial cooperation in criminal matters in the Union rests upon the principle of mutual recognition of the judicial judgements and decisions; and b) the harmonization of legislative and regulatory provisions of Member-States. In order to achieve this objective, the Union, by law or European framework-law, implement measures towards: 1) Defining rules and procedures for insuring the recognition, throughout the Union, of all judicial decisions and judgements; 2) prevent and resolve the conflicts of jurisdiction between Member-States; 3) to assist with the professional development of magistrates, workers and agents of justice; 4) facilitate cooperation between judicial authorities or other equivalent institutions of Member-States in the ambits of investigation and in the exercise of criminal actions, as well as on the execution of decisions³⁰⁹. In this context, the objective of facilitating the mutual recognition of judicial judgements and decisions and of promoting police and judicial cooperation in cross-border criminal matters can be undertaken in the basis of European framework laws, which could establish minimal rules³¹⁰, taking into account the differences between the juridical systems and traditions of Member-States. It may also establish a specific juridical basis for material criminal law through the adoption of minimal rules³¹¹ relating to the

³⁰⁹ See Official Journal C326, of 21.11.01

³¹⁰ See nº2 of article III-270: "Such [minimum] rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:(a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure;(c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a European decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament."

³¹¹ PIÇARRA, Nuno, "O espaço de liberdade, segurança e justiça no Tratado que estabelece uma Constituição para a Europa: unificação e aprofundamento", in *O Direito*, ano 137; IV-V, 2005, p. 1004: "(...) We cannot, therefore, consider this aspect of the harmonisation of criminal legislation "minimalist" only because the Constitutional Treaty still uses the unfortunate expression "minimum rules", which resulted from unclear compromises. In this context, the substantive "rules" ["relating to the definition of criminal transgressions and sanctions"] would dispense any adjective. However, if it had to be coupled with any term, it should be

definition or criminal violations and of the sanctions to be applied in cases of particularly grave cross-border criminality³¹² (terrorism, human trafficking, sexual exploitation of women and children, arms and drugs trafficking, money laundering, corruption, counterfeiting of means of payment, cyber-crime and organized crime) that results from the very nature and incidence of these crimes or from the special need to develop a common legal framework to combat them. However, in our view, one of the most significant aspects of the CT in this domain of judicial cooperation in criminal matters was: a) the implementation, by law or by European framework law, of measures to promote and support the actions of Member-States in the domain of crime prevention; b) the institutionalization or *constitutionalization* of Eurojust³¹³ with the resulting definition of functions. In this regard, Eurojust may: 1) proceed to the opening of criminal investigations; 2) proposed the enactment of criminal actions to be undertaken by competent national authorities, especially those relating to criminal transgressions that are detrimental to the financial interests of the Union; 3) coordinate investigations and criminal actions referred to in points 1 and 2; 4) reinforce judicial cooperation, in accordance with the resolution of conflicts of jurisdiction and in strict cooperation with the European Judicial Network (EJN)³¹⁴; 5) implement official acts of the judicial process in the exercise of criminal actions through national agents³¹⁵; 6) starting with Eurojust, the possibility to institute through a European law that is unanimously adopted at the Council and approved by the European Parliament³¹⁶, a European Attorney-General Office with the objective of combating crimes that are detrimental to the financial interests of the Union; later, by European decision, this institution could extend its competences to serious cross-border crimes that affect several Member-States (n°4 of article III-274). The European Attorney-General and/or the "European Public Ministry" has powers to

"adequate", bearing in mind that the objectives, principles and values that characterize the Area of Freedom, Justice and Security in the Constitutional Treaty".

³¹² *Ibid.* "(...) We should note, however, that "crimes against the Union", whose effective repression depends on the transposition of European framework-laws to the juridical regimes of Member-States, as well on the actions of the police forces, the Prosecution services and its courts, are clearly distinguished, for example, from the "crimes against the United States" in the US federal law. In this case, the federal law does not depend on any transposition and is directly executed and applied by the police, the Prosecution services and by federal courts respectively."

³¹³ See (Eurojust) Decision 2002/187/JHA of the Council, of the 28th of February of 2002 (Official Journal L 63 of 6.3.2002); Council Decision 2000/7999/JHA, of 14.12.2000 (Official Journal L 324 of 21.12.2000); European Council Decision 2004/97/EC (Official Journal L29 of 3.2.2004); The Treaty of Nice includes Eurojust in the Treaty on the European Union (OJ C80 of 10.03.2001).

³¹⁴ See European Judicial Network (EJN) - Joint Action of 29th of June of 1998, adopted by the Council, on the basis of the article K.3 of the Treaty on the European Union, established a European Judicial Network (Official Journal L 191 of 7.7.1998).

³¹⁵ See n° 2 of article III-273.

³¹⁶ See n°1 to 4 of article III-274.

investigate, sue and submit to trial, in cooperation with Europol, the authors and accomplices of crimes that are detrimental to the financial³¹⁷ interests of the Union.

In section 5 of the CT, on the paragraph relating to "Police Cooperation", there are some basic aspects that should be considered: a) the association of all of the competent authorities of Member-States (police, customs and other services responsible for the specialized application of the law in the domains of prevention, detention and investigation of criminal crimes); b) the constitutional institutionalization of Europol³¹⁸, with the mission to support and reinforce the actions of police authorities and of other services that are responsible for the application of the laws of Member-States. Cooperation between these authorities has been instituted so as to prevent serious forms of criminality that affect two or more Member-States, such as terrorism and other forms of criminality detrimental to a common interest that is addressed by a EU policy, as well as in combating these phenomena; c) the redefinition of the functions of Europol, which should include: 1) collection, storage, analysis and exchange of information that has been transmitted by the authorities of Member-States or by third countries; 2) coordinating, organizing and conducting investigations and operations, undertaken jointly with the authorities of Member-States or in the ambit of joint investigations that could be articulated with Eurojust.

Conclusion:

The Treaty that establishes a Constitution for Europe follows a "policy of small steps." In reality, this Treaty does not constitute "(...) a rupture, and inscribes itself into constitutional continuity given that most of its contents have already been enacted by the present Treaties."³¹⁹ The CT symbolizes the stereotyped image of the sovereign state, despite we know from the start that the European Union will never be sovereign. However, this underlying juridical-conceptual facts cannot and should not be a subterfuge for our national fears in advancing with a full integration, in which common legal codes would be applied (Criminal, Criminal Process, Commercial, Civil, Labour Laws, Asylum, Migration, among many others) insuring juridical security, equality of opportunity and treatment, as well as social cohesion in the midst of the European Union. The "policy of small steps" only makes sense if we know beforehand which road we wish to take; if not, then we shall have the "policy of small regresses", just as it has happened recently with the non-ratification by France and the Netherlands of the Treaty

³¹⁷ See European Anti-Fraud Office (OLAF) - Decision of the Commission of 28th of April of 1999 (Official Journal L136 of 31.5.99); regarding this point see also Official Journal L312 of 23.12.1995; Official Journal C 316 of 27.11.1995; First Protocol - Official Journal C 313 of 23.10.1996; Official Journal C 151, of 20.5.1997; Second Protocol - Official Journal C 221, of 19.7.1997.

³¹⁸ See European Police Office (Europol Convention) Official Journal C 316 of 27.11.95

³¹⁹ MARTÍN, *op. cit.*, p.738.

establishing a Constitution for Europe. The values of Freedom, Security and Justice and/or the CSFSJ are, "unquestionably, one of the *shipyards* of the Union in the 21st century"³²⁰ and constitute, therefore, the foundations of the European Union and its Member-States. Hence, "The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004 [and on 7 July 2005 in London]."³²¹ Why then should we delay the process of legislative unification? Blind are those who have not yet grasped the road that we have taken. In other words, "the deep integration in domains of a political nature, which can supplant the superficial aversion to the federalist project, is desirable and necessary."³²²

As far as we are concerned, we want a free Europe that is safe, just, strengthened, fraternal, egalitarian, open and, above all, respectful of the Fundamental Rights of every Man, irrespective of his/her Member-State and/or country of origin.

³²⁰ PIÇARRA, *op. cit.*, p.1009.

³²¹ See Presidency Conclusions of the European Council of Brussels, 4-5 November of 2004 (14).

³²² BRANCO, José Pedro Aguiar, "Liberdade de circulação e circulação da liberdade – Inclusão, diversidade e criminalidade na União Europeia", in *Europa Novas Fronteiras*, nº 16/17, Lisboa, ed. Centro de Informação Europeia Jacques Delors, 2005, p.20.