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THE EVOLUTION OF INTERNATIONAL JUDICIAL COOPERATION IN CRIMINAL MATTERS : IN PARTICULAR, JUDICIAL COOPERATION IN CRIMINAL MATTERS IN EUROPE

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INTRODUCTION

The aim of this introductory unit is to offer a general overview of the evolution and current status of the policies on judicial cooperation in criminal matters in Europe. This is not an easy task given the far-reaching transformation that this area has undergone in recent times. While in certain spheres the traditional context of cooperation based on mutual assistance has not been exceeded, in other regional contexts, such as the European Union, hitherto unthinkable degrees of cooperation have been reached. It is even possible to say that a new integration-based route has been forged, the ultimate aim of which is the construction of a European space of justice. In order to better understand this uneven evolution depending on the regional environment, we must first understand what international cooperation consists of and what its purpose is.

Cooperation consists simply in working together with another person or persons to achieve a mutual benefit. This definition, based on that offered by the *Oxford* or *Webster* dictionaries, has two characteristic aspects. First of all, it is a process of interaction between two or more subjects and, secondly, there is a common effort towards a mutual benefit.

Thus, we should start our study of international judicial cooperation from this perspective, analysing how it has evolved from bilateral cooperation between states –restricted to the shared actions of the two cooperating states– to a multilateral or regional cooperation, in which international organisations with their own legal status intervene, in addition to the sovereign states. This fact is proof of the growing complexity of the processes of cooperation today, due to the increasing number of subjects involved, on the one hand, and of the pressing need to establish mechanisms for cooperation in a world in which borders are increasingly less defined and in which, as a result, the success of virtually any policy depends to a large extent on the manifestation of a shared effort, on the other.

Moreover, the object of cooperation has been increasing gradually but unfailingly to the extent that nowadays it is difficult to find a part of the legal system in which this kind of policies have not been contemplated. The subject matter of cooperation that started out being included under foreign policy now exists in its own right and independently of that catch-all category.

Europe provides us with a paradigmatic example of this evolution. The first policies developed in the mid-seventies and dealing essentially with the fight against terrorism and organised crime emerged in the context of European Political Cooperation (EPC), which comprised basically foreign policy matters[1]. Indeed, as can be seen from Article 30 of the Single European Act, which regulated EPC for the first time, it was defined in very general terms as a structure for coordinating the external policies of the Member States of the European Community designed to create a common European foreign policy.

Judicial cooperation in justice and home affairs began to emerge within foreign policy cooperation from the 1975 Rome European Council onwards, where it was agreed that the Home Office Ministers or their equivalent counterparts would meet regularly to deal with matters that fell within their remit, essentially those related to public order, thus giving rise to the Trevi Group.

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[1] On this point, LIÑÁN NOGUERAS already highlighted that, "European political cooperation had become a structure which attracted all those domains of collaboration between Member States of the EC for which there was no room in the different areas of community jurisdiction", in *Instituciones y Derecho de la Unión Europea*, 5th Ed., with Araceli Mangas, Madrid, 2005, page 719.

Cooperation in the field of justice only became independent as of the Maastricht Treaty[2], which established the Third Pillar of the TEU, including Title V, which repealed the provisions of the Single European Act and established the CFSP (Common Foreign and Security Policy, a new approach to the defunct EPC) in its place. Moreover, matters related to cooperation in the fields of justice and home affairs (JHA) were excluded from that title and went on to comprise Title VI. In this way cooperation achieved its own place in the construction of the Union, achieving a degree of importance that has recently led it to be communitised in the Lisbon Treaty[3], becoming part of the Union's supranational law.

1. LEGAL COOPERATION: CONCEPT, CONTENT AND PURPOSES

1.1. CONCEPT

The transformation that cooperation has undergone in recent times has also been reflected in its name. While traditionally we spoke of judicial cooperation, nowadays it is far more appropriate to refer to international legal cooperation. Judicial cooperation has generally referred to the activity of collaboration between states aimed at ensuring that a judicial process in one is effective. Thus, the concept refers to the instruments aimed at making it possible to exercise national jurisdictional authority, favouring activities such as the notification of judgments, summons and the examination of evidence abroad. Nowadays, cooperation extends to areas that –while intimately related to the proceedings–, go beyond what is strictly understood as judicial cooperation. Thus, it involves mechanisms designed not so much to favour the judicial proceedings (as judicial should only be understood as affecting that which belongs or is related to the proceedings), but other activities linked to the proceedings that fall outside the scope of the same. This is the case, for example, of all those measures aimed at the spontaneous exchange of information, the creation of registries of criminal records, the seizure and confiscation of products and profits of criminal origin and the collection of fines and sanctions, not to mention the possibility of cooperating in administrative sanctioning proceedings, clemency proceedings, etc.

Basically, it seems far more appropriate to talk about legal cooperation in criminal matters these days than judicial cooperation, as this term allows us to encompass everything related to criminal law and not the purely jurisdictional activity[4]. Moreover, when it comes to the forms of cooperation in criminal matters, there are usually two distinct levels or

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[2] Treaty on European Union (Maastricht Treaty), (OJ C 191 dated 29.7.92).

[3] The Lisbon Treaty amending the TEU and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007, (OJ 2007/C 306/01).

[4] From a different perspective PARRA GARCÍA affirms in, "El nuevo régimen de las solicitudes de asistencia judicial en materia penal", *CDJ*, no. 13, 2003, page 4, that "we can accept in particular that the legal aid or assistance refers to judicial cooperation where there are greater degrees of assistance from the judicial system (judges and prosecutors, mainly), while legal cooperation would cover a broader version of the mutual assistance between authorities, encompassing also collaboration with a greater degree of governmental intervention, such as in classic cases of extradition, the transfer of sentenced persons, transfers of proceedings, etc. To put it another way, the latter concept entails a more hands-on role of the Executive in referrals and fulfilment of requests, while the former represents a more "judicialised" version of cooperation. In this way, the "'rogatory letter' would be associated with greater intervention by the central authorities, as opposed to the term 'request for judicial assistance' which could be accompanied by a greater presence in a direct communication regime between the judicial authorities in question".

dimensions, one of which clearly exceeds the boundaries of the proceedings. On the one hand, cooperation tends to be addressed and developed on an operational level, such as in relation to the instruments that favour and indeed make possible criminal proceedings with a foreign element. There is, however, also the cooperation that forces the parties that participate therein to formulate common approaches to criminal rules both of a procedural and a substantive nature. And it is this second dimension of cooperation that, as HÖPFEL put it, "is grounded in Human Rights and in the international consensus in relation to certain penalties such as in the case of international humanitarian law, the fight against terrorism or, recently, also the protection of the environment"[5]. This harmonisation or convergence of national criminal systems can be understood as the only way of achieving a simplification of the judicial instruments of assistance as such; nevertheless, it seems more logical to think that this derives from the desire to reach common positions on the treatment of criminal phenomena of an international nature.

Therefore, and by way of conclusion, international legal cooperation can be understood as the collection of legal instruments of a supranational nature that determine the conditions in which the States must act in conjunction with one other in order to ensure justice is administered and, ultimately, to guarantee that *jus puniendi* is exercised. And it is through such cooperation that the requirements and conditions that must be fulfilled in order to fight transnational crime are defined, on bilateral, regional and, as we will see, even global levels. Nevertheless, neither legislation nor doctrine tend to differentiate between the two terms and they are used as if they were synonyms[6].

1.2. CONTENT

The object of legal cooperation from its classic beginnings, which included both what was known as "major assistance" (i.e. extradition) and what was termed "minor assistance" (citations, summons and notifications), up to our times has undergone a significant expansion, to the point that, as we have seen, a degree of terminological precision is necessary. Its scope has been extended not only to specific aspects of the proceedings apart from its traditional field of action, such as interim measures, but it has also been extrapolated to neighbouring sectors that fall outside the scope of the proceedings *strictu sensu*, such as the mechanisms for police cooperation. These have recently been included as legal cooperation mechanisms when they require judicial intervention or control –joint investigation teams, the spontaneous transfer of information, cross-border surveillance or observation and hot pursuit–.

The incorporation of all these mechanisms shows that legal cooperation has transcended the strictly judicial scope and now includes activities that belong more to the realm of police cooperation, intimately linked to the possibility of court proceedings. There is no doubt that from a strictly legal point of view, the prevention of crime, insofar as it does not affect criminal behaviour as such, should not be incorporated into legal cooperation, strictly

[5] "Nuevas formas de cooperación internacional en materia penal», *CDJ,* no. 7, 2001, page 226.

[6] Spanish procedural law itself is proof of this; the Spanish Law of the Judiciary refers to "jurisdictional cooperation" (Arts. 276-278), while the Spanish Law of Civil Procedure talks about judicial cooperation (see Art. 177). In any event, the titles given to this area are many and varied and one can hear it referred to as legal cooperation, mutual assistance, judicial cooperation, judicial assistance, judicial aid, assistance in criminal matters, etc.

speaking, at least insofar as its content is concerned (judicial cooperation). In these cases, we are actually dealing with police or governmental actions, despite the fact that these can have judicial implications from a criminal policy point of view[7].

a) Instruments

At present the possible contents of cooperation are highly diverse. On the one hand, the traditional acts of citation and summons can be carried out, as well as the notification of judicial documents and decisions. Likewise, activities aimed at obtaining evidence may be performed, such as the testimony of the accused or the questioning of witnesses or experts. It will also be possible to carry out measures aimed at embargo such as the seizure and confiscation of assets. And as cooperation prior to the trial strictly speaking, but aimed directly at favouring its development, a wide variety of investigation activities may be carried out: controlled deliveries, spontaneous transfer of information, interception and tapping of telecommunications, etc. Cooperation instruments may also be used to request the transfer of sentenced persons as well as the information regarding criminal records and information on court sentences.

b) Objective scope

Indeed, the scope of application of cooperation is also extended. It originally seemed to be restricted to criminal infringements, initially excluding fiscal misdeeds. Its scope was subsequently extended to include administrative proceedings when the infringement for which the administrative authority is responsible can be submitted by the injured party to a court; it was also extended to indemnification proceedings due to unjustified investigative measures or sentences; and to clemency proceedings and civil actions linked to criminal ones while the judicial body has not yet issued a final decision on the criminal responsibility.

c) Subjective scope

A significant transformation can also be said to have occurred in the subjective scope of cooperation. Today a wide variety of parties can intervene in cooperation. In this regard it is important to highlight that the cooperation activity aimed at investigation can be charged to different bodies both of a police (including the customs services and the administrative services in the prevention of money laundering), and of a judicial nature (judges, prosecutors, secretaries in some cases)[8].

In fact, the complexity that the regulatory framework for this field has acquired is such that it has been necessary to create different kinds of bodies and institutions responsible for facilitating it. These institutions, although their mission is to promote the comprehension and coordinate the execution of these policies, have ended up complicating the already complex structure of legal instruments related to judicial cooperation even further. Thus for example, in recent times there has been widespread proliferation of cooperation networks, which include: the European Judicial Network[9]; the Schengen consultation network[10]; the European

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[7] On this point, see SALCEDO VELASCO, "Mecanismos procesales de cooperación judicial", *CDJ*, no. 23, 1995, pages139-256.

[8] Thus, for example, even though in our legal system the Public Prosecutor is not responsible for the investigation stage -the opposite is the case in other European countries-, s/he has autonomous powers to seek and supply international judicial aid.

[9] Joint Action 98/428/JHA of 29 June 1998, adopted by the Council, on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network (DO L 191 of 7.7.1998, pages 4/7).

[10] Council Decision of 19 December 2002 on declassifying the Schengen consultation network (technical

network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes[11]; the European network for the protection of public figures[12] and the European crime prevention network[13]. Agencies such as CEPOL[14], Europol[15] and Eurojust[16]; the liaison magistrates[17] and the consultative or expert groups[18] have been created with the same objective as the networks, namely, to contribute to the simplification and promotion of legal cooperation processes.

Finally, it is important to point out that the list of subjects that can intervene in cooperation processes includes the International Courts as requesting subjects such as the International Criminal Court[19], the European Court of Human Rights[20], the European Court of Justice[21] as well as the War Crimes Tribunals[22]. It would therefore be particularly appropriate for this possibility to be contained in the international treaties in this field and not only in the regulations of the different bodies.

This ongoing extension of the content of international legal cooperation can even be identified as a progressive evolution, so that its original content can be said to be found in extradition and what has traditionally been termed “minor judicial assistance in criminal matters” (citations, notifications and obtaining evidence). A second phase has seen the incorporation of instruments aimed not so much at holding the trial but at enforcing the outcome of the same, such as the transfer of the processing and enforcement of criminal sentences of citizens. In the third phase it can be said that the traditional forms of cooperation are being intensified –for example, it is now possible to request and provide judicial assistance not only in criminal matters, but also in investigations related to behaviour punished with administrative sanctions or clemency proceedings, amongst others–, and the means of communication have been simplified, the latter being an aspect of great importance

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specifications) (OJ L 116 of 13.5.2003, pages 22/23).

[11] Council Decision 2003/335/JHA of 8 May 2003 setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (OJ L 167 of 26.6.2002, pages 1/2).

[12] Council Decision 2002/956/JHA setting up a European network for the protection of public figures (OJ L 333 of 10.12.2002, pages 1/2).

[13] Council Decision 2001/427/JAI of 28 May 2001 setting up a European crime prevention network (DO L 153 of 8.6.2001, pages 1/3).

[14] http://www.cepol.europa.eu.

[15] http://www.europol.net.

[16] http://www.eurojust.europa.eu.

[17] Joint Action 96/277/JHA of 22 April 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union (OJ L 105 of 27.4.1996, pages 1/2).

[18]Commission Decision 2003/209/EC of 25 March 2003 setting up a consultative group, to be known as the "Experts Group on Trafficking in Human Beings" (DO L 79 of 26.3.2003, pages 25/27).

[19] Rome Statute of the International Criminal Court, Rome, 17 July 1998 (http://www.icc-cpi.int/).

[20] http://www.echr.coe.int/echr.

[21] http://curia.europa.eu/es.

[22] For example, the Criminal Court for the former Yugoslavia, established by Resolution 827 of the United National Security Council, dated 25 May 1993 (http://www.icty.org/); the Criminal Court for Rwanda, established by a Resolution of the United National Security Council, dated 8 November 1994 (http://wwwictr.org).

in practice. This third phase started with the European Convention on Judicial Assistance in Criminal Matters (ECJACM 2000)[23] and has continued up to the present. It represents an extension and enhancement of the field of application of the 1959 Judicial Assistance Convention[24] and the Schengen *acquis*. As this has progressed, the institutional tools have been the last to be incorporated; these tools have emerged precisely in order to throw some light on the complex situation in which judicial cooperation in criminal matters has found itself[25].

1.3. GROUNDS

The grounds for international legal cooperation have also undergone a significant transformation. Cooperation emerged as a means of allowing States to satisfy their own national interests. In an area such as criminal matters, constructed on the basis of the principle of territoriality, the appearance of cross-border disputes or processes with a foreign element highlighted the incapacity of States to deal with these new phenomena on an individual basis. It is paradoxical to note how criminal law, an essential part of the classic construction of sovereignty[26], crumbles when faced with the fact that the territorial boundaries cannot be erected at the limits of state sovereignty. Indeed, it will on occasion be necessary to exercise one's own sovereignty in the territory of other states while, on others, it will be necessary to cede territory so that another state can exercise its sovereignty[27].

Cooperation originally arises as part of that international law that was conceived as a

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[23] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197 of 12.7.00, page 3).

[24] ETS ("European Treaty Series") no. 30, see also the protocol to the convention regarding criminal assistance of 17 March 1978.

[25] Resources which include: the computerised files; the judicial atlas; the assistance forms for drafting writs and the practical guides of legal resources such as the *prontuario*.

[26] Classical theory on sovereignty is summarised by BACIGALUPO ZAPATER in "Jurisdicción penal nacional y violaciones masivas de Derechos Humanos cometidas en el extranjero", *CDJ*, no. 7, 2001, page 199, as follows: "For a legal scholar the borders of a State are the territorial limit of the validity of its rules. The laws of a State are only valid within the territorial space in which they can be imposed, i.e., within the territory in which the State exercises its sovereignty. To put it another way: the limits of my sovereignty are the boundaries of my law. From the opposite perspective, that is, from the outside looking in, the boundaries of the State embody the limit of the power of other States: they define an ambit of exclusion that is expressed in what is known as the non-intervention principle".

[27] In any event, this was not the first time classical theory on sovereignty crumbled, because as BACIGALUPO ZAPATER already pointed out in, "Jurisdicción penal nacional…", *op. cit*., page 200, this had already occurred in the case of human rights, as "the boundaries of the territory will no longer be the only limits of the power derived from sovereignty. The search for legitimacy also acknowledges internal limits in the respect of human rights and the international community guarantees them by means of supranational Courts with jurisdiction in different regions […] After the Second World War of 1939/1945 the Nuremberg and Tokyo Courts set a decisive precedent in the intervention of the international community in the repression of persons who took decisions in the context of the sovereignty of a State. The Statute of the International Criminal Court of 17 July 1988 is the culmination of the evolution of international criminal law".

On the configuration of international criminal courts as another example of international legal cooperation insofar as they imply the surrender of jurisdiction, see LOVELACE, "Sistema de la justicia penal internacional: una hipótesis de integración", *Boletín de Información del Ministerio de Justicia*, no. 1747, pages 75 *et seq.* and SALCEDO VELASCO, "Mecanismos procesales de cooperación judicial", *cit.*, pages 139-256.

primitive right. It is for this reason that its origins can be found in *comitas gentium ob reciprocam utilitaten* (international courtesy or reciprocal utility) and the principle of *pacta sunt servanda* (agreements must be kept). Ultimately, what states sought by cooperating in this area was simply the enforcement of their own law. Judicial cooperation was therefore considered as an end in itself, sought by sovereign states in order to satisfy their own interests. Thus, at that point in history, with judicial cooperation representing a genuine act of sovereignty, it was granted on the basis that the cooperating states had similar constitutional parameters, from which one could infer that they would fulfil the requirements that apply to any request for legal cooperation with reciprocity and in a satisfactory manner. In fact, we can say that what it really involved were two acts of sovereignty that translated as one act of cooperation. On the one hand, the requesting state, who by means of its rogatory letter aims to satisfy its own domestic interests (exercising its *jus puniendi*). And on the other, the requested state, that has to decide whether or not to accede to and comply with the request for cooperation from another state. Both acts were performed on a completely discretionary basis for many years, as the intervention of the ministries of foreign affairs –we must not forget that this is how cooperation arises as part of foreign policy—, would not only slow down the assistance process, but would also transform it into a political act, as both the request from the requesting State, and the granting of the same by the requested state were decided according to criteria of political opportunity and in a highly discretionary manner[28].

Nevertheless, cooperation policies in criminal matters transform rapidly and become an increasingly important function, as they prove to be the only way of effectively fighting international crime that would otherwise go unpunished. It is in this way that the legal systems of the different states become ever more interconnected in relation to criminal matters and with different types of international legal systems (the United Nations, the Council of Europe, the European Union, etc.), increasing common efforts to effectively combat international crime.

In the early 20th century, cooperation policies in criminal matters started to become more intense. Collaboration between States was considered the only efficient way of fighting the crime that had begun to overflow national boundaries. It is precisely at that moment that a preliminary transformation of the raison d'être for collaboration between States in the field of justice takes place. At that moment there is a significant step-up that entails "international courtesy" being replaced by the achievement of social justice as the reason for cooperation policies; understood as a concept of justice that goes beyond the individual interests of states and aims to leave no crime unpunished. It is at this point that cooperation finds its justification in the need to provide an effective response to the fact that, while the defence of society in criminal matters is exercised primarily within a limited scope due to territoriality, crime is not bound by such barriers and is internationalised, rendering the domestic criminal systems ineffective. This is the underlying idea in the works of PESSINA, who in analysing extradition, the classic cooperation institution, observes that it "is based on the legal principle

[28] Although the terms in which cooperation must take place have been embodied in a seemingly endless number of legal instruments, this has not led to the disappearance of discretionality, which has filtered through under the guise of clauses such as public order provisions. An example of this is the declaration contained in the 2000 CJACM, which states that "this Convention does 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, and that it is a matter for each Member State to determine, in accordance with Article 33 of the Treaty on European Union, under which conditions it will maintain law and order and safeguard internal security".

that all States must help one another in order to ensure social justice; and as a common sense of justice, which comes before the individual of interests of different nations is now being acknowledged, we must also recognise the duty of international justice in relation to the need for treaties so that states can help each other in bringing criminals to justice. And even though the autonomy of the nation state, a basic component of the inviolability of territory, is a deeply rooted idea in law, we cannot allow this inviolability to be used against the law itself, becoming something that helps criminals escape and favours their impunity"[29].

This cooperation is possible insofar as the principle of mutual recognition begins to gain weight. The joint fight against international crime can only be sustained on the basis of reciprocal trust of the states cooperating in their respective criminal jurisdictions. This was highlighted in the Council's Programme of Measures dated 15 January 2001[30], based on the Commission's communication of 26 July 2000[31], which pointed out that the principle of mutual recognition is based on a common plinth of convictions comprising freedom, democracy, respect for human rights and the rule of law.

We can say today that the basis for legal cooperation has undergone a further transformation, as in an international community made up largely of states under the rule of law, conflict resolution is inextricably linked to the basic rights. If is for this reason that nowadays international legal cooperation in criminal matters finds its raison d'être: not so much in the state's interest in exercising its *jus puniendi* and resolving the conflict, nor in the search for social justice and the fight against impunity, but in the rights of the parties in criminal proceedings. In this way, cooperation policy would reach a clearly constitutional level, such as that involved in ensuring the right to due judicial protection.

It is important to understand that nowadays the interests that come into play when we talk about international legal cooperation, are not the public interests related to the sovereignty of the State, i.e. the right to punish or conflict resolution, but the private interests of the citizens, essentially their legitimate expectations to have their right to due judicial protection guaranteed and not be left defenceless. And this is because the proceedings to which they are a party are those that are awaiting the possibility of obtaining the collaboration of other judicial authorities in order to ensure an effective resolution of their disputes.

The whole idea of international courtesy playing a role in the processing of a request for assistance has been definitively left behind, together with the traditional ideas of sovereignty or reciprocity on which it was based. The sole, primeval basis for judicial cooperation must be the satisfaction of the right to effective legal protection, avoiding a situation in which those involved in a trial are left defenceless, or are not provided with a legal means before, during or after the trial, due to the foreign element of the same, as their procedural rights and guarantees would otherwise be undermined.

The EU itself is testament to the transformation of the grounds of international legal cooperation. In it, as the result of the creation of a "space of freedom, security and justice", legal cooperation has gone from a virtually insignificant role to become one of the main

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[29] *Elementos del Derecho penal,* translation by Hilarión González del Castillo, 4th Ed., Reus, Madrid, 1936, page 258.

[30] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C, no. 12 of 15.1.2001, page 1.

[31] Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final.

actors, since in a common space, cooperation is a premise for justice, as disputes tend to become cross-border affairs.

In this context the development of cooperation policies has become the only effective instrument for ensuring the right to due court protection for citizens of the EU, and it is for this reason that there is even talk of a new freedom, that of the possibility for a judgment to move throughout the European Union and in this way guarantee the geographical continuity of citizens' rights in the entire European space. In fact, the free movement of judgments in civil cooperation is a reality today, and we hope that it will not be long before the same can be said in relation to criminal matters[32].

Therefore, and by way of conclusion, we could say that the states not only have the right but also the duty to provide the corresponding legal assistance when requested, as they have a duty in the sense that they are obliged to guarantee the right to effective judicial protection, both as requested states and as requesting states. Nevertheless, it must not be forgotten that all of this will only be possible when such legal cooperation can take place in the context of the constitutional principles and rights of the state in question. Thus the importance, as we will see later, of the need to harmonise the substantive and procedural laws in criminal matters, which is the only way for the principle of mutual recognition –the driving force behind cooperation in our times– to have full effect[33].

2. PAST, PRESENT AND FUTURE OF COOPERATION IN CRIMINAL MATTERS

If there is one particular aspect that seems to have remained unchanged in this brief but intense process of transformation that cooperation policies have undergone, it is without a doubt their essential international public law nature. Let us return to the definition with which we started and transfer it to this context; we are dealing with an activity carried out jointly by at least two States –although we have seen how nowadays it can be between states and international law institutions–, aimed at achieving the effectiveness of criminal law

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[32] On this point see J.L. IGLESIAS BUHIGUES and M. DESANTES REAL, "La quinta libertad comunitaria: competencia judicial, reconocimiento y ejecución de resoluciones judiciales en la Comunidad Europea", in E. GARCIA DE ENTERRIA y OTROS (eds.), *Tratado de Derecho comunitario europeo. Estudio sistemático desde el Derecho español,* vol. III, Civitas, Madrid, 1986, pages 711 *et seq*.

[33] This is something that still seems complicated in our times because as PARRA GARCÍA warns in, "El nuevo régimen de las solicitudes de asistencia judicial en materia penal", cit., pages 109-110: "international judicial cooperation will always be presided over –and indeed inevitably so– by the intimate connection that the field has with the exercise of the sovereignty of States and the exercise of their *jus puniendi*. This situation usually gives rise to the following consequences: the States are usually more reluctant to embark on the preparation of conventions in this area: the debates on the final wording can go on forever; once the text is approved, ratification may be delayed and the presentation of declarations and reservations prolongs the process enormously. Meanwhile, the citing of the principle of reciprocity is multiplied in many internal provisions of the texts making it necessary to take recourse, when it comes to application, to the casuistry in question; when the text enters into force, the doubts regarding interpretation can lead to abuse in the form of resorting to the intervention of Central Authorities, with the ensuing delay of the process of sending and returning judicial assistance; what is more, the instrument in force must be considered in relation to other earlier ones, of different institutional origins and different territorial scopes; setting in motion an application for judicial assistance under an international instrument, the effective fulfilment of which will generally have to bear the burdens derived from ignorance of mutual procedural systems, the different legal systems and the respective judicial structures, language barriers, incorrect interpretation of requests..., etc.".

and the criminal law of procedure in one of the States involved. The truest source of mechanisms of legal cooperation in criminal matters is, and has always been, the treaty[34]. Nevertheless, this could change in the near future because if the provisions of the Lisbon Treaty[35] are fulfilled, we will be presented with supranational, albeit not international, law, insofar as the EU will reflect the will of the Member States and its citizens, because its powers derive from said states[36].

But until that moment arrives, we can take a brief look at the evolution of international legal cooperation by dividing it into the different ambits (bilateral or regional) in which this international law has developed.

2.1. COOPERATION IN THE PAST

When talking about judicial cooperation in criminal matters one is inevitably talking about something that has emerged in recent times. The emergence of cooperation mechanisms between states in the fight against crime goes back no further than the end of the 19th or the start of the 20th century. Prior to this historic moment, the need for cooperation can be said to have been limited almost exclusively to the surrender, by means of the mechanism of extradition, of those persons accused or found guilty of serious crimes. In fact, this cooperation relied on there being a certain political understanding between the cooperating states as well as solid historical links. As we have already seen, cooperation was subject to the rules of a good understanding and goodwill based on reciprocity, so that, on an exceptional basis, one state (the requested state) allowed another (the requesting state) to use its justice administration to carry out its own judicial process.

It is in the second half of the 20th century when the outbreak and spread of serious forms of crime associated with terrorism, drug trafficking, trafficking in human beings and organised crime in general, led to a crisis for criminal law as conceived since the classical theory of sovereignty. This is how alliances began to be formed; first between states and subsequently on a regional basis, leading to a supranational response to a problem of international significance.

These events are what triggers the evolution of international cooperation for the repression of crime between states, allowing it to be based on principles that objectively

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[34] At this point we are using the term "treaty" in its broadest sense, i.e., as a generic term used to refer to all binding instruments of international law agreed between international entities, regardless of their formal title. However, the Vienna Conventions of 1969 and 1986 confirm this generic use of the term. Thus, the 1969 Vienna Convention on the Law of Treaties considers a treaty to be "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Meanwhile, the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations extends the definition of treaty to include international organisations as parties. It considers a treaty to be "an international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[35] Signed on 13 December 2007 by the Heads of State or Government of the twenty-seven (OJ 2007/C 306/01).

[36] In this regard the Lisbon Treaty merely maintains the new developments contained in the Constitutional Treaty because the consideration of police and judicial cooperation in criminal matters as an extra-community pillar disappears, but above all because it considers it in its entirety to comprise a shared power of the EU, while maintaining the territorial exception for the United Kingdom, Ireland and Denmark, just as the Constitutional Treaty did.

restrict the sovereignty of each country. The classical theory of sovereignty was thus surpassed; based as it was on the principle of territoriality and non-intervention, it resulted in the impunity of international crime. In this regard, the contribution of international bodies and in particular the United Nations, the Council of Europe and the EU was decisive and invaluable. The first attempts at cooperation in criminal matters based on conventional routes were an absolute disaster, because, not having fully left behind the concept of cooperation as an act of sovereignty, the treaties left too much room for political discretion in granting assistance, thus condemning them to failure. The situation arose even in the context of the EU, where the Convention on the simplified extradition procedure[37] and the Convention on extradition between EU Member States[38] never entered into force and were only provisionally applied by a few states. This failure was due, among other things, to the scepticism caused by the broad margins for political discretion that they contemplated.

2.2. COOPERATION TODAY

2.2.1. THE NECESSARY PERSISTENCE OF BILATERAL ENVIRONMENTS

Even though the origins of international legal cooperation in criminal matters can be found in bilateral intergovernmental policies, and it subsequently went on to advance on both multilateral and regional levels, this has not led to the disappearance of the original form of cooperation. What is more, it could be said that, generally speaking, it represents an improvement of the provisions of a regional nature. Proof of this can be seen, for example, in Article 1.2 of the 2000 ECJACM[39], which states that: "This Convention shall not affect the application of more favourable provisions in bilateral or multilateral agreements between Member States or, as provided for in Article 26(4) of the European Mutual Assistance Convention, arrangements in the field of mutual assistance in criminal matters agreed on the basis of uniform legislation or of a special system providing for the reciprocal application of measures of mutual assistance in their respective territories"[40]. What this amounts to is recognition that on occasion the relations between two states derived from their condition as neighbours or their historical, political or cultural links can be sufficient to make better instruments of cooperation possible. Although globalisation has promoted a joint fight of states against crime, it is also true that, on occasion, the instruments established on a regional level cannot compare with those that can be achieved by means of bilateral agreements between states that share full trust in each other's legal systems as they have historically evolved in the same direction.

Just the opposite can be said of those bilateral ambits of cooperation that survive today because differences between states –be they geographical, historical, political or cultural– rule out integration in a single regional ambit, so that the most basic levels of

[37] Council Act of 10 March 1995, adopted on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union, DO C 78 of 30.3.1995.

[38] Council Act of 27 September 1996, adopted on the basis of Article K.3 of the Treaty on European Union, establishing a convention relating to extradition between the Member States of the European Union, OJ C 313 of 23.10.1996.

[39] Council Act of 29 May 2000 (OJ C 197 of 12.7.2000).

[40] In fact, Article 22 of the same text repeats that "Nothing in this Title shall preclude any bilateral or multilateral arrangements between Member States for the purpose of facilitating the exploitation of present and future technical possibilities regarding the lawful interception of telecommunications".

cooperation, such as extradition, require bilateral conventions[41].

2.2.2. THE CONSOLIDATION OF MULTILATERAL ENVIRONMENTS FOR THE DEVELOPMENT OF COOPERATION

a) In the ambit of the UN

The United Nations is, and always has been, the largest international organisation in existence[42], and it is for this reason that the development of policies for international legal cooperation in criminal matters has been intimately linked to its activities.

The work of the UN, in attempting to rise above the individual interests of each state, has been successful on numerous occasions, achieving the approval and entry into force in recent times of a significant number of multilateral conventions whose objective was fighting the most serious manifestations of organised crime (terrorism, drug-trafficking and organised crime in general), as well as the internationalisation of criminal activities in general. In order to achieve this it has of course promoted the development of cooperation policies in each of its conventions.

In fact, the first definition in a treaty of what the term "judicial assistance" should be understood to mean is in the UN Convention on the illicit traffic of narcotic drugs and psychotropic substances of 20 December 1988. Article 7 of this Convention contains an exhaustive definition of the types of cooperation, with the exception of extradition, which is dealt with in Article 6. Despite its broad nature, this definition has inspired multiple bilateral and regional conventions on judicial assistance in criminal matters that saw the light in the years that followed[43].

Therefore, its ultimate aim is preventing any criminal activity on an international scale going unpunished, providing an incentive for judicial cooperation between states in this regard. Several conventions have been ratified in the context of the UN which have ultimately aimed to promote international judicial cooperation in criminal matters in order to fight international crime.

b) In the ambit of the Council of Europe

It is obvious that the seeds of international legal cooperation in criminal matters were sown in the work carried out by the Council of Europe during the second half of the 20th century. The Council managed to lay the foundations for the subsequent development of cooperation policies in the EU. In fact, many of the instruments it created continue to be the

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[41] Proof of this can be found, for example, in the Extradition Treaty between the Kingdom of Spain and the People's Republic of China, signed in Madrid on 14 November 2005 (Spanish State Gazette –BOE– 28 March 2007); the Extradition Convention between the Kingdom of Spain and the Republic of Korea, signed in Seoul on 17 January 1994 (Spanish State Gazette 4 February 1995); the Extradition Treaty between the Kingdom of Spain and the Republic of India, signed in Madrid on 20 June 2002 (Spanish State Gazette 27 March 2003) and the Extradition Convention between the Kingdom of Spain and the Islamic Republic of Mauritania, signed on 12 September 2006 (Spanish State Gazette 8 November 2006).

[42] It currently has 192 Member States, practically all of which are internationally recognised.

[43] The wording of Article 7.2 of the United Nations Convention on the illicit traffic of narcotic drugs and psychotropic substances of 20 December 1988, under the title "mutual legal assistance" established that: "Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes: a) Taking evidence or statements from persons; b) Effecting service of judicial documents; c) Executing searches and seizures; d) Examining objects and sites; e) Providing information and evidentiary items; f) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records; g) Identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes".

pillars supporting collaboration between European states today[44]. Its texts constitute the first manifestation of the intention to cooperate on a European level, thus going beyond the traditional cooperation based on bilateral conventions.

Although the Council of Europe has approved numerous texts related to international legal cooperation, as we will see below, three of these were landmarks that represented a watershed in European cooperation and are well worth at least a brief mention.

The first of the great conventions on judicial cooperation in criminal matters in the ambit of the Council of Europe was the one on "major cooperation", namely extradition. The 1957 Extradition Convention represented three major advances in this area. Firstly, it did away with the list of crimes system and replaced it with the double incrimination system. Secondly, it marked the disappearance of the *prima facie* principle and, lastly, it replaced diplomatic channels with direct communication between justice ministries, meaning requests could be processed more quickly. In this way, the Convention on extradition represented a significant advance when compared with the traditional bilateral conventions in this field, as it set out international obligations instead of discretionary powers. It was, however, unable to avoid get-out clauses such as those on public order, which just goes to show that at this moment in time cooperation was still anchored to the concept of national sovereignty and, as a result, to the idea of cooperation as a political act at the end of the day.

While the second text, the 1959 Convention judicial assistance in criminal matters, was born of a desire to facilitate the application of the 1957 European Extradition Convention, it soon became important in its own right as it envisaged the possibility of acceptance by a significant number of states and because it was a rule that was susceptible to widespread application. This change in its projection was a huge success, as even today it continues to be one of the most important treaties from a practical point of view. Its scope of application only mentioned criminal infringements, and excluded tax, political and military crimes, while it set out three different modes of cooperation. The first, and most important, refers to rogatory letters for acts of investigation, including seizure, albeit with significant restrictions. The second deals with what is termed minor cooperation, i.e. notifications and citations for experts and witnesses. Thirdly, it contemplated the notification of criminal records, which could be carried out for specific cases or involve sending annual dispatches to the Central Registries of each state in relation to the sentences imposed on its citizens in the other participant state. For practical purposes it is important to highlight that this Convention represented the first time that the possibility of direct communication between judges and prosecutors via INTERPOL was contemplated for those rogatory letters considered urgent, thus avoiding the need to go through the justice ministries. Like with the Extradition Convention, legal obligations were established for the participant states, so that they cannot refuse to cooperate other than on grounds of public order, sovereignty or national security, reasons that in practice can be interpreted in a broad sense.

Finally, we must mention the Convention on the transfer of sentenced persons, by virtue of which a foreigner sentenced in a participant state can ask to serve his/her time in a state of which he/she is a citizen or one with which he/she has close links. It contains the right to apply for a transfer, which should not be confused with the existence of a subjective right to a transfer. If the transfer takes place, the legislation of the state where the sentence

[44] A detailed analysis of this topic can be found in MIGUEL ZARAGOZA, "El espacio jurídico-penal del Consejo de Europa", *op. cit*., pages 13-40.

is being served will apply, although the two states involved may agree to grant an amnesty, a pardon or the commutation of the sentence. In any event, the consent of the guilty party will be necessary in order to do so, as compulsory transfers are not permitted. Meanwhile, this Convention, unlike others, does not contemplate legal obligations; indeed the requested state does not even have to justify its decision. Here again, we would appear to be dealing with an act of sovereignty rather than a true mechanism of legal cooperation.

The importance of these Council of Europe texts lies in the fact that while they are not universal conventions, as in theory they can only be signed by states belonging to the Council of Europe, the Committee of Ministers may invite non-European third-party states to join. Thanks to this mechanism they have been able to extend their initial scope, thus enhancing the effectiveness of the instruments envisaged therein.

While the wide scope in relation to the possibility for third-party states to join the Council of Europe Conventions has been the greatest success of its judicial cooperation system, its failing has been not to establish a court along the lines of the ECJ for this ambit, as there is no avenue for the judicial resolution of conflicts of interpretation or application in this regard, which means that parties have to resort to the always complex and delicate diplomatic route.

c) In the ambit of the European Union

Without a doubt, it is in the context of the EU where the greatest degree of development of cooperation policies has been achieved; the fact that the different Member States have established a community has favoured this process, since we have already pointed out how such policies require a context of integration and trust in order to fully develop. While this matter will be dealt with in the following units, we must make at least a brief reference to it, in order to understand why it is in this regional context that the construction of a common space of justice is planned, and one which, as we will see, is not without its objections.

Within the ambit of the EU the development of judicial cooperation policies can be found in the Amsterdam Treaty, as it is there that the construction of a space of freedom, security and justice was contemplated for the first time. This treaty represented a substantial improvement on the regulations regarding this area contained in the so-called Third Pillar. On the one hand, the objectives were set out: strengthening police and judicial cooperation in order to prevent impunity and public insecurity. It thereby sought to create a space of freedom, security and justice in which the free movement of persons would be guaranteed, while it also ensured the prevention of, and effective fight against, crime. On the other, it incorporated a new instrument, the framework decision, which could replace inter-state conventions[45].

These improvements proved to be more theory than practice, as the framework decisions, as set out in Article 34.2.b) of the TEU, needed the unanimity of the Council in order to be approved, making it more difficult to adopt them and meaning that they are more

[45] We should recall that the areas that form part of this Third Pillar are characterised by the fact that they constitute intergovernmental rules under Title VI of the European Union, which means that they are developed by means of intergovernmental Decisions and Agreements. Therefore, we are dealing with the policies in which the Member States agree to cooperate, maintaining their ultimate decision-making power via the Council, leaving the rest of the Community institutions in the background. Thus, the leading role in the development of these areas continues to be played by the Member States while the Commission, the Parliament and the Court of Justice remain in the background.

infrequent in practice. Moreover, as the framework decisions only bind the participant states in relation to the results, leaving it up to them to choose the manner and methods of achieving them, they also failed to perform the intended function of legislative and regulatory approximation for which they had been designed. Despite this, the pronouncement of the European Court in the well-known Pupino Case[46] in which it stated that domestic law should be interpreted pursuant to the framework decisions, revived the hope that these legal instruments would indeed perform their harmonising function.

It was the consecration of the principle of mutual recognition as a basis for the construction of the space of freedom, security and justice at the European Councils of Cardiff (1998) and Tampere (1999) that really meant that the traditional rules and criteria of cooperation associated with international judicial assistance had been surpassed[47]. This principle has served as the medium through which the development of cooperation instruments favouring more expedient and efficient processes has been sought, processes in which the political and indeed often random elements that mutual assistance entailed would disappear. In order to achieve this, it was necessary to attain a certain degree of harmonisation or approximation of the criminal and procedural legislation of the Member States, and this led to the approval of several legal instruments aimed at achieving just that[48]. In any event, it is necessary to point out that the use of new cooperation mechanisms has not implied the disappearance of intergovernmental cooperation policies between the Member States[49].

The construction of this common space of freedom, security and justice required not

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[46] Judgment of the ECJ (Grand Chamber), dated 16 June 2005, C-8209; 105/03. The text is available at www.curia.eu.

[47] Conclusion no. 33 of the Presidency of the Council of Tampere reads as follows "Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. *The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union*. The principle should apply both to judgements and to other decisions of judicial authorities" (The full text of the conclusions is available at www.europarl.europa.eu/summits/tam_es.htm).

[48] Proof of this can be found, for example, in the replacement of the traditional extradition process –slow and complex to execute–, with the European arrest warrant introduced by Council Framework Decision 2002/584/JAI of 13 June 2002 [OJ L 190 of 18.7.2002], establishing a faster, more simple system which did away with the political and administrative process, in favour of a judicial one. It states that "The European arrest warrant proposed by the Commission is designed to replace the current extradition system by requiring each national judicial authority (the executing judicial authority) *to recognise, ipso facto, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State* (the issuing judicial authority)".

[49] Following on from the above example, The Council Framework Decision of 13 June 2002 regarding the European arrest warrant and surrender procedures between Member States affirms that "As of 1 July 2004, the framework decision will therefore replace the existing texts, such as: the 1957 European Extradition Convention and the 1978 European Convention on the suppression of terrorism as regards extradition; the agreement of 26 May 1989 between 12 Member States on simplifying the transmission of extradition requests; the 1995 Convention on the simplified extradition procedure; the 1996 Convention on extradition; the relevant provisions of the Schengen agreement.

Nevertheless, the Member States remain at liberty to apply and conclude bilateral or multilateral agreements insofar as such agreements help to simplify or facilitate further the surrender procedures. The application of such agreements may in no case affect relations with Member States that are not parties to them".

only legal resources but also institutional ones, meaning that we can talk about a true policy of institutional cooperation in criminal matters. European institutions such as EUROPOL, a central agency for joint police work, were created to coordinate national criminal prosecution activity[50]. Eurojust[51] was born as an EU body designed to intensify the effectiveness of the competent authorities in Member States in the fight against serious forms of organised and transnational crime. It aims to facilitate due coordination of judicial investigations and actions, while at the same time providing support for Member States to enhance the effectiveness of their investigations and actions. Moreover, the European Anti-Fraud Office (OLAF)[52] was created with a mission to protect the financial interests of the EU, combat fraud, corruption and any other irregular activity, including irregularities within European institutions.

This cooperation panorama which until that point had materialised in the form of a policy of harmonisation of national systems –via framework decisions–, and an institutionalised cooperation policy –via the creation of collaboration institutions–, seemed to undergo a further transformation with the Treaty establishing a Constitution for Europe[53], which finally gave this area a community-wide dimension. Nevertheless, its rejection has meant that the space of freedom, security and justice will continue to be a space created by means of the regulation of the joint efforts of the national authorities in the fight on crime for a while yet. This situation has undergone an important transformation recently with the entry into force of the Treaty of Lisbon[54], which despite duly containing a large part of the innovations of the Constitution Treaty, has amended some of its contributions in relation to the regulation of justice and home affairs, with a view to promoting action being taken on a European level in these spheres. Among the new developments introduced is the generalisation of the application of the community method of the first pillar, the rule of the qualified majority for decision-making as a general rule of operation with the participation of the European Parliament in the same. Thus, the acts belonging to the "third pillar" (common positions, framework decisions, complementary decisions and agreements) disappear; and the legislative acts applicable until now to the "first pillar" (regulations, directives, decisions, recommendations and opinions) become standard.

Moreover, the Treaty represents an enhancement of the role of the European Parliament, the national Parliaments and the Court of Justice, which as of this point extends its jurisdiction to the entire space of freedom, security and justice. The Charter of Fundamental Rights is given binding legal status, acquiring the same value as the Treaties.

Meanwhile, some modifications not envisaged in the Constitution Treaty have been introduced which constitute an enhancement of intergovernmental elements, on the one

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[50] Council Act, dated 26 July 1995, drawing up the Convention creating the European Police Office (Europol Convention).

[51] Council Decision 2002/187/JAI, dated 28 February 2002 (OJ L 63 of 6.3.2002), amended by Council Decision 2003/659/JAI, dated 18 June 2003 (OJ L 245 of 29.9.2003).

[52] Created by Commission Decision 1999/352/EC, EURATOM (OJ L 136 of 31.5.1999, page 20).

[53] Treaty establishing a Constitution for Europe, (OJ 2004/C 310/01).

[54] The Treaty of Lisbon amending the TEU and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007 (OJ 2007/C 306/01) entered into force on 1 December 2009, according to the provisions of Article 6. In relation to the changes introduced by this Treaty see SOBRINO HEREDIA "El Tratado de Lisboa o la capacidad de Europa para reinventarse constantemente", *Revista General de Derecho Europeo*, no. 19, 2009, pages 1-16.

hand, and exemption clauses that allow an *à la carte* design, thus limiting the legal effect of the measures depending on the degree of integration sought by each state, on the other[55].

2.2.3. THE FUTURE OF COOPERATION

The road travelled thus far augurs well for the future of cooperation, as it is not just in the context of the EU that progress is being made, albeit the process is not without its difficulties, toward the creation of a common judicial space –which would strictly speaking mean surpassing cooperation–; indeed it goes beyond the regional level movement, here too cooperation is growing and expanding in line with the globalisation that has made it possible for crime to cross borders. Therefore, for as long as organised crime and the internationalisation of criminal activities exist, international legal cooperation in criminal matters will continue to boast a rude state of health. Modern states, rather than giving up in the fight on crime, will have to put their efforts into establishing the most efficient cooperation mechanisms possible, as it is not just national interests that are at stake, but also, and above all, the interests of the persons who are the victims of crime.

What we will be looking for in the near future, and this is a process that is already in motion, is for the States to continue advancing from the different regional and even global ambits towards the harmonisation of substantive and procedural laws in relation to criminal matters. It is only through the adoption of rules that guarantee a high degree of protection of the rights of individuals, and that as such make it possible to create mutual trust between different states, that the principle of mutual recognition can be reinforced, and this is and will continue to be a key element of judicial cooperation.

Proof of this reality has been provided by the Hague Programme[56] which considers that "Judicial cooperation both in criminal and civil matters could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law. In an enlarged European Union, mutual confidence shall be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality. In order to facilitate full implementation of the principle of mutual recognition, a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary and consistent with all the existing European mechanisms, must be established".

It would seem that at present the future of judicial cooperation will have to be oriented not so much towards those operational aspects from which it originally evolved, but in the direction of the new content aimed at common development of both substantive and procedural rules of a criminal nature, which make it possible to implement the principle of mutual recognition based on trust between states.

3. SOURCES OF INTERNATIONAL LEGAL COOPERATION

Now that we have set out the transformation that international legal cooperation in

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[55] See LIROLA DELGADO, "La cooperación judicial en materia penal en el Tratado de Lisboa: ¿un posible proceso de comunitarización y consolidación a costa de posibles frenos y fragmentaciones?", *Revista General de Derecho Europeo*, no. 16, 2008, page 3 *et seq.*

[56] Communication of 10 May 2005 from the Commission to the Council and the European Parliament. The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice" [COM (2005) 184 final].

criminal matters has undergone in recent times, all that is left for us to do is offer a general overview of the different sources that exist. In order to do so, we have considered that instead of using a classification based on the type of source (bilateral or multilateral convention, supranational law, etc.) or the scope of application of the same, on the occasion of this preliminary approach to the topic it may be more interesting to look at the different substantive ambits that have been dealt with by the instruments of legal cooperation.

While not intending it to be an exhaustive list, we will at least try to provide what will be a general overview, containing a systematic list of some of the most relevant instruments by matter that have been established under the UN. Moreover, we will refer to the Conventions approved by the Council of Europe as well as its Recommendations, as they are instruments aimed at achieving the harmonisation of different systems of legislation that, as we have seen, constitutes one of the requisites for the future effectiveness of the cooperation policies. And finally, this collection of sources will also contain the different instruments implemented in the EU.

HUMAN RIGHTS AND PROCEDURAL GUARANTEES	AGENCIES AND INSTITUTIONS	SECURITY AND INVESTIGATION
Universal Declaration of Human Rights (UN General Assembly 1948)	EUROPOL CONVENTION Council Decision of 6 April 2009 establishing the European Police Office	Convention on the protection of the financial interests of the EU and its protocols
International Covenant on Civil and Political Rights (1966)	Framework decision establishing EUROJUST Council Decision 2009/426/JHA of 16 Dec. 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA of 28 Feb. 2002 setting up Eurojust with a view to reinforcing the fight against serious crime	Regulation on the protection of financial interests
European Convention on Human Rights and Fundamental Freedoms (1950)	Joint action establishing liaison magistrates	Regulation concerning investigations by OLAF
Charter of Fundamental Rights of the EU (2000) Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual	Joint action creating the European Judicial Network	Protocol on the Schengen *acquis* integrated into the framework of the EU

recognition to decisions rendered in the absence of the person concerned at the trial Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of conviction in the Member States of the European in the course of new criminal proceedings		
	Framework decision on JOINT INVESTIGATION TEAMS	Convention implementing the Schengen Agreement on the gradual abolition of checks at common borders
	Commission decision creating the EUROPEAN ANTI-FRAUD OFFICE	Convention on the stepping up of cross-border cooperation
		Convention on mutual assistance and cooperation between customs administrations (Naples II)
		Framework decision on the exchange of information and intelligence between law enforcement authorities
		Recommendation (2001)10, on the European code of police ethics, 19 September 2001. Recommendation (2003)21, concerning partnership in crime prevention.

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JUDICIAL ASSISTANCE

European Extradition Convention

European Convention on Judicial Assistance in criminal matters

European Convention on the Transfer of Sentenced Persons

Convention on the international validity of criminal judgments

Convention on the Transfer of Proceedings in Criminal Matters

Framework decision on the European arrest warrant and the surrender procedures

Framework decision on the execution of orders freezing property or evidence

Framework decision on the application of the principle of mutual recognition of financial penalties

Framework decision on the confiscation of instrumentalities and the proceeds from crime

Agreement of Member States of the EC on the transfer of sentenced persons

Convention on simplified extradition procedure between the Member States

Convention on extradition between Member States

Convention on judicial assistance between Member States of the EU and its protocol

Agreement between the International Criminal Court and the European Union on cooperation and assistance.

Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation

HARMONISATION OF CRIMINAL LAW

CORRUPTION

UN Convention against Corruption 31 October 2003

UN Convention against Transnational Organized Crime 8 January 2001

UN International Code of Conduct for Public Officials 28 January 1997

UN Declaration against Corruption and Bribery in International Commercial Transactions 21 February 1997

UN Measures against Corruption and Bribery in International Commercial Transactions 25 January 1999

Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (1997)

Framework decision 2003/568/JHA combating corruption in the private sector

ORGANISED CRIME

UN Convention against Transnational Organized Crime 15 November 2000

Joint Action 98/733/JAI making it a criminal offence to participate in a criminal organisation in the Member States of the European Union

Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime

DISCRIMINATION

UN International Convention on the Elimination of All Forms of Racial Discrimination 21 December 1965

UN Convention on the Elimination of All Forms of Discrimination against Women 18 December 1978

Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

MINORS AND CRIMINAL LAW

UN Convention on the Rights of the Child 20 November 1989.

Declaration on the Rights of the Child, General Assembly of the United Nations, Resolution 1386 (XIV), 20 November 1959

Council Framework Decision 2004/68/JAI on combating sexual exploitation of children and child

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in criminal matters

Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of conviction in the Member States of the European in the course of new criminal proceedings

Resolution (75)11, on the criteria governing proceedings in the absence of the accused, 21 May 1975.

Recommendation (80)9, concerning extradition to states not party to the European convention on human rights, 27 June 1980.

Recommendation (80)11, concerning custody pending trial, 27 June 1980.

Recommendation (85)11, on the position of the victim in the framework of criminal law and procedure, 28 June 1985.

Recommendation (87)18, concerning the simplification of criminal justice, 17 September 1987.

Recommendation (92)1, on the use of analysis of DNA in the framework of the criminal justice system, 10 February 1992.

Recommendation (92)17, concerning consistency in sentencing.

Recommendation (97)13, concerning the intimidation of witnesses and the rights of the defence.

Recommendation (2000)19, on the Role of Public Prosecution in the Criminal Justice System, 6 October 2000.

Recommendation (2006)8, on assistance to crime victims.

pornography

Convention 201 of the Council of Europe on the Protection of Children against Sexual Exploitation and Sexual Abuse

Recommendation (2003)20, concerning new ways of dealing with juvenile delinquency and the role of juvenile justice

PENAL LAW

UN Standard Minimum Rules for the Treatment of Prisoners 31 July 1957

AIR AND MARITIME SECURITY

Convention on Offences and Certain Other Acts Committed On Board Aircraft ("Tokyo Convention") 1963

Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention") 1970

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Montreal Convention"), regarding the acts of air sabotage, such as the explosion of bombs on board an aircraft in flight 1971

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, regarding terrorist activities on ships 1988

UN Convention on Maritime Law (1982)

TERRORISM

Convention on the Physical Protection of Nuclear Material ("Nuclear Material Convention"), on the unlawful taking and use of nuclear material 1980

UN International Convention for the Suppression of Terrorist Bombings 9 January 1998

Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991

International Convention for the Suppression of Terrorist Bombings 1997

International Convention for the Suppression of the Financing of Terrorism 1999

International Convention for the Suppression of Acts of Nuclear Terrorism 2005

Framework decision 2002/475/JAI on combating terrorism

EC Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism

Directive on the prevention of the use of the financial system for the purpose of money laundering

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and terrorist financing (2005)

Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems

European Convention on the Suppression of Terrorism 1977

Council of Europe Convention on the Prevention of Terrorism 2005

DRUG TRAFFICKING

Single Convention on Narcotic Drugs 1961

Convention on Psychotropic Substances 1971

UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988

Framework Decision 2004/757/JAI laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.

TORTURE

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

TRAFFICKING IN HUMAN BEINGS AND ILLEGAL IMMIGRATION

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children

Council Framework Decision 2002/629/JAI, on combating trafficking in human beings

Council Framework Decision 2002/946/JAI, on strengthening the penal framework to prevent the facilitation of unauthorised entry, transit and residence

MONEY LAUNDERING AND THE FINANCIAL SYSTEM

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)

Directive on insider dealing and market manipulation (market abuse)

International Convention for the Suppression of Counterfeiting Currency (1929)

Framework Decision Combating fraud and counterfeiting of means of payment

CRIMINAL PROCEDURE AND VICTIMS

European Convention on the compensation of victims of violent crimes

Framework Decision on the standing of victims in

COUNCIL OF EUROPE

EUROPEAN UNION

UN

oyo de la Unión Europea
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criminal proceedings (2001)
Council Directive 2004/80/EC relating to compensation to crime victims

4. FINAL CONSIDERATIONS

We can say by way of conclusion that until fairly recently, international cooperation between states in criminal matters took the form of bilateral agreements entered into by different countries –and in the absence of such agreements, it took place under the aegis of the principles of wilfulness and reciprocity–. Nowadays, it is hard to find a single area without regional or multilateral regulations. The avenue of bilateral cooperation has been reduced to improving the terms of bilateral agreements between states with certain historical, political or cultural links or to regulating a minor collaboration activity with other countries that, due to their particular nature, have not managed to join a regional ambit of cooperation.

In addition to the confirmation of this reality, this brief overview of the evolution and current status of international legal cooperation policy in criminal matters has intended to highlight the complex nature of this area. Not only does it include diverse ambits, each one of these contains a multitude of highly varied legislative techniques, to which we also have to add the regulations on matters of this kind which, far from remaining stable, continue to increase, thus showing the need to pull together in the fight against crime. All of this contributes to the creation of a genuinely complex panorama for legal actors, which is ultimately quite a concern as on many occasions the right to effective judicial protection today depends on judicial cooperation. And this fact should be the overriding principle of any future development of international legal cooperation in criminal matters. While it is true that significant efforts have been made with a view to providing rapid, effective responses in the field of judicial cooperation, we still have a long way to go before we can boast a justice system that deals with transnational phenomena with the same efficiency as with internal ones. Despite the fact that we often seem to be moving toward the principle of mutual recognition of judgments, the spectre of mistrust still lurks in the development of other measures –particularly in relation to the newer members in the case of the EU and those countries further removed from our cultural environment–, forcing us to return over and over again to cooperation based on the idea of *comitas gentium*, from which the principle of reciprocity derives; despite the fact that many believed it had disappeared, it still thwarts our attempts to construct a common space that guarantees justice.

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