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The 1959 Convention on Mutual Assistance Criminal Matters

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1. INTRODUCTION.-

The creation of the Council of Europe in 1949 represented a watershed for the field of legal cooperation in criminal matters on a European level, as it marked the start of a new phase in which the legal instruments used for international cooperation transcended mere bilateral or multilateral conventions and became part of a more-or-less intense process of European integration that comprises other aspects in addition to mere legal assistance or cooperation[1]. Among the international treaties promoted by the Council of Europe in legal cooperation in criminal matters are the 1957 European Convention on Extradition and the 1959 European Convention on Mutual Assistance in Criminal Matters, which even today are two of the basic pillars upon which legal cooperation in criminal matters between European states is based.

The statute of the Council of Europe differentiates between the terms “convention” and “agreement”, although in truth the distinction has no legal meaning once the corresponding text is in force, as their binding nature is identical. The difference between one instrument and the other refers to the procedure for becoming a party to it, because conventions usually require the states to sign and ratify them, while the agreements only require signing or acceptance. All the Council of Europe conventions have a similar formal structure. They start out with a short preamble, which recalls the general purposes of the Council of Europe, followed by a specific paragraph regarding the convention in question, the body of the treaty and some concluding clauses regarding its entry into force, signing and ratification, possible reservations and denunciation, including what is known as the “colonial

[1] In this regard, see CARMONA RUANO, M.: *Formas específicas de asistencia judicial (II)*, in Derecho Penal Supranacional y Cooperación Jurídica Internacional. Cuadernos de Derecho Judicial no. XIII, Consejo General del Poder Judicial, 2003, pages 192 to 194.

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clause" which allows the convention to be extended to the colonial territories of the states who are party to it.

According to DE MIGUEL ZARAGOZA[2] we can highlight the following main characteristics of the Council of Europe conventions (including those regarding cooperation in criminal matters):

A) They are statutory acts of the organisation, whose force is derived from the acceptance by the states via formal channels: signing with a ratification reservation, acceptance or accession.

B) They are drawn up by committees of experts from the states, revised by the Steering Committee to which the corresponding Committee of Experts answers and are submitted for the approval of the Committee of Ministers.

C) The number of ratifications necessary so that each of the conventions enters into force internationally is small; generally ratification by three states is sufficient. This point can seem misleading, as the lists of the Council of Europe set out quite a wide range of the instruments in force; however, in some cases they apply to few states.

D) They are not universal conventions because, in principle, they are only open to the Member States of the Council of Europe. However, third-party states, even non-European ones, can be invited to join by the Committee of Ministers; this decision is generally adopted unanimously by the states that are already party to the convention in question. For example, Spain has been a party to the 1968 European Convention on Information on Foreign Law since 1974 (as such, since before it joined the Council of Europe), Israel has been a party to the 1957 European Convention on Extradition and the 1959 European Convention on Mutual Assistance in Criminal Matters for many years and the USA and Canada are parties to the 1983 Convention on the transfer of sentenced persons. Exceptionally some conventions (for

[2] DE MIGUEL ZARAGOZA, J.: *El espacio jurídico-penal del Consejo de Europa*, en Política Común de Justicia e Interior en Europa. Cuadernos de Derecho Judicial no. XXIII, Consejo General del Poder Judicial, 1995, pages 25 to 27.

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example, the 1977 European Convention for the Suppression of Terrorism) are closed, as they are only open to the Member States of the Council of Europe.

E) Conflicts arising in the interpretation or application of the conventions are resolved via diplomatic and not judicial channels, as the framework of the Council of Europe does not have a judicial body along the lines of the Court of Justice of the European Union. Some conventions on criminal matters attribute the authority for resolving such conflicts to the Council of Europe's own European Committee on Crime Problems or different solutions for the settlement of disputes are established[3]. In some cases, the committees of experts have, with due politeness, reported breaches of the conventions by some of the states party to them.

And F) Generally speaking, the conventions of the Council of Europe are self-executing in a material sense, as their content –whether establishing duties or prohibitions– allows the courts (or administrative bodies such as the Ministries of Justice, within the scope of their authority), to apply them directly without the need for internal laws. Nevertheless, it may be the case that part of the convention is not self-executing or that complementary internal measures of an organic or procedural nature are necessary, without which it may be impossible to apply the convention.

[3] Article 42 of the 1990 Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, for example, contains a wide range of options for resolving differences because, in addition to submitting the matter to the European Committee on Crime Problems, it envisages negotiation between the parties, arbitration or submission to the International Court of Justice in the terms agreed by the parties.

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2. THE 1959 EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS.-

From a chronological point of view, of the European Convention on Mutual Assistance in Criminal Matters, done at Strasbourg on 20 April 1959 (the 1959 ECMACM Convention or Convention) is the second weighty treaty adopted in the context of the Council of Europe on cooperation or assistance in criminal matters, after the 1957 European Convention on Extradition. In addition to being the original multilateral instrument for assistance in criminal matters in Europe, it remains the essential convention of reference in this area, and one whose application other subsequent convention texts seek to complement and facilitate, such as those adopted both in the sphere of the Council of Europe (First and Second Additional Protocols of 17 March 1978 and 8 November 2001, respectively), and in the ambit of the European Union (Convention of 19 January 1990, on the Application of the Schengen Agreement of 14 June 1985 and Convention of 29 May 2000, regarding Judicial Assistance in Criminal Matters between the Member States of the European Union).

According to the explanatory report to the 1959 ECMACM Convention and the Preamble to the Treaty itself[4], it was initially conceived as a complementary text to the 1957 European Convention on Extradition, aimed at facilitating the application of the same, even though as of when its authors began drawing it up it was deemed independent of the earlier convention on extradition. This was because it was considered that assistance in criminal

[4] A list of all the conventions of the Council of Europe, including basic information on each of the instruments (signings and ratifications, date of entry into force, list of reservations, declarations and communications by the states party to them, full text of the convention, summary of their content and explanatory reports) is available in the two official languages of the Council of Europe (French and

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matters between states should be kept separate from decisions on extradition (and provided even in those cases where the extradition request is rejected) and that the contents of a convention on assistance in criminal matters would be more acceptable to the Member States of the Council of Europe and, consequently, would have a greater practical application than the Convention on Extradition. The general considerations section of the explanatory report to the Convention states that the Committee of Experts responsible for drafting the 1959 ECMACM Convention discussed whether provision should be made for an arbitral body to settle any disputes on the interpretation or application of the convention or a committee in charge of establishing a common interpretation of the provisions of the instrument, although both options were rejected, on the one hand, because it was thought that arbitration was unviable as Article 2 of the convention allowed assistance to be rejected on the basis of a series of reasons which would have to be assessed pursuant to the internal law of the requested state and, on the other, because it was not possible to reach an agreement on the creation of such a committee.

The 1959 ECMACM Convention is no. 30 on the Council of Europe's list and it entered into force on 12 June 1962, once it had been ratified by three Member States. As mentioned earlier, the 1959 ECMACM Convention has been complemented by two additional protocols: the First Additional Protocol (convention no. 99 on the Council of Europe's list) dated 17 March 1978 and the Second Additional Protocol (convention no. 182 on the Council of Europe's list), opened for signing on 8 November 2001. The two additional protocols to the 1959 ECMACM Convention will be dealt with in two specific sections of this topic.

The structure of the 1959 ECMACM Convention consists of a brief Preamble and eight Chapters, comprising a total of thirty articles. Chapter I contains the general provisions, which include precepts governing the objective scope of the convention, including the events in which the mutual assistance requested can be refused. Chapters II and III refer to letters

English) and also in Italian, German and Russian on the website of the organisation (http://conventions.coe.int/Default.asp).

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rogatory and the service of writs and records of judicial verdicts, appearance of witnesses, experts and prosecuted persons, respectively. Chapter IV (consisting only of Article 13) briefly deals with mutual assistance in the communication of judicial records, while Chapter V contains the rules governing procedure, including those that refer to the contents of requests for mutual assistance and how they should be sent. The purpose of Chapters VI and VII is to regulate two specific cases of mutual assistance in criminal matters (action in connection with proceedings and the exchange of information on judicial convictions). Lastly, Chapter VIII contains the final provisions of the convention, regarding the signing, ratification and denunciation of the same, declarations and reservations and the territorial scope of application (including the "colonial clause" and the provisions regarding the invitation for third-party states to accede to the convention).

It should be pointed out that the 1959 ECMACM Convention grants the contracting states broad powers to submit reservations in relation to any of the specific provisions of the convention. In general terms, Article 23 of the Convention (which coincides largely with Article 26 of the 1957 European Convention on Extradition, as pointed out in the explanatory report to the former) authorises each contracting party to "make a reservation in respect of any provision or provisions of the Convention" when signing it or depositing its instrument of accession or ratification (point 1). Nevertheless, the same provision requires the contracting parties making reservations to any of the provisions of the 1959 ECMACM Convention to withdraw the reservation (by means of a notification addressed to the Secretary General of the Council of Europe) "as soon as circumstances permit" (point 2). Moreover, the submission of a reservation regarding any of the provisions of the Convention means that the principle of reciprocity applies, because –pursuant to Article 23.3 of the 1959 ECMACM Convention– the state making the reservation may not claim application of the said provision by another party unless it has itself accepted the provision. The latitude of this general power to make reservations contained in Article 23 of the 1959 ECMACM Convention, together with the specific provisions in this regard in other articles of the Convention in relation to specific

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aspects regulated by it (for example, Article 5 regarding letters rogatory regarding the search or seizure of property, Article 15.6 in relation to the channels for sending requests for mutual assistance or Article 16.2 on the requirement to translate the request for mutual assistance and its annexed documents), explain the high number of reservations and declarations made by the contracting parties to the convention.

2.1 SCOPE OF APPLICATION.-

2.1.1 TERRITORIAL AND TEMPORAL SCOPE.-

To date the 1959 ECMACM Convention has been signed by the 47 Member States of the Council of Europe and has been ratified by all the signatory states. In addition to the Member States of the Council of Europe, it has been signed and ratified by Israel, as this convention (like other Council of Europe conventions), according to Article 28.1, is open to non-member third-party states, when invited by the Committee of Ministers on the basis of a unanimous decision of the members of the Council of Europe who have ratified it.

The table below shows the dates of signing, ratification or accession and entry into force of the 1959 ECMACM Convention in relation to each of the contracting states.

Member States of the Council of Europe

States	Signing	Ratification	Entry into force							
Albania	19/5/1998	4/4/2000	3/7/2000							
Andorra	15/6/2004	26/4/2005	25/7/2005							
Armenia	11/5/2001	25/1/2002	25/4/2002							
Austria	20/4/1959	2/10/1968	31/12/1968							
Azerbaijan	7/11/2001	4/7/2003	2/10/2003							
Belgium	20/4/1959	13/8/1975	11/11/1975							
Bosnia Herzegovina	30/4/2004	25/4/2005	24/7/2005							

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Bulgaria	30/9/1993	17/6/1994	15/9/1994							
Croatia	7/5/1999	7/5/1999	5/8/1999							
Cyprus	27/3/1996	24/2/2000	24/5/2000							
Czech Republic	13/2/1992	15/4/1992	1/1/1993							
Denmark	20/4/1959	13/9/1962	12/12/1962							
Estonia	4/11/1993	28/4/1997	27/7/1997							
Finland		29/1/1981 (accession)	29/4/1981							
France	28/4/1961	23/5/1967	21/8/1967							
Georgia	27/4/1999	13/10/1999	11/1/2000							
Germany	20/4/1959	2/10/1976	1/1/1977							
Greece	20/4/1959	23/2/1962	12/6/1962							
Hungary	19/11/1991	13/7/1993	11/10/1993							
Iceland	27/9/1982	20/6/1984	18/9/1984							
Ireland	15/10/1996	28/11/1996	26/2/1997							
Italy	20/4/1959	23/8/1961	12/6/1962							
Latvia	30/10/1996	2/6/1997	31/8/1997							
Liechtenstein		28/10/1969 (accession)	26/1/1970							
Lithuania	9/11/1994	17/4/1997	16/7/1997							
Luxembourg	20/4/1959	18/11/1976	16/2/1977							
Malta	6/9/1993	3/3/1994	1/6/1994							
Moldova	2/5/1996	4/2/1998	5/5/1998							

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Monaco	19/3/2007	19/3/2007	17/6/2007							
Montenegro		30/9/2002 (accession)	6/6/2006							
The Netherlands	21/1/1965	14/2/1969	15/5/1969							
Norway	21/4/1961	14/3/1962	12/6/1962							
Poland	9/5/1994	19/3/1996	17/6/1996							
Portugal	10/5/1979	27/9/1994	26/12/1994							
Romania	30/6/1995	17/3/1999	15/6/1999							
Russia	7/11/1996	10/12/1999	9/3/2000							
San Marino	29/9/2000	18/3/2009	16/6/2009							
Serbia		30/9/2002 (accession)	29/12/2002							
Slovakia	13/2/1992	15/4/1992	1/1/1993							
Slovenia	26/2/1999	19/7/2001	17/10/2001							
Spain	24/7/1979	18/8/1982	16/11/1982							
Sweden	20/4/1959	1/2/1968	1/5/1968							
Switzerland	29/11/1965	20/12/1966	20/3/1967							
Former Yugoslav Republic of Macedonia	28/7/1999	28/7/1999	26/10/1999							
Turkey	23/10/1959	24/6/1969	22/9/1969							
Ukraine	29/5/1997	11/3/1998	9/6/1998							
United Kingdom	21/6/1991	29/8/1991	27/11/1991							

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States who are not members of the Council of Europe

States	Signing	Ratification	Entry into Force							
Israel		27/9/1967 (accession)	26/12/1967							

Total number of signings not subsequently ratified:	1
Total number of ratifications/accessions:	48

According to Article 25 of the 1959 ECMACM Convention, it applies to the metropolitan territories of the contracting parties, and can also be applied in the overseas territories of the states mentioned in said provision. This article is largely similar to Article 27 of the 1957 European Convention on Extradition and contains specific provisions (which are redundant today) regarding Algeria, the territory of Somaliland, which was under Italian administration and the *Land* of Berlin (Article 25.2 and 3). Moreover, it envisages the extension of its application to the Netherlands Antilles, Surinam and the Netherlands New Guinea by means of a notice from the Kingdom of the Netherlands (Article 25.4), which was indeed made in relation to the Netherlands Antilles and Aruba. Finally, Article 25.5 states that the territorial scope of application of the 1959 ECMACM Convention may be extended by direct agreement of two or more contracting parties and subject to the conditions they lay down in the arrangement to any other territory (other than the ones already mentioned) “for the international relations of which any such Party is responsible”.

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2.1.2 SUBJECTIVE AND OBJECTIVE SCOPE.-

As the title of the 1959 ECMACM Convention and the contents of its Preamble suggest, its objective is the "adoption of common rules in the field of mutual assistance in criminal matters".

Article 1.1 specifies the meaning of the expression "criminal matters" by stating that mutual assistance in the context of the 1959 ECMACM Convention refers to "proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party". The explanatory report indicates that assistance works in relation to serious and minor offences, provided the suppression of the same is contemplated in the scope of responsibilities of the judicial authorities of the requesting state, meaning that the principles that govern extradition and, in particular, the requirement of dual criminality of the offence in relation to which the request for mutual assistance is being made, do not apply, notwithstanding the particular cases envisaged in Article 5 in relation to letters rogatory for the search or seizure of property. Consequently, assistance must also be given in the cases where the jurisdiction of the requested state covers the suppression of the offence to which the request for assistance refers, provided that the judicial authorities of the requesting state are also responsible for it at the time the request for assistance is made.

The fact that the objective scope of the 1959 ECMACM Convention includes all kinds of criminal offences, regardless of their seriousness, means that Article 1.1 covers requests for assistance made in the context of proceedings involving the suppression of less serious offences (trials for minor offences such as the *juicio verbal de faltas* in the case of Spain), including written criminal proceedings (small claims proceedings –*procedimiento monitorio*– or criminal proceedings –*orden penal*– in the Spanish legal system) which exist in some

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European states, such as France (*ordonnance pénale*), Germany (*Strafbefehlsverfahren*) or Italy (*procedimento per decreto*) .

The definition of the objective scope of application contained in Article 1.1 of the 1959 ECMACM Convention should be interpreted broadly, according to the explanatory report, and as such will cover requests for assistance made in relation to:

A) Administrative offences in relation to those being heard by criminal courts due to a challenge of an administrative penalty decision or in the case of an offence connected with a crime directly attributed to its competence, as in the case of *Ordnungswidrigkeiten*[5] in German law. Nevertheless, assistance may only be sought at the jurisdictional stage of a challenge to an administrative penalty decision or when the competence for prosecuting the offence has been assumed by the Public Prosecutor's Office and the ordinary jurisdiction bodies. It is for this reason that the Committee of Experts in charge of drafting the 1959 ECMACM Convention included the phrase "the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party" in the last epigraph of Article 1.1.

B) Civil action taken in the context of criminal proceedings.

C) Applications for pardon or review of sentence.

And D) Proceedings for the compensation of persons found innocent in criminal proceedings, provided they are being heard by the criminal courts.

Nevertheless, despite the latitude granted by the terms of the explanatory report, it seems that in practice the interpretation of Article 1.1 of the 1959 ECMACM Convention has

[5] These are infringements regulated in the Law on Administrative Infringements (*Gesetz über Ordnungswidrigkeiten* or *OWiG,* revised text dated 19-2-1987, with the amendment introduced by Law 7-8-2007), and which are usually sanctioned by the competent administrative authorities, notwithstanding the possibility of a challenge via jurisdictional channels, which the Official Court (*Amtsgericht*), a lower court in the German legal system responsible for criminal and civil matters, is responsible for hearing. Nevertheless, when the administrative infringement is connected to a criminal infringement the Public Prosecutor's Office and the ordinary jurisdiction courts are responsible for the prosecution.

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not gone that far, and this has led to the extension of the objective scope of the requests for judicial assistance in criminal matters in subsequent instruments, both from the Council of Europe itself (Second Additional Protocol to the 1959 ECMACM Convention, dated 8 November 2001), and the European Union (Convention of 19 January 1990, on the Application of the Schengen Agreement dated 14 June 1985 and Convention of 29 May 2000, regarding Judicial Assistance in Criminal Matters between Member States of the European Union) to include, in a more-or-less express manner, the different cases referred to in the explanatory report to the 1959 ECMACM Convention[6].

Article 1.2 in the 1959 ECMACM Convention expressly excludes "arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law" from its objective scope of application. The exclusion of crimes of a military nature from the scope of application of the 1959 ECMACM Convention is a similar provision to the one contained in Article 4 of the 1957 European Convention on Extradition and one that, according to the explanatory report, leaves the possibility for other conventions or agreements on assistance in criminal matters to deal with military crimes.

The explanatory report to the First Additional Protocol to the 1959 ECMACM Convention (§ 16) indicates that one of the reasons for the exclusion of requests for assistance in relation to the enforcement of judgments is due to the fact that this convention is only applicable to judicial proceedings, which, according to the legal systems of some of the Member States of the Council of Europe, would exclude the enforcement stage, insofar as the bodies responsible for said stage are administrative authorities or public prosecutors, equivalent to administrative bodies in some of these states. Meanwhile, the practical doubts in relation to the specific acts of enforcement of judgments excluded from the objective scope of the 1959 ECMACM Convention by Article 1.2 of the same, led the First Additional Protocol

[6] In this regard, see PALOMO DEL ARCO, A.: *Cooperación judicial penal en Europa*, in Sistemas Penales Europeos. Cuadernos de Derecho Judicial no. IV, Consejo General del Poder Judicial, 2002, pages 354 to 356.

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(Article 3) to extend the objective scope of the former to "the service of documents concerning the enforcement of a sentence, the recovery of a fine or the payment of costs of proceedings" and also to "measures relating to the suspension of pronouncement of a sentence or of its enforcement, to conditional release, to deferment of the commencement of the enforcement of a sentence or to the interruption of such enforcement". According to the explanatory report mentioned above (§ 18), if the document to be served or the measures to be adopted do not emanate from a judicial authority, the provision is applicable only if the contracting party concerned has declared that it considers the authority in question a judicial authority in accordance with Article 24 of the 1959 ECMACM Convention (to which I will refer later), in relation to which Article 8.1 *in fine* of the protocol itself envisages that the declarations made in relation to said rule of the convention will also apply to the protocol, unless the contracting state has declared otherwise.

Apart from the cases of exclusion under Article 1, Article 2 of the 1959 ECMACM Convention envisages the possibility for the requested state to refuse mutual assistance if it refers to offences that the requested state itself considers a "political offence, an offence connected with a political offence, or a fiscal offence" (point a) or if the requested state considers that "execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country" (point b). As the explanatory report points out, the refusal of mutual assistance under Article 2.a) of the 1959 ECMACM Convention is not obligatory for the requested state, it is indeed optional. In any event, the possible refusal of assistance in relation to offences of a political nature has been mitigated to a significant degree in relation to terrorism by the specific conventions in this regard, both by the United Nations and the Council of Europe itself, as these conventions tend to avoid the application of the political exception in relation to this kind of crime[7].

[7] Among others, the 1997 International Convention for the suppression of terrorist bombings, the 1999 International convention for the suppression of terrorist financing, the 2005 International Convention

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In the case of the exception in relation to fiscal offences, the First Additional Protocol to the 1959 ECMACM Convention has led to the disappearance of said exception in relation to the contracting states to the same, as Article 1 expressly establishes that the contracting parties will not use the power to refuse mutual assistance in the terms envisaged in Article 2.a) of the 1959 ECMACM Convention "simply because the request concerns a fiscal offence". The explanatory report to the First Additional Protocol (§§ 10 and 11) highlights that its purpose is to the put the system of requests for assistance in relation to fiscal offences on the same footing as the requests regarding "common offences", but this initiative does not prevent states who are not party to the Protocol providing assistance in relation to fiscal offences pursuant to the precepts of the 1959 ECMACM Convention itself, in view of the optional and discretionary nature of the refusal of assistance. Neither the 1959 ECMACM Convention nor the First Additional Protocol provide a true definition of "fiscal offences" for the purposes of the two instruments, as the content of the concept varies from one state to another, but the explanatory report to the latter states in § 12 that the definition contained in Article 5 of the 1957 European Convention on Extradition (according to which fiscal offences are offences related to "taxes, duties, customs and exchange") would apply for the purposes of requests for mutual assistance based on those two instruments. It should be pointed out, in any event, that Article 2.2 of the First Additional Protocol prevents the refusal of mutual assistance due to the fact that the legislation of the requested party does not impose "the same kind of tax or duty", or does not contain "tax, duty, customs and exchange regulation of the same kind as the law of the requesting Party".

As far as the refusal of assistance under Article 2.b) of the 1959 ECMACM Convention is concerned, the explanatory report indicates that the expression "essential interests" refers to those of the requested state and not to those of individuals, and that interests of an economic nature would also be included. The causes for refusal of assistance

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for the suppression of acts of nuclear terrorism and the 1977 European Convention on the Suppression of Terrorism.

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linked to sovereignty, security, public order or essential interests of the requested state are *numerus clausus* and must also be sufficiently justified, as Article 19 of the 1959 ECMACM Convention requires all refusals of mutual assistance (including partial refusals) to be justified by the requested state. In this regard it should be remembered that the explanatory report states that the Committee of Experts responsible for drafting the convention rejected the proposal to include additional causes for the refusal of assistance apart from the ones referred to in Article 2.b) of the same (such as the lack of competence of the courts in the requested state to enforce the request for assistance; the existence of substantial grounds for believing that the proceedings against the person concerned have been instituted for the purpose of prosecuting or punishing him/her on account of his/her race, religion, nationality or political opinions; if the same person is the object of proceedings for the same reasons in the requested state or in a third-party state; or if the same person has been finally convicted or acquitted by the judicial authorities of the requested state or those of a third-party state in respect of the same matter which has given rise to the request for assistance), although some of the contracting states to the 1959 ECMACM Convention have in fact made declarations or reservations in relation to Article 2, qualifying the meaning of the expression "other essential interests of its country" or including the power to refuse assistance in some of these additional cases[8].

As already pointed out and in view of the wording of Article 1.1, the 1959 ECMACM Convention only applies to court proceedings (i.e., "proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party") as opposed to penalty proceedings of an administrative nature. However, this delimitation can be problematic –particularly in relation

[8] These states include Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, Georgia, Hungary, Iceland, Ireland, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, the United Kingdom, Russia, Sweden, Switzerland and the Ukraine. The contents of these declarations or reservations are available on the website mentioned in footnote 4 to this work.

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to the investigation stage prior to the oral hearing– due to the numerous procedural systems used in the contracting states and due to the fact that the Public Prosecutor's Office (responsible for leading the investigation in many of these states) is considered a judicial authority in some of them, while in others it is considered an administrative authority. In order to overcome the problems derived from this disparity of systems, Article 24 of the 1959 ECMACM Convention has expressly envisaged that the contracting states may make a declaration to the Secretary General of the Council of Europe, when signing, acceding to or ratifying the convention, stating what authorities must be considered "judicial authorities" in this regard. This means that the authorities requesting assistance under the 1959 ECMACM Convention may not necessarily be judicial authorities in the sense of the functions they perform, as for the purposes of requesting assistance it will be sufficient for them to be considered as such in their home state, as confirmed by the corresponding declaration in accordance with Article 24.

At the time of ratification of the 1959 ECMACM Convention and in application of Article 24, Spain made a declaration stating that in this regard the following were to be considered judicial authorities: (a) the Judges and Courts of ordinary jurisdiction; (b) the members of the Public Prosecutor's Office; and (c) the military judicial authorities. Many other contracting states to the convention have made similar declarations, by virtue of which, in addition to the corresponding courts, the Public Prosecutor's Office is considered a judicial authority for that purpose[9], and some have even extended the classification of judicial authority to include the Ministry of Justice (Armenia, Austria, Azerbaijan, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Iceland, Israel, Lithuania, Moldova, Romania, Slovakia and Switzerland), the Ministry of Home Affairs or the

[9] This is the case of Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Norway, the Netherlands, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Sweden, Switzerland, the Ukraine and the United Kingdom.

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police or investigative authorities (Armenia, Bulgaria, Cyprus, Denmark, Estonia, Finland, Iceland, Latvia, Norway, Romania, the Ukraine and the United Kingdom), parliamentary investigation commissions (Italy) or the Constitutional Court (Georgia, Italy and San Marino). They are evidently declarations designed to cover the peculiar features of each criminal procedure system.

2.1.3 RELATIONS WITH OTHER CONVENTIONS ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS.-

Article 26 of the 1959 ECMACM Convention regulates the relations between the convention itself and other bilateral or multilateral treaties, present and future, in relation to mutual assistance in criminal matters. In the territories in which it is applied, the 1959 ECMACM Convention supersedes –with the exception of the provisions of Articles 15.7 and 16.3 of the Convention on possible bilateral agreements between the contracting states in relation to the direct transfer of requests for mutual assistance or the translation of the same and their annexed documents– the provisions of the bilateral treaties, conventions or agreements between any two contracting states regulating mutual assistance in criminal matters, although it does not affect the provisions of any other international convention of a bilateral or multilateral nature in which certain clauses regulate a specific sphere of mutual assistance on particular matters (Article 26.1 and 2). This means, as set out in the explanatory report to the 1959 ECMACM Convention, that both the provisions on cooperation or assistance in criminal matters between contracting states contained in the conventions or treaties dealing with a specific criminal matter and the provisions of the conventions regulating specific aspects of cooperation or assistance in criminal matters, generally speaking and in the event of an overlap, take precedence over the rules of the 1959 ECMACM Convention, even though the latter are accessory in relation to specific aspects not regulated by said instruments.

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Moreover, Article 26.3 of the 1959 ECMACM Convention conditions the power of the contracting states to negotiate in relation to international mutual assistance in criminal matters, as said states "may conclude between themselves bilateral or multilateral agreements on mutual assistance in criminal matters only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein". Other international instruments that aspire to supplement the 1959 ECMACM Convention have emerged in order to facilitate its application in the scope of another international organisation (the European Union) which, while close to the Council of Europe, is a different entity.

Apart from the Convention of 19 January 1990, on the Application of the Schengen Agreement of 14 June 1985 (Article 48 of which states that its provisions aim to integrate or improve the 1959 ECMACM Convention, among other international instruments in cooperation in criminal matters approved within the scope of the Council of Europe[10]), the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (the 2000 CMACM Convention) is worth highlighting, as –according to its explanatory report (Article 1 page 9)– it is not autonomous and cannot be used as the sole basis for a request of mutual assistance. This peculiar characteristic would seem to be based on the fact that at the time the 2000 CMACM Convention was being drawn up, it was considered that mutual assistance in criminal matters between the Member States of the European Union could rest on the solid foundations of the wide-ranging, proven effectiveness of the 1959 ECMACM Convention, notwithstanding the development and amendment of the provisions of this instrument "mainly by extending the range of circumstances in which mutual assistance may be requested and by facilitating assistance,

[10] Among the international instruments supplemented by the Convention on the Application of the Schengen Agreement are, in the scope of the Council of Europe, the European Convention on Extradition of 1957 and the Convention on the Transfer of Sentenced Persons of 1983, as well as the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27-6-1962 (amended by a Protocol dated 11-5-1974).

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through a whole series of measures, so that it is quicker, more flexible and, as a result, more effective", as explained in the explanatory report and expressly set out in Article 1.1 a) and b) on relation to the 1959 ECMACM Convention and its First Additional Protocol.

Consequently, for the Member States of the European Union that are party to the 2000 CMACM Convention the latter will take precedence, due to its status as a specific convention, in the event of a discrepancy with the provisions of the 1959 ECMACM Convention[11]. Nevertheless, for all those matters not expressly covered in the 2000 CMACM Convention, the 1959 ECMACM Convention will act in an accessory manner, according to the Preamble of the former. Meanwhile, it should not be overlooked that pursuant to the content of the Preamble to the 2000 CMACM Convention, the regulation of mutual assistance in criminal matters contained therein is based on the principles of the 1959 ECMACM Convention, and as such this latter convention can be used as an interpretative element of the provisions of the former[12]. In any event, it is clear that the 2000 CMACM Convention cannot be invoked for requests for mutual assistance in criminal matters between Member States of the Council of Europe who do not belong to the European Union or who are not party to the 2000 CMACM Convention.

Finally, in the event that between two or more contracting states to the 1959 ECMACM Convention mutual assistance in criminal matters is provided on the basis of uniform legislation (such as in the case of the Scandinavian countries), said states are expressly entitled under Article 26.4 of the Convention to regulate their mutual relations in

[11] According to Article 30.3 and 4 of the Vienna Convention on the Law of Treaties, according to which "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty" and "When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations".

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that sphere exclusively in accordance with said uniform legislation, notwithstanding the provisions of the 1959 ECMACM Convention itself. This same system applies to those contracting states that have established a special regime with the reciprocal application of mutual assistance measures in their respective territories, which –according to the explanatory report to the 1959 ECMACM Convention– would cover reciprocal agreements that may exist or be reached between the United Kingdom and the Republic of Ireland in this area. In both cases the exclusion of the mutual relations between the contracting states in question from the application of the 1959 ECMACM Convention must be notified to the Secretary General of the Council of Europe.

2.2 TYPES OF MUTUAL ASSISTANCE.-

Article 1.1 of the 1959 ECMACM Convention contains the general principle *pro assistentia* by stating that "The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance" (...). According to the explanatory report, this general rule should be interpreted in a broad sense, so that it covers any kind of mutual assistance in criminal matters and not only those expressly mentioned in the Convention. Moreover, the explanatory report to the Second Additional Protocol to the 1959 ECMACM Convention specifies in § 19 that the parties have always understood that the convention is applicable to "all stages of proceedings", which rendered it unnecessary to expressly add that phrase in the original wording of Article 1.1 of the 1959 ECMACM Convention by means of said additional protocol. In any event, the fact is that from a systematic point of view, the 1959 ECMACM Convention establishes five main groups of acts of mutual assistance or aid in criminal matters, to which it dedicates individual chapters: letters rogatory (Chapter II); service of writs and records of judicial verdicts –

[12] In this regard, see PALOMO DEL ARCO, A.: *Convenio 2000. Ámbito de aplicación y relación con otros convenios*, in Derecho penal supranacional y cooperación jurídica internacional. Cuadernos de Derecho Judicial no. XIII, Consejo General del Poder Judicial, 2003, page 70.

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appearance of witnesses, experts and prosecuted persons (Chapter III); judicial records (Chapter IV); the laying of information in connection with proceedings (Chapter VI) and exchange of information from judicial records (Chapter VII).

The systematisation of the acts of mutual assistance in those five categories contrasts with the internal law of some of the contracting states to the convention. In fact, the explanatory report itself, in the section on general considerations, expressly states that some of these states (including Austria, Germany and Norway) do not differentiate between "letters rogatory" and "other requests for mutual assistance", such as the "service of writs and records of judicial verdicts" or the "laying of information in connection with proceedings", and as such, in relation to these states, all these acts of assistance must be treated individually. According to the explanatory report, this is the reason why the rules regarding procedure are dealt with separately in Chapter V of the Convention.

2.2.1 LETTERS ROGATORY.-

Article 3.1 of the 1959 ECMACM Convention defines letters rogatory as acts of judicial aid aimed either at "procuring evidence" or "transmitting articles to be produced in evidence, records or documents". This definition is complemented by the explanatory report to the convention, which indicates that letters rogatory, in the sense of the above rule are "a mandate given by a judicial authority of one country to a foreign judicial authority to perform in its place one or more specified actions", citing, by way of example, the questioning of witnesses, experts or accused persons as well as search and seizure of assets. The broadness of the definition makes it possible to consider that a rogatory letter covers any act of procurement of evidence aimed at clarifying the crime or identifying the criminal, to freezing the sources of evidence, securing the effectiveness of decisions that may be issued in the context of criminal proceedings, as well as any other actions necessary to prepare the oral hearing. Thus, the most frequent procedures include, for example, the declaration of the accused or witnesses, confrontation hearings, line-ups, expert reports on weapons,

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fingerprints, human tissue, documents or other objects, visual inspections, medical examinations, tapping into any kind of communications, entering and searching domiciles and apprehending subjects therein or in other enclosed venues, controlled deliveries of objects, the infiltration of covert agents, information on movements in bank accounts and the freezing of the same or of their balances, etc. In the case of mutual assistance aimed at the service of files or documents, Article 3.3 of the 1959 ECMACM Convention states that the requested party may merely send copies or certified photocopies of the files or documents requested, although if the requesting party expressly asks for the originals to be sent, the requested party will comply with this request to the extent possible.

Article 3.1 of the 1959 ECMACM Convention also reflects the general principle imposed by the execution of a rogatory letter according to the legislation of the requested state (*locus regit actum*), which has been superseded by subsequent instruments on international cooperation in criminal matters that entail respect for the procedures established by the law of the requesting state in the fulfilment of letters rogatory, even when not customary in the requested state and provided they are not contrary to the principles of the legal system of the latter (*forum regit actum* principle)[13].

It should be highlighted in any event that the 1959 ECMACM Convention itself timidly points to the possibility of procuring evidence subject to the procedures of the requesting state in relation to the questioning of witnesses or experts, as Article 3.2 envisages that the latter may expressly state in its request for judicial aid that it wishes the declaration of the witness or expert to take place under oath, which must be complied with by the requested state, unless its internal law disallows it. According to the explanatory report to the

[13] This is the underlying principle of the 2000 CMACM Convention and, as we will see later, of the Second Additional Protocol to the 1959 ECMACM Convention. It is evident that the *forum regit actum* principle is related to the purpose of the evidence procured in the requested state being taken advantage of in the requesting state by means of a letter rogatory, thus avoiding the possibility of the results of the actions taken being inadmissible because they fail to fulfil the necessary requirements established in the requesting state to be considered valid or because all the due guarantees were not provided in order for them to be included in the criminal process underway in said state.

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Convention, this rule will even apply in the cases where the legislation of the requested state does not envisage putting the witness or expert under oath (provided, of course, it is not contrary to its legal system) and the declaration under oath will take place under the rules of the requested state. Moreover, Article 4 of the 1959 ECMACM Convention expressly envisages that, with the consent of the requested state, the corresponding authorities and persons from the requesting state may attend the act of execution of the letter rogatory, provided they expressly state their wish to do so, and the requested state will inform them of the date and venue of execution[14].

Article 5 of the 1959 ECMACM Convention refers specifically to the letters rogatory that are aimed at "a search or seizure of property". Although, as indicated in section 2.1.2 of this work, the general rule of the 1959 ECMACM Convention is that mutual assistance between the contracting states is not subject to the rules of extradition and the requirement of dual criminality, point 1 of this rule authorises states to reserve the right to submit the execution of a letter rogatory aimed for the search or seizure of property to "one or more of the following conditions: 1. that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party; 2. that the offence motivating the letters rogatory is an extraditable offence in the requested country; 3. that execution of the letters rogatory is consistent with the law of the requested Party".

It should be remembered that a considerable number of contracting states, including Spain, have made reservations to Article 5 of the 1959 ECMACM Convention establishing limits to the execution of letters rogatory seeking the performance of such steps, which conditions the possibility of carrying them out by means of international mutual assistance

[14] It should be highlighted that despite the fact that the explanatory report to the 1959 ECMACM Convention states that the Italian representative of the Committee of Experts responsible for drafting the convention indicated that, according to Italian law, only foreign judicial authorities (and no other interested parties) could be present at the execution of the letter rogatory, Greece is the only contracting state that has made an express reservation to Article 4 of the 1959 ECMACM Convention, indicating that this rule is contrary to Article 97 of its Law of Criminal Procedure.

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under this instrument to a significant degree[15]. In any event, Article 5.2 of the Convention allows any contracting state to invoke the rule of reciprocity in relation to another contracting state that made a reservation under Article 5.1 regarding letters rogatory seeking the search and seizure of property. Moreover, Article 2.1 of the First Additional Protocol to the 1959 ECMACM Convention limits the effect of any reservations made under Article 5.1 of the Convention in relation to letters rogatory seeking the search or seizure of property when the execution is subject to the condition that the offence giving rise to the letter rogatory be punishable under the law of the requesting state and the requested state, provided that "this condition shall be fulfilled, as regards fiscal offences, if the offence is punishable under the law of the requesting Party and corresponds to an offence of the same nature under the law of the requested Party". Nevertheless, the fact that Article 8 of the First Additional Protocol to the 1959 ECMACM Convention allows the contracting states to make a reservation regarding all or part of Chapter I of the protocol (in relation to fiscal offences) or reserve the right "not to comply with letters rogatory for search or seizure of property in respect of fiscal offences" undermines the effectiveness of the limitation contained in Article 2.1 of the protocol itself, as some contracting states –including Spain and Germany– have reserved the right not to

[15] In the case of Spain the reservation represents the power not to comply with letters rogatory in the search or seizure of property, unless the following conditions are fulfilled: (a) that the offence motivating the letters rogatory is punishable under Spanish law; (b) that the offence motivating the letters rogatory is an extraditable offence under Spanish law; and (c) that execution of the letters rogatory is consistent with Spanish law. The other contracting states that made reservations under Article 5.1 of the Convention (the contents of which are available on the website mentioned in footnote 4 of this work) are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Hungary, Iceland, Ireland, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Norway, the Netherlands, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Sweden, Switzerland, Turkey, the Ukraine, and the United Kingdom.

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comply with letters rogatory for the search or seizure of property in relation to fiscal offences[16].

In relation to the service of objects, records or documents in the execution of a letter rogatory, Article 6.1 of the 1959 ECMACM Convention envisages that the requested state may delay the same, provided that it needs them for criminal proceedings in progress. This rule is based on Article 20.3 of the 1957 European Convention on Extradition, and is complemented by the provision in point 2 of Article 6 of the 1959 ECMACM Convention, which states that the objects and original copies of records and documents sent to the requesting state in the execution of a letter rogatory will be returned by said state to the requested state as soon as possible, unless it has waived the return thereof. According to the explanatory report to the Convention, the scope of application of this precept includes objects ("articles to be produced in evidence" according to Article 3.1 of the Convention itself) which have been seized or confiscated in the execution of a letter rogatory, those that were seized or confiscated on a previous occasion in the context of different criminal proceedings but delivered, nonetheless, to the requesting state and the objects delivered to the requesting state without a prior seizure or confiscation. The explanatory report also indicates that, pursuant to this rule, the requesting state cannot dispose of the objects delivered, even if obliged to resolve on the ownership of the same by its own legal system.

2.2.2 SERVICE OF PROCEDURAL DOCUMENTS AND JUDGMENTS. SUMMONS FOR WITNESSES, EXPERTS AND PROSECUTED PERSONS TO APPEAR.-

Notices and summons to appear are regulated in Chapter III of the 1959 ECMACM Convention and specifically in Articles 7 to 10 and 12. The word "service" is used in a broad

[16] In addition to Spain and Germany, Armenia, Austria, Azerbaijan, Georgia, Luxembourg and Switzerland have also made some reservations in relation to fiscal offences under Article 8 of the First Additional Protocol to the 1959 ECMACM Convention.

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sense in the Convention, including summons and notices and both the act of formal service and the mere delivery or sending of a judicial document or decision to its addressee. Article 7.1 of the 1959 ECMACM Convention obliges the requested state, in general terms, to effect service of writs and records of judicial verdicts which are transmitted to it for this purpose by the requesting state, which –according to the explanatory report– implicitly includes the summons of accused persons, witnesses or experts so that they attend any court hearing or process in the requesting state.

The rule envisages several alternative forms of service to the person in question depending on whether the requesting state has specified the manner of the service in its request for judicial assistance. If not specified, the service may take place by "simple transmission of the writ or record to the person to be served" (Article 7.1 paragraph 1, 1st sentence), which means giving the requested state the alternative between effecting service by means of simple delivery without any other formality or doing so in the manner envisaged in its internal law. On the other hand, if the requesting party expressly requests, the requested state will effect service "in the manner provided for the service of analogous documents under its own law or in a special manner consistent with such law". Pursuant to Article 7.2 of the Convention, proof of service may be provided by the requested party by any means, being sufficient in this regard (in addition to a dated receipt signed by the addressee of the service) the declaration of the party itself staring "the fact, the form and the date of the service", and therefore the requested state is not obliged to use the form that may or may not have been sent by the requesting party as an annex to the documents or decisions to be served to that end. Any of the documents used to justify service of the notice must be immediately sent to the requesting party and, if it so requests, the requested party is obliged to state that the service was performed in accordance with its internal law. In the event it is impossible to perform the service, the requested party is also obliged to immediately inform the requesting party of the reason therefor.

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Article 7.3 of the 1959 ECMACM Convention contains a special rule in the event the object of the act of mutual assistance is a summons addressed to an accused person in the territory of the requested state, as it authorises the contracting states to make a declaration by virtue of which said summons must be transmitted to the authorities a certain time in advance (specified in the declaration itself, but not exceeding 50 days) of the date set for the appearance, so that this term is taken into account by the requesting and requested states in setting the date of the appearance and the delivery of the summons. According to the explanatory report to the Convention, the reason for this special rule has to do with the particular features of Scandinavian legal systems, which do not contemplate the possibility of criminal proceedings by default and tend to impose a term between the date of delivery of the summons to the accused person and the moment he/she appears before the court, so that he/she can duly prepare his/her defence and travel to the place where the appearance is to take place[17].

Articles 8, 9 and 10 of the 1959 ECMACM Convention develop the provisions implicit in Article 7.1 of the Convention in relation to summoning witnesses and experts to declare in the requesting state. The first of these precepts establishes the general rule (derived from the international custom by virtue of which witnesses or experts are free to travel to the requesting state to declare, due to the burden that the travel involves) that the witnesses or experts who fail to obey a summons to appear cannot be subjected to any punishment or measure of restraint by the requesting state, even if the summons contained a warning to that end. The exception contained in the last sentence of the precept refers to the case of the witness or expert, after receiving the summons made by means of international judicial

[17] The following countries have made declarations under this precept requiring the transmission of the summons between 30 and 50 days in advance, depending on the case: Andorra, Armenia, Austria, Azerbaijan, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Israel, Malta, Monaco, Montenegro, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Spain, Sweden, Switzerland, Turkey and the Ukraine.

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assistance, voluntarily entering into the territory of the requesting state and being summoned in due form therein.

Nevertheless, if the requesting state considers it particularly necessary that the witness or expert appear in person before the judicial authorities, it will state as much in its request for judicial assistance and the requested party will be obliged, when serving the summons, to urge the witness or expert to appear before the judicial authority of the requesting state and inform the latter of the reply of the witness or expert (Article 10.1 of the Convention). As the explanatory report to the Convention points out, it is merely a "recommendation" made by the requested state to the witness or expert summoned to appear, but it does not represent a breach of the general rule of Article 8 that prohibits the witness or expert being compelled to appear before the judicial authority of the requesting state. When the requesting state has stated in the request for judicial assistance that it considers it necessary for the witness or expert to appear in person before its judicial authorities, it will include the approximate amount of the indemnification to be paid to the witness or expert and the travel and accommodation expenses that will be refunded to him/her in the request, and it may even ask the requested party to provide an advance, the amount of which must be mentioned in the summons and refunded by the requesting party to the requested party (Article 10.2 and 3 of the 1959 ECMACM Convention). The rules on the quantification and advance of indemnification and refundable expenses to which the witness or expert is entitled are aimed at favouring their voluntary appearance before the judicial authorities of the requesting state and are consistent with the provisions of Article 9 of the Convention, which obliges said state to calculate the amount of the indemnification, refundable allowances and travel expenses to be paid to the witness or expert –and that the requesting state must bear– taking into consideration the place of residence of the witness or expert, and at rates at least equal to those provided for in the scales and rules in force in the country where the hearing is intended to take place. It is clear (as the explanatory report to the 1959 ECMACM Convention points out) that this precept does not prevent the requesting

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state from setting a higher amount of indemnification and/or refundable expenses for the witness or expert summoned to appear by means of international judicial assistance.

Article 11.1 of the 1959 ECMACM Convention contemplates the case of the temporary transfer of persons in custody who are required to appear in person as witnesses or for a confrontation pursuant to a request from the requesting state, although it conditions the transfer upon the latter party returning the person in custody to his/her place of origin within the term established by the requested party to that end and the observance of the provisions of Article 12 of the Convention, regarding the immunity of persons who appear before the judicial authorities of the requesting state, to the extent they are applicable[18]. Temporary transfer may be refused by the requested state in any of the cases envisaged in paragraph 2 of the provision: (a) if the person in custody does not consent; (b) if his/her presence is necessary at criminal proceedings pending in the territory of the requested Party; (c) if transfer is liable to prolong his detention, or (d) if there are other overriding grounds for not transferring him/her to the territory of the requesting Party. The explanatory report to the Convention states that the list of causes for refusing temporary transfer is exhaustive (i.e., transfer can only be refused in these cases), although it admits that the last cause is of a general and open nature.

Point 2 of the rule contains some provisions for regulating the transfer of the person in custody through the territory of a third contracting state to the 1959 ECMACM Convention, which the Ministry of Justice of the requesting state must expressly apply for to the Ministry

[18] Conflicts in the interpretation of the cases in which temporary transfer is valid under this rule of the 1959 ECMACM Convention have led to the extension of the scope of transfer in Article 3 of the Second Additional Protocol to the Convention, which gives a new wording to Article 11 of the original instrument in order to include “personal appearance for evidentiary purposes other than for standing trial” in the object of the transfer of a person in custody. As set out in the explanatory report to the additional protocol (§§ 32 to 39) the expression “standing trial” is used in a restrictive sense to include only the final stage of the criminal proceedings, where the person is brought before a court for the purpose of being tried by that court at that time, so that in this case the temporary transfer of the person in custody/accused person is comparable to extradition, while transfer in order to ensure the

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of Justice of the requested transit state and which can be refused by the latter in relation to its own nationals. Finally, Article 11.3 of the Convention envisages that the person transferred temporarily may remain in custody in the requesting state –and, if applicable, in the state through which transit is requested– unless the requested state asks that he/she be released.

As advanced above, Article 12 of the 1959 ECMACM Convention refers to the immunity of persons appearing before the judicial authorities of the requesting state. As a general rule, no witness or expert, regardless of his/her nationality, may be prosecuted, detained or subjected to any other restriction of his/her personal freedom for acts or convictions prior to his/her exit from the territory of the requested state (point 1). The same rule applies in relation to any person summoned by the judicial authorities of the requesting state to answer for acts forming the subject of proceedings against him/her, in relation to those acts or convictions when they did not appear in the summons sent to said person (point 2). According to the wording of the provision, immunity does not apply in relation to acts committed after the departure of the witness, expert or prosecuted person from the territory of the requested state. Moreover, as with the provisions regarding extradition (Article 14.1b of the 1957 European Convention on Extradition), immunity ceases to exist when the witness, expert or prosecuted person has had the possibility of leaving the territory of the requesting state for an uninterrupted period of 15 days, as of such time as his/her presence was no longer required by the judicial authorities of that state and has, nonetheless, remained in said territory or returned to it after having left.

2.2.3 INFORMATION ON CRIMINAL RECORDS AND THE EXCHANGE OF INFORMATION ON COURT SENTENCES.-

personal appearance of the person in custody before the judicial authority of the requesting state for evidentiary purposes other than standing trial excludes the idea of extradition.

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Regarding the communication and exchange of information on criminal records and court sentences, the 1959 ECMACM Convention has two quite different provisions (Articles 13 and 22), whose scope is different and should not be mixed up, as the explanatory report to the Convention points out[19].

Article 13.1 of the Convention refers to requests for assistance submitted by the judicial authorities of the requesting state aimed at communicating extracts or information related to criminal records necessary in a criminal trial. In this case the requested party is obliged to deal with the request for assistance by providing the information requested "to the same extent that these may be made available to its own judicial authorities in like case". In all cases not included in Article 13.1 of the Convention (i.e., when the request for communication of extracts or information regarding criminal records is not in relation to criminal proceedings, but comes from civil courts or administrative authorities, as set out in the explanatory report to the Convention), point 2 of this precept envisages that the requested state will accede to said request in accordance with the conditions established by its legislation, its regulations or its internal practice.

Article 22 of the 1959 ECMACM Convention, meanwhile, regulates the automatic communication of criminal convictions and subsequent measures to be recorded in the corresponding registry of criminal records in relation to nationals of the other contracting states to the Convention. The explanatory report indicates that the expression "criminal convictions" should be interpreted in a broad sense and that the "subsequent measures" refer, in particular, to the rehabilitation or cancellation of criminal records. The communication is made by Ministries of Justice in a reciprocal manner at least once a year and should include each of the parties interested in the event the person affected is a

[19] In any event, and as DE MIGUEL ZARAGOZA, J.: *op. cit*. page 32 points out, the exchange of information on criminal records plays an important role for the purposes of noting the effects of the *ne bis in idem* principle in the international sphere or the aggravating circumstance of international recidivism, which is envisaged in substantive criminal legislation in relation to certain categories of

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national of two or more contracting parties, unless the person in question holds the nationality of the state in whose territory he/she has been convicted.

It is worth highlighting that the First Additional Protocol to the 1959 ECMACM Convention introduced a second paragraph to Article 22, by virtue of which any contracting state that has communicated information on criminal convictions and subsequent measures affecting the nationals of other contracting states and that have been recorded in the corresponding registry of criminal records will serve the interested state (in individual cases and at the request of said state) a copy of the convictions and measures in question, as well as any other relevant information, so that the interested party can decide whether it should adopt any additional measure derived from the original conviction or measure adopted by the other state. The exchange of this additional information follows the system of communication between the Ministries of Justice of the interested states, as envisaged in the initial wording of Article 22 of the 1959 ECMACM Convention.

2.2.4 LAYING OF INFORMATION IN CONNECTION WITH PROCEEDINGS.-

In Chapter VI of the 1959 ECMACM Convention, Article 21 under the title “laying of information in connection with proceedings” regulates a mechanism of international cooperation in criminal matters, by virtue of which a contracting state may formally lay information in connection with a specific criminal act before another contracting state, so that it is prosecuted in the latter. As indicated in the explanatory report to the Convention, this cooperation mechanism is specifically designed for cases in which a contracting state is competent to prosecute a crime but cannot carry out the prosecution because the accused person has sought refuge in the contracting state he/she is a national of and from which he/she would not normally be extradited.

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crimes such as those connected to prostitution and the corruption of minors, drug trafficking, counterfeiting, or terrorism (see Articles 190, 375, 388 and 580 of the Spanish criminal code).

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In these cases, the laying of information, the object of which is to give rise to criminal proceedings being brought before the courts of the requested state, should be transmitted by communication between the Ministries of Justice of the contracting states, although an alternative channel of transmission may be used under the provisions of Article 15.6 of the 1959 ECMACM Convention. Once the information has been transmitted to the requested state, what usually happens is that the information is repeated or validated in said state in order to give rise to new criminal proceedings being brought and thus, pursuant to Article 21.2 of the convention, the requested party is obliged to notify the requesting party of any action taken and send it a copy of the verdict issued in the corresponding proceedings, if applicable. Moreover, the explanatory report states that the requesting state should provide broader judicial assistance to the requested state in the context of criminal proceedings brought as a result of information laid. The provisions of Article 16 of the 1959 ECMACM Convention, regarding the translation of requests for international mutual assistance and the annexed documents are also applicable in relation to information laid in this manner (Article 21.3).

It is nevertheless clear that the mechanism for the laying of information could give rise to an issue of extraterritorial competence in the event that the legal system of the requested state does not allow its courts to hear cases involving offences committed abroad, and in this regard the explanatory report to the Convention states that the Irish member of the Committee of Experts responsible for drafting the same indicated that Irish courts would only have extraterritorial competence in exceptional cases. The existence of international instruments for the transfer of criminal proceedings that are far more elaborate than the mechanism of the laying of information in connection with proceedings (including the 1972 European Convention on the Transfer of Proceedings in Criminal Matters, which will be studied in detail in the third unit of this module) means that Article 21 of the 1959 ECMACM Convention is somewhat redundant.

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2.3 PROCEDURE FOR MUTUAL ASSISTANCE.-

Chapter V of the 1959 ECMACM Convention (Articles 14 to 20) contains the rules on procedure for mutual assistance in criminal matters, including the ones on form, contents and language of the requests, and the channels for transmitting them.

2.3.1 FORM AND CONTENTS OF THE REQUESTS FOR MUTUAL ASSISTANCE.-

In determining the contents of the requests for mutual assistance in general, Article 14 of the 1959 ECMACM Convention starts on the premise that such requests will be in writing. The requests must include the following indications: (a) the authority making the request, (b) the object of and the reason for the request, (c) where possible, the identity and the nationality of the person concerned, and (d) where necessary, the name and address of the person to be served (for example, in the service of documents and other acts of procedural service). In the case of letters rogatory (referred to in Articles 3, 4 and 5 of the Convention) it is also necessary to mention the crime in question and provide a summary of the facts of the proceedings from which the letter rogatory is derived. Even though the precept does not expressly require as much, the explanatory report to the Convention indicates that it may be useful to include a list of questions to be put to the witness or expert to be questioned by the judicial authority of the requested state, although this list would be indicative and not restrictive.

As for the language of the request for assistance, the general rule set out in Article 16.1 of the 1959 ECMACM Convention means that it is not necessary to translate the request or the annexed documents to a different language to that of the requesting state. However, point 2 of the same provision establishes an exception to the general rule and

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states that the contracting states may make a declaration by virtue of which they reserve the right to demand that "requests and annexed documents shall be addressed to it accompanied by a translation into its own language or into either of the official languages of the Council of Europe or into one of the latter languages, specified by it", which would authorise the other contracting states to apply the rule of reciprocity. According to the explanatory report to the Convention, the Committee of Experts charged with drafting it considered the exception appropriate because –unlike in the case of extradition– the requests for mutual assistance will not be enforced, as a general rule, by central bodies, but rather by decentralised bodies that are not accustomed to working in a language other than their own. This report also points out that in the event the requesting state is unable to obtain a translation of the request for assistance and other documents in the language of the requested state, it may ask the latter to organise the translation, although the former will still bear the cost, and the requested state will be obliged to accede to the application insofar as it is possible.

As pointed out earlier, the official languages of the Council of Europe are English and French, but Article 16.2 of the Convention allows the reservation to impose the translation of requests for assistance (and the annexed documents) to the language of the requested state. The large number of reservations made under Article 16.2 of the 1959 ECMACM Convention means that the translation of the request for assistance and annexed documentation appears as a generalised demand, contrary to the principle enshrined in Article 16.1 of the Convention itself[20]. In any event, Article 16.3 of the 1959 ECMACM Convention envisages the preferential application of provisions regarding the translation of

[20] The following countries have made reservations under this provision: Albania, Andorra, Armenia, Austria, Azerbaijan, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, Georgia, Germany, Hungary, Ireland, Iceland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Norway, the Netherlands, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the Ukraine and the United Kingdom. The contents of the reservations can be seen in the website indicated in footnote 4 to this work.

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requests and annexed documents appearing in the agreements in force, or which are agreed between two or more contracting states subsequently.

Article 17 of the 1959 ECMACM Convention establishes the exemption from all the formalities of legalisation in relation to the documents transmitted in application of the Convention, and Article 20 envisages that the execution of requests for assistance will not give rise to the refund of any kind of expenses (with the exception of the provisions of Article 10.3 in relation to advances for witnesses and experts), except for those expenses caused by the intervention of experts in the territory of the requested party or for the transfer of persons in custody under Article 11 of the Convention.

2.3.2 MEANS OF TRANSMISSION OF REQUESTS FOR MUTUAL ASSISTANCE.-

Article 15 of the 1959 ECMACM Convention refers to the different channels for the transmission of requests for international judicial assistance. This provision establishes the general rules for communication between central authorities (Ministry of Justice of the requesting state and Ministry of Justice of the requested state), particularly in the case of letters rogatory and requests for the temporary transfer of persons in custody under Article 11 of the Convention (Article 15.1), although the explanatory report to the Convention highlights that, apart from the contents of this precept, it will always be possible to take recourse to diplomatic channels of transmission if considered necessary for a particular reason.

Point 2 of the provision establishes an exception to the general rule in the case of letters rogatory, when there are reasons of urgency, as it is possible under such circumstances for the request for assistance to be sent directly by the judicial authorities of the requesting state to the judicial authorities of the requested state, although the return of the fulfilled letter rogatory will be via the central authorities (i.e., from the Ministry of Justice of the requested state to the Ministry of Justice of the requesting state). Requests for

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assistance aimed at obtaining extracts or information referring to criminal records that are necessary in criminal proceedings (Article 13.1 of the 1959 ECMACM Convention) can be sent directly by the requesting judicial authorities to the competent authorities of the requested party, who can send their reply directly. This direct avenue of transmission is not obligatory because, as the explanatory report to the convention clarifies, it is possible for the requesting judicial authorities to address the Ministry of Justice of the requested state if they do not know, for example, which authority is competent for dealing with criminal records. Nevertheless, the requests for information on criminal records referred to in Article 13.2 of the Convention (those that are not linked to criminal proceedings) are subject to the general regime of communication via central authorities (Article15.3 of the Convention).

Finally, the possibility is envisaged for recourse to be taken to the option of direct communication between judicial authorities under Article 15.4 of the 1959 ECMACM Convention in relation to requests for assistance not covered by points 1 and 3 of the article in question (service of procedural documents and court verdicts, according to the explanatory report to the Convention) and the requests for investigation preliminary to prosecution, although this is also an optional channel. In all cases in which it is possible to take recourse to the direct avenue of transmission of the request for mutual assistance, this request may be made via the International Criminal Police Organisation (INTERPOL), pursuant to Article 15.5 of the Convention. This is a similar provision to the one contained in Article 16 of the 1957 European Convention on Extradition.

Article 18 of the 1959 ECMACM Convention envisages that an authority receiving a request for mutual assistance that lacks competence to process it, will send it *ex officio* to the local competent authority. Moreover, in the event that the transfer has taken place by means of direct communication between judicial authorities, it will inform the requesting judicial authorities via the same channels. As the explanatory report to the Convention indicates, the provision of information to the requesting judicial authority of the processing of its request for assistance when the recipient judicial authority is not the competent one for fulfilling it only

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makes sense in relation to requests made via direct channels, because in the event the transmission had taken place through the central authorities, the requesting judicial authority would not have had a particular interest in identifying the competent judicial authority for fulfilling its request for mutual assistance in the requested state.

Article 15.6 of the 1959 ECMACM Convention authorises the contracting states to make a declaration indicating some or all of the requests for mutual assistance that should be sent via a channel other than the one set out in the rule itself or requesting that, in the case of letters rogatory sent directly between judicial authorities under Article 15.2 of the Convention, a copy of the letter rogatory be sent to its Ministry of Justice. According to the explanatory report to the Convention, this point was included in the article because not all the delegations of the states that participated in the drafting of the convention could accept the means of transmission of the requests for mutual assistance envisaged in the instrument, and, in particular, the direct channel between judicial authorities. The fact is that a significant number of the contracting states to the 1959 ECMACM Convention (including Spain) have made declarations under Article 15.6 requiring that a copy of any letter rogatory sent directly between judicial authorities for reasons of urgency be sent to their Ministry of Justice at the same time[21]. Meanwhile, as with the case regarding translations, Article 15.7 of the 1959 ECMACM Convention envisages the preferential application of the provisions regarding the direct transfer of requests for mutual assistance between judicial authorities in agreements in force or which are pacted between two or more contracting states subsequently.

[21] In addition to Spain, the following countries have made declarations under Article 15.6 of the 1959 ECMACM Convention: Albania, Andorra, Armenia, Azerbaijan, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, France, Georgia, Hungary, Ireland, Iceland, Israel, Italy, Latvia, Lithuania, Malta, Moldova, Monaco, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Switzerland, the Ukraine and the United Kingdom. Some of these states require simultaneous sending of the request for mutual assistance to their Ministry of Justice when the direct means of transmission between judicial authorities is used due to reasons of urgency, while others have taken advantage of the declaration to

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3.- THE FIRST ADDITIONAL PROTOCOL TO THE EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS.-

The First Additional Protocol to the 1959 ECMACM Convention (Convention no. 99 on the Council of Europe's list), was opened for signing by the contracting states to the Convention on 17 March 1978 and entered into force on 12 April 1982, after being ratified three times.

The protocol is open for signing by the Member States of the Council of Europe who signed the 1959 ECMACM Convention and is subject to subsequent ratification, acceptance or approval, so that a Member State of the Council of Europe cannot ratify, accept or approve the protocol unless it has ratified the 1959 ECMACM Convention either simultaneously or previously (Article 5). It is possible, however, for the Member States of the Council of Europe who have signed the 1959 ECMACM Convention without ratifying it to sign the protocol before they have ratified the Convention. States that are not members of the Council of Europe but who have acceded to the 1959 ECMACM Convention can accede to the protocol at any time after its entry into force. To date, the protocol has only been signed and ratified by the Member States of the Council of Europe. The following table shows the dates of signing, ratification or accession and entry into force of the First Additional Protocol to the 1959 ECMACM Convention in relation to each of its contracting states.

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exclude or reduce the possibilities of direct transmission of requests for mutual assistance or to identify the central authorities to whom the requests for assistance should be sent.

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States	Signing	Ratification	Entry into force							
Albania	19/5/1998	4/4/2000	3/7/2000							
Andorra										
Armenia	8/11/2001	23/3/2004	21/6/2004							
Austria	17/3/1978	2/5/1983	31/7/1983							
Azerbaijan	7/11/2001	4/7/2003	2/10/2003							
Belgium	11/7/1978	28/2/2002	29/5/2002							
Bosnia Herzegovina										
Bulgaria	30/9/1993	17/6/1994	15/9/1994							
Croatia	15/9/1999	15/9/1999	14/12/1999							
Cyprus	27/3/1996	24/2/2000	24/5/2000							
The Czech Republic	18/12/1995	19/11/1996	17/2/1997							
Denmark	25/10/1982	7/3/1983	5/6/1983							
Estonia	3/5/1996	28/4/1997	27/7/1997							
Finland		30/1/1985 (accession)	30/4/1985							
France	28/3/1990	1/2/1991	2/5/1991							
Georgia	7/11/2001	22/5/2003	20/8/2003							
Germany	8/11/1985	8/3/1991	6/6/1991							
Greece	18/6/1980	24/7/1981	12/4/1982							
Hungary	19/11/1991	13/7/1993	11/10/1993							
Iceland	27/9/1982	20/6/1984	18/9/1984							
Ireland			26/2/1997							

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	28/11/1996	28/11/1996								
Italy	30/10/1980	26/11/1985	24/2/1986							
Latvia	30/10/1996	2/6/1997	31/8/1997							
Liechtenstein										
Lithuania	9/11/1994	17/4/1997	16/7/1997							
Luxembourg	9/12/1994	2/10/2000	31/12/2000							
Malta	20/11/2000									
Moldova	26/6/1998	27/6/2001	25/9/2001							
Monaco										
Montenegro		23/6/2003 (accession)	6/6/2006							
The Netherlands	13/7/1979	12/1/1982	12/4/1982							
Norway	11/12/1986	11/12/1986	11/3/1987							
Poland	9/5/1994	19/3/1996	17/6/1996							
Portugal	12/8/1980	27/1/1995	27/4/1995							
Romania	15/2/1996	17/3/1999	15/6/1999							
Russia	7/11/1996	10/12/1999	9/3/2000							
San Marino										
Serbia		23/6/2003 (accession)	21/9/2003							

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Slovakia	14/2/1996	23/9/1996	22/12/1996							
Slovenia	4/3/1999	19/7/2001	17/10/2001							
Spain	12/4/1985	13/6/1991	11/9/1991							
Sweden	6/4/1979	13/6/1979	12/4/1982							
Switzerland	17/11/1981									
The Former Yugoslav Republic of Macedonia	28/7/1999	28/7/1999	26/10/1999							
Turkey	4/2/1986	29/3/1990	27/6/1990							
The Ukraine	29/5/1997	11/3/1998	9/6/1998							
The United Kingdom	21/6/1991	29/8/1991	27/11/1991							

Total number of signings not subsequently ratified:	2
Total number of ratifications/accessions:	40

The First Additional Protocol to the 1959 ECMACM Convention consists of a brief Preamble and four Chapters, containing a total of twelve articles. Chapters I to III complement the objective scope and the provisions of the Convention and Chapter IV contains the final provisions of the additional protocol, regarding signing, ratification, accession and denunciation of the same, declarations and reserves and the territorial scope of application in relation to the territories whose international relations a contracting state assumes. As set out in the explanatory report to the protocol (§§ 1 to 7), the origin of this document can be found in a meeting of those responsible for the implementation of the 1959 ECMACM Convention in each of its contracting states, organised by the Council of Europe in June 1970. This meeting studied the practical problems derived from the application of the convention and a series of conclusions were adopted, including proposals aimed at facilitating such application in the future, which were examined by the European Committee

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on Crime Problems (specifically by its Subcommittee no. XXXI) of the Council of Europe at its 23rd plenary session.

Subcommittee XXXI was charged with drafting the protocol, which –as indicated in the official summary of its contents– limits the possibility of refusing mutual assistance only when the request refers to an offence that the requested party considers a fiscal offence (Chapter I); extends mutual assistance to the service of documents concerning the enforcement of a sentence, the collection of a fine or the payment of procedural costs, and the measures regarding the suspension of the announcement of a sentence or the enforcement thereof, to conditional release, the deferment of commencement of a sentence or the interruption of the enforcement (Chapter II); and adds some specific rules in relation to the exchange of information on criminal convictions and subsequent measures regarding the recording at the corresponding registry of criminal records (Chapter III). As we have already studied the contents of the protocol in relation to these points, I refer you to the corresponding sections of this work (sections 2.1.1, 2.2.1 and 2.2.3). However, I would just add that Article 8 of the Protocol limits the possibility of making reservations to the contents of the instrument[22] and that Article 10 establishes a dispute resolution mechanism in the application of the protocol stating that the European Committee on Crime Problems will be kept informed regarding application of the protocol and "do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution".

[22] The possibility of making reservations is limited to the non-acceptance of Chapter I (or to the partial acceptance in relation to certain fiscal offences or categories of fiscal offences or the non-execution of

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4.- THE SECOND ADDITIONAL PROTOCOL TO THE EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS.-

The Second Additional Protocol to the 1959 ECMACM Convention (convention no. 182 on the Council of Europe's list), was opened for signing by the contracting states to the Convention on 8 November 2001 and entered into force on 1 February 2004, after obtaining three ratifications. As with the case of the First Additional Protocol, this instrument can be signed by the Member States of the Council of Europe who have signed the 1959 ECMACM Convention and is subject to subsequent ratification, acceptance or approval, so that a Member State of the Council of Europe cannot ratify, accept or approve the protocol unless it has ratified the 1959 ECMACM Convention simultaneously or previously (Article 30). Also in this case, the states who are not members of the Council of Europe but have acceded to the 1959 ECMACM Convention may accede to the protocol at any time after its entry into force (Article 31).

To date the protocol has only been signed and ratified by less than half the Member States of the Council of Europe and by Israel, and it is worth highlighting that some representative states (who are also members of the European Union) have not even signed it (for example, Spain, Italy or Austria) or have not ratified it despite having signed it (Belgium, France, Germany, the Netherlands and the United Kingdom, among others). The following table contains the dates of signing, ratification or accession and entry into force of the

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the letters rogatory regarding the search or seizure of property in relation to fiscal offences), Chapter II or Chapter III.

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Second Additional Protocol to the 1959 ECMACM Convention in relation to each of the contracting states to the same.

Member States of the Council of Europe

States	Signing	Ratification	Entry into force							
Albania	13/11/2001	20/6/2002	1/2/2004							
Andorra										
Armenia	3/3/2009									
Austria										
Azerbaijan										
Belgium	8/11/2001	9/3/2009	1/7/2009							
Bosnia Herzegovina	17/5/2006	7/11/2007	1/3/2008							
Bulgaria	8/11/2001	11/5/2004	1/9/2004							
Croatia	9/6/2004	28/3/2007	1/7/2007							
Cyprus	8/11/2001									
The Czech Republic	18/12/2003	1/3/2006	1/7/2006							
Denmark	8/11/2001	15/1/2003	1/2/2004							
Estonia	26/11/2002	9/9/2004	1/1/2005							
Finland	9/10/2003									
France	8/11/2001									
Georgia										
Germany	8/11/2001									
Greece	8/11/2001									

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Hungary	15/1/2003									
Iceland	8/11/2001									
Ireland	8/11/2001									
Italy										
Latvia	24/9/2003	30/3/2004	1/7/2004							
Liechtenstein										
Lithuania	9/10/2003	6/4/2004	1/8/2004							
Luxembourg	30/1/2008									
Malta	18/9/2002									
Moldova										
Monaco										
Montenegro	7/4/2005	20/10/2008	1/2/2009							
The Netherlands	8/11/2001									
Norway	8/11/2001									
Poland	11/9/2002	9/10/2003	1/2/2004							
Portugal	8/11/2001	16/1/2007	1/5/2007							
Romania	8/11/2001	29/11/2004	1/3/2005							
Russia										
San Marino										
Serbia	7/4/2005	26/4/2007	1/8/2007							
Slovakia	12/5/2004	11/1/2005	1/5/2005							
Slovenia	7/4/2005									
Spain										
Sweden	8/11/2001									
Switzerland	15/2/2002	4/10/2004	1/2/2005							
The Former Yugoslav Republic of Macedonia	8/11/2001	16/12/2008	1/4/2009							

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Turkey										
The Ukraine	8/11/2001									
The United Kingdom	8/11/2001									

States that are not members of the Council of Europe

States	Signing	Ratification	Entry into force							
Israel		20/3/2006 (accession)	1/7/2006							

Total number of signings not subsequently ratified:	17
Total number of ratifications/accessions:	19

The Second Additional Protocol to the 1959 ECMACM Convention consists of a brief Preamble and three Chapters with a total of 35 articles. Chapters I and II contain rules that replace or supplement the provisions of the Convention, while Chapter III covers the provisions regarding the signing, ratification, accession, denunciation, reservations and territorial scope of application of the additional protocol. According to the summary of the contents of the protocol (in line with the explanatory report to the same), it aims to improve the capacity of states to react to cross-border crime in light of the political and social evolution in Europe and technological development worldwide, improving and supplementing both the 1959 ECMACM Convention and the First Additional Protocol to it, by extending the cases in which mutual assistance can be requested and making the provision of such assistance faster and more flexible.

Both its date and its contents (which largely coincide, as the explanatory report acknowledges in § 9) mean that the Second Additional Protocol to the 1959 ECMACM

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Convention is a direct consequence of the 2000 CMACM Convention, to the extent that the explanatory report itself refers (§ 11) to the explanatory report to the 2000 CMACM Convention for the interpretation of the precepts of the protocol[23]. This fact, together with the circumstance that a large number of Member States of the European Union have not signed or ratified it, means that a detailed study of its provision is not necessary.

In any event, it should be pointed out that the protocol replaces or supplements the Articles of the 1959 ECMACM Convention regarding the scope of application (Article 1), presence of authorities from the requesting state (Article 4), temporary transfer of persons in custody (Article 11), means of transmission (Article 15), expenses (Article 20) and judicial authorities (Article 24), introducing the main new developments of an extension of the cases of direct communication between judicial authorities and application of the *forum regit actum* principle, which implies observance of the procedure required by the law of the requesting state in the execution of letters rogatory when so specified in the request for mutual assistance, even if said procedure is not customary in the requested state and provided it does not contravene the basic principles of the latter's legal system (Article 8 of the protocol). Moreover, it expressly envisages the possibility of sending requests for mutual assistance the object of which is the adoption of interim measures aimed at preserving evidence, maintaining an existing situation or protecting endangered legal interests (Article 24.1 of the protocol). Unlike the technique used in the 1959 ECMACM Convention, the protocol significantly limits the power of the states to make reservations to the content of the same, as Article 33.2 only allows reservations to be made regarding all or part of the contents of

[23] As pointed out by BUENO ARÚS, F./ DE MIGUEL ZARAGOZA, J.: *Manual de Derecho Penal Internacional*. Publicaciones de la Universidad Pontificia de Comillas. Madrid. 2003. page 245, this situation implies a notable methodological change, as until now there had been a transfer of legal instruments for cooperation in criminal matters from the Council of Europe to the European Union. Moreover, the fact that the Council of Europe has a far less homogenous legal structure than that of the source that inspired it (the European Union) in this case, entails the risk that the Second Additional Protocol to the 1959 ECMACM Convention could be an unviable instrument.

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Articles 16 (service by post), 17 (cross-border observations), 18 (controlled delivery), 19 (covert investigations) and 20 (joint investigation teams).

Finally, in relation to the specific forms of cooperation in criminal matters, the protocol contains provisions that are almost literal reproductions of the text of the 2000 CMACM Convention in relation to hearings via videoconference (Articles 9 and 10 of the protocol), spontaneous information (Article 11 of the protocol), controlled delivery (art. 18 of the protocol), covert investigations (Article 19 of the protocol), joint investigation teams (Article 20 of the protocol) or data protection (Article 26 of the protocol), although it omits the regulations regarding assistance in intercepting telecommunications and the general possibility of the requesting and requested judicial authorities reaching a consensus on the manner of execution of the assistance, which is contemplated in relation to certain specific cases (hearings by videoconference and teleconference and joint investigation teams, for example).

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NIVEL III: REFERENCE DOCUMENTS

1.- THE 1959 CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS.-

1.1.- *The following Council of Europe webpage (http://conventions.coe.int/Default.asp) provides access to all the basic information on the 1959 ECMACM Convention (table of signings and ratifications, date of entry into force, list of reservations, declarations and communications from the contracting states, full text of the convention in Html and Word format, summary of contents and explanatory report) in the two official languages of the Council of Europe (French and English).*

1.2.- ENGLISH: *Full information in English is available at the following address: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=030&CM=8&DF=2/17/2009&CL=ENG*

1.3.- FRENCH: *Full information in French is available at the following address: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=030&CM=8&DF=2/17/2009&CL=FRE*

1.4.- GERMAN: *The Council of Europe website provides the following information in German: table of signings and ratifications, date of entry into force, full text of the convention in Html format and summary of contents at the following address: http://conventions.coe.int/Trebaty/Commun/QueVoulezVous.asp?NT=030&CM=8&DF=2/17/2009&CL=GER*

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The rest of the information on the 1959 ECMACM Convention available at the above address (list of reservations, declarations and communications from the contracting states, full text of the convention in Word format and explanatory report) is available only in English.

1.5.- ITALIAN: *The Council of Europe website provides the following information in Italian: table of signings and ratifications, date of entry into force, full text of the convention in Html format and summary of contents at the following address:*

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=030&CM=8&DF=2/17/2009&CL=ITA

The rest of the information on the 1959 ECMACM Convention available at the above address (list of reservations, declarations and communications from the contracting states, full text of the convention in Word format and explanatory report) is available only in English.

1.6.- RUSSIAN: *The Council of Europe website provides the following information in Russian: table of signings and ratifications, date of entry into force, full text of the convention in Html format and summary of contents at the following address:*

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=030&CM=8&DF=2/17/2009&CL=RUS

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1.7.- SPANISH: *The full text of the 1959 ECMACM Convention in Spanish is available on the* prontuario *website: www.prontuario.org*

This website contains a file with information in Spanish on the 1959 ECMACM Convention which includes: date of publication and entry into force in Spain, official source of the instrument, list of contracting states, observations on the convention, the subsequent instruments developing it, the legislation related to the convention and its scope of application. This page provides information in English on the explanatory report of the convention, the table of signings and ratifications and the list of reservations, declarations and communications by the contracting states by means of links to the Council of Europe website.

2. FIRST ADDITIONAL PROTOCOL TO THE 1959 CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS.-

2.1.- *The following Council of Europe webpage (http://conventions.coe.int/Default.asp) provides access to all the basic information on the First Additional Protocol of the 1959 ECMACM Convention (table of signings and ratifications, date of entry into force, list of reservations, declarations and communications from the contracting states, full text of the convention in Html and Word format, summary of contents and explanatory report) in the two official languages of the Council of Europe (French and English).*

2.2.- ENGLISH: *Full information in English is available at the following address:*

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=099&CM=8&DF=2/17/2009&CL=ENG

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2.3.- FRENCH: *Full information in French is available at the following address:*

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=099&CM=8&DF=2/17/2009&CL=FRE

2.4.- GERMAN: The Council of Europe website provides the following information in German: table of signings and ratifications, date of entry into force, full text of the convention in Html format and summary of contents at the following address:

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=099&CM=8&DF=2/17/2009&CL=GER

The rest of the information on the First Additional Protocol to the 1959 ECMACM Convention available at the above address (list of reservations, declarations and communications from the contracting states, full text of the convention in Word format and explanatory report) is available only in English.

2.5.- ITALIAN: The Council of Europe website provides the following information in Italian: table of signings and ratifications, date of entry into force, full text of the convention in Html format and summary of contents at the following address:

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=099&CM=8&DF=2/17/2009&CL=ITA

The rest of the information on the First Additional Protocol to the 1959 ECMACM Convention available at the above

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address (list of reservations, declarations and communications from the contracting states, full text of the convention in Word format and explanatory report) is available only in English.

2.6.- RUSSIAN: The Council of Europe website provides the following information in Russian: table of signings and ratifications, date of entry into force, full text of the convention in Html format and summary of contents at the following address:

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=099&CM=8&DF=2/17/2009&CL=RUS

The rest of the information on the First Additional Protocol to the 1959 ECMACM Convention available at the above address (list of reservations, declarations and communications from the contracting states, full text of the convention in Word format and explanatory report) is available only in English.

2.7.- SPANISH: *The full text of the First Additional Protocol to the 1959 ECMACM Convention in Spanish is available on the* prontuario *website: www.prontuario.org*

This website contains a file with information in Spanish on the First Additional Protocol to the 1959 ECMACM Convention which includes: date of publication and entry into force in Spain, official source of the instrument, list of contracting states, observations on the convention, the subsequent instruments developing it, the legislation related to the convention and its scope of application. This page provides information in English on the explanatory report of the convention, the table of signings and ratifications and the list of

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reservations, declarations and communications by the contracting states by means of links to the Council of Europe website.

3.- SECOND ADDITIONAL PROTOCOL TO THE 1959 CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS.-

3.1.- The following Council of Europe webpage (http://conventions.coe.int/Default.asp) provides access to all the basic information on the Second Additional Protocol of the 1959 ECMACM Convention (table of signings and ratifications, date of entry into force, list of reservations, declarations and communications from the contracting states, full text of the convention in Html and Word format, summary of contents and explanatory report) in the two official languages of the Council of Europe (French and English).

3.2.- ENGLISH: *Full information in English is available at the following address:*

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=182&CM=8&DF=2/18/2009&CL=ENG

3.3.- FRENCH: *Full information in French is available at the following address:*

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=182&CM=8&DF=2/18/2009&CL=FRE

3.4.- GERMAN: The Council of Europe website provides the following information in German: table of signings and ratifications, date of entry into force, full text of the

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convention in Html format and summary of contents at the following address:

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=182&CM=8&DF=2/18/2009&CL=GER

The rest of the information on the Second Additional Protocol to the 1959 ECMACM Convention available at the above address (list of reservations, declarations and communications from the contracting states, full text of the convention in Word format and explanatory report) is available only in English.

3.5.- ITALIAN: The Council of Europe website provides the following information in Italian: table of signings and ratifications, date of entry into force, full text of the convention in Html format and summary of contents at the following address:

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=182&CM=8&DF=2/18/2009&CL=ITA

The rest of the information on the Second Additional Protocol to the 1959 ECMACM Convention available at the above address (list of reservations, declarations and communications from the contracting states, full text of the convention in Word format and explanatory report) is available only in English.

3.6.- RUSSIAN: The Council of Europe website provides the following information in Russian: table of signings and

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ratifications, date of entry into force, full text of the convention in Html format and summary of contents at the following address:

http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=182&CM=8&DF=2/18/2009&CL=RUS

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