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MODULE V

UNIT XVII

Bilateral and European Union Conventions with third Countries. Special reference to the EU-USA Convention

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LEVEL I: TOPIC

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LEVEL I: TOPIC

SUMMARY:

2.3. AGREEMENT BETWEEN THE EUROPEAN UNION AND THE REPUBLIC OF ICELAND AND THE KINGDOM OF NORWAY ON THE APPLICATION OF CERTAIN PROVISIONS OF THE CONVENTION OF 29 MAY 2000 ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE MEMBER STATES OF THE EUROPEAN UNION AND THE 2001 PROTOCOL THERETO

2.4. AGREEMENT BETWEEN THE EU AND JAPAN ON COOPERATION IN CRIMINAL MATTERS

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1. BILATERAL CONVENTIONS BETWEEN MEMBER STATES OF THE EU AND THIRD COUNTRIES AND INTERNATIONAL ORGANISATIONS

As we will see shortly, the European Union (EU) has signed some Agreements with third countries and international organisations in the field of police and judicial cooperation in criminal matters in line with Articles 24 and 38 of the Treaty on European Union (EU Treaty).

Apart from the Agreements that the EU has entered into with third countries and international organisations as an institution, it is important to highlight the importance of the bilateral agreements or conventions in this field nowadays. As indicated in unit 1 of this course in relation to the evolution of judicial cooperation in criminal matters: "Even though the origins of international legal cooperation in criminal matters can be found in bilateral intergovernmental policies, and it subsequently went on to advance on both multilateral and regional levels, this has not led to the disappearance of the original form of cooperation. What is more, it could be said that, generally speaking, it represents an improvement of the provisions of a regional nature".

In this regard, even where the EU has entered into agreements with third countries and international organisations, the Member States of the EU have signed bilateral agreements with third countries in relation to international judicial cooperation in order to facilitate such cooperation[1].

[1] I am not going to make a detailed exposition of all the bilateral conventions existing between the member states of the EU and third countries because the length of the list would go far beyond the limits of this work, but I will name a few of them for the purposes of example. Thus, for instance, among the bilateral agreements for judicial assistance in criminal matters signed by Italy, we could cite, among others: Algeria: Convention on judicial assistance in criminal matters between the Government of the Italian Republic and the People's Democratic Republic of Algeria (Algeria, 2003); Argentina: Convention on judicial assistance in criminal matters (Rome, 1987); Australia: Treaty on mutual assistance in criminal matters (Melbourne, 1988); Bolivia: Treaty on judicial assistance in criminal matters (Cochabamba, 1996); Canada: Treaty

2. AGREEMENTS BETWEEN THE EU AND THIRD COUNTRIES AND INTERNATIONAL ORGANISATIONS

Conventions between the Member States of the European Union may be established for adoption by them in matters concerning Police and Judicial Cooperation in Criminal Matters (Article 34 of the EU Treaty).

The EU can also enter into agreements with third countries and organisations, pursuant to the provisions of Articles 24 and 38 of the EU Treaty, on matters relating to the Common Foreign and Security Policy (CFSP) and police and judicial cooperation in criminal matters.

In relation to these latter agreements of the EU with third countries and organisations we can highlight:

- The Agreement between the International Criminal Court (ICC) and the European Union on cooperation and assistance signed on 10 April 2006[2];

on mutual assistance in criminal matters (Rome, 1990); Costa Rica: Convention on extradition and judicial assistance (Rome, 1873); Mexico: Extradition Treaty (Mexico City, 1899); Paraguay: Extradition Treaty (Asunción, 1907) (although only Article 16 is in force); Peru: Treaty on judicial assistance in criminal matters (Roma, 1994); USA: Treaty on mutual assistance in criminal matters between the Government of the Italian Republic and the Government of the United States of America (Rome, 1982); Venezuela: Treaty on extradition and judicial assistance in criminal matters (Caracas, 1930); etc. France has also signed numerous bilateral agreements with third countries in relation to judicial cooperation in criminal matters, including, for example, Algeria, Australia, Bosnia Herzegovina, Brazil, Cameroon, Canada, China, Colombia, Croatia, Dominican Republic, Egypt, Hong Kong, India, Iran, Israel, Kosovo, Madagascar, Mexico, Monaco, Nigeria, Paraguay, Peru, Russia, Serbia, South Africa, Thailand, Uruguay, etc. Meanwhile, the United Kingdom has also signed agreements with third countries in relation to judicial assistance in criminal matters, for example, with Algeria, Argentina, Australia, Bahamas, Barbados, Bolivia, Canada, Colombia, Ecuador, Hong Kong, India, Malaysia, Mexico, Nigeria, Panama, Paraguay, Peru, Rumania, Saudi Arabia, Thailand, USA, Uruguay, etc.

[2] Published in the Official Journal of the European Union on 28 April 2006 (L 115/50).

- The two agreements between the EU and the USA, signed in June 2003 in Washington on Extradition and Mutual Legal Assistance; and
- The Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union and the 2001 protocol thereto.
- Agreement between the EU and Japan on cooperation in criminal matters.

2.1. AGREEMENT BETWEEN THE ICC AND THE EU ON COOPERATION AND ASSISTANCE

Although the creation of the ICC[3], on 1 July 2002, would seem to be a question that falls outside the sphere of the community jurisdiction of the EU, both in terms of its foreign policy and police and judicial cooperation in criminal matters dimensions, there has been certain involvement of the EU in the establishment of the ICC.

We say that it would seem to fall outside the scope of the EU because the latter constitutes a legal community where criminal matters continue to form part of the main nucleus of matters that fall under the jurisdiction of the states. Nevertheless, the EU and its Member States have adopted a firm decision in favour of the existence of the ICC and have translated this into legal terms, in an open approach to the legal bases of the Treaties, both in relation to the common foreign and security policy and regarding the third pillar of police and judicial cooperation in criminal matters[4].

Since the creation of the ICC, the EU has always shown unconditional support and has used different instruments to materialise such support. On a political level, different agreements between the two institutions have been signed and special attention has

[3] On the origin and characteristics, rules of jurisdiction and procedure, structure and operation, the obligation to cooperate with the ICC, see unit 14 in Module V, section 3.2.

been paid to updating the **common positions** within the EU[5]. It is necessary to clarify that we are talking about common positions and not joint actions, which are different, as according to Article 14 of the EU Treaty, joint actions refer to specific situations in which an operational action of the EU is considered necessary and the positions they adopt are binding for the Member States; on the other hand, common positions, as set out in Article 15 of the EU Treaty, will define the approach of the EU to a specific matter with a defined geographic or thematic scope and the Member States will ensure their national policies are in line with the common positions[6].

The last Common Position of June 2003, which substituted and redrafted the initial one of 2001, was aimed at supporting the effective operation of the ICC along the same lines as the amendment made in 2002. Doctrine points out that the innovative nature of this Common Position can be seen from three aspects:

- It establishes that in order to support the independence of the ICC, the EU and its Member States will encourage the Contracting States to make their contribution effective; make an effort to obtain the signing and ratification of the Agreement on privileges and immunities of the ICC; make an effort to support the development of the training of and assistance to judges, prosecutors, officials and lawyers in work related to the Court.

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[4] See PONS RAFOLS, "La Unión Europea ante la Corte Penal Internacional", in *Revista de Derecho Comunitario Europeo*, no. 15, May/August 2003, pp. 1068 *et seq*.

[5] See VIDAL MARTÍN, "El doble rasero de la impunidad: la UE y la Corte Penal Internacional", in FRIDE comment, December 2007, who states that the first common position dates back to June 2001 (Common Position 2001/443/CFSP), Article 7 of which envisages reviews every 6 months. These reviews were carried out in June 2002 (Common Position 2002/474/CFSP) and June 2003 (Common Position 2003/444/CFSP), thus strengthening the position of the EU. The 2002 review introduced an express reference to the "universal support" that the EU offered the Court, specifically calling for the collaboration of other states and all the agents of the International Community. Meanwhile, the second review of the common position aimed to give the EU's activity regarding the ICC a new direction, referring repeatedly to the conclusions of the Council of 30 September 2002 on the ICC and the annexed guiding principles of the EU. This review mentioned the crime of aggression for the first time, and asked the Member States to contribute to the activities of the special working group and support its solutions whenever they exist.

[6] See PONS RAFOLS, "La Unión Europea ante la Corte Penal Internacional", *op, cit*., page 1080, who states that the common positions are configured more as policy guidelines that the Member States should follow.

- The EU and its Member States will following the evolution of effective cooperation with the ICC closely and in this context, as far as the obstacles that the USA is raising are concerned, where necessary it will draw the attention of third countries to the conclusions of the Council of 30 September 2002 on the ICC and the guiding principles of the EU annexed to said conclusions in relation to proposed agreements or arrangements regarding the conditions of surrender of persons to the ICC.
- It establishes a prior practice in declarations by the Presidency and in interventions before different international forums in relation to the ICC, in the sense that the countries that have joined also desire to apply the Common Position from the day it is adopted[7].

Taking into consideration that virtually all the Member States of the EU are parties to the Rome Statute, it is logical for the EU to seek to enter into an agreement with the ICC that would facilitate appropriate cooperation between the two organisations.

The police and judicial mechanisms of cooperation in criminal matters adopted by the EU must allow police and judicial cooperation in relation to those crimes that fall within the jurisdiction of the ICC, facilitating both the persecution and the prosecution of the perpetrators throughout its jurisdictions as well as cooperation with the Court.

Nevertheless, the peculiar characteristics of the crimes heard by the ICC, crimes of international significance and particular gravity, led the Council to adopt **two decisions** to step up cooperation.

The first was the **Decision of 13 June 2002**[8], at the initiative of the Netherlands, in relation to the creation of a European network of contact points[9], and the second the **Decision of 8 May 2003**[10], at the initiative of Denmark, with the purpose of

[7] PONS RAFOLS, "La Unión Europea ante la Corte Penal Internacional", *op. cit.*, page 1085.
[8] Council Decision 2002/494/JHA of 13 June 2002 (OJEC L 167 of 26 June 2002).
[9] On the European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, see unit 14, section 3.2.6.
[10] Council Decision 2003/335/JHA of 8 May 2003 (OJEC L 118 of 14 May 2003).

strengthening cooperation in relation to the investigation and prosecution of crimes under the jurisdiction of the ICC.

However, it must be pointed out that pursuant to the already existing instruments on police and judicial assistance in criminal matters, what these Decisions add is not particularly relevant and, as the doctrine establishes, goes no further than the gathering and exchange of information and overall cooperation in relation to investigation and prosecution. However, special mention is made of the need for the competent authorities for immigration to have sufficient information on the persons suspected of being responsible for such crimes, as many of them will probably have taken place outside the borders of the Member States and the police services may have difficulties obtaining sufficient information or verifying the accuracy of the information obtained[11].

The last step was taken with the signing of the **Agreement on Cooperation and Assistance between the EU and the ICC on 10 April 2006**[12]. By means of this Agreement, the tradition of cooperation between the two institutions is given continuity and certain matters in particular are regulated, regarding the exchange of information (including classified information), regular meetings between the two institutions, statements from EU personnel, security, immunity, resources, training and direct cooperation between the EU and the ICC Prosecutor.

On the basis of Article 87, section 6 of the Rome Statute which states that the ICC may ask any intergovernmental organisation to provide it with information or documents, or other forms of cooperation and assistance that have been agreed with any of its organisations, pursuant to its jurisdiction or mandate, the agreement was signed and contains the provisions regarding cooperation and assistance between the ICC and the

[11] PONS RAFOLS, "La Unión Europea ante la Corte Penal Internacional", *op. cit.,* pp 1089-1092.
[12] The United States has maintained an aggressive stance against the International Criminal Court, firstly withdrawing from the signing of the Rome Statute, and secondly, seeking to enter into bilateral agreements in which, taking into account Article 98.2 of the Rome Statute, it seeks to prevent the surrender of any US national to the Court, which constitutes a clear continuation of the strategy set in motion by that country and which initially involved including the option of guaranteeing the immunity of its citizens before the Court in the Rules of Procedure and Evidence by means of an Agreement on relations with the United Nations or via a separate agreement between the United Nations and the Court itself.

EU and not between the ICC and the Member States of the EU; it was not possible to negotiate an agreement between the EU and the ICC as a whole, instead it was necessary to negotiate a series of small agreements between the bodies of each institution.

In this way the Agreement is not binding for the Member States, but the EU as a whole. In this regard, the direct participation of the Member States would be necessary. The Agreement was based on Article 87.6 of the Rome Statute, but the Agreement refers not only to said provision for the purpose of interpretation, but the very Preamble of the Agreement states that it should be considered in conjunction with the rest of the provisions of the Rome Statute and its Rules of Procedure and Evidence, which prevail over it.

As for the content of the Agreement, we should point out first of all that the Agreement consists of a Preamble, 20 Articles and an Annex.

Articles 1, 2 and 3 specify the purpose of the Agreement (to set out the conditions for cooperation and assistance between the EU and the ICC) and definitions, and Article 3, the agreements with the Member States; the latter indicates that the Agreement, including any agreements entered into pursuant to Article 11, will not apply to requests for information made by ICC regarding information other than EU documents, including classified EU information, coming from a Member State. In this case, the request should be made directly to the Member State in question.

Article 4 specifies the obligation of cooperation and assistance, indicating that the EU and the ICC agree that, in order to facilitate the effective discharge of their respective responsibilities, they will cooperate closely, as appropriate, with each other and consult each other on matters of mutual interest, pursuant to the provisions of this Agreement while fully respecting the respective provisions of the EU Treaty and the Statute. In order to facilitate this obligation of cooperation and assistance, the Parties agree on the establishment of appropriate regular contacts between the Court and the EU Focal Point for the Court. In this way, the channels of information between the two institutions are used to promote mutual cooperation and consultation and, as set out in Article 5 of

the Agreement, the information is not centred solely on the EU Focal Point for the Court, but also the attendance of the latter at the meetings and conferences organised under the auspices of the EU provided they are of interest to the judicial institution and it can provide assistance with regard to matters within its jurisdiction.

In relation to the exchange of information, Article 7 envisages that the EU and the ICC will, to the fullest extent possible and practicable, ensure the regular exchange of information and documents of mutual interest in accordance with the Statute and the Rules of Procedure and Evidence. The third section envisages the possibility for the EU to provide relevant information or documents for the activities of the ICC acting on its own initiative. Meanwhile, the Registrar of the Court will supply all information and documentation regarding pleadings, oral proceedings, judgements and orders of the Court, which may be of interest to the EU.

Where the obligation of cooperation between the EU and the ICC is closest is in the duty of the former to cooperate with the Court Prosecutor, which is established in the context of Article 54.3 sections c) and d) of the Statute, which is the article to which Article 11, sections 1.ii) and iii) of the Agreement, refers. This article establishes that the Prosecutor may request the cooperation of an intergovernmental organisation pursuant to its respective competence and mandate, as well as establishing the compatible agreements with the Statute that are necessary to facilitate the cooperation with an intergovernmental organisation. Moreover, the EU undertakes to provide the Prosecutor with any additional information in its power, requested by the latter, and requests for information in general should be processed in writing and within a term of no more than one month. In any event, the EU and the Prosecutor may agree that the Union provide documentation or information to the Prosecutor, provided that it is maintained confidential and only used for the purposes of obtaining new evidence. The documents or information will not be disclosed at any stage of the proceedings, or after they have concluded, or to any other ICC bodies or third parties, unless the EU gives its consent.

In relation to privileges and immunities, Article 12 of the Agreement establishes that if the ICC seeks to exercise its jurisdiction over a person who is alleged to be criminally

responsible for a crime within the jurisdiction of the Court and if such person enjoys, according to the relevant rules of international law, any privileges and immunities, the relevant institution of the EU undertakes to cooperate fully with the Court and, with due regard to its responsibilities and competencies under the EU Treaty and the relevant rules thereunder, to take all necessary measures to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities in accordance with all relevant rules of international law.

Finally, pursuant to Article 44, section 4, of the Rome Statute, to which Article 13 of the Agreement refers, the EU and the ICC agree to establish, in view of each particular case, in which exceptional circumstances the Court may take recourse to the specialist knowledge of personnel provided free of charge by the EU, to collaborate in the work of any of the bodies of the Court.

As doctrine has highlighted[13], the personnel supplied in this regard must be employed pursuant to the guidelines to be established by the Assembly of the States Parties, as set out in Article 44.4 of the Statute. Moreover, not only the personnel but also the services and installations of the EU that are necessary and available will be placed at the disposal of the ICC, at the request of the same, including, if applicable, *in situ* support. The terms and conditions under which the EU will provide such installations, services and support will be established in the supplementary preliminary agreements, as the case may be, although to date none have been signed.

As far as training is concerned, Article 15 of the Agreement contemplates the obligation for the EU to endeavour to support, as appropriate and in consultation with the Court, the development of training and assistance for judges, prosecutors, officials and counsel in work related to the Court.

Finally, Articles 16 to 20 of the Agreement refer to the logistics and application of the rules of the treaties. Thus, Article 16 sets out the addresses for the purposes of correspondence between the two organisations, establishing as contact points the Council of the EU and its Chief Registry Officer, on the one hand, and for the ICC, its

Registrar or Prosecutor. In relation to any differences that may arise between the EU and the ICC on the interpretation or application of the Agreement, the text states that they will be resolved by means of consultations between the Parties. The possibility of reviewing the agreement in writing and with the mutual consent of both Parties is contemplated, and provision is also made for denunciation.

The Annex attached to the Agreement refers to classified EU information and supplying the same to the ICC in conditions in line with the Council's rules on security[14]. The classified information refers to any specific information or material that requires protection against any unauthorised disclosure and that has been designated as such by a security classification[15]. The regulation in the annex is highly specific, and leaves it up to both parties, but particularly the ICC, to guarantee that said information is used appropriately, protecting its security in any event. Thus, provision is made for the exchange of information between the two bodies in order to facilitate the correct exercise of the ICC's jurisdiction without the confidential nature of certain EU documents being an obstacle[16].

The financing provided by the EU to the ICC has been quite substantial and unconditional, leading to some negative reactions from sectors of the International Community calling for the two bodies to be merged[17].

2.2. SPECIAL REFERENCE TO THE EU-USA CONVENTION

While it is true that no one disputes the importance of the transatlantic link that joins the two shores of the ocean in a broad community of values and interests[18], known as the

[13] QUESADA ALCALÁ, "La Unión Europea y la Corte Penal Internacional…", *op. cit*., page 367.
[14] Council Decision 2001/264/EC, of 19 March 2001, adopting the Council's security regulations (DO L 101 of 11.4.2001, p.1).
[15] QUESADA ALCALÁ, "La Unión Europea y la Corte Penal Internacional…", *op. cit*., pages 368 and 369.
[16] QUESADA ALCALÁ, "La Unión Europea y la Corte Penal Internacional…", *op. cit*., pages 369 and 370.
[17] See VIDAL MARTÍN, "El doble rasero de la impunidad: la UE y la Corte Penal Internacional", *op. cit*.

"West"[19], it is no less true that attempts have been made to break the existing link in recent times in particular. Relations between Europe and the USA have not always been easy and less so in recent years; in the nineties a new debate arose regarding the community of values existing between the two. The idea of European and American citizens sharing the same values and worldview has disappeared, if indeed it ever existed at all, and more and more we can hear the idea that an "axiological divorce"[20] between the two shores of the Atlantic is imminent, if it has not already been consummated. The cause of this axiological divorce is, among other things, the different concept of what principles are essential in a civil and political community; an example of this would be the different attitude of the EU and the USA regarding capital punishment[21]; the American refusal to ratify the Treaty that prohibits anti-personnel

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[18] On 22 November 1990, a few months after the fall of the Berlin wall, during the Italian Presidency and at the start of George Bush senior's term of office, the EU and the USA signed the Transatlantic Declaration, formalising the bilateral relationship between the two entities. This first step established six common objectives: (a) support democracy; (2) safeguard international stability and peace; (3) achieve a global economic environment conductive to sustained growth; (4) promote market principles, limiting protectionist measures; (5) provide support to developing countries implementing political and economic reforms; and (6) encourage the processes of change initiated by the countries of Central and Eastern Europe. Moreover, the Declaration established a framework of relations based on three levels of biannual meetings: a summit (President of the Council and of the Commission and the President of the USA), on a ministerial level (Foreign Ministers of the EU Member States together with a representative of the Commission and the US Secretary of State); and between the Commission and representatives of the US government. See ORIOL COSTA and PABLO AGUIAR, "Relaciones Transatlánticas. ¿Hacia la dilución del partenariado estratégico?", in *Relaciones Transatlánticas*, http://selene.uab.es, page 95.

[19] MUÑOZ ALONSO Y LEDO states in "El vínculo trasatlántico. Las relaciones de la Unión Europea con la OTAN y Estados Unidos", in *Un concepto estratégico para la UE*, Centro Superior de Estudios de Defensa Nacional, no. 71, www.ceseden.es, page 303, that "there can be no doubt that the democracy that took root first in the West, on both shores of the Atlantic, virtually simultaneously, did not do so by chance; it is the consequence of the common origins shared by Europeans and Americans. That is the basis for the community of visions and policies that we have shared since then and that has become especially marked during the second half of the 20th century. A period of history during which the fundamental factor in the collective security of Europe has been precisely the Atlantic Alliance".

[20] See MUÑOZ-ALONSO Y LEDO, "El vínculo trasatlántico. Las relaciones…", *op. cit.*, page 322.

[21] The fact that the death penalty still exists in 38 States of the USA, as well as in the military tribunals of that country, were the most evident obstacles in the signing of the agreements. The USA did not seem prepared to accept the exceptions that the EU wanted to introduce in order to avoid extradition in cases for which capital punishment was envisaged or the US judicial procedures applied did not provide the safeguards considered necessary by the EU.

landmines; the same attitude of the USA in relation to the Treaty approving the ICC and the pressure it exerts on other states either to avoid their ratifying it or bilaterally agree the exemption of its citizens[22]; the refusal to ratify the Kyoto commitment on greenhouse gas emissions; the different attitudes of Europe and the USA regarding genetically modified food, etc. Added to this we have the different vision the two sides have of the international order.

It was as of the terrorist attacks of 11 September 2001 against the World Trade Center in New York, which shook the world, that the procedures of judicial cooperation were accelerated and the idea of making it possible for decisions rendered in criminal proceedings to be effective beyond the borders of the state in which they were handed down was strengthened. This tendency to make the barriers between states' jurisdictions more flexible led, among other things, to the opening of negotiations between the EU and the USA which concluded with two international agreements aimed at perfecting or supplementing the existing bilateral relations between the different Member States of the EU with the USA in relation to judicial cooperation, mainly in criminal matters.

Thus, in June 2003, two agreements were signed in Washington between the EU and the USA on Extradition and Mutual Legal Assistance in criminal matters, as two bilateral agreements between two international entities[23], but with the important feature of not including independent normative bodies, instead, more indirectly, but no less ambitiously, guaranteeing sufficiently homogenous and strengthened regulations by means of the consequent reform of the treaties existing between each of the Member States of the EU and the USA[24].

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[22] On this point, see unit 14, section 3.2.1, footnote 26.

[23] DE JORGE MESAS states in "El Acuerdo de extradición entre la Unión Europea y los Estados Unidos de América. La perspectiva del Consejo General del Poder Judicial", in *http://www.cienciaspenales.net*, in relation to the legal nature of the Agreement in question, that it is an international convention, entered into under Article 24 of the Treaty on European Union and, as such, falling under the legal rules of the EU's second pillar, although, pursuant to the provisions of Article 2 of the Convention, the contracting parties are the European Union and the United States of America, and therefore, it does not take the form of a multilateral convention, but a bilateral convention with two parties.

[24] LUJOSA VADELL, "Acuerdos entre la Unión Europea y los Estados Unidos de América sobre extradición y asistencia judicial en materia penal", in *Revista General de Derecho Europeo*, no. 3, 2004, page 2.

These Agreements are not immediately applicable, instead they are to be taken into account when applying the existing bilateral extradition and judicial assistance treaties between each of the Member States of the EU and the USA.

Essentially, these two Agreements establish a generic framework with some improved minimums affecting the most important aspects of international judicial cooperation in criminal matters. These minimums are to act as a starting point for the updating of the different treaties already in force between the Member States of the EU and the USA. All in all, the agreements supplement the bilateral agreements between the USA and the Member States of the EU and represent added value in relation to said bilateral agreements. The agreements establish the necessary safeguards for the protection of human rights and fundamental freedoms and respect the constitutional principles of the Member States.

Both texts state that the starting point is the desire to facilitate cooperation in order to combat crime in a more effective way, always mindful of the constitutional guarantees regarding the right to a fair trial.

In its Recommendation on the EU-USA Agreements on extradition and judicial cooperation in criminal matters[25] the European Parliament highlighted that these agreements would represent an important political advance in at least three aspects:

1) with respect to the efficacy of the fight against international crime, since they would cover two important areas of the world, Europe and the United States, and would consequently clear the way for other agreements of a similar nature with other countries, such as Russia, and would also indirectly strengthen the implementation of the UN Convention Against Transnational Organised Crime;

2) with respect to the strengthening of the European Judicial Area, since the implementation of the agreements would oblige the Member States and, before long, the applicant countries to tighten up their relations and cooperation by implementing, initially among themselves, the European conventions signed but not yet ratified which serve as the basic texts for the agreements with the United States; furthermore, the requirement to respect international obligations

should encourage the Member States once and for all to regulate data-protection standards in a less chaotic and less arbitrary manner;

3) with respect to the strengthening of guarantees for the accused, since the agreements will confirm the guarantees already laid down in the bilateral agreements between the Member States and the United States, while adding thereto the guarantees deriving from European legislation.

As for the legal and institutional aspects, the European Parliament recommended[26] that all the agreements refer to Article 6 of the EU Treaty and to the Charter of Fundamental Rights of the European Union, so that the provisions of those agreements are binding: firstly, because the Union may not lawfully negotiate in areas outside the powers conferred and constraints imposed on it by its founding treaty and, secondly, on grounds of good faith towards the United States which, being a party neither to the European Convention nor to the control mechanisms, must not be surprised by the constraints on the Union deriving therefrom.

The Parliament deemed it essential that these agreements should also become the transparent framework for EU-US cooperation, including for the European agencies such as Europol, Eurojust and OLAF, and calls for joint monitoring committees to be established, including at parliamentary level, with a view to the prevention of any disputes as to interpretation and problems in implementation.

2.2.1. AGREEMENTS ON EXTRADITION AND MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE EU AND THE USA

Pursuant to Articles 24[27] and 38[28] of the EU Treaty, the Council of the EU, on 26 April 2002, decided to authorise the Presidency, assisted by the Commission, to open negotiations with the USA, and the Presidency negotiated two Agreements on International Cooperation in criminal matters, one on Mutual Legal Assistance

[25] European Parliament recommendation to the Council on the EU-USA agreements on judicial cooperation in criminal matters and extradition (2003/2003 (INI)). A5-0172/2003.

[26] European Parliament recommendation to the Council on the EU-USA agreements on judicial cooperation in criminal matters and extradition (2003/2003 (INI)). A5-0172/2003.

and the other on Extradition. Both Agreements were signed in Washington on 25 June 2003[29].

The Agreements were signed on behalf of the EU, notwithstanding their subsequent execution. Thus, Article 3.2 of both Agreements envisages the exchange of written instruments between the USA and the Member States of the EU on the implementation of the bilateral treaties. Section three of Article 3 of the Agreement on Legal Assistance contains a similar obligation for the Member States who have not entered into any legal assistance treaty with the USA. In order to ensure effectiveness, the Member States will have to coordinate their actions in the Council with a view to establishing said written instruments.

The adoption of an agreement on judicial assistance and counter-terrorism cooperation between the EU and the USA was one of the conclusions of the EU Plan of Action in the extraordinary European Council held on 21 September 2001. In this way, in May 2002 the Ministers for Justice and Home Affairs approved the mandate under which the Presidency would negotiate extradition and legal assistance with the USA. Finally, at the Council of 6 June 2003 the Member States of the EU, after a lengthy period of negotiation, gave their formal approval to the Agreements[30].

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[27] Published in the Official Journal of the European Communities on 24 December 2002 (C 325/5).
Said article states: "1. When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency. 2. The Council shall act unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions. 3. When the agreement is envisaged in order to implement a joint action or common position, the Council shall act by a qualified majority in accordance with Article 23(2). 4. The provisions of this Article shall also apply to matters falling under Title VI. When the agreement covers an issue for which a qualified majority is required for the adoption of internal decisions or measures, the Council shall act by a qualified majority in accordance with Article 34(3). 5. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally.".

[28] Said article states: "Agreements referred to in Article 24 may cover matters falling under this title" (Title VI: Provisions on police and judicial cooperation in criminal matters)

[29] OJ L 181, dated 19 July 2003, pages 27 and 34, respectively.

[30] The Council of Justice and Home Affairs launched the idea of negotiating an agreement between the United States and the European Union at its extraordinary meeting on 20

As we will see in more detail when discussing the Extradition Agreement, it seeks to enhance cooperation and make the fight against crime more effective. Some of the most important aspects are that it regulates: the identification of the facts that give rise to extradition; the relations between the bilateral extradition conventions and this multilateral one; the formalities to be followed in extradition requests; the transmission of documents; the request for provisional arrest, temporary transfer; the order of importance of extradition and surrender requests; the grounds for refusal, as well as the territorial application clause, of great importance for Spain as it is not automatically applicable to Gibraltar. One of the novelties contained in said Agreement refers to the possibility of also using diplomatic channels, further to a detention order, the possibility of presenting the request and the documents in the Embassy of the requested state in the requesting state.

Meanwhile, the Agreement on legal assistance between the EU and the USA does not derogate the existing bilateral conventions between each of the Member States of the EU and the USA, but supplements them instead or replacing their provisions with a more favourable conventional clause. Therefore, in Article 3.2 the Agreements envisage the negotiation of bilateral instruments that determine the manner in which each of the provisions of the Agreement is to be implemented, in order to make such implementation possible.

It was by virtue of Article 3.2 of the Agreement on legal assistance between the EU and the USA, on the application of the Treaty on Mutual Legal Assistance in criminal matters between the USA and the Kingdom of Spain, signed on 20 November 1990, done *ad referendum* in Madrid on 17 December 2004, that an Instrument was signed[31]. Thus, in order to put the Agreement on legal assistance between the EU and the USA into practice, the Annex contains the text included in the provisions of the 1990 Treaty

September 2001, immediately after the attacks of 11 September. The Council stated its agreement with the principle of proposing to the United States the negotiation of an agreement between it and the EU on the basis of Article 38 of the EU Treaty, in the context of cooperation in criminal matters in relation to terrorism. This provision, approved on the following day by the European Council, aroused the interest of the United States and was the subject of an exchange of letters between President Bush and Guy Verhofstadt and a new position on the part of the Council at its meeting of 20 October in Ghent. See the background to the approval of the Agreement in the Report that contains a proposed recommendation of the European Parliament to the Council on the EU-USA Agreements regarding judicial cooperation in criminal matters and extradition (2003/2003 (INI)) A5-0172//200.

on Mutual Legal Assistance and the Agreement on legal assistance between the EU and the USA which will apply when this Instrument enters into force. It will be subject to the conclusion by the United States of America and the Kingdom of Spain of the internal procedures in order to ensure its entry into force. This instrument will enter into force on the date the Agreement on legal assistance between the EU and the USA enters into force. In the event of the denunciation of the Agreement on legal assistance, this Instrument will be considered terminated and the Mutual Legal Assistance Treaty of 1990 will apply. However, the governments of the United States of America and the Kingdom of Spain may agree to continue applying some or all of the provisions of this Instrument.

2.2.1.1. AGREEMENT ON MUTUAL LEGAL ASSISTANCE BETWEEN THE EU AND THE USA, DONE IN WASHINGTON ON 25 JUNE 2003

This Agreement consists of a preamble, eighteen articles and an explanatory note.

In the preamble, the Parties state their desire to enter into a mutual legal assistance agreement that facilitates cooperation between the Member States of the EU and the USA in order to fight crime more effectively and protect their respective democratic societies and shared values.

Article 1, which refers to the object and purpose, envisages that Contracting Parties undertake, in accordance with the provisions of this Agreement, to provide for enhancements to cooperation and mutual legal assistance.

Article 2, for the purposes of the implementation of the Agreement, contains the definitions of a series of terms, such as the meaning of “Contracting Parties” and “Member States”.

Article 3 establishes the conditions of implementation of Articles 4 to 10 of the Agreement in relation to the bilateral mutual legal assistance treaties between the

[31] Published in the BOE of 26 January 2010.

Member States of the EU and the USA, in force at the time of entry into force of the Agreement, or in the event of the absence thereof.

The EU will guarantee, pursuant to the EU Treaty, that each Member State will determine in a written instrument between that Member State and the USA the manner in which, pursuant to the provisions of Article 3, the bilateral treaty on mutual legal assistance in force with the USA is to be implemented and will ensure that the new Member States joining the EU after the entry into force of this Agreement and who have bilateral mutual legal assistance treaties with the USA adopt the same measures.

Article 4 of the Agreement (bank information) states that upon request of the requesting State, the requested State shall, in accordance with the terms of this Article, promptly ascertain if the banks located in its territory possess information on whether an identified natural or legal person suspected of or charged with a criminal offence is the holder of a bank account or accounts. The requested State shall promptly communicate the results of its enquiries to the requesting State. The same actions may also be taken with a view to identifying: (a) information regarding natural or legal persons convicted of or otherwise involved in a criminal offence; (b) information in the possession of non-bank financial institutions; or (c) financial transactions unrelated to accounts.

Requests for assistance under this Article shall be transmitted between central authorities responsible for mutual legal assistance in Member States, or national authorities of Member States responsible for investigation or prosecution of criminal offences and national authorities of the United States responsible for investigation or prosecution of criminal offences, as designated pursuant to the Agreement.

Moreover, the same Article 4 envisages that assistance in relation to the identification of bank information will not be refused on grounds of banking secrecy, although the general criterion of dual criminality may be applied or the assistance may be limited to those offences punishable by a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the requesting State and at least two years in the requested States, or be limited to certain designated serious offences punishable under the laws of both the requested and requesting States. In the latter two cases, states will guarantee at least the implementation of these provisions to

those crimes associated with terrorist activity and the laundering of proceeds generated from a comprehensive range of serious criminal activities, punishable under the laws of both the requesting and requested States. The requested State shall respond to a request for production of the records concerning the accounts or transactions identified pursuant to this Article, in accordance with the provisions of the applicable mutual legal assistance treaty in force between the States concerned, or in the absence thereof, in accordance with the requirements of its domestic law.

Article 5 of the Agreement establishes the possibility for the Contracting Parties to adopt the measures necessary to create joint investigation teams that operate in the respective territories of each Member State and the USA. The procedures under which the team is to operate, such as its composition, duration, location, organisation, functions, purpose, and terms of participation of team members of a State in investigative activities taking place in another State's territory shall be as agreed between the competent authorities responsible for the investigation or prosecution of criminal offences, as determined by the respective States concerned.

Nevertheless, as an exception to the usual channels of mutual legal assistance, and although the competent authorities of the states concerned will communicate directly regarding the circumstances in which each joint action takes place, in cases of exceptional complexity, other appropriate channels of communication may be used. Where the joint investigative team needs investigative measures to be taken in one of the States setting up the team, a member of the team of that State may request its own competent authorities to take those measures without the other States having to submit a request for mutual legal assistance. As doctrine has highlighted, this is another peculiarity of this type of cooperation which entails overcoming the traditional rigidities in specific cases due to the practical needs of efficiency of cooperation[32].

In Article 6, paving the way for the use of new technology in mutual legal assistance, the Contracting Parties shall take such measures as may be necessary to enable the use of video transmission technology between each Member State and the United States of America for taking testimony in a proceeding for which mutual legal

[32] See LUJOSA VADELL, "Acuerdos entre la Unión Europea y los Estados Unidos de América…", *op. cit.*, pages 15 and 16.

assistance is available of a witness or expert located in a requested State. Where not set out in Article 6, the rules that regulate this procedure will be established pursuant to the applicable mutual legal assistance treaty in force between the states concerned or the legislation of the requested state. Specifically, Article 8 of the bilateral treaty between Spain and the USA regulates testimony and evidence in the requested state and Articles 10 and 11 cover transfers of detained persons to the requesting state, as the case may be[33].

The application of Article 6 of the Agreement is only valid for the testimony of witnesses and experts and not for accused persons, unlike the regulation contained in the Convention between the Member States of the EU[34], which permits it under Article 12.

Article 7 supplements the content of Articles 4 and 5 of the bilateral treaty with Spain[35] regarding the "Form and Content of the Request" and the "Execution of requests"; thus the requests for mutual legal assistance and the communications related to them may be transmitted via expedited means of communication, in particular by fax or email, with the subsequent formal confirmation if so requested by the requesting state. In this way, the requested state may respond to the request via any expedited communication system.

Meanwhile, Article 8 of the Agreement includes a rule on mutual legal assistance for administrative authorities investigating conduct with a view to a criminal prosecution of the conduct, or referral of the conduct to criminal investigation or prosecution authorities, pursuant to its specific administrative or regulatory authority to undertake such investigation. Hence, this refers to cooperation between judicial authorities and

[33] Where not covered by the provisions of the bilateral treaty, we must take recourse to internal legislation. In the case of Spain, we would have to look at Organic Law 14/1999, dated 9 June, amending the Criminal Code in relation to the protection of victims of abuse and the Law of Criminal Procedure (Articles 448.III and 707.II LECrim). Article 4 of Organic Law 13/2003, dated 24 October, has added new provisions on this matter to the provisions contained in this regard in the LOPE (Article 229.3) and in the Law of Criminal Procedure (Articles 306.IV, 325 and 731 bis).

[34] Done in Brussels on 29 May 2000 (OJ C 197, of 12 July 2000, page 1) and declared provisionally applicable between Spain and those countries that had also issued a declaration of provisional applicability (Spanish State Gazette 15 October 2003).

[35] US - Spain Mutual Legal Assistance in Criminal Matters Treaty, Washington, 20 November 1990 (BOE 17/6/1993).

investigating administrative authorities, or even other administrative authorities, provided criminal proceedings are envisaged or the matter is to be referred to the Public Prosecutor or to judicial authorities that will conduct the criminal investigation. It is a question of direct cooperation between the jurisdictional bodies of one state and the police of another, without the need for the latter to have already initiated criminal proceedings, although the investigation is aimed at initiating them at some point.

Article 9 of the Agreement sets practical limitations designed to protect personal and other data. It establishes limitations on the use of data obtained via mutual legal assistance, allowing its use not only in the criminal proceedings but also, pursuant to the provisions of Article 8 discussed above, in administrative actions related to non-criminal legal investigations and actions[36]. The requested state will seek to use all means at its disposal to maintain the confidentiality of the request and the contents of the same, if so requested by the requesting state. If the request cannot be executed without breaching confidentiality, the central authority of the requested state will inform the requesting state accordingly and the latter will then decide whether or not the request should be executed regardless (Article 10 of the Agreement).

When necessary, the Contracting Parties will consult each other to facilitate the most effective use possible of this Agreement, in particular to facilitate the resolution of any difference regarding its interpretation or implementation.

[36] The Draft Bill of the Agreement on mutual legal assistance contained detailed provisions regarding data protection, based largely on Article 23 of the Convention of 29 May 2000 regarding mutual assistance between Member States of the EU in criminal matters. As stated in the Report that contains a proposed recommendation of the European Parliament to the Council on the EU-USA agreements on mutual legal assistance and extradition (A5-0172/200), it is one of the most delicate areas in which, on the one hand, the EU has not finished defining common rules and, on the other, the USA only takes into account the protection of the data of its own citizens. As far as the EU is concerned, the applicable principles are in general, those established in Council of Europe Convention no. 108 of 1981, in the 1987 Recommendation and in Article 23 of the 2000 Convention. Articles 27 and 28 of the Convention on Cybercrime (Budapest, 23 November 2001) could also be considered reference texts. The Parliament cannot but lament the lack of clear and homogenous criteria in this regard, both in EU legislation and in the existing bilateral agreements. This makes it difficult, generally speaking, in the case of the transmission of data, to verify that it is not used for purposes other than those for which it was transmitted or used by authorities other than the ones that requested it. An analysis should be performed of the repercussions of the recent *Homeland Security Act* insofar as it affects the data transmitted by the EU or its agencies (EUROPOL/EUROJUST).

2.2.1.2. EXTRADITION AGREEMENT BETWEEN THE EU AND THE USA, DONE IN WASHINGTON ON 25 JUNE 2003

As we stated earlier, with a view to improving cooperation in the context of the relations applicable to extradition between the Member States of the EU and the USA an Agreement on Extradition between the EU and the USA was signed on 25 June 2003, in Washington. The Agreement comprises a preamble, twenty-two articles and an explanatory note.

As for the territorial application, the Agreement is applicable to the USA and the Member States of the EU, together with those territories whose foreign relations are the responsibility of a Member State, or to countries that are not Member States and over whose foreign relations a Member State has responsibility, when so resolved by exchange of diplomatic note between the Contracting Parties, duly confirmed by the corresponding Member State.

The Agreement contains the provision stating that some of its rules are applied in the absence of the applicable rule in the existing bilateral extradition treaties, while other rules take precedence or amend those of the bilateral treaties.

Although we will go on to break down and discuss the individual articles of the Agreement, it is worth highlighting that the agreement contains provisions regarding the offences eligible for extradition, the transmission and authentication of documents, capital punishment, requests for extradition made by several states and the sensitive information contained in a request. This agreement also contains the classic principles of dual criminality and the minimum sentence, i.e. the deprivation of liberty with a maximum scope of one year's imprisonment. The channel for transmission of request for extradition and judicial assistance is diplomatic channels.

Article 3 sets out the conditions for the application of Articles 4 to 14 of the Agreement in relation to the bilateral extradition treaties between the Member States and the USA, in force at the time of entry into force of the Agreement. The EU will guarantee,

pursuant to the EU Treaty, that each Member State will determine by means of a written instrument between the Member State and the USA the manner in which, pursuant to the provisions of Article 3, the bilateral extradition treaty with the USA will be applied and will ensure that new Member States joining the EU after the entry into force of the Agreement and who have bilateral extradition treaties with the USA adopt the same measures.

Thus, pursuant to the provisions of Article 3.2 of the Extradition Agreement between the EU and the USA[37] of 25 June 2003, the governments of Spain and the USA acknowledged that, pursuant to the provisions of this instrument, the EU-USA Extradition Agreement will apply in relation to the bilateral Extradition Treaty between Spain and the USA of 29 May 1970, the Supplementary Extradition Treaty of 25 January 1975, the Second Supplementary Extradition Treaty of 9 February 1988 and the Third Supplementary Extradition Treaty of 12 March 1996, respectively.

Article 4 of the Agreement, in relation to extraditable offences, states that an offence shall be an extraditable offence if it is punishable under the laws of the requesting and requested States by deprivation of liberty for a maximum period of more than one year or by a more severe penalty. An offence shall also be an extraditable offence if it consists of an attempt or conspiracy to commit, or participation in the commission of, an extraditable offence. This implies, therefore, the application of the principle of dual criminality in the relations between the states of the EU and the USA. The regulation of Article 4 of the Agreement will apply instead of the lists of specific offences contained in the bilateral treaties, as set out in Article 3.1 of the Extradition Agreement.

[37] "(a) The European Union, pursuant to the Treaty on European Union, shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application, in the manner set forth in this Article, of its bilateral extradition treaty in force with the United States of America. (b) The European Union, pursuant to the Treaty on European Union, shall ensure that new Member States acceding to the European Union after the entry into force of this Agreement and having bilateral extradition treaties with the United States of America, take the measures referred to in subparagraph (a). (c) The Contracting Parties shall endeavour to complete the process described in subparagraph (b) prior to the scheduled accession of a new Member State, or as soon as possible thereafter. The European Union shall notify the United States of America of the date of accession of new Member States".

Meanwhile, Article 2 of the bilateral treaty between Spain and the USA[38] already provided that extradition would also apply in relation to attempts to commit or conspiracy to commit such offences, as well as to any kind of participation therein. Moreover, the minimum limit for the extradition of persons sentenced for extraditable offences, at least four months of the sentence left, is also maintained the same as in the bilateral treaty.

Article 4 of the Agreement maintains a specific rule on the inclusion of offences attributed to the US federal jurisdiction when the existence of interstate transportation, or use of the mail or of other facilities affecting interstate or foreign commerce is demonstrated, and those offences specified in the request are also deemed extraditable, even when punished with less than one year's deprivation of liberty, when extradition is granted for another offence that leads directly to them.

Finally, Article 4.4 of the Agreement establishes a rule applicable to offences committed outside the territory of the requesting state, provided the other applicable requirements are met, if the laws of the requested State provide for the punishment of an offence committed outside its territory in similar circumstances. If the laws of the requested State do not provide for the punishment of an offence committed outside its territory in similar circumstances, the executive authority of the requested State, at its discretion, may grant extradition provided that all other applicable requirements for extradition are met.

It is true, as doctrine has pointed out, that in comparison with other international texts devoted to judicial cooperation in criminal matters, the absence of substantial rules regarding the suspension or refusal of extradition in this Agreement, which usually provide a negative delimitation of the material scope of application of this institution, is particularly noteworthy[39].

[38] Article 2 section (B) specifies that "B. Extradition shall also be granted for participation in any of the offenses mentioned in this article, not only as principal or accomplices, but as accessories, as well as for attempt to commit or conspiracy to commit any of the aforementioned offenses, when such participation, attempt or conspiracy is subject, under the laws of both Parties, to a term of imprisonment exceeding one year.".

[39] See LUJOSA VADELL, "Acuerdos entre la Unión Europea y los Estados Unidos de América sobre extradición…", *op. cit.*, page 5, who states that "not event the reference in Article 14 to scenarios in which sensitive information is involved can be cited in this regard, as it refers

However, the cases in which extradition may be refused are left to be regulated in bilateral agreements between the countries in question, as can be seen from Article 17.1 of the Agreement. While this does not prevent the bilateral agreements between Member States of the EU and the USA establishing rules such as those in Article 5 of the bilateral agreement with Spain[40], it fails to guarantee a minimum unified set of regulations in this regard, leaving the matter somewhat incomplete. The specification of important, decisive aspects for granting or refusing extradition, such as the effect of *res judicata,* the statute of limitations, the definition of "political crime" or "strictly military offence" etc., is left to be regulated by the bilateral treaties. Only section 2 of Article 17 of the Agreement refers to cases in which constitutional principles or a final judgment in the requested state may constitute an impediment to the fulfilment of the obligation to proceed with the extradition, but neither the Agreement nor the applicable bilateral treaty contain a solution to this problem, establishing that in these cases consultations will take place between the states in order to seek a solution *ad casum*[41].

Meanwhile, Articles 5 to 8 contain a series of provisions regarding the transmission and authentication of documents, the transmission of documents with a view to provisional arrest or as a result of provisional arrest and the supplementary information. Thus, the EU-USA Agreement is still based on traditional formulas, i.e., diplomatic channels,

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simply to the provision of safeguards for the transmission of this information by the requesting state in order to strengthen its extradition request. Therefore, the new regulation has a potential Achilles' heel".

[40] Article 5, section (A) states that "Extradition shall not be granted in any of the following circumstances:
1. When the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested Party for the offense for which his extradition is requested.
2. When the person whose surrender is sought has been tried and acquitted or has undergone his punishment in a third State for the offense for which his extradition is requested.
3. When the prosecution or the enforcement of the penalty for the offense has become barred by lapse of time according to the laws of either of the Contracting Parties.
4. When the offense in respect of which the extradition is requested is regarded by the requested Party as an offense of a political character, or that Party has substantial grounds for believing that the request for extradition has been made for the purpose of trying or punishing a person for an offense of the above mentioned character. If any question arises as to whether a case comes within the provisions of this subparagraph, the authorities of the Government on which the requisition is made shall decide.
5. When the offence is purely military."

[41] LUJOSA VADELL, "Acuerdos entre la Unión Europea y los Estados Unidos de América sobre extradición…", *op. cit.*, pages 5 and 6.

even for the transfer of documents in relation to provisional arrest, although in this latter scenario the Ministries of the requested and requesting states may communicate directly, or via the services offered by INTERPOL. According to Article 11 of the bilateral treaty between the USA and Spain, the content would be the same as established in the Agreement, albeit set out in far greater detail[42]. Nevertheless, for the Member States of the EU, the approval of Council Framework Decision 2002/584/JHA, of 13 June 2002, on the European Arrest Warrant and surrender procedures between Member States[43], represented the specific application of the principle of mutual recognition of judicial decisions and favours direct relations between judicial authorities.

Article 9 envisages that if extradition is granted in relation to a person in the case of a person who is being proceeded against or is serving a sentence in the requested State, the requested State may temporarily surrender the person sought to the requesting State for the purpose of prosecution[44]. The person so surrendered shall be kept in custody in the requesting State and shall be returned to the requested State at the conclusion of the proceedings against that person, in accordance with the conditions to be determined by mutual agreement of the requesting and requested States. The time spent in custody in the territory of the requesting State pending prosecution in that State may be deducted from the time remaining to be served in the requested State. The Agreement makes no provision for the postponement of the extradition procedure by the requested state in the same scenarios in which temporary transfer is permitted.

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[42] Article 11 states: "A. In case of urgency a Contracting Party may apply to the other Contracting Party for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. This application may be made either through the diplomatic channel or directly between the respective Ministries of Justice.. B. The application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction or sentence against that person, and such further information, if any, as may be required by the requested Party. C. On receipt of such an application the requested Party shall take the necessary steps to secure the arrest of the person claimed. D. A person arrested upon such an application shall be set at liberty upon the expiration of 30 days from the date of his arrest if a request for his extradition accompanied by the documents specified in Article X shall not have been received. However, this stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received".

[43] OJ L 190, dated 18 July 2002.

[44] Temporary transfer and transit, the latter regulated in Article 12 of the Extradition Agreement, are different scenarios.

Therefore, it will be the Member States who establish the rules in this regard in their bilateral treaties, as Spain did in its bilateral text with the USA (Article 8.B)[45].

Article 10 regulates the scenario in which extradition requests are submitted by several states, establishing, as a general rule, that if the requested State receives requests from the requesting State and from any other State or States for the extradition of the same person, either for the same offence or for different offences, the executive authority of the requested State shall determine to which State, if any, it will surrender the person. If a requested Member State receives an extradition request from the United States of America and a request for surrender pursuant to the European arrest warrant for the same person, either for the same offence or for different offences, the competent authority of the requested Member State shall determine to which State, if any, it will surrender the person. This rule completes those established in Article 16 of the Framework Decision on the European Arrest Warrant and surrender procedures between Member States, which only regulates the scenario where there are multiple surrender warrants[46].

This same article of the Agreement only contains rules applicable in the case of multiple extradition requests from states, but not those issued by a court with international jurisdiction. Therefore, the Agreement does not interfere in the obligations assumed by the Member States vis-à-vis the ICC, and indeed the USA rejects the jurisdiction of said Court over its citizens[47].

Article 11 states that if the person sought consents to be surrendered to the requesting State, the requested State may, in accordance with the principles and procedures provided for under its legal system, surrender the person as expeditiously as possible without further proceedings. The consent of the person sought may include agreement to waiver of protection of the rule of specialty.

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[45] Section (B) of said article states: "the requested state may defer the extradition procedure against a person who is on trial or serving a sentence in said state. The deferral may continue until the conclusion of the criminal proceedings or until any sentence has been served".

[46] See unit 10 on the European Arrest Warrant (Module IV).

[47] The explanatory note to the Extradition Agreement reflects the common interpretation of the application of certain provisions of said Agreement in relation to Article 10 that this article does not intend to affect the obligations of the Contracting States to the Rome Statute of the ICC or the rights of the USA as a state that is not a party.

Article 12 deals with transit of a surrendered person through territories of the states, the procedure to be followed and those cases in which the authorisation of the transit state is not necessary. Transit in relation to extradition is not regulated in the bilateral treaty between Spain and the USA meaning that pursuant to Article 3.1.i) the regulations set out in the EU-USA Extradition Agreement will apply.

A request for transit shall be made through the diplomatic channel or directly between the United States Department of Justice and the Ministry of Justice of the Member State concerned. The facilities of Interpol may also be used to transmit such a request. The request shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit.[48]

Authorisation is not required when air transportation is used and no landing is scheduled in the territory of the transit State. If an unscheduled landing does occur, the State in which the unscheduled landing occurs may require a request for transit pursuant to the above. Finally, Article 12 of the Agreement states that all measures necessary to prevent the person from absconding shall be taken until transit is effected, as long as the request for transit is received within 96 hours of the unscheduled landing.

Article 13 stipulates that where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.

[48] In line with the provisions of Article 25, section 4, of the Framework Decision on the European Arrest Warrant and surrender procedures, this requirement does not apply when air transport is used and no stopovers are envisaged in the territory of the transit state.

Spain's position in relation to these crimes that can be punished with the death penalty in the requesting state has always been firm, ruling out the possibility that extradition may or may not be granted in these cases[49]. Therefore, Spain formulated a Declaration in relation to this article making it obligatory to refuse extradition in these cases, unless the requesting state offered sufficient guarantees in the eyes of the requested state that the death penalty will not be imposed, and if imposed, it will not be enforced. In the Declaration, Spain specified the obligation to refuse surrender unless such guarantees were provided.

Article 14 governs situations in which the extradition request requires the transmission of sensitive information and Article 15 indicates that, when necessary, the parties will, as appropriate, consult to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding its interpretation or application.

Article 16 states that the Agreement will apply to offences committed both before and after its entry into force and to the requests for extradition made after its entry into force. Nevertheless, the provisions of Articles 4 (extraditable offences) and 9 (temporary transfer) will apply to requests that are pending in a requested state at the time the Agreement enters into force.

Article 17 establishes that the Agreement will not prevent the requested state citing grounds for refusal of an extradition request related to matters not governed therein but provided in the bilateral extradition treaty in force between a Member State and the USA. Where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States.

[49] Spain is not the only country to be firm in this regard. Great Britain, for example, has also been categorical, as can be seen from the Soering vs. the United Kingdom case (JECHR of 7 July 1989, which affirmed that the British Minister's decision to extradite the plaintiff to the USA would violate Article 3 of the Rome Convention ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"), if enforced.

Article 18 states that the Agreement will not preclude the conclusion, after its entry into force, of bilateral Agreements between a Member State and the United States of America consistent with this Agreement.

Finally, Articles 19 to 22 cover designation and notification, territorial application of the Agreement, its review and entry into force and denunciation, respectively.

All that is left is for us to conclude that in the event that any of the measures contemplated in the Agreement creates an operational problem for one or more Member States of the EU or the USA, the problem will be resolved first of all, if possible, by means of consultations between the Member State or States affected and the USA, or, if appropriate, via the consultation procedures established in the Agreement. In the event it is not possible to resolve the operational problem by consultation alone, pursuant to the Agreement future bilateral agreements between the Member State or States affected and the USA will include an operationally viable alternative mechanism that satisfies the objectives of the specific provision in relation to which the difficulty arose[50].

2.3. AGREEMENT BETWEEN THE EUROPEAN UNION AND THE REPUBLIC OF ICELAND AND THE KINGDOM OF NORWAY ON THE APPLICATION OF CERTAIN PROVISIONS OF THE CONVENTION OF 29 MAY 2000 ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE MEMBER STATES OF THE EUROPEAN UNION AND THE 2001 PROTOCOL THERETO

[50] See the explanatory note to the Extradition Agreement.

With a view to improving judicial cooperation in criminal matters between the Member States of the EU and Iceland and Norway, without prejudice to the rules that protect individual freedoms, an agreement between the EU and those states was entered into on 19 December 2003[51].

As the Preamble to the Agreement states, considering that current relationships among the Contracting Parties require close cooperation in the fight against crime and highlighting the Contracting Parties' common interest in ensuring that mutual assistance between the Member States of the European Union and Iceland and Norway is provided in a fast and efficient manner compatible with the basic principles of their national law, and in compliance with the individual rights and principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, expressing their mutual confidence in the structure and functioning of their legal systems and in the ability of all Contracting Parties to guarantee a fair trial, they decided to supplement the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and other Conventions in force in this area, by an Agreement between the European Union, Iceland and Norway.

The provisions of the European Convention on mutual assistance in criminal matters of 20 April 1959 and the other Conventions in force remain valid for all those matters not covered in this Agreement.

As for the content of the Agreement, it regulates judicial assistance in criminal matters, based on the principles of the Convention of 20 April 1959. Taking into account that section 1 of Article 2 of the Convention on judicial assistance in criminal matters between the Member States of the EU, of 29 May 2000, and Article 15 of its Protocol of 16 October 2001 set out the provisions that constitute measures developing the Schengen acquis, and that, consequently, they have been accepted by Iceland and Norway pursuant to their obligations in the context of the Agreement of 18 May 1999 entered into between the Council of the EU and the Republic of Iceland and the Kingdom of Norway on the association of these two states in the execution, implementation and development of the Schengen acquis and considering that Iceland

[51] Published in the OJ L 26 of 29.1.2004, p. 3/9.

and Norway have expressed their desire to enter into an agreement that allows them to also apply the other provisions of the Convention on judicial assistance in criminal matters of 2000, and the 2001 Protocol thereto, in their relations with the Member States of the EU, on 19 December 2003 the Agreement we are commenting on was signed.

The Agreement consists of a Preamble, ten Articles and two Annexes.

The first article states that notwithstanding the Agreement, the contents of Articles 4, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 25 and 26, as well as Articles 1 and 24 to the extent that they are relevant for any of those other Articles, of the Convention of 29 May 2000, entered into by the Council of EU pursuant to Article 34 of the EU Treaty, regarding judicial assistance in criminal matters between the Member States of the EU, will apply both to relations between the Republic of Iceland and the Kingdom of Norway and to the relations between each of these states and the Member States of the EU.

The provisions of Articles 1 (paragraphs 1 to 5), 2, 3, 4, 5, 6, 7, 9, 11 and 12, of the Protocol of 16 October 2001, established by the Council of the European Union in accordance with Article 34 of the Treaty on European Union, to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, will apply both to relations between the Republic of Iceland and the Kingdom of Norway and to the relations between each of these states and the Member States of the EU.

The declarations made by Member States under Articles 9(6), 10(9), 14(4), 18(7) and 20(7) of the EU Mutual Assistance Convention and Article 9(2) of the EU Mutual Assistance Protocol shall also be applicable in the relations with the Republic of Iceland and the Kingdom of Norway.

In Article 2 of this Agreement, the Contracting Parties, in order to achieve the objective of arriving at as uniform an application and interpretation as possible of the provisions referred to in Article 1, shall keep under constant review the development of the case-law of the Court of Justice of the European Communities, as well as the development

of the case-law of the competent courts of Iceland and Norway relating to such provisions. To this end a mechanism shall be set up to ensure regular mutual transmission of such case-law. Iceland and Norway shall be entitled to submit statements of case or written observations to the Court of Justice in cases where a question has been referred to it by a court or tribunal of a Member State for a preliminary ruling concerning the interpretation of any of said provisions.

If a request is refused, Norway or Iceland may ask the requested Member State to report to EUROJUST any problem encountered concerning the execution of the request, for a possible practical solution.

In the event of any dispute regarding the interpretation or the application of this Agreement or of any of the provisions referred to above, the Parties may refer the question to a meeting of representatives of the governments of the Member States of the European Union and of Iceland and Norway, with a view to its settlement within six months.

Article 5 of the Agreement refers to the review of the Agreement that must be carried out within five years. Meanwhile, Article 6 contemplates the obligation to notify the conclusion of the necessary procedures required to express their consent to be bound to the Agreement.

Article 7 of the Agreement refers to the fact that Accession by new Member States of the European Union to the EU Mutual Assistance Convention and/or to the EU Mutual Assistance Protocol shall create rights and obligations under the Agreement.

Article 8 refers to termination of the Agreement by the Parties.

Finally, Articles 9 and 10 cover the depository of the Agreement, the Secretary General of the Council of the EU in this case, and the languages in which the Agreement is drafted.

As recently as 9 September 2010, the OJEU (Official Journal of the European Union) published a Decision containing an Agreement between the EU, Iceland and Norway in relation to the fight against terrorism. This Council Decision dated 26 July 2010 on the conclusion of the Agreement between the European Union and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and the Annex thereto (2010/482/EU).
This Agreement was signed on 30 November 2009, subject to its conclusion on a later date and consists of 4 Articles.

2.3 AGREEMENT BETWEEN THE EU AND JAPAN ON COOPERATION IN CRIMINAL MATTERS SIGNED IN BRUSSELS ON 3 NOVEMBER 2009 AND IN TOKYO ON 15 DECEMBER 2009

The European Union has signed an agreement on cooperation in criminal matters with Japan[52].
This is the first agreement of this kind signed by the EU with a third state that is not a member. Moreover, this Agreement means giving relations between the EU and Japan a new dimension, helping combat crime while ensuring respect for the principles of Justice, the Rule of Law, democracy and judicial independence. The tools of cooperation will now be more effective and costs and delays will be significantly reduced when it comes to performing legal procedures between the EU and Japan.

The object and purpose of the Agreement is to provide mutual legal assistance in connection with investigations, prosecutions and other proceedings, including judicial proceedings, in criminal matters, as set out in Article 1 of the same.

Extradition, transfer of proceedings in criminal matters and enforcement of sentences other than confiscation envisaged in Article 25 of said Agreement are excluded.

The Agreement was signed in Brussels on 30 November 2009 and in Tokyo on 15 December 2009 and consists of 31 Articles and 4 Annexes.

Evidently, the entire content of the Agreement is relevant when it comes to ensuring the effectiveness of mutual assistance between the EU and Japan. However, we will take a look at the most significant points. Thus, in relation to the scope of assistance, according to Article 3, this will cover:

a) taking testimony or statements;

b) enabling the hearing by videoconference;

c) obtaining items, including through the execution of search and seizure;

d) obtaining records, documents or reports of bank accounts;

e) examining persons, items or places;

f) locating or identifying persons, items or places;

g) providing items in the possession of the legislative, administrative or judicial authorities of the requested State as well as the local authorities thereof;

h) serving documents and informing a person of an invitation to appear in the requesting State;

i) temporary transfer of a person in custody for testimony or other evidentiary purposes;

j) assisting in proceedings related to freezing or seizure and confiscation of proceeds or instrumentalities; and

k) any other assistance permitted under the laws of the requested State and agreed upon between a Member State and Japan.

In relation to the form that requests for cooperation should take, according to Article 8 of the Agreement, requests for assistance will be made in writing, although in urgent cases they may be made by any other reliable means of communication, including fax or email. In this case, if the requested State so requests, the requesting State will provide complementary written confirmation of the request as soon as possible.

[52] Published in the OJEU on 12 February 2010.

As for the execution of requests, they should always be executed pursuant to the legislation of the requested State. If it is considered that the execution of a request would interfere with an investigation, prosecution or other proceedings, including judicial proceedings that are underway in the requested State, it may postpone execution. The state will inform of the reasons for the postponement and will consult further procedure. Instead of postponing the execution, the requested State may make the execution subject to the requirements it deems necessary after consultations with the requesting State. If the requesting State accepts such conditions, the requesting State shall comply with them.

The States shall inform each other of the result of the execution of a request, and shall provide any testimonies, statements or items obtained as a result of the execution, including any claim from a person from whom testimony, statements or items are sought regarding immunity, incapacity or privilege under the laws of the requesting State. The requested State shall provide originals or, if there are reasonable grounds, certified copies of records or documents.

There are cases in which assistance maybe refused; these are set out in Article 11 of the Agreement and include: where the request refers to an offence of a political nature or an offence linked to a political offence; where it prejudices the sovereignty, security, *ordre public* or other essential interests, where the person has been convicted or acquitted of the same acts by virtue of a final decision in a Member State or in Japan, or does not constitute a criminal offence under the legislation of the requested State.
Coercive measures may be adopted to ensure the effective execution of a request provided that they are necessary and that the requesting State supply information that justifies using the same pursuant to the legislation of the requested State.
As far as the necessary presence in the requesting State of the persons detained in the requested State, in order for them to make a statement or in relation to any other evidentiary process, they may be transferred temporarily to the requesting State to that end, provided that the interested party gives his/her consent and there is an agreement in that regard between the requesting State and the requested State, provided that the legislation of the requested State allows it.

Meanwhile, the Agreement makes it possible to supply spontaneous information between the Member States and Japan, i.e., exchange of information without a prior request; in this way, information on criminal matters may be supplied insofar as it is permitted by the legislation of the transmitting State.

Finally, in order to resolve any difficulty, the central authorities of the Member States and Japan (specified in one of the Annexes) will consult each other in order to resolve it.

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