OPINION OF ADVOCATE GENERAL SHARPSTON
delivered on 5 December 2006 [1]

1. In this reference for a preliminary ruling, the Fifth Criminal Division of the Bundesgerichtshof (Federal Court of Justice) seeks clarification of what is meant by 'the same acts' and by the concept of 'enforcement' of a criminal penalty in Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 [2] ('the CISA'). The national court also wishes to know whether the definition of enforcement is affected by the implementation into national law of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [3] ('the Framework Decision').

Relevant provisions

The CISA

2. Pursuant to Article 1 of the Protocol integrating the Schengen acquis into the framework of the European Union [4] ('the Protocol'), 13 Member States, including Italy and Germany, are authorised to establish closer cooperation among themselves within the scope of the so-called 'Schengen acquis'.

3. The annex to the Protocol defines the 'Schengen acquis' as including the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985 [5] (the 'Schengen Agreement') and, in particular, the CISA.

4. The Protocol provides that, from the date of entry into force of the Treaty of Amster-

1 — Original language: English.
2 — OJ 2000 L 239, p. 19.
3 — OJ 2002 L 190, p. 1.
4 — Annexed by the Treaty of Amsterdam to the Treaty on the European Union ('TEU') and to the Treaty establishing the European Community.
5 — OJ 2000 L 239, p. 13.

dam, namely 1 May 1999, the Schengen acquis is to apply immediately to the 13 Member States referred to in Article 1 of the Protocol. [6]

5. Articles 54 to 58 of the CISA together constitute Chapter 3 (entitled 'Application of the *ne bis in idem* principle') of Title III, which deals with 'Police and Security'.

6. Article 54 provides that 'a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.

7. Article 55 entitles a Contracting Party, 'when ratifying, accepting or approving this Convention, to declare that it is not bound by Article 54' where the acts to which the foreign judgment relates took place in whole or in part in its own territory, they constitute an offence against national security or other equally essential interests of that Contracting Party and/or they were committed by officials of that Contracting Party in violation of the duties of their office.

8. Article 56 provides that 'if a further prosecution is brought in a Contracting Party against a person whose trial, in respect of the same acts, has been finally disposed of in another Contracting Party, any period of deprivation of liberty served in the latter Contracting Party arising from those acts shall be deducted from any penalty imposed. To the extent permitted by national law, penalties not involving deprivation of liberty shall also be taken into account'.

The Framework Decision

9. The Framework Decision was adopted under Title VI of the EU Treaty, 'Provisions on Police and Judicial Cooperation in Criminal Matters', and in particular on the basis of Articles 31(a) and (b) and 34(2)(b) thereof.

10. It is, as recital 6 in its preamble notes, 'the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the [1999] European Council [of Tampere] referred to as the "cornerstone" of judicial cooperation'.

6 — Article 2(1), first subparagraph.

11. The main aims of the Framework Decision are twofold: first, to abolish formal extradition procedures among Member States in respect of persons who are fleeing from justice after having been finally sentenced and, second, to speed up extradition procedures in respect of persons suspected of having committed an offence. The existing system of extradition between Member States is to be replaced by a new, simplified and swifter system for surrender of persons in the above categories between judicial authorities for the purposes of execution of criminal sentences or prosecution of criminal offences. [7]

12. According to recital 10, 'the mechanism of the European arrest warrant is based on a high level of confidence between Member States.'

13. Article 1(1) defines the European arrest warrant as a judicial decision issued by a Member State ('the issuing Member State') with a view to the arrest and surrender by another Member State ('the Member State of execution') of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. Under Article 1(2), Member States are required to execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of the Framework Decision.

14. Article 2(1) defines the scope of the European arrest warrant: 'a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months'.

15. Article 2(2) contains a list of offences which, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, shall give rise to surrender pursuant to a European arrest warrant. Article 2(4) provides that 'for offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described'.

16. Article 3 sets out grounds on which the judicial authority of the Member State of execution must refuse to execute the European arrest warrant, including cases in which

7 — Recital 5.

it 'is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State'. [8]

17. Article 4 sets out grounds on which the executing judicial authority may refuse to execute a European arrest warrant. A refusal to execute is permitted, inter alia, in the following cases:

— where the person who is the subject of the European arrest warrant is being prosecuted in the Member State of execution for the same act as that on which the European arrest warrant is based (Article 4(2));

— where the judicial authorities of the Member State of execution have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings (Article 4(3));

— if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country (Article 4(5)).

18. Article 5 regulates the guarantees to be given by the issuing Member State in particular cases. Article 5(1) provides that 'where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment'.

19. Article 34 requires Member States to take the necessary measures to comply with the provisions of the Framework Decision by 31 December 2003.

8 — Article 3(2).

20. The Commission noted in its submissions that whereas Italy had properly implemented the Framework Decision into national law, the Bundesverfassungsgericht (German Constitutional Court) had declared the law implementing the Framework Decision in Germany void by judgment of 18 July 2005. As a result, a new implementing law was adopted by the Bundestag on 20 July 2006, shortly after the hearing in the present case took place. It entered into force on 2 August 2006. [9]

The national proceedings and the questions referred

21. Mr Kretzinger's appeal against his conviction by the Landgericht Augsburg (Augsburg Regional Court) is pending before the referring court. That court gives the following description of the facts in the main proceedings.

22. On two occasions, in May 1999 and in April 2000, Mr Kretzinger transported cigarettes, smuggled into Greece by third parties, by lorry through Italy and Germany, bound for the United Kingdom. They were concealed under other loads. They were not presented for customs clearance at any point.

23. The first consignment, consisting of 34 500 cartons of smuggled cigarettes, was seized by officials of the Italian Guardia di Finanza on 3 May 1999. Mr Kretzinger was held briefly in Italian police custody and/or on remand pending trial. On 22 February 2001, allowing the appeal brought by the Public Prosecutor against the decision of acquittal at first instance, the Corte d'Appello di Venezia found him guilty, after a trial *in absentia*, of importing and being in possession of 6 900 kilograms of contraband foreign tobacco, and of failing to pay customs duty on that tobacco. It imposed 'a custodial sentence of one year and eight months ... in respect of both of the offences with which he was charged'. It appears that the sentence was suspended. Under Italian law, that judgment has now become final.

24. The second consignment consisted of 14 927 cartons of contraband cigarettes. Mr Kretzinger was stopped by the Italian Guardia di Finanza on 12 April 2000. Again, he was held briefly in Italian police custody and/or on remand pending trial. By judgment of 25 January 2001 the Tribunale di Ancona imposed, again *in absentia* and applying the same provisions of Italian law, a custodial sentence of two years (not suspended). That judgment has also become final under Italian law.

25. The referring court notes that, despite several attempts to obtain clarification of those judgments, it has been unable to

9 — Bundesgesetzblatt 2006 Teil I Nr. 6 of 25.07.06.

establish with certainty precisely which import duties each judgment applied to, and in particular whether either or both encompassed any charges relating to, or sentence imposed for, customs fraud.

26. Mr Kretzinger was charged before the Landgericht Ausburg with evading the customs duties which had arisen on the initial importation of the smuggled goods into Greece (an offence under paragraph 374 of the German Tax Code) and was found guilty. The Landgericht sentenced him to one year and ten months imprisonment in relation to the first consignment and one year's imprisonment in relation the second consignment.

27. The Landgericht Augsburg was aware of the Italian convictions, but noted that the sentences imposed on Mr Kretzinger in Italy had not been enforced. It took the view that, although the same two cigarette shipments formed the factual basis of the two convictions in Italy and of its own decisions, Article 54 of the CISA was not applicable.

28. The Italian authorities appear to have taken no steps under the Framework Decision in order to enforce the convictions in Italy.

29. Mr Kretzinger appealed to the Criminal Division of the Bundesgerichtshof (the referring court) on a point of law. That court has doubts about the compatibility with EU law of the reasoning adopted by the Landgericht Augsburg.

30. In particular, it questions the latter's conclusion that Mr Kretzinger's convictions in Italy do not give rise to the application of the rule of *ne bis in idem* as embodied in Article 54 of the CISA and, therefore, do not bar further criminal proceedings in Germany. It wonders whether, as a result of a single journey from Greece to northern Europe, 'a smuggler can be punished in separate criminal proceedings in every Member State through which he passes for the revenue offence committed each time he crosses a border, so that he may have to serve each of those sentences consecutively, or whether a sentence passed in one Member State in respect of (only) one part of that single smuggling journey can bar further prosecutions throughout Europe'.

31. The referring court therefore asks the Court to give a preliminary ruling on the following questions:

'(1) Is it a criminal prosecution of "the same acts" within the meaning of Article 54 of the CISA if a defendant has been

convicted by an Italian court of importing contraband foreign tobacco into Italy and of being in possession of it there, as well as of failing to pay duty at the border on importing the tobacco, and is subsequently convicted by a German court — in connection with his earlier receipt of the same goods in Greece — of being party to evasion in relation to the (technically) Greek import duty that arose when the goods were previously imported by third parties, in so far as the defendant had intended from the outset to transport the goods to the United Kingdom via Italy, after taking delivery of them in Greece?

(2) Has a penalty "been enforced" or is it "actually in the process of being enforced" within the meaning of Article 54 of the CISA:

(a) if the defendant was given a custodial sentence, the enforcement of which was suspended in accordance with the law of the State in which judgment was given;

(b) if the defendant was for a short time taken into police custody and/or held on remand pending trial, and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given?

(3) Is the interpretation of the notion of enforcement for the purposes of Article 54 of the CISA affected by

(a) the fact that, having transposed the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1) into national law, the (first) State in which judgment was given is in a position at any time to enforce its judgment which, under national law, is final and binding;

(b) the fact that a request for judicial assistance by the State in which judgment was given, with a view to extraditing the convicted person or enforcing judgment within that State, might not automatically be complied with because judgment was given *in absentia*?'

32. Written observations have been submitted by the Governments of Austria, the Czech Republic, Germany, Poland, Spain and Sweden, and by the Commission. Counsel for Mr Kretzinger was appointed only after the deadline for the written procedure had expired. For that reason the main submissions for Mr Kretzinger were presented at

the hearing on 4 July 2006, at which Germany, the Netherlands, Spain and the Commission also presented oral argument.

33. It should be noted that the written observations were submitted before the judgment in *Van Esbroeck*. [10] However, the hearing took place after that judgment was delivered.

Assessment

The first question

34. By its first question, the referring court asks essentially what the term 'same acts' in Article 54 of the CISA means and, in particular, whether one may regard the transportation by lorry of smuggled goods from Greece, through Italy and Germany, bound for the United Kingdom as constituting a single act for the purposes of that provision in so far as the defendant had intended from the outset to transport the goods from Greece to the United Kingdom.

35. I consider that the issues raised by the first question have now been resolved by *Van Esbroeck*, as confirmed by subsequent case-law. [11]

36. In *Van Esbroeck* the Court held that the 'only relevant criterion' for the purposes of Article 54 of the CISA is that there should be an 'identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'. [12] Material facts qualify as the 'same acts' if they constitute a 'set of facts which are inextricably linked together in time, in space and by their subject-matter'. [13] The Court declined to hold that either identity of the protected legal interest or identity of the legal classification of the acts was required for the acts to be categorised as the 'same acts' for the purposes of Article 54 of the CISA. [14] It is for the national court to determine, on the facts, whether 'the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter'. [15]

10 — The Court's judgment in Case C-436/04 *Van Esbroeck* [2006] ECR I-2333, was given on 9 March 2006. Advocate General Ruiz-Jarabo Colomer had delivered his Opinion on 20 October 2005.

11 — See Case C-150/05 *Van Straaten* [2006] ECR I-9327 and Case C-467/04 *Gasparini* [2006] ECR I-9199.

12 — At paragraph 36.

13 — At paragraph 37.

14 — *Van Esbroeck*, cited in footnote 10, paragraphs 31, 32 and 35. In the case of concurrent Community and national sanctions for the same acts in the field of competition law, the Court has additionally required that for the principle of *ne bis in idem* to apply, the legal interest protected by the Community and the national rules has to be identical. For the reasons that I gave in my Opinion in *Gasparini*, cited in footnote 11 above, at points 155 to 158, I take the view that the apparent contradiction between the two strands of case-law can be resolved.

15 — At paragraph 38.

37. It follows from *Van Esbroeck* that it is for the national court to examine whether the prosecutions against Mr Kretzinger in Germany for smuggling the cigarettes into Greece, and in Italy for smuggling the same goods into Italy, relate to acts which are inextricably linked together in time, in space and by their subject-matter.

38. In that respect, the national court should bear in mind that, in *Van Esbroeck*, the Court observed that a sequence of events consisting of linked export and import transactions 'may, in principle, constitute a set of facts which, by their very nature, are inextricably linked'. [16] As Advocate General Ruiz-Jarabo Colomer correctly stressed in that case, 'it is ludicrous to refer to import and export in a territory governed by a legal system which, in essence, is designed to remove borders for both persons and goods'. [17]

39. The same reasoning may apply by analogy here. The referring court indicates that Mr Kretzinger had intended to transport the smuggled goods in question by land from their point of entry into the Community (Greece) to their final destination (the United Kingdom) in a single journey. That necessarily involved successive crossings of internal EU borders. Those crossings are distinct stages of a single overall course of action and may not artificially be severed. They may, in principle, be regarded as linked in time, in space and (by virtue of the final aim of the journey of which they form part and the unity of intention underlying them) by their subject-matter. The smuggling of cigarettes into Greece (the German prosecution) and the smuggling of the same cigarettes into Italy as the lorry crossed the Italian border on its way to its final destination in the United Kingdom (the Italian prosecutions) appear therefore to be based on 'the same acts' for the purposes of Article 54 of the CISA.

40. I therefore propose that the Court answers the first question as follows:

'The phrase "the same acts" in Article 54 of the CISA refers to identity of material facts, understood as a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter. The determination of whether the facts in the main proceedings are so linked is a matter for the competent national court. However, where a defendant intended from the outset to transport smuggled goods from their point of entry to a final destination in the Community in a single operation, any successive crossings of internal borders in the course of that

16 — Paragraph 37.

17 — Point 52 of his Opinion, cited in footnote 10 above.

operation may, in principle, be regarded as acts which are inextricably linked for that purpose.'

The second question

41. The second question consists of two branches.

2(a) The first branch

42. The referring court asks whether a suspended custodial sentence issued under national law may be considered to be a penalty which has 'been enforced' or is 'actually in the process of being enforced' for the purposes of Article 54 of the CISA. In what follows, I shall refer to those two requirements as 'the enforcement condition'.

43. I agree with all the parties submitting observations that for the purposes of the principle of *ne bis in idem* in Article 54 of the CISA a suspended custodial sentence amounts to a penalty which has either 'been enforced' or is 'actually in the process of being enforced'.

44. Even a brief comparative law survey demonstrates that, although the detailed requirements may vary from one Member State to another, all recognise the concept that a custodial sentence imposed on a defendant who has been found guilty may, by way of reducing the severity of the sentence, be suspended in particular circumstances. The underlying philosophy is that, for relatively short terms of imprisonment imposed on offenders who are thought to be unlikely to re-offend, it is not in the interests of society — and equally not in the interests of the individual concerned — to expose them to the negative impact of prison life. Reintegration of the offender is better ensured by suspending the sentence, subject to the fulfilment of certain conditions by the offender during the probation period.

45. The circumstances in which a sentence is suspended vary as between national legal systems, but present overall substantial similarities. They relate to the seriousness of the offence (and thus to the applicable penalty) and to the personal circumstances of the offender. The sentencing judge usually enjoys some discretion when assessing the latter.

46. Suspension of a custodial sentence is always made dependent on the offender respecting certain conditions imposed by the competent court over the probation period. These conditions vary as between Member States, and also depend on the circumstances of the case. The competent authorities monitor the offender's compliance with those conditions and the compe-

tent court retains the power to activate the suspended sentence if they are broken. Usually, activation is discretionary, but it may sometimes be mandatory. In general, conviction for another criminal offence will trigger the suspended sentence.

47. If the suspended sentence is activated, the full sentence of imprisonment originally imposed must then be served.

48. If, however, the offender respects the conditions applicable during the probation period, he is then (depending on the Member State) either recorded as having duly served his sentence or regarded as though the offence and the conviction had never taken place.

49. Viewed substantively, a suspended custodial sentence incorporates within it a penalty which is being enforced. A person subject to a suspended custodial sentence has been tried, convicted and sentenced. By virtue of the probation period during which that person must respect certain compulsory conditions, his normal freedom of action is temporarily circumscribed. He also knows that, if he breaches the conditions of the suspension, he is likely to go to prison to serve the custodial sentence. He lives with that sword of Damocles hanging over his head.

50. It is therefore clear that a suspended custodial sentence does indeed 'penalise' the offender, albeit to a lesser extent than an immediate custodial sentence. As a result it should, during its currency, be regarded as a penalty which 'has been enforced [or] is actually being enforced' within the meaning of Article 54 of the CISA.

51. I also note that, within a *national* context, a person subject to a suspended sentence is generally regarded as benefiting from the principle of *ne bis in idem*. He has already been placed in jeopardy once and should not have to run the risk of prosecution in respect of the same facts a second time.[18] I do not see any reason why the conclusion should be different in the context of the Schengen agreement.

52. I therefore suggest that the Court should answer question 2(a) as follows:

A custodial sentence, the enforcement of which has been suspended provided that,

18 — C.f. the analysis of the association between the rule against double jeopardy and the principle of *ne bis in idem* set out at points 72 to 77 of my Opinion in *Gasparini*, cited in footnote 11 above.

during a fixed period of time, the offender respects certain conditions set in accordance with the law of the State in which judgment was given, is a penalty that has been enforced or is actually in the process of being enforced within the meaning of Article 54 of the CISA and, provided the other conditions under that provision are met, gives rise to the application of the principle of *ne bis in idem* enshrined in that article'.

2(b) The second branch

53. The referring court asks whether the enforcement condition in Article 54 of the CISA is fulfilled if the defendant is taken for a short time into police custody and/or held on remand pending trial, and that detention would count towards any subsequent enforcement of the penalty of imprisonment under the law of the State in which judgment was given. For convenience, I shall refer to the latter concept as the 'principle of set-off'.

54. The referring court has explicitly limited the scope of its question to the case where the detention periods pending trial are of a short duration. It is, however, not clear from the order for reference whether the brief periods of detention served by Mr Kretzinger in Italy [19] were spent in police custody for questioning without the intervention of a judge, or whether he was also remanded in custody pending trial by a decision of the competent judge. The question of the referring court explicitly mentions both types of detention. For that reason, and also in the light of the written observations submitted, I will examine, first, detention on remand pending trial in general, whatever its duration, and, second, time spent in police custody.

— Detention on remand pending trial

55. It is helpful to begin with two preliminary observations.

56. First, detention on remand pending trial is a sensitive area of criminal law and policy in democratic societies in so far as it protects the public interest at the expense of individual freedom. The general rule is that citizens may not be deprived of their individual freedom unless they have been convicted of a criminal offence by a competent court

19 — The order for reference indicates that Mr Kretzinger spent only one day in police custody in relation to the first prosecution. No information on that point is available as regards the second prosecution in Ancona.

following a process established by law. [20] For precisely that reason, preventive detention is subject to strict procedural and material safeguards under the European Convention of Human Rights ('ECHR'). [21] Similarly, persons subjected to pre-trial detention who are subsequently released without charge, or tried but acquitted, may, under certain circumstances, be entitled to compensation. [22]

57. Second, the aim of pre-trial detention is not (and could not be) the punishment of the defendant for a criminal offence of which he has yet to be convicted. As the European Court of Human Rights has pointed out, the aim of detention pending trial is to avert the risk that the accused will fail to appear for trial, or that, if released, he may take action to prejudice the administration of justice, commit further offences or cause public disorder. [23] Thus, as Germany, Spain and Austria indicate, pre-trial detention precedes any sentence or resolution of the criminal proceedings.

58. Turning now to the question raised, I agree with all parties submitting observations (with the obvious exception of Mr Kretzinger) that periods of detention on remand cannot automatically be considered to be (partial or full) enforcement of a penalty for the purposes of Article 54 of the CISA.

59. Article 54 of the CISA applies only once the 'trial has been disposed of'. Detention on remand takes place pending trial. It thus by definition occurs before the trial 'is disposed of' in accordance with the applicable rules. On a literal interpretation, Article 54 of the CISA therefore cannot apply to such periods, even if these are, by virtue of national law, to be taken into account for the purposes of any subsequent custodial sentence.

60. Furthermore, the aims of detention pending trial are quite different from those pursued by society when enforcing a penalty. [24]

20 — See Article 5(1)(c) and (3) of the ECHR.

21 — There is abundant case-law of the European Court of Human Rights on Article 5(1)(c) and (3) of the ECHR. See in particular, *Ječius* v. *Lithuania*, No. 34578/97 ECHR 2000-IX.

22 — As is the case, for instance, in France.

23 — See, for instance, *Smirnova* v. *Russia*, Nos 46133/99 and 48183/99, § 59 ECHR 2003-IX and the case-law cited therein.

24 — See point 57 above.

61. I thus reject the argument that a person who has been subject to detention pending trial (especially if the detention was for a short time) has thereby necessarily satisfied the enforcement condition under Article 54 of the CISA.

62. That being said, as Mr Kretzinger, Austria, the Netherlands and the Commission submit, there may be circumstances where pre-trial detention will have that effect. If the defendant who has been detained pending trial is subsequently convicted and receives a custodial sentence, the trial has been finally disposed of and — at that point — the first condition for the application of Article 54 of the CISA is met. In those circumstances, the question is whether the time spent in detention pending trial, which under national law must count towards the enforcement of the custodial sentence imposed, can be held to satisfy the enforcement condition in Article 54 of the CISA.

63. In answering that question, two scenarios need to be distinguished.

64. In the first scenario, the time spent in detention pending trial is at least equal to the term of imprisonment imposed in the final custodial sentence. So far as I have ascertained, the criminal law systems of all Member States contain some version of the principle of set-off[25] when any custodial sentence is enforced. As counsel for Kretzinger and Spain rightly point out, this principle is a specific manifestation of the general principle of proportionality in criminal justice (and, I may add, of natural justice): the sentence must be in proportion to the offence. Thus, under national law, deprivation of liberty pending trial is to be deducted from any terms of imprisonment finally imposed by sentence. Where the former periods are at least equal in duration to the latter, the custodial sentence is regarded as having being served by the time spent in detention pending trial. Otherwise the offender would be subjected to a harsher penalty than society considers appropriate for that offence.

65. The same conclusion applies for the purposes of Article 54 of the CISA. In fact, that conclusion is unavoidable if one considers, as I do, that the principle of set-off

25 — That principle is specifically referred to as *principe d'imputation* in French criminal law or *Anrechnungsprinzip* in German criminal law. See also the decision of the House of Lords in *Regina* v *Governor of Her Majesty's Prison Brockhill, Ex parte Evans (No 2)* [2001] 2 AC 19, where Lord Hope of Craighead referred to 'the broad principle ... that periods spent in custody before trial or sentence which are attributable only to the offence for which the offender is being sentenced are to be taken into account in calculating the length of the period which the offender must spend in custody after he has been sentenced'. That principle is also reflected in Article 26(1) of the Framework Decision (which is part of Chapter 3, entitled 'Effects of the surrender'), according to which 'the issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed'. In some Member States, such as Germany and parts of the United Kingdom, sentencing rules allow the competent judge to reject the application of the principle for reasons relating to the behaviour of the offender while on remand. Any departure must however be duly justified.

arises from applying the requirements of natural justice and the principle of proportionality in criminal justice, and that, as such, it enjoys the status of a general principle of EU law. [26] It follows that, even if national law did *not* provide for any principle of set-off, [27] EU law would require Member States to treat the enforcement condition in Article 54 of the CISA as being satisfied where a convicted defendant has been held in custody on remand in one Member State for a period equal to, or greater than, the length of the custodial sentence imposed in another Member State for the same acts. As a result, any further criminal proceedings against the same person for the same material facts would be precluded by Article 54 of the CISA.

66. In the second scenario, the periods spent in detention pending trial are less than the length of the final custodial sentence. Within that scenario, two situations need to be distinguished.

67. In the first situation, the offender goes on to serve the remainder of his term of imprisonment (that is, the difference between the time spent in detention and the custodial sentence imposed). [28] It is obvious that since the penalty is 'actually in the process of being enforced', the enforcement condition in Article 54 of the CISA is satisfied. Assuming the other conditions in Article 54 of the CISA are fulfilled, other Member States must refrain from prosecuting that offender a second time on the basis of the same facts.

68. In the second situation, the offender has served periods of detention pending trial, but is at liberty when the custodial sentence is passed. The penalty cannot be held to have been fully enforced (since part of the sentence is still to be served), nor is it actually in the process of being enforced (since the defendant is not in prison). The enforcement condition is therefore not met. In those circumstances, the defendant cannot rely on Article 54 of the CISA if further criminal proceedings are brought against him in another Member State for the same acts.

69. In the latter case, an offender would nevertheless be able to rely by virtue of Community law on the principle of set-off in order to have any time served on remand in the first Member State deducted from the term of imprisonment imposed by the sentence in the second Member State.

26 — See the analysis in points 53 to 64 of my Opinion in Case C-367/05 *Kraaijenbrink*, which I have also delivered today.

27 — That possibility is of course merely theoretical. As I have explained above, all national criminal laws recognise the principle of set-off detention periods pending trial.

28 — Or completes the probation period associated with a suspended (custodial) sentence, as described above.

70. As I have indicated above, I consider the principle of set-off to be a general principle of EU law arising from the principles of proportionality in criminal law and of natural justice, which is distinct from, although related to, the principle of *ne bis in idem*. As such, it can be relied upon directly by the offender.

71. Even if the Court were to reject that proposition, Article 56 of the CISA [29] would still oblige, as the Commission and Sweden submit, a Member State to set off any period of detention served by the defendant in another Member State against any custodial sentence it wished to impose.

72. The broad drafting of Article 56 of the CISA indicates that it applies when, for whatever reason, a prosecution against the same defendant is initiated in a Member State despite the fact that his trial for the same acts has been disposed of in another Member State. [30] One can see that that might happen either where one of the derogations in Article 55 of the CISA applies, or where the trial has been 'disposed of' but the enforcement condition in Article 54 of the CISA has not been fulfilled. In other circumstances, the principle of *ne bis in idem* in Article 54 of the CISA would apply.

— Time spent in police custody

73. In most Member States the police are permitted to hold a suspect in custody for a brief period of time in order to question him or to carry out preliminary inquiries. In general, such periods may not exceed between 48 and 72 hours, within which the suspect must be brought before a competent judge, who must decide whether to authorise further police detention, remand the defendant in custody or release him, with or without charging him. [31] As with remand in custody pending trial (and for the same reasons relating to the primacy of individual liberty, essential democratic values and respect of the rule of law), police custody is subject to stringent conditions under Article 5(1)(c) and (3) of the ECHR, as interpreted by the European Court of Human Rights. [32]

29 — I regard Article 56 of the CISA as merely spelling out the general principle of set-off (which applies to any previous penalty imposed for the same acts, whatever its nature) for the purposes of Schengen and only in so far as penalties involving deprivation of liberty are concerned. The fact that Articles 54 and 56 are both in Chapter 3 of Title III of the CISA, under the heading 'Application of the *ne bis in idem* principle', does in my view not detract from the fact that they are two autonomous principles in EU law. I discuss the principle of set-off in my Opinion in *Kraaijenbrink*, cited in footnote 26 above, at points 53 to 64 and refer to that analysis.

30 — In *Kraaijenbrink*, cited in footnote 26 above, the Dutch Government vehemently opposed the Commission's oral submissions to this effect. See point 54 of my Opinion in that case.

31 — The arrangements for detaining terrorist suspects in police custody may be less liberal.

32 — The leading case is *Brogan and Others* v *the United Kingdom*, judgment of 29 November 1988, series A No. 145-B.

74. I see no valid reason why periods spent in police custody should be treated differently to time spent on remand pending trial for the purposes of the enforcement condition in Article 54 of the CISA. [33] The same reasoning applies, *mutatis mutandis*.

75. I therefore suggest that the Court should answer the second branch of the second question as follows:

Periods spent by a defendant in police custody and/or on remand pending trial in one Member State are not to be considered as a penalty that has been enforced or that is actually in the process of being enforced for the purposes of Article 54 of the CISA, unless those periods are at least equal to any term of imprisonment imposed by the sentence finally disposing of the trial in relation to which the defendant has been in police custody or in remand.

The third question

76. In its third question the referring court enquires as to the effect, if any, of the Framework Decision on the interpretation of the 'enforcement condition' in Article 54 of the CISA. The third question also consists of two branches.

77. As I have indicated [34] the law implementing the Framework Decision in Germany was annulled by the Bundesverfassungsgericht on 18 July 2005, just one day before the present request for a preliminary ruling was lodged before the Court. The Framework Decision appears at present not to be applicable in Germany. However, a new implementing law was adopted on 20 July 2006, and entered into force on 2 August 2006, after the hearing in the present case took place.

78. As the Czech Republic has pointed out, it is not obvious why an answer to the second branch of the third question — which asks about the effects of sentences passed following a trial *in absentia* and, more particularly, of Article 5(1) of the Framework Decision, on Article 54 of the CISA — is relevant to the outcome of the proceedings before the national court. The Italian authorities have not issued a European arrest warrant. Nor, according to the order for reference, are they about to do so.

33 — It is true that some national systems provide that some periods of detention in police custody (usually those not exceeding 24 hours in length) are not to be deducted from any final term of imprisonment imposed by sentence. That constitutes a negligible exception to the normal rule.

34 — Point 20 above.

79. On those grounds the third question is arguably merely hypothetical and therefore inadmissible pursuant to the case-law. [35]

80. However, on the basis of the information available, it is possible that those questions, which clearly raise a point of interpretation of EU law, may be relevant to the main proceedings. Only the referring court can make that assessment. Consequently, the Court is, in principle, bound to give a ruling. [36]

81. Furthermore, as regards the second branch, the referring court notes in its order for reference that the status of sentences rendered after a trial *in absentia* by foreign courts is a matter of some controversy in Germany. It therefore seems that an answer to the question might indeed be of assistance to the referring court in considering how such sentences should be treated, irrespective of Article 5(1) of the Framework Decision, in the context of Article 54 of the CISA.

82. I will therefore suggest a reply to both branches of the third question.

35 — See, for instance, *Van Straaten*, cited in footnote 11 above, paragraph 34.

36 — Ibid., paragraph 33.

83. I also note that the third question envisages the situation in which a European arrest warrant is issued for the purposes of 'executing a custodial sentence or detention order' against the requested person. My analysis is limited to those circumstances.

3(a) The first branch

84. The first branch asks in essence whether the interpretation of the concept of 'enforcement' for the purposes of Article 54 of the CISA is affected by the fact that, under the Framework Decision as implemented in national law, the issuing Member State (in this case Italy) in which final sentence was passed may request the arrest and surrender of the defendant from the executing Member State (in this case Germany) in order to enforce that judgment at any time.

85. I cannot see how the Framework Decision affects the interpretation of the enforcement condition in Article 54 of the CISA.

86. Article 1 of the Framework Decision provides that the purpose of the issuing of an arrest warrant is the arrest and surrender by another Member State of a requested person, for the purposes of 'conducting a criminal prosecution or executing a custodial sentence or detention order'.

87. Article 3(2) of the Framework Decision expressly lists, as one of the grounds for mandatory non-execution of a European arrest warrant, the case in which 'the judicial authority of the Member State of execution ... is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State'.

88. It follows from those provisions, and as matter of logic, that where a European arrest warrant for the purposes of executing a custodial sentence is issued after trial and conviction, the enforcement condition in Article 54 of the CISA is, by definition, not met. Clearly, a European arrest warrant for the execution of a custodial sentence is issued precisely because the sentence in question has *not* been enforced or is not in the process of being enforced. Article 54 of the CISA cannot therefore apply. It follows irresistibly that, in those circumstances, a Member State is not prevented by the principle of *ne bis in idem* from commencing criminal proceedings for the same acts, even if the offender in question has been tried and convicted for the same acts in another Member State.

89. Thus, it is clear from the Framework Decision itself that the actual issue of a European arrest warrant, let alone the mere possibility that it might be issued in the future, has no implications for the principle of *ne bis in idem*. On the contrary, as Article 3(2) shows, the principle of *ne bis in idem* governs whether a European arrest warrant issued under the Framework Decision will, or will not, be executed.

90. That conclusion is further warranted by the fact that, as noted by Austria in its observations, the parties to the Schengen Agreement [37] are not the same as those subject to the Framework Decision. If the application of the *ne bis in idem* principle in Article 54 of the CISA were dependent on the provisions of the Framework Decision, the result would be legal uncertainty.

37 — Whereas the Framework Decision applies to all EU Member States, the CISA is only applicable to those Member States which have fully implemented the Schengen acquis, plus Norway and Iceland as contracting parties to the CISA and the United Kingdom and Ireland as regards, inter alia, Articles 54 to 58 of the CISA. See point 75 of my Opinion in *Gasparini*, cited in footnote 11 above.

91. I therefore suggest that the Court should answer the first branch of the third question in the following terms:

'The concept of enforcement for the purposes of Article 54 of the CISA is not affected by the fact that a Member State in which a defendant has been sentenced by a final and binding judgment under national law may at any time issue a European arrest warrant for the surrender of that defendant so as to enforce that sentence under the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States'.

3(b) The second branch

92. The second branch of the third question asks in essence whether the interpretation of the enforcement condition in Article 54 of the CISA is affected by the fact that the sentence which is the subject-matter of the European arrest warrant was passed after a trial *in absentia*.

93. The referring court analyses that question by reference to Article 5(1) of the Framework Decision. It considers that the possibility of insisting on a retrial as a precondition for surrender in the circumstances envisaged by that provision may cast doubt on whether the Italian convictions are properly to be categorised as trials which have been 'finally disposed of' for the purposes of Article 54 of the CISA (assuming that the term 'final' is not to be defined solely by reference to domestic legislation). It draws attention to the possibility that acts which concern several Member States and which are directed also against the Community's financial interests could effectively remain unpunished. That would be the case if one Member State's judgment *in absentia* had the effect of barring prosecutions in other Member States, but the judgment *in absentia* was never enforced and the State in which judgment was given made no effort to enforce it. [38]

94. The wording of the question concentrates on the impact that sentences passed after trials *in absentia* in the first Member State may have on the interpretation of the enforcement condition contained in Article 54 of the CISA. However, as several parties submitting observations have correctly noted, the substance of the referring court's question appears, rather, to be whether sentences *in absentia* should be considered to be decisions 'finally disposing' of a trial for the purposes of Article 54 of the CISA.

95. Article 5(1) of the Framework Decision expressly considers the implications of sen-

38 — In the referring court's view, that is precisely what has happened in respect of the sentences imposed in Italy.

tences imposed after a trial *in absentia* for the purposes of a European arrest warrant. Article 5(1) provides that, if the requested person 'has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*', the executing Member State is entitled to make the surrender of that person subject to the condition that 'the issuing judicial authority give an assurance deemed adequate to guarantee that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment'.

96. That provision reflects the requirements laid down by the European Court of Human Rights in its case-law on Article 6 of the ECHR (right to a fair trial). Pursuant to that case-law (and contrary to the position advanced by Poland), trials *in absentia* are not of themselves incompatible with Article 6 of the Convention. They must, however, be carried out in accordance with the strict procedural and substantive requirements set out by the ECHR so as to prevent a denial of justice. In essence, trials *in absentia* are permissible under the ECHR only where it is unequivocally established that the defendant has waived his right to attend the trial or has deliberately absented himself from the jurisdiction. [39]

97. If one takes the second branch of the third question literally, the straightforward answer (as Spain correctly observes) must be that the fact that final sentences are rendered following a trial *in absentia* is of no relevance to the enforcement condition under Article 54 of the CISA. The issuing of a European arrest warrant for the purposes of enforcing a sentence *in absentia* implies, by definition, that the enforcement condition in Article 54 of the CISA is not met. Whether it is not met because the defendant was sentenced *in absentia* (so that the sentence was never likely to be enforced) or because the defendant absented himself after sentence can make no difference to the plain fact that there has been no enforcement of the sentence. By necessary corollary, the fact that the execution or non-execution of that warrant may be affected by Article 5(1) of the Framework Decision can have no bearing on the correct interpretation of Article 54 of the CISA. [40]

98. As I have indicated, behind the actual question referred lies the question of whether, in the light of Article 5 of the Framework Decision, a judgment after a trial *in absentia* is to be considered as a decision 'finally disposing' of a trial for the purposes

39 — The principles applying to trials *in absentia* have recently been summarised by the European Court of Human Rights in *Sejdovic* v. *Italy* [GC], No. 56581/00, § 81 et seq., ECHR 2006.

40 — See the analysis at points 85 to 90 above in respect of the first branch of the third question, which is equally applicable here.

of Article 54 of the CISA. Part of the answer to that question is to be found in *Gözütok and Brügge*. [41] In that case, the Court held that decisions which under national law definitively bar further proceedings or definitively discontinue prosecutions were to be considered as decisions which 'finally disposed of' a trial for the purposes of Article 54 of the CISA.

99. Clearly, as both the Court's decision in *Gözütok and Brügge* and the wording of Article 54 of the CISA itself imply, it is for the domestic legal order of the sentencing Member State to determine whether, and in what circumstances, a judgment, including one arrived at after a trial *in absentia*, definitively bars further criminal proceedings for the same acts under national law and is a decision that finally disposes of a trial. That conclusion is in line with other international instruments, in particular Article 4 of Protocol No 7 to the ECHR, regulating the application of the principle of *ne bis in idem* at the domestic level. All those instruments leave it to the domestic legal system in question to determine what is a final decision definitively disposing of criminal proceedings. [42]

100. When assessing a claim based on Article 54 of the CISA by a defendant convicted *in absentia* in a Member State, all other Member States are therefore bound by whether the sentencing Member State treats a judgment following a trial *in absentia* as a decision 'finally disposing' of the trial. If so, and the other conditions in Article 54 of the CISA are met, that judgment will trigger the application of the principle of *ne bis in idem* in the supranational Schengen context, in accordance with the principle of mutual trust on which Article 54 of the CISA is founded. [43]

101. That conclusion is subject to one important proviso. The trial *in absentia* which led to the judgment must have complied with the requirements laid down by Article 6 of the ECHR. By virtue of the general principles of EU law and Article 6(1) and (2) EU, those requirements are applicable by extension in the EU context. A judgment following a trial *in absentia* which had been issued in a manner that contravened the ECHR, even if it were regarded as valid and final under national law, would ipso facto violate those general principles of EU law that encapsulate basic and fundamental human rights. As a result, it could not lawfully be regarded as a judgment 'finally disposing' of a trial for the purposes of Article 54 of the CISA.

41 — Case C-187/01 [2003] ECR I-1345.

42 — See also Article 14(7) of the 1966 International Covenant on Civil and Political Rights, which provides that 'no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted *in accordance with the law and penal procedure of each country*'.

43 — See *Gözütok and Brügge*, cited in footnote 41 above.

102. That is, indeed, precisely why the wording of Article 5(1) of the Framework Decision echoes the conditions laid down by the case-law of the European Court of Human Rights on Article 6 of the ECHR for determining when a sentence *in absentia* is valid.

103. I therefore suggest that the Court answers the second branch of the third question as follows:

> The concept of enforcement for the purposes of Article 54 of the CISA is not affected by the fact that, under Article 5(1) of the Framework Decision, the judicial authorities of the executing Member State are not required automatically to execute a European arrest warrant issued to enforce sentence imposed upon conviction after a trial *in absentia*.
>
> Where, under the legal system of the sentencing Member State, a decision reached following a trial *in absentia* definitively bars further criminal proceedings, that decision finally disposes of the trial for the purposes of Article 54 of the CISA, provided that the trial complied with the requirements of Article 6 EU and general principles of Community law guaranteeing respect for fundamental rights as enshrined in the European Convention on Human Rights and Fundamental Freedoms'.

Conclusion

104. In view of the foregoing I consider that the Court should reply to the preliminary questions posed by the referring court as follows:

(1) The phrase 'the same acts' in Article 54 of the CISA refers to identity of material facts, understood as a set of concrete circumstances which are inextricably

linked together in time, in space and by their subject-matter. The determination of whether the facts in the main proceedings are so linked is a matter for the competent national court. However, where a defendant intended from the outset to transport smuggled goods from their point of entry to a final destination in the Community in a single operation, any successive crossings of internal borders in the course of that operation may, in principle, be regarded as acts which are inextricably linked for that purpose.

(2) (a) A custodial sentence, the enforcement of which has been suspended provided that, during a fixed period of time, the offender respects certain conditions set in accordance with the law of the State in which judgment was given, is a penalty that has been enforced or is actually in the process of being enforced within the meaning of Article 54 of the CISA and, provided the other conditions under that provision are met, gives rise to the application of the principle of *ne bis in idem* enshrined in that article.

(2) (b) Periods spent by a defendant in police custody and/or on remand pending trial in one Member State are not to be considered as a penalty that has been enforced or that is actually in the process of being enforced for the purposes of Article 54 of the CISA, unless those periods are at least equal to any term of imprisonment imposed by the sentence finally disposing of the trial in relation to which the defendant has been in police custody or in remand.

(3) (a) The concept of enforcement for the purposes of Article 54 of the CISA is not affected by the fact that a Member State in which a defendant has been sentenced by a final and binding judgment under national law may at any time issue a European arrest warrant for the surrender of that defendant so as to enforce that sentence under the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States.

(3) (b) The concept of enforcement for the purposes of Article 54 of the CISA is not affected by the fact that, under Article 5(1) of the Framework Decision, the judicial authorities of the executing Member State are not required automatically to execute a European arrest warrant issued to enforce sentence imposed upon conviction after a trial *in absentia.*

Where, under the legal system of the sentencing Member State, a decision reached following a trial *in absentia* definitively bars further criminal proceedings, that decision finally disposes of the trial for the purposes of Article 54 of the CISA, provided that the trial complied with the requirements of Article 6 EU and general principles of Community law guaranteeing respect for fundamental rights as enshrined in the European Convention on Human Rights and Fundamental Freedoms.