OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 8 June 2006 [1]

I — Introduction

1. This reference for a preliminary ruling under Article 35 EU, from the Rechtbank 's-Hertogenbosch ('s-Hertogenbosch District Court), [2] affords the Court of Justice a fourth opportunity to interpret Article 54 of the Convention implementing the Schengen Agreement (hereinafter 'the CISA'), which sets out the *ne bis in idem* principle.

2. On the first two occasions it held that the principle applies when the prosecution is discontinued on fulfilment of certain conditions agreed with the Public Prosecutor, [3] but does not, however, operate where a case is closed as the result of the Public Prosecutor's Office itself deciding not to pursue the prosecution, on the ground that proceedings have commenced in another Member State against the same defendant and for the same acts. [4]

3. The third opportunity arose in *Van Esbroeck*, [5] which examined the temporal scope of the principle, and outlined the concept of 'the same acts'.

4. The definition of the latter notion and the manner of determining the exercise of State power to combat criminal conduct come to the fore once again, since the referring court is unsure of the import of the expression 'the same acts' and seeks to know whether the trial of a person who has been acquitted on the grounds of insufficient evidence has 'been disposed of' within the meaning of Article 54 of the CISA. [6]

1 — Original language: Spanish.

2 — 's-Hertogenbosch, a town in Brabante, near Antwerp, and the birthplace, in 1450, of Jeroen van Aken, known under the pseudonym Hieronymus Bosch. The Netherlands has accepted the jurisdiction of the Court of Justice to give preliminary rulings and has granted all courts power to refer questions to it (OJ 1999 C 120, p. 24).

3 — Joined Cases C-187/01 and C-385/01 *Gözutök and Brügge* [2003] ECR I-1345, in which I delivered an Opinion on 19 September 2002.

4 — Case C-469/03 *Miraglia* [2005] ECR I-2009.

5 — Case C-436/04 *Van Esbroeck* [2006] ECR I-2333. I also issued the Opinion in that case, delivered on 20 October 2005.

6 — The Commission of the European Communities has produced a Green Paper on Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings (Brussels, 23 December 2005, COM(2005) 696 final), which explores the types of decision which trigger the application of that principle (p. 9).

5. Those doubts arise in proceedings brought by Mr Van Straaten under Article 111(1) of the CISA, against the entry of his data in the Schengen Information System.

II — The Schengen *acquis*

A — *General considerations*

6. The body of law in question consists of:

(a) the Agreement signed on 14 June 1985 in the Luxembourg town which gives it its name by the States comprising the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; [7]

(b) the Convention implementing that agreement, signed on 19 June 1990, [8] which establishes cooperation measures to counteract the effect of the elimination of those checks;

(c) the accession protocols and instruments of the other Member States, the declarations and decisions of the Executive Committee created under the CISA, and those of the organs upon which that Committee has conferred decision-making powers. [9]

7. Protocol (No 2) to the Treaty on European Union and to the Treaty establishing the European Community integrated that *acquis* into the framework of the Union and, by virtue of the first subparagraph of Article 2(1), has applied to the 13 States set out in Article 1, which include the Kingdom of the Netherlands and the Italian Republic, [10] since the entry into force of the Treaty of Amsterdam (1 May 1999).

7 — OJ 2000 L 239, p. 13.

8 — OJ 2000 L 239, p. 19.

9 — OJ 2000 L 239, p. 63 et seq.

10 — The other States are the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Grand-Duchy of Luxembourg, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden. The United Kingdom and the Republic of Ireland have not subscribed fully to that common project, and have chosen to participate on an ad hoc basis [Council Decisions 2000/365/EC of 29 May 2000 (OJ 2000 L 131, p. 43), and 2002/192/EC of 28 February 2002 (OJ 2002 L 64, p. 20) respectively, address the requests of each of those Member States to take part in some of the provisions of the Schengen *acquis*]. Denmark has a unique status, enabling it to opt out of decisions made in the field. The combined provisions in question have been binding on the 10 new Member States since entry into the European Union, even where many of the provisions require intervention by the Council (Article 3 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded).

8. The aim, according to the preamble to the Protocol, is to enhance European integration and, in particular, to enable the European Union to develop more rapidly into an area of freedom, security and justice.

9. Pursuant to the second subparagraph of Article 2(1) of the Protocol, on 20 May 1999 the Council adopted Decisions 1999/435/EC and 1999/436/EC, in which it defined the Schengen Agreement and, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, determined the legal basis for the provisions which constitute the *acquis*. [11]

B — *The ne bis in idem principle*

10. Title III of the CISA, 'Police and Security', begins with a chapter on 'Police Cooperation' (Articles 39 to 47) and continues with another concerning 'Judicial Assistance in Criminal Matters' (Articles 48 to 53).

11. Chapter three, under the heading 'Application of the *ne bis in idem* principle' consists of Articles 54 to 58, which have their legal basis, according to Article 2 and Annex A of Decision 1999/436, in Articles 34 EU and 31 EU.

11 — OJ 1999 L 176, p. 1 and 17 respectively.

12. Article 54 of the CISA provides:

'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.'

13. Article 55(1)(a) states that, when ratifying the Convention, a State can declare that it is not bound by Article 54 where the acts did not take place in the country where the judgment is delivered and took place, in full or in part, in its own territory.

C — *Combating drug trafficking*

14. After chapters four ('Extradition'; Articles 59 to 66) and five ('Transfer of the Enforcement of Criminal Judgments'; Articles 67 to 69), Title III devotes a further chapter to 'Narcotic Drugs' (Articles 70 to 76), Article 71(1) of which, having its legal

basis not only in Articles 34 EU and 31 EU, but in Article 30 EU, states:

'The Contracting Parties undertake as regards the direct or indirect sale of narcotic drugs and psychotropic substances of whatever type, including cannabis, and the possession of such products and substances for sale or export, to adopt in accordance with the existing United Nations Conventions, all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.'

15. A final, seventh, chapter (Articles 77 to 91) concerns 'Firearms and Ammunition'.

D — *The Schengen Information System*

16. Title IV of the Convention (Articles 92 to 119) establishes the Schengen Information System, [12] consisting of a national section in each of the signatory States and a technical support unit to enable access, by means of an automated search procedure, to alerts on persons and property for the purposes under Articles 95 to 100 (Article 92(1) in conjunction with Article 94(1) and Article 102(1)).

17. One of those objectives is arrest for extradition purposes, in which circumstances data on persons wanted is to be entered in the system at the request of the judicial authority of the requesting State (Article 95(1)), the only body authorised to modify, add to, correct or delete that data (Article 106(1)). Where the requested State considers that the alert is incompatible with its national law, international obligations or essential national interests, it may insert a flag prohibiting the arrest in its territory (Article 95(3) in conjunction with Article 94(4)).

18. Each country designates a competent authority to manage the national part of the system (Article 108(1)). Persons affected may bring an action to correct or delete an alert, to obtain information or to seek compensation (Article 111(1)), and the Contracting Parties undertake mutually to enforce any final decisions taken (Article 111(2)).

12 — The Court of Justice looked at the System for the first time in Case C-503/03 *Commission* v *Spain* [2006] ECR I-1097.

III — The facts, the main proceedings and the questions raised for a preliminary ruling [13]

19. In March 1983, Mr Van Straaten, a Community national, was in possession in Italy of approximately five kilograms of heroin, which he brought into the Netherlands, where he had around 1 000 grams at his disposal.

20. He was charged in the Netherlands with three offences: (1) on or about 26 March, importing 5 500 grams of heroin from Italy, together with Mr Yilmaz, (2) having a quantity of approximately 1 000 grams of heroin at his disposal during the period from 27 March to 30 March 1983 and (3) possessing firearms and ammunition.

21. The Rechtsbank 's-Hertogenbosch, in its judgment of 23 June 1983, acquitted him of the first charge on the grounds of insufficient evidence, [14] and sentenced him in respect of the other two to 20 months' imprisonment, which he duly served, once the sentence had become final. [15]

22. In Italy, Mr Van Straaten was prosecuted for possessing and exporting to the Netherlands approximately five kilograms of heroin, in various consignments up to 27 March 1983, with the aggravating circumstance that he acted as a member of a criminal organisation. The trial was heard in his absence, although he had been duly summoned, and the Tribunale Ordinario di Milano (Court of First Instance, Milan), in a judgment of 22 November 1999, without ruling on the aggravating circumstance, imposed a prison sentence of 10 years and a fine of 50 million lira and ordered him to pay costs.

23. At the request of the Italian authorities, an alert in respect of Mr Van Straaten was entered in the Schengen Information System, for the purpose of his arrest and subsequent extradition, for which the Milan Public Prosecutor applied on 11 September 2001. Invoking Article 95(3) of the CISA, the Netherlands inserted a flag, preventing the detention from being carried out in its territory.

24. Once he learned of the second sentence and of his inclusion in the system, Mr Van Straaten, through the Korps Landelijke Politidiensten [16] (Netherlands National Police Services), sought the deletion of his data and, since he obtained no reply, immediately applied to the Rechtbank

13 — In view of the paucity of the information supplied in the order for reference, in drafting the following paragraphs I have also used a number of the observations filed in the pre-litigation proceedings, in particular those of the Netherlands Government and those of the Commission.

14 — The allegation of a defect in the statement of reasons is, to my mind, irrelevant and vexatious. The crucial point is that the Dutch court acquitted Mr Van Straaten because, in its view, the facts were not proven.

15 — The Gerechtshof 's-Hertogenbosch ('s-Hertogenbosch Regional Court of Appeal) upheld the decision, although it amended the legal classification of the second charge by a judgment of 3 January 1984, confirmed on appeal by the decision of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 26 February 1985.

16 — The authority designated in compliance with Article 108(1) of the Convention.

's-Hertogenbosch. Under Article 106(1) of the CISA, on 16 July 2004, that court summoned the Italian Republic to appear.

25. The Rechtbank takes the view that, in accordance with Article 111 of the CISA, Mr Van Straaten has standing to bring the action and Italy is bound to accept the decision it delivers.

26. Mr Van Straaten argues that the sentence imposed in Italy infringes the CISA and that, as a result, its enforcement would be unlawful. Italy counters that no trial relating to the offending import was 'disposed of' in the Netherlands, since there was an acquittal, and that there is nothing to prevent a second set of proceedings.

27. The Rechtbank 's-Hertogenbosch stayed the proceedings and referred the following questions to the Court:

'(1) What is to be understood by "the same acts" within the meaning of Article 54 of the CISA? (Is having at one's disposal approximately 1 000 grams of heroin in the Netherlands in or around the period from 27 to 30 March 1983 the same act as being in possession of approximately five kilograms of heroin in Italy on or about 27 March 1983, regard being had to the fact that the consignment of heroin in the Netherlands formed part of the consignment of heroin in Italy? Is exporting a consignment of heroin from Italy to the Netherlands the same act as importing the same consignment of heroin from Italy into the Netherlands, regard also being had to the fact that Mr Van Straaten's fellow accused in the Netherlands and Italy are not entirely the same? Having regard to the acts as a whole, consisting of possessing the heroin in question in Italy, exporting it from Italy, importing it into the Netherlands and having it at one's disposal in the Netherlands, are those "the same acts"?

(2) Is a person's "trial disposed of", for the purposes of Article 54 of the CISA, if the charge brought against that person has been declared not to have been legally and satisfactorily proved and that person has been acquitted on that charge by way of a judgment?'

IV — The proceedings before the Court of Justice

28. The Commission and the Austrian, Czech, Spanish, French, Italian, Netherlands, Polish and Swedish Governments have submitted written observations, and the representatives of Spain, the Netherlands and the

Commission appeared at the hearing of 4 May 2006, at which they presented oral arguments.

V — Admissibility of the questions referred for a preliminary ruling

29. The French and Spanish Governments, although on different grounds, dispute whether these proceedings are relevant.

30. The French Government laments the frugality of the information provided by the referring court which, because it obscures the subject-matter of the dispute, makes it impossible to gauge the need for interpretation by the Court of Justice in order to determine it.

31. The Spanish Government's preliminary objection [17] is lesser in scope, since it relates only to the first question and, in the alternative, to the second part of that question which, in its view, goes to the determination of the facts. It argues that to define whether acts tried in one set of proceedings are the same as those assessed in earlier proceedings exceeds the interpretative role of the Court of Justice.

17 — The text of the objection points up a regrettable confusion between questions referred for preliminary rulings on validity and those relating to interpretation (paragraphs 5 and 7).

A — *Relevance of the referral*

32. The French Government is not wide of the mark in saying that the Rechtbank's order barely gives a glimpse of the nature and purpose of Mr Van Straaten's claim. However, the fog lifts if one turns to the original proceedings and to the written submission of the Netherlands.

33. Invoking Article 111(1) of the CISA, Mr Van Straaten asked the court to cancel the alert against him in the Schengen Information System, which it is for the Italian Republic to do, since it is bound by the decision made (Article 106(1) in conjunction with Article 111(2) of the CISA).

34. The alert derives from the judgment of the Tribunale Ordinario di Milano, which, in order to enforce it, the Public Prosecutor commenced proceedings for extradition, which requires arrest.

35. In short, the lawfulness of the penalty determines that of the entry in the System or, conversely, the application seeking the cancellation can only succeed if the act on which it depends is unlawful. Accordingly, a court decision which infringes the *ne bis idem* principle could not justify handing over the

convicted person, previously the subject of an entry in the system, for detention. [18] There is, therefore, nothing surprising in the fact that the Rechtbank 's-Hertogenbosch, in the interests of upholding that principle, should examine the meaning of the expression 'the same acts', used in Article 54 of the CISA, in enquiring whether an acquittal on the grounds of insufficient evidence triggers application of the principle.

36. There is an argument that the referral serves no purpose, since Mr Van Straaten did not have to fear arrest in his country, because the Netherlands authorities, by virtue of Article 95(3) of the CISA, inserted a flag (which I mentioned in point 17 of this Opinion). However, that approach is wrong on two counts: on the one hand, to analyse the interest of the claimant in the main proceedings and to address his standing to be a party to the action, is to encroach on an area out of bounds to the Community judicature; at the same time, that approach overlooks the fact not only that such specific intervention by the requested State does not prevent detention in other Member States, but also that Article 54 of the CISA seeks to ensure freedom of movement of citizens within the Union, [19] an aim set out in the fourth indent of the first paragraph of Article 2 EU.

37. Furthermore, the system under Article 234 EC applies to Article 35 EU, [20] adjusted to meet its specific characteristics, but with all its accrued doctrine and case-law. According to both provisions, the referral of questions to the Court of Justice is subject to the national court considering that a preliminary ruling is necessary in order to enable it to give judgment, and there is, therefore, a presumption that a referral is relevant, unless it: (a) bears no relation to the actual facts of the main action or to its purpose; or (b) the issue is merely hypothetical; or (c) the wording of the referral withholds from the Court of Justice information necessary to give a useful answer, [21] none of which circumstances, as I have indicated, obtains in the present situation.

38. A final obstacle to admissibility, which the Commission noted only to refute it, relating to the redundancy to which the French Government alluded, lies in ascertaining whether Article 54 of the CISA applies *ratione temporis* to the original proceedings.

39. *Van Esbroeck* addressed the effects in time of Article 54, and in my Opinion in that case I suggested that the right not to be prosecuted or punished repeatedly for the same offence is to be classed as a fundamental individual right designed to ensure that no one 'who has committed an offence and served their sentence is prosecuted and punished again', and takes full effect when those conditions are met, at which moment, as the other side of the coin, the obligation of the State to refrain completely from all punitive measures arises. In order for the principle to apply a final judgment must already been delivered (paragraph 31). The

18 — The Commission explores these ideas in paragraphs 30 to 36 of its observations.

19 — Judgments in *Gözütok and Brügge* (paragraph 38) and *Miraglia* (paragraph 32).

20 — Case C-105/03 *Pupino* [2005] ECR I-5285, paragraphs 19 and 28.

21 — *Pupino*, paragraphs 29 and 30.

date of the first trial is immaterial, provided the second took place after the entry into force of the CISA, which contains no provision dealing specifically with the effects in time of Article 54 (points 32 and 29 of that Opinion). Accepting my recommendations, the judgment in that case held that the *ne bis in idem* maxim did apply in circumstances similar to those of the present facts (points 23 and 24).

40. The international instrument in question, unpublished when the facts occurred (approval of the first decision in the Netherlands and commencement of proceedings in Italy), was in force at the time of the conviction in the latter country, at which moment, accordingly, the *ne bis in idem* principle was fully effective, and the considerations in points 33 to 37 above therefore remain completely valid.

B — *An indeterminate legal concept*

41. Nor does the Spanish Government err in observing that the first question concerns the facts, but it is mistaken to propose its dismissal at the outset.

42. It does not suggest such a fate for the question in its entirety, only the enquiries in parentheses, in which the referring court requests guidance on the specific circumstances of the dispute, which the Court of Justice cannot give, because to do so would go beyond its interpretative role.

43. So, the referral starts with an enquiry which, despite alluding to facts, affords undeniable scope for interpretation, since it relates to an indeterminate legal concept [22] ('the same acts') in the provision in question.

44. A similar issue arose in *Van Esbroeck*, in which I stated that the task of ascertaining whether the acts on account of which a prosecution is opened are the same as those which were at issue in a previous prosecution is at the very heart of the role of administering justice, and only the court having direct knowledge of the situation to be the subject of its assessment is qualified for that task, without prejudice to the right of review at second instance (point 36 of the Opinion). The role of the Court is restricted to furnishing interpretative criteria which, having regard to the basis and the aim of Article 54 of the CISA, indicate the most suitable approach in the interests of ensuring uniform treatment throughout the whole territory of the European Union (point 37).

22 — That is how I describe it in my Opinion in *Van Esbroeck* (point 38).

45. In that endeavour it seems futile to extract, in the context of Community law, a number of autonomous guidelines on the basis of which to put forward a general criterion to apply to cases which may arise in the future, since 'the contingent nature of criminal law policies and the characteristics of criminal proceedings are not conducive to the creation of universally valid rules', and an approach which may be helpful with regard to certain types of offence or certain types of participation is liable to prove inappropriate for others (points 38 and 39). I regard it as more sensible to adopt an intermediate approach which, rather than becoming mired in the vicissitudes of the main proceedings, assesses the particular circumstances of the case, in order to assist the national court by furnishing rules enabling it to resolve the dispute in accordance with the spirit of the provision (point 40).

46. In my view such an approach provides a useful answer to the referring court, whilst not usurping its role, and averts the risks signalled by the Spanish Government.

VI — Analysis of the questions referred

47. Having cleared the way, and with no further preliminaries, it is necessary to dispel the doubts of the Rechtbank 's-Hertogenbosch. The first, as commented, has been examined in *Van Esbroeck*. The judgments in *Gözutök and Brügge*, on the one hand, and *Miraglia*, on the other, offer guidelines for the second. However, the present proceedings are to interpret a number of variations on the same theme.

48. I shall begin at the end because if it is found that an acquittal on the grounds that the charges were not made out does not preclude a subsequent review of 'the same acts', any speculation about the latter concept is superfluous.

A — *The concept of a second trial: acquittal on the grounds of insufficient evidence (second question)*

49. In my Opinion in *Gözütok and Brügge*, I stated that no one whose trial has been finally disposed of in one State which is party to the Convention may be prosecuted again, for the same acts, irrespective of whether he has been acquitted or convicted (point 46).

50. My view has not altered one iota since then but, unlike the situation on that occasion, when the issue was not contentious, it is now necessary to articulate the reasons why such a finding triggers the protective effect of the *ne bis in idem* principle.

1. The literal interpretation

51. The wording of Article 54 of the CISA affords no room for discussion since, after referring to a trial which has been finally disposed of, without alluding to the outcome, it prohibits any future prosecution, with the qualification that, 'if a penalty has been imposed', [23] the bar is conditional on it being enforced or that it can no longer be enforced. That clarification would be redundant if the principle were only effective after imposition of a penalty.

52. *Miraglia*, albeit by implication, since that case likewise did not broach the issue directly, expressed the same view, stressing the notion of examination 'as to the merits of the case' (paragraph 30) and rejecting application of Article 54 of the CISA where the case has been discontinued because other proceedings have been started in another Member State (paragraph 35). The key lies in the fact of exercise of the *ius puniendi*, by means of an assessment of all the elements of the case, and the verdict is immaterial (I explore this notion further below).

53. The emphatic terms of the Charter of Fundamental Rights of the European Union [24] support that observation. Article 50 bars any later examination if the person concerned has been 'finally acquitted or convicted'. [25]

54. Those arguments render meaningless an interpretation such as that which the Austrian Government sets out, only to reject it, in paragraph 37 of its written observations. In the Schengen context, to hold that *ne bis in idem* requires a conviction, irrespective of whether there is also a penalty, would run counter to the spirit of Article 54 of the Convention, as well as unjustifiably reducing its scope of application by excluding acquittals because that factor was missing from the person tried. [26]

55. The Spanish Government's thesis displays a similar antagonism and is, as well as contradictory, [27] mistaken, since it identifies

23 — Equivalent expressions appear in other language versions; for example: *en cas de condamnation* (French); *im Fall einer Verurteilung* (German); *en caso de condena* (Spanish); and *in caso di condanna* (Italian).

24 — OJ 2000 C 346, p. 1.

25 — The International Covenant on Civil and Political Rights of 19 December 1966 (Article 14(7)), Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4(1)) and the Rome Statue of the International Criminal Court (Article 20(1)) are similarly categoric.

26 — The principle would operate when, despite being culpable, the act is not sanctioned (exonerating circumstances, where the acts are not objectively punishable or liable to prosecution), but would not apply where the non-imposition of a penalty was due to a finding of a ground of lack of criminal responsibility.

27 — In paragraph 31 of its observations, it argues that the words 'if a penalty has been imposed' reveals that Article 54 of the CISA excludes acquittals, overlooking the fact that the main proposition of the provision occurs in the expression 'person whose trial has been finally *disposed of*'.

the rationale of the maxim in the principle of proportionality, and calls for a response fitting the crime. [28]

2. Teleological interpretation

(a) The *ne bis in* idem principle in Schengen

56. Other principles inspire the axiom in question: legal certainty and equity. The offender must know that, by paying the penalty, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings (points 49 of the Opinion in *Gözütock and Brügge* and 19 of that in *Van Esbroeck*).

57. The *ne bis in idem* principle is a fundamental right of citizens, linked to the right to due process and a fair trial; it is also a structural requirement of the legal system and its lawfulness is founded on respect for *res judicata* (point 21 of the Opinion in *Van Esbroeck*).

58. Where, in a situation involving multiple penalties, one invokes proportionality to ensure that, on imposing them, the court takes previous sanctions into account, alleviating those penalties, there comes into play the '*Anrechnungsprinzipi*' or 'taking into consideration principle', [29] not to be confused with the *ne bis in idem* principle, although they are complementary. Article 54 of the CISA is not a procedural guideline which works as a palliative, in the interests of that proportionality, when a person is prosecuted and punished more than once for identical acts, but a fundamental safeguard, which prevents a second judgment on the same matter (*Erledigungsprinzip* or 'exhaustion of procedure principle'). [30]

59. In the Schengen *acquis*, intended to enhance European integration and, in particular, to make the Union an area of freedom, security and justice, the *ne bis in idem* principle also operates in conjunction with

28 — Its approach, taken to its absurd extreme, would permit a subsequent trial, not only when the defendant is acquitted, but also when the first penalty did not reflect the assessment made in a different Member State of the severity of the conduct, with scope for an 'additional penalty' to make the punishment reflect the social disapproval, with the effect that sovereignty in criminal matters, which no one would deny exists, would be undermined, not by a freely accepted international agreement, but rather by the unilateral intervention of foreign authorities.

29 — Article 56 of the CISA reflects that notion. Where, under Article 55, a Member State declares itself not bound by Article 54 and commences proceedings against a person whose trial has already been finally disposed of by another Contracting Party, previous penalties must be 'taken into account' by that State.

30 — I use equivalent expressions in my Opinions in Cases C-213/00 P *Italcementi* v *Commission* (points 96 and 97) and C-217/00 P *Buzzi Unicem* v *Commission* (points 178 and 179), joined with four others, the judgment being delivered on 7 January 2004. See footnote 19 to the Opinion in *Gözütock and Brügge*.

the right to freedom of movement.[31] The gradual removal of border checks, an evitable stage on the way to that common area, is not without risks, since it favours those who take advantage of the reduction in surveillance to extend their unlawful activities, necessitating an increase in police and judicial cooperation. Yet that more robust impact must be achieved with no erosion of the inalienable freedoms inherent to a democratic society governed by the rule of law.

60. A multinational context demands, as already indicated, more collaboration, but also greater cross-border recognition of judicial proceedings.

(b) Mutual trust

61. The *ne bis in idem* principle serves the principle of legal certainty,[32] ensuring that decisions adopted by the public authorities, once definitive and final, cannot be challenged indefinitely. When a prosecution has run its course in one Member State, the others cannot disregard that circumstance. Integration requires assistance, unlikely without mutual confidence in the criminal justice systems of each Member State and without the mutual recognition of judgments, adopted in a true 'common home' of fundamental rights.[33]

62. Even when one State may not deal with a matter in the same or even a similar way as another, the result will be accepted as equivalent because it reflects the same principles and values. In a project as ambitious as the European Union, the States must trust in the adequacy of their partners' rules and also trust that they apply them correctly, accepting their consequences, even though they may produce different outcomes;[34] that concept implies taking those outcomes into consideration, one corollary of which is the *ne bis in idem* principle.

63. In short, if one Member State judges the perpetrator of or a participant in an offence,[35] the courts of the other States

31 — That understanding is evident in paragraph 38 of the judgment in *Gözütok and Brügge* and paragraph 32 of *Miraglia*.

32 — I advance that view in point 119 et seq. of my Opinion in *Gözütok and Brügge*.

33 — The 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters' (OJ 2001 C 12, p. 10) regards the *ne bis in idem* principle as one of the measures appropriate for that purpose (p. 12). In a similar vein is the Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States [COM (2005) 195 final, point 2.2.2.].

34 — Paragraph 33 of the judgment in *Gözütok and Brügge* and paragraph 30 of that in *Van Esbroeck*.

35 — I suggest that approach in point 119 of my Opinion in *Gözütok and Brügge*, laying emphasis on the final word of the State, whether by a court in its role as judge, or by an examining magistrate as the result of his investigations or by a Prosecutor bringing the prosecution against the criminal acts.

must refrain from re-examining the matter, whatever the verdict,[36] a conviction or an acquittal, since, in either instance, the court is expressing the *ius puniendi.*

3. The panoply of possible judgments

64. Where a penalty is imposed, there is no room whatsoever for doubt, and the term includes, in addition to judgments in the strict sense, the discontinuance of the prosecution as the result of fulfilment of the conditions imposed on the defendant by the Public Prosecutor (judgment in *Gözütok and Brügge*).

65. In the event of an acquittal, any subsequent step is prohibited, provided the State monopoly on punishing crime has come into operation, in the form of an analysis of 'the merits'.[37] That expression, coined in *Miraglia*, embraces several situations, depending on the grounds of the decision, some intrinsic to the defendant and others extrinsic. The intrinsic grounds include those for exonerating a defendant who lacks the indispensable requirements for accountability (grounds relating to lack of criminal responsibility, such as being under age or mental disorder). The extrinsic grounds cover factual situations, in which no other behaviour could be expected (justifying circumstances: self-protection, necessity or overwhelming fear) or in which the personal requirements of the offence (elements relating to the perpetrator of the crime) are not satisfied, and those relating to the passage of time[38] and to the substantive truth of the facts under analysis.

66. That latter group includes three types of acquittal, depending on whether: (1) the acts do not constitute a criminal offence, (2) the defendant did not commit them or (3) it is not proven that the defendant committed them;[39] the question now referred concerns that third category.

4. In particular, acquittal on the grounds of insufficient evidence

67. That type of verdict entails an investigation of the merits or, in other words, implies a decision on the conduct in relation to its

36 — The European Court of Human Rights, in an inadmissibility decision of 3 October 2002 (Case No 48154/99, *Zigarella* v *Italy*), held that the *ne bis in idem* guarantee operates independently of the outcome. A more recent decision, of 15 March 2005 (Case No 70982/01, *Horciag* v *Rumania*), restated that view.

37 — In the Green Paper to which I referred in footnote 6 to this Opinion, the Commission asks (question 18) whether, for the *ne bis in idem* principle to operate, there must be an assessment 'of the merits' (p. 12).

38 — In Case C-467/04, *Gasparini*, a reference for a preliminary ruling from the Audiencia Provincial de Málaga (Provincial Court, Malaga) (Spain), as the criminal court of first instance, the Court of Justice is called upon to rule on an acquittal due to the time-barring of the prosecution.

39 — One might speak of 'proof of innocence' and 'lack of proof of guilt', were it not that there is a presumption of innocence, a not insignificant distinction and one of relevance to the Rechtbank 's-Hertogenbosch's question.

attribution to a perpetrator and, as such, exhausts the State *ius puniendi*.

68. The *ne bis in idem* principle precludes a person being either punished, or 'prosecuted' or 'tried' more than once. Article 54 of the CISA uses the first term, whilst Article 50 of the Charter of Fundamental Rights of the European Union (Spanish version) contains the second. The judgment in *Gözütock and Brügge* ruled very clearly, pointing out that the objective of Article 54 is to 'ensure that no one is prosecuted on the same acts in several Member States' (paragraph 38). The judgments in *Miraglia* and *Van Esbroeck* reiterated that interpretation (paragraphs 32 and 33 respectively), which is no arbitrary construction, since the principle in question, as indicated, serves the interests of equity and legal certainty, and is linked to the right to a fair trial; it also protects the dignity of the individual vis-à-vis inhuman and degrading treatment, since that is a fitting description of the practice of repeatedly punishing the same offence. [40]

69. Criminal proceedings represent, of themselves, a necessary imposition on a person in respect of whom there are reasonable grounds to suspect they have committed an offence. However, if the courts in a final judgment find that the charges have not been substantiated, nothing authorises the reopening of the case, even if new evidence comes to light proving who perpetrated the illegal acts.

70. That is not the consequence of a secondary criterion, such as the principle of adopting the interpretation most favourable to the accused, which operates at the time of assessing the evidence, [41] but of a fundamental right, intended to protect the citizen vis-à-vis the public authorities, which only permits acquittal if, all the guarantees having been observed and after the appropriate evidential procedures, innocence does not fall away.

71. It is unacceptable to cause concern to a person who has been found not guilty [42] both if that finding is made in substantive terms and where it derives from the basic right of the individual referred to above, common to the constitutional traditions of the Member States and incorporated in the Charter of Fundamental Rights of the European Union (Article 48(1)), as well as being declared in Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and enshrined, in Article 6(2) EU, as a general principle of Community law.

40 — I lay emphasis on that aspect in footnote 10 to my Opinion in *Van Esbroeck*.

41 — If there is uncertainty as to whether the subject-matter and the perpetrator satisfy the subjective and objective elements of the offence, benefit of the doubt must go to acquittal.

42 — The Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle (OJ 2003 C 100, p. 24) sought to broaden its scope to situations where there is an acquittal (Article 2(1)).

72. In short, I share the view of the Commission and of the participating Member States, with the exception of Spain, that a person who has been acquitted because the charge has not been proven must be regarded as having had their 'trial disposed of' for the purposes of Article 54 of the CISA. [43]

73. No one, including the Spanish Government, disputes that the *ne bis in idem* principle is effective in such a situation within a national legal system, and there should therefore be no question as to a similar outcome in a supranational framework such as that of the European Union, unless one were to take a parsimonious and reticent approach, which denies two pillars of that common space: mutual trust, with the reciprocal acceptance of judicial decisions, and respect for the fundamental rights of citizens.

B — *The concept of idem: 'the same acts' (first question)*

74. The judgment in *Van Esbroeck* has addressed that aspect of the reference for a preliminary ruling, in which it was held that Article 54 of the CISA requires that the acts must be the same, in the sense of a set of inextricably linked circumstances, independently of the legal classification of the acts and the interests protected by the criminal offences. [44] It the adds that the import and export of a consignment of narcotics, punishable in different Member States subject to the Schengen *acquis*, do fall within that definition, without prejudice to the fact that it is for the national courts to make the definitive assessment.

75. That approach takes up the recommendations in my Opinion in *Van Esbroeck* on the purely fact-based dimension of the concept (points 41 to 49), on its application to the transporting of a specific quantity of a drug from one Contracting State to another (points 50 to 52), and on the interpretation of Article 71 of the CISA and of the United Nations sectoral conventions (points 53 to 58).

76. Although, at the present stage of my analysis, I am tempted to stop, the particular features of the instant case suggest that I should go one step further and make a number of additional remarks about 'the

43 — It is common ground in academic legal circles that a final acquittal involves the disposal of a trial within the meaning of Article 54 of the CISA (Dannecker, G., 'La garantía del principio *ne bis in* idem en Europa', in *Dogmática y ley penal. Libro homenaje a Enrique Bacigalupo*, volume I, Madrid 2004, p. 171).

44 — In my Opinion in *Gözütok and Brügge* (points 48 and 56) I allude, in passing, to the legal principles and the interests which the penalising provision protects, but that statement should not be taken out of context to reach hasty conclusions, casting me as the champion of a position which I expressly reject in the Opinion in *Van Esbroeck*. In that first Opinion, in order to assert the international dimension of the *ne bis in idem* principle, I refer to values, although hinting that within the European Union and the Schengen area they are irrelevant, since all the contracting States share those values (point 55 *in fine*).

same acts', without impinging on the task of the referring court, to which it falls to ascertain whether the account of the facts which gave rise to one action is the same as that of the earlier proceedings.

77. That last observation concurs with the Spanish Government, according to which the second part of the first question (the part in parentheses) should be disregarded, since it is conducive to becoming involved in the facts, which this Court must not do.

1. The subject-matter of 'the same acts'

78. The *Van Esbroeck* judgment refers to 'a set of concrete circumstances which are inextricably linked together' (paragraph 36). That way of putting it conceals two objective aspects.

79. On the one hand, one has to have regard for time and for space, in such a way that, if there is unity in both dimensions, the substantive facts cannot be divided into artificially separate episodes.

80. At the same time, whilst not overlooking the factual aspect, the offender's mental link with his own acts deserves consideration.

81. A single time, a single place, but, also, a single intention.

82. It is necessary to work with that trinity in order to ascertain the equality which the *ne bis in idem* principle requires, clearly understanding that they do not all have to exist at the same time. The place may change, as in *Van Esbroeck*, where a quantity of prohibited substances was transported from one Member State to another, but the event does not change. The sequence of offending acts tends to be lengthy and to be divided into distinct phases but, for the purpose of punishment, retains its unity. [45] Lastly, there is nothing to prevent the perpetrator's intention, on occasion from changing, and yet, that circumstance notwithstanding, the offence remains unaltered.

2. The personal element: the existence and fate of other defendants

83. The *ne bis in idem* principle, a personal guarantee, bars a second trial for the same

45 — The peregrinations of Mr Van Straaten, who drove a quantity of heroin from Italy to the Netherlands, where he was in possession of part of that quantity, fit that description.

conduct. Accordingly, as well as objective identity, there must be subjective identity, such that it is sufficient for the trial of one individual to be disposed of for that person not to be troubled again.

84. In consequence, the collaboration of other people, the possibility that they might change in the course of the criminal behaviour and the fate which criminal justice metes out to them are of secondary importance.

85. That is to say, the principle under analysis in this case operates only in relation to the person accused a first time, and the story does not change because others take part, replacing each other during the execution of the offending acts.

VII — Conclusion

86. In the light of the foregoing, I suggest that the Court of Justice should respond as follows to the questions referred by the Rechtbank 's-Hertogenbosch:

'(1) A person's trial has been "disposed of" within the meaning of Article 54 of the Convention implementing the Schengen Agreement if, after assessment of the evidence, that person is acquitted on the ground that the charges alleged have not been established.

(2) In order to assess whether the acts are the same it is necessary:

— to have regard to the essence of the acts prosecuted in both sets of proceedings, irrespective of their legal classification and the principles or interests which punishment of that person protects in the legal systems of the Contracting States or in those in which the Schengen *acquis* applies; and

— to define "acts" as a set of inextricably linked circumstances, for which purpose it is necessary to consider whether they display unity in time and space, and in the intention of the perpetrator, and it is irrelevant that, in both sets of proceedings, the person benefiting from the *ne bis in idem* principle might appear with different co-defendants.

(3) It falls to the national court to determine, in accordance with the foregoing criteria, whether the possession of a consignment of heroin in Italy, transporting it to the Netherlands and possession, in the latter State, of some or all of that consignment, constitute "the same acts".'