OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 8 April 2008 [1]

I — Introduction

1. Over the last five years the Court of Justice has defined the blurred outlines of the *ne bis in idem* principle, by means of case-law [2] to which I have had the privilege of contributing, [3] in which the specific circumstances of the cases being heard do not overshadow its underlying aspiration to generality.

2. Just as, when we look at a painting, the right way to obtain an overall view is to stand back from the object painted because, otherwise, we run the risk that the retina will pick up only the strokes, texture and mass of colours, and will fail to capture the full meaning of the work.

3. Sometimes, this course of action becomes really difficult, as in this case, which arises in part out of the paradoxical behaviour of a person who seeks to ensure his own well-being by invoking his own death sentence, [4] pronounced 47 years previously, in order to activate the *ne bis in idem* principle. Herein lies the greatness and the inadequacy of the law.

II — Legal framework

A — *The Schengen* acquis

4. The body of law in question consists in:

(a) the Agreement signed on 14 June 1985 in the Luxembourg town which gives it its

1 — Original language: Spanish.

2 — The Court of Justice has considered this principle on seven occasions: Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345; Case C-469/03 *Miraglia* [2005] ECR I-2009; Case C-436/04 *Van Esbroeck* [2006] ECR I-2333; Case 150/05 *Van Straaten* [2006] I-9327; Case C-467/04 *Gasparini and Others* [2006] ECR I-9199; Case C-288/05 *Kretzinger* [2007] ECR I-6441; and Case C-367/05 *Kraaijenbrink* [2007] ECR I-6619.

3 — In *Gözütok and Brügge*, *Van Esbroeck* and *Van Straaten* my Opinions, delivered on 19 September 2002, 20 October 2005 and 8 June 2006 respectively, may be consulted. In the other cases, except *Miraglia*, which was decided without an Opinion, Advocate General Sharpston delivered Opinions, on 15 June 2006 in *Gasparini* and 5 December 2006 in *Kretzinger* and *Kraaijenbrink*.

4 — Nietzche F., *Twilight of the Idols*, against the background of the will to live, shows mankind's ability to turn adversity to advantage in aphorism 8 of his maxims and arrows, which refers to Life's school of war, stating that 'what does not destroy me, makes me stronger'. A more traditional version is provided by the Spanish proverb 'lo que no mata, engorda' ('what does not kill you, makes you fat').

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; [5]

(b) the Convention implementing that agreement, signed on 19 June 1990 ('the Convention'), [6] 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 Convention, and those of the organs upon which that Committee has conferred decision-making powers; [7]

5. Protocol (No 2) to the Treaty on European Union and to the Treaty establishing the European Community ('the Protocol') 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, [8] since the entry into force of the Treaty of Amsterdam (1 May 1999).

6. Council Decision 2007/801/EC of 6 December 2007 [9] has considerably extended the territorial scope of the *acquis*, declaring its provisions fully applicable in the Czech Republic, the Republic of Estonia, 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.

7. The United Kingdom [10] and the Republic of Ireland [11] have not subscribed fully to that common project, and have chosen to participate on an ad hoc basis.

5 — OJ 2000 L 239, p. 13.
6 — OJ 2000 L 239, p. 19.
7 — OJ 2000 L 239, p. 63 et seq.

8 — The Kingdom of Belgium, 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, the Kingdom of Sweden and the Kingdom of Denmark, although this last State has a unique status, enabling it to opt out of decisions made in the field.
9 — OJ 2007 L 323 p. 34.
10 — Council Decisions 2000/365/EC of 29 May 2000 (OJ 2000 L 131, p. 43), and 2004/926/EC of 22 December 2004, on the putting into effect of parts of the Schengen *acquis* by the United Kingdom of Great Britain and Northern Ireland (OJ 2004 L 395, p. 70).
11 — Its request was attended to by Council Decision 2002/192/EC of 28 February 2002 (OJ 2002 L 64, p. 20).

8. The Republic of Cyprus, [12] the Republic of Bulgaria and the Republic of Romania, [13] although bound by the aforementioned body of rules after joining the European Union, require the intercession of the Council, in order to verify that the conditions for their application have been satisfied.

9. Of the countries which do not belong to the European Union, the Republic of Iceland and the Kingdom of Norway are required under Article 6 of the Protocol to implement and develop the Schengen *acquis*, which has been in force in those countries since 25 March 2001. [14] There is also an Agreement of association with Switzerland concerning the implementation, application and development of the aforementioned *acquis*, [15] to which the Principality of Liechtenstein will probably accede, pursuant to a proposal for a decision drawn up by the Council. [16]

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

11. 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*. [17]

B — *In particular, the ne bis in idem principle*

12. Title III of the Convention, '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).

12 — Article 3(2) of the Act concerning the conditions of accession (OJ 2003 L 236, p. 50).

13 — Article 4(2) of the Act concerning the conditions of accession (OJ 2005 L 157, p. 203).

14 — On 19 December 1996 the 13 Member States of the European Union at the time signatories of the Schengen *acquis* and the aforementioned northern countries signed an ad hoc agreement in Luxembourg, prior to the Agreement concluded on 18 May 1999 by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis* (OJ 1999 L 176, p. 36). Article 15(4) of the latter agreement entrusts the Council with the task of fixing the date of entry into force for the new signatories, a task which it fulfilled in Decision 2000/777/EC of 1 December 2000 (OJ 2000 L 309, p. 24), setting 25 March 2001 as a general date (Article 1).

15 — Approved by Council Decision 2004/860/EC of 25 October 2004 (OJ 2004 L 370 p. 78).

16 — Proposal for a Council Decision of 1 December 2006 (COM (2006), 752 final).

17 — OJ 1999 L 176, pp. 1 and 17, respectively.

13. 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.

14. Article 54 of the Convention 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.'

C — *French law*

15. I share the views of some of those who have joined [18] the discussions in these preliminary ruling proceedings regarding the paucity of the information provided by the order for reference regarding the applicable French provisions. [19]

16. Nevertheless, under Article 120 of the Code of Military Justice, [20] a person convicted in absentia could lodge an appeal against his sentence within five days following notification thereof; it is generally the case in proceedings held *in absentia*, that there is no record of such notification having been effected, in which case the aforementioned Article 120 provided that an appeal could be lodged up to the date on which the penalty became time-barred.

17. The Code of Criminal Procedure [21] provides that enforcement of a penalty becomes time-barred after 20 years, to be calculated from the time the penalty is imposed. [22]

18. When these provisions are taken together, it appears that a judgment given *in absentia*, where it is not known for certain that it was notified to the party concerned, [23] becomes unchallengeable [24] after 20 years have elapsed since it was pronounced, and it should be remembered that, in the present case, the period of prescription coincides with the period granted for applying for a review. [25]

18 — Specifically, those of the Hungarian Government, in paragraph 8 of its observations.

19 — The appearance of France, and even of Germany, which unfortunately has not occurred, would have clarified certain doubts.

20 — This Code has been repealed, although it is applicable *ratione tempore* to the main action, in its 1958 version, which is based on a Law of 9 March 1928.

21 — Article 133(2) of the current Code and Articles 639, 640 and 763 of the Code applicable at the time the murder was committed.

22 — The Portuguese Republic, in paragraph 27 of its observations, cites Article 639 of the Code of Criminal Procedure, from which it is apparent that the time-limit for enforcing sentence starts to run before the absentee is arrested: 'si le contumax se constitue prisonnier ou s'il est arrêté avant que la peine sois éteinte par prescription …'.

23 — In this case there is no record of the judgment having been notified to the convicted man.

24 — The French term which defines this state is 'irrévocabilité', which describes a strictly final judgment.

25 — This is according to the report issued by the prosecutor of the Tribunal aux armées de París [Paris Military Tribunal], to which I refer in greater detail below.

III — The facts, the main proceedings and the question referred for a preliminary ruling

19. Klaus Bourquain, a German citizen serving in the Foreign Legion, [26] was tried and convicted of murder *in absentia*, and sentenced to death on 26 January 1961 by the Permanent Military Tribunal of the Eastern Zone of Constantine, in Bône. [27]

20. That military tribunal held, pursuant to the French Criminal Code applicable at the time, that it was proved that, on 4 May 1960, while trying to desert at the Algerian-Tunisian border, in the province of El Tarf, [28] Mr Bourquain shot dead another member of the Foreign Legion, also German, who was trying to prevent him from escaping.

21. The convicted man never appeared before the Tribunal, because he fled to the German Democratic Republic; the sentence was not carried out, but his property was placed under sequestration as security for costs.

22. Following that judgment, no further criminal proceedings were brought against Mr Bourquain either in France or Algeria; however, proceedings were initiated in the Federal Republic of Germany, whose authorities issued an arrest warrant in 1962, addressed to the German Democratic Republic, which refused it.

23. In 2002, the Staatsanwaltschaft Regensburg (Regensburg Public Prosecutor's Office) brought proceedings against Mr Bourquain, to try him in Germany for the same crime.

24. However, at that time, the punishment imposed by the judgment of 26 January 1961 could not be enforced in France because (1) an amnesty had been granted there in 1968 [29] in respect of crimes committed by military personnel during the hostilities in Algeria; (2) in 1981 enforcement of the sentence was

26 — This elite unit of the French army, which fought in the Algerian War, was established in 1831 by King Louis-Philippe I, wrote one of the most illustrious pages in its history in Mexico on 30 April 1863, at the Battle of Camerón, where 65 soldiers under the command of Jean Danjou resisted for 10 long hours the attack of thousands of soldiers of the Mexican regular army; a meticulous account of this episode is given in the Spanish novel by Mañes J., *El mito de Camerone*, 2nd ed., Hergué Editorial, Huelva, 2005.

27 — Algerian city, now Annaba, known in ancient times as Hippo Regius, where Saint Augustine was bishop from 396 to 430.

28 — Although we are aware of the insurmountable barrier between truth and fiction, the circumstances of this tragic event are reminiscent of the work of Camus, A., *L'étranger*. The Nobel laureate who was born in Algeria, depicts a harsh existentialism, recounting the misfortunes suffered in Algiers by Meursault, who is completely indifferent to his mother's death or to his chance of marriage, an apathy which leads him to fire his revolver at the 'Arab', because he was dazzled by the sunlight reflected in the steel of the man's knife, and which continues even during the trial in which he is condemned to death, when he states, to the amusement of those present, that the sun was the only motive for his action.

29 — Law of 31 July 1968.

time-barred; and (3) in that year capital punishment was abolished. [30]

25. At this juncture, the Landgericht Regensburg obtained an expert opinion from the Max-Planck-Institut für ausländisches und internacionales Strafrecht (Institute for Foreign and International Criminal Law), according to which even though, owing to the specific features of French law, it could not be directly enforced, the judgment given *in absentia* had the status of a final judicial decision in formal and substantive terms, resulting in further criminal proceedings for the same acts being barred.

26. Furthermore, the Landgericht Regensburg requested information, pursuant to Article 57 of the Convention, from the French Ministry of Justice as to whether the judgment of 26 January 1961 precluded the initiation of further proceedings in Germany, in accordance with Article 54 of the Convention.

27. The public prosecutor of the Tribunal aux armées, Paris, confirmed that the judgment has the status of a final judicial decision because it has been irreversible since 1981, and that it cannot be enforced in France because the penalty is time-barred; he considered, however, that the *ne bis in idem* principle of the Convention is not applicable to this case. [31]

28. These contrary opinions raise doubts for the Landgericht Regensburg which, in the order for reference, seeks to ascertain whether Article 54 of the Convention requires the penalty to have been enforceable at some juncture. It argues that as a consequence of the right to seek a retrial during the limitation period, [32] the sentence cannot be enforced until the end of that period, which is the precise moment at which enforcement of the sentence becomes time-barred. [33]

29. The Landgericht Regensburg has therefore suspended proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'May a person whose trial has been finally disposed of in one Contracting Party be

30 — By Law 81-908, of 9 October (Journal Official of 10 October 1981, p. 2759). Recently, owing to the amendment introduced by Constitutional Law 2007-239, of 23 February 2007 (Journal Official of 24 February 2007, p. 3355), the French Republic has reproduced the aforementioned abolition in Article 66 of its Constitution.

31 — This view is clearly contradictory since, regardless of whether the sentence has not been enforced or is not in the process of being enforced, the other condition which renders the principle applicable is precisely that 'it can no longer be enforced', under the law of the sentencing State.

32 — I emphasise that these periods clearly overlap.

33 — I am deliberately avoiding any consideration of the non-enforcement of the sentence as a result of the amnesty, since that is a point for the national court to decide, subject always to the jurisdiction of the Court of Justice to examine its effect within the scope of Article 54 of the Convention.

prosecuted in another Contracting Party for the same acts; when, under the laws of the sentencing Contracting Party, the sentence imposed on him could never have been enforced?'

IV — The proceedings before the Court of Justice

30. The order for this reference for a preliminary ruling was lodged at the Court Registry on 21 June 2007.

31. Observations were submitted, within the time-limit laid down in Article 23 of the EC Statute of the Court of Justice, by Mr Bourquain, the Commission and the Czech, Hungarian, Netherlands and Portuguese Governments.

32. After the general meeting held on 19 February 2008, I was notified, on 27 February, that the period within which a hearing could be requested had expired on 25 February without such a request being made. Therefore, since that notification, the case has reached the stage at which an opinion may be delivered.

V — Analysis of the question referred for a preliminary ruling

A — *A few preliminary points concerning the ne bis in idem principle in the Schengen* acquis

1. The dual expression of the principle

33. The scope accorded by the Court of Justice to the *ne bis in idem* principle has varied depending on whether it concerns the area of competition [34] or that of the 'third pillar' of the European Union: in both areas it has referred to the prohibition against double penalties, but only in the latter [35] does it extend the principle to the possibility of being prosecuted twice for the same acts (*nemo debet bis vexart pro una et eadem causa).*

34 — The judgment in Case 7/72 *Boehringer Monnheim* v *Commission* [1972] ECR 1281, raised it to the standing of a general principle of Community law.

35 — Vervaele J., 'El principio non bis in idem en Europa', in *La orden de detención y entrega europea*, Arroyo L. and Nieto A., Ed. de la Universidad de Castilla-La Mancha, Cuenca, 2006, p. 229, emphasises the limitation of the principle in competition law.

34. The full recognition of foreign criminal judgments represented a real challenge for Community law and the Court of Justice, without shirking its responsibility, declared, under the auspices of the freedom of movement of persons, that Article 54 of the Convention ensures that persons whose trials have been finally disposed of are able to exercise that fundamental freedom without having to fear a fresh prosecution in another contracting State for the same acts. [36]

2. Its traditional bases

35. Article 54 of the Convention, prevents a person from being subject, in respect of the same unlawful conduct, to more than one penalising procedure and, possibly from being punished repeatedly, thus avoiding the unacceptable repetition of the exercise of the *ius puniendi.* [37]

36. Legal certainty provides the accused in criminal proceedings with the guarantee that he will not be prosecuted a second time for his acts, if he has been acquitted, and that a further penalty will not be imposed, if he has been convicted.

37. Furthermore, the role of equity as a basis for the proportionality rule which prevents the accumulation of penalties [38] must not be forgotten, since although every penalty, in addition to being designed to rehabilitate, [39] has the dual purpose of punishment and deterrence by curbing misconduct and discouraging other possible offenders, it also has to be proportionate to those purposes, keeping an appropriate balance in order to punish the conduct which is being penalised whilst, at the same time, serving as an example.

38. Finally, as a structural requirement of the legal system, the lawfulness of the *ne bis in idem* principle is also founded on respect for *res judicata*.

36 — Paragraphs 38, 32, 57 and 27, respectively, of the judgments in *Gözütok and Brügge, Miraglia, Van Straaten* and *Gasparini and Others*.

37 — Opinions in *Gözütok and Brügge* (point 48 et seq.) and *Van Esbroeck* (point 18 et seq.).

38 — The prosaic nature of the topic is no incentive to use it in a literary context, but our attention is drawn to the concept of the principle presented by Dumas A., in *Impressions de voyage*, Michel Lévy Frères Libraires-Editeurs, París 1855, p. 57; he links it, in a humorous tone completely lacking in legal rigour, to the difficulty of enforcing a penalty twice, when he describes the infallible 'cadi' system used to simplify the administration of justice in Cairo; when the thief has been arrested, one of his ears is cut off, so if he reoffends, 'il n'y a pas de dénégation posible, à moins que l'oreille n'ait repoussé, ce qui est rare; alors on coupe l'autre, en vertu de cet axioma de droit: non bis in idem'.

39 — Henzelin M., 'Ne bis in idem, un principe à géométrie variable', *Revue Pénale Suisse*, vol. 123, 2005, Part 4, Stämpfli Editions SA, p. 347.

3. Its most recent developments

(a) From trust between States …

39. This concept, which is still new in the construction of a European criminal justice system, underlies the principle of mutual recognition, [40] introduced in paragraph 33 of the conclusions of the Tampere European Council of 16 October 1999. [41]

40. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [42] unambiguously postulates a high level of confidence between Member States (recital 10).

41. Those elements presaged an early pronouncement by the Court of Justice which, at the first opportunity it was offered, [43] stressed the importance of mutual trust, crucial to the implementation of Article 54 of the Convention, so that each of the Member States must recognise the criminal law in force in the other Member States, even if the outcome would be different if its own national law were applied; in other words, from the point of view of its purpose and effects, mutual trust is a touch utilitarian when it supports the principle of mutual recognition.

42. However, although the clarification thus given by the Court of Justice can be helpful to finding a solution in some cases, it is inadequate in others, above all because the mechanism of enhanced cooperation gives the national courts an important role, which requires significant interpretative skills. [44]

40 — Which ought to be accepted without hesitation because, as Moreiro González, C.J., rightly points out in *Las claúsulas de seguridad nacional*, Ed. Iustel, Portal Derecho S.A., Madrid, 2007, pp. 132 and 133, the approval by States is the first step in the creation of international rules and raises the main issue of the obligations which bind them.

41 — Shortly afterwards, that trust is referred to explicitly in the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (OJ 2001 C 12, p. 10) in order 'to strengthen cooperation between Member States but also to enhance the protection of individual rights... Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each others' criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law'.

42 — OJ 2002 L 190, p. 1.

43 — In paragraph 33 of the judgment in *Gözütok and Brügge*, cited above, following point 124 of my Opinion.

44 — The years I have spent as a judge in Spanish courts and those I have lived in Luxembourg as Advocate General also give me a seniority which enables me to disagree with the expressive views of Flore D.,'La notion de confiance mutuelle: l'alpha ou l'oméga d'une justice pénale européenne' in *La confiance mutuelle dans l'éspace européen/Mutual Trust in the European Criminal Area*, Éditions de l'Université de Bruxelles, 2005, p. 17: 'If a Brussels judge sometimes has concerns regarding the ability of a colleague in Arlon or Bruges, how will he not have concerns regarding the decisions of another distant colleague, whom he has never seen nor will see, who carries out his duties in a country which the Brussels judge does not know, and in which he will never set foot, and who perhaps has neither the same statute nor the same independence as he does, who applies a different law and speaks a different language...'.

43. An appropriate way of dealing with confused situations would be to harmonise [45] the substantive and procedural criminal law of the Member States, since the apprehension felt when taking decisions in this branch of the law will normally be reduced by the realisation that the criminal judgments delivered in another State include the same safeguards.

44. Meanwhile, the *ne bis in idem* principle continues to be the standard-bearer for mutual trust, since, irrespective of whether convergence becomes a reality one day, Article 54 of the Convention is not dependent on the approximation of the criminal laws of the Member States; [46] on the contrary, its validity is reinforced precisely because there is no such approximation.

45. Although it must be assumed that there is, between the States, a respect for certain conditions, especially regarding fundamental rights, experience shows that mutual trust applies in a similar way to a normative principle which encapsulates the interpretative rules concerning obligations relating to the 'third pillar', fulfilling a role similar to that of loyal cooperation. [47]

46. Mutual recognition, although it originates in the abstract field of cooperation between States, materialises in the most tangible of individual safeguards [48] and extends to the verification of usual standards in the area of rights, where its regular invocation by lawyers increases the likelihood of mutual understanding.

(b) … to recognition of an individual right

47. In spite of the progress which has been made, a tremendous effort is still required to liberate the fundamental freedoms (such as freedom of movement) from the prohibition against prosecuting or penalising a person 'twice for the same acts', the justification for which lies in the degree of integration achieved in a European Union which views the citizen as the holder of rights and the ultimate beneficiary of legislative safeguards. [49]

48. However, I see no obstacle to supplementing (not replacing) the guidelines for cooperation between States, founded on mutual trust, with an approach which

45 — Conceivable as a goal, but by no means the only prerequisite for achieving a common area of justice, freedom and security.

46 — Paragraph 32 of the judgment in *Gözütok and Brügge*, cited above.

47 — De Schutter O.,'La contribution du contrôle jurisdictionnel à la confiance mutuelle', in *La confiance mutuelle dans l'éspace européen/Mutual Trust in the European Criminal Area*, Editions de l'Université de Bruxelles, 2005, p. 103.

48 — I emphasise that the *ne bis in idem* principle contains one of these individual safeguards.

49 — In my opinion in *Gözütok and Brügge* I warn of this lack of sensitivity and stress that Article 54 et seq. of the Convention must be defined from the citizen's point of view (points 114 and 115).

applies the fundamental rights as a reference framework, [50] since the *ne bis in idem* principle is an expression of judicial protection vis-à-vis the *ius puniendi*, derived from the right to a fair trial, [51] and as such it has the status of a constitutional provision in a number of the States that are parties to the Schengen Agreement. [52]

49. The *ne bis in idem* rule acquires true legislative weight with the creation of a subjective right to be prosecuted only once for the same acts, [53] thus being set on solid foundations, which help to offset the weakness [54] of some institutions, like limitation, *res judicata* or the numerous proportionality theories, which cannot be satisfactorily resolved only by recourse to the mutual trust between States. [55]

50. A clearer glimpse of this horizon is given with the independent declaration of the *ne bis in idem* principle in the Charter of the Fundamental Rights of the European Union, [56] Article 50 of which provides that '[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence of which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

51. Among the many facets of fundamental rights, particular relevance attaches to the limits, and even exceptions, which they set with regard to mutual recognition, [57] always

50 — Peers S., EU Justice and Home Affairs Law, 2nd ed., Oxford University Press, 2006, p. 460, sees in the European Union, as a reflection of the high degree of integration, certain measures of cooperation in criminal matters which he believes will contribute to the development of international human rights legislation.

51 — I suggest this line of interpretation in my opinion in *Gözütok and Brügge*.

52 — This rule is also included in international agreements, such as the International Covenant on Civil and Political Rights of 19 December 1966 (Article 14(7)) or Protocol 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4). However, these provisions envisage the principle in its national dimension, ensuring its application within the jurisdiction of a State.

53 — According to Advocate General Sharpston, 'the State has one opportunity to assess and pass judgment on an individual's alleged criminal conduct' (point 92 of her opinion delivered on 15 June 2006 in *Gasparini and Others)*.

54 — Weaknesses which emerge owing to the lack of harmonisation of criminal law, either substantive or procedural.

55 — *Gasparini and Others*, cited above, provides a good example; in that case, the Court of Justice underlined the importance of mutual trust, departing from the opinion of Advocate General Sharpston, for whom, on the contrary, that concept does not provide a sensible basis for applying the *ne bis in idem* principle in relation to criminal proceedings which are discontinued because the prosecution is time-barred (point 108 et seq.).

56 — In the Opinion I delivered on 12 September 2006 in Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, I maintain that 'the Court must... recognise the authority of the Charter of Fundamental Rights as an interpretative tool at the forefront of the protection of the fundamental rights which are part of the heritage of the Member States. That undertaking must be approached with caution and vigour alike, in the full belief that, while the protection of fundamental rights is an essential part of the Community pillar, it is equally indispensable in the context of the third pillar, which, owing to the nature of its subject-matter, is capable of affecting the very heart of individual freedom, the foundation of the other freedoms'. Also, the Treaty of Lisbon of 13 December 2007 amends Article 6 EU, to which it adds this paragraph: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

57 — This is apparent from Article 6 EU and Article 1(3) of Framework Decision 2002/584.

bearing in mind that those rights apply as common principles in the Member States. [58]

B — *The meaning of 'finally disposed of'*

52. The terms in which the Landgericht Regensburg formulates the question show that its doubts are limited to the scope of Article 54 of the Convention, which prohibits a further prosecution for the same acts where, if a penalty has been imposed, it 'can no longer be enforced'.

53. Nevertheless, the facts of the case make it necessary, first, to examine whether the judgment given *in absentia* constitutes a decision 'finally disposing' of a trial for the purposes of the aforementioned provision, by assessing the impossibility of directly enforcing the penalty imposed owing to the procedural requirement for a retrial once the absentee had been found.

58 — Case C-36/02 *Omega* [2004] ECR I-9609, paragraphs 34, 37 and 38.

1. Its interpretation

54. The judgment in *Kretzinger*, cited above, avoids this issue, [59] stating in paragraph 67 that it was 'not necessary to examine... whether a judgment given in absentia, the enforceability of which may be subject to conditions under Article 5(1) of the Framework Decision, must be regarded as a decision by which a person's "trial has been finally disposed of" within the meaning of Article 54 of the CISA'.

55. However, the Court of Justice has supported a broad criterion, which reaffirms the need to respect, within the European Union, decisions putting an end to the trial of the accused in accordance with the law of the State in which the proceedings were initiated.

56. Accordingly, it included in the concept of a case finally disposed of a decision by which the Public Prosecutor discontinued criminal

59 — However, Advocate General Sharpston did not avoid it in her Opinion delivered on 5 December 2006, when she stated that, on the basis of mutual trust, a judgment given *in absentia* accords the protection of Article 54 of the Convention, provided that it complies with the requirements laid down by Article 6 of the European Convention on Human Rights (point 101).

proceedings without the involvement of a court (*Gözütok and Brügge*), and decisions finally acquitting the accused, either for lack of evidence (*Van Straaten*) or because prosecution of the offence was time-barred (*Gasparini*).

57. Moreover, although there are differences between the various language versions of Article 54 of the Convention, [60] the teleological objective of supporting the movement of persons is stated unanimously in the area of freedom, security and justice; this purpose would be undermined if, owing to the particularities of the national procedural systems, a broad interpretation of 'case finally disposed of' were not accepted.

58. The archetype of *res judicata* [61] gives the judgment a legal status which cannot be altered by any challenge, because the judgment is not open to appeal or because an appeal has not been lodged within the prescribed period. [62]

2. The judgment given *in absentia*

59. The different approaches taken by the States with regard to judgments given *in absentia* constitute an obstacle to smooth cooperation in criminal matters, which does not pass unnoticed by recent initiatives, [63] which achieve a certain unity by reinforcing the criteria with common rules designed to reduce those differences.

60. In the present case, a possible subsequent trial would clearly diminish, for the purposes of Article 54 of the Convention, the 'final' nature of the judgment of the Tribunal de Bône.

61. However, that was a fleeting doubt since, as the Prosecutor of the Tribunal aux armées, Paris, maintains, the judgment had the status of *res judicata* in 1981, that is to say, before the proceedings were initiated in Germany, and therefore cannot be challenged [64] in the sphere of Community law.

60 — In another context I refer to those linguistic differences in my Opinion in *Gözütok and Brügge*.

61 — Article 1 of the Initiative (not adopted) 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) attributes the nature of a case finally disposed of to any decision having the status of *res judicata* under national law. For another perspective, see Almagro J. and Tomé J., *Instituciones de Derecho Procesal. Proceso Penal*, Ed. Trivium, Madrid, 1994, p. 347, and Cortés V., *Derecho Procesal, Parte General. Proceso Civil*, 6th ed., Ed. Tirant lo Blanch, Valencia, 1992, tomo I (vol. I), p. 488.

62 — This is the idea transmitted by the versions in French ('définitivement jugé'), English ('finally disposed of'), German ('rechtskräftig abgeurteilt') and Italian ('giudicata con sentenza definitiva', although in other legal systems, such as the Spanish system, this kind of decision is designated by the term 'sentencia firme', as is confirmed by the Spanish version of Article 54 of the Convention, the 'sentencia definitiva' being only the one which decides the case at first instance.

63 — Such as those of the Slovenian, French, Czech, Swedish, Slovak, United Kingdom and German Governments, extended by the Council of the European Union in a working document (5213/08) of 14 January 2008, to facilitate judicial cooperation and the mutual recognition of judicial decisions given *in absentia*.

64 — It must be noted that this is consistent with the information provided with the question referred for a preliminary ruling, because the period within which the convicted man could appeal against the judgment began to run at the moment it was delivered, as did the period on expiry of which the penalty would be time-barred: therefore, once they had both expired, without any possibility of review, the judgment became materially and procedurally irreversible.

62. Nevertheless, it is for the Court of Justice to note that Article 54 of the Convention does not require the judgment to acquire the status of a final judgment when it is delivered, since it is sufficient for that condition to be met when the second proceedings are brought, [65] which, in Mr Bourquain's case, was 2002, when the decision of the military tribunal had already acquired the status of *res judicata* under French law.

63. Furthermore, according to various instruments, [66] the presence of the accused during the trial ensures the proper conduct of his defence and his right to due process [67] and Framework Decision 2002/584 [68] even provides that the issuing State, when it wishes to enforce a penalty imposed *in absentia,* may be required to give a clear assurance that the convicted person may ask for a retrial during which his fundamental rights will be observed.

64. To transform this safeguard for the accused into a condition which invalidates the application of other rights would lead to an absurd situation; this would occur if application of the *ne bis in idem* principle were limited to decisions precluding any review of the case to his advantage.

65 — My Opinion in *van Esbroeck* may shed some light, since I analyse the temporal application of Article 54 of the Convention.

66 — Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and Articles 47 and 48 of the Charter of Human Rights of the European Union.

67 — In order to know the charges against him, to be heard by an impartial judge, to have the assistance of a lawyer and to participate in the taking of evidence.

68 — Article 5(1).

65. For the reasons stated, the judgment given *in absentia* should be regarded as 'final' for the purposes of the application of Article 54 of the Convention.

C — *The condition of 'non-enforcement of the penalty'*

66. In these preliminary reference proceedings, it is generally agreed that, when the action was initiated in Germany, the penalty was not enforceable in France, since, apart from the fact that it was time-barred, France had abolished capital punishment and, even earlier, had passed an Amnesty Law in respect of events in Algeria.

67. However, the question posed by the Landgericht Regensburg seeks to ascertain whether the obstacle to enforcement of the penalty has to be subsequent to its imposition, an argument supported by the Hungarian Government, which points out that Article 54 of the Convention allows obstacles to arise later but does not envisage a situation in which a punishment is unenforceable from the onset, as in this case, in which the requirement for a retrial, which was necessary if the penalty was to become a reality, was impossible to fulfil because Mr Bourquain failed to appear.

68. The Hungarian Government relies on the actual wording of Article 54 that the penalty 'can no longer be enforced', in order to infer, *a sensu contrario*, that at some moment in the past it could have been enforced.

69. This argument is not persuasive, because the literal meaning of the words is not always an appropriate point of reference, as the Court of Justice has warned on occasion; [69] moreover, in my view, the brevity of the formulation indicates only that the enforceability of the penalty becomes an issue when it is sought to bring new proceedings, and not before, which means that the rule still has practical effect.

70. However, Article 54 covers national criminal provisions which, on account of their nature as *ultima ratio*, preclude any broad interpretation [70] contrary to the principle of legality, [71] applicable in the common traditions [72] of the States and given positive expression [73] in Community law.

71. Without prejudice to the above, it is interesting to note the Netherlands Government's observation regarding the difficulty of imagining that a judgment finally disposing of a case should impose non-enforceable penalties. [74]

72. Special care must be taken to assess the exact scope of the provision, which refers to the enforceability of the penalty, not of the judgment.

73. That warning having been given, a distinction must be made between judgments which are final and immediately enforceable and those which are not, [75] since, although French legislation does not permit the execution of the penalty without a retrial, it does not diminish the value of the judgment as a legal

69 — The judgment in Case 173/88 *Henriksen* [1989] ECR 2763 rejected this method of interpretation, pointing out that 'the scope of the contested phrase cannot be determined exclusively on the basis of an interpretation of its terms' (paragraph 11).

70 — Berdugo I., Arroyo L., García N., Ferré J., and Ramón J., in *Lecciones de Derecho penal. Parte general*, Ed. Praxis, Barcelona, 1996, p. 37, state that a perspective from the principle of legality requires that 'only the law — the monopoly of Parliament — may define criminal acts and apply penalties, to the exclusion of other lower-ranked legal provisions and custom; that legal rules should be clear, certain and specific; that a broad interpretation and analogy *in malam partem* should be prohibited; that criminal provisions unfavourable to the prisoner should not be retroactive...'. Along the same lines, Vogel J., 'Principio de legalidad, territorialidad y competencia judicial', in *Eurodelitos. El derecho penal económico de la Unión Europea*, Tiedemann K. and Nieto A., Ed. de la Universidad de Castilla-La Mancha, Cuenca, 2004, p. 32, emphasises that the prohibition against interpretation by analogy and the requirement for restrictive interpretation are recognised in all the Member States without exception as a corollary of the principle of legality.

71 — The principle of legality as a general principle of Community law is stated inter alia in *Advocaten voor de Wereld*, cited above, paragraphs 46 and 49.

72 — Paragraph 67 of the judgment in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, which cites the judgments in Case C-112/00 *Schmidberger* [2003] ECR I-5659, and Joined Cases C-20/00 and C-64/00 *Broker Aquaculture and Hydro Seafood* [2003] ECR I-7411.

73 — Principle enshrined in Article 49 of the Charter of Fundamental Rights of the European Union.

74 — 'The Netherlands Government cannot moreover conceive of a situation in which a final judgment imposes a penalty, about which it can later be stated that it could never be enforced' (paragraph 40 of its observations).

75 — This dual perspective is illustrated by the categories of Spanish administrative law of 'autotutela declarative', and 'autotutela ejecutiva', because although the former means that the acts of the public authorities enjoy a presumption of legality, which affects the parties concerned unless they rebut it by bringing the appropriate appeal, the latter leads into the realm of facts and to enforcement when the addressees resist implementation of a decision (García de Enterría E. and Fernández T. R., *Curso de Derecho administrativo I*, 6th ed., Ed. Civitas, Madrid, 1996, pp. 490 and 491).

document extending *ipso iure* over the person and property of the accused, as is demonstrated by the resolution of the issue of Mr Bourquain's liability, in the event of his being found, in a new trial concerning the earlier judgment, and by the seizure of his assets.

74. In parallel, the penalty would become enforceable following the removal of the procedural obstacle which rendered it of no practical effect, but did not otherwise affect its intrinsic validity, [76] which is to be distinguished from its mere effectiveness.

75. For the reasons I have stated, I propose that the Court of Justice interpret Article 54 of the Convention as meaning that its protection also extends to a penalty imposed in a final judgment which, owing to the procedural idiosyncrasy of the national law, could never have been executed.

D — *Amnesty, the* ne bis in idem *principle and the differences between them*

76. It is not legal escapism to omit to address the manner in which the abolition of the death sentence and the time-bar on the penalty prevent execution of the judgment of the Tribunal of Bône: the fact that it is obvious, on the one hand, and respect for the sole jurisdiction of the national court, on the other, would render any reasoning superfluous and inappropriate.

77. However, caution dictates that I reflect, albeit briefly, on the implications of amnesty, in view of the various guises taken by this exceptional mechanism of mercy in the different legal systems.

78. Additional Protocol II to the Geneva Convention [77] likens amnesty to a feeling of pacification and reconciliation, following periods of upheaval involving violent clashes within a community.

79. It is necessary to appease hostile feelings, of very specific origin, generated in events of a collective nature, which have politically and socially divided the population.

76 — Apart from the fact that this is the death penalty, which is fundamentally incompatible with the freedoms and rights whose unshakeable protection the European Union aspires to achieve.

77 — Specifically, Article 6(5), which states: 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict... '.

80. 'Amnesty' is the term used to designate, loosely, [78] any measures to remit or cancel penalties, including a pardon, [79] as opposed to other concepts which restrict amnesty to general parliamentary decisions, adopted in accordance with the national procedures for enacting legislation.

81. The differences which occur within Europe in relation to these measures of clemency, seen from such diverse perspectives as their typology or purpose, as well as the category of offence which they may redeem, [80] do not impair their capacity to extinguish the *ius puniendi* in all the States nor do they alter the undeniable fact that, by implementing such measures, non-judicial authorities abrogate the effects of a sentence in a criminal case. [81]

82. This collection of measures for granting clemency, which is inconsistent in the disparity of the ideas it brings together but consistent in respect of the objectives it serves, shows real signs of political intent, supported by principles of expediency whose roots lie in the sovereignty of States, as an expression of the management of their own conflicts.

83. Mutual trust should not shelter, under the Community *ne bis idem* principle, instances of non-enforcement of a penalty brought about by the exercise of these exorbitant national powers, since mutual recognition then ceases to operate in the sphere of the judicial application of the law and follows a different course, driven by winds with a strong sociological and political component.

84. It is not by chance that the Framework Decision on the European arrest warrant gives amnesty as a ground for mandatory non-execution, where that State had jurisdiction to prosecute the offence under its own criminal law (Article 3(1)).

85. From the perspective of human rights, amnesty likewise cannot be used to justify non-enforcement of the penalty by application of the *ne bis in idem* principle, since, apart from the fact that it may become an instrument endangering the implementation of those rights, [82] two different dimensions are again observed: its basic inspiration does not flow from the values enshrined in the fundamental rights and, at the same time, it acts according to parameters which are so broad and random that they transcend the traditional ones of judicial rationality, limiting the opportunity for judicial review. [83]

78 — Bernardi A. and Grande C., 'Amnistía. La prescripción del delito y de la sanción', in *La orden de detención y entrega europea*, Arroyo L. and Nieto A., Ed. de la Universidad de Castilla-La Mancha, Cuenca, 2006, pp. 260, 261 and 275.

79 — The specific feature of a pardon is that it is granted to individuals, as opposed to other measures of mercy which are directed towards groups of people.

80 — Bernardi A. and Grande C., op cit, p. 262.

81 — Pradel, *Droit Pénal général*, Paris, 2002, p. 669.

82 — The Inter-American Court of Human Rights expressed criticism of certain forms of pardon, in its judgment of 14 March 2001 in *Barrios Altos* v *Peru* (Series C, No 45).

83 — As an independent category of 'discretionary power', the act of 'grace', by virtue of its very definition, escapes possible judicial review.

VI — Conclusion

86. In the light of the foregoing considerations, I propose that the Court of Justice give the following reply to the question referred for a preliminary ruling:

Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement must be interpreted as meaning that a person whose trial has been finally disposed of in one State cannot be prosecuted in another for the same acts, where, under the law of the State in which he was convicted, the penalty imposed on him could never be enforced.