OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 12 September 2006 [1]

I — Introduction

1. 'The knowledge already acquired ... concerning the surest rules to be observed in criminal judgments, is more interesting to mankind than any other thing in the world.' [2]

2. The Belgian Arbitragehof or Cour d'arbitrage (Constitutional Court) has asked the Court, pursuant to Article 35 EU, [3] to rule on the validity of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ('the Framework Decision'). [4]

3. The Belgian court asks whether the Framework Decision is compatible with the Treaty on European Union in a procedural and a substantive context. With regard to the procedural context, which has its roots in Article 34(2)(b) EU, the Belgian court questions the legal basis relied on by the Council and asks whether the instrument chosen is suitable.

4. That question will require the Court to examine the system of sources of law in the third pillar of the Union, by analysing the nature of framework decisions, which are equivalent to the directives of the Community pillar. The judgment in *Pupino* [5] is a suitable starting point for that analysis.

5. As regards the second, substantive, context, the Belgian court casts doubt on what is perhaps the most important of the innovations entailed in this method of assistance between Member States for the arrest and surrender of individuals, that is, the fact that, in certain circumstances, it is prohibited to make execution of a European arrest warrant subject to the condition that the acts on which it is based must also constitute an

1 — Original language: Spanish.

2 — Montesquieu, 'L'esprit des lois', Book 12, Chapter II, Gallimard, La Pléiade, Œuvres complètes, Paris, 1951, Volume II, p. 432.

3 — Belgium has accepted the jurisdiction of the Court of Justice to give preliminary rulings pursuant to that provision and has conferred on all courts and tribunals the power to submit questions to the Court (OJ 1999 C 120, p. 24).

4 — OJ 2002 L 190, p. 1.

5 — Case C-105/03 [2005] ECR I-5285.

offence in the State of execution. The Arbitragehof asks whether that innovation is compatible with the principle of equality and with the principle of legality in criminal proceedings and, accordingly, whether it complies with Article 6(2) EU.

6. In order to answer that question, it will be necessary to conduct a full examination of the role of fundamental rights in the sensitive sector of police and judicial cooperation in criminal matters, following the proclamation of the Charter of Fundamental Rights of the European Union. [6]

7. That is not a straightforward task because, in a number of Member States, transposition of the Framework Decision has been ruled out on the grounds that it infringes individual rights. In Poland, the Trybunał Konstytucyjny (Constitutional Court), which has jurisdiction to scrutinise laws in the light of the Constitution, held in a judgment of 27 April 2005 [7] that Article 607t(1) of the Code on criminal procedure was incompatible with Article 55(1) of the Constitution, [8] in that it authorised the surrender of a Polish national to the authorities of another Member State in response to a European arrest warrant. Barely three months later, on similar grounds, [9] the German Bundesverfassungsgericht (Federal Constitutional Court) delivered a similar judgment [10] with regard to the law implementing the Framework Decision. [11] The Supreme Court of Cyprus has adopted the same approach, [12] on the basis that Article 11 of the Cypriot Constitution does not provide for arrest with a view to the execution of a European arrest warrant. By contrast, the Czech Ústavní soud (Constitutional Court), in a judgment of 3 May 2006, [13] dismissed an action for unconstitutionality brought by a group of senators and members of parliament contesting the law transposing the Framework Decision, which, they claimed, infringed the Constitution on the ground that it authorised the surrender

6 — OJ 2000 C 364, p. 1.

7 — P 1/05. On that judgment, see Komárek, J., 'Pluralismo constitucional europeo tras la ampliación — Un análisis de la jurisprudencia comunitaria del Tribunal Constitucional polaco —', *Revista Española de Derecho Europeo*, No 16, 2005, pp. 627 to 657.

8 — That provision states: 'Polish citizens shall not be extradited'.

9 — Article 16(2) of the Grundgesetz für die Bundesrepublik (Bonn Fundamental Law) provided that a German national could not be surrendered to another State. That provision was amended on 29 December 2000 to restrict the right in certain cases stipulated by the law

10 — Judgment of 18 July 2005 (2 BvR 2236/04), which held that there had been a breach of the essential subject-matter of the fundamental right laid down in Article 16(2) of the Bonn Fundamental Law.

11 — Europäisches Haftbefehlgesetz — EuHbG. The Polish Constitutional Court, relying on Article 190 of the Constitution, deferred the effects of the declaration of unconstitutionality for 18 months because 'the European arrest warrant is crucially important to the operation of the administration of justice, especially — in so far as it is a method of cooperation between the Member States to promote the fight against crime — for the purpose of improving security'. However, the judgment of the German Federal Constitutional Court took immediate effect. Therefore, the Criminal Chamber of the Audiencia Nacional (National High Court), which is the Spanish judicial authority with jurisdiction in the field (Article 6(3) of the Framework Decision in conjunction with Ley Orgánica (Basic Law) 2/2003 of 14 March supplementing the Law on the European arrest warrant and surrender, *Boletín Oficial del Estado* ('BOE') No 65, 17 March 2003, p. 10244), set aside surrender proceedings commenced in response to warrants issued by Germany and converted them into extradition proceedings (order of 20 September 2005). A similar reaction may be seen in the judgment of the Arios Pagos (Greek Supreme Court of Cassation) of 20 December 2005 (Case 2483/2005).

12 — Judgment of 7 November 2005 (Case 294/2005).

13 — Case 66/04.

of Czech nationals and abolished the protection inherent in the double criminality rule.

8. There is, therefore, a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law. The Court of Justice must participate in that debate by embracing the prominent role assigned to it, with a view to situating the interpretation of the values and principles which form the foundation of the Community legal system within parameters comparable to the ones which prevail in national systems. [14]

II — The legal framework

A — *The Treaty on European Union*

9. The Union, which embodies a new stage in the process of integration and seeks to create closer ties between the peoples of Europe, is founded on the European Communities, supplemented by the policies and forms of cooperation established by the Treaty on European Union (Article 1 EU). The Union is founded on values common to Europeans, such as liberty, democracy, the rule of law, and respect for human rights and fundamental freedoms (Article 6(1) EU).

10. In particular, in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('the Rome Convention'), as they result from the constitutional traditions common to the Member States, those rights are enshrined as general principles of Community law, the protection of which, within the scope of the Treaties establishing the European Communities and the EU Treaty, is the responsibility of the Court of Justice (Article 6(2) EU in conjunction with Article 46(d) EU).

11. The objectives of the Union include the maintenance and development of the Union as an area of freedom, security and justice, in which the free movement of persons is assured by the adoption of measures for the prevention and combating of crime (Article 2(1) EU, fourth indent), as part of the so-called third pillar which concerns police and judicial cooperation in criminal matters (Title VI EU).

12. The third pillar is intended to provide citizens with a high degree of security by drawing up policies for the prevention and combating of crime, by means of increased cooperation between the judicial authorities, and for the approximation, where appropriate, of national criminal provisions (Articles 31 EU and 32 EU).

14 — Alonso García, R., *Justicia constitucional y Unión Europea*, Thomson-Civitas, Madrid, 2005, p. 41, echoes that need.

13. Action in the judicial sector includes, for example, (a) increasing mutual assistance in the processing of cases and in the enforcement of decisions, (b) facilitating extradition, (c) ensuring compatibility in rules applicable in the Member States, (d) preventing conflicts of jurisdiction, and (e) progressively establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking (Article 31(1) EU).

14. To that end, the Council may adopt by unanimous decision (Article 34(2) EU, subparagraphs (a) to (c)):

(1) common positions defining the approach of the Union to a particular matter;

(2) framework decisions for the purpose of approximation of the laws and regulations of the Member States. Like the directives of the first pillar, framework decisions are binding as to the result to be achieved but leave to the national authorities the choice of form and method, although, by contrast, they do not have direct effect;

(3) binding decisions for any other purpose consistent with the objectives of the third pillar, which are not aimed at harmonisation and which do not have direct effect.

15. In addition, the Council may conclude conventions which it shall recommend to the Member States for adoption and which will enter into force when they have been ratified by half the Member States (Article 34(2)(d) EU).

B — *Framework Decision 2002/584*

16. Pursuant to Articles 31(1)(a) and (b) EU and 34(2)(b) EU, the Framework Decision addresses the desire to abolish the formal extradition procedure in the Union [15] and to replace it with a simplified system of judicial surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences (recitals 1 and 5). In accordance with that plan, the Framework Decision replaces, in relations between the Member States, prior and subsequent inter-

15 — That recommendation was made by the European Council held in Tampere on 15 and 16 October 1999 (point 35 of the Presidency Conclusions).

national conventions (Article 31(1)),[16] which, however, continue to apply when they extend beyond the objectives of the Framework Decision or help to simplify or facilitate the execution of a European arrest warrant (Article 31(2)).

17. Accordingly, the system of cooperation between Member States has been abolished and a system of free movement of judicial decisions has been established, which is based on mutual confidence and recognition (recitals 5, 6 and 10, and Article 1(2)).

18. The Council of the European Union adopted the Framework Decision in accordance with the principles of subsidiarity and proportionality, and with a desire to respect fundamental rights and comply with Article 6 EU (recitals 7 and 12, and Article 1(3)). In that connection, the surrender of an individual must be refused[17] when there are reasons to believe, on the basis of objective elements, that the arrest warrant has been issued for the purpose of prosecuting, punishing or prejudicing the position of a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or where there is a serious risk that that person would be subjected to the death penalty, torture or other inhuman or degrading treatment. Furthermore, the Framework Decision encourages Member States to have regard to their constitutional rules relating to due process[18] and to freedom of association, freedom of the press and freedom of expression (recitals 12 and 13). There is also an undertaking to protect the personal data processed in the context of the implementation of the Framework Decision (recital 14).

16 — Those conventions are as follows: (a) the European Convention on Extradition of 13 December 1957, its additional protocols of 15 October 1975 and 17 March 1978, and the European Convention on the Suppression of Terrorism of 27 January 1977; (b) Title III, Chapter 4, of the Convention of 19 June 1990 implementing the Schengen Agreement on the gradual abolition of checks at common borders (OJ 2000 L 239, p. 19); (c) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989; (d) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union; and (e) the Convention of 27 September 1996 relating to extradition between the Member States of the European Union. The last two were concluded pursuant to Article K.3(2)(c) of the Treaty on European Union, the immediate precursor of Article 34(2)(d) EU.

17 — The Spanish version states: 'Nada de lo dispuesto en la presente Decisión marco podrá interpretarse en el sentido de que impide la entrega de una persona contra la que se ha dictado una orden de detención europea cuando existan razones objetivas ...' [which translates as 'Nothing in this Framework Decision may be interpreted as prohibiting the surrender of a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements ...']. However, the desire of the Community legislature was exactly the opposite, as is clear, inter alia, from the French ('Rien dans la présente décision-cadre ne peut être interprété comme une interdiction de refuser la remise d'une personne qui fait l'objet d'un mandat d'arrêt européen s'il y a des raisons de croire, sur la base d'éléments objectifs ...'), English ('Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements ...'), German ('Keine Bestimmung des vorliegenden Rahmenbeschlusses darf in dem Sinne ausgelegt werden, dass sie es untersagt, die Übergabe einer Person, gegen die ein Europäischer Haftbefehl besteht, abzulehnen, wenn objektive Anhaltspunkte dafür vorliegen ...') and Dutch ('Niets in dit kaderbesluit staat eraan in de weg dat de overlevering kan worden geweigerd van een persoon tegen wie een Europees aanhoudingsbevel is uitgevaardigd, indien er objectieve redenen bestaan om aan te nemen ...') versions.

18 — Point 24 of this Opinion.

19. The European arrest warrant is a decision from a court in a Member State, addressed to the authorities of another Member State, seeking the arrest and surrender of an individual for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order (Article 1(1)).

20. The warrant is strictly judicial in nature. It is a mechanism for judicial cooperation (Article 1 and Articles 3 to 6), without prejudice to any practical or administrative assistance which the central authority may be required to provide (recital 9 and Article 7).

21. The European arrest warrant is issued for the prosecution of offences punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months, or for the execution of custodial sentences or detention orders for a period of at least four months (Article 2(1)). The Member State to which the arrest warrant is addressed may make surrender subject to the condition that the acts must also constitute an offence under its own legal system (Article 2(4)).

22. Under Article 2(2), that rule, which is known as the double criminality rule, does not apply in respect of 32 categories of offence, provided that the issuing Member State punishes those offences by a prison sentence of a maximum of at least three years. The list includes the following offences:

— participation in a criminal organisation,

— terrorism,

— trafficking in human beings,

— sexual exploitation of children and child pornography,

— illicit trafficking in narcotic drugs and psychotropic substances,

— illicit trafficking in weapons, munitions and explosives,

— corruption,

— fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995,

— laundering of the proceeds of crime,

— counterfeiting currency, including of the euro,

— computer-related crime,

— environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties,

— facilitation of unauthorised entry and residence,

— murder, grievous bodily injury,

— illicit trade in human organs and tissue,

— kidnapping, illegal restraint and hostage-taking,

— racism and xenophobia,

— organised or armed robbery,

— illicit trafficking in cultural goods, including antiques and works of art,

— swindling,

— racketeering and extortion,

— counterfeiting and piracy of products,

— forgery of administrative documents and trafficking therein,

— forgery of means of payment,

— illicit trafficking in hormonal substances and other growth promoters,

— illicit trafficking in nuclear or radioactive materials,

— trafficking in stolen vehicles,

— rape,

— arson,

— crimes within the jurisdiction of the International Criminal Court,

— unlawful seizure of aircraft/ships,

— sabotage.

23. Article 3 sets out three grounds for mandatory non-execution of the European arrest warrant, while Article 4 lays down seven grounds for optional non-execution. The latter category covers cases where the convicted person is a national or resident of the State to which the warrant is addressed and that State undertakes to ensure that the sentence or detention order is executed in accordance with its domestic law (Article 4(6)). Similarly, Article 5(3) provides that, in the same circumstances, for the purposes of prosecution, surrender may be subject to the condition that the person, after being heard, is returned to his own Member State in order to serve there the punishment imposed on him.

24. In the proceedings, which are dealt with as a matter of urgency and within preclusive time-limits (Articles 17 and 23), the requested person is entitled to a hearing (Articles 14 and 19), to be assisted by a lawyer and an interpreter (Article 11(2)), to the rights available to arrested persons and, where appropriate, to provisional release in accordance with the law of the executing Member State (Article 12).

25. The order must contain the information necessary for its execution, in particular the details of the identity of the person sought and the nature and classification of the offence (Article 8(1)). Any difficulties which may arise during the procedure must be dealt with by direct contact between the courts

involved, and, where appropriate, with the involvement of the supporting administrative authorities (Article 10(5)).

26. The period for complying with the Framework Decision expired on 31 December 2003 (Article 34(1)).

III — The main proceedings and the questions referred for a preliminary ruling

27. Advocaten voor de Wereld, a non-profit-making association, brought an action in the Arbitragehof contesting the Wet betreffende het Europees aanhoudingsbevel (Law on the European arrest warrant) of 19 December 2003, [19] which transposes the Framework Decision into national law, on the ground that the said Law infringes Articles 10 and 11, in conjunction with Articles 36, 167(2), and 168, of the Grondwet (Belgian Constitution). The applicant claims that the European arrest warrant ought to have been established by an international convention and that Article 5(5) of the Law, which transposes Article 2(2) of the Framework Decision into national law, infringes the principle of equality and the requirement of legal certainty in the sphere of criminal proceedings.

19 — *Moniteur belge*, 22 December 2003, Second edition, p. 60075.

28. In view of the nature of the dispute, prior to giving judgment, the Belgian Constitutional Court decided [20] to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Framework Decision 2002/584 ... compatible with Article 34(2)(b) EU, under which framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States?

(2) Is Article 2(2) of Framework Decision 2002/584 ..., in so far as it sets aside verification of the requirement of double criminality for the offences listed therein, compatible with Article 6(2) EU and, more specifically, with the principle of legality in criminal proceedings guaranteed by that provision and with the principle of equality and non-discrimination?'

20 — I hope that other constitutional courts, which are reluctant to accept their responsibilities as Community courts, will follow the example and enter into a dialogue with the Court of Justice which is essential for the purpose of building a united Europe. In 'Reflexiones sobre el Tribunal Constitucional español como juez comunitario', a contribution to the round table entitled 'Los tribunales constitucionales ante el derecho comunitario' during the conference entitled 'La articulación entre el derecho comunitario y los derechos nacionales: algunas zonas de fricción', which was organised by the General Council of the Spanish Judiciary and held in Murcia in November 2005, I criticised the reservations of the Spanish Constitutional Court, which remains on the fringes of Community discussions.

IV — The procedure before the Court of Justice

29. The order for reference from the Arbitragehof was received at the Court Registry on 2 August 2005. Written observations were submitted by Advocaten voor de Wereld, the Commission, the Council of the European Union, and the Belgian, Czech, Spanish, Finnish, French, United Kingdom, Latvian, Lithuanian, Netherlands and Polish Governments. At the hearing held on 11 July 2006, oral argument was presented by the representatives of Advocaten voor de Wereld, the representatives of the Belgian, Czech, Spanish, French, Netherlands and United Kingdom Governments, and the representatives of the Council of the European Union and the Commission of the European Communities.

V — Analysis of the questions referred for a preliminary ruling

A — *The legal basis (first question)*

30. It is common ground that the Framework Decision concerns matters which fall within the scope of the third pillar of the European Union and, accordingly, that the Council has jurisdiction to adopt provisions in that connection. [21] The dispute is focused on the type of instrument adopted, since, in the main proceedings, the suitability of a framework decision is contested on two grounds. The first is that the Framework Decision does not seek to approximate pre-existing national laws, because the European arrest warrant is a newly created concept. The second ground is that prior international agreements on extradition cannot be repealed by a framework decision.

31. Having summarised the dispute in those terms, it is appropriate first of all to consider the essence of the European arrest warrant with a view to ascertaining its nature and concluding whether it is possible to apply to it the harmonising provisions of a framework decision. Should the reply to that question be in the affirmative, it will then be necessary to ascertain whether, in accordance with the principle of *contrarius actus*, the adoption of a framework decision was precluded because the field concerned had previously been governed by international agreements.

21 — The European arrest warrant addresses a concern which is reflected in Article 2(1) EU, fourth indent, Article 29 EU, second paragraph, second indent, and Article 31(1)(a) and (b) EU. The essential feature of the system is that the courts of a Member State confer validity on warrants issued by the courts of other Member States, thereby helping to consolidate and implement judicial cooperation (Article 31(1)(a) EU). If the arrest warrant is regarded as a form of extradition (an opinion which I do not share as I will explain below), it comes under the power referred to in Article 31(1)(b) EU. In any event, the list in Article 31 EU is not exhaustive (it uses the expression 'shall include') and, therefore, a procedure which facilitates the arrest and surrender of individuals so that they may be prosecuted or serve a sentence improves the level of safety of citizens of the Union, which is fully compatible with Article 29 EU.

32. However, before considering those matters, I must propose a resolution of the claim put forward by the Czech Government that the first question is inadmissible.

1. Admissibility

33. The Czech Government contends that the examination of the question whether a framework decision is a suitable instrument to govern the European arrest warrant requires the Court to analyse a provision of primary law (Article 34(2)(b) EU) which is outside its control and, accordingly, the Court lacks jurisdiction to give a ruling. That approach is wholly erroneous specifically because one of the central responsibilities of this institution is to interpret the Treaties and to safeguard them vis-à-vis secondary law, tasks which are essentially constitutional in nature. [22]

34. All the powers of the Union are connected and are subject to the provisions enacted by the Community legislature, but the Court of Justice is also charged with preserving the integrity and ensuring the effectiveness of those powers by safeguarding them from any irregularities on the part of the other Community institutions. The Arbitragehof does not ask the Court for anything out of the ordinary, and instead merely requests that the Court exercise its powers in order to establish whether an act of the Union legislature is compatible with a provision of the Treaty, [23] an assessment which, at the outset, and by way of necessity, requires the Court to interpret and define the scope of the contested provision.

35. However, the Czech Republic is adamant that the first question is inadmissible and asserts that the order for reference does not state clearly the reasons why the Framework Decision is invalid. The Czech Government maintains that, with regard to its application for a declaration that the Belgian implementing law is unconstitutional on the grounds that the Framework Decision is not a suitable instrument for approximating national laws, the applicant association should have based its claim on relevant arguments which the referring court should have set out in the order for reference.

36. The information provided by national courts must make it possible for interested parties in proceedings for a preliminary ruling to submit observations which supply the Court with facts which will enable it to

22 — Rodríguez-Iglesias, G.C., has drawn attention to the role of the Court of Justice as a constitutional court in 'El poder judicial en la Unión Europea', *La Unión Europea tras la Reforma*, Universidad de Cantabria, 1998, p. 22 et seq. I myself have reiterated that view (Ruiz-Jarabo, D., 'La vinculación a la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas (I)', *Estudios de Derecho Judicial*, No 34, Consejo General del Poder Judicial, 2001, pp. 287 to 291).

23 — Referring a question on validity provides an indirect means of reviewing the constitutionality of secondary law at the time of its application.

give a useful reply. [24] That requirement is satisfied in this case because it is clear that the dispute centres on the question whether a framework decision is capable of establishing the European arrest warrant through the approximation of national laws. That is the view taken by the other 12 parties who have submitted observations in these proceedings and the Czech Government, while complaining about a lack of clarity on the part of the Arbitragehof, has still found itself able to take part in the discussion. [25]

37. Now that I have cleared the way for a discussion of the substantive issue, I will analyse this new instrument governing cooperation between the Member States in criminal matters.

2. The European arrest warrant and extradition

38. It has been argued that the European arrest warrant procedure is a subspecies of extradition. Academic writers have described the Framework Decision as an attempt to facilitate extradition between the Member States, [26] and as a modern version of extradition [27] which is sui generis and has [28] a different name. [29] The Community legislature has contributed to the confusion by relying on Article 31(1)(b) EU. Certain high-ranking national courts have also contributed to the uncertainty; for example, the Trybunał Konstytucyjny described the surrender of an individual in compliance with a European arrest warrant as a form of extradition, [30] although it did so with a view to making the warrant subject to the same determining factors from the point of view of the protection of the fundamental rights enshrined in the Polish Constitution. The Bundesverfassungsgericht acted similarly by tacitly equating the two concepts with one another. [31]

39. However, attention has also been drawn to the differences by legisla-

24 — Order of the Court in Case C-9/98 *Agostini* [1998] ECR I-4261, paragraph 5, and order of the Court in Case C-422/98 *Colonia Versicherung and Others* [1999] ECR I-1279, paragraph 5.

25 — The Court does not have jurisdiction to resolve the question as to how the unsuitability of the Framework Decision leads to the unconstitutionality of the implementing law. However, I would venture to suggest that to uphold the suitability of an international treaty would infringe Article 36, in conjunction with Articles 167 and 168, of the Grondwet.

26 — Tomuschat, C., 'Ungereimtes — Zum Urteil des Bundesverfassungsgerichts vom 18. Juli 2005 über den Europäischen Haftbefehl', *Europäische Zeitschrift für Grundrechte*, 2005, p. 456.

27 — Flore, D., 'L'accueil de la décision-cadre relative au mandat d'arrêt européen en Belgique', *Le mandat d'arrêt européen*, Bruylant, Brussels, 2005, p. 137. Conway, G., 'Judicial interpretation and the third pillar', *European Journal of Crime, Criminal Law and Criminal Justice*, 2005, p. 255, regards them as equivalent concepts.

28 — Keijzer, N., 'The double criminality requirement', *Handbook on the European Arrest Warrant*, Tob Blekxtoon, Wouter van Ballegooij (editors), The Hague, 2005, p. 139.

29 — Plachta, M., 'European arrest warrant: Revolution in extradition', *Journal of Crime, Criminal Law and Criminal Justice*, 2003, p. 193.

30 — Legal ground 3 of the judgment cited in point 7.

31 — Judgment referred to in footnote 10.

tures,[32] academic writers[33] and national courts.[34]

40. However, the views held are not so different in as much as they depend on the perspective chosen. If the focus is the result there are numerous similarities, but the differences appear more stark if regard is had to the reasons for the method of cooperation concerned and the manner in which it is carried out.

41. The move from extradition to the European arrest warrant constitutes a complete change of direction. It is clear that both concepts serve the same purpose of surrendering an individual who has been accused or convicted of an offence to the authorities of another State so that he may be prosecuted or serve his sentence there. However, that is where the similarities end.

42. In the case of extradition, contact is initiated between two sovereign States, the requester and the requested, each of which acts from an independent position. One State asks for the cooperation of the other State which decides whether to provide that cooperation on a case-by-case basis, having regard to grounds which exceed the purely legal sphere and enter into the scope of international relations, where the principle of opportuneness plays an important role. Accordingly, the intervention of politicians and criteria such as reciprocity and double criminality are justified because they have their origins in different spheres.

43. The nature of the situation changes when assistance is requested and provided in the context of a supranational, harmonised legal system where, by partially renouncing their sovereignty, States devolve power to independent authorities with law-making powers. That approximation, which falls within the scope of the first pillar of the Union,[35] also operates in the third, intergovernmental, pillar — albeit with a clear

32 — The preamble to Spanish Law 3/2003 of 14 March 2003 on the European arrest warrant and surrender procedures (BOE No 65, 17 March 2003, p. 10244) states that the Law introduces 'amendments to the traditional extradition procedure which are so substantial that it may be stated without reservations that that procedure has disappeared from the scope of judicial cooperation relations between the Member States of the European Union' (final paragraph).

33 — Plachta, M., at p. 191 of the work cited in footnote 29, draws attention to the differences. Lagodny, O., '"Extradition" without a granting procedure: the concept of "surrender"', *Handbook on the European Arrest Warrant*, Tob Blekxtoon, Wouter van Ballegooij (editors), The Hague, 2005, pp. 41 and 42, notes the judicial nature of the European arrest warrant. Jégouzo, I., 'Le mandat d'arrêt européen ou la première concrétisation de l'espace judiciaire européen', *Gazette du Palais — Recueil*, July-August 2004, p. 2311, maintains that the Framework Decision is innovative in that it replaces political powers with a strictly procedural mechanism.

34 — The Bundesverfassungsgericht, in the judgment referred to above, unwittingly points out the differences when it states that the Framework Decision has transformed a political decision, exempt from legal controls, into a judicial decision (ground 88, *in fine*).

35 — Since the judgments in Case 26/62 *Van Gend & Loos* [1963] ECR 1 and Case 6/64 *Costa* v *ENEL* [1964] ECR 585, it is generally accepted that Community law constitutes a special legal system which, with regard to the specific fields which comprise its body of law, takes precedence over the legal systems of the Member States.

Community objective, as was demonstrated in *Pupino* — [36] by transferring to framework decisions certain aspects of the first pillar and a number of the parameters specific to directives. [37]

44. The relationship is not established between hermetically sealed spaces where a case-by-case assessment is required to determine that the assistance does not undermine the foundations of social organisation. On the contrary, the aim is to provide assistance to someone with whom one shares principles, values and objectives, [38] through the creation of an institutional framework with its own special sources of law which vary in force but which ultimately are all binding and which seek to prevent and combat crime in a single area of freedom, security and justice, by facilitating cooperation between States and harmonising their criminal laws.

45. In that context, inspired by mutual trust, cooperation is based not on the coming together of separate interests but rather on a common provision — the Framework Decision — which sets out the types of offence in respect of which assistance may be requested. Thus, arguments to the effect that there must be an individual assessment in the interests of reciprocity, [39] or that the double criminality rule is an absolute principle, are outmoded, since the participants in the procedure both regard the conduct which gives rise to the request as criminal and the request would also be dealt with if it was made from the executing State to the issuing State instead. In that situation, any assessment of opportuneness is irrelevant and the power of review is limited strictly to the courts. In other words, the political authorities must allow the judicial authorities to take the lead and an individual assessment of each case must give way to a more general type of assessment because the Framework Decision assumes that national courts have the jurisdiction to prosecute the offences it lists. In short, the situation is no longer one where sovereign States cooperate in individual cases; instead, it is one where Member

36 — Paragraph 36 of the judgment in *Pupino* states that irrespective of the degree of integration envisaged by the Treaty of Amsterdam in the process of creating an ever closer union among the peoples of Europe within the meaning of the second paragraph of Article 1 EU, it is perfectly comprehensible that the authors of the Treaty on European Union should have considered it useful to make provision, in the context of Title VI of that treaty, for recourse to legal instruments with effects similar to those provided for by the EC Treaty, in order to contribute effectively to the pursuit of the Union's objectives. Sarmiento, D., 'Un paso más en la constitucionalización del tercer pilar de la Unión Europea. La sentencia María Pupino y el efecto directo de la decisiones marco', *Revista Electrónica de Estudios Internacionales*, No 10, 2005 (http://www.reei.org), maintains that that judgment of the Court opens the way for a gradual 'communitarisation' of the intergovernmental fields of the EU Treaty. Alonso García, R., at pp. 36 to 38 of the work cited in footnote 14, maintains that the third pillar is a *tertium genus*, which is 'strongly intergovernmental in nature, although there are also supranational elements present in the instruments governing participation and in the mechanisms for judicial control'.

37 — The principle of conforming interpretation (paragraphs 34, 43 and 47) and the principle of loyal cooperation (paragraph 42).

38 — Weigend, Th., 'Grundsätze und Probleme des deutschen Auslieferungsrechts', *Juristische Schulung*, 2000, p. 110, asserts that the fight against international crime gives rise to uncertainty about whether it is appropriate to remain wedded to inherited views which are derived from an unconditional preference for State sovereignty and from a distrust of foreign criminal justice systems. He adds that many States would renounce that traditional view in the case of other States to which they know they are linked by a common legal culture and by respect for human rights.

39 — As long ago as 1880, the Institute of International Law, Oxford, took the view that, although reciprocity in regard to extradition may be required for political reasons, it is not a requirement of justice (Article 5 of the Resolution of 9 September 1880 (Institute Yearbook new abbreviated edition, Volume I, 1875-83, p. 733). I have taken the quotation from Schultz, H., 'Rapport général provisoire sur la question IV pour le X^{e} Congrès international de droit pénal du 29 septembre au 5 octobre 1969 à Rome', *Revue Internationale de Droit Pénal*, 1968, No 3-4, p. 795.

States of the European Union are required to assist one another when offences which it is in the common interest to prosecute have been perpetrated. [40]

46. It is therefore my view that extradition and the European arrest warrant and surrender procedure take account of axiological models whose sole similarity is their objective. The Framework Decision takes that approach by abolishing extradition and replacing it with a system of surrender between judicial authorities, which is based on mutual recognition [41] and on the free movement of judicial decisions, and results from a high level of confidence between the Member States (recitals 1, 5, 6 and 10). For the reasons stated, reciprocity and double criminality are presumed for certain offences — that is, the most serious ones — and the grounds for refusing to provide assistance are restricted, while there is no scope at all for political discretion (Articles 3 and 4). [42]

47. That outcome appears to bolster the view of those who argue that, since the procedure concerned is new, there was nothing to harmonise, from which it follows that it was not appropriate to establish the European arrest warrant in a framework decision. However, that conclusion, by its simplicity, fails to take account of the nature of that source of law and of the essential character of the mechanism it creates.

3. The Framework Decision as a harmonising provision

48. That approach fails on its main premiss because the fact that the European arrest warrant and surrender procedure differs from the extradition system in all but its

40 — No one would accord the status of extradition to legal assistance for the surrender of an accused between a court in the *Land* of Bavaria and a court in the *Land* of Lower Saxony, or between a court in the autonomous community of Catalonia and a court in the autonomous community of Andalusia, from which it follows that assistance should not be regarded as extradition where it takes place in the context of the European Union. It might be countered that, just as the courts of one country (Germany or Spain) apply the same criminal law irrespective of where their seat is, so those of different Member States are bound by different criminal codes even though they share identical principles and values. However, that assertion is not entirely correct for the following reasons. On the one hand, there are harmonised fields within the Union while, on the other hand, there are basic criminal provisions (for example, those which create environmental offences, referred in Article 2(2) of the Framework Decision) which are implemented by technical measures whose adoption is the responsibility of the *Länder* or the autonomous communities, thereby leading to a number of differences in the categorisation of a particular offence in the same Member State.

41 — The Tampere European Council made the principle of the mutual recognition of judicial decisions into the cornerstone of judicial cooperation within the Union (point 33 of the Presidency Conclusions). That principle is examined by Sanz Morán, A.J., 'La orden europea de detención y entrega: algunas consideraciones de carácter jurídico-material', *Cooperación Judicial Penal en la Unión Europea: la orden europea de detención y entrega*, Lex Nova, Valladolid, 2005, pp. 81 to 90, which sets out the arguments of opponents of the principle.

42 — The Framework Decision is part of a process of development which began with the European Convention on Extradition of 1957 (Article 28(3)) and continued with the European Convention on Extradition of 1996 (Article 1(2)), paving the way for provisions more favourable to cooperation, contained in uniform or reciprocal laws which lay down a system for execution in the territory of a State of arrest warrants issued by other States. One example of that type of instrument is the treaty between the Kingdom of Spain and the Italian Republic for the prosecution of serious offences by means of the abolition of extradition in an area of common justice, done at Rome on 28 November 2000, which never entered into force because the procedure had begun which led to the adoption of the Framework Decision, described by the Council of the European Union as a uniform law within the meaning of Article 28(3) of the 1957 convention ('Conclusions on the application of the European arrest warrant and its relationship with the Council of Europe legal instruments', Brussels, 11 September 2003, doc. 12413/03).

objective does not mean that the procedure was created in a vacuum, without any precedents in the national legal systems whose harmonisation is sought.

49. The European arrest warrant, a measure which is vital to the creation of an area of freedom, security and justice (Articles 2 EU and 29 EU), is an embodiment of judicial cooperation. It consists of a judicial decision requiring the arrest and surrender of an individual by a foreign judicial authority, for the purposes of conducting a criminal prosecution or executing a sentence (Article 1(1) of the Framework Decision). It is, therefore, a decision governed by the procedural law of the issuing Member State which, in accordance with the principle of mutual recognition, is treated in the other Member States in the same way as a decision of a national court, from which it follows that legislative harmonisation is essential. Arrest warrants are well established under the criminal procedure laws of the Member State and, in certain circumstances, subject to specified conditions, the Framework Decision affords them cross-border effect, an objective which requires approximation of the relevant national rules. The operative part of the Framework Decision addresses that objective, by harmonising the form and content of the decision, the methods of and time-limits for transmission and execution, the grounds for non-execution, and the rights which protect the arrested person during the procedure and for the purposes of surrender.

50. It is therefore not the case that a mechanism which did not previously exist has been created or that national extradition laws have been harmonised; rather, it is the concepts of arrest and surrender which have been harmonised so that the judicial authorities existing in each Member State may assist one another. [43]

51. This reference for a preliminary ruling does not concern the harmonising capacity of the Framework Decision but rather whether the decision is suitable for the purpose of creating a new concept. However, there is also an underlying ambiguity in that assertion because, as I have just pointed out, although the European arrest warrant differs from extradition, it is not a creation without parallels in the laws of the Member States. [44]

43 — For example, in Spain, the Framework Decision has affected Articles 273 to 278 of Basic Law 6/1985 of 1 July 1985 on the judiciary and Articles 183 to 196 of the Law on criminal procedure of 14 September 1982.

44 — As the United Kingdom and France have pointed out (paragraphs 28 to 32 and 10 to 13 of their statements in intervention, respectively), in accordance with Articles 94 EC, 95 EC and 308 EC, any new act must be adopted pursuant to Article 308 EC, while the harmonisation of existing provisions and the coordination of the basic provisions of future laws must take place pursuant to Articles 94 EC and 95 EC. Thus, in Opinion 1/94 ([1994] ECR I-5267), the Court explained that the Community is competent, in the field of intellectual property, to harmonise national laws pursuant to Articles 94 EC and 95 EC and may use Article 308 EC as the basis for creating new rights superimposed on national rights (point 59). That applied to the creation of a supplementary protection certificate for medicinal products (Council Regulation (EEC) No 1768/92 of 18 June 1992 (OJ 1992 L 182, p. 1), as the Court pointed out in the judgment in Case C-350/92 *Spain* v *Council* [1995] ECR I-1985, paragraph 23. In Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079, the Court noted that Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ 1998 L 213, p. 13) comes under the first category because it does not create a Community-based right and instead is based on national concepts, such as patents, which are issued in accordance with internal procedures, notwithstanding the fact that the inventions covered were not previously patentable in certain Member States and that the directive makes certain clarifications and provides for derogations as regards the scope of the protection (paragraph 25).

In any event, even if such an argument were put forward, nothing would preclude the use of a framework decision if harmonisation were required because the EU Treaty does not prohibit its use in such circumstances.

4. The system of sources in the third pillar; in particular, the relationship between framework decisions and conventions

52. Article 34(2) EU lists four sources of law within the third pillar and, as the Council, the Commission, the Netherlands and Belgium point out, does not place them in a hierarchical order or categorise them by assigning each type of act to a particular field. In principle, each type may be used for all fields, without prejudice to the limits imposed by the nature of the act and the objective set, within whose boundaries the legislature has freedom of choice.

53. That margin of discretion is not subject to judicial review, from which it follows that a decision which does not exceed those boundaries is legally correct, irrespective of its content.

54. On this occasion, the Council opted for a framework decision and it is therefore appropriate to begin the analysis by establishing whether, in the light of the aim pursued and the procedure followed to achieve it, the Council could have used a different type of act. The common position must be rejected as a suitable measure, although it is useful in the sphere of the international relations of the Union and the Member States for the purpose of setting out their opinion on a particular subject (Article 37 EU), and, together with the joint action, its specific features may equally well be employed within the second pillar (Article 12 EU). [45]

55. The remaining acts — framework decisions, decisions and conventions — are suitable for measures which require transposition into national law. [46] However, the present proceedings do not call for an analysis of decisions, which are referred to in Article 34(2)(c) EU, because the article excludes their adoption for the purposes of harmonisation, which is vital to ensure the functioning of the European arrest warrant procedure.

45 — Simon, D., *Le système juridique communautaire*, Presses Universitaires de France, Second edition, November 1998, pp. 238, calls them 'atypical measures'. For example, the Council common position of 31 January 2000 on the proposed protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against transnational organised crime (OJ 2000 L 37, p. 1), and Joint Action 96/443/JHA of 15 July 1996, adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia (OJ 1996 L 185, p. 5).

46 — Brechmann, W., *Kommentar zu EU-Vertrag und EG-Vertrag*, Calliess/Ruffert, Second edition, 2002, paragraph 34.6, p. 267.

56. Accordingly, the only alternative to a framework decision would have been a convention. The choice between the two types of measure entails the widest possible discretion. It is appropriate to dismiss the view, which is based on an assertion that the rank of provision has been 'frozen' pursuant to the *contrarius actus* principle, that, since extradition between Member States has traditionally been governed by international agreements, its 'successor', the European arrest warrant, must be established in the same manner.

(a) The inapplicability of the *contrarius actus* principle

57. The rule which states that once a field has been governed by a particular type of provision, that field must always be governed by other provisions of the same rank, without any possibility of using a lower rank, is not absolute because it reflects an individual right in the context of relations between a sovereign power — the legislature — and another, essentially subordinate power — the executive — and their respective acts, namely laws and regulations. When parliament legislates in a field, the government must remain on the sidelines and intervene only to the extent that the representative chamber allows it to for the purpose of completing or incorporating its decisions, and no governmental act may regulate the same field, thereby usurping the will of the holder of power, unless, after the repeal of legislation, the latter authorises it and provided that there is no constitutional restriction to the effect that the field concerned must be governed by a law. [47]

58. Therefore, it makes no sense to discuss that point because framework decisions and international conventions have the same legal basis and must pass through the same procedure, in that both must be approved unanimously by the Council, following a proposal from a Member State or the Commission, and after consultation of the European Parliament (Article 34(2) EU in conjunction with Article 39(1) EU). [48]

59. An analysis of the practice leads to the same outcome as a theoretical analysis, since the Member States have on many occasions replaced measures enacted via a convention with other, harmonising measures. One paradigmatic example is the Convention of

47 — Professors García de Enterría, E., and Fernández, T.R. explain the principle in *Curso de Derecho Administrativo*, Volume I, Civitas, 10th edition, Madrid, 2000, pp. 247 and 248.

48 — I feel obliged to mention the claim to the effect that the practice of adopting measures by means of framework decisions is undemocratic, which has been put forward by the applicant association in the main proceedings on the ground that, unlike international agreements, framework decisions do not require any additional action on the part of national legislatures. First of all, framework decisions, and the manner in which they are enacted, are governed by a treaty which has been freely adopted by the Member States under the decision-making leadership of their respective governments. Furthermore, as I have just stated, the European Parliament is consulted during the procedure for the adoption of framework decisions and its national counterparts have the right to draw up restrictions and have jurisdiction to adopt domestic measures applying and implementing framework decisions if their constitutional system requires that they must have the rank of a law.

27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,[49] known as the Brussels Convention, which was replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 (Article 68).[50]

60. In those circumstances, it is appropriate to consider whether the format of an international convention facilitates respect for the principles of subsidiarity and proportionality, with the result that the Community legislature is obliged to use that format.

(b) The principles of subsidiarity and proportionality

61. Those two principles, which are enshrined in Article 5 EC, apply in the third pillar. The principle of subsidiarity applies pursuant to Article 2 EU *in fine*, while the principle of proportionality applies as a mechanism to facilitate subsidiarity.[51]

62. Recital 7 in the preamble to the Framework Decision states that those principles have been respected, and rightly so, because, since the Framework Decision governs the execution, in the territory of a Member State, of arrest warrants issued by another Member State, in a common area based on mutual confidence and the reciprocal recognition of judicial decisions, that task may be dealt with more effectively by a joint approach, using the structures of the Union, rather than separately, albeit in a coordinated manner, by each Member State. Accordingly, there was a need for multilateral action, from which it follows that the principle of subsidiarity was observed.

63. The adoption of an international convention would also have been compatible with the principle of subsidiarity but the latitude accorded to the Union legislature allowed it to choose a framework decision. Moreover, the inalienable principle of proportionality did not impose the need for a different approach since, as I will explain below, experience recommended the choice of a framework decision in the light of the failure of the conventions concluded in the past. Since the requirement that the method must be appropriate to the purpose means that action taken by the Union must be restricted to fulfilling the objectives proposed, it is essential to use an instrument which imposes an obligation on the Member States to achieve the results in a specified period.

64. In other words, the freedom of action of the Community legislature was not restricted by an alleged freezing of the rank of provision which has traditionally governed

49 — OJ 1972 L 299, p. 32; consolidated version in OJ 1998 C 27, p. 1.

50 — OJ 2001 L 12, p. 1. Other examples are Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ 2001 L 174, p. 1) (Article 21); Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) (Article 44); and Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (OJ 2000 L 160, pp. 37) (Article 20).

51 — The close connection between the two principles is clear in Article 5 EC, which provides that the Community may take action only where the objectives of the proposed action cannot be achieved by the Member States unilaterally (subsidiarity) and restricts the action which the Community may take to that which is strictly necessary (proportionality).

the surrender of a citizen from one Member State to another, for the purposes of prosecution or the execution of a sentence, or by the principle of subsidiarity. However, even if a certain restriction of that freedom of action were accepted, a framework decision would still be a suitable measure in accordance with the principle of proportionality and the principle of the effectiveness of Community law, which, it is clear from the *Pupino* judgment, also applies to the third pillar.

66. It was precisely the limitations inherent in international treaties that led to the inclusion of a new category in the list of sources of law, which would avoid the difficulties arising from States having freedom of choice with regard to ratification. [53] The Tampere European Council explicitly set out the objective of converting the Union into an area of freedom, security and justice, 'by making full use of the possibilities offered by the Treaty of Amsterdam'. [54] The proposal of the Commission is most revealing in that it states that a framework decision was chosen for reasons of effectiveness in view of the limited success of the previous conventions. [55]

(c) The demand for greater effectiveness

65. The disputed Framework Decision is not the first attempt to improve judicial cooperation in criminal matters within the Union. The 1995 and 1996 conventions were its immediate, albeit failed, precursors. Both those conventions were adopted pursuant to Article K.3 of the Treaty on European Union, but at the moment they do not apply in all the Member States, since a number have still not ratified them. [52]

67. The Member States and the institutions are required to achieve the objectives of Article 2 EU and, therefore, they must maintain and develop the area of freedom, security and justice and are obliged to use the most appropriate tools to meet that requirement. The Member States and the institutions are bound to ensure the effectiveness of Community law in general [56] and the

52 — The Commission notes (paragraph 22 of its observations) that the conventions concluded pursuant to the Treaty of Maastricht did not enter into force before the Treaty of Amsterdam, because they had not been ratified by a sufficient number of Member States. On the date of adoption of the Framework Decision, those conventions had been ratified by 12 of the 15 Member States existing at the time.

53 — The Council only recommends its adoption (Article 34(2)(d) EU).

54 — Introduction to the Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999.

55 — COM(2001) 522 final/2, p. 4, point 4.3.

56 — The principle of effectiveness also applies to the jurisdiction of the Member States with regard to procedural matters, by requiring that their national legal systems do not render excessively difficult or impossible the exercise of rights conferred by Community law. Case 33/76 *Rewe* [1976] ECR 1989 heads a long line of cases in which the Court made a ruling to that effect. Among the most recent are Case C-255/00 *Grundig Italiana* [2002] ECR I-8003 and Case C-30/02 *Recheio-Cash & Carry* [2004] ECR I-6051.

effectiveness of Union law in particular,[57] from which it follows that the Council was not only entitled but, moreover, obliged to establish a mechanism for the European arrest warrant and surrender procedure in a framework decision.[58] Accordingly, it is not appropriate to call into question the method chosen by the Council.[59]

68. Accordingly, I propose that the Court reply to the first question by ruling that Framework Decision 2002/584 does not infringe Article 34(2)(b) EU.

B — *Framework Decision 2002/584 and fundamental rights (second question)*

69. Framework Decision 2002/584 concerns the rights of an individual who is the subject of an arrest warrant and specifically sets out the objective of protecting fundamental rights. In points 18 and 24 of this Opinion, I referred to that objective of the Framework Decision, an example of a move towards cooperation in criminal matters which transcends the merely bilateral relationship between States and takes account of a third dimension, namely the rights of the individual concerned.[60]

70. In that connection, Article 1(3) of the Framework Decision contains a solemn declaration which, had it not been included, would have been implicit since one of the founding principles of the European Union is respect for human rights and fundamental freedoms (Article 6(1) EU), enshrined as general principles of Community law, with the scope which they derive from the Rome Convention and the constitutional traditions common to the Member States (Article 6(2) EU).[61]

71. That consideration requires an examination of the protection of those rights in the Union and of the role assigned to the Court.

1. The protection of fundamental rights in the European Union

72. The absence of a list of fundamental rights in the founding treaties did not mean

57 — I have already argued in this Opinion that the principle of effectiveness is the basis for the judgment in *Pupino*, as stated in paragraphs 38 and 42 of that judgment.

58 — The United Kingdom Government describes the Framework Decision as 'indispensable' (paragraph 37, *in fine*, of its statement in intervention).

59 — The principle of effectiveness is the inspiration for Article 31(2) of the Framework Decision which provides that the Member States may continue to apply bilateral or multilateral agreements the provisions of which extend beyond those of the Framework Decision and help to simplify or facilitate the procedures for surrender.

60 — Vennemann, N., 'The European arrest warrant and its human rights implications', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2003, pp. 113 and 114.

61 — In the judgment in *Pupino*, the Court noted that framework decisions must be interpreted in accordance with the Rome Convention (paragraph 59).

that those rights were not part of Community law. The Communities, the result of an agreement between States based on the democratic model, were created with the objective that they would be organisations governed by the rule of law. The seed was sowed in fertile ground and, over time, basic individual rights flowered as a result of the case-law of the Court of Justice.

73. That work in the field of protection has resulted in rights which are specifically recognised, such as the prohibition of discrimination with regard to pay on grounds of sex, enshrined in the current Article 141 EC, [62] but also in others which are not rooted directly in the Community legal system, such as the inviolability of private premises, [63] freedom of expression, [64] and, with closer links to this reference for a preliminary ruling, the *nullum crimen, nulla poena sine lege* principle. [65]

74. The Court applied a simple, logical line of reasoning to the effect that rules common to the legal systems of the Member States are general principles of Community law and, as such, they must be observed, from which it follows that fundamental rights, guarantees which are shared by all, form part of those principles and must be protected. [66] The harmonising objective in that field is beyond doubt and it is based on sources external to Community law, [67] namely, the aforementioned general principles which are shared by the Member States, [68] the common elements of their constitutional traditions, [69] and the

62 — The case of Ms Defrenne is symbolic. The judgments in Case 80/70 *Defrenne I* [1971] ECR 445, Case 43/75 *Defrenne II* [1976] ECR 455, and Case 149/77 *Defrenne III* [1978] ECR 1365 mark the progress of the case through the Court.

63 — Judgments in Case 31/59 *Acciaieria e Tubificio di Brescia* v *High Authority* [1960] ECR 71; Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033; Joined Cases 46/87 and 227/87 *Hoechst* [1989] ECR 2859; and Case C-94/00 *Roquette Frères* [2002] ECR I-9011.

64 — Judgments in Case C-260/89 *ERT* [1991] ECR I-2925; Case C-112/00 *Schmidberger* [2003] ECR I-5659; and Case C-101/01 *Lindqvist* [2003] ECR I-12971. On the freedom of expression of Community officials, see the judgment in Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611.

65 — Judgments in Case 14/86 *Pretore di Salò* [1987] ECR 2545; Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969; Case C-168/95 *Arcaro* [1996] ECR I-4705; and Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609.

66 — That approach first appears in the judgment in Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13.

67 — Rubio Llorente, F., examined that process in detail in 'Mostrar los derechos sin destruir la Unión', *La estructura constitucional de la Unión Europea*, Civitas, Madrid, 2002, pp. 113 to 150.

68 — Pescatore P., 'Los principios generales del derecho como fuentes del derecho comunitario', *Noticias C.E.E.*, 1988, No 40, pp. 39 to 54.

69 — In *Nold* v *Commission*, the Court held that, 'in safeguarding these rights [fundamental rights], the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States' (paragraph 13). Subsequently, in the judgment in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, the Court stated that 'the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community' (paragraph 4).

international instruments for the protection of rights, [70] in particular the Rome Convention. [71]

75. The Community legislature gathered the evidence, inserted that case-law into Article 6 EU with effect from the Treaty of Amsterdam, and charged the Court of Justice with the protection of fundamental rights (Article 46(d) EU).

76. In 2000, an event which was difficult to ignore occurred, in the form of the proclamation of the Charter of Fundamental Rights of the European Union. That instrument does not have binding force because there is no enacting provision incorporating its subject-matter. [72] The proclamation is set out as a mere political declaration, devoid of legal force. [73]

77. However, that assertion does not lead me to the view that nothing has changed, as though the Charter were not worth the paper it is written on. First of all, the Charter did not emerge in a vacuum, without any link to its surroundings. On the contrary, the Charter belongs to a stage in the development process which I have described, in that, as it states in the preamble, [74] it codifies and reaffirms certain rights which are derived from the heritage common to the Member States, at national and international level, [75] from which it follows that the Union must respect those rights and the Court must protect them, in accordance with Articles 6 EU and 46(d) EU, whatever the legal nature

70 — In *Nold* v *Commission*, international treaties for the protection of human rights were regarded as having limited effect and as being capable merely of supplying 'guidelines which should be followed within the framework of Community law' (paragraph 13). However, a few years later, such treaties were expressly relied on (judgment in Case C-36/75 *Rutili* [1975] ECR 1219, paragraph 32) and emerged as deciding factors (judgment in Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18 et seq.).

71 — Judgment in *X*, paragraph 25. See also the judgment in *ERT*, paragraph 41, and the judgments to which it refers. The Court made similar observations in point 33 of Opinion 2/94 [1996] ECR I-1759, which was delivered pursuant to Article 228 of the EC Treaty (now, after amendment, Article 300 EC).

72 — The situation would change in the event of the adoption and entry into force of the Treaty establishing a Constitution for Europe, Part II of which incorporates the Charter.

73 — Díez-Picazo, J.M., 'Carta de derechos fundamentales de la Unión Europea', *Constitucionalismo de la Unión Europea*, Civitas, Madrid, 2002, pp. 21 to 42, in particular, p. 39.

74 — 'This Charter reaffirms ... the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.'

75 — Although the order for reference makes no mention of it, attention must be drawn to the absence of a universally accepted right not to be extradited. Some States, such as Germany, Cyprus, Finland and Poland, grant that right to their citizens but the legal systems of many other States do not afford that fundamental protection to their citizens and it therefore remains on the fringes of the common constitutional traditions. Austria, Portugal and Slovenia have amended their constitutions to permit the surrender of their nationals.

and force of the instrument adopted in December 2000.[76]

78. Second, the Charter features in the case-law of the Court since the Advocates General have interpreted it, thereby transcending its merely programmatic and declarative nature.[77] Furthermore, the Court of First Instance has referred to the Charter in a number of its judgments.[78] However, the Charter is rarely cited in the judgments of the Court of Justice,[79] not even to refute the views put forward by the Advocates General, and it was only very recently — barely two months ago, in fact — in *Parliament* v *Council*[80] that the Court announced a change of direction, ruling that, while the Charter is not a legally binding document, its importance must be acknowledged (paragraph 38).

79. Accordingly, the Court must break its silence and 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

76 — Alonso García, R., 'Las cláusulas horizontales de la Carta de los derechos fundamentales de la Unión Europea', *Encrucijada constitucional de la Unión Europea*, Civitas, Madrid, 2002, p. 151, maintains that the fact that the Charter of Fundamental Rights does not have binding force does not negate its effectiveness, as evidenced by the role played by the Rome Convention which, although it is not legally binding on the Community, has acted as a fundamental source of inspiration for the Court in the interpretation of fundamental rights. Carrillo Salcedo, J.A., 'Notas sobre el significado político y jurídico de la Carta de derechos fundamentales de la Unión Europea', *Revista de derecho comunitario*, 2001, p. 7, asserts that the Charter of Fundamental Rights enables criteria to be set for assessing the lawfulness of acts of the public authorities of the Union. Rodríguez Bereijo, A., 'El valor jurídico de la Carta de los derechos fundamentales de la Unión Europea después del Tratado de Niza', *Encrucijada ...*, p. 220, paraphrasing former Member of the Commission Antonio Vittorino, predicts that, through its interpretation by the Court, the Charter will become binding as a summary and an expression of the general principles of the Community law.

77 — In the Opinion in Case C-173/99 *BECTU* [2001] ECR I-4881, Advocate General Tizzano argues that, notwithstanding that it has no binding force, 'in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved ... in the Community context' (point 28). Some months later, Advocate General Léger proposed in the Opinion in Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565 that the Charter was intended to constitute a privileged instrument for identifying fundamental rights (point 83), because it enshrines certain values which 'have in common the fact of being unanimously shared by the Member States ... The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States' (point 80). In my Opinion in Case C-208/00 *Überseering* [2002] ECR I-9919, I accept that, while the Charter does not constitute binding law in the strict sense, it provides an extremely valuable source for the common denominator of the fundamental legal values of the Member States, from which the general principles of Community law are in turn derived (point 59). Other Advocates General have also taken up the cause.

78 — In Case T-54/99 *max.mobil* v *Commission* [2002] ECR II-313, the Court of First Instance applied Article 47 of the Charter by an indirect route, stating that judicial review of the activities of the Commission, and, accordingly, the right to effective legal protection, is one 'of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States' (paragraph 57). The same approach was taken in the judgments in Case T-177/01 *Jégo-Quéré* v *Commission* [2002] ECR II-2365, paragraphs 42 and 47; Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris and Others* v *Commission* [2003] ECR II-1, paragraph 122; and Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2003] ECR II-2957.

79 — In the judgment in Case C-245/01 *RTL Televisión* [2003] ECR I-12489, the Court referred in passing to Article 11(2) of the Charter, stating that it enshrines the right to freedom of opinion (paragraph 38). In the judgment in Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and ERSA* [2005] ECR I-3785, the Court made a similar reference to Article 17 of the Charter (paragraph 118).

80 — Judgment in Case C-540/03 [2006] ECR I-5769.

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.

80. In that way it might be possible to avoid repeating past misunderstandings with national courts which have been reticent about the capacity of the Community institutions to protect fundamental rights. [81]

81. The protective role is exercised in three different spheres [82] — national, Council of Europe and European Union — which are partly coextensive and, most importantly, are imbued with the same values. There are many points of intersection and overlapping is possible, but respect for other jurisdictions does not create any insurmountable problems where there is confidence that all parties exercise their jurisdiction while fully guaranteeing the system of coexistence. A dialogue between the constitutional courts of the European Union permits the foundations to be laid for a general discussion.

82. Thus, in the present reference for a preliminary ruling, the Court must have regard to the spirit of Articles 20 and 49 of the Charter of Fundamental Rights which respectively proclaim the principle of equality before the law and the principle of legality of criminal offences, principles which are widely accepted in the constitutional frameworks of the Member States, and the Court may refer, if necessary, to the case-law of the national courts and to the judgments of the European Court of Human Rights concerning Articles 14 and 7 of the Rome Convention.

81 — In the judgment of 29 May 1974 in *Solange I* (2 BvL 52/71), the Bundesverfassungsgericht called into question the competence of the Community institutions to protect fundamental rights, while upholding its jurisdiction where the protection concerned was not equivalent to protection at national level. That judgment resulted in a salutary lesson which was soon reflected in the pages of the European Court Reports to the extent that, in the judgment of 22 October 1986 in *Solange II* (2 BvR 197/83), the German Constitutional Court stated that the Communities had a system of protection comparable to the Bonn Fundamental Law and announced that in the future it would refrain from reviewing secondary provisions of Community law, although it asserted its opposition to the fundamental rights (Rodríguez Iglesias, G.C. and Woelker, U., 'Derecho comunitario, derechos fundamentales y control de constitucionalidad (La decisión del Tribunal Constitucional Federal alemán de 22 de octubre de 1986)', *Revista de Instituciones Europeas*, 1987, Volume 14/1987, No 3, pp. 667 to 85). The judgment of the Trybunał Konstytucyjny of 11 May 2005, concerning the Accession Treaty of Poland (Case K 18/04), and the more recent judgment of the Czech Ústavní soud of 8 March 2006, cited above, are in the same spirit as the *Solange II* judgment. However, I fear that the judgment of the Bundesverfassungsgericht concerning the German law transposing the Framework Decision is inspired by that old mistrust and is a reaction to the restrictions on judicial control in the third pillar (the optional nature of proceedings for a preliminary ruling, the limitation of legal standing to bring actions for annulment, the absence of an action for failure to fulfil obligations). It is rather paradoxical that, in an area where the Union has an increased influence on the fundamental rights of individuals, the powers of the Court have been somewhat restricted, to quote from Alonso García, R. and Sarmiento Ramírez-Escudero, D., 'Los efectos colaterales de la Convención sobre el futuro de Europa en la arquitectura judicial de la Unión: ¿hacia una jurisdicción auténticamente constitucional europea?', *Revista de Estudios Políticos*, No 119, January-March 2003, p. 136.

82 — Capotosti, P.A., 'Quelles perspectives pour les rapports entre la Cour constitutionnelle et la Cour de justice des Communautés européennes?', a report submitted to the Conference on Cooperation between the Court of Justice and National Courts, held in Luxembourg on 3 December 2002 on the occasion of the 50th anniversary of the Court, warns of 'multilayered constitutionalism' (p. 6).

2. Article 2(2) of Framework Decision 2002/584 and the principle of equality

specified duration (paragraph 1), although it is possible to make surrender conditional upon the act concerned constituting an offence in the State to which the warrant is addressed (paragraph 4). However, that option is not available for the 32 offences listed in paragraph 2. [83]

(a) Equality before the law

83. The Arbitragehof asks whether it is compatible with that fundamental right to provide that, where a European arrest warrant is executed for any of the offences listed in Article 2(2) of the Framework Decision, unlike in the case of other offences, it is not necessary to verify the criminality of those offences in the two Member States concerned.

84. For the purposes of analysing that question, it is important to consider the structure of Article 2 of the Framework Decision with a view to clarifying the misunderstanding which is clear in the question itself, as well as in a number of the observations submitted in these proceedings. A European arrest warrant is valid provided that the offence is punishable in the issuing Member State by a sentence of a

85. Accordingly, I believe it is incorrect to argue that, with the exception of the offences listed in Article 2(2), the European arrest warrant system is based on the principle of double criminality. On the contrary, prosecution in the requesting Member State is the only requirement that may be stipulated, even where the Member States are authorised, either when they transpose the Framework Decision [84] or when their courts execute an individual arrest warrant, [85] to make execution of the warrant conditional on the act concerned being categorised as an offence under their own legal systems, an

83 — Paragraph 3 authorises the Council to extend the list by unanimous decision.

84 — That is the case in Belgium, since Article 5(1) of the Law of 19 December 2003, referred to above, provides that execution of a European arrest warrant must be refused if the acts in question do not constitute a criminal offence under Belgian law.

85 — Spanish Law 3/2003 of 14 March 2003, cited in footnote 32, opts for that alternative and leaves the decision in the hands of the courts (Article 12(2)(a) in conjunction with Article 9(2)).

option which is not available for the offences referred to in Article 2(2). [86]

86. In those circumstances, the question referred by the Arbitragehof is addressed to the wrong authority, since the discrimination complained of may not be attributed to the Union legislature but rather to national legislation or a national judicial decision, as applicable, matters on which the Court does not have jurisdiction to rule.

87. Even if the view were taken that the Framework Decision is the root cause of the infringement because it establishes different rules depending on the nature of the offence, the question would still lack logic.

88. Approached in those terms, the question must be restricted to the abstract concept of equality before the law, leaving aside, for the moment, consideration of the uncertainty surrounding its application and the prohibition of discrimination by reason of personal and social circumstances. [87]

89. The law must treat individuals equally and may not treat comparable situations differently or make different situations sub-

86 — In fact, it is not the double criminality requirement which is set aside but rather the requirement of verification, because the nature of the acts listed — such as murder, grievous bodily injury, kidnapping, illegal restraint, hostage-taking, organised or armed robbery, and rape — is such that they are classed as offences in all the Member States. Another difficulty, which I will deal with below, concerns the definition of the offences by the legal systems of each Member State (point 96 et seq.). In any case, the list in Article 2(2) of the Framework Decision contains some acts for which there is, or is soon to be, a harmonised definition of the offence, and other acts which are certainly punished in all the Member States. In that connection, see the Council resolution of 21 December 1998 on the prevention of organised crime with reference to the establishment of a comprehensive strategy for combating it (OJ 1998 C 408, p. 1), and the United Nations Convention against Transnational Organised Crime of 15 November 2000, and the protocols thereto. On combating terrorism, see Framework Decision 2002/475/JHA of 13 June 2002 (OJ 2002 L 164, p. 3), and on combating trafficking in human beings, see Framework Decision 2002/629/JHA of 19 July 2002 (OJ 2002 L 203, p. 1). On combating the sexual exploitation of children and child pornography, see Framework Decision 2004/68/JHA of 22 December 2003 (OJ 2004 L 13, p. 44). On the illicit traffic in narcotic drugs and psychotropic substances, see the United Nations Convention of 20 December 1988. On financial crime, see Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ 2000 L 140, p. 1), amended by Framework Decision 2001/888/JHA of 6 December 2001 (OJ 2001 L 329, p. 3); Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting of non-cash means of payment (OJ 2001 L 149, p. 1); and Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ 2001 L 182, p. 1). On corruption, see the Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (OJ 1997 C 195, p. 2), and Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector (OJ 2003 L 192, p. 54). On computer crime, see Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ 2005 L 69, p. 67). On the protection of the environment in the European Union through criminal law, see Council Framework Decision 2003/80/JHA of 27 January 2003 (OJ 2003 L 29, p. 55), which was annulled by the Court in Case C-176/03 *Commission* v *Council* [2005] ECR I-7879, on the ground that legislation on that field must be enacted within the Community pillar by means of a directive. On the protection of victims in cases of illegal entry, see Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ 2002 L 328, p. 1). Lastly, on racism and xenophobia, see the joint action of 15 July 1996, cited in footnote 45.

87 — The applicable provision of the Charter of Fundamental Rights of the European Union is Article 20, which provides: 'Everyone is equal before the law.' Article 14 of the Rome Convention enshrines the principle of equality with regard to the enjoyment of the rights and freedoms it proclaims, while Protocol No 12 of 4 November 2000, which entered into force on 1 April 2005, contains a general prohibition of discrimination.

ject to identical rules. However, the law has a wide latitude to differentiate between similar situations provided that an objective and reasonable justification is given. In that connection, a justification will be objective and reasonable provided that the aim and the effects sought are legitimate and there is an adequate relationship of proportionality between them, which precludes particularly onerous and disproportionate outcomes. [88]

90. It is my view that in this case the situations concerned are not comparable. First, they are concerned with acts; regard is not had to individual circumstances but rather to the nature of the offence, from which it follows that there is no subjective discrimination. Second, from the point of view of their prosecution, there is no similarity between individuals who perpetrate different acts which do not have the same degree of seriousness and have different levels of culpability; the difference in the gravity of the offences precludes their comparability.

91. My opinion would not be altered if an assessment of the consequences of the execution of a European arrest warrant (arrest, surrender, prosecution, serving a sentence) led to the conclusion that the individuals concerned are in a similar situation, whatever the offence which gives rise to their arrest, since the distinction is objective, reasonable, fair and proportionate.

92. The distinction is objective because it takes account of factors which are external to the individual, are independent, and may be measured using abstract, general criteria, thereby avoiding any selective arbitrariness. Those factors are the nature of the offence and the punishment provided for it.

93. In addition, the distinction is reasonable and justified because it is aimed at one of the objectives of the European Union, namely, combating crime in an area of freedom, security and justice (Article 2 EU, fourth indent, in conjunction with Article 29 EU). The list in Article 2(2) of the Framework Decision contains offences which, as the Spanish Government observes in its notable statement in intervention (paragraph 121), have a serious effect on legal interests in need of special protection in Europe, and there is a requirement that the Member State issuing the arrest warrant must punish those

88 — Judgments of the Court of Justice in Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7; Case 139/77 *Denkavit* [1978] ECR 1317, paragraph 15; and Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801. Judgments of the European Court of Human Rights in *Fretté v. France* (26 February 2002, *Reports of Judgments and Decisions* 2002-I), § 34, and *Pla and Puncernau v. Andorra* (13 July 2004, *Reports of Judgments and Decisions* 2004-VIII), § 61. Judgments of the Spanish Constitutional Court 75/1983 (BOE Supplement No 197, 18 August 1983), third legal ground; 46/1999 (BOE Supplement No 100, 27 April 1999), second legal ground; and 39/2002 (BOE Supplement No 63, 14 March 2002), fourth legal ground.

offences by sentences with a particular degree of severity. [89] They are offences where the verification of double criminality is regarded as superfluous because the acts concerned are punished throughout the Member States. [90]

94. Finally, the proportionality of the measure is beyond doubt because the different rules are crucial for ensuring the surrender by a Member State of a person accused or convicted of a serious offence to the authorities of a judicial system which is comparable to that of the said Member State and which respects the principles of the rule of law and guarantees the fundamental rights of the individual concerned, including the rights which apply during the course of criminal proceedings.

extremely unusual cases [91] where a Member State surrenders an individual under Article 2(2) of the Framework Decision for an act which is not punishable in its own territory. [92] That situation does not bring into play the principle of equality because there can be no discrimination vis-à-vis oneself, and it is important to reiterate that, for the purposes of that principle, any European arrest warrant issued with a view to detaining a person suspected or convicted in a Member State of one of the offences referred to in Article 2(2), and punished by a penalty of the severity specified in that provision, must be executed notwithstanding the personal and social circumstances of the individual concerned.

(b) Equality in the application of the law

95. I will conclude this section of the Opinion at the point where the applicant association in the main proceedings begins its observations, that is, by referring to those

96. The order for reference puts forward another aspect of that complaint of dis-

89 — It includes the offences specifically referred to in Article 29 EU, the offences for which jurisdiction is assigned to Europol in the annex to the Council Act of 26 July 1995 drawing up the Convention on the Establishment of a European Police Office (OJ 1995 C 316, p. 2), and offences which there is a general duty to prosecute under international law.

90 — A number of writers take the view that Article 2(2) of the Framework Decision reflects the consensus of the Member States on criminal matters (Von Bubnoff, E., 'Institutionelle Kriminalitätsbekämpfung in der EU — Schritte auf dem Weg zu einem europäischen Ermittlungs- und Verfolgungsraum', *Zeitschrift für europarechtliche Studien*, 2002, p. 226; Combeaud, S., 'Premier bilan du mandat d'arrêt européen', *Revue du Marché commun et de l'Union européenne*, No 495, 2006, p. 116; and Hecker, B., *Europäisches Strafrecht*, Berlin, 2005, p. 433).

91 — The cases in question are extraordinary because the double test used (the nature of the offence and the severity of the penalty) normally precludes a Member State from being required to deal with an arrest warrant for an act which is not prosecuted under its own legal system. I find it difficult to imagine an act which is punished in one Member State by a sentence or detention order of a maximum of at least three years but which is lawful in another State.

92 — The Finnish Government points out (paragraph 49 of its observations) that the principle of territoriality governs criminal matters, so that a foreign national guilty of an offence perpetrated in Finland cannot evade liability by claiming that the act with which he is charged is not punished in his country of origin. With regard to the extraterritorial exercise of the right to punish, the Framework Decision provides (Article 4(7)) that a Member State may refuse to execute a European arrest warrant relating to offences committed in whole or in part in its jurisdiction, and even outside its jurisdiction, if its legislation does not provide for prosecution of such offences.

crimination by pointing out that there is a risk that Article 2(2) of the Framework Decision may be interpreted incorrectly owing to a lack of precision in the definitions it contains.

97. Since the question has arisen in those terms, it is clear that such a situation is not capable of placing in doubt the precision of the provision, which does not take account of future, hypothetical discrimination at the time of its application. There is an underlying confusion here between equality in the law itself and the equality which operates when the law is applied. The former, which is substantive in nature and aimed at ensuring that comparable situations are treated in the same way, is not respected when a provision makes similar situations subject to different rules without reasonable justification, whereas the latter, which is procedural in nature, is breached when an authority which is required to apply the provision in a particular instance construes that provision differently from on previous occasions with regard to similar situations. Accordingly, there is no inequality in the application of the law where conflicting judgments are handed down by courts which are acting in the legitimate exercise of their jurisdiction to determine a case, because the principle of equality does not require separate courts to reach identical conclusions. It would be ludicrous to class a law as discriminatory because it may be open to different interpretations which it may be possible to consolidate via the appropriate remedies.

98. In any event, it will be necessary to wait and see whether the disparities predicted actually arise despite the safeguards which the system establishes to prevent them. The Framework Decision provides useful mechanisms in that connection, by providing for an accurate exchange of information and direct contact between the courts involved. [93] In addition, should any uncertainty remain about the meaning of the terms used in Article 2(2) of the Framework Decision, the procedure for referring a preliminary ruling under Article 35 EU provides a suitable channel for a uniform interpretation within the territory of the Union.

99. The risk predicted, an obstacle arising from the absence of harmonisation of the criminal laws of the Member States, does not affect the principle of equality and is connected with the requirement of certainty in legal relationships, specifically ones which arise for the purposes of enforcement between the State and individuals. That assertion leads me to the other aspect of the second question referred for a preliminary ruling.

3. Article 2(2) of the Framework Decision and the principle of legality in criminal proceedings

100. That principle, [94] which is contained in the Latin aphorism *nullum crimen, nulla*

93 — Article 8 of the Framework Decision sets out in detail the information which an arrest warrant must contain, and Section (e) in the form provided for is used for the description of the offence and its legal classification. Any particular required by the court in the executing Member State is dealt with by direct contact with the issuing court.

94 — Rolland, P., 'La Convention européenne des droits de l'homme (commentaire article par article)', *Economica*, Second edition, Paris, 1999, p. 293, has described it as the foundation of European legal civilisation.

poena sine lege and enshrined in Article 7(1) of the Rome Convention, and in Article 49(1) of the Charter of Fundamental Rights of the European Union, comprises, in the time-honoured words of the Spanish Constitutional Court, [95] two levels of protection. On the first level, which is substantive in nature and absolute in scope, the protection entails the fundamental requirement that there must be a pre-existing definition of offences and the penalties applicable to them. The second level is procedural and concerns the rank of the provisions which create those offences and govern the penalties, which, in the Spanish legal system, [96] and in the legal systems of most of the Member States, is the equivalent of a law adopted by the legislature, the custodian of popular sovereignty.

101. With regard to the argument put forward by the applicant association in the main proceedings, the Arbitragehof seeks to ascertain whether, in the light of its vagueness and lack of precision, the list of offences in Article 2(2) of the Framework Decision is compatible with the substantive protection.

102. That protection is a reflection of the principle of legal certainty in criminal law [97] and is all the more significant because it affects fundamental values, such as individual freedom. It seeks to ensure that people are aware in advance of the types of act from which they must refrain and the consequences of committing such acts (*lex previa*). [98] The protection requires a strict, unambiguous definition of offences (*lex certa*), so that, from the time those offences are created, and, where applicable, with the assistance of the courts, [99] individuals know with a reasonable degree of foreseeability the

95 — Judgments 42/1987 (BOE Supplement No 107, 5 May 1987), second legal ground; 22/1990 (BOE Supplement No 53, 2 March 1990), seventh legal ground; and 276/2000 (BOE Supplement No 299, 14 December 2000), sixth legal ground.

96 — The principle of legality was developed in the criminal and fiscal fields in the Lower Middle Ages, as a restriction on the powers of the sovereign. In Spain, the communities, towns and cities made the acceptance of subsidies in favour of the crown and the punishment of certain acts conditional on the approval of representative assemblies (*cortes*). The evolution of a system of negotiation between the monarchy and political society, which consolidated a hierarchical political organisation and prevented further development of the powers of the monarch, is a constant theme, albeit with important differences and nuances, in the formation of the kingdoms of medieval Spain. In Aragon and Navarre, the *cortes* gained legislative and financial supervisory powers between the end of the 13th century and the middle of the 14th century (Ladero Quesada, M.A., 'España: reinos y señoríos medievales', *España. Reflexiones sobre el ser de España*, Real Academia de la Historia, Second edition, Madrid, 1998, pp. 95 to 129). In Castille, the same institution, which was at its peak in the 14th and 15th centuries, always had a lower profile and, although it played a crucial role in political life, its powers were more limited (Valdeón, J., 'Los reinos cristianos a fines de la Edad Media', *Historia de España*, Historia 16, Madrid, 1986, pp. 391 to 455, in particular pp. 414 to 423).

97 — Advocate General Kokott put forward a similar view in point 41, *in fine*, of the Opinion in *Pupino*.

98 — According to the judgment in *X*, the principle of legality 'precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law' (paragraph 25). In the Opinion in the same case, I argued that that principle 'gives all persons the legal certainty that their conduct will lead to criminal liability only if it contravenes a national provision which defined it beforehand as an offence of that kind' (point 53).

99 — That may even include taking appropriate legal advice (judgment in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* [2005] ECR I-5425, paragraph 219).

acts and omissions which will give rise to criminal liability, and it precludes the provisions concerned from being extensively construed by analogy, to the detriment of the accused, and from being applied retrospectively. [100]

103. Accordingly, the principle of legality applies to substantive criminal law as a requirement which is addressed to the legislature when it defines offences and sentences, and which is addressed to the courts when they analyse and apply those definitions in criminal proceedings. [101] In other words, it comes into play during the exercise of the State's right to punish and during the application of acts which may be strictly construed as imposing a penalty, from which it follows that the Framework Decision cannot be said to contravene the principle because it does not provide for any punishments [102] or even seek to harmonise the criminal laws of the Member States. Instead, the Framework Decision is confined to creating a mechanism for assistance between the courts of different States during the course of proceedings to establish who is guilty of committing an offence or to execute a sentence. That system of cooperation is subject to a number of conditions, in that the sentences and detention orders which may be imposed must be of a certain severity, and it is also possible to require that the acts concerned must be classified as offences in the Member State of the court providing the assistance, except in the case of the offences referred to in Article 2(2) 'as they are defined by the law of the issuing Member State'.

104. Thus, the certainty required by that principle must be demanded from the substantive criminal law of the issuing Member State and, therefore, from the legislature and the courts of that State for the purposes of commencing criminal proceedings and resolving them, where appropriate, with a sentence. It is clear that a correctly drafted European arrest warrant must be based on acts which are defined in law as offences in that State. The criminal law of the Member State which executes the

100 — That aspect of the principle of legality in criminal proceedings was upheld in the judgments of the European Court of Human Rights in *Kokkinakis v. Greece* (25 May 1993, Case 14307/77, A 260-A), § 52; *S.W. v. United Kingdom* (22 November 1995, Case 20166/92, A 335-B), § 35; and Cases 34044/96, 35532/97 and 44801/98 (22 March 2001, *Reports of Judgments and Decisions* 2001-II), § 50. It has also been accepted by the Spanish Constitutional Court; see for example judgment 75/1984 (BOE Supplement No 181, 30 July 1984), fifth legal ground, and judgment 95/1992 (BOE Supplement No 169, 15 July 1992), third legal ground.

101 — The Spanish Constitutional Court held that that individual protection excludes the judicial creation of law and unforeseeable expressions which are incompatible with the wording of provisions or unsuitable with respect to the rights they seek to protect (judgment 25/1999 (BOE Supplement No 89, 14 April 1989), third legal ground), so that the definition of a criminal offence must respect the terms of the provision, the interpretational guidelines which make up the constitutional system, and the minimum criteria imposed by legal logic, in addition to the methods of reasoning adopted by the Community (judgment 42/1999 (BOE Supplement No 100, 27 April 1999), fourth legal ground).

102 — Academic writers argue that Article 2(2) does not contain offences because the list does not describe the characteristic features of each punishable act (Flore, D., 'Le mandat d'arrêt européen: première mise en oeuvre d'un nouveau paradigme de la Justice pénale européenne', *Journal des Tribunaux*, 2002, p. 276, and Unger, E.M., *Schutzlos ausgeliefert? — Der Europäische Haftbefehl*, Frankfurt am Main, 2005, p. 100). In the event of an argument to the contrary, it must be recalled that framework decisions do not have direct effect (Article 32(2)(b) EU), without prejudice to the principle that national provisions must be interpreted in such a way as to ensure the greatest possible effectiveness of Community law, as stated in the judgment in *Pupino* (paragraphs 43 to 47). In that case, provisions of national law which transpose the Framework Decision must comply with the principle of legality.

warrant simply has to provide the assistance requested and, if the measure transposing the Framework Decision so provides, make surrender conditional on the conduct concerned also being classified as a criminal offence by its own legislation, with the exception of the offences referred to in Article 2(2) to which the principle of legality also applies.

105. Notwithstanding the foregoing considerations, I must add that the arrest and surrender procedure entailed in the execution of a European arrest warrant is not punitive in nature. The court responsible for executing the warrant must establish that the conditions for handing over an individual who is in its jurisdiction to the issuing court have been satisfied, but the executing court is not required to hear the substance of the case, except for the purposes of the surrender proceedings, and must refrain from assessing the evidence and delivering a judgment as to guilt. That was the view of the European Court of Human Rights with regard to extradition, which it excluded from the concept of punishment in Article 7 of the Rome Convention. [103]

106. The question submitted by the Arbitragehof relates little to the principle of legality in criminal proceedings and a great deal to the fear that the concepts referred to in Article 2(2) of the Framework Decision may be interpreted differently in each Member State, with the risk of non-uniform application. I have already referred to that possibility, which is inherent in the nature of all legislative provisions, both abstract and general, in points 96 to 99 of this Opinion. Now it merely remains for me to add that, if, after relying on the methods provided for in the Framework Decision to resolve any difficulties and obtain a uniform interpretation by means of a reference for a preliminary ruling, the court executing the European arrest warrant still harbours uncertainty about the legal classification of the acts which form the basis of the warrant and about whether those acts are covered by any of the 32 offences listed in Article 2(2), then that court must rely on the provisions of Article 2(1) and (4).

107. In summary, it is my view that Article 2(2) of the Framework Decision does not infringe Article 6(2) EU because it is consistent with the principle of equality and the principle of legality in criminal proceedings.

103 — Judgments in *X v. Netherlands* (6 July 1976, Case 7512/76, DR 6, p. 184); *Polley v. Belgium* (6 March 1991, Case 12192/86); and *Bakhtiar v. Switzerland* (18 January 1996, Case 27292/95). The Spanish Constitutional Court has applied the same criterion (judgments 102/1997 (BOE Supplement No 137, 9 June 1997), sixth legal ground, and 32/2003 (BOE Supplement No 55, 5 March 2003), second legal ground).

VI — Conclusion

108. In the light of the foregoing considerations, I propose that the Court reply to the questions referred for a preliminary ruling by the Arbitragehof by declaring:

(1) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States does not infringe Article 34(2)(b) EU;

(2) by abolishing verification of the requirement of double criminality for the offences listed therein, Article 2(2) of the Framework Decision does not contravene the principle of legality in criminal proceedings or the principle of equality, and, accordingly, is compatible with Article 6(2) EU.