VIEW OF ADVOCATE GENERAL KOKOTT of 6 August 2008 [1]

I — Introduction

1. Following an extradition request made by the Spanish authorities on 2 June 2008 under the Convention of 27 September 1996, [2] Mr Ignacio Santesteban Goicoechea [3] has been detained in France for the purpose of extradition. [4]

2. According to the information provided by the referring court, Mr Santesteban Goicoechea is a member of the terrorist organisation Euskadi Ta Askatasuna/Tierra Vasca y Libertad/Basque Land and Freedom (ETA). The offences he is accused of were committed on Spanish territory in February and March 1992. They are described as the storing of weapons, illegal possession of explosives, unlawful use of a motor vehicle belonging to another, the offence of changing car registration plates, and the offence of belonging to a terrorist organisation. [5]

3. The Chambre de l'instruction (Indictment Division) of the Cour d'appel de Montpellier (Court of Appeal, Montpellier) (France), which has to rule on the request for extradition, entertains doubts as to the applicability of the 1996 Convention. It considers that the application by the French Republic of that convention could be contrary to the Framework Decision on the European arrest warrant and the surrender procedures between Member States [6] ('the Framework Decision'). In those circumstances, it decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling on the interpretation of the Framework Decision:

'(1) Does the failure of a Member State (in this case [the Kingdom of] Spain) to notify under Article 31(2) of the

1 — Original language: French.

2 — Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union (OJ 1996 C 313, p. 12), also known as the Dublin Convention ('the 1996 Convention').

3 — Or, according to the observations submitted by him, Inaki Santesteban Goikoetxea.

4 — Before the present extradition request, the Spanish authorities had already attempted on two occasions to lay hands on Mr Santesteban Goicoechea, but without success: a request for extradition made to the French authorities on 11 October 2000 was the subject of an unfavourable opinion of the Cour d'appel de Versailles (France) (judgment of 19 June 2001) on the ground that the offences of which he was accused were statute-barred under French law; a European arrest warrant of 31 March 2004 also failed to bring about Mr Santesteban Goicoechea's extradition to Spain.

5 — It should be noted in passing that Mr Santesteban Goicoechea has just served a term of imprisonment in France for offences other than those for which his extradition is now sought by the Spanish authorities; this appears from the written replies of the French Government to questions put by the Court in the course of the present proceedings.

6 — Council Framework Decision 2002/584/JHA of 13 June 2002 (OJ 2002 L 190, p. 1).

Framework Decision … its intention to continue to apply bilateral or multilateral agreements preclude, by reason of the word "replace" in Article 31 of that Framework Decision, that Member State from using with another Member State (in this case [the French Republic]), which has made a statement under Article 32 of the Framework Decision, procedures other than that of the European arrest warrant?

If the answer to the above question is in the negative:

(2) Do the provisos made by the executing Member State permit that State to apply a Convention of … 1996, which was thus prior to 1 January 2004, but entered into force in that executing State after that date of 1 January 2004 referred to in Article 32 of the Framework Decision?'

4. Since the only reason why Mr Santesteban Goicoechea was currently being detained by the French authorities was the extradition request made by the Spanish authorities, the referring court requested, and the Third Chamber of the Court decided, that the present case should be dealt with under the urgent preliminary ruling procedure (Article 104b of the Rules of Procedure).

II — Admissibility of the reference for a preliminary ruling

5. The admissibility of the reference must be assessed in the light of Article 234 EC and Article 35 EU. Two points principally should be distinguished here: first, whether the referring court is a 'national court or tribunal' as defined in the settled case-law of the Court on references for preliminary rulings; [7] and, second, whether that court is performing judicial functions rather than administrative functions in the present case. [8]

6. As regards the first point, there is no doubt that the indictment division of a French court of appeal hearing a request for extradition may be regarded as a 'national court or tribunal' within the meaning of the Treaty provisions governing the preliminary ruling procedure. According to the information on this point given by the French Government in its written observations, that chamber is a permanent body established by law, it consists of judges whose independence and security of tenure are guaranteed, it acts in accordance with a compulsory inter partes procedure, and it applies rules of law.

7 — See, among many other cases, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, and order in Case C-109/07 *Pilato* [2008] ECR I-3503, paragraph 22.

8 — See Case C-165/03 *Längst* [2005] ECR I-5637, paragraph 25; Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561, paragraph 13; and order in Case 138/80 *Borker* [1980] ECR 1975, paragraph 4.

7. As regards the second point, one might indeed wonder whether the extradition procedure in which the indictment division of the court of appeal is involved is really judicial in nature. The French Conseil d'État has in the past held that this is an administrative function, not a judicial function, as understood in French law. [9] Such an assessment under national law cannot, however, decide the question whether the national court is performing a judicial function as understood in Community law.

8. The French Government rightly points out that there is indeed a dispute which the indictment division of the court of appeal will have to decide in this case. That dispute is between the public prosecutor's office and the person sought by the request for extradition. That the procedure involves a dispute is particularly clear in the present case, since the person concerned has not given his consent to being extradited, but has, on the contrary, challenged the lawfulness of the extradition.

9. It is true that the indictment division of the court of appeal does not decide on its own on extradition, as an administrative authority must subsequently adopt the order for extradition. Nevertheless, the jurisdiction of the indictment division of the court of appeal extends to making an entirely independent assessment, in an inter partes procedure, of the lawfulness of the extradition sought. If its opinion is unfavourable to extradition, it will not be possible for the person sought to be extradited, and he will be automatically released.

10. More generally, it should not be overlooked that the various national extradition procedures, including moreover those introduced in order to implement the Framework Decision, often provide in one way or another for an administrative authority to be involved, [10] as with the procedure applicable in this case in France. Too restrictive an interpretation of the criteria governing the admissibility of references for preliminary rulings might risk blocking access to the Court in such cases, and consequently jeopardising the uniform interpretation of the Framework Decision.

11. Finally, in view of the nature of the Framework Decision, the Court's jurisdiction to answer the questions could be doubted. Under Article 34(2)(b) EU, a framework decision cannot entail direct effect. It follows that the Framework Decision cannot be used to oppose the application of the national rules on extradition. Consequently, one might wonder whether the Court's answer in this case will serve any purpose.

12. However, questions referred for preliminary rulings by national courts enjoy a presumption of relevance which can be

9 — Judgment of the French Conseil d'État of 7 July 1978, *Croissant*.

10 — For German law, see for example the description in the judgment in Case C-66/08 *Kozlowski* [2008] ECR I-6041, paragraphs 14 and 15. In that case, the Court did not cast doubt on the judicial nature of the procedure before the referring German court.

displaced only in exceptional circumstances. That is the case where it is quite obvious that the interpretation of European Union law sought by those questions bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. Except in such cases, the Court is in principle bound to give a ruling on questions relating to the interpretation of the acts referred to in Article 35(1) EU. [11] In fact, the Court's answer, in particular with respect to the interpretation of French law consistently with European Union law, is not obviously irrelevant.

13. For all those reasons, the reference for a preliminary ruling must be declared admissible.

III — Analysis of the questions referred

A — *Preliminary observations*

14. The national court's doubts as to the applicability of the 1996 Convention are essentially based on the following considerations:

— first, the Framework Decision provides that it is to replace the 1996 Convention (see Article 31(1)(d) of the Framework Decision) and the Kingdom of Spain has not notified the Council of the European Union and the Commission of the European Communities that it wishes to continue to apply it (fourth subparagraph of Article 31(2) of the Framework Decision);

— second, the French Republic has stated, pursuant to Article 32 of the Framework Decision, that it will continue to deal with requests relating to acts committed before 1 November 1993 not in accordance with the arrest warrant system but in accordance with the extradition system applicable before 1 January 2004. However, the 1996 Convention has been applicable in France only from 1 July 2005.

15. In those circumstances, there might prove to be a 'lacuna' in the extradition system applicable between the French Republic and the Kingdom of Spain in relation to acts, such as those at issue in the main proceedings, committed before 1 November 1993. The two questions referred for a preliminary ruling seek to clarify whether or not such a lacuna exists.

11 — Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 30.

B — *The first question*

16. By its first question the referring court seeks essentially to know whether Article 31(1) of the Framework Decision prohibits a request for extradition from being dealt with in accordance with the rules laid down by an international convention, where the requesting Member State has not notified its intention to apply that international convention under the fourth subparagraph of Article 31(2) of the Framework Decision, although the executing Member State has for its part excluded the application of the European arrest warrant procedure by a statement under Article 32 of the Framework Decision.

17. It should be emphasised, at the outset, that requests for extradition received as from 1 January 2004 are in principle governed by the European arrest warrant procedure. [12] That is the general rule laid down by the second sentence of Article 32 of the Framework Decision. It follows that a request for extradition such as that made by the Kingdom of Spain on 2 June 2008 should in principle be dealt with under the European arrest warrant procedure. [13]

18. However, that general rule has exceptions, which are set out in Articles 31(2) and (3) and 32 of the Framework Decision. In particular, Member States are free to exclude the application of the European arrest warrant procedure in relation to requests for extradition for acts committed before a date to be specified (third to sixth sentences of Article 32 of the Framework Decision). Thus the French Republic stated that it would continue to deal with requests relating to acts committed before 1 November 1993 in accordance with the system of extradition applicable before 1 January 2004. As the acts of which Mr Santesteban Goicoechea is accused were committed in 1992, the present request for extradition submitted by the Kingdom of Spain will therefore have to be dealt with by the French Republic in accordance with the system applicable before 1 January 2004, not in accordance with the European arrest warrant procedure.

19. It remains to be examined, however, whether the application of that earlier system requires, in addition to the statement of the executing Member State (the French Republic) under Article 32 of the Framework Decision, a notification by the requesting Member State (the Kingdom of Spain) under the fourth subparagraph of Article 31(2) of the Framework Decision.

20. According to the information provided by the referring court, there is no notification by the Kingdom of Spain that it wishes to continue applying pre-existing agreements such as the 1996 Convention, which

12 — The Framework Decision thus applies to requests for extradition relating to acts prior to its entry into force.

13 — It may be noted that a European arrest warrant had been issued against Mr Santesteban Goicoechea in 2004.

it used as the basis for the present extradition request, or indeed the Convention of 13 December 1957. [14]

21. At first sight, it might be deduced from this *absence of notification* by the Kingdom of Spain that the 1996 Convention — as also the 1957 Convention — was replaced by the Framework Decision (see Article 31(1)) and cannot thus be applied in the present case. However, such a result would appear to be inconsistent with the general scheme and objectives of the Framework Decision.

22. To begin with, the system of notifications provided for in Article 31(2) of the Framework Decision is not intended to apply to instruments such as the 1996 Convention. As the Commission pointed out, the multilateral instruments expressly mentioned in Article 31(1), including the 1996 Convention, are already part of the European Union *acquis*, [15] and their existence is well known in the Member States. The French Republic rightly adds that Article 31(2) of the Framework Decision in fact refers only to extradition procedures that are *more ambitious* than the European arrest warrant procedure and are capable of supplementing and improving that procedure, such as for example the extradition system existing between the Nordic cooperation countries. [16]

23. Even if the 1996 Convention could be the subject of a notification under Article 31(2) of the Framework Decision, the absence of such a notification cannot be regarded as an obstacle to the actual application of that convention in the present case. Unlike the *statements* provided for in Article 32 of the Framework Decision, the *notifications* provided for in the fourth and fifth subparagraphs of Article 31(2) of the Framework Decision are not published in the *Official Journal of the European Union* and are not communicated to the other Member States. It may be concluded that those notifications are to be understood as purely declaratory acts which are not a necessary condition precedent for the application of pre-existing or new agreements.

24. Moreover, Article 31 of the Framework Decision must be interpreted in the light of the principal objective of that decision, namely to contribute to the creation of an area of freedom, security and justice, which involves improving and accelerating extradition procedures. [17] The replacement of certain pre-existing agreements provided for in Article 31(1) of the Framework Decision

14 — European Convention on Extradition, signed at Paris, concluded within the framework of the Council of Europe ('the 1957 Convention').

15 — See the fourth recital in the preamble to the Framework Decision.

16 — For that reason, according to the French Government, only the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden have made notifications under Article 31(2) of the Framework Decision.

17 — See, to that effect, the first and fifth recitals in the preamble to the Framework Decision.

is thus also intended to improve and accelerate extradition procedures, and certainly does not have the aim of slowing them down or making them more difficult.[18] It seems inconceivable that Article 31(1) of the Framework Decision should have the effect of a deterioration of the extradition system applicable between two Member States at the time of the entry into force of the Framework Decision.

25. It follows that, in bilateral relations between two Member States, pre-existing agreements such as the 1996 and 1957 Conventions can be regarded as replaced by the Framework Decision only to the extent that the Framework Decision is actually applied between those Member States. For as long as one of those two Member States, in this case the French Republic, does not apply the Framework Decision to certain extradition requests, those requests can be made and dealt with in accordance with the pre-existing agreements, subject to Article 32 of the Framework Decision.

26. For all the above reasons, the first question must be answered in the negative.

C — *The second question*

27. By its second question, the referring court seeks essentially to know whether a Member State which has made a statement under Article 32 of the Framework Decision is allowed to deal with requests for extradition in accordance with a convention which was signed before 1 January 2004 but became applicable in that Member State after that date. It appears from the context of the reference and the observations of the parties that this question targets the 1996 Convention, on which the Kingdom of Spain based its extradition request of 2 June 2008.

28. The 1996 Convention was indeed signed before 1 January 2004, the date referred to in Article 32 of the Framework Decision, but it did not become applicable for the French Republic until 1 July 2005,[19] and then only for requests for extradition received after that date.[20] The question therefore arises of whether the 1996 Convention may be regarded as forming part of 'the extradition system applicable before 1 January 2004' in relations between the Kingdom of Spain and the French Republic.

18 — From the same perspective, the continued application of pre-existing agreements, like the conclusion of new agreements between Member States, is meant to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants (see the first and second subparagraphs of Article 31(2) of the Framework Decision).

19 — The 1996 Convention has not yet been ratified by all the Member States, and has thus not yet formally entered into force (see Article 18(2) of the convention). However, since 1 July 2005, the 1996 Convention has been applicable between the French Republic and the Kingdom of Spain, as those two States have ratified it and made declarations pursuant to Article 18(4) of the convention.

20 — Article 18(5) of the 1996 Convention.

29. At first sight, a negative answer to the question seems to be required, since the 1996 Convention was not applicable in France on 1 January 2004, the date to which Article 32 of the Framework Decision refers. It would thus be the 1957 Convention, not the 1996 Convention, which should be applied in the present case.

30. However, such an answer would not take sufficient account of the general scheme and objectives of the Framework Decision. As explained above, [21] the principal aim of the Framework Decision is to contribute to creating an area of freedom, security and justice, which involves improving and accelerating extradition procedures. [22]

31. In providing for the possibility of derogating from the European arrest warrant procedure, Article 32 of the Framework Decision does not prevent the Member States from developing the extradition procedures applicable between them by gradually improving and accelerating them. The mere fact that a Member State, by means of a statement pursuant to Article 32 of the Framework Decision, removes certain extradition requests from the European arrest warrant procedure does not oblige that State to 'freeze' its domestic law at the state in which it applied to such requests before 1 January 2004. It cannot be maintained that the Member State concerned is limited to choosing between the status quo as at 1 January 2004, on the one hand, and the European arrest warrant procedure, on the other. In view of the purpose of the Framework Decision, nothing prevents a Member State from adapting, little by little, the extradition procedure it applies to old cases covered by its statement under Article 32.

32. On the contrary, a Member State remains entitled to improve gradually its procedural law applicable to extradition requests which it did not wish to subject at the outset to the European arrest warrant system. To that end, it may in particular bring into force an international convention — such as the 1996 Convention — which it had concluded before 1 January 2004 but which had not yet been ratified and made applicable. [23] Such an improvement of the applicable procedures is entirely consistent with the general scheme and objective of the Framework Decision. [24]

21 — See the section on the first question, especially point 24 above.

22 — See to that effect the first and fifth recitals in the preamble to the Framework Decision.

23 — See Article 18 of the 1996 Convention.

24 — Even with respect to extradition requests falling within the scope of the European arrest warrant procedure, Article 31(2) of the Framework Decision allows the Member States to go further and apply bilateral or multilateral agreements — pre-existing or new ones — which help to simplify or facilitate further the procedures for surrender of persons who are the subject of European arrest warrants. A fortiori, such an improvement of the procedure must be possible with respect to requests for extradition which are outside the scope of the European arrest warrant procedure.

33. At the very least, Article 32 of the Framework Decision should be interpreted as not preventing the subsequent improvement of an *extradition system* applicable in the executing Member State before 1 January 2004.

34. It was such a pre-existing extradition system that was improved on 1 July 2005 by the implementation with respect to the French Republic of the 1996 Convention. The objective of the 1996 Convention is to supplement the provisions of the 1957 Convention and facilitate its application (see the first indent of Article 1(1) of the 1996 Convention and the penultimate recital in the preamble to that convention). [25] Similarly, the 1957 Convention already provided, in Article 28, for the contracting parties to be able to conclude bilateral or multilateral agreements between themselves to supplement its provisions or facilitate the application of its principles.

35. The conclusion that the 1996 Convention supplements and improves a pre-existing extradition system within the meaning of Article 32 of the Framework Decision is moreover supported by the Framework Decision itself, which lists that convention as one of the international instruments forming part of the *acquis* of the European Union. [26]

36. For all the above reasons, the second question should be answered in the affirmative.

D — *General principles*

37. In his observations to the Court, Mr Santesteban Goicoechea submits that the application of the 1996 Convention would clash, in the present case, with the general principles of law and with fundamental rights.

38. Under Article 6 EU, the European Union is founded on the rule of law and respects fundamental rights as guaranteed by the European Convention on Human Rights [27] and as they result from the constitutional traditions common to the Member States,

25 — Among the improvements made to the 1957 system by the 1996 Convention, the following may be mentioned in particular: first, extradition may not be refused on the ground that the prosecution or punishment is statute-barred under the law of the requested Member State (Article 8(1) of the 1996 Convention) and, second, no offence may be regarded by the requested Member State as a political offence (Article 5 of the 1996 Convention, 'depoliticisation' of offences). The consequence is that extradition may no longer be refused on the ground that the offence is 'political'.

26 — Fourth recital in the preamble to the Framework Decision.

27 — European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR').

as general principles of Community law. It follows that the Member States are subject to review of the conformity of their acts with the Treaties and the general principles of law when they implement the law of the Union [28] (see also Article 51(1) of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1)).

39. It could therefore be argued that the Member States may not rely on Article 32 of the Framework Decision to apply an extradition system which is not consistent with fundamental rights. [29] It is not essential for the Court to rule on this point in the present proceedings, however. First, the point is not part of the reference for a preliminary ruling. Moreover, the general principles do not appear to have been breached, as will be shown below.

40. The ECHR does not enshrine a right not to be extradited as such, [30] and does not contain provisions on the conditions in which extradition may be ordered or on the procedure to be followed. [31] Moreover, the extradition procedure does not concern the determination of the applicant's civil rights and obligations or of any criminal charge against him within the meaning of Article 6 of the ECHR. [32]

41. It remains to be examined, however, whether general principles of European Union law preclude the French Republic from dealing with the request for extradition made by the Kingdom of Spain in accordance with the 1996 Convention. Mr Santesteban Goicoechea refers in particular to the principle of the legality and non-retroactivity of the more severe criminal law and the principle of legal certainty.

The principle of the legality of penalties

42. As regards the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), it should be recalled that this is one of the general legal principles underlying the constitutional traditions common to the Member States. It has been enshrined in various international

28 — Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 45.

29 — See, to that effect, Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraphs 70 and 71.

30 — EurCtHR, *Soering v. the United Kingdom*, 7 July 1989, § 85, Series A no. 161.

31 — EurCtHR, *Di Giovine v. Portugal* (dec.), no. 39912/98, 31 August 1999.

32 — See EurCtHR, *Mamatkulov and Askarov v. Turkey*, 4 February 2005, nos. 46827/99 and 46951/99, § 82, ECHR 2005-I; *Raf v. Spain* (dec.), 21 November 2000, no. 53652/00, ECHR 2000-XI; *Sardinas Albo v. Italy* (dec.), 8 January 2004, no. 56271/00, ECHR 2004-I; and *Zaratin v. Italy* (dec.), no. 33104/06, 23 November 2006.

treaties, in particular in Article 7(1) of the ECHR, [33] and more recently in Article 49 of the Charter of Fundamental Rights of the European Union.

43. That principle could be called into question by the fact that, despite the wording of Article 32 of the Framework Decision referring to 'the extradition system applicable before 1 January 2004', a Member State wishes to apply rules that became applicable after that date.

44. The principle *nullum crimen, nulla poena sine lege* means that the law must define clearly offences and the penalties which they attract. [34] It is closely linked to the principle of non-retroactivity of offences and penalties (*nullum crimen, nulla poena sine lege praevia*), by virtue of which the legislature cannot retroactively create an offence or a penalty, or make a penalty more severe.

45. However, the principle *nullum crimen, nulla poena sine lege (praevia)* applies only to substantive law, that is, the question whether or not an act can incur penalties. The principle does not apply to the procedural aspects of criminal law. [35] A person may thus have applied to him procedural provisions introduced or amended after the date of the offence he is charged with without the principle *nullum crimen, nulla poena sine lege (praevia)* being breached. That is the case in particular with provisions governing the extradition of persons between States, [36] since they are of a purely procedural nature.

46. It follows that Mr Santesteban Goicoechea cannot validly rely on the principle *nullum crimen, nulla poena sine lege (praevia)* to avoid the 1996 Convention being applied to the present extradition request made by the Kingdom of Spain.

The principle of legal certainty and the principle *non bis in idem*

33 — See *Advocaten voor de Wereld*, cited in footnote 28, paragraph 49 and the case-law cited, and judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission and Council*, paragraph 38.

34 — See *Advocaten voor de Wereld*, cited in footnote 28, paragraph 50, and *Evonik Degussa* v *Commission and Council*, cited in footnote 33, paragraph 39.

35 — See, to that effect, *Pupino*, cited in footnote 11, paragraph 46, read together with paragraphs 44 and 45. See also the order of the Bundesverfassungsgericht (Federal Constitutional Court, Germany) of 26 February 1969, Case 2 BvL 15, 23/68, published in *Neue Juristische Wochenschrift* 1969, p. 1059, 1061, and BVerfGE vol. 25, p. 269, 286 et seq.

36 — EurCommHR, *X v. the Netherlands*, no. 7512/76, Commission decision of 6 July 1976, Decisions and Reports 6, p. 185; *Polley v. Belgium*, no. 12192/86, Commission decision of 6 March 1991; and *Bakhtiar v. Switzerland*, no. 27292/95, Commission decision of 18 January 1996.

47. These two principles are relied on in the present case in so far as Mr Santesteban Goicoechea's position is said to have been 'definitively settled' by the rejection of an earlier extradition request made by the Kingdom of Spain on 11 October 2000.[37] It might therefore be asked whether the present extradition request, made on 2 June 2008, conflicts with legal certainty or the *non bis in idem* rule.

48. However, this question will arise in the context of the assessment of the extradition request as such, rather than the preliminary examination concerning the rules applicable to such an assessment. The subject of the present reference for a preliminary ruling is solely the question of which extradition system applies in this case. Nevertheless, the national court is required to verify and ensure that fundamental rights, including legal certainty and the *non bis in idem* rule, are respected in its assessment of the request. The Court can give some indications in this respect.

49. As regards the principle of legal certainty, an integral part of which is the rule of *res judicata*, it is settled case-law that this is one of the general principles of law applied by the Court.[38] However, *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question.[39]

50. Here the earlier decision admittedly related to an extradition request relating to the same person and the same facts as the present one. However, the competent court did not rule on that request under the 1996 Convention, since that convention did not apply at the time. The status of *res judicata* of an unfavourable opinion given at that time cannot therefore prevent the present extradition request, relating to the same person and the same facts, from being dealt with under a new legal basis, namely the 1996 Convention.[40]

51. It should be remembered that the rejection of the extradition request of 11 October 2000 was based on the fact that, in French law, the offences with which Mr Santesteban

37 — It should be recalled that that extradition request was the subject of an unfavourable opinion of the Cour d'appel de Versailles (judgment of 19 June 2001) because the offences with which he was charged were statute-barred under French law.

38 — Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 37.

39 — Case C-462/05 *Commission* v *Portugal* [2008] ECR I-4183, paragraph 23.

40 — See also the judgments of the French Cour de cassation, criminal division, of 15 February 2006, no 05-86.095 (*Zurutuza Sarasola*); 12 May 1987, Bull. Crim. 1987, no 194 (*Dario Fantig*); and 9 July 1987, Bull. Crim. 1987, no 229 (*Imaz-Martiarena*).

Goicoechea was charged were statute-barred. Precisely on this point the law has changed, as the 1996 Convention no longer allows the executing Member State to rely on the fact that an offence is statute-barred under its own national law. [41]

52. As regards the principle *non bis in idem*, enshrined in Article 4 of Protocol No 7 to the ECHR and Article 50 of the Charter of Fundamental Rights of the European Union, this is a fundamental principle of Community law the observance of which is guaranteed by the judicature. [42]

53. The application of the principle *non bis in idem* is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be punished (or tried [43]) more than once for a single unlawful course of conduct in order to protect the same legal asset. [44]

54. It is clear that, according to the information before the Court, Mr Santesteban Goicoechea has not been prosecuted several times for the same offence and it is not the intention of the competent authorities to punish him several times for the same offence. [45] The Spanish authorities have merely made several attempts to obtain his extradition from the French Republic, all in the context of the same criminal proceedings.

55. Extradition as such is not a penalty, and the mere fact of extraditing a person does not in any way prejudge the question whether, in law, the requesting State will be able to impose a penalty on the person concerned and enforce that penalty.

56. Consequently, the principle *non bis in idem* does not apply to extradition proceedings themselves. It cannot therefore preclude a new request for the extradition of Mr Santesteban Goicoechea from being made by the Kingdom of Spain and dealt with by the French Republic.

41 — Article 8(1) of the 1996 Convention.

42 — Case C-308/04 P *SGL Carbon* v *Commission* [2006] ECR I-5977, paragraph 26 and the case-law cited.

43 — Article 50 of the Charter of Fundamental Rights of the European Union.

44 — Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 338.

45 — Unlike the position in Case C-467/04 *Gasparini and Others* [2006] ECR I-9199.

IV — Conclusion

57. In the light of the above considerations, the following answer should be given to the questions referred by the Cour d'appel de Montpellier for a preliminary ruling:

(1) Where the executing Member State has excluded the application of the European arrest warrant procedure by a statement under Article 32 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Article 31 of that framework decision does not preclude a request for extradition from being dealt with in accordance with the rules laid down by an international convention, even if the requesting Member State has not notified its intention to apply that international convention under the fourth subparagraph of Article 31(2) of the framework decision.

(2) A Member State which has made a statement under Article 32 of Framework Decision 2002/584 in order to exclude, for certain extradition requests, the application of the European arrest warrant procedure may deal with those requests as the executing Member State in accordance with an international convention which was signed before 1 January 2004 to supplement a pre-existing extradition system, even if that convention became applicable in that Member State after 1 January 2004.