OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 20 October 2005 [1]

I — Introduction

1. The Schengen *acquis* comprises:

(a) the Agreement concluded on 14 June 1985, in the Luxembourg town from which it takes its name, by the three Member States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; [2]

(b) the Convention implementing that Agreement which the same contracting parties entered into on 19 June 1990 (hereinafter 'the Convention'); [3]

(c) the protocols and instruments of accession of other Member States, the declarations and acts adopted by the Executive Committee created by the Convention, and the declarations adopted by the authorities on which the Executive Committee confers decision-making powers. [4]

2. The Protocol (No 2) annexed to the Treaty on European Union and the Treaty establishing the European Community (hereinafter 'the Protocol') integrates that body of law into the framework of the Union and, pursuant to the first subparagraph of Article 2(1) of the Protocol, makes it applicable in

1 — Original language: Spanish.
2 — OJ 2000 L 239, p. 13.
3 — OJ 2000 L 239, p. 19.
4 — OJ 2000 L 239, p. 63 et seq.

the 13 Member States referred to in Article 1, including, *inter alia*, the Kingdom of Belgium, [5] from the date of entry into force of the Treaty of Amsterdam (1 May 1999).

3. Under Article 6 of the Protocol, the Republic of Iceland and the Kingdom of Norway are required to implement and develop the *acquis*, which has been in force in those countries since 25 March 2001. [6]

4. The reference for a preliminary ruling from the Hof van Cassatie (Court of Cassation), Belgium, provides the Court of Justice with an opportunity to interpret, for the third time, [7] Article 54 of the Convention, which lays down the *ne bis in idem* principle, and also to analyse the application of that principle *ratione temporis* and define the concept of *idem*.

II — The legal framework

A — *European Union law*

5. The preamble to the Protocol states the Schengen *acquis* is aimed at enhancing European integration and, in particular, at enabling the European Union to develop more rapidly into an area of freedom, security and justice.

5 — The others are the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden. The United Kingdom and Ireland have not acceded fully to this joint project, opting instead for partial participation (Council Decisions 2000/365/EC of 29 May 2000 (OJ 2000 L 131, p. 43) and 2002/192/EC of 28 February 2002 (OJ 2002 L 64, p. 20) deal respectively with the requests of those two Member States to take part in some of the provisions of the *acquis*). Denmark has special status which means that it is entitled not to apply decisions taken in the sphere of the *acquis*. That raft of provisions is applicable in the 10 new Member States from their entry into the European Union, although many of the provisions require action on the part of the Council (Article 3 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, and the adjustments to the Treaties on which the European Union is founded).

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

7 — On the first two occasions, the Court examined the manner in which the *ius puniendi* is exercised in the Member States, declaring that the *ne bis in idem* rule also applies where further prosecution is barred once the accused has fulfilled certain obligations agreed with the Public Prosecutor (Joined Cases C-187/01 and C-385/01 *Gözutök and Brügge* [2003] ECR I-1345, in which I delivered an Opinion on 19 September 2002), but that the rule is not applicable where a case is declared to be closed on the ground that the Public Prosecutor has decided not to pursue the prosecution because proceedings have been started against the accused in another Member State for the same acts (Case C-469/03 *Miraglia* [2005] ECR I-2009).

6. Pursuant to the second subparagraph of Article 2(1) of the Protocol, on 20 May 1999 the Council adopted Decisions 1999/435/EC and 1999/436/EC concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis*. [8]

7. Under Article 2 and Annex A of Decision 1999/436, the basis for Articles 54 to 58 of the Convention is Articles 34 EU and 31 EU, which are contained in Title VI headed 'Provisions on police and judicial cooperation in criminal matters'.

8. Those articles of the Convention form Chapter 3, which is entitled 'Application of the *ne bis in idem* principle' and comes under Title III: 'Police and security'.

9. Article 54 provides:

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

10. Article 71, contained in Chapter 6 ('Narcotic Drugs') of Title III, is based on Article 30 EU, in addition to Articles 34 EU and 31 EU. In accordance with the first two paragraphs of Article 71:

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

2. The Contracting Parties undertake to prevent and punish by administrative and penal measures the illegal export of narcotic drugs and psychotropic substances, including cannabis, as well as the sale, supply and handing over of such products and sub-

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

stances, without prejudice to the relevant provisions of Articles 74, 75 and 76.[9]

...'

B — *The United Nations conventions*

11. Article 36 of the Single Convention on Narcotic Drugs, signed in New York on 30 March 1961, provides that:

'1. Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a) (i) Each of the offences enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

...

3. The provisions of this article shall be subject to the provisions of the criminal law of the Party concerned on questions of jurisdiction.

4. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.'

9 — These provisions refer to legal trade and essential controls.

12. The wording of Article 22 of the Convention on Psychotropic Substances, concluded in 1971, is virtually identical to that of Article 36 of the 1961 convention.

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

13. On 2 October 2000, Mr Van Esbroeck, a Belgian citizen, was sentenced by the Bergens Tingrett (Court of First Instance, Bergen) (Norway) to five years' imprisonment for illegally importing narcotic drugs, an offence which he committed on 1 June 1999.

14. After serving half his sentence and being released conditionally, Mr Van Esbroeck returned to his own country where, on 27 November 2002, a prosecution was opened in which he was charged with exporting, on 31 May 1999, the same substances which he had imported into Norway one day later. The Correctionele Rechtbank van Antwerpen (Criminal Court, Antwerp), Belgium, sentenced Mr Van Esbroeck to one year's imprisonment by judgment of 19 March 2003, which the Hof van Beroep te Antwerpen (Court of Appeal, Antwerp) upheld on appeal by judgment of 9 January 2004.

15. The defendant lodged an appeal on a point of law and pleaded infringement of the *ne bis in idem* principle enshrined in Article 54 of the Convention.

16. Prior to handing down its decision, the Hof van Cassatie submitted the following questions to the Court:

'1. Must Article 54 of the [CISA] be construed as meaning that it may apply in proceedings before a Belgian court with regard to a person against whom a prosecution is brought in Belgium after 25 March 2001 before a criminal court in respect of the same acts for which that person was convicted by judgment of a Norwegian criminal court of 2 October 2000, and where the sentence imposed has already been served, in a situation where, pursuant to Article 2(1) of [the Agreement], Article 54 of the [CISA] is to be implemented and applied by Norway only as from 25 March 2001?

If the reply to Question 1 is in the affirmative:

2. Must Article 54 of the [CISA], read with Article 71 thereof, be construed as meaning that offences of possession for the purposes of export and import in respect of the same

narcotic drugs and psychotropic substances of any kind, including cannabis, and which are prosecuted as exports and imports respectively in different countries which have signed the [CISA], or where the Schengen *acquis* is implemented and applied, are deemed to be "the same acts" for the purposes of Article 54?'

IV — The procedure before the Court of Justice

17. Written observations were submitted in these proceedings by Mr Van Esbroeck, the Commission, and the Netherlands, Czech, Austrian, Polish and Slovak Governments. At the hearing, held on 22 September 2005, oral argument was presented by the representatives of Mr Van Esbroeck, the Commission, and the Netherlands and Czech Governments.

V — Analysis of the questions referred

A — *The nature and basis of the* ne bis in idem *principle*

18. In the Opinion in *Gözütok and Brügge* (point 48 et seq.), I stated that Article 54 of the Convention is a genuine expression of the principle which, in respect of the same unlawful conduct, prevents a person from being subject to more than one penalising procedure and, possibly, being punished repeatedly, in so far as that involves the unacceptable repetition of the exercise of the *jus puniendi*.

19. I went on to state that the principle rests on two pillars found in every legal system: legal certainty and equity. The offender must know that, by paying the penalty, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings.

20. Furthermore, it should not be forgotten that every penalty has a dual purpose: to punish and to deter. It is designed to punish misconduct and to discourage the perpetrators, as well as other possible offenders, from legally culpable behaviour. It therefore has to be proportionate to those purposes, keeping an appropriate balance to provide retribution for the conduct which is being penalised and, at the same time, serve as an example. The principle of equity, of which the proportionality rule is a tool, thus prevents multiple penalties.

21. The *ne bis in idem* principle therefore has two main bases. First, it is an expression of the legal protection of individuals vis-à-vis the *ius puniendi,* derived from the right to due process and a fair trial, [10] and as such it has the status of a constitutional provision in a number of the States that are parties to the Schengen Agreement. [11] Second, it is a structural requirement of the legal system and its lawfulness is founded on respect for *res judicata.* [12]

22. That duality must guide the reply to the questions from the Hof van Cassatie, but regard must also be had to the aim of Article 54 of the Convention.

B — *The aim of the* ne bis in idem *principle in the Schengen framework*

23. Article 54 of the Convention, [13] which confers international validity on the *ne bis in idem* principle, contains a rule designed to assist European integration by creating a common area of freedom, security and justice.

24. The gradual abolition of border checks is a necessary step towards that common area, although the removal of administrative obstacles is favourable to everyone, including those who take advantage of the reduction in security to expand their unlawful activities.

25. That is why, particularly with regard to policing and security, it is essential to increase cooperation between the Member States, which thus become protagonists in the fight against crime throughout the whole of European society by collaborating with one another to maintain order. However, that increased emphasis on the prosecution

10 — It could also be argued that the *ne bis in idem* principle protects the dignity of the individual vis-à-vis inhuman and degrading treatment, since that is a fitting description of the practice of repeatedly punishing the same offence.

11 — The *ne bis in idem* principle, as a safeguard for the individual, is enshrined in international agreements, such as the International Covenant on Civil and Political Rights of 19 December 1966 (Article 14(7)), and Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 4). However, those provisions deal with the principle in a domestic context, by guaranteeing its application within the jurisdiction of a State. The United Nations Human Rights Committee maintained that Article 14(7) of the International Covenant does not apply to decisions having the force of *res judicata* adopted in other States (UN Human Rights Committee, 2 November 1987).

12 — Attention was drawn to those points by Vervaele, J.A.E., 'El principio *ne bis in idem* en Europa. El Tribunal de Justicia y los derechos fundamentales en el espacio judicial europeo', *Revista General de Derecho Europeo,* No 5, October 2004 (www.iustel.com).

13 — Its precedent is contained in the Brussels Convention of 25 May 1987 on the application of the *ne bis in idem* principle, which, despite its limited success, had the distinction of inspiring Articles 54 to 58 of the Convention, as was noted by Blanco Cordero, I., 'El principio *ne bis in idem* en la Unión Europea', *Diario La Ley,* No 6285, 30 June 2005.

of offences must be achieved without erosion of the inalienable safeguards which exist in a democratic society based on the rule of law.

26. The attainment of that objective is assisted by Article 54 of the Convention, which, in accordance with the judgments in *Gözütok and Brügge* and *Miraglia*, ensures the free movement of persons within the Union (paragraphs 38 and 32 respectively), an aim enshrined in Article 2 EU, first paragraph, fourth indent.

C — *The temporal scope of Article 54 of the Convention (the first question referred for a preliminary ruling)*

27. The Schengen *acquis* has been applicable in Belgium since 1 May 1999 and in Norway since 25 March 2001. The acts which Mr Van Esbroeck was accused of took place on 31 May and 1 June 1999. On 2 October 2000, Mr Van Esbroeck was found guilty in Norway of the offence of illegally importing prohibited substances, while, on 19 March 2003, he was found guilty in Belgium of unlawfully exporting the same substances.

28. In the light of that chronology, the referring court asks whether the prohibition of double prosecution, laid down in Article 54 of the Convention, which was not in force in Norway when the first judgment was handed down, is capable of precluding the subsequent imposition of a penalty in Belgium.

29. It must be noted that the Schengen *acquis* contains no provision dealing specifically with the entry into force of Article 54 of the Convention or with its effects in time.

30. With the exception of the Slovak Government, all those who have participated in these proceedings agree that the solution to the question of interpretation submitted by the referring court is derived entirely from the essential nature and the foundations of the *ne bis in idem* principle.

31. The principle, classed as a fundamental individual right designed to ensure that no one who has committed an offence and served their sentence is prosecuted and punished again, takes full effect when those conditions are met, which is when, like the other side of the same coin, the obligation of the State to refrain completely from all punitive measures arises. The fact that a final judgment has already been delivered acts as a trigger for the principle to come into play.

32. The Belgian legal authorities prosecuted and sentenced Mr Van Esbroeck notwithstanding that he had already been convicted by judgment of a foreign court and even

though Article 54 of the Convention was applicable in both States. That being the case, I propose that the Court advise the Hof van Cassatie that Article 54 of the Convention does apply to a situation such as the one in the main proceedings.

34. The same solution results from an interpretation of Article 54 of the Convention in its procedural context, since, unless there is express provision to the contrary, rules of that kind govern proceedings commenced after their entry into force, and the main proceedings were opened in Belgium after Article 54 entered into force in that country and in Norway.

33. In the Opinion in *Gözütok and Brügge*, I argued (point 114) that the *ne bis in idem* principle is not a procedural rule but a fundamental safeguard for citizens in legal systems which, like those of the partners in the European Union, are based on the acknowledgment that the individual has a series of rights and freedoms in respect of the acts of public bodies. [14] In that connection, even if, for the purposes of the *ne bis in idem* principle, the legal framework of the second prosecution were deemed to be that which applied when the first took place, or, indeed, that which was applicable when the offence was committed, the current legal framework would have to be applied retroactively since it is the most favourable to the accused, pursuant to a basic principle of criminal law policy recognised in the legal systems concerned.

D — *The definition of* idem *(the second question referred for a preliminary ruling)*

1. Preliminary observations

35. The referring court asks for an explanation of the scope of the term 'the same facts' contained in Article 54 of the Convention.

36. The task of ascertaining whether the acts on account of which a prosecution is opened are the same as those which were at issue in a previous prosecution is at the very heart of the role of administering justice and it is one for which only the court having direct knowledge of the situation to be the subject of its assessment is qualified, without prejudice to the right of review at second instance.

14 — Queralt Jiménez, A., *La incidencia en la jurisprudencia constitucional de la autoridad interpretativa de las sentencias del Tribunal Europeo de Derechos Humanos. Especial referencia al caso español* (doctoral thesis in preparation), states that an analysis of Judgment No 2/2003 of 16 January of the Spanish Constitutional Court (*Boletín Oficial del Estado* No 219, 2003) reveals that there are two aspects to the *ne bis in idem* principle: the substantive aspect which relates to the prohibition on punishing a person more than once for the same act, irrespective of whether the punishment is imposed in the same penal system and in a single set of proceedings, and the procedural aspect which precludes another trial in respect of an offence which has already been finally disposed of, either by a conviction or an acquittal, thereby protecting the force of *res judicata* in judgments. The writer also includes, as an autonomous right, the prohibition of double prosecution, which comes within the framework of the right to a fair trial but has an indirect bearing on the *ne bis in idem* principle.

37. The Court of Justice must, therefore, resist the temptation to usurp the role of that court. The role of the Court is restricted to furnishing interpretative criteria which, having regard to the basis and the aim of the provision concerned, indicate the most suitable approach in the interests of ensuring uniform treatment throughout the whole territory of the European Union.

38. At this stage of the analysis, I must admit that a hasty reading of the second question submitted by the Hof van Cassatie led me to embark on the task of defining the limits of the indeterminate legal concept of 'the same acts'. My intention was to extract, in the context of Community law, a number of autonomous guidelines on the basis of which to put forward a general criterion to apply to cases which may arise in the future.

39. To carry out such a task is not merely presumptuous; it is also impossible. That is because the contingent nature of criminal law policies and the characteristics of criminal proceedings are not conducive to the creation of universally valid rules. Therefore, an approach which may be helpful with regard to certain types of offence or certain types of participation is liable to be inappropriate for others. [15]

40. It appears more sensible to adopt an intermediate approach and, rather than concentrating too closely on the facts of the main proceedings, to assess the particular circumstances of the case with a view to assisting the national court by furnishing rules designed to resolve the dispute in accordance with the spirit of the provision whose interpretation is sought in these proceedings.

2. The purely factual aspect of the concept

41. That eclectic approach underlies the question referred by the Hof van Cassatie in that it seeks to ascertain whether, for the purposes of Article 54, the illegal trafficking of narcotic drugs and psychotropic substances between two countries that are signatories to the Convention constitutes 'the same acts' or whether, conversely, each State is entitled to punish the trafficking as a separate offence.

42. The importance of that question is obvious, not simply because of its legal complexity but also because the type of offence concerned entails the frequent repe-

15 — Dannecker, G., 'La garantía del principio *ne bis in idem* en Europa', *Dogmática y ley penal. Libro homenaje a Enrique Bacigalupo*, Volume 1, Madrid, 2004, pp. 157 to 176, draws attention to the ways in which the principle must be adjusted when it is applied to acts relating to cooperation between criminal groups or certain continuous offences, such as the possession of illegal weapons (p. 168).

tition of the same conduct. Legal writers predicted such difficulties [16] and reality has borne out that prediction. [17]

43. Therefore, it is necessary to define the concept comprised in the second element of the *ne bis in idem* principle. To that end, the concept must be examined from three angles: (1) by assessing the acts to the exclusion of all other considerations; (2) by focusing on the legal classification of the acts; and (3) by having regard to the interests protected by the classification of the offence.

44. A linguistic approach will suffice in relation to the first angle of assessment. There is no room for uncertainty in the Spanish version of the Convention, which contains the words 'por los mismos hechos'; nor do the German, French, English, Italian and Dutch versions ('wegen derselben Tat', 'pour les mêmes faits', 'for the same acts', 'per i medesimi fatti' and 'wegens dezelfde feiten', respectively) give rise to any doubts, since they all refer to the notion of *idem factum*, that is, to all the acts which are being prosecuted, as a historical phenomenon which the court must assess and apply the consequences appropriate in law.

45. That approach is borne out by reference to the basis and the meaning of that basic safeguard afforded to individuals: freedom of movement within the Schengen area requires that the perpetrator of an act knows that once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another State on the basis that the legal system of that State treats the conduct concerned as a distinct offence. If the latter approach were upheld, the objective of Article 2 EU, first paragraph, fourth indent, would be deprived of effect and that would lead to the creation in the Schengen area of as many obstacles as there are penal systems. Furthermore, notwithstanding the harmonising aim of the framework decisions approved by the Council, those penal systems have strong national traits.

46. The criterion relating to legally protected interests must also be dismissed for the same reasons, because it is so closely linked to the legitimate options available under the criminal law policies of the

16 — Vervaele, J.A.E., op. cit., pointed out that following the judgment in *Gözütok and Brügge*, crucial questions remained to be answered, such as the definition of *idem*. Van den Wyngaert, C. and Stessens, G., 'The international *non bis in idem* principle: resolving some of the unanswered questions', *International and Comparative Law Quarterly*, Vol. 48, October 1999, p. 789, consider whether an individual who illegally traffics drugs between two countries commits two offences, one involving export and the other involving import. Dannecker, G., op. cit., pp. 167 and 168, uses the same example.

17 — In Case C-493/03 *Hiebeler*, the Cour d'appel (Court of Appeal), Bordeaux, asked whether for the purposes of the *ne bis in idem* principle, the cross-border transport of a consignment of narcotic drugs amounts to different acts which are punishable in both the Member States concerned. The Court did not deliver a ruling because the proceedings were discontinued by an order of 30 March 2004 on the grounds that the subject-matter of the main proceedings no longer existed. The Rechtbank (District Court), 's-Hertogenbosch (Case C-150/05 *Van Straaten*) and the Hof van Beroep, Antwerp (Case C-272/05 *Bouwens*) referred similar questions to the Court, also in relation to the illegal international trade in drugs. Both those references for a preliminary ruling are currently before the Court.

Member States that it would enable the same conduct to be punished on more than one occasion, thereby frustrating the aim of Article 54 of the Convention.

47. If, instead of the acts alone, account were taken of the offences or of the rights protected by the prohibition of the said acts, the *ne bis in idem* principle would never function at international level. [18]

48. That situation probably explains why, unlike the International Covenant on Civil and Political Rights, which prohibits double punishment for the same 'offence' (Article 14 (7)), and Protocol No 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms which, for the same purpose, also refers to 'offence' (Article 4) [19] (both the former documents refer to the principle at national level), other agreements (which refer to the international aspect of the principle) adopt a purely fact-based approach. [20] The Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the *ne bis in idem* principle [21] adopted a similar criterion and defined *idem* as 'a second criminal offence arising solely from the same, or substantially the same, facts, irrespective of its legal character' (Article 1(e)).

49. In connection with this case, it must also be noted that, on 10 December 1998, the Belgian Minister for the Interior and the Belgian Minister for Justice published a circular [22] which states that Article 54 of the Convention does not require identical

18 — That is the view of Dannecker, G., op. cit., p. 175.

19 — The case-law of the European Court of Human Rights is contradictory in that regard. In the judgment of 23 October 1995, Gradinger v Austria (Case 33/1994/480/562; Series A, No 328-C), the European Court of Human Rights upheld the concept of the same act, irrespective of its legal classification, whereas, in the judgment of 30 July 1998, Oliveira v Switzerland (Case 84/1997/868/1080, Reports of Judgments and Decisions 1998-V), the Court of Human Rights took the other approach. The judgment of 29 May 2001 (Case 37950/97; Series A, No 312), Franz Fischer v Austria, appeared to reconcile those two precedents, taking as its basis the facts. However, the judgment of 2 July 2002, Göktan v France (Case 33402/96, Reports of Judgments and Decisions 2002-V), relied again on the legal definition of *idem*.

20 — The Statutes of the International Tribunals for the Former Yugoslavia and Rwanda refer to 'acts constituting serious violations of international humanitarian law' (Articles 10(1) and 9(1) respectively). The Convention on the protection of the European Communities' financial interests (OJ 1995 C 316, p. 49) and the Convention 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) use the words 'in respect of the same facts' (Articles 7(1) and 10(1) respectively). However, the Charter of fundamental rights of the European Union (OJ 2000 C 364, p. 1) adopts the criterion of the same criminal offence ('No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law' — Article 50), which is also used in the Treaty establishing a constitution for Europe (Article II-110) (OJ 2004 C 310, p. 1).

21 — OJ 2003 C 100, p. 24.

22 — 'Circulaire interministérielle sur l'incidence de la convention de Schengen en matière de contrôle frontalier et de coopération policière et judiciaire,' *Moniteur belge*, No 20, 29 January 1999, p. 2714).

legal classifications but only identical facts. [23] No Belgian court has followed that guideline. [24]

3. The particular facts of the main proceedings

50. The foregoing considerations are borne out by the result of applying them to the facts of the case before the Court.

51. There is no question that, from a material point of view, the act on account of which Mr Van Esbroeck was punished in Norway is the same as the act in respect of which he was prosecuted and convicted in Belgium, in other words the illegal trafficking from one country to the other of a quantity of drugs between 31 May and 1 June 1999. That conduct has a different legal classification in each State: export of the said illicit substances in Belgium and import of those substances in Norway. If the *idem* is deemed to be exclusively factual, Mr Van Esbroeck would be protected by Article 54 of the Convention, whereas, if the concept is afforded a legal aspect, double punishment would be possible.

52. I believe that the latter approach must be rejected on three grounds. First, it results in a restrictive solution which is incompatible with the broad impact inherent in the basic safeguards which protect the dignity of the individual. Second, it is in direct conflict with the declared objective of Article 54 of the Convention, which is to ensure freedom of movement for persons, by leaving the sword of Damocles of further punishment hanging over those who have served their sentence if they leave the boundaries of the legal system in which that sentence was served. Finally, it is ludicrous to refer to import and export in a territory governed by a legal system which, in essence, is designed to remove borders for both persons and goods. [25]

23 — The conclusions of the Ninth International Congress on Criminal Law, adopted in the Hague on 29 August 1964, proposed a move towards the purely factual definition of *idem* (the text of the conclusions may be consulted in *Zeitschrift für Strafrechtswissenschaften*, 1965, pp. 184 to 193, in particular pp. 189 and 190). The highest courts of the Netherlands and France have upheld that approach (judgment of the Hoge Raad (Supreme Court) of 13 December 1994 (*Ars Aequi* 1995, p. 720) and judgment of the Cour de Cassation (Court of Cassation) of 13 December 1983 (*Bulletin* No 340)), cited by Weyembergh, A., 'Le principe *ne bis in idem:* pierre d'achoppement de l'espace pénal européen?', *Cahiers de droit européen*, 204, Nos 3 and 4, p. 349).

24 — The Tribunal correctionnel, Eupen, in a judgment of 3 April 1995 (published in *Revue de droit pénal et de criminologie*, November 1996, p. 1159), argued that, even where participation by an individual in trafficking between Belgium and France could be broken down into two offences pursuant to Article 36 of the Single Convention on Narcotic Drugs done at New York on 30 March 1961, a prosecution brought before the Belgian courts on account of the offence committed in that country could not be admitted because the conduct concerned amounted to a single criminal act the perpetrator of which had already been tried in Germany. Brammertz, S., 'Trafic de stupefiants et valeur internationale des jugements répressifs à la lumière de Schengen', *Revue de droit pénal et de criminologie*, November 1996, pp. 1063 to 1081, describes how, prior to the entry into force of the Schengen arrangements, Belgian case-law conflicted with the *ne bis in idem* principle.

25 — In the view of Brammertz, S., op. cit., pp. 1077 and 1078, since the entry into force of the Schengen *acquis* it is not appropriate to argue that the illicit trade in drugs between two Member countries amounts to distinct acts capable of double punishment, since the free movement of persons and goods entails a climate of confidence which must have a bearing on the analysis and assessment of a cross-border offence. 'Why regard trafficking between Eupen and Liège as a single criminal offence and divide trafficking between Eupen and Aix-la-Chapelle into two distinct acts on the basis of a border which is not physically represented on the ground?'

4. Article 71 of the Convention

53. Under this provision, the signatory States undertake to adopt all necessary measures to prevent the illicit trafficking in drugs in accordance with the United Nations conventions, in particular the Convention on narcotic drugs and the Convention on psychotropic substances which require that certain offences must be considered as a distinct offence if committed in different countries (Articles 36 and 22 respectively).

54. On the surface, the provisions cited contradict the arguments put forward earlier in this Opinion, but a careful analysis of their subject-matter reveals that, far from calling into question those arguments, the provisions concerned actually support them.

55. Article 71 seeks to ensure that, within the Schengen framework, the Member States do not relax their efforts in the battle against illicit drugs and, to that end, it reasserts the link with the United Nations sectoral conventions. Article 71 is general in scope and therefore it does not constitute a specific restriction on Article 54.

56. On that premiss, the aforementioned United Nations Conventions must be examined in their historical and legislative contexts, since the requirement in Articles 22 and 36 thereof that the contracting parties must adopt measures to punish the conduct involved in the illegal trade in drugs is not unconditional but is subject to the limitations laid down in the legal systems of the Contracting parties. Article 54 of the Convention forms part of the domestic law of the States which have ratified it, from which it follows that those provisions are not capable of restricting its effectiveness.

57. Nor must it be forgotten that the United Nations conventions were conceived to combat on a global scale the illicit trafficking of drugs, narcotic drugs and psychotropic substances, in the absence of a strong response to the problem in all countries. It is that vision which endows Articles 22 and 36 with their true meaning, and the result is that where offences are perpetrated in a number of Contracting States they may be prosecuted and punished in any of those States so that, even if some countries fail in their duty, the perpetrators do not go unpunished. That approach has no sense in the Schengen area which, as I stated in the Opinion in *Gözütok and Brügge* (point 124) and as the Court confirmed in its judgment (paragraph 33), is founded on the mutual trust of the Member States in their criminal justice systems. [26]

26 — The Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (OJ 2001 C 12, p. 10) refers to the *ne bis in idem* principle as one of the measures which is appropriate in that regard (p. 12). The Communication from the Commission to the Council and the European Parliament on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States (COM(2005) 195 final, p. 4) adopts a similar approach.

58. In short, the articles in question are designed to prevent the substantive decriminalisation of misconduct while at the same time ensuring that, once such misconduct has been punished, further punishment is impossible in legal systems which, like the Schengen *acquis*, recognise the *ne bis in idem* principle. Accordingly, there is no conflict between the two bodies of law.

59. Therefore, under Article 54, in conjunction with Article 71, of the Convention, the trafficking of the same narcotic drugs and psychotropic substances of whatever type, including cannabis, between two States which are signatories to the Convention or in which the Schengen *acquis* is implemented and applied, constitutes 'the same acts' for the purposes of the former provision, irrespective of the legal classification of that conduct in the legal systems of the States concerned.

VI — Conclusion

60. In the light of the foregoing considerations, I propose that the Court state in reply to the questions referred by the Hof van Cassatie van België that:

(1) Article 54 of the Convention implementing the Schengen Agreement applies *ratione temporis* when a prosecution is commenced after the entry into force of the said Convention on account of acts in respect of which a person's trial has already been finally disposed of. The date on which the first trial took place is immaterial.

(2) Under Article 54, in conjunction with Article 71, of the Convention, the trafficking of the same narcotic drugs and psychotropic substances of whatever type, including cannabis, between two States which are signatories to the Convention, or in which the Schengen *acquis* is implemented and applied, constitutes 'the same acts', irrespective of the legal classification of that conduct in the legal systems of the States concerned.