OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 26 October 2006 [1]

1. By orders of 7 June 2004 made in Case T-333/02 *Gestoras Pro Amnistía and Others* v *Council* (not published in the ECR) and Case T-338/02 *Segi and Others* v *Council* [2004] ECR II-1647 ('the contested orders'), the Court of First Instance dismissed the actions brought by the organisations Gestoras Pro Amnistía and Segi and their respective spokespersons against the Council of the European Union for compensation for damage allegedly suffered as a result of the inclusion of Gestoras Pro Amnistía and Segi on the list of persons, groups and entities to which Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to terrorism applies. [2]

2. The Court is seised of two appeals against the aforesaid orders lodged by the same parties as brought the actions at first instance (Gestoras Pro Amnistía and Messrs J.M. Olano Olano and J. Zelarain Errasti in Case C-354/04 P, and Segi and Messrs A. Zubimendi Izaga and A. Galarraga in Case C-355/04 P).

I — Facts

3. The factual background to the disputes, which is described in broadly similar terms in the contested orders, can be set out as follows.

4. According to the allegations made by the applicants in Case T-333/02, Gestoras Pro Amnistía is an organisation based in Hernani (Spain) whose purpose is to defend human rights in the Basque territory, in particular those of political prisoners and exiles, and whose spokespersons are Messrs Olano Olano and Zelarain Errasti.

5. According to the allegations made by the applicants in Case T-338/02, Segi is an

1 — Original language: Italian.

2 — OJ 2001 L 344, p. 93.

organisation established in Bayonne (France) and Donostia (Spain), which has the aim of supporting the claims of Basque youth and defending Basque identity, culture and language, and whose spokespersons are Messrs Zubimendi Izaga and Galarraga.

6. On 28 September 2001 the Security Council of the United Nations ('the Security Council') adopted Resolution 1373 (2001), in which it decided, in particular, that all States are to afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

7. By orders of 2 and 19 November 2001, the central investigating judge No 5 at the Audiencia Nacional (National High Court), Madrid (Spain), ordered the arrest of the presumed leaders of Gestoras Pro Amnistía, including its two spokespersons, and declared the activities of Gestoras Pro Amnistía to be illegal on the ground that it was an integral part of the Basque separatist organisation ETA. Gestoras Pro Amnistía challenged the second of these orders.

8. On 27 December 2001 the Council of the European Union ('the Council'), considering that it was necessary to adopt further measures in addition to those previously taken in order to implement the aforesaid Security Council resolution, adopted Common Position 2001/931 on the basis of Articles 15 EU and 34 EU, which had been inserted into Title V ('Provisions on a common foreign and security policy') and Title VI ('Provisions on police and judicial cooperation in criminal matters') respectively of the EU Treaty.

9. Articles 1 and 4 of Common Position 2001/931 provide as follows:

'*Article 1*

1. This Common Position applies in accordance with the provisions of the following articles to persons, groups and entities involved in terrorist acts and listed in the Annex.

...

4. The list in the Annex shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups

and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds. Persons, groups and entities identified by the Security Council of the United Nations as being related to terrorism and against whom it has ordered sanctions may be included in the list.

...

6. The names of persons and entities on the list in the Annex shall be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping them on the list.'

'*Article 4*

Member States shall, through police and judicial cooperation in criminal matters within the framework of Title VI of the Treaty on European Union, afford each other the widest possible assistance in preventing and combating terrorist acts. To that end they shall, with respect to enquiries and proceedings conducted by their authorities in respect of any of the persons, groups and entities listed in the Annex, fully exploit, upon request, their existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States.'

10. Point 2 of the Annex to Common Position 2001/931 lists, under 'groups and entities':

'* — Euskadi Ta Askatasuna/Tierra Vasca y Libertad/Basque Fatherland and Liberty (ETA)

(The following organisations are part of the terrorist group ETA: K.a.s., Xaki; Ekin, Jarrai-Haika-Segi, Gestoras Pro Amnistía.)'.

11. The footnote to the Annex states that '[p]ersons marked with an * shall be the subject of Article 4 only'.

12. The Council declaration annexed to the minutes on the adoption of Common Position 2001/931 ('the Council declaration

concerning the right to compensation') states:

'The Council recalls regarding Article 1(6) of Common Position [2001/931] that in the event of any error in respect of the persons, groups or entities referred to, the injured party shall have the right to seek judicial redress.' [3]

13. By orders of 5 February and 11 March 2002, the central investigating judge No 5 at the Audiencia Nacional, Madrid, declared Segi's activities illegal on the ground that it was an integral part of the Basque separatist organisation ETA and ordered the arrest of certain of Segi's presumed leaders.

14. By a decision of 23 May 2002, [4] the European Court of Human Rights dismissed as inadmissible the actions brought by the appellants against the 15 States that were then members of the European Union with regard to Common Position 2001/931 on the ground that the situation complained of did not entitle them to be regarded as victims of an infringement of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 ('the ECHR').

15. On 2 May and 17 June 2002 the Council adopted, under Articles 15 EU and 34 EU, Common Positions 2002/340/CFSP [5] and 2002/462/CFSP [6] updating Common Position 2001/931. The annexes to those two common positions contain the updated list of persons, groups and entities to which Common Position 2001/931 applies, and in which the names of Gestoras Pro Amnistía and Segi still appear, worded in the same way as in the list annexed to Common Position 2001/931.

16. It should be added that Gestoras Pro Amnistía and Segi applied to the Council for access to the documents on which it had based its decision to include them in the list annexed to Common Position 2001/931. The Secretary-General of the Council sent Gestoras Pro Amnistía and Segi a series of documents relating to that common position. As they considered that the documents in question did not relate to them specifically and personally, the two associations made a further request to the Council, which that institution rejected by letter of 21 May 2002, stating that the information needed to

3 — Unofficial translation of the French text placed in the file.

4 — Not published, but available on the site www.echr.coe.int.

5 — OJ 2002 L 116, p. 75.

6 — OJ 2002 L 160, p. 32.

prepare the list annexed to the common position had been returned to the national delegations concerned after they had been examined and the resulting decisions taken.

17. In addition, the appellants in Case C-355/04 P alleged, in the course of the proceedings, that, by a judgment of 20 June 2005, the Fourth Criminal Division of the Audiencia Nacional, Madrid, before which the action relating to Segi was pending, had exonerated that association from the accusation that it was a terrorist group and part of ETA. The Kingdom of Spain has not contested the existence of that decision but has indicated that it had not become final and that an appeal had been made to the Tribunal Supremo (Supreme Court) by the Ministry of Finance (public prosecutor) and by the Association of Victims of Terrorism.

II — The proceedings before the Court of First Instance and the contested orders

18. By applications lodged at the Registry of the Court of First Instance on 31 October 2002 (Case T-333/02) and 13 November 2002 (Case T-338/02), the appellants brought two separate actions for damages against the Council.

19. The appellants claimed that the Court of First Instance should:

— order the Council to pay an amount of EUR 1 000 000 to each association and an amount of EUR 100 000 to each of their spokespersons by way of compensation for the damage allegedly suffered as a result of the inclusion of respectively Gestoras Pro Amnistía and Segi on the list of persons, groups and entities mentioned in Article 1 of Common Position 2001/931, as updated by Common Positions 2002/340 and 2002/462;

— declare that the said sums shall bear default interest at the rate of 4.5% per annum from the date of the Court's judgment until payment is made;

— order the Council to pay the costs.

20. By documents lodged at the Registry of the Court of First Instance on 12 February 2003, the Council raised in both cases an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance. In addition to claiming, in particular, that Gestoras Pro Amnistía and Segi did not have the capacity to bring legal proceedings, that the natural persons among the applicants who had used

the organisations' names had no power to represent them, that the appointment of the lawyer on behalf of the two organisations was consequently invalid and that Mr Zelarain Errasti had not granted the lawyer a mandate, the Council objected that the Court of First Instance had no jurisdiction, first because Article 235 EC and the second paragraph of Article 288 EC were not applicable to the case in point and secondly because it was impossible for the Court of First Instance to rule on the legality of Common Position 2001/931.

21. In their observations with regard to that objection, the appellants asked the Court of First Instance to declare the applications admissible and, in the alternative, if the Court considered that it lacked jurisdiction to hear the action for damages, to declare in any case that the Council, by adopting the said common positions, had contravened the general principles of Community law stemming from the constitutional traditions common to the Member States and, in particular, from Articles 1, 6(1) and 13 of the ECHR.

22. By orders of 5 June 2003, the President of the Second Chamber of the Court of First Instance granted leave to the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland to intervene in the two cases in support of the forms of order sought by the Council.

23. In the contested orders, which were adopted pursuant to Article 111 of its Rules of Procedure, the Court of First Instance dismissed the appellants' actions without opening the oral procedure.

24. The Court of First Instance first ruled that it patently lacked jurisdiction to hear the applications in that their purpose was to obtain compensation for damage allegedly caused by the inclusion of Gestoras Pro Amnistía and Segi in the list of persons, groups and entities mentioned in Article 1 of Common Position 2001/931, as updated by Common Positions 2002/340 and 2002/462.

25. Secondly, the Court of First Instance held that it was none the less competent, under Article 235 EC and the second paragraph of Article 288 EC, to rule on the applicants' actions for damages to the extent that they were based on the claimed infringement of the powers of the European Community by the Council as a result of the adoption of the said common positions. After having examined the actions as to their substance within the aforementioned limits, the Court of First Instance dismissed them as patently unfounded.

26. Thirdly, the Court of First Instance also dismissed the appellants' alternative claim on the ground of its own patent lack of jurisdiction, noting that '[i]n proceedings before the Community judicature, there is

no remedy whereby the Court can adopt a position by means of a general declaration on a matter which exceeds the scope of the main proceedings'.[7]

27. Finally, considering that there were exceptional circumstances within the meaning of Article 87(3) of its Rules of Procedure, the Court of First Instance divided the legal costs among the main parties.

III — The proceedings before the Court of Justice and the forms of order sought

28. By applications lodged at the Registry of the Court of Justice on 17 August 2004, registered under numbers C-354/04 P and C-355/04 P and drawn up in almost identical terms, the appellants appealed against the said orders.

29. In both cases, the appellants claim that the Court should:

— set aside the contested order;

— give a final ruling on the dispute and grant the forms of order sought by the appellants before the Court of First Instance;

— order the Council to pay the costs.

30. In both cases, the Council claims that the Court should:

— dismiss the appeal as patently inadmissible;

— in the alternative, dismiss the appeal as unfounded;

— if necessary, refer the case back to the Court of First Instance;

— order the appellants to pay the costs.

31. In both cases, the Kingdom of Spain seeks the same forms of order as the Council.

7 — Paragraph 48 of the contested orders.

IV — Analysis

A — *The admissibility of the appeals*

32. In their pleadings, both the Council and the Kingdom of Spain contend that the appeals are inadmissible in that they merely reproduce, almost literally, the pleas in law and arguments already put forward at first instance.

33. Under Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure, an appeal against a judgment of the Court of First Instance must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal. [8]

34. It is true, as the Council and the Kingdom of Spain observe, that the requirements resulting from those provisions are not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the judgment of the Court of First Instance, simply repeats the pleas in law and arguments already put forward before that Court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake. [9]

35. Nevertheless, where the abovementioned requirements are met, an appeal against a judgment of the Court of First Instance can be based on arguments which have already been presented at first instance in order to show that, by dismissing the pleas in law and arguments presented to it by the appellant, the Court of First Instance infringed Community law. [10]

36. In the present case, it appears to me that in the actions before the Court the disputed elements of the contested orders are identified with sufficient clarity. As is evident, in particular, from paragraph 32 of the appeals, the appellants challenge the finding of the Court of First Instance in paragraph 40 of the contested orders that it lacked jurisdiction to rule on the actions for compensation for damage allegedly caused by the inclusion of Gestoras Pro Amnistía and Segi in the list of

8 — See, inter alia, Case C-82/98 P *Kögler* v *Court of Justice* [2000] ECR I-3855, paragraph 21.

9 — See, inter alia, 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, paragraphs 47 and 51.

10 — *Kögler* v *Court of Justice*, paragraph 23.

persons, groups and entities to whom Common Position 2001/931 applies ('the list of persons involved in terrorist acts') on the ground that it is vitiated by an error in law.

37. Furthermore, where the appeals identify Article 6(2) EU, the Council declaration concerning the right to compensation and the eighth 'recital' of Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP [11] as the legal basis for the jurisdiction of the Community court [12] to hear the appellants' actions for damages, which allegedly the Court of First Instance wrongly disregarded, they also contain a statement of the pleas in law to support the applications to set aside the contested orders.

38. The mere fact that the appeals contain long passages from the documents produced by the appellants before the Court of First Instance does not therefore render the appeals inadmissible.

11 — OJ 2003 L 16, p. 68.

12 — In the text, I use the expression 'Community court' (and occasionally also 'Court of Justice') to mean the Court of Justice and the Court of First Instance, even though the present cases relate to their involvement outside the ambit of the first pillar of the European Union, constituted by the Communities.

39. I therefore propose that the Court dismiss the objection of inadmissibility of the appeals raised by the Council and the Kingdom of Spain.

B — *The substance of the appeals*

1. Preliminary considerations

40. It is true that the appellants' pleas and arguments are badly presented in the appeal submissions, being arranged in three sections entitled 'Jurisdiction of the Community court' (paragraphs 33 to 44), 'The existence of damage' (paragraphs 45 to 49) and 'The exploitation by the Council of the European Union of the division of the activities of the European Union into three pillars' (paragraphs 50 to 59). [13]

41. It is clear that the appellants' remarks in paragraphs 45 to 49 aimed at proving the alleged damage and the causal link between that and Common Position 2001/931 do not challenge any assessment by the Court of First Instance, which did not rule on those aspects. Hence, these remarks do not con-

13 — Unofficial translation of the appeal documents.

stitute a ground of appeal and can, at most, be of relevance in the event that the Court sets aside the contested orders and decides to give a final ruling on the disputes under the first paragraph of Article 61 of its Statute, as requested by the appellants.

42. By contrast, it is rather unclear what objective the appellants aim to achieve, on the procedural level, by means of the remarks made in paragraphs 50 to 59 of their appeals, which are rather confused and, it is true, slavishly reproduce an entire section of the observations presented to the Court of First Instance on the objection of inadmissibility raised by the Council.

43. In those remarks, the appellants complain of misuse of procedure by the Council. They appear, in the final analysis, to reproach the Council for having fraudulently deprived them of judicial protection by not using a Community instrument to adopt the list of persons involved in terrorist acts, including persons to whom only Article 4 of Common Position 2001/931 applies. According to the appellants, the use of a Community instrument would have permitted such persons, including the appellants themselves, to bring an action before the Community court to challenge their inclusion on the list and obtain compensation. In this regard, the appellants claim unlawful discrimination against themselves, given that persons affected by the measures laid down in Articles 2 and 3 of the aforementioned common position, [14] who are included in the same list, do have judicial protection in that those measures are adopted by means of a Community action open to review by the Community court. However, in their defences the appellants manage to contradict that argument, maintaining that Articles 2 and 3 of Common Position 2001/931 were also applicable to themselves.

44. Considerations of this kind raise arguments which the Court of First Instance, *on the basis of the claimed assumption that it had jurisdiction under Articles 235 EC and the second paragraph of Article 288 EC*, considered and dismissed, within the scope of the limited examination of the substance of the actions for compensation at first instance, concluding with a finding that the claims were patently unfounded on the ground that there was no unlawful conduct on the part of the Council. [15] However, the appeals and defences contain no passage that makes it possible to hold that the appellants have challenged the parts of the orders of the Court of First Instance relating to that finding. As I have already noted in point 36 above, the appeals appear to turn solely on the declaration of lack of jurisdiction in paragraph 40 of the contested orders. Moreover, the conclusion that the appellants appear to draw from these considerations is

14 — These provide for the freezing and prohibition on the making available of funds and other financial assets or economic resources.

15 — Paragraphs 41 to 47 of the contested orders.

that 'the present dispute therefore comes within the jurisdiction of the Community courts pursuant to Article 235 EC and the second paragraph of Article 288 EC'. [16] This is precisely what the Court of First Instance stated in paragraph 42 of the contested orders.

45. I therefore consider that the considerations in paragraphs 50 to 59 of the appeals, complemented by those contained in paragraphs 12 to 16 of the statements of defence, should be considered to be inadmissible, first because they fail to meet the minimum requirements of clarity and precision and secondly because they do not identify precisely the contested elements of the orders against which the appeals have been brought.

46. In any case, even supposing that such considerations can legitimately be interpreted as being designed to substantiate a further ground of appeal against the declaration of lack of jurisdiction in paragraph 40 of the contested orders, a ground consisting in the presumed impossibility for the Council to rely on the lack of jurisdiction of the Community court with respect to the appellants, it would nevertheless appear to me to be unfounded.

47. It is quite obvious that, contrary to what is maintained in the statements of defence, the appellants were affected by only Articles 1 and 4 of Common Position 2001/931, and not also by Articles 2 and 3. The contrary argument adduced in the statements of defence, according to which the footnote to the Annex to Common Position 2001/931 referred only to the natural persons on the list and not also to the groups and entities named there, is very strange, given that in the list there was also an asterisk against the names of Gestoras Pro Amnistía and Segi and that the term 'persons' is sufficiently general to cover groups and entities as well.

48. As the Court of First Instance correctly found in the contested orders, [17] the mutual assistance between the Member States to prevent and combat terrorist acts, provided for in Article 4 of the aforementioned common position, falls within the scope of police and judicial cooperation in criminal matters under Title VI of the EU Treaty. The appellants have not in any way shown, either at first instance or before the Court of Justice, that such mutual assistance should have been ordered or at least implemented by means of Community instruments. [18] Moreover, they cannot seriously reproach the Council for not having made them subject also to the sanctions envisaged in Articles 2 and 3 of the common position. Hence, it has not been demonstrated in any way that the Council committed an abuse of procedure and infringed the competences of the Community in such a way that it might

16 — Paragraph 16 of the statements of defence (unofficial translation). See also paragraph 59 of the appeals.

17 — Paragraph 45 of the contested orders.

18 — See paragraph 46 of the contested orders.

be argued, if only in the abstract, that the lack of jurisdiction of the Community courts cannot be used as an argument against the appellants.

49. I therefore consider that the Court should focus its attention on the ground of appeal set out in paragraphs 33 to 44 of the appeals — relating to the infringement by the Court of First Instance of Article 6(2) EU, of the Council declaration concerning the right to compensation and of the eighth 'recital' of Decision 2003/48 — and on the declaration of lack of jurisdiction to which it refers. Consequently, in the remainder of this Opinion I shall refrain from further consideration of the parts of the orders of the Court of First Instance that are not contested, which are summarised in points 25 and 26 above.

2. The grounds adopted by the Court of First Instance in support of the declaration of its own lack of jurisdiction

50. The reasoning followed by the Court of First Instance to conclude that it had no jurisdiction to hear the appellants' actions for damages [19] consists essentially of the following passages:

(1) The acts that allegedly caused the damage of which the appellants complain — in other words Common Position 2001/931 and the subsequent common positions updating it which kept the names of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts — are, as far as the part relating to the appellants is concerned, based on Article 34 EU and come within the scope of Title VI of the EU Treaty relating to police and judicial cooperation in criminal matters; [20]

(2) No judicial remedy for compensation is available in the context of Title VI of that Treaty and no jurisdiction of the Community court to hear such an action can be deduced from Article 46(d) EU; [21]

(3) The appellants 'probably' have no effective judicial remedy with regard to the inclusion of Gestoras Pro Amnistía and Segi on the list in question; [22]

(4) The last circumstance cannot, however, in itself give rise to Community jurisdiction to hear the appellants' claims

19 — Paragraph 40 of the contested orders.

20 — Paragraphs 32 and 33 of the contested orders.

21 — Paragraphs 34 to 37 of the contested orders.

22 — Paragraph 38 of the contested orders.

for compensation, given that the legal system of the European Union ('the Union') is based on the principle of conferred powers, as follows from Article 5 EU; [23]

(5) The Council declaration concerning the right to compensation is also incapable of forming a basis for the jurisdiction of the Community court in the present case. [24]

3. Analysis

51. According to the appellants, the Court of First Instance erred in law by declaring its lack of jurisdiction to hear actions for compensation for damage allegedly caused to them by the inclusion of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts. In their opinion, a legal basis for the jurisdiction of the Court of First Instance is to be found in Article 6(2) EU, read in conjunction with the Council declaration concerning the right to compensation and the eighth 'recital' of Decision 2003/48.

23 — Ibid.

24 — Paragraph 39 of the contested orders.

52. In that ground of appeal, the appellants do not appear to dispute the assessments of the Court of First Instance set out in (1), (2) and (3) of point 50 above. Their complaints appear to be directed essentially against the assessments of the Court of First Instance recalled in (4) and (5) of that point.

53. However, since the point at issue is the jurisdiction of the Community court, which is a matter of public policy to be examined in the light of all the relevant facts and not only those put forward by the parties, I consider it necessary to review not only the specific complaints brought by the appellants in their appeals but the entire reasoning that led the Court of First Instance to make the contested declaration of lack of jurisdiction, and hence also its assessments recalled in (1), (2) and (3) of point 50 above, which are not disputed by the appellants.

(a) The legal basis of the measures taken with regard to the appellants

54. As can be seen from the fifth 'recital' in its preamble, Common Position 2001/931 is a response to the perceived need to 'take additional measures in order to implement [Security Council] ... Resolution 1373 (2001)', which required all States to take a series of actions to combat terrorism, includ-

ing, in particular, to afford one another the greatest measure of assistance in connection with criminal investigations and other proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

55. In that sense, Common Position 2001/931 can be considered to be an act which, *as far as its objectives are concerned*, comes within the framework of the common foreign and security policy under Title V of the EU Treaty. However, some of the measures for which that act provides — those affecting the appellants Gestoras Pro Amnistía and Segi, which are laid down in Article 4 (that is to say, mutual assistance between Member States to prevent and combat terrorist acts and, in particular, in connection with investigations and criminal proceedings against the persons named on the annexed list) — are *operational instruments* and as such come within the scope of police and judicial cooperation in criminal matters under Title VI of the EU Treaty.

56. The inclusion and maintenance of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts was a means of applying only Article 4 of Common Position 2001/931 to those organisations. I therefore share the assessment of the Court of First Instance, referred to in (1) of point 50 above, that the legal basis of the acts which were allegedly detrimental to the legal position of the appellants is Article 34 EU, inserted into Title VI of the EU Treaty.

57. I also wish to emphasise, however, that, although in accordance with the second sentence of Article 1(4) of Common Position 2001/931 persons, groups and entities identified by the Security Council as being related to terrorism and against whom it has ordered sanctions may be included in the list in question, it is not alleged in the present cases that Gestoras Pro Amnistía and Segi were placed on the list as a consequence of their being identified by the Security Council. It must therefore be held that their inclusion was decided completely autonomously by the Council on the basis of information from one or more Member States in accordance with the criteria specified in the first sentence of Article 1(4) of Common Position 2001/931. More generally, I note that Article 1 of that act does not constitute the transposition of similar provisions in Resolution 1373 (2001), but is the result of an autonomous decision by the Council.

(b) The absence of provision in the EU Treaty for actions for damages and for jurisdiction of the Court of Justice over

police and judicial cooperation in criminal matters

58. I also share the assessments of the Court of First Instance referred to in (2) of point 50 above, but subject to a number of appropriate clarifications.

59. I observe that Article 46 EU lists exhaustively (as shown by the use of the term 'only') the powers of the Court of Justice in the fields of activity of the Union governed by the EU Treaty. As regards the provisions of Title VI of the Treaty, Article 46(b) provides that '[t]he provisions of the [EC] Treaty, the [ECSC] Treaty and the [Euratom] Treaty concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply' 'under the conditions provided for by Article 35 [EU]'.

60. Article 35 EU provides that:

'1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.

2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:

(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or

(b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised

in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

4. Any Member State, whether or not it has made a declaration pursuant to paragraph 2, shall be entitled to submit statements of case or written observations to the Court in cases which arise under paragraph 1.

5. The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

6. The Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.

7. The Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d).'

61. Hence, Article 35 EU does not envisage an action to obtain compensation for damages caused by the activities of the Union in the field of police and judicial cooperation in criminal matters.

62. I nevertheless wish to point out immediately that, in my opinion, although Article 46(b) EU taken in conjunction with Article 35 EU excludes the jurisdiction of the *Community* court for actions for compensation for damage caused by the Union's activities in the field of police and judicial cooperation in criminal matters, it does not for that reason as a general rule preclude the bringing of such judicial actions. The EU Treaty does not mention such actions, but nor does it preclude them. I shall return to this point later.

63. I also share the assessment of the Court of First Instance that Article 46(d) EU does not give the Community court further competence. [25]

64. Indeed, in providing that '[t]he provisions of the [EC] Treaty, the [ECSC] Treaty and the [Euratom] Treaty concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply' to '[Article 6(2) EU] with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty', Article 46(d) EU, which was inserted into the EU Treaty by means of the Treaty of Amsterdam, simply makes it clear that the Community court may verify that the acts of the institutions comply with the fundamental rights recognised by the Union to be 'general principles of Community law' in the contexts in which that court has jurisdiction to intervene *on other grounds*. Hence, that provision does not establish a specific jurisdiction of the Community court or a specific remedy for the infringement of fundamental rights comparable to the *Verfassungsbeschwerde* under German law or the *recurso de amparo* under Spanish law. [26]

65. I also observe, from a different angle, that under Article 46(f) EU the Community court has jurisdiction to interpret and apply Article 46 EU itself on the powers of the Court of Justice. Insofar as it thus has jurisdiction under the EU Treaty, and for the purposes of the exercise of that jurisdiction, the Community court is also authorised to interpret and apply Article 6(2) EU as regards the action of the institutions, in conformity with Article 46(d) EU.

66. I further consider that, in exercising those powers based on Article 46(f) EU, the Community court is not prevented from also taking into account other provisions of the EU Treaty, even though they are not mentioned in Article 46 EU. I note in this regard that, under Article 31(1) of the Vienna Convention on the Law of Treaties signed in Vienna on 23 May 1969 ('the Vienna Convention'), when interpreting a treaty its terms must be considered 'in their context', which comprises, inter alia, the 'text' of the treaty, 'including its preamble and annexes'. Hence, in the context of these appeals and for the purpose of examining the jurisdiction of the Community court for the actions for damages brought by the appellants, there is nothing to prevent the Court of Justice from taking into account, in particular, the preamble to the EU Treaty and the 'Common provisions' in Title I thereof, such as Article 5 EU, which the Court of First Instance cited in the contested orders, or Article 6(1) EU.

25 — Paragraph 37 of the contested orders.

26 — The introduction of a specific action before the Community court into the legal system of the Union to protect fundamental rights had been raised, along with other proposals, at the Intergovernmental Conference to amend the Treaty of Maastricht, but it was not adopted when the Treaty of Amsterdam was approved.

(c) The inappropriateness of the Council declaration concerning the right to compensation as a basis for the jurisdiction of the Community court to hear the appellants' claims for damages

67. Moreover, the assessment of the Court of First Instance recalled in (5) of point 50 above regarding the inappropriateness of the Council declaration concerning the right to compensation as a basis for the jurisdiction of the Community court to hear the appellants' claims for damages seems unquestionably to be correct. [27]

68. First of all, that declaration does not in any way suggest that compensation for damages due to an error as to the persons, groups or entities included in the list of persons involved in terrorist acts may be claimed in an action before the *Community* court.

69. Furthermore, such an action before the Community court is precluded by the provisions of the EU Treaty, which can obviously not be waived or amended by a declaration annexed to the minutes recording approval of an act of secondary legislation such as a common position.

27 — Paragraph 39 of the contested orders.

70. None the less, I shall indicate below the sense in which the declaration relied upon by the appellants is not, in my opinion, entirely without significance.

(d) The supposed lack of effective judicial protection of the appellants' rights

71. However, I consider that the assessment by the Court of First Instance that the appellants had no judicial remedy against the inclusion of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts, which moreover is expressed in curiously perplexed terms, [28] to be unjustified, but in some ways not surprising.

72. Before setting out the reasons that lead me to consider that assessment unjustified, I wish to demonstrate the seriousness of its consequences.

28 — I refer to the use of the adverb 'probably' in the first sentence of paragraph 38 of the contested orders after the emphatic expression 'it must be noted'. ('Concerning the absence of an effective remedy invoked by the applicants, it must be noted that indeed probably no effective judicial remedy is available to them, whether before the Community Courts or national courts, with regard to the inclusion of [Gestoras Pro Amnistía and Segi] on the list of persons, groups or entities involved in terrorist acts.')

(i) The consequences of a finding of a lack of judicial protection of the appellants' rights

73. It must be remembered that, pursuant to Article 6(1) EU, as amended by the Treaty of Amsterdam, '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'.

74. Article 6(2) EU, which enshrines in a rule of primary law a settled principle of the case-law of the Court on the application of the EC Treaty and extends it to all spheres of activity of the Union, states that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

75. The primary importance which the versions of the EU and EC Treaties resulting from the Treaty of Amsterdam give to the principle of the rule of law and the protection of fundamental rights [29] and which is widely and variously celebrated in the literature is also evident in other provisions of those Treaties: Article 7 EU, which provides for a procedure whereby the Council may determine the existence of a serious and persistent breach by a Member State of one or more of the principles mentioned in Article 6(1) EU, with the possibility of suspending certain of the rights deriving from the application of the EU Treaty to the Member State in question; Article 49 EU, which makes the entry of new States to the Union conditional on their respecting the principles set out in Article 6(1) EU; and Article 11(1) EU, which makes the 'develop[ment] and consolidat[ion of] democracy and the rule of law, and respect for human rights and fundamental freedoms' one of the objectives of the common foreign and security policy, an objective to which, under Articles 177(2) EC and 181a(1) EC, the Community policies in the fields of development cooperation and economic, financial and technical cooperation with third countries are required to contribute.

76. Mention should also be made of the Charter of Fundamental Rights of the European Union, which was solemnly proclaimed by the European Parliament, the Council and the Commission in Nice on 7 December 2000 after having been approved by the Heads of State or Government of the Member States ('the Charter'). While the Charter is not a legally binding instrument,

29 — The preamble to the EU Treaty mentions the Member States' 'attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.

its principal aim, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the [EU] Treaty, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights'. [30]

77. As regards the principle of the rule of law, I would point out that the Court has already drawn from that the corollary, with reference to the European Community and in describing it as a 'Community based on the rule of law', that the Member States and the institutions are subject to judicial review of the compatibility of their acts with the EC Treaty and with the general principles of law, which include fundamental rights. [31] Similarly, it must be held that, if the Union is based on the principle of the rule of law (Article 6(1) EU), its institutions and the Member States of which it is composed cannot be exempted from judicial review of the compatibility of their acts with the Treaty, in particular Article 6(2) EU, even where they act on the basis of Titles V and VI of the EU Treaty.

78. As regards the protection of fundamental rights, which form an integral part of the general principles of law, in ensuring observance thereof the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories, in particular the ECHR, which the Court deems to have 'special significance' in that respect. As the Court has further stated, it follows that the Community cannot accept measures which are incompatible with observance of the human rights thus recognised and guaranteed, which therefore constitutes a precondition for the legality of Community acts. [32] Given the wording of Article 6(2) EU and its place among the 'Common provisions' in Title I of the EU Treaty, similar considerations must obviously be made with reference to measures expressing the action of the Union in the fields of the common foreign and security policy (the 'second pillar') and police and judicial cooperation in criminal matters (the 'third pillar').

79. Respect for human rights and fundamental freedoms and the principle of the rule of law are therefore an 'internal' dimension, being a foundation of the Union and a criterion for assessing the legality of the action of its institutions and of the Member

30 — Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 38.

31 — Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23, and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 38.

32 — See, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Opinion 2/94 [1996] ECR I-1759, points 33 and 34; Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14; and Case C-540/03 *Parliament* v *Council*, paragraph 35.

States in the matters for which the Union has jurisdiction, and an 'external' dimension, as a value to be 'exported' beyond the borders of the Union by means of persuasion, incentives and negotiation.

80. The Court has already shown that entitlement to the effective judicial protection of rights invoked in this case by the appellants forms an integral part of the general principles of law deriving from the constitutional traditions common to the Member States and that it is also enshrined in Article 6(1) EU and Article 13 of the ECHR.[33] I would add that the right in question is also recognised by Articles 8 and 10 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations by means of Resolution 217A (III) on 10 December 1948 and by Articles 2(3) and 14(1) of the International Covenant on Civil and Political Rights, which was adopted on 16 December 1966 and came into force on 23 March 1976.[34] The Charter provides for it in Article 47.

81. It should be pointed out that the reliance in this case on the fundamental right to effective judicial protection assumes particular importance, in that such protection in turn affects fundamental rights recognised and protected by Union law. In their actions before the Court of First Instance, the appellants maintained, with arguments that are not indefensible, that the inclusion on the list of persons involved in terrorist acts, of which they complain, harmed the genuine fundamental rights of the organisations Gestoras Pro Amnistía and Segi and/or of their spokespersons, such as, in particular, the presumption of innocence (Article 6(2) of the ECHR and Article 48(1) of the Charter), freedom of expression (Article 10 of the ECHR and Article 11 of the Charter), freedom of association (Article 11 of the ECHR and Article 12 of the Charter) and the right to respect for private life (Article 8 of the ECHR and Article 7 of the Charter).[35]

82. Hence, to acknowledge, as the Court of First Instance felt it had to do in the contested orders, that the appellants are denied an effective judicial remedy against their inclusion means recognising that, in the sphere of police and judicial cooperation in criminal matters, situations may arise in which, where judicial remedy is absent, the action of the Union may in fact infringe with

33 — See, in particular, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case C-424/99 *Commission* v *Austria* [2001] ECR I-9285, paragraph 45; and *Unión de Pequeños Agricultores* v *Council*, paragraph 39.

34 — The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law (see Case C-540/03 *Parliament* v *Council*, paragraph 37, and the case-law cited).

35 — In paragraph 46 of the appeals, the appellants mention the freedom of expression and the right to the image and reputation of Gestoras Pro Amnistía and Segi, and the freedom of expression, freedom of association and right to respect of the private life and reputation of their spokespersons.

impunity all the other rights and fundamental freedoms which the Union professes to respect.

83. Although it is true that, according to the case-law of the European Court of Human Rights, the so-called 'right to a court' is not absolute, but may be subject to limitations, it must be remembered that according to that Court such limitations are permissible only where they pursue a legitimate aim and are proportionate to that aim and do not restrict the individual's access to a court in such a way that the very essence of the right is impaired. [36] I do not consider that those requirements are met where there is a total absence of judicial protection of the appellants' rights, as found by the Court of First Instance, which would be the result not of specific regulations designed to limit access to a court in pursuit of a particular aim but of the failure to establish adequate remedies in an entire sphere of activity of the Union.

84. Moreover, I wish to point out that the European Court of Human Rights has emphasised that Article 1 of the ECHR, under which the Contracting States 'secure to everyone within their jurisdiction the rights and freedoms defined in Section I' of the ECHR, makes no distinction as to the type of rule or measure concerned and does not exclude any part of those States' 'jurisdiction' from the application of the ECHR. [37]

85. If in a case such as that of the appellants there is genuinely no effective judicial remedy, this would not only be an extremely serious and flagrant inconsistency of the system within the Union, but also a situation which, from an external point of view, exposes the Member States of the Union to censure by the European Court of Human Rights and not only impairs the image and identity of the Union on the international plane [38] but also weakens its negotiating position vis-à-vis third countries, creating a theoretical risk that they will activate clauses on the respect of human rights (so-called 'conditionality clauses'), which the Union itself ever more frequently requires to be included in the international agreements it signs. [39]

36 — See *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3124, § 147, and *Waite and Kennedy v. Germany*, judgment of 18 February 1999, *Reports of Judgments and Decisions* 1999-I, p. 393, § 59.

37 — *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, p. 1, § 29, and *Matthews v. the United Kingdom*, judgment of 18 February 1999, *Reports of Judgments and Decisions* 1999-I, p. 251, § 29.

38 — To assert its 'identity on the international scene, in particular through the implementation of a common foreign and security policy', constitutes one of the objectives of the Union under Article 2 EU.

39 — Such clauses, which are deemed 'essential' in the context of the agreements, may authorise the contracting parties to suspend the agreements and even to withdraw from them if they are breached.

86. In particular, from the point of view of observance of the obligations undertaken by the Member States when they signed the ECHR, it is entirely improbable that the European Court of Human Rights would extend to the third pillar of the Union the presumption of equivalence in the protection of the fundamental rights that it has established between the ECHR and Community law, or the 'first pillar' of the Union, and which leads that Court to carry out only a 'marginal' review of the compatibility of acts adopted by the Community institutions with the ECHR. [40] On the other hand, it is highly likely that, in the course of a full examination of the compatibility of acts adopted by the institutions under Title VI of the EU Treaty with the ECHR, the European Court of Human Rights will in future rule that the Member States of the Union have infringed the provisions of that Convention, or at least Articles 6(1) and/or 13.

87. I wish to explore two further points regarding relations with the ECHR.

88. First, I consider that the decision taken by the European Court of Human Rights under Article 34 of the ECHR regarding the actions brought before that Court by the appellants (see point 14 above) neither gives reassurance from the point of view I have just set out nor, and even less, excludes the possibility of a breach of the appellants' right to effective judicial remedy in this case *from the point of view of Union law*. It is a decision not on the merits of the case but on admissibility, based on a denial that, *in the light of the specific nature of the actual case*, the appellants are 'victims' within the meaning of Article 34 of the ECHR, which is a purely procedural provision of the ECHR and hence cannot, in my view, be relevant to the protection of fundamental rights within the Union. [41]

89. Secondly, there would be little point in noting that, since it would in any case be possible to bring an action before the European Court of Human Rights for breach of fundamental rights against acts adopted by the institutions in the field of police and judicial cooperation in criminal matters, there is not a gap in the protection of such rights in that field. The review carried out by that Court is a subsidiary review *outside* the Union system and hence would not make good any lack of adequate guarantees *within* the system to protect fundamental rights or resolve the serious inconsistency that would

40 — See *Bosphorus v. Ireland*, judgment of 30 June 2005, *Reports of Judgments and Decisions* 2005-VI, which, as expressly stated in paragraph 72 of the judgment, concerns only the provisions of the 'first pillar' of the Union.

41 — By contrast, it seems to me that no doubt can be cast on the appellants' interest in bringing an action in the present case.

ensue for the system itself, as I have shown above.

90. I would add, however, that were the Court to endorse the recognition of such a gap in the protection of fundamental rights in the field of police and judicial cooperation in criminal matters, the national courts of various Member States would feel entitled, if actions were brought before them, to verify whether the acts adopted by the Council on the basis of Article 34 EU [42] were compatible with the fundamental rights *guaranteed by their respective national legal systems, but not necessarily in an identical manner.* This would impair the equality of citizens of the Union before the law. The theory of so-called 'counter-checks' under domestic law, which have become established in the constitutional case-law of several Member States as a barrier to the institutions' exercise of the parts of sovereignty transferred to the Community, [43] would find scope for much more concrete application in the third pillar of the Union than it has had in relation to the action of the Community.

42 — Common positions (Article 34(2)(a) EU, framework decisions (Article 34(2)(b) EU), decisions and measures necessary to implement those decisions (Article 34(2)(c) EU) and measures implementing conventions (Article 34(2)(d) EU).

43 — The theory is well enough known not to require explanation here. It is sufficient to cite, in particular, the judgments of the Bundesverfassungsgericht of 22 October 1986, known as Solange II, in BverfGE, 73, 339, and of the Italian Constitutional Court of 21 April 1989 No 232, Fragd, in Foro it., 1990, I, 1855.

(ii) The appellants are not deprived of effective judicial protection of their rights

91. Having emphasised the serious consequences of a finding of a lack of judicial protection of (fundamental) rights invoked by the appellants, such as that made in paragraph 38 of the contested orders, it appears even more obvious that, if possible, the EU Treaty should be interpreted in a way that ensures such protection *within* the system established by that Treaty. [44]

— Inadequacy, for the purposes of providing judicial protection of the appellants' rights, of judicial remedies against national measures implementing Article 4 of Common Position 2001/931 and of the reference for a preliminary ruling on validity under Article 35(1) EU

92. It must be borne in mind, as the Court of First Instance has shown, [45] that in the present case the appellants are claiming compensation for an infringement of their

44 — I would point out that Article 13 of the ECHR shows that the existence of an external review of Contracting States' respect for rights and fundamental freedoms does not exempt those States from making arrangements for an internal review.

45 — Paragraph 38 of the contested orders.

(fundamental) rights that is due not so much to their being subject to the measures laid down in Article 4 of Common Position 2001/931 as directly to the inclusion of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts. The harm of which they complain therefore arises irrespective of whether national measures implementing the abovementioned article are actually adopted.

93. Hence, the Court of First Instance correctly stated that the protection of such rights cannot reside in the possibility of invoking the (non-contractual) liability of individual Member States for national measures enacted pursuant to Article 4 of Common Position 2001/931. [46]

94. The Court of First Instance then held that the Court of Justice's power to give preliminary rulings on validity under Article 35(1) EU was equally inappropriate as a means of ensuring such protection. I share that assessment, even beyond the reason given in the contested orders, namely that that power does not relate to common positions but only to framework decisions and decisions, [47] and beyond the possibility of reclassifying Common Position 2001/931 as a decision on the basis of the content of the act.

95. I note, rather, that a reference for a preliminary ruling, including one regarding validity, is not a remedy in the true sense but a means of cooperation between national courts and the Community court in the context of an action that can be brought before national courts. Typically, a reference for a preliminary ruling on validity is appended to an action for annulment brought at national level against national measures implementing the act whose validity is being challenged. In my view, it is rather difficult in a case such as the present one to invoke the Court's power to give a preliminary ruling on validity under Article 35(1) EU in the context of an action challenging possible measures implementing Article 4 of Common Position 2001/931. That article does not grant Member States and their authorities new powers but merely encourages or, at most, requires Member States and their authorities to use 'existing powers in accordance with acts of the European Union and other international agreements, arrangements and conventions which are binding upon Member States'. Those powers could and can be exercised in respect of the persons listed in the annex to

46 — Ibid.

47 — Ibid.

Common Position 2001/931 even in the absence of that act. [48] Hence, I do not see how the question of the legality of the inclusion of a particular person on the abovementioned list can be relevant for the purposes of an examination, by a national court, of the legality of national measures such as those contemplated in the abovementioned Article 4.

96. In any case, exercise of the power to give a preliminary ruling on validity could, at most, lead to a declaration that Common Position 2001/931 or the contested listings are invalid, but not to compensation for the damage that may have ensued. The possibility of obtaining compensation for damage sustained as a result of infringement of a right, where a simple finding of infringement or a declaration of the invalidity of the detrimental act is not sufficient adequately to restore the infringed right, is, in my opinion, inherent in judicial protection of the right if such protection is intended to be effective. [49]

48 — As the European Court of Human Rights observed in the decision dismissing the appellants' actions as inadmissible. That Court showed that, although 'Article 4 could serve as a legal basis for concrete measures that may concern the applicants, in particular in the context of police cooperation among States within Community bodies such as Europol', it does not 'add new powers that can be exercised in relation to the applicants' but 'contains only an obligation for the Member States to engage in judicial and police cooperation' (unofficial translation of the French text of the decision).

49 — See, to that effect, Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italy* [1991] ECR I-5357, paragraph 33; Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame and Others* [1996] ECR I-1029, paragraph 22; and Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 33. See also European Court of Human Rights. *Klass and Others v, Germany*, judgment of 6 September 1978, Series A No 28, § 64. and *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A No 161, § 120, from which it was deduced that the effective remedy required by Article 13 of the EHCR must permit an individual who considers himself to have been prejudiced by a measure in breach of the ECHR to have his claim decided and, if appropriate, to obtain redress ('réparation' or 'redressement' in the French texts of the judgments).

97. Compensation for damage allegedly sustained is precisely the subject-matter of the action brought by the appellants before the Court of First Instance.

— The judicial protection of the appellants' rights rests with the national courts

98. The fact that the EU Treaty makes no provision for an action for damages possibly caused by acts adopted by the Council on the basis of Article 34 EU and prevents the Community court from hearing such actions, which are not mentioned in Article 35 EU, does not however, in my opinion, mean that the appellants in the present case are without effective judicial protection of the (fundamental) rights that they invoke.

99. I consider instead that a correct interpretation of the EU Treaty testifies to the fact that such protection exists, but is entrusted, *in the present state of Union law*, not to the Community court but to the national courts.

100. It should be noted, however, that under the arrangements provided for in the Treaty establishing a Constitution for Europe, which has not yet been ratified by all Member

States, in a case such as the present one an individual would be able to bring before the Community court an action against the Union either for annulment (Article III-365, which is also applicable to acts of the Union adopted in the field of police and judicial cooperation in criminal matters) [50] or for damages (Article III-370 and the second paragraph of Article III-431).

101. As I have stated, the Union is based, inter alia, on the principle of the rule of law and respect for fundamental rights. The rule of law is based not so much on rules and the proclamation of rights as on mechanisms that make it possible to ensure respect for rules and rights (*ubi ius ibi remedium*). The 'right to challenge a measure before the courts is inherent in the rule of law', [51] it is the 'corollary' to it, and both 'a victory over and an instrument' of it. [52] In Article 6(2) EU, Union law now expressly grants the individual a range of fundamental rights, which, as is clear from Article 46(d) EU, can be relied on before a court as criteria for the legality of acts of the Union.

102. The point of departure must therefore be that, under Article 6(1) and (2) EU, the Union recognises the judicial review of the legality of the action of its institutions and guarantees the judicial protection of rights, especially those that can be classified as fundamental.

103. No provision of the EU Treaty to the contrary can be invoked to claim, in particular, that the authors of that Treaty intended to exclude such review and protection from the field of police and judicial cooperation in criminal matters, where moreover the action of the Union may impair individuals' fundamental rights and freedoms more easily than in other fields within the jurisdiction of the Union and where the involvement of the European Parliament is still very limited. [53]

104. Article 46 EU concerns only the jurisdiction of the *Community* court and defines its scope. Furthermore, no provision of the EU Treaty gives that court exclusive power to assess the legality of the acts by which the Union performs its activities. It follows from the principle of conferred powers — which finds expression, inter alia, in the EU Treaty (Article 5) — that the

50 — Moreover, the Treaty establishing a Constitution for Europe also makes provision for bringing a direct action before the Community court for the annulment of restrictive measures against natural or legal persons adopted by the Council with regard to the common foreign and security policy, despite the limited powers conferred by that Treaty on the Court of Justice in that field (Article III-376).

51 — Opinion of Advocate General Darmon in *Johnston*, point 3.

52 — Opinion of Advocate General Léger in *Köbler*, point 68.

53 — Under Article 39(1) EU, the European Parliament is merely consulted (and its opinion is not binding) before the adoption of framework decisions or decisions and it is not even consulted before the adoption of common positions.

exercise of Member States' sovereign powers, including judicial power, is reserved to the Member States themselves, and hence to their authorities, where such powers have not been conferred on institutions of the Union.

105. The power of national courts to review the legality of acts adopted by the Council pursuant to Article 34 EU, which is obviously limited by respect for the powers conferred on the Court of Justice, is rooted not only in the principles of the rule of law and respect for fundamental rights on which the Union is based (Article 6(1) and (2) EU), including the right to effective judicial protection, but also in the principle of loyal cooperation.

106. The Court has already confirmed that the principle of loyal cooperation is also binding in the area of police and judicial cooperation in criminal matters, meaning that Member States should take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Union law. [54]

107. It must be deduced from this, in particular, that in the context of the third pillar of the Union as well it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection [55] and for their courts to interpret and apply the national procedural rules governing the bringing of actions in such a way as to ensure such protection.

108. Important evidence confirming, albeit indirectly, that acts adopted by the Council under Article 34 EU are subject to judicial review by national courts on the initiative of individuals can also be deduced from the rules on the judicial powers conferred on the Court by Article 35 EU.

109. By providing, in paragraph 1, that the Court has jurisdiction to give preliminary rulings, in particular, on the validity of framework decisions and decisions, Article 35 EU first of all confirms that such acts are not exempt from judicial review that can be initiated by individuals.

110. Moreover, Article 35(1) EU shows that to some extent national courts also operate with respect to the third pillar of the Union,

54 — Case C-105/03 *Pupino* [2005] ECR I-5285, paragraph 42.

55 — See, by analogy, *Unión de Pequeños Agricultores* v *Council*, paragraph 41. The principle was reiterated in Article I-29(1) of the Treaty establishing a Constitution for Europe, under which 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

as with respect to the first pillar, as 'common law courts' of the Union. By asking the Court to clarify the interpretation to be given to framework decisions and decisions, they can better ensure, for example, a conforming interpretation of national law [56] in relation to such acts. By referring questions on the validity of such acts to the Court, national courts can better ensure that the fundamental rights recognised by Union law, which individuals can invoke directly before a court, are respected by the action of the Union in the field of police and judicial cooperation in criminal matters.

111. In the framework of the third pillar of the Union, as in that of the Communities, the Court of Justice operates in a context in which the institutions of the Union coexist not only with the Member States but also with the individual authorities of those States. Among these authorities, the courts also contribute to shaping Union law. Even within the framework of the third pillar, the judicial system of the Union therefore does not consist solely of actions that can be brought before the Court of Justice but also of those that can be brought before national courts.

112. In Article 35 EU, the authors of the Treaty of Amsterdam significantly extended the jurisdiction of the Court of Justice with regard to police and judicial cooperation in criminal matters by comparison with the situation resulting from the Treaty of Maastricht. However, the provisions of that article on the Court's power to give preliminary rulings are designed to limit that power significantly. Moreover, they are modelled essentially on those laid down as between the Member States, after difficult negotiations, for the Europol Convention [57] and implemented in the Protocol on the interpretation of that Convention by the Court by way of preliminary rulings, [58] which are a compromise solution in the face of the hostility of some Member States towards an extension of the Community court's involvement in this area.

113. Hence, the Court's power to give preliminary rulings under Article 35(1) EU is optional for Member States. Under Article 35(2) EU, they can accept it or not ('opt-in' system). On the basis of a notice published by the Council in the *Official Journal of the European Union* on 14 December 2005, [59] at that date only 14 Member States had declared that they accepted such

56 — See *Pupino*, paragraphs 38 and 43.

57 — Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) (OJ 1995 C 316, p. 2).

58 — Council Act of 23 July 1996 drawing up, on the basis of Article K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office (OJ 1996 C 299, p. 1).

59 — OJ 2005 L 327, p. 19.

jurisdiction. Naturally, the lack of acceptance by the other Member States does not prevent the courts of accepting States from referring questions to the Court for preliminary rulings and the Court from ruling on such questions.

114. If it were held that persons affected by measures enacting framework decisions or decisions under Article 34 EU, adopted by States that have not accepted the jurisdiction of the Court to give preliminary rulings, were not able to challenge the validity of such Council acts before the courts of those States, we would be in a situation of intolerable inequality between persons affected by one and the same act under Article 34 EU, who would or would not enjoy judicial protection against that act, depending on the options chosen by the individual State pursuant to Article 35(2) EU.

115. A reading of Article 35(1) and (2) EU that respected not only the right to effective judicial protection but also the principles of equality before the law (see Article 20 of the Charter) and non-discrimination on grounds of nationality (see Article 21(2) of the Charter) without thereby betraying the literal meaning of the provisions in question requires it to be recognised that even in the States that have not accepted the jurisdiction of the Court to give preliminary rulings individuals can mount a legal challenge to the validity of the framework decisions and decisions underlying the national measures which they are asking the national court to annul. In this case, it must be possible for a decision as to the validity or invalidity of the Council act to be taken by the national court itself in the absence of the possibility of a reference for a preliminary ruling.

116. But there is more. It follows from Article 35(3) EU that the power of the Court to give preliminary rulings, including rulings on validity, is, *from the point of view of Union law,* purely optional for the courts of the States that have accepted it. Whether Member States specify, by making the declaration referred to in paragraph 2, that they wish only their courts of last instance to be able to make a reference to the Court for a preliminary ruling (Article 35(3)(a)) or wish to grant that possibility to all of their courts (Article 35(3)(b)), under Article 35(3) EU it remains an option and not an obligation ('may request') for a court, of any level, where it considers it necessary to enable it to give judgment, to seek a decision on the validity or interpretation of a framework decision or decision. The optional nature of the reference even for courts of last instance can be explained partly by the need for speed in the resolution of the disputes that may arise in the matters in question.

117. It is true that on the basis of Declaration 10 on Article 35 EU annexed to the Final Act of the Intergovernmental Conference of Amsterdam Member States may,

when making a declaration pursuant to Article 35(2) EU, reserve the right to make provisions in their national law requiring their courts of last instance to refer questions on validity or interpretation to the Court of Justice. Nevertheless, it remains a fact that such an obligation stems not from Union law but from the domestic law of the Member State.

118. Hence, if, *from the point of view of Union law*, reference for a preliminary ruling on validity is optional even for a court of last instance, and only when it deems it necessary to obtain a ruling on the validity of a framework decision or decision of the Council in order to resolve the dispute before it, it follows that under Union law such an assessment may also be made directly by that court, without prior reference to the Court of Justice.

119. Similarly, in my opinion, it must be held that the possibility for a Member State, on the basis of Article 35(3)(a) EU, to reserve to the courts of last instance alone the power to make a reference for a preliminary ruling means that if the lower courts consider an assessment of the validity of a framework decision or decision of the Council to be necessary they can make it themselves. It does not seem sensible to hold that individuals must work fruitlessly through one or more levels of jurisdiction before being able to raise a question of validity and have it resolved.

120. Naturally, an assessment of validity or invalidity made directly by the national court will have effect only in the domestic case and not *erga omnes*.

121. On the other hand, I see no imperative reason to preclude national courts from having the power to determine that framework decisions or decisions under Article 34 EU are invalid. It is true that, with reference to Article 234 EC, in the *Foto-Frost* judgment [60] the Court established the rule that the national courts have no jurisdiction themselves to declare that acts of Community institutions are invalid. In the context of Article 234 EC that rule (hereinafter also referred to as 'the *Foto-Frost* rule') also applies to lower courts — which under that article have an option and not an obligation to make a reference — but it does not appear to apply in the context of Title VI of the EU Treaty.

122. In this regard, I observe that the two assumptions on which the Court based its interpretation in the *Foto-Frost* judgment regarding the exclusive jurisdiction of the Community court to determine that acts of the Community institutions are invalid do not apply in the context of Title VI of the EU Treaty.

60 — Case 314/85 *Foto-Frost* [1987] ECR 4199.

123. First, it cannot be said — as the Court was able to do with reference to Articles 230 EC and 241 EC on the one hand and Article 234 EC on the other and in relation to measures adopted by Community institutions [61] — that Title VI of the EU Treaty established a *complete system* of legal remedies and procedures *designed to permit the Court of Justice* to review the legality of the Council measures referred to in Article 34 EU. Indeed, it is clear that the *jurisdiction conferred on the Court of Justice* by Article 35 EU *alone* does not constitute a *complete system* of legal remedies and procedures such as to ensure review of the legality of such measures; as proof, one need only consider that a reference for a preliminary ruling on validity is not possible in the Member States that have not made a declaration in accordance with Article 35(2) EU, given the lack of provision for any direct recourse to the Court of Justice by individuals against such acts.

124. In paragraph 35 of the *Pupino* judgment, [62] the Court itself noted, on the other hand, that its jurisdiction 'by virtue of Article 35 EU ... is less extensive under Title VI of the [EU] Treaty than it is under the EC Treaty'.

125. For the sake of completeness, I would add that in paragraph 35 of that judgment the Court simultaneously noted that 'there is no complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI'. That observation must, however, be read against the background of the reasoning that led the Court to make it. The Court was responding to arguments raised before it by a number of Member States that deduced from the lesser degree of integration in police and judicial cooperation in criminal matters than in the action of the Community that it was impossible to accord to a framework decision under Article 34 EU the so-called indirect effects (obligation for national courts to interpret national law in conformity with Community law) that are recognised in the case of Community directives. The Court therefore considered that the circumstances it described in paragraph 35 of that judgment confirmed the lesser degree of integration under Title VI of the EU Treaty than under the EC Treaty, and then nevertheless concluded that the degree of integration had no influence for the purposes of the question on which it had been called upon to rule. [63] In my opinion, the absence of a 'complete system of actions and procedures designed to ensure the legality of the acts of the institutions in the context of Title VI' can constitute a relevant indicator of weak integration in so far as it refers to the *supranational* level.

126. I therefore consider that the passage from the *Pupino* judgment reproduced in the preceding point should not be treated simply

61 — *Foto-Frost*, paragraph 16.

62 — *Pupino*, cited above.

63 — *Pupino*, paragraph 36 ('*[i]rrespective 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, ...'). My italics.

as an *obiter dictum* but should be construed as meaning, in the light of the context in which it appears, that Title VI does not confer *on the Court of Justice* sufficient jurisdiction to ensure a review of the legality of the acts of the institutions. That is precisely what I have observed in point 123 above.

127. Secondly, to invoke the second assumption on which the Court based the *Foto-Frost* rule — namely that the main purpose of the power to give preliminary rulings under Article 234 EC is 'to ensure that Community law is applied uniformly by national courts'[64] — in order to assert that a similar rule also existed in the context under examination would carry little conviction. In fact, the *à la carte* regime of the power to give preliminary rulings under Article 35 EU is patently an inappropriate means of ensuring the uniform application of Union law by national courts.

128. In this regard, I would point out that various Member States of the Union, as is their right under Article 35 EU, have not so far accepted that jurisdiction; as I have noted above, their courts must therefore consider themselves authorised to make their own assessment of both the scope and the validity of framework decisions and decisions under Article 34 EU when necessary to decide cases before them. For that reason alone, the uniform application of Union law in the area under examination is not guaranteed, even leaving aside doubts whether these courts are bound by the preliminary rulings delivered by the Court at the request of the courts in Member States that have accepted that jurisdiction.

129. Moreover, the fact that Article 35 EU allows Member States to preclude references for preliminary rulings by courts other than those of last instance heightens the risk of a lack of uniformity in the application of Union law by national courts under Title VI of the EU Treaty, since some national cases are concluded without reaching the court of last instance.

130. It must therefore be recognised that the uniform application of Union law by national courts in the context of the third pillar of the Union is not currently guaranteed (not even, it should be noted, if a rule such as the *Foto-Frost* rule were recognised in that sphere). The risk of inconsistency in the application of the Council acts referred to in Article 34 EU is certainly a drawback of the judicial system constructed by the Treaty of Amsterdam for that pillar. However, in my opinion, a far more serious problem would

64 — *Foto-Frost*, paragraph 15.

flow from a reading of the provisions of the EU Treaty that sacrificed the judicial protection of rights that is inherent in a Community based on the rule of law, even though assiduously pursuing the objective of the uniform application of Union law in the context of the third pillar.

131. I would add that an interpretation of Article 35 EU consistent with the principle of respect for the fundamental right to such protection means that the Court cannot be granted exclusive jurisdiction to rule that an act adopted by the Council under Article 34 EU is invalid where individuals are not only denied direct access to the Community court but, given the purely optional nature of references for preliminary rulings even by national courts of last instance, are also denied adequate guarantees that the question of validity they have raised will be referred to the Court by that mechanism even in the Member States that have accepted the jurisdiction of the Court to give preliminary rulings.

132. I have made this digression on the model of the Court's power to give preliminary rulings laid down in Article 35 EU to show that the Member States have defined a judicial system for the third pillar of the Union in which the involvement of the Court of Justice, the supranational court, is more limited than under the EC Treaty and in which *as a consequence* wider jurisdiction is left to the national courts. This should come as no surprise, however, given that, partly as a result of the amendments contained in the Treaty of Amsterdam, police and judicial cooperation in criminal matters does not yet have the pronounced supranational features that characterise the action of the Community and remains halfway between pure intergovernmental cooperation and the Community 'integrationist' model. Further evidence of the enhanced role of national courts in the matters of the third pillar is to be found in Declaration 7 on Article 30 EU annexed to the Final Act of the Intergovernmental Conference of Amsterdam, which states that '[a]ction in the field of police cooperation under Article [30 EU], including activities of Europol, shall be subject to appropriate judicial review by the competent national authorities in accordance with rules applicable in each Member State'.

— Nature of the judicial remedy available before national courts

133. I have shown above that in the context of the third pillar of the Union as well it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection and for their courts to interpret and apply the national procedural rules governing the bringing of actions in such a way as to ensure such protection. This means that the judicial protection which individuals must be held to have, under Union law, in national courts in relation to the action of the Union in the context of the

third pillar is not limited to the mere possibility, expressly provided for in Article 35(1) EU, of indirectly challenging the validity of framework decisions and decisions (objection of invalidity in the context of a direct action against national implementing measures). It also includes, in particular, the right to challenge directly the validity of such acts and of common positions mentioned in Article 34(a) EU, where, despite having no direct effects, they are nevertheless likely of themselves, irrespective of national implementing measures, to cause immediate harm to the legal position of individuals; the purpose of such a challenge is to obtain at least compensation for any damage they may have caused.

134. In the latter regard, I consider that recognition of the right to such compensation is prevented neither by the failure to insert a specific provision in the EU Treaty expressly creating that right or the associated liability nor by the absence of a reference in the provisions of that Treaty, in particular in Article 41 EU, to the second paragraph of Article 288 EC. Indeed, the right in question is, as I have already indicated in point 96 above, a component of the right to the *effective* judicial protection of rights, [65] and furthermore it can be deduced — if not from customary international law, as the appellants allege — at least from the general principles common to the legal systems of the Member States, recourse to which must be held to be available in order to close the gaps in Union law due to the absence of written rules.

135. As the Court has already had occasion to note in order to assert the principle of the State's liability for damage caused by breach of its obligations under Community law, the principle of the non-contractual liability of the Community expressly laid down in Article 288 EC 'is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused'. [66] It can therefore be said that the principle of the public authorities' liability for damage caused to individuals as a result of breaches of Union law, in particular infringement of the fundamental rights accorded to them by that law, is inherent in the system of the EU Treaty. [67]

65 — In his Opinion in *Köbler*, point 35, Advocate General Léger pointed out that 'the principle of State liability [for loss or damage caused to individuals by breach of Community law] constitutes the necessary extension of the general principle of effective judicial protection or of the "right to challenge a measure before the courts"'.

66 — *Brasserie du pêcheur and Factortame and Others*, paragraph 29. In the words of Advocate General Léger (see his Opinion in *Köbler*, point 85), 'it is settled case-law that, in order to acknowledge the existence of a general principle of law, the Court does not require that the rule be a feature of all the national legal systems. Similarly, the fact that the scope and the conditions of application of the rule vary from one Member State to another is not material. The Court merely finds that the principle is generally acknowledged and that, beyond the divergences, the domestic laws of the Member States show the existence of common criteria'.

67 — See, by analogy, *Brasserie du pêcheur and Factortame and Others*, paragraphs 29 and 31.

136. The existence of that liability, moreover, was essentially recognised by the Council in the declaration concerning the right to compensation, in which the institution 'recalls' that 'any error' as to persons, groups or entities involved gives the injured party that right.

137. In addition, the principle of the public authorities' liability for damage caused to individuals as a result of breaches of Union law is explicitly specified, in the context of police and judicial cooperation in criminal matters, in some of the provisions of the Europol Convention. On the premiss stated in the preamble to that Convention that, 'in the field of police cooperation, particular attention must be paid to the protection of the rights of individuals, and in particular to the protection of their personal data', Articles 38 and 39(2) of that Convention lay down respectively the principle of non-contractual liability of each Member State for any damage caused to an individual by unauthorised or incorrect data processing by Europol and that of the non-contractual liability of Europol for damage caused through the fault of its organs, of its deputy directors or of its employees in the performance of their duties.

138. It is appropriate to point out that the principle of loyal cooperation dictates that when national courts assess the legality of acts adopted by the Council under Article 34 EU, including an assessment made in an action for damages, they should do so in the light of the relevant provisions and general principles of *Union law*, especially the fundamental rights under Article 6(2) EU, namely those guaranteed by the ECHR and those stemming from the constitutional traditions common to the Member States. Reference by the national court to the constitutional provisions of its own legal system may not be sufficient to guarantee the standard of protection of fundamental rights deriving from Article 6(2) EU, to the extent that, as is repeatedly observed, that standard is not the 'lowest common denominator' of protection afforded to fundamental rights by the constitutional laws of the Member States but rather a high level of protection appropriate to the needs of Union law. Against that background, it will moreover be for national courts to assess any limitation on the exercise of fundamental rights that correspond to objectives of general interest, [68] taking account less of the needs of the State to which they belong than of the needs of the Union as a whole.

139. Application of the standard of protection required by Article 6(2) EU could undoubtedly pose some difficulties to the national court and involve it in clarifying the fundamental rights recognised by the Union, a task hitherto performed mainly by the Community court. Such difficulties should not, however, be exaggerated. National courts can rely for that purpose on the

68 — See, inter alia, Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 18, and Article 52 of the Charter.

provisions of the Charter and on Community case-law, as well as on the provisions of the ECHR and the case-law of the European Court of Human Rights. In order to assess the legality of the Council acts described in Article 34 EU, at least those mentioned in Article 35(1) EU, national courts may naturally seek the assistance of the Court, to the extent that the choices made by the respective States under Article 35(2) and (3) EU allow, by making a reference for a preliminary ruling on validity. In any case, the difficulty in question cannot justify preferring the absence of judicial protection of fundamental rights, which result from Article 6(2) EU, in the context of Title VI of the EU Treaty.

140. Naturally, in the absence of rules of Union law, it is for the internal legal order of each Member State to designate the competent court and lay down the procedural rules for actions for damages intended to safeguard the fundamental rights which the Union grants to individuals against acts adopted by the Council under Article 34 EU.[69] The limits on the procedural autonomy of Member States represented by the principles of equivalence and effectiveness developed by the case-law of the Court on the EC Treaty[70] and likely to be transposed to the third pillar of the Union will apply in this regard.

— Practicability and effectiveness of compensation claims before national courts in relation to specific issues

141. In the contested orders,[71] the Court of First Instance considered that an action to establish the individual liability of each Member State before the national courts on account of their involvement in the adoption of Common Position 2001/931 and subsequent ones updating it was 'of little effect'.

142. I do not agree with that assessment, for which the Court of First Instance gave no reasons.

143. Undoubtedly, a number of questions arise for the purpose of assessing the practicability and effectiveness of a claim for redress for the infringement of the appellants' rights before national courts. I

69 — See, by analogy, *Köbler*, paragraphs 46 and 50.

70 — See, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12, and Case C-13/01 *Safalero* [2003] ECR I-8679, paragraph 49.

71 — Paragraph 38 of the contested orders.

shall briefly list and describe those questions, solely to show that answers can be found and that such protection is therefore not merely a theoretical possibility, since the search for the most adequate answer is not necessary for the purpose of ruling on the present appeals and it will be for the national court seised.

144. First, there arises the question as to the identity of the person potentially liable to make good the alleged damage. In essence, against whom should the appellants bring an action before the national courts to obtain compensation for the damage allegedly caused by the inclusion of Gestoras Pro Amnistía and Segi on the list of persons involved in terrorist acts? Would non-contractual liability fall on the Union as such or, jointly and severally, on the individual Member States, which unanimously adopted Common Position 2001/931 and the subsequent positions updating it? The reply to that question will depend on the answer to the question of the legal personality of the Union, which has been extensively debated in the literature. In that regard, I note that for Europol, as for the European Community, the explicit Treaty provision establishing non-contractual liability is accompanied by the express attribution both of legal personality and, in each of the Member States, of the most extensive legal capacity available to legal persons under national law, including the capacity to be a party to legal proceedings. [72]

145. Secondly, there is the problem of identifying the national legal system competent to hear the hypothetical action for damages. That problem is to some extent linked to that of the capacity to be sued.

146. If non-contractual liability lies with the Union as an international organisation with legal personality, an action could be brought in the courts of the State (and place) where the harmful event occurred or may occur, in accordance with the criterion laid down in Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. [73] I note, moreover, that Article 39 of the Europol Convention makes reference to the relevant provisions of the Brussels Convention of 27 September 1968 (now replaced, as between Member States, by the abovementioned regulation) to determine the national courts competent to deal with disputes involving Europol's liability.

72 — See, for Europol, Article 26(1) and (2) of the Europol Convention and, for the European Community, Articles 281 EC and 282 EC.

73 — OJ 2001 L 12, p. 1.

147. If, however, non-contractual liability rests with the individual Member States, it could be enforced against each State, essentially in the courts of that State, on the basis of the criterion of the jurisdiction of the defendant's domicile laid down in Article 2(1) of Regulation No 44/2001. Alternatively, in accordance with the criterion laid down in Article 5(3) of that regulation, the action could be brought in the courts of the State in which the harmful event occurred or may occur against that State.

148. Note should be taken, however, of the mechanism established by Article 38 of the Europol Convention to engage the liability of the Member States for damage caused as a result of unauthorised or incorrect data processing by Europol. In providing that 'each Member State' is liable for such damage, that article lays down that '[o]nly the Member State in which the event which gave rise to the damage occurred may be the subject of an action for compensation on the part of the injured party, who shall apply to the courts having jurisdiction under the national law of the Member State involved'. It goes on to state that 'a Member State may not plead that another Member State [or Europol] had transmitted inaccurate data in order to avoid its liability ... vis-à-vis an injured party'. Finally, it establishes a right for the State that had to pay compensation to be reimbursed if the conduct which caused the damage is attributable to Europol or to another State.

149. Thirdly, the problem of jurisdictional immunity of States and international organisations could prove a procedural obstacle to the effectiveness of a right to bring an action for compensation in the national court against Council acts adopted under Article 34 EU.

150. If it were held that non-contractual liability rested with Member States individually, the problem might arise only if the appellants intended to enforce the liability of a Member State in the courts of another Member State. It would obviously not arise in the more realistic hypothesis of an action brought against a Member State in its own courts. The States' jurisdictional immunity would therefore not be an absolute impediment to claiming the right to compensation in national courts.

151. On the other hand, if it were held that it was the Union as such, in other words in its capacity as an international organisation with legal personality, that bore liability for damages, besides the fact that the EU Treaty and the protocols annexed thereto do not confer jurisdictional immunity on the Union (just as the EC Treaty and its protocols do

not confer it on the Community [74]), I believe it can be held that where such immunity is accorded to international organisations by the domestic law of the jurisdiction seised or is recognised by the latter as deriving from customary international law, the Council is obliged to waive it under Union law if invoking it would entail a denial of justice. In particular, in a case such as the present one, such immunity for the Union should be ruled out in that it is likely to impair the effectiveness of the principle of non-contractual liability for damage caused by unlawful acts adopted by the Council and is incompatible with the principle of the effective judicial protection of rights.

152. In any event, the Council declaration concerning the right to compensation, which was made when Common Position 2001/931 was adopted, could be interpreted as an at least implied waiving of jurisdictional immunityas regards possible damage resulting from an unlawful inclusion on the list of persons involved in terrorist acts, in that it refers to the right 'to seek legal compensation'.

153. I would also add that the literature has recently documented a trend in international and domestic judicial practices to limit the jurisdictional immunity of international organisations, removing the absolute immunity they had under the more traditional concept. That limitation is often applied not only according to the type of activity of the international organisation giving rise to the dispute (*iure imperii* or *iure gestionis*) but also, in order to ensure respect for the fundamental right of access to the courts, according to whether or not alternative and effective means of resolving disputes are available to the private party, such as procedures established within the organisation itself or recourse to arbitration tribunals approved by the organisation. [75]

154. Fourthly, taking as given the principle of the right to reparation of damage resulting from unlawful acts adopted by the Council under Article 34 EU as a principle inherent in the EU Treaty, there nevertheless arises the problem of identifying the actual conditions for such liability and hence the rules applicable in that regard. It seems to me that essentially the following options are available: (i) the national legislation of the

74 — The jurisdictional immunity of the European Community in the courts of Member States should also be considered to be implicitly excluded by Article 240 EC, under which '[s]ave where jurisdiction is conferred on the Court of Justice by this Treaty, disputes to which the Community is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States'.

75 — I take the liberty of referring in this regard not only directly to the judgments of the European Court of Human Rights in *Waite and Kennedy v. Germany*, cited above, and in *Beer and Regan v. Germany* of 18 February 1999 (not published, but available at the site www.echr.coe.int), but also to the detailed analysis and review of cases in A. Reinisch and U.A. Weber, 'In the Shadow of Waite and Kennedy. The Jurisdictional Immunity of International Organisations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', *International Organisations Law Review*, 2004, 1, p. 59, and to E. Gaillard and I. Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass', *International and Comparative Law Quarterly*, 2002, Vol. 51, p. 1.

jurisdiction seised is applied *in toto*, subject to respect for the principles of equivalence and effectiveness; (ii) where liability can be attributed to a single State, the minimum conditions establishing the right to reparation developed by Community case-law on the liability of Member States for breaches of Community law are applied, and otherwise national law applies, subject to respect for the principles of equivalence and effectiveness;[76] (iii) whether liability rests with the State or the Union, the conditions developed by Community case-law on the non-contractual liability of the Community, such as the general principles common to the laws of the Member States (second paragraph of Article 288 EC), are applied.[77] I note, however, that the Europol Convention provides that where liability for damage resulting from unauthorised or incorrect data processing by Europol rests with the Member State the competent national court should apply its national legislation (Article 38(1)), but it has nothing to say about the rules applicable in the case of Europol's non-contractual liability (Article 39).

155. In the light of the foregoing considerations, I do not believe that the scope for the appellants to obtain compensation in the national courts falls into a judicial void or encounters obstacles that render it purely illusory.

76 — See *Köbler*, paragraphs 57 and 58.

77 — Such a situation would ensure equal treatment of persons injured by one and the same act.

— Conclusion regarding judicial protection in the national courts

156. With regard to the issue examined hitherto, I therefore conclude that, contrary to what the Court of First Instance gave to understand in the contested orders[78] and what is maintained in the appeals, under Union law the appellants enjoy the right to compensation in the national courts for possible infringement of their (fundamental) rights caused by the abovementioned common positions.

157. The erroneous assessment in this regard by the Court of First Instance did not, however, affect the contested declaration of lack of jurisdiction, which is based essentially on the assessments to which I referred in (2) and (4) of point 50 above. In that sense, I do not consider that the conditions are met for setting aside the contested orders on account of that erroneous assessment.

158. Conversely, given that the appellants have an effective judicial remedy in the national courts, the Community court's declaration of lack of jurisdiction to hear their action for non-contractual liability does not entail, as they claim, an infringement of

78 — Paragraph 38 of the contested orders.

their right to such protection. In that sense, these appeals are based on a false premiss and for that reason alone I consider that they should be dismissed.

(e) Effective judicial protection of rights, principle of conferred powers and jurisdiction of the Community court

159. It is therefore solely to cover the possibility that, contrary to my recommendation, the Court does not recognise that the appellants have an effective judicial remedy before the national courts that I shall devote some remarks to the merit of the assessment by the Court of First Instance (see (4 of point 50 above), which the appellants dispute, that the lack of such a remedy could not of itself form the basis for the jurisdiction of the Community court in a legal system, such as that of the Union, based on the principle of conferred powers. [79]

160. The appellants' line of argument hinges essentially on a combination of the following elements: their right to effective judicial protection within the meaning of Article 6(2) EU; the Council declaration concerning the right to compensation; the eighth 'recital' of Decision 2003/48; the duty of Member States, on the basis of Article 30(3) of the Vienna Convention and Article 307(1) EC, to honour the international obligations previously accepted by their accession to the Charter of the United Nations and the ECHR; and lastly the 'general interpretative principle' relating to the 'enlarged jurisdiction' of the Court of Justice.

161. The Council and the Kingdom of Spain maintain that the appellants' arguments are entirely unfounded. The Council also contends that those based on the last two items mentioned in the preceding point are inadmissible in that they were raised by the appellants only in their statements of defence.

162. I have already shown, in point 67 above, that the Council declaration concerning the right to compensation is incapable of affecting the powers of the Court of Justice laid down in the EU Treaty. It is obvious that the same assessment should be made with regard to the eighth 'recital' of Decision 2003/48, which states that '[that] Decision respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union' and none of its provisions 'may be interpreted as allowing infringement of the legal protection afforded under national law to the persons, groups and entities listed in the Annex to Common Position 2001/931/CFSP'.

79 — Ibid.

163. The appellants' argument regarding Article 30(3) of the Vienna Convention and Article 307(1) EC is also irrelevant. This argument, like the one concerning an 'enlarged jurisdiction' of the Court of Justice, can be examined despite the fact that it was raised only in the appellants' statements of defence, since it is simply an argument in support of a ground already put forward in the appeals and the jurisdiction of the Community court is, as I have already pointed out, a public policy issue that the Court may in any event examine of its own motion in the light of each relevant element.

164. Article 30 of the Vienna Convention concerns the rights and obligations of States parties to successive treaties relating to the same subject-matter and is not applicable in the present case because, contrary to the appellants' assertion, it cannot be said that the EU Treaty deals with the same subject-matter as the Charter of the United Nations and the ECHR. Moreover, the third paragraph of the article provides that '[w]hen all the parties to the earlier treaty are parties also to the later treaty ..., the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty'. The appellants lose sight of the fact that it is the EU Treaty that is later than the Charter of the United Nations and the ECHR.

165. As regards Article 307(1) EC, pursuant to which '[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of ... [the EC] Treaty', it is sufficient to note, as does the Council, that it is not applicable in the context of Titles V and VI of the EU Treaty.

166. It therefore remains for me to examine the appellants' reliance on their right to effective judicial protection within the meaning of Article 6(2) EU and the 'general interpretative principle' relating to an 'enlarged jurisdiction' of the Court of Justice that they deduce, in particular, from the judgments in *Les Verts* v *Parliament* and the *'Chernobyl'* case. [80] I shall deal with these two points together. In essence, according to the appellants, in a community based on the rule of law such as the Union the Court of Justice is authorised to close gaps in the treaties to assert its own jurisdiction if that jurisdiction is not expressly and unequivocally limited or excluded in the treaties and is necessary to ensure the judicial protection of individuals' rights.

80 — *Les Verts* v *Parliament*, in which the Court recognised that acts of the Parliament designed to produce legal effects vis-à-vis third parties could be challenged by bringing an action for annulment under Article 173 of the EEC Treaty, and Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, which recognised the right of the Parliament to bring an action for annulment under Article 173 of the EEC Treaty against an act of the Council or of the Commission allegedly breaching its prerogatives.

167. The principle of conferred powers, which finds expression in Articles 5 EC (with regard to the Community), 7 EC (with regard to the Community institutions) and 5 EU (with regard to the institutions forming the single institutional framework of the Union), does not imply a necessarily explicit conferment of powers. Article 308 EC on the implied powers of the Community proves the point. Powers can also be implied and deduced by interpreting the provisions of the treaties, even in a broad sense, subject to respect for the letter and structure of the provisions.

168. In my opinion, in the judgments in *Les Verts* v *Parliament* and *Chernobyl*, on which the applicants rely — as also in the judgments in *ERTA*,[81] *Greece* v *Council*[82] and *Simmenthal* v *Commission*[83] — the Court simply defined the scope of the provisions of the EEC Treaty regarding actions for annulment and objections of invalidity by giving a systematic teleological interpretation or one conducted in such a way as to ensure an outcome consistent with general principles or requirements of Community law (such as observance of the institutional balance, the need for a complete and consistent review of the legality of an act, the judicial protection of rights), but without thereby offending against the letter and structure of the Treaty. In particular, 'where the provisions are silent' the Court has been able to interpret them 'in the light of the overriding requirement that the most suitable legal protection be provided'.[84]

169. Conversely, in the judgment in *Unión de Pequeños Agricultores* v *Council*,[85] the Court held that an interpretation of the requirement to be individually concerned within the meaning of Article 173 of the EC Treaty, made in the light of the principle of effective judicial protection, could not have the effect of setting aside the condition in question, *expressly* laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community courts. The broad interpretation of that provision invoked by the appellant, in the name of that principle, was prevented by the letter of the Treaty.

170. Nor should it be overlooked that there are more stringent judgments than those cited in point 168 above in which the Court,

81 — Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraphs 38 to 43, in which the Court held that an action for annulment under Article 173 of the EEC Treaty must be available against 'all measures adopted by the institutions which are intended to have legal force'.

82 — Case C-62/88 *Greece* v *Council* [1990] ECR I-1527, paragraph 8, in which it was held that a complaint alleging infringement of a rule of the EAEC or ECSC Treaties could be examined in proceedings for the annulment of a measure based on a provision of the EEC Treaty, even though that possibility was not mentioned in Article 173 of the EEC Treaty.

83 — Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraphs 40 and 41, in which the Court held that Article 184 of the EEC Treaty was also applicable to general acts not in the form of regulations in order to provide individuals with the benefit of judicial review of the lawfulness of acts which they cannot challenge.

84 — It was in these terms that Advocate General Van Gerven referred to the judgment in *Les Verts* v *Parliament* in his Opinion in Case C-70/88 *Parliament* v *Council*, point 11.

85 — Paragraph 44.

despite claims that the provisions on the institution of actions for annulment needed to be interpreted widely in order to ensure individuals' legal protection, nevertheless interpreted the limits of its own jurisdiction by adhering strictly to the situations expressly contemplated by the relevant provision. [86]

171. It seems to me that in the present cases the situation is more akin to that prevailing in *Unión de Pequeños Agricultores* v *Council* than to those obtaining in the cases resolved in the judgments mentioned in point 168 above. The combined provision of Articles 46 EU and 35 EU means that the list of the powers of the Court of Justice they contain is explicit, thus excluding, in particular, the jurisdiction of the Community court to hear actions for compensation for damage caused by acts adopted by the Council under Article 34 EU.

172. Moreover, in the judgments cited in point 168 above, the Court in essence only stated a number of the conditions (relating to the persons entitled to bring actions, the grounds of invalidity on which they may rely or the acts open to challenge under Article 173 or 184 of the EEC Treaty) for exercising one kind of jurisdiction which had clearly been conferred on it by those provisions, namely the power to annul acts of the institutions or to declare them inapplicable. In the case in point, by contrast, the appellants are asking the Community court to exercise a type of jurisdiction, namely the power to award compensation for damages, that is not to be found in Article 35 EU.

173. If the problem is therefore, to quote the words of Advocate General Jacobs, [87] 'how to ensure — within the limitations imposed by the wording and structure of the Treaty — that individual applicants are granted effective judicial protection', the reply in a case such as the present one is, as I have indicated, to recognise that an action for the compensation sought by the appellants is brought in the national court and not in the Community court. If, however, contrary to what I maintain, it were to be held that a remedy of this kind in the national court were not admissible, recognising as an alternative the jurisdiction of the Community court would constitute not a wide interpretation or an interpretation *praeter legem* but an interpretation *contra legem* of the combined provision of Articles 46 EU and 35 EU.

86 — See Case 66/76 *CFDT* v *Council* [1977] ECR 305, paragraphs 8 to 12, with regard to the capacity to sue and be sued in actions under Article 33 of the ECSC Treaty, and the order of 13 January 1995 in Case C-253/94 P *Roujansky* v *Council* [1995] ECR I-7, paragraphs 9 and 11, with regard to acts whose legality is subject to review under Article 173 of the EC Treaty.

87 — Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores* v *Council*, point 54.

174. In this second hypothesis, there would be an insoluble conflict between the general principle of effective judicial protection of rights, which is recognised indirectly in Article 6(2) EU, and the principle of conferred powers enshrined in Article 5 EU and the combined provision of Articles 46 EU and 35 EU.

175. This conflict is similar to the one between the general principle of effective judicial protection of rights and the principle of conferred powers enshrined in Article 7 EC and Article 173 of the EC Treaty, which the Court implicitly took into account in paragraph 44 of the judgment in *Unión de Pequeños Agricultores* v *Council* and which it resolved by granting priority to the principle of conferred powers and Article 173 of the EC Treaty, as correctly observed by the Court of First Instance in paragraph 38 of the contested orders.

176. I do not believe that on other occasions the Court has had to examine a situation involving a clear and insoluble conflict requiring a stark choice between provisions and primary principles. [88] I note, moreover, that the rules that would come into conflict in the present case are all in a sense 'constitutional', in that they relate on the one hand to the identification of the fundamental limits to the exercise of public power vis-à-vis the individual and, on the other, to the distribution of that power among the various institutions charged with exercising it.

177. To give priority to the fundamental right to effective judicial protection and to disapply for that purpose the relevant provisions of the EU Treaty on the powers of the Court of Justice would necessitate recognising that there was also a hierarchy among primary rules and a kind of 'supra-constitutional' value in the respect for fundamental rights. I consider that such an approach, while not in itself alien, is not permissible *in the present state of Union law*, not least because the current treaties do not explicitly list the fundamental rights guaranteed by the Union. The Charter cannot, in my opinion, make good the lack of such a list, since it is only a source of inspiration for the Community court and national courts in clarifying the fundamental rights protected by Union law as general principles and has no binding legal force. That limitation would obviously no longer apply if all the Member States ratified the Treaty establishing a Constitution for Europe, Part II of which lists the

88 — In some instances, it has essentially found a balance between fundamental rights and fundamental freedoms guaranteed by the EC Treaty (see Case C-112/00 *Schmidberger* [2003] ECR I-5659 and Case C-36/02 *Omega* [2004] ECR I-9609).

fundamental rights, among which is expressly enshrined, in Article II-107, the 'right to an effective remedy and to a fair trial'.

178. While repeating again that, in my opinion, the appellants are not denied effective judicial protection of the rights which they claim were infringed by the contested inclusion on the list of persons involved in terrorist acts but enjoy such protection in the national courts, I consider that, if the Court were to conclude otherwise, it could not in any case assert, *in the present state of Union law*, that the Community court has jurisdiction to hear the actions for damages brought by the appellants before the Court of First Instance. Hence, the Court of First Instance did not err in law in finding that the lack of provision for a judicial action to protect the appellants' rights did not of itself justify recognising its own jurisdiction to hear such actions.

4. Final observations

179. In proposing that the Court dismiss the appeals, I wish to make two concluding observations.

180. First, I consider it appropriate that the Court, in the judgment that it will deliver in the present cases, should recognise the jurisdiction of the national courts to hear actions of this kind, in the name of respect for fundamental rights and the judicial protection thereof. Recognition of the jurisdiction of the national courts would demonstrate, inter alia, just how unfounded is the suspicion often voiced that the jurisdiction of the Court with regard to respect for fundamental rights as general principles of Community law is inspired not so much by genuine concern for the protection of such rights as by a desire to defend the primacy of Community law *and of the Community court* in relation to the law and authorities of the Member States.

181. Secondly, I recognise that acknowledging the jurisdiction of the national courts for actions for damages such as those brought in the cases before the Court has disadvantages for the uniform application of Union law and hence for legal certainty. Those disadvantages should be eliminated by amending the treaties currently in force in order appropriately to widen the jurisdiction of the Court of Justice, along the lines of the overhaul carried out by the Treaty establishing a Constitution for Europe. In the meantime, with regard to those disadvantages I observe that a little legal 'uncertainty' is always preferable to the certainty of 'no law at all', especially when it comes to the protection of fundamental rights.

V — Costs

182. I consider that the arrangement adopted by the Court of First Instance, involving a division of the costs among the parties, can be endorsed wholeheartedly and is also valid for the proceedings before the Court of Justice. Going beyond the Council declaration concerning the right to compensation, it is entirely understandable that the appellants, to whom Union law affords the right to effective judicial protection, chose the Community court as a court competent to hear their claim for compensation, and their appeal as well.

183. In my opinion, there are therefore exceptional circumstances that justify sharing the cost among the main parties, in accordance with Article 69(3) of the Rules of Procedure.

184. Moreover, under Article 69(4), the Kingdom of Spain must bear its own costs.

VI — Conclusion

185. In the light of the foregoing considerations, I propose that the Court:

— dismiss the appeals;

— order each party to bear its own costs.