2006/05/03 - PL. ÚS 66/04: EUROPEAN ARREST WARRANT

HEADNOTES

A constitutional principle can be derived from Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs. If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected with supports the carrying out of that obligation, and not an interpretation which precludes its. These conclusions apply as well to the interpretation of Art. 14 par. 4 of the Charter.

The petitioners' assertion, that the adoption into domestic law of the European arrest warrant would disrupt the permanent relationship between citizen and state, is not tenable. A citizen surrendered to an EU Member State for criminal prosecution remains, even for the duration of this proceeding, under the Czech state's protection. The European arrest warrant merely permits a citizen to be surrendered, for a limited time, for prosecution in an EU Member State for a specifically defined act, and after the proceeding is completed there is nothing preventing her from returning again to Czech territory. In the case of a surrender pursuant to a European arrest warrant, a citizen has the right to defend herself against measures by criminal justice bodies, by means of remedial measures, including even a possible constitutional complaint.

The first sentence of Art. 14 par. 4 of the Charter, which provides that every citizen has the right to freely enter the Republic, as well as its second sentence, which provides that no citizen may be forced to leave his homeland, make entirely clear that the Charter precludes the exclusion of a Czech citizen from the community of citizens of the Czech Republic, a democratic state to which he is bound by the ties of state citizenship. The text of Art. 14 par. 4 cannot itself, without further arguments, unambiguously answer whether and to what extent it precludes the surrender of a citizen, for a limited time, to an EU Member State for a criminal proceeding being conducted there if, following the conclusion of such proceeding, he has the right to return to his homeland. Although a linguistic interpretation of the phrase, "forcing to to leave one's homeland" might include even such a relatively short surrender of a citizen to a foreign state for a criminal proceeding.

The prohibition on "forcing one to leave his homeland" can be interpreted either broadly or narrowly. In agreement with the petitioner, the Constitutional Court concludes that, in order to resolve the issue of the meaning of Art. 14 par. 4 of the Charter, its objective purport must be sought. In assessing of the meaning of this provision of the Charter, it is appropriate above all to take into account the historical

impetus for its adoption. The second sentence of Article 14 par. 4 first appeared in Art. 15 par. 2 of the draft Charter, in the 7 January 1991 report of the Constitutional Law Committee of the Assembly of the People and the Assembly of the Nations (see print 392, http://www.psp.cz). The Constitutional Court also agrees both with the petitioner and with the parties to this proceeding, that the experience with the crimes of the Communist regime played a critical role in the constitution of the Charter. It played this role even in the drafting of the current version of Art. 14 par. 4 of the Charter, at the end of 1990 and beginning of 1991, that is, experience that is still quite recent. This was especially the case in connection with the "Demolition" operation, in which the Communist regime forced troublesome persons to leave the Republic. A historical interpretation of Art. 14 par. 4 of the Charter thus attests to the fact that it was never concerned with extradition.

If Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then it is naturally in this context that a certain degree of responsibility must be accepted along with these advantages. The investigation and suppression of criminality which takes place in the European area, cannot be successfully accomplished within the framework of individual Member States, but requires extensive international cooperation. The results of this cooperation is the replacement of the previous procedures for the extradition of persons suspected of criminal acts by new and more effective mechanisms, reflecting the life and institutions of the 21st century. The contemporary standard for the protection of fundamental rights within the European Union does not, in the Constitutional Court's view, give rise to any presumption that this standard for the protection of fundamental rights, through invoking the principles arising therefrom, is of a lesser quality than the level of protection provided in the Czech Republic.

These facts cannot be disregarded when determining the objective meaning of Art. 14 par. 4 of the Charter. It is not in harmony with the principle of the objective teleological interpretation, reflecting the contemporary reality of the EU (i.e., that it is founded on the high mobility of citizens in the framework of the entire Union area), for Art. 14 par. 4 to be interpreted such that it does not even allow for the surrender of a citizen, for a limited time, to another Member State for a criminal proceeding concerning a criminal act committed by this citizen in that state, as long as it is guaranteed that, following the conclusion of the criminal proceeding the citizen will, at his own request, be returned to the Czech Republic to serve any sentence imposed (srov. § 411 par. 7 of the Criminal Procedure Code). Thus, the surrender of a citizens for a limited time for criminal proceedings being held in another EU Member State, conditioned upon their subsequent return to their homeland, does not and cannot constitute forcing them to leave their homeland in the sense of Art. 14 par. 4 of the Charter. The Court can equally draw attention to the rules providing that Czech citizens or persons with permanent residence status in the Czech Republic may be sent to another Member State of the Union to serve a sentence or for protective treatment or protective measures, but only if they consent thereto (§ 411 par. 6 of the Criminal Procedure Code). It follows therefrom that unless they give their consent, they will never be sent abroad to serve a sentence of imprisonment.

The right of citizens to protection by the state is manifested in the fact that it would represent a breach, among others, of Art. 14 par. 4, Art. 36 par. 1 of the Charter and Art. 6 par. 1 of the Convention, for a citizen were to be surrendered for criminal prosecution to a state where the standards of criminal proceedings do not meet the requirements for criminal proceedings enshrined in the Czech Constitutional order, for ex., in the situation where the citizen's right to fair process (Art. 36 par. 1 of the Charter) would be genuinely threatened, or alternatively where the citizen would be subjected to torture or other inhuman or degrading treatment or punishment (Art. 3 of the Convention, Art. 7 par. 2 of the Charter). However, such is not the case for the European arrest warrant.

It is always necessary to remember the fact that all EU Member States are also signatories of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accordingly a citizen cannot not be significantly affected in his rights due to the fact that his criminal matter will be decided in another Member State of the Union, as each EU Member State is bound by a standard of human rights protection, which is equivalent to the standard required in the Czech Republic while all Member States' legal orders rest on the values to which our state declared its allegiance only after 1989. The Czech Charter of Fundamental Rights and Basic Freedoms also draws upon the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Section 377 of the Criminal Procedure Code can be considered as something of a safeguard, guaranteeing on the constitutional law plane the protection of Czech citizens. According to this provision, the request of a foreign state's organ may not be granted if its granting would constitute a violation of the Constitution of the Czech Republic or such provision of the Czech legal order which must be adhered to without exception, or if the granting of the request would damage some other significant protected interest of the Czech Republic. This principle, contained in the Twenty-Fifth Chapter, First Division of the Criminal Procedure Code (designated as general provisions) thus applies both to the classic extradition procedure pursuant to the Second Division, and to proceedings on the surrender of persons between EU Member States on the basis of the European arrest warrant, pursuant to the Third Division of the same Chapter. Even though this provision of the Criminal Procedure Code is introduced by the marginal heading "Protection of the State's Interests", it can be deduced, primarily from the text of its first sentence, that it is be concerned primarily with the state's interest in not violating a Czech citizen's fundamental rights enshrined in the Czech Republic's constitutional order, of which the Charter of Fundamental Rights and Basic Freedoms forms an integral part (. . . if its execution would constitute a violation of the Constitution of the Czech Republic or such provision of the Czech legal order which must be adhered to without exception . . .).

Persons who are to be surrendered to another EU state retain the right to submit against the relevant measures of organs taking part in criminal proceedings a complaint which has suspensive effect (§ 411 par. 5 of the Criminal Procedure Code) and, in appropriate cases, a constitutional complaint, and the deadline for the surrender of the person does not run while the Constitutional Court is deciding (§ 415 par. 3 of the Criminal Procedure Code). These provisions preserve the legal protection of citizens,

or of other persons who should be surrendered for criminal prosecution, and at the same time uphold the condition that, in consequence of the surrender of a requested person, the constitutional order of the Czech Republic will not be affected in individual cases.

These principles are in conformity with the Framework Decision, according to which nothing in it may be interpreted as prohibiting the refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or that that person's position may be prejudiced for any of these reasons. The Framework Decision does not prevent a Member State from applying its constitutional rules relating to the due process, the freedom of association, the freedom of the press and the freedom of expression in other media. The Framework Decision also expressly declares that no person may be removed, expelled or extradited to a state where there is a serious risk that she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The assertion that the domestic law rules relating to the European arrest warrant have disturbed the relationship between the citizen and the state is, thus, not tenable. A citizen surrendered to an EU Member State for criminal prosecution remains, even for the duration of that criminal proceeding, under the protection of the Czech state. The European arrest warrant merely permits, for a limited time, the surrender of a citizen for his criminal prosecution in a Member State of the Union for a specifically defined act, while following the completion of this criminal proceeding, there is nothing preventing him from returning back (where relevant even to serve his sentence in Czech territory). The Criminal Procedure Code specifies the grounds upon which the surrender of a person to another Member State of the Union shall not occur (esp. § 411). Citizens have the right to defend themselves against measure by organs acting in the criminal proceeding by means of remedial measures, which have suspensive effect (see § 411 par. 5 of the Criminal Procedure Code), including even the possibility of a constitutional complaint. In the case that the surrender of a citizen would result in a breach of the constitutional order, the surrender of the citizen will not occur.

In reaching these conclusions, it is necessary to take into account not only the protection of rights of persons suspected of committing a criminal act, but also the interests of the victims of criminal acts. For the protection of the rights of victims and injured persons, it generally appears more practical and fair for the criminal proceeding to be held in the state in which the criminal act was committed (cf. the conditions for the resolution of cases of two or more concurrent European arrest warrants in § 419 of the Criminal Procedure Code and Art. 16 of the Framework Decision). Since the execution of the European arrest warrant, in the case a state is surrendering its own citizen, is conditioned on reciprocity (§ 403 par. 2 of the Criminal Procedure Code), the rules contested by the petitioners protect the rights of persons who can be considered, according to the Czech Criminal Procedure Code, as injured persons. It can generally be said that, in view of the evidence that will found in the state where the criminal act occurred, a criminal proceeding there will be quicker,

more effective and, at the same time, more reliable and just both for the defendant and for any victim of the criminal act.

The Constitutional Court, therefore, does not concur with the petitioners' arguments asserting that § 412 par. 2 of the Criminal Procedure Code is in conflict with Art. 39 of the Charter because this provision in no way defines the criminal offenses not requiring double criminality. If it had been a substantive law enactment, that is if certain conduct had been made criminal by means of a provision like § 412 par. 2 of the Criminal Procedure Code, that is, by enumerating them without any sort of statutory definition, that would certainly constitute a violation of Art. 39. of the Charter. The Constitutional Court proceeds, however, from the fact that § 412 of the Criminal Procedure Code is not a substantive law provision, rather a procedural law one. A surrender pursuant to the European arrest warrant is still not the imposition of punishment in the sense of Art. 39 and Art. 40 of the Charter.

Persons suspected of having committed a criminal act and surrendered in accordance with the European arrest warrant will not be prosecuted under § 412 par. 2 of the Criminal Procedure Code; rather the criminal proceeding will be conducted for criminal offenses defined in the substantive law of the requesting EU state. The statutory enumeration of criminal offenses in § 412 par. 2 of the Criminal Procedure Code (Art. 2 par. 2 of the Framework Decision) serves merely for the procedural steps taken by courts. That is to say, in cases where the requesting state's organ designates in the European arrest warrant the conduct of the surrendered person as one of the categories of conduct enumerated in § 412 par. 2 of the Criminal Procedure Code, or Art. 2 par. 2 of the Framework Decision, Czech courts do not ascertain the criminality of this act according to the law of the Czech Republic. The adoption of § 412 of the Criminal Procedure Code did not result in the criminal law of all EU Member States becoming applicable in the Czech Republic. It merely means that the Czech Republic is assisting the other Member States in the enforcement of their criminal laws. Thus, § 412 of the Criminal Procedure Code does not impose on persons in the Czech Republic (citizens, permanent residents, and others commonly found within the territory) the obligation to know the criminal law of all EU states.

Moreover, the enumeration of criminal offenses in § 412 par. 2 of the Criminal Procedure Code or Art. 2 par. 2 of the Framework Decision generally corresponds to conduct which is criminal even according to Czech law, even though the titles of particular criminal offenses do not necessarily correspond exactly to each other. The enumeration of criminal offenses which do not require dual criminality is not given due to the fact that it would otherwise be presumed that some of these categories of conduct do not qualify as criminal offenses in one or more of the Member States; rather the exact opposite, that it is conduct which, in view of the values shared by the EU Member States, is criminal in all of them. The reason for enumerating them in this fashion is to speed up the execution of European arrest warrants, as the proceeding for ascertaining the criminality of such acts under Czech law has been dropped. In addition, in adopting this Framework Decision each EU Member State expressed its agreement that all criminal conduct coming within the categories defined in this way will also be criminally prosecuted.

By dispensing with the principle of dual criminality in relation to the Member States of the EU, the Czech Republic in no way violates the principle of legality. As a general matter, the requirement of dual criminality can be dispensed with, as a safeguard, in relations among the Member States of the EU, which have a sufficient level of value approximation and mutual confidence that they are all states as having democratic regimes that adhere to the rule of law and are bound by the obligation to observe this principle. It is precisely the situation, where the level of approximation among the 25 EU Member States has arrived at such a degree of mutual confidence, that they no longer feel the need to cling to the principle of dual criminality.

The Constitutional Court takes as a starting proposition that the surrender of Czech citizens or other persons authorized to stay on Czech territory to another EU Member State for the purpose of their prosecution will generally come into consideration only in the case where their conduct, qualifying as a criminal offense, did not occur in the Czech Republic, but in another Member State of the Union. Should the commission of a criminal act occur partly abroad and partly in the Czech Republic, then criminal prosecution in the Czech Republic would be an option. An impediment to the surrender of such persons for a criminal proceeding abroad (cf. § 411 par. 6 lit. d) of the Criminal Procedure Code) thereby arises, to the extent that it would be more appropriate, in view of the nature of the conduct in question, for the prosecution to take place in another EU Member State, for ex., due to the fact that decisive evidence is found there or the criminal deeds played out primarily in that state, etc.

Pursuant to Art. 4 par. 7 of the Framework Decision, the executing judicial authorities may refuse to execute a European arrest warrant where it relates to offenses which have been committed in whole or in part in the territory of the executing Member State, or in a place treated as such. This provision, which affords domestic criminal justice organs the possibility to weigh whether to refuse to execute the European arrest warrant, protects the value of legal certainty, which is also a value in European law and whose observance on the European plane is a prerequisite for the Czech constitutional order permitting the application of European law in the domestic legal order (in the case of the implementation and application of the Framework Decision). Although Article 4 par. 7 of the Framework Decision was not explicitly implemented into the Czech legal order, in accordance with the principle of the constitutionally conforming interpretation, Czech criminal justice organs must pay heed to Czech citizens' trust in the fact that their conduct within the Czech Republic will be governed by Czech criminal law. If Czech citizens remain within the territory of the Czech Republic, domestic law is applied to their conduct, from which also follows these persons' constitutionally protected trust that legal consequences laid down in Czech law will be attributed to their legal conduct. The general value of legal certainty finds expression, on the constitutional plane, in the principle formulated in Art. 39 of the Charter, and on the sub-constitutional plane is expressed in the general principle of § 377 of the Criminal Procedure Code, which applies subsidiarily in relation to § 411 par. 6 lit. d) of the Criminal Procedure Code, that is, it will only be applied in the case that a criminal prosecution concerning the same act is not already in progress in the Czech Republic. According to § 377 of the Criminal Procedure Code, interpreted in the light of Art. 4 par. 7 of the Framework Decision, a Czech citizen will not be surrendered to another EU Member State due to suspicion of having committed a

criminal offense, if it was allegedly committed within the Czech Republic, except in cases where, in view of the special circumstances of the commission of the criminal act, priority must be given to holding the criminal prosecution in the requesting state, for example, on grounds of adequate fact-finding concerning the conduct in question, if in the greater part it occurred abroad, or because prosecution in the given EU Member State would, in that particular case, be more appropriate than that person's prosecution in the Czech Republic. It is appropriate for the court which may, but need not, refuse to execute the European arrest warrant, to have sufficient decision-making discretion, as in a whole host of cases it would be appropriate for a person suspected of having committed a criminal offense to be surrendered, even though his activity occurred within the Czech Republic (for ex. organized criminal acts, which naturally were brought to fruition in the another EU Member State). This provision will be clarified in more detail only through the decision-making practice in this phase of such proceedings; it is not for the Constitutional Court to preempt that process. The Constitutional Court would emphasize that the Czech constitutional order does not protect merely Czech citizens' trust in Czech law, rather it similarly protects also the trust and legal certainty of other persons, authorized to stay within the territory of the Czech Republic (for ex., aliens having permanent residence status in the Czech Republic).

"Distance" criminal offences, that is, those usually committed by means of computer technology, represents a specific category falling within the terms of the territoriality principle, as it theoretically admits of the possibility that conduct occurring in the Czech Republic could satisfy the material elements of a criminal offense in another EU Member State. The Constitutional Court concedes that, under quite exceptional circumstances, the application of the European arrest warrant would be in conflict with the Czech Republic's constitutional order, especially in the case that the "distance" delict would qualify as a criminal act under the law of the requesting state, but would not qualify as such under Czech criminal law, and perhaps would even enjoy constitutional protection in the Czech Republic (for ex., within the framework of the constitutional protection of free expression). The petitioners' objections are justified in this respect. In such an, albeit unlikely, case, the application of § 377 of the Criminal Procedure Code would come into consideration, as it contains a mechanism for precluding the unconstitutional consequences of the European arrest warrant, in the sense stated above.

CZECH REPUBLIC
CONSTITUTIONAL COURT

JUDGMENT

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court Plenum, composed of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, in the matter of the petition submitted by the petitioners - a group of deputies of the Chamber of Deputies of the Czech Parliament and a group of senators of the Senate of the Czech Parliament, represented by Prof. JUDr. Aleš Gerloch, CSc., advocate with his office in Prague 2, at Botičská 4, proposing the annulment of § 21 par. 2 of Act No. 140/1961 Coll., as amended and the annulment of § 403 par. 2, § 411 par. 6 lit. e), § 411 par. 7 and § 412 par. 2 of Act No. 141/1961 Coll., on the Criminal Procedure Code, as amended, has decided as follows:

The petition proposing the annulment of § 21 par. 2 of Act No. 140/1961 Coll., as amended and the annulment of § 403 par. 2, § 411 par. 6 lit. e), § 411 par. 7 and § 412 par. 2 of Act No. 141/1961 Coll., on the Criminal Procedure Code, as amended, is rejected on the merits.

REASONING

I.
Definition of the Matter and Summary of the Petition

1. On 26 November 2004, the Constitutional Court received a petition of a group of deputies of the Chamber of Deputies of the Czech Parliament and of a group of senators of the Senate of the Czech Parliament (hereinafter “petitioners”) proposing that the above-designated provisions of the Criminal Procedure Code and the Criminal Code be annulled as of the day of the publication of the Court’s judgment in the Collection of Laws.

2. In the introductory part, the petitioners summarized the grounds and circumstances of the adoption of the above designated legal provisions. Sec. 21 par. 2 of the Criminal Code was adopted Act No. 537/2004, amending that code, and § 403 par. 2, § 411 par. 6 lit. e), § 411 par. 7 and § 412 par. 2 of the Criminal Procedure Code were adopted by Act No. 539/2004 Coll., amending that code. According to the petitioners, these provisions (hereinafter „the contested provisions“) conflict with Articles 1, 4 par. 2, 14 par. 4 and 39 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter „the Charter“). By

means of these amendments the „European arrest warrant“ was implemented into the Czech legal order, in conformity with the Framework Decision of the Council of the European Union, No. 2002/584/JHA of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States.

3. The petitioners drew attention to the fact that initially, when the Government of the Czech Republic submitted the draft bills including the above-mentioned amendments, it proposed that Art. 14 of the Charter be amended at the same time by the inclusion of a fifth paragraph, which would have read: „Citizens can be surrendered to Member States of the European Union for the purpose of criminal prosecution or of serving a custodial sentence, if such results from those of the Czech Republic’s obligations as a European Union Member State which cannot be restricted or excluded.“ The proposed amendment to the Charter was rejected by the Chamber of Deputies on 2 April 2004. Afterwards the mentioned amendments to the Criminal Code and the Criminal Procedure Code were adopted by the Chamber of Deputies, even over the veto of the President of the Republic, who had urged their unconstitutionality.

4. According to the contested provisions, citizens of the Czech Republic can be surrendered to a foreign state (that is, to a European Union Member State) for the purpose of their criminal prosecution, which follows from the exhaustively enumerated grounds impeding the surrender of a requested person, listed in § 411 par. 6 lit. a) to e) of the Criminal Procedure Code. These grounds do not include as a ground for the refusal of the surrender of a person the fact that she is a Czech citizen. The fact that a Czech citizen can be handed over to another EU Member State follows not only from § 21 par. 2 of the Criminal Code and § 403 par. 2 of the Criminal Procedure Code, but also, albeit indirectly, from § 411 par. 6 lit. e) and par. 7 of the Criminal Procedure Code. These provisions represent a certain exception from the obligation to hand over a citizen to another EU Member State. However, by means of an argument a contrario, it also follows from these provisions that the court shall always grant a request for the surrender of a requested Czech citizen in the case that she should be surrendered to another Member State for the purpose of criminal prosecution.

5. The designated provisions are thus in conflict with Art. 14 par. 4 of the Charter, according to which no citizen may be forced to leave his homeland. The prohibition laid down in this article of the Charter is clear and unconditional. The right of citizens not to be forced to leave their homeland is a fundamental right which, in the sense of Art. 1 of the Charter is inherent, inalienable, illimitable, and not subject to repeal. Thus, not even citizens themselves can give up or waive this right in any way. The Charter does not allow for this fundamental right to be restricted by statute. The Explanatory Report to the Draft Amendment to the Charter, rejected by the Chamber of Deputies of Parliament on 2 April 2004, as was stated above, was also in agreement with this position. The petitioners make reference to the fact that the Government of the Czech Republic, as the subject initiating the amendments to the Criminal Code and the Criminal Procedure Code, changed its arguments after the proposed amendment to the Charter was rejected. Only as of April, 2004 did the Government start to argue that an amendment to the Charter is not

necessary, as the submitted draft amendments to both criminal codes are not in any way in conflict with it.

6. In the petitioners' view, forcing a citizen to leave his homeland, in the sense of Art. 14 par. 4 of the Charter, is from the context analogous in nature to expulsion abroad in the sense of par. 5 of the same Article. In both cases, it occurs without the consent of the affected person. Moreover, the consequence of such an encroachment by the state is to hinder citizens' entry into the territory of the Czech state, which is a further right of citizens expressly recognized in the Charter (Art. 14 par. 4, first sentence, of the Charter). In the petitioners' view, it is necessary also to use an "argumentum a minori ad maius". If the Charter forbids forcing citizens to leave their homeland, by which can be understood at the very least indirect forcing (indirect compulsion), all the more does it forbid the surrender of a citizen, which constitutes forcing by direct means, that is, by means of compelled restriction on liberty in the form of taking him into surrender custody and the subsequent surrender to the organs of an EU Member State.

…

III.
Conditions for the Petitioners' Standing

40. The petition which is before the Constitutional Court was submitted by a group of forty-seven deputies of the Chamber of Deputies of the Czech Parliament and a group of twenty-one senators, thus it satisfies the conditions contained in § 64 par. 1 lit. b) Act on Constitutional Court. The petitioners have thus fulfilled the conditions to have standing.

…

V.
The Wording of the Contested Provisions of the Criminal Code and the Criminal Procedure Code

43. The provision of § 21 par. 2 of the Criminal Code (Act No. 140/1961 Coll., as amended) proposed to be annulled reads: „Citizens of the Czech Republic may be surrendered to another Member State of the European Union solely on the basis of a European arrest warrant."

44. The provisions of the Criminal Procedure Code (Act No. 141/1961 Coll., as amended) proposed to be annulled, read as follows:
§ 403 par. 2: „The Czech Republic may surrender its own citizens to other Member States of the European Union only on the condition of reciprocity."

§ 411 par. 6 lit. e) (regulating one of the situations in which a court shall refuse to surrender the requested person): “this person is a citizen of the Czech Republic or has permanent residence status in the Czech Republic, whose surrender is requested to execute a custodial sentence, or to undergo protective treatment or protective education, and before the competent court he declares for the record that he refuses to submit to the execution of this sentence or to the protective measures in the requesting state; such a declaration cannot be withdrawn.”

§ 411 par. 7: „Where a person surrendered to a requesting state for criminal prosecution is a citizen of the Czech Republic or a person having permanent residence status in the Czech Republic, the court shall make the surrender conditional on that person being returned to the Czech Republic to serve his custodial sentence of imprisonment, or to undergo protective treatment or protective education, if such a sentence or if protective measures are imposed upon that person and, following the judgment in the requesting state, he does not give his consent to serving the sentence or undergoing the protective measures in the requesting state. The court should proceed in this manner only in cases that the requesting state provides an assurance that the person will turned back over to the Czech Republic to serve the sentence of imprisonment or to undergo protective measures. If the requesting state does not provide this assurance, then the court shall refuse to surrender the requested person.”

45. § 412 par. 2 (which is substantively related to par. 1 of the same provision, enumerating the types of conduct for which Czech courts do not ascertain their criminality under the law of the Czech Republic):
„Conduct under paragraph 1 is understood to mean
a) participation in a criminal organization,
b) terrorism,
c) trafficking in human beings,
d) sexual exploitation of children and child pornography,
e) illicit trafficking in narcotic drugs a psychotropic substances,
f) illicit trafficking in weapons, munitions and explosives,
g) corruption,
h) fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities’ financial interests,
i) laundering of the proceeds of crime,
j) counterfeiting currency,
k) computer-related crimes,
l)environmental crime, including illicit trafficking in endangered animal and plant species and in their varieties,
m) aiding in unauthorized border crossing and in unauthorized residence,
n) murder, grievous bodily injury,
o) illicit trade in human organs and tissues,
p) kidnapping, restriction on personal freedom, and hostage-taking,
q) racism and xenophobia,
r) organized or armed robbery,
s) illicit trafficking in cultural goods, including antiques and works of art,

t) fraudulent conduct,
u) extortion and the exaction of protection money,
v) counterfeiting and piracy of products,
w) forgery of public documents and trafficking therein,
x) forgery of means of payment,
z) illicit trafficking in nuclear or radioactive materials,
y) illicit trafficking in hormonal substances and other growth promoters,
aa) trafficking in stolen vehicles,
bb) rape,
cc) arson,
dd) crimes over which the International Criminal Court has jurisdiction to prosecute and punish,
ee) hijacking of aircraft or sea vessels,
ff) sabotage.“

VI.
Classical Extradition and the Surrender of Persons among the Member States of the EU on the Basis of the European arrest warrant

46. According to criminal law doctrine, extradition is understood as the rendition/turning over of a person by a state on whose territory that person is found to another state at the latter’s request for the purpose of criminal prosecution or the carrying out of punishment. The objective of extradition is to prevent the perpetrator of a criminal offense from escaping criminal prosecution or the carrying out of punishment by fleeing to another state. The duty of the state of residence to render/extradite the perpetrator generally arises from a treaty (extradition treaty, treaty on legal assistance in criminal matters, etc.). Extradition itself is based on a large number of principles, among which are included, for example, the principles of reciprocity, of dual criminality, of the impermissibility for a state to extradite its own citizens, of the impermissibility of extraditing in respect of a designated category of criminal offenses, and of specialty. Criminal law theory draws a distinction between substantive and formal extradition law. Substantive extradition law refers to the totality of conditions under which the duty to extradite a perpetrator arises under international law. Formal extradition law then governs the special proceeding before bodies of the requested state, which results in a decision either to surrender or not to surrender the perpetrator, thus the response to the requesting state’s request (Musil J., Kratochvíl V., Šámal P., Kurz trestního práva – Trestní právo procesní [A Course of Criminal Law – Criminal Procedural Law], C.H. Beck, 2003).

47. In Czech law the rendition (extradition) of persons to a foreign state is governed by § 391 and following of the Criminal Procedure Code. The proceeding as a whole is broken down into three phases, which are, the preliminary investigation (§ 394 and foll.), the judicial decision (§ 397, § 398), and the authorization and carrying out of the extradition (§ 399). In the preliminary investigation stage, the state attorney ascertains whether the

conditions for extradition, according to the substantive extradition law, are met. Following the preliminary investigation, the competent court (which is generally the regional court) decides as to whether extradition is permissible. The final phase of the whole process is the decision of the Minister of Justice authorizing the extradition of the person to the foreign state. Thus, the Minister may do so solely in the case that the competent court (the regional court or Supreme Court) decides that the extradition is permissible. That does not mean, however, that in the case the court decides in favor of extradition that the Minister must authorize the person's extradition. The cases in which the Minister may decide not to authorize extradition are enumerated in § 399 par. 2 of the Criminal Procedure Code. In making his decision, the Minister proceeds in accordance with the canons of diplomatic relations between states, or in the form of inter-ministerial relations, if the international agreement so permits.

48. While the classical extradition process is relatively drawn-out, as is demonstrated in the Czech case (in other states this procedure is similar) and takes place with the participation of the Minister of Justice, as the representative of the executive, the surrender process pursuant to Framework Decision of the European Council from 13 June 2002, on the European arrest warrant and the Surrender Process between Member States, (2002/584/JVV), hereinafter "European arrest warrant", markedly simplified and sped up the entire process. Thus, in the relations among the Member States, the European arrest warrant has replaced classical extradition and represents a qualitatively entirely different process. It is thus essential to distinguish between classical extradition and the and surrender of persons among the Member States of the European Union on the basis of the European arrest warrant, which for that matter the Czech Criminal Procedure Code does as well. The entire process of transfer or surrender is entrusted to the competent courts, which are bound only by law, so that the intervention of the executive in the final phase, as was the case with classical extradition, drops out.

49. According to the Preamble of the Framework Decision, the basic aim of the European arrest warrant is to abolish, in the framework of the European Union, the formal extradition procedure in respect of persons who are fleeing justice after having been finally sentenced and to speed up the extradition procedures in respect of persons suspected of having committed a criminal offense. The objective set for the EU, that is, becoming an area of freedom, security and justice leads to abolishing classical extradition between individual Member States and replacing it by a system of surrender between individual judicial authorities. The traditional formal relations of cooperation between the central authorities, or through diplomacy, which have prevailed up till now, should be replaced by a system of free movement of judicial decisions in criminal matters. Thus, persons suspected of having committed a criminal offense will no longer be turned over on the basis of an individual act of the executing state, rather directly on the basis of a court decision in the requesting EU Member State, which thus has direct effect in the executing state. The activities of central authorities are replaced by cooperation between individual courts, and the role of central authorities is thus limited to practical and administrative assistance.

50. The Framework Decision emphasizes that the mechanism for the European arrest warrant is based on a high level of confidence between the Member States of the EU, so that the implementation of a warrant can be suspended only in the event of serious and persistent breach by certain of the Member States of the principles set out in Art. 6 par. 1 of the Treaty on the European Union, if such breach is formally determined by the Council pursuant to Art. 7 of the Treaty on the European Union.

51. A European arrest warrant is thus an individual legal act, issued by a court of an EU Member State, seeking the arrest and surrender of the requested person from another Member State. A European arrest warrant does not apply in the case of minor criminal activities. It can only be issued due to suspicion of the commission of a criminal offense for which can be imposed a punishment of imprisonment with a maximum possible sentence of at least 12 months, or for the condemnation to imprisonment (or imposition of protective measures) of at least 4 months in duration (cf. Art. 2 par. 1 of the Framework Decision and § 404 par. 2 of the Criminal Procedure Code). In the case of the thirty-two expressly enumerated criminal offenses, if the punishment of imprisonment with a maximum possible sentence of at least three years can be imposed for them (in the requesting EU Member State), then the dual criminality principle is dispensed with. In such a case it is sufficient if the deed for which the surrender is requested is criminal under the law of the requesting state (for an analysis of the institute of the European arrest warrant, cf. for ex. Polák, P., Evropský zatýkací rozkaz [The European Arrest Warrant], Právní fórum [Legal Forum], No. 2/2004, p. 76 and foll.).

VII.
The Substantive Conformity of the Contested Provisionswith the Constitutional Order

52. The Constitutional Court is the judicial body for the protection of constitutionalism, which reviews the constitutionality of all acts of Czech Republic public authorities. Thus, its jurisdiction extends, in principle, also to all Czech domestic norms which, pursuant to Art. 10a and Art. 1 par. 2 of the Constitution carry out the Czech Republic's obligations towards the EU. The Czech Republic's accession to the EU on the basis of Art. 10a resulted in Constitutional Court's jurisdiction being restricted to a certain extent, just as was the case with other state bodies. In view of the ECJ doctrine on the supremacy of Community law, the Constitutional Court can exercise its jurisdiction in relation to Community law norms only under certain circumstances. According to the ECJ, in areas where Community law applies exclusively, it is supreme, so that it cannot be contested by means of national law referential criteria, not even on the constitutional level. According to this doctrine the Constitutional Court would have no competence to decide on the constitutionality of a European Law norm, not even in the case that they are contained in legal enactments of the Czech Republic. Its competence to adjudge the constitutionality of Czech norms is, thus, restricted in the same respect.

53. In its judgment no. Pl US 50/04 of 8 March 2006, the Constitutional Court refused to recognize the ECJ doctrine insofar as it claims absolute primacy of EC law. It stated that

the delegation of a part of the powers of national organs upon organs of the EU may persist only so long as these powers are exercised by organs of the EU in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. Understandably that, unless such an exceptional and highly unlikely eventuality comes to pass, the Constitutional Court, guided by the above-mentioned ECJ doctrine, will not review individual norms of Community law for their consistency with the Czech constitutional order. In this matter, however, the petitioners asserted that, by adopting the European arrest warrant, just such a conflict with the essential attributes of a democratic law-based state has come about.

54. However, also in its judgment Pl US 50/04 the Constitutional Court adumbrated a further exception to the position that it does not have any competence whatsoever to review the constitutionality of Czech legal enactments adopted to transpose or implement European law. In situations where the Member States implement European law norms and that implementation leaves Member States a certain area of discretion as to the choice of means to accomplish the aim laid down in the EC norm, then the Member State may review the resulting implementing norm in terms of conformity with its own constitution. Member States enjoy freedom at least to the extent of ensuring that, from among the choice of means available to them under Community law, they select such means as are consistent with their respective constitutions and avoid those in conflict therewith. As a corollary to this doctrine announced in Pl US 50/04, where the delegation of authority leaves the member states no room for discretion as to the choice of means, that is, where the Czech enactment reflects a mandatory norm of EC law, the doctrine of primacy of Community law in principle does not permit the Constitutional Court to review such Czech norm in terms of its conformity with the constitutional order of the Czech Republic, naturally with the exception stated in paragraph 53.

55. Although the contested provisions are of a mandatory nature, the situation presented in this case is considerably different from that in the Court's judgment no. Pl US 50/04 in that it involves not Community law in the classic sense, that is under the First Pillar, rather Union law under the Third Pillar, in the form of a framework agreement. The Constitutional Court concurs with the petitioner that the framework agreement which formed the basis for the adoption of the contested norms does not entail direct effect. The purpose of a framework decision is the approximation of the laws and regulations of the Member States. Framework Decisions are binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. Unless they are implemented into national law, Framework decisions cannot be invoked against natural or legal persons. Framework Decisions must be implemented by national legal acts, which occurred in this case by the adoption of the provisions, portions of which are proposed to be annulled.

56. Despite the fact that the contested provisions were adopted for the purpose of transposing a framework agreement, which leaves no room for discretion as to the choice of means, it might still be the case that the this is an enactment which the Constitutional

Court may review for its consistency with the Czech constitutional order. Whether it may proceed in such a manner depends on the actual nature and status of norms adopted under the Third Pillar, such as Framework Decisions.

57. The questions concerning the nature and status of such Union acts stems from several differences between them and traditional Community acts. For ex., Framework Decisions are adopted pursuant to the legislative process in Title VI. of the Treaty on the European Union within the context of the „Third Pillar“, which means that, on the initiative either of the Commission or of a Member State, it is adopted by the Council acting unanimously, that is, with the assent of all Member States, following consultation with the European Parliament. Direct effect of such Framework Decisions is excluded by virtue of Article 34 par. 2 lit. b) of the EU Treaty. In this respect, among others, it is distinguished from primary Community law (esp. of the founding treaties) and classical secondary Community law, adopted by EU organs pursuant to Art. 251-252 of the Treaty on the European Community. In addition, the obligation to implement a Framework Decision is not enforceable by the European Court of Justice, as Title VI of the EU Treaty does not include an action for infringement of the Treaty (see. Art. 226 of the EC Treaty). The Application of the European arrest warrant in the Member States is subject to the ECJ's jurisdiction, in the context of a preliminary reference procedure under the conditions of Art. 35 par. 1 of the EU Treaty, in respect of issues of the validity and interpretation of Framework Decisions (See Zemánek J.: Evropskoprávní meze přezkumu ústavnosti transpozice rámcového rozhodnutí o eurozatykači, Právní rozhledy č. 3/2006 [Zemánek J.: European Law Limits on the Review of Constitutionality of the Transposition of the Framework Decision on the European arrest warrant, Právní rozhledy [Legal Horizons], No. 3/2006].

58. The consequences of these differences for the current nature and status of such norms in relation to Member State legal orders, has not as yet been definitively and clearly settled in the case-law of the ECJ. Although Art. 34 of the EU Treaty explicitly states that framework decisions do not have direct effect, in its decision of the matter of Maria Pupino, the ECJ held that the EU Treaty contains a principle of loyal cooperation analogous to that laid down in Art. 10 of the EC Treaty. In consequence of that principle framework decisions have indirect effect (see Case C-105/03 Maria Pupino of 16 June 2005, paras. 42 - 43, in Czechon the ECJ's internet site, http://www.curia.eu.int.). This means that national courts are under an obligation, „[w]hen applying national law . . . [to] do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU" (Id, par. 43). The ECJ left open the issue of what obligation national courts have in a situation where they cannot interpret their national law in conformity with the Framework Decision. In other words, the ECJ did not touch upon the problem of primacy, that is, whether, as is the case in Community law, framework decisions take precedence over national law and whether, in consequence thereof, national courts are obliged to set aside national law that conflict with a framework decision. In their written observations in that case Italy, Sweden, and the UK insisted "on the inter-governmental nature of cooperation between Member States in the context of Title VI of the Treaty on European Union" (Id., par. 26). In her Opinion on the Maria Pupino Case, the Advocate General emphasized that, while "[t]he lesser degree of integration under the Treaty on European Union is apparent

in the definition of a framework decision, which excludes direct effect . . . . [t]he term policies indicates that . . . the Treaty on European Union includes not only inter governmental cooperation, but also joint exercise of sovereignty by the Union," (the Opinion of Advocate General J. Kokott in the M. Pupino matter, paras. 31-32, delivered on 11 November 2004). See also Zemánek J.: Eurokonformní výklad Rámcového rozhodnutí – Povinnost nebo soudcovský aktivismus? [The Euro-Conforming Interpretation of a Framework Decision – Duty or Judicial Activism?], Jurisprudence No. 8/2005, p. 37 and foll.].

59. Thus the ECJ itself in no way pronounced upon the issue whether the supremacy principle applies as well to framework decisions. In the M. Pupino case, neither did the ECJ even touch upon the delicate issues of whether the principle of supremacy that it has expounded in relation to Community law applies in the same way to Union law, whether framework agreements are simply intergovernmental in nature, or whether some other interpretation is possible. It can, in consequence, be stated that ECJ doctrine concerning the exact nature of Union law acts such as framework agreements is still evolving.

60. Such a situation presents perhaps ideal circumstances for referring the mentioned issues to the ECJ for a preliminary ruling. However, in view of the fact that the Belgian Cour d'arbitrage has already referred to the ECJ the issue of the framework decision's validity, there is no point in the Constitutional Court of the Czech Republic doing so as well. To await the ECJ's decision would not be entirely appropriate, as in the interim the contested provisions will remain in force, and, in accordance therewith, persons are subject to being transferred abroad pursuant to a European arrest warrant. In such a situation the Constitutional Court considers it as imperative to determine whether or not such persons' fundamental rights are threatened. In an effort to deal with this dilemma, the Constitutional Court resolved to assess whether the provisions implementing the Framework Decision could be interpreted in a manner consistent with the Czech constitutional order. As it has determined that such an interpretation is possible, there is no need to await clarification by the ECJ of the above-indicated issues of Union law.

VIII.
Assessment of the Contested Provisions' Conformity with Art. 14 par. 4 of the Charter

61. A constitutional principle can be derived from Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs. If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected with supports the carrying out of that obligation, and not an interpretation which precludes its. These conclusions apply as well to the interpretation

of Art. 14 par. 4 of the Charter.

62. The petitioners' assertion, that the adoption into domestic law of the European arrest warrant would disrupt the permanent relationship between citizen and state, is not tenable. A citizen surrendered to an EU Member State for criminal prosecution remains, even for the duration of this proceeding, under the Czech state's protection. The European arrest warrant merely permits a citizen to be surrendered, for a limited time, for prosecution in an EU Member State for a specifically defined act, and after the proceeding is completed there is nothing preventing her from returning again to Czech territory. In the case of a surrender pursuant to a European arrest warrant, a citizen has the right to defend herself against measures by criminal justice bodies, by means of remedial measures, including even a possible constitutional complaint.

VIII/a

63. The new provisions of the Criminal Procedure Code, which allow for the surrender of Czech citizens to another EU Member State for criminal prosecution, without question mark a break with the previous statutory provisions, which did not allow for (and even now do not allow for – see § 393 par. 1 lit. a) of the Criminal Procedure Code) the extradition of citizens to foreign states for criminal prosecution being conducted there. The Constitutional Court is of the view that one cannot deduce the unconstitutionality of the contested provisions solely from the fact that the Government of the Czech Republic, as the body which took legislative initiative in respect of the amendments to both criminal codes, initially considered it appropriate for the Charter of Fundamental Rights and Basic Freedoms to be amended and that only after its proposed amendment to the Charter was rejected in the Chamber of Deputies did it begin to argue that it was not necessary to amend the Charter.

64. The first sentence of Art. 14 par. 4 of the Charter, which provides that every citizen has the right to freely enter the Republic, as well as its second sentence, which provides that no citizen may be forced to leave his homeland, make entirely clear that the Charter precludes the exclusion of a Czech citizen from the community of citizens of the Czech Republic, a democratic state to which he is bound by the ties of state citizenship. The text of Art. 14 par. 4 does not itself, without further arguments, unambiguously resolve whether and to what extent it precludes the surrender of a citizen, for a limited time, to an EU Member State for a criminal proceeding being conducted there if, following the conclusion of such proceeding, he has the right to return to his homeland. Although a linguistic interpretation of the phrase, "forced to leave one's homeland" might include even such a relatively short surrender of a citizen to a foreign state for a criminal proceeding.

65. The fact that the text of Art. 14 par. 4 of the Charter does not of itself respond to this question (whether Czech citizens can be surrendered to an EU Member State for the purpose of criminal proceedings being conducted there), can be also illustrated by the

example of the Slovak Republic, to which the petitioners in any case made reference. Due to the fact that it is based on the former Federal Charter of Fundamental Rights and Basic Freedoms, the Slovak legal provisions, in their essence, come closest to the Czech. The Constitution of the Slovak Republic expressly declares, in its Art. 23 par. 4, the prohibition on extraditing its own citizens. The amendment to its Constitution, No. 90/2001 of Collection of Laws omitted the concluding words "nor extradite to another state". Following its entry into force, Art. 23 par. 4 of the Slovak Constitution read as follows: "Every citizen has the right to unrestricted entry into the Slovak Republic. Citizens cannot be forced to leave their homeland, and they cannot be expelled." The Slovak text thus consistently distinguished the terms, "forced to leave their homeland" and "expulsion" from "extradition" of citizens to another state. In comparison with the Slovak text, Art. 14 par. 4 of the Czech Charter is expressis verbis narrower and, in all respects, speaks merely of the prohibition on forcing citizens to leave their homeland.

66. The prohibition on "forcing one to leave his homeland" can be interpreted either broadly or narrowly. In agreement with the petitioner, the Constitutional Court concludes that, in order to resolve the issue of the meaning of Art. 14 par. 4 of the Charter, its objective purport must be sought. In assessing of the meaning of this provision of the Charter, it is appropriate above all to take into account the historical impetus for its adoption. The second sentence of Article 14 par. 4 first appeared in Art. 15 par. 2 of the draft Charter, in the 7 January 1991 report of the Constitutional Law Committee of the Assembly of the People and the Assembly of the Nations (see print 392, http://www.psp.cz). The Constitutional Court also agrees both with the petitioner and with the parties to this proceeding, that the experience with the crimes of the Communist regime played a critical role in the constitution of the Charter. It played this role even in the drafting of the current version of Art. 14 par. 4 of the Charter, at the end of 1990 and beginning of 1991, that is, experience that is still quite recent. This was especially the case in connection with the "Demolition" operation, in which the Communist regime forced troublesome persons to leave the Republic (for analogous examples, cf. Kavěna M., Základní právo občana nebýt nucen k opuštění své vlasti, Evropský zatýkací rozkaz a mezinárodní trestní soud [The Fundamental Right of Citizens of the Czech Republic not to Be Forced to Leave their Homeland, the European Arrest Warrant, and the International Criminal Court], EMP, No. 5/2004, p. 42 and foll.,, or Kysela J., Rok 2004 ve vývoji vybraných institutů českého ústavního práva – 1. část [The Evolution of Selected Institutes of Czech Constitutional Law in 2004 – 1st Part], Právní rozhledy [Legal Perspectives], No. 12/2005, pp. 425-26). A historical interpretation of Art. 14 par. 4 of the Charter thus attests to the fact that it was never concerned with extradition.

67. The intention of the constitutional framers is not alone a decisive argument, where it is based on historical experience, particularly in the circumstance where historical memory fades and cannot be passed on to future generations, because they are bound up with the experience of their own times. For this reason, the Constitutional Court sought the objective meaning of Art. 14 par. 4, second sentence, of the Charter, which must be gauged against contemporary life and institutions at the start of the 21st century. In seeking the objective significance of the indicated Charter provision, the Constitutional

Court also took into account the historical evolution of extradition as a legal institution. As a general matter, the extradition of perpetrators of ordinary criminality did not exist until the 19th century and, in view of the low mobility of Europe's inhabitants in those times, as well as the very limited degree of cooperation among the then European states, did not even constitute much of a weighty issue (cf. Čepelka Č. - Šturma P., Mezinárodní právo veřejné, Praha 2003, str. 353 [Public International Law, Prague 2003, p. 353].

68. The currently existing rules for extradition in the majority of European states trace their origin to the model formed in the 19th century. On the one hand, that model did not allow for judicial decisions in criminal matters, including arrest warrants, to operate directly in other states (cf. Musil J., Kratochvíl V., Šámal P., Kurz trestního práva, str. 962 [A Course of Criminal Law – Criminal Procedural Law], C.H. Beck, 2003, p. 962); on the other hand, the state arrogated to itself total control and full criminal jurisdiction over its own citizens (in the original conception of subjects), which no third state whatsoever was permitted to exercise. Initially, the traditional canon that a state does not extradite its own citizens for criminal proceedings abroad, thus, did not by a long shot reflect a citizen's fundamental right not to be extradited, rather was the manifestation of a state's sovereign control over its own citizens in the conception then current. The canon that a state did not extradite its own citizens for criminal prosecution abroad had at that time a strong justification in the widely prevailing distrust among the competing European powers.

69. Only later, after the tragic events which occurred, primarily in Europe, in the first half of the 20th century, did the canon against the extradition of one's own citizens transform, from state-claimed responsibility for their own citizens, into the principle of the protection of one's own citizens from extradition abroad. The practice remained the same; only the justification therefore changed. On the basis of their own historical experiences, certain states even went so far as to incorporate this prohibition on extradition into their constitutions (for ex., as regards neighboring states, Art. 55 par. 1 of the Constitution of the Polish Republic or Art. 16 par. 2 of the Basic Law of the Federal Republic of Germany). The prohibition on extradition thus gradually shifted into the area of fundamental rights, which is quite understandable in circumstances where the world still contains a large number of non-democratic regimes which do not guarantee the right to fair process measuring up to one's own standards, for ex. those of EU Member States.

70. It cannot be overlooked that the current period is connected with an extraordinarily high mobility of people, ever-increasing international cooperation and growing confidence among the democratic states of the EU, which places new demands on the arrangements for extradition within the framework of the Union. A qualitatively new situation exists in the EU. Citizens of the Member States enjoy, in addition to the rights arising from citizenship in their own state, also rights arising from EU citizenship, which guarantees, among other things, free movement within the province of the entire Union. The EU is an area of freedom, security and justice, which facilitates the free movement of citizens while guaranteeing their safety and security (see the Preamble to the Treaty on the

EU). The European arrest warrant proceeds from this reality and renders more effective the cooperation of organs taking part in criminal proceedings. Cooperation between central state authorities of Member States has been replaced by the direct cooperation of bodies of the justice system and makes an exception to the principle prohibiting the extradition of one's own citizens for criminal proceedings abroad.

71. If Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then it is naturally in this context that a certain degree of responsibility must be accepted along with these advantages. The investigation and suppression of criminality which takes place in the European area, cannot be successfully accomplished within the framework of individual Member States, but requires extensive international cooperation. The results of this cooperation is the replacement of the previous procedures for the extradition of persons suspected of criminal acts by new and more effective mechanisms, reflecting the life and institutions of the 21st century. The contemporary standard for the protection of fundamental rights within the European Union does not, in the Constitutional Court's view, give rist to any presumption that this standard for the protection of fundamental rights, through invoking the principles arising therefrom, is of a lesser quality than the level of protection provided in the Czech Republic.

72. These facts cannot be disregarded when determining the objective meaning of Art. 14 par. 4 of the Charter. It is not in harmony with the principle of the objective teleological interpretation, reflecting the contemporary reality of the EU (i.e., that it is founded on the high mobility of citizens in the framework of the entire Union area), for Art. 14 par. 4 to be interpreted such that it does not even allow for the surrender of a citizen, for a limited time, to another Member State for a criminal proceeding concerning a criminal act committed by this citizen in that state, as long as it is guaranteed that, following the conclusion of the criminal proceeding the citizen will, at his own request, be returned to the Czech Republic to serve any sentence imposed (srov. § 411 par. 7 of the Criminal Procedure Code). Thus, the surrender of a citizens for a limited time for criminal proceedings being held in another EU Member State, conditioned upon their subsequent return to their homeland, does not and cannot constitute forcing them to leave their homeland in the sense of Art. 14 par. 4 of the Charter. The Court can equally draw attention to the rules providing that Czech citizens or persons with permanent residence status in the Czech Republic may be sent to another Member State of the Union to serve a sentence or for protective treatment or protective measures, but only if they consent thereto (§ 411 par. 6 of the Criminal Procedure Code). It follows therefrom that unless they give their consent, they will never be sent abroad to serve a sentence of imprisonment.

VIII./b

73. The petitioners made reference to the constitutions of Estonia (Art. 36 par. 2), Lithuania (Art. 13 par. 2), Poland (Art. 52 par. 4), Hungary (Art. 69 par. 1) Slovenia (Art. 48), the FRG (Art. 16 par. 2), Finland (Art. 9 par. 3), France (Art. 88-2 point 3), Italy (Art. 26), Portugal (Art. 33 par. 3), or Spain (Art. 13 par. 3). The constitutions of these

countries either enshrine the right of citizens not to be extradited, or lay down an exception for international agreements or particularly only in relation to the EU. Since the constitution of a large number of countries was amended in connection with the European arrest warrant (the petition mentions the FRG and France), the petitioners deduce therefrom the existence of a general, widely-shared constitutional principle prohibiting a state from extraditing its own citizens. According to them, the conclusion follows from this that the implementation of the European arrest warrant in the Czech Republic cannot be effected otherwise than subsequent to a constitutional amendment.

74. The Constitutional Court took into account the fact that in a number of countries the constitution was actually amended in connection with the implementation of the European arrest warrant (unless stated otherwise, the following data is based on a report from the XXI. Congress of FIDE, Dublin, June 2004, accessible at http://www.fide2004.org). Apart from Germany and France, referred to by the petitioners, also Slovenia (Constitutional Act No. 24 – 899/2003) and Latvia, among others, can be mentioned.

75. The petitioners did not, however, cite the host of other EU Member States in which the prohibition against extraditing one's own citizens does not at all qualify as an issue of constitutional principle and has not even been introduced into sub-constitutional law. For example, in Greece the prohibition against extraditing one's own citizens has never been considered a constitutional principle and was always dealt with by means of a statute. A similar situation prevails in Denmark, where a mere statutory revision was all that was required to change the existing law. In the situation where the national constitution does not govern the issue of extradition or surrender to foreign states of perpetrators, it was not necessary to make any changes to the constitution, as was the case in the Netherlands (in conformity with the decision of the Dutch Council of State), Belgium, Luxembourg, and Sweden (see the above-cited Report of the XXI Congress of FIDE). Due to its unique constitutional situation, the adoption of acts governing the European arrest warrant presents no substantial problem for Great Britain, as UK law never contained a prohibition on the extradition of its own citizens (cf. Čepelka, Č., Šturma, P., Mezinárodní právo veřejné [Public International Law], Prague 2003, p. 354). On the contrary, British lawyers have traditionally preferred this approach to that of the European continental countries (cf. Biron, H.Ch. - Chalmers, K. E., The Law and Practice of Extradition, London 1903, p. 13). The British model, which always permitted the extradition of its own citizens, has generally been followed by the Irish Republic and Malta (cf. Stanbrook, I. - Stanbrook, C., Extradition: Law and Practice, 2nd ed., Oxford 2000, p. 313, p. 385, p. 427).

76. The petitioners cited the fact that, by an Act of 18 March 2004 (Dz.U. 2004, No. 69, pol. 626), Poland amended its Criminal Code, Criminal Procedure Code, and its Code of Misdemeanors. Art. 55 par. 1 of the Constitution (the petitioners incorrectly cite it as Art. 52 par. 4) was in no way formally modified by this amendment. On 27 April 2005, the Polish Constitutional Tribunal annulled, by its decision P 1/05, certain provisions designated as amendments to the criminal enactments, due to their conflict with Art. 55 par. 1 of the Constitution, according to which the extradition of Polish citizens is prohibited ("The extradition of a Polish citizen shall be forbidden.") and according to its

second paragraph the extradition of persons suspected of non-violent political crimes is prohibited. The Polish Constitutional Tribunal stated that “surrender” in the sense of the European arrest warrant must a fortiori be considered as coming within the term, “extradition”, in the sense of Art. 55 of the Constitution.

77. In this connection, the Czech Constitutional Court refers to the fact that, in contrast to the wording of Art. 14 par. 4 of the Czech Charter, the formulation of Art. 55 par. 1 of the Polish Constitution excludes any form whatsoever of extradition of Polish citizens (inclusive also of a surrender pursuant to the European arrest warrant). In comparison with the Czech constitutional order, the Polish Constitution leaves no room at all for it to be interpreted in harmony with the state’s obligations towards the EU.

78. In view of this fact, the Court cannot assent to the petitioners’ view that a general constitutional principle prohibiting the extradition of one’s own citizens to a foreign state can be deduced from a comparative perspective and that, as a result, it is necessary to seek a constitutional amendment before the European arrest warrant can be implemented. In a number of EU Member States the constitution was not amended. A constitutional amendment would be indispensable only in the case that a statutory revision, required for the implementation of the European arrest warrant, would be in conflict with the national constitution, that is, in a situation where the national constitution directly forbids the extradition or surrender of citizens to a foreign state for the purpose of criminal prosecution.

VIII/c

79. The general principle, according to which the Czech Republic shall observe its obligations resulting from international law, is enshrined in Art. 1 par. 2 of the Constitution of the Czech Republic. In consequence, since the Constitution itself proclaims the value of being open towards international law (cf. judgment No. Pl. US 31/03, Collection of Judgments and Rulings of the Constitutional Court, Vol. 32, p. 143; published in the Collection of Laws as No. 105/2004 Coll.), in principle a meaning should be attributed to the Constitution which is conformable to international law.

80. As of 1 May 2004, Art. 1 par. 2 of the Constitution of the Czech Republic took on new significance in relation to the observance of duties which arise for the Czech Republic from its membership in the EU. As the Czech Republic has already emphasized in its case-law, European law is founded on fundamental values, common to all EU Member States. The Constitutional Court thus declared the Czech Republic’s allegiance to the European legal culture and to its constitutional traditions. The Constitutional Court also interprets constitutional acts, above all the Charter of Fundamental Rights and Basic Freedoms, in light of the general principle of law existing in all Member States of the Union, (judgment No. Pl. US 5/01, Collection of Judgments and Rulings of the Constitutional Court, Vol. 24, p. 79; published in the Collection of Laws as No. 410/2001 Coll.).

81. From Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation enshrined in Art. 10 of the EC Treaty, follows a constitutional principle according to which national legal enactments, including the Constitution, should whenever possible be interpreted in conformity with the process of European integration and the cooperation between European and Member State organs (cf. the analogous decision of the Polish Constitutional Tribunal K 15/04 of 31 May 2004, OTK ZU ser. A., Part 5, No. 47, pp. 655 - 668 and, in particular as far as concerns acts under the III. Pillar, the ECJ decision of 16 June 2005, in which the Court held that the principle of conforming interpretation applies also to framework decisions adopted within the confines of Charter of the Treaty on European Union, see Case C-105/03 Maria Pupino, par. 43.)

82. The constitutional principle that national law shall be interpreted in conformity with the Czech Republic's obligations resulting from its membership in the European Union is limited by the possible significance of the constitutional text. Article 1 par. 2 of the Constitution is thus not a provision capable of arbitrarily modifying the significance of any other express constitutional provision whatsoever. If the national methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European Law, it is solely within the Constituent Assembly's prerogative to amend the Constitution. Naturally, the Constituent Assembly may exercise this authority only under the condition that it preserves the essential attributes of a democratic law-based state (Art. 9 par. 2 of the Constitution), which are not within its power to change, and not even a treaty pursuant to Art. 10a of the Constitution can assign the authority to modify these attributes (cf. Holländer, P., Materiální ohnisko ústavy a diskrece ústavodárce [The Substantive Heart of the Constitution and the Constituent Assembly's Discretion], Právník [The Lawyer], No. 4/2005)

83. It follows therefrom that, to the extent that there are several interpretations of the Constitution that are possible in accordance with the national interpretive methodology, although only certain of them would result in the Czech Republic fulfilling the obligations it undertook by its membership in the European Union, that interpretation must be selected which supports the fulfillment of those obligations, not one which would hinder their fulfillment. The principle in Art. 1 par. 2 of the Constitution will at the same time be upheld thereby. These conclusions apply as well to the interpretation of Art. 14 par. 4 of the Charter. Since the Constitutional Court interpreted the meaning of Art. 14 par. 4 of the Charter according to the domestic methodology for the interpretation of the Constitution, it was not even necessary carry out a weighing of the values and principles of European law and national constitutional law which are relevant for consideration.

VIII./d

84. The Constitutional Court's judgment, published in the Collection of Laws as No. 207/1994 Coll., to which the petitioners' refer, define citizenship "as a relationship between an individual and a state which is not limited in duration and not restricted to the state's territory, which, as a rule, is not revocable against the will of the individual, and on the basis of which is founded an individual's capacity for reciprocal rights and duties,

consisting primarily of the right of the individual to the state's protection both within its territory and without, the right of the individual to reside in the territory, and the right to take part in the administration of public affairs.” (Collection of Judgments and Rulings of the Constitutional Court, Vol. 2, p. 7).

85. The right of citizens to protection by the state is manifested in the fact that it would represent a breach, among others, of Art. 14 par. 4, Art. 36 par. 1 of the Charter and Art. 6 par. 1 of the Convention, for a citizen were to be surrendered for criminal prosecution to a state where the standards of criminal proceedings do not meet the requirements for criminal proceedings enshrined in the Czech Constitutional order, for ex., in the situation where the citizen’s right to fair process (Art. 36 par. 1 of the Charter) would be genuinely threatened, or alternatively where the citizen would be subjected to torture or other inhuman or degrading treatment or punishment (Art. 3 of the Convention, Art. 7 par. 2 of the Charter). However, such is not the case for the European arrest warrant.

86. Already in 2003, the ECJ declared that “the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied” (Cases C-187/01 and C-385/01, the criminal proceeding against Hüseyin Gözütok (C-187/01) and Klaus Brügge (C-385/01), [2003] ECR I-1345, par. 33). It is always necessary to remember the fact that all EU Member States are also signatories of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accordingly a citizen cannot not be significantly affected in his rights due to the fact that his criminal matter will be decided in another Member State of the Union, as each EU Member State is bound by a standard of human rights protection, which is equivalent to the standard required in the Czech Republic while all Member States’ legal orders rest on the values to which our state declared its allegiance only after 1989. The Czech Charter of Fundamental Rights and Basic Freedoms also draws upon the European Convention for the Protection of Human Rights and Fundamental Freedoms.

87. In view of the mentioned principle of mutual confidence among the EU Member States in the functioning of their criminal justice systems, the Framework Decision proceeds from the assumption that the implementation of a European arrest warrant may be suspended only in the event of a serious and persistent breach of the principles set out in Art. 6 par. 1 of the EU Treaty (the protection of human rights) by certain Member States, while such breach must be formally determined by the Council pursuant to Art. 7 of the EU Treaty (10th recital to the Preamble).

88. Section 377 of the Criminal Procedure Code can be considered as something of a safeguard, guaranteeing on the constitutional law plane the protection of Czech citizens. According to this provision, the request of a foreign state’s organ may not be granted if its granting would constitute a violation of the Constitution of the Czech Republic or such provision of the Czech legal order which must be adhered to without exception, or if the granting of the request would damage some other significant protected interest of the Czech Republic. This principle, contained in the Twenty-Fifth Chapter,

First Division of the Criminal Procedure Code (designated as general provisions) thus applies both to the classic extradition procedure pursuant to the Second Division, and to proceedings on the surrender of persons between EU Member States on the basis of the European arrest warrant, pursuant to the Third Division of the same Chapter. There is an ongoing scholarly debate concerning the meaning of this provision (cf. Zemánek J., Evropsko-právní meze přezkumu ústavnosti transpozice rámcového rozhodnutí o eurozatykači, Právní rozhledy č. 3/2006 [European Law Limits to the Constitutional Review of the Transposition of the Framework Decision on the European arrest warrant], Právní rozhledy [Legal Perspectives] No. 3/2006).

89. Even though this provision of the Criminal Procedure Code is introduced by the marginal heading "Protection of the State's Interests", it can be deduced, primarily from the text of its first sentence, that it is be concerned primarily with the state's interest in not violating a Czech citizen's fundamental rights enshrined in the Czech Republic's constitutional order, of which the Charter of Fundamental Rights and Basic Freedoms forms an integral part (... if its execution would constitute a violation of the Constitution of the Czech Republic or such provision of the Czech legal order which must be adhered to without exception ...).

90. Persons who are to be surrendered to another EU state retain the right to submit against the relevant measures of organs taking part in criminal proceedings a complaint which has suspensive effect (§ 411 par. 5 of the Criminal Procedure Code) and, in appropriate cases, a constitutional complaint, and the deadline for the surrender of the person does not run while the Constitutional Court is deciding (§ 415 par. 3 of the Criminal Procedure Code). These provisions preserve the legal protection of citizens, or of other persons who should be surrendered for criminal prosecution, and at the same time uphold the condition that, in consequence of the surrender of a requested person, the constitutional order of the Czech Republic will not be affected in individual cases.

91. These principle are in conformity with the Framework Decision, according to which nothing in it may be interpreted as prohibiting the refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or that that person's position may be prejudiced for any of these reasons. The Framework Decision does not prevent a Member State from applying its constitutional rules relating to the due process, the freedom of association, the freedom of the press and the freedom of expression in other media. The Framework Decision also expressly declares that no person may be removed, expelled or extradited to a state where there is a serious risk that she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

92. There are grounds for refusing a request to surrender a requested person in the event, among others, that the criminal offense for which the European arrest warrant is issued is

covered by an amnesty issued in the Czech Republic or that the criminal prosecution or punishment are statute-barred in the Czech Republic if, under the Czech Republic's own criminal law enactments, it has jurisdiction to prosecute that criminal act (§ 411 par. 6 lit. b) of the Criminal Procedure Code).

93. The ne bis in idem principle is also preserved. According to § 411 par. 6 lit. c) of the Criminal Procedure Code, the surrender request will be refused if, in respect of the same act, the requested person has been finally judged in the Czech Republic or a foreign state, provided that the sentence has already been served or is currently being served or may no longer be executed, or if a final judgment has already been passed in a criminal proceeding, either in the Czech Republic or another Member State, and such decision may no longer be quashed through a prescribed procedure.

94. Last but not least, it should be emphasized that an ongoing criminal proceeding brought by the Czech Republic against the requested person takes precedence over the surrender of the requested person pursuant to a European arrest warrant [according to § 411 par. 6 lit. d) of the Criminal Procedure Code, the court shall refuse to surrender the requested person in that case that he is being prosecuted in the Czech Republic for the same act as that for which the European arrest warrant was issued].

95. The assertion that the domestic law rules relating to the European arrest warrant have disturbed the relationship between the citizen and the state is, thus, not tenable. A citizen surrendered to an EU Member State for criminal prosecution remains, even for the duration of that criminal proceeding, under the protection of the Czech state. The European arrest warrant merely permits, for a limited time, the surrender of a citizen for his criminal prosecution in a Member State of the Union for a specifically defined act, while following the completion of this criminal proceeding, there is nothing preventing him from returning back (where relevant even to serve his sentence in Czech territory). The Criminal Procedure Code specifies the grounds upon which the surrender of a person to another Member State of the Union shall not occur (esp. § 411). Citizens have the right to defend themselves against measure by organs acting in the criminal proceeding by means of remedial measures, which have suspensive effect (see § 411 par. 5 of the Criminal Procedure Code), including even the possibility of a constitutional complaint. In the case that the surrender of a citizen would result in a breach of the constitutional order, the surrender of the citizen will not occur.

96. In reaching these conclusions, it is necessary to take into account not only the protection of rights of persons suspected of committing a criminal act, but also the interests of the victims of criminal acts. For the protection of the rights of victims and injured persons, it generally appears more practical and fair for the criminal proceeding to be held in the state in which the criminal act was committed (cf. the conditions for the resolution of cases of two or more concurrent European arrest warrants in § 419 of the Criminal Procedure Code and Art. 16 of the Framework Decision). Since the execution of the European arrest warrant, in the case a state is surrendering its own citizen, is conditioned on reciprocity (§ 403 par. 2 of the Criminal Procedure Code), the rules

contested by the petitioners protect the rights of persons who can be considered, according to the Czech Criminal Procedure Code, as injured persons. It can generally be said that, in view of the evidence that will found in the state where the criminal act occurred, a criminal proceeding there will be quicker, more effective and, at the same time, more reliable and just both for the defendant and for any victim of the criminal act.

IX.

The Conformity of the Contested Provisions with other Provisions of the Charter

97. The Constitutional Court considered as well the conformity of the contested provisions, in particular § 412 paras. 1 and 2 of the Criminal Procedure Code, with Article 39 of the Charter, according to which only a law may designate the acts which constitute a crime and the penalties or other detriments to rights or property that may be imposed for committing them. The provisions of § 412 paras. 1 and 2 of the Criminal Procedure Code implement the provisions of Art. 2 par. 2 of the Framework Decision and represent a break with the principle that persons are not extradited for criminal prosecution abroad, unless they are suspected of having committed an act which is criminal both under the law of the requesting state and the law of the surrendering state. According to § 412 par. 1 of the Criminal Procedure Code, in cases where the surrender is requested for a criminal offense for which it is possible in the requesting state to impose a punishment of imprisonment with an upper of at least three years or order protective measures connected with restrictions on liberty lasting for at least three years, and which consists in conduct which the requesting state organ designates in the European arrest warrant as one or more of the categories of conduct enumerated in paragraph 2, the court does not ascertain whether it is a criminal offense under the law of the Czech Republic. § 412 par. 2 of the Criminal Procedure Code thus enumerates criminal offense for which the court, in connection with a proceeding on surrender, does not ascertain their criminality under the law of the Czech Republic.

98. It would appear at first glance that the argument to the effect that § 412 is in conflict with Art. 39 of the Charter could be rejected as excluded in principle. First of all, it should be noted that Art. 1 par. 3 of the Framework Decision makes the following general proviso: „This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.“ Thus, the Framework Decision cannot be interpreted as requiring the Member States to do anything that would violate fundamental rights, including the principle of legality enshrined in Art. 39 of the Charter.

99. The generally recognized principle of legality, embodied in Art. 39 of the Charter, entails first and foremost the requirement that a state may impose punishment upon a certain person solely on the basis of fair notice in its own law that particular conduct is forbidden by that state. In this manner, the state allow all persons subject to its law to foresee the consequences of their conduct (general requirement of foreseeability). There are two aspects to this requirement. First, the state’s law must clearly and precisely

define the conduct that is prohibited (comprehensibility of the norm). According to the second, there must be some connection between an accused's conduct and the territory or public interest of the state seeking to punish (a nexus, that is, linkage to the criminal jurisdiction of that state), so as to enable the concerned persons to be aware that their conduct calls forth consequences foreseen in that state's laws.

100. Viewed from this perspective, the argument against § 412, taken literally, would mean that the Czech Republic's failed to respect the principle of foreseeability of criminal law. But this argument overlooks the fact that Art. 39 generally limits the Czech Republic in the exercise of its own criminal jurisdiction. It does not explicitly regulate the issue of the extradition or surrender of a person. In a situation where Czech law authorizes the Czech Republic to extradite or surrender a person within its jurisdiction, the Czech Republic is not seeking to exert its criminal jurisdiction against an accused, so that it would seem that Art. 39 does not apply. After all § 412 does not define criminal offenses; for § 412 to come into play, the criminal offenses must be properly defined in legislation of the state requesting a person's extradition or surrender. The situation where Art. 39, by its explicit terms, clearly applies is where the Czech Republic itself wishes to prosecute that person, in which case Art. 39 would without question require that such prosecution be based on a criminal offense precisely defined in its own criminal code. For these reasons, in adopting § 412 of the Criminal Procedure Code, the Czech Republic does not violate the principle of legality enshrined in Art. 39.

101. The Constitutional Court, therefore, does not concur with the petitioners' arguments asserting that § 412 par. 2 of the Criminal Procedure Code is in conflict with Art. 39 of the Charter because this provision in no way defines the criminal offenses not requiring double criminality. If it had been a substantive law enactment, that is if certain conduct had been made criminal by means of a provision like § 412 par. 2 of the Criminal Procedure Code, that is, by enumerating them without any sort of statutory definition, that would certainly constitute a violation of Art. 39. of the Charter. The Constitutional Court proceeds, however, from the fact that § 412 of the Criminal Procedure Code is not a substantive law provision, rather a procedural law one. A surrender pursuant to the European arrest warrant is still not the imposition of punishment in the sense of Art. 39 and Art. 40 of the Charter.

102. Persons suspected of having committed a criminal act and surrendered in accordance with the European arrest warrant will not be prosecuted under § 412 par. 2 of the Criminal Procedure Code; rather the criminal proceeding will be conducted for criminal offenses defined in the substantive law of the requesting EU state. The statutory enumeration of criminal offenses in § 412 par. 2 of the Criminal Procedure Code (Art. 2 par. 2 of the Framework Decision) serves merely for the procedural steps taken by courts. That is to say, in cases where the requesting state's organ designates in the European arrest warrant the conduct of the surrendered person as one of the categories of conduct enumerated in § 412 par. 2 of the Criminal Procedure Code, or Art. 2 par. 2 of the Framework Decision, Czech courts do not ascertain the criminality of this act according to the law of the Czech Republic. The adoption of § 412 of the Criminal Procedure Code did not result in the

criminal law of all EU Member States becoming applicable in the Czech Republic. It merely means that the Czech Republic is assisting the other Member States in the enforcement of their criminal laws. Thus, § 412 of the Criminal Procedure Code does not impose on persons in the Czech Republic (citizens, permanent residents, and others commonly found within the territory) the obligation to know the criminal law of all EU states.

103. Moreover, the enumeration of criminal offenses in § 412 par. 2 of the Criminal Procedure Code or Art. 2 par. 2 of the Framework Decision generally corresponds to conduct which is criminal even according to Czech law, even though the titles of particular criminal offenses do not necessarily correspond exactly to each other. The enumeration of criminal offenses which do not require dual criminality is not given due to the fact that it would otherwise be presumed that some of these categories of conduct do not qualify as criminal offenses in one or more of the Member States; rather the exact opposite, that it is conduct which, in view of the values shared by the EU Member States, is criminal in all of them. The reason for enumerating them in this fashion is to speed up the execution of European arrest warrants, as the proceeding for ascertaining the criminality of such acts under Czech law has been dropped. In addition, in adopting this Framework Decision each EU Member State expressed its agreement that all criminal conduct coming within the categories defined in this way will also be criminally prosecuted.

104. The fact that § 412 does not establish legal grounds for criminal prosecution in the Czech Republic still does not, however, exhaust the issue as to whether Art. 39 has been violated. As a provision concerning cooperation in criminal matters between independent states, this matter cannot be viewed strictly from the perspective of the Czech Republic. It must also be borne in mind that persons with the Czech Republic's jurisdiction might also be subject to the criminal jurisdiction of other states. This is so where they have engaged in conduct partly in Czech Republic and partly in other countries, or conduct in the Czech Republic that has effects in other countries. This legal regulation must be viewed in a broader context, as it involves a transnational situation, and it must be remembered that legal systems other than the domestic system will apply to such situations. This aspect of the situation brings into play a further dimension of the protection provided by Art. 39 of the Charter.

105. This further dimension of Art. 39 is the fact that it prohibits the Czech Republic from participating in or directly assisting another state in effecting a criminal prosecution that does not respect the principles of legality. This would occur in a situation where the Czech Republic does not itself punish a person, rather it surrenders a suspect to a state which does not respect the principle of legality. It is also necessary to take into account the significance of the ECHR jurisprudence on Art. 3 (the Case of Soering v. the United Kingdom, which forbids the States Parties to the ECHR to send a person to a state which is not bound by the prohibitions on cruel or arbitrary treatment and which does not give assurances that it will not violate this prohibition.

106. In light of the above-discussed considerations of the further aspects of the principle of legality, the Constitutional Court can consider whether dispensing with the dual

criminality requirement results in a violation of Art. 39. The dual criminality requirement is typically a safeguard against states having a treaty obligation to hand over someone for punishment for conduct which in itself did not deem to merit punishment. It was an assurance against the obligation to collaborate or acquiesce in conduct by a receiving state that does not respect the principle of legality, that is, the prohibition of cruel, arbitrary or unjust treatment or punishment. The general notion is that if both states in question find a particular type of conduct worthy of punishment, then the extraditing state can hardly view punishment for such conduct as cruel, arbitrary and against the principle of legality.

107. By dispensing with the principle of dual criminality in relation to the Member States of the EU, the Czech Republic in no way violates the principle of legality. As a general matter, the requirement of dual criminality can be dispensed with, as a safeguard, in relations among the Member States of the EU, which have a sufficient level of value approximation and mutual confidence that they are all states as having democratic regimes that adhere to the rule of law and are bound by the obligation to observe this principle. It is precisely the situation, where the level of approximation among the 25 EU Member States has arrived at such a degree of mutual confidence, that they no longer feel the need to cling to the principle of dual criminality.

108. After concluding that that principle of legality in Art. 39 does not require the principle of dual criminality as an indispensable component of the extradition process, the Constitutional Court turned attention to considering whether the surrender of persons pursuant to the Framework Agreement do not comport with Art. 39. It is evident that this Article would prohibit the Czech Republic from surrendering a person to another state for criminal prosecution, if that other state has not sufficiently defined in its law that the conduct the accused is alleged to have engaged in is prohibited by that state. But nothing in the Framework Decision requires the Czech Republic to act in this manner. In addition, even should the prohibited conduct be clearly and precisely defined in the law of a state which seeks to assert criminal jurisdiction over a person, the principle of legality still requires a nexus (see the interpretation above) between the alleged conduct and the state seeking to prosecute.

109. International law recognizes several legitimate grounds for a state to assert its criminal jurisdiction. The generally recognized grounds are the nationality principle, the protective principle, universality principle, the territoriality principle. Apart from some minor exception with which the Court need not occupy itself, the first three jurisdiction principles do not present a significant problem in relation to the requirement of a nexus. In terms of the nexus requirement, nothing has changed from the previous state of affairs where citizens of the Czech Republic and other persons within its jurisdiction were and remain liable, according to the legal order of a given state, for criminal acts which they committed abroad. The territoriality principle, which provides the foundation for the operation of substantive criminal law on the territory of a foreign state (including EU Member States), applied and still applies to all persons, if they commit a criminal act on the territory of those states. Therefore, the petitioners’ notion that it is necessary to publish the criminal legislation of all the remaining 24 EU Members States is not

apposite. Although it is, on the whole, generally accepted, the territoriality principle brings certain problems of application in its wake. For example, while it is generally acknowledged that a state may exert its criminal jurisdiction for conduct occurring on its territory, which alone suffices for a nexus to be found, still the territoriality principle also extends to cases where a state extends it jurisdiction to conduct which, although it occurred outside of its territory, its consequences affected its territory.

110. The Constitutional Court takes as a starting proposition that the surrender of Czech citizens or other persons authorized to stay on Czech territory to another EU Member State for the purpose of their prosecution will generally come into consideration only in the case where their conduct, qualifying as a criminal offense, did not occur in the Czech Republic, but in another Member State of the Union. Should the commission of a criminal act occur partly abroad and partly in the Czech Republic, then criminal prosecution in the Czech Republic would be an option. An impediment to the surrender of such persons for a criminal proceeding abroad (cf. § 411 par. 6 lit. d) of the Criminal Procedure Code) thereby arises, to the extent that it would be more appropriate, in view of the nature of the conduct in question, for the prosecution to take place in another EU Member State, for ex., due to the fact that decisive evidence is found there or the criminal deeds played out primarily in that state, etc.

111. Pursuant to Art. 4 par. 7 of the Framework Decision, the executing judicial authorities may refuse to execute a European arrest warrant where it relates to offenses which have been committed in whole or in part in the territory of the executing Member State, or in a place treated as such. This provision, which affords domestic criminal justice organs the possibility to weigh whether to refuse to execute the European arrest warrant, protects the value of legal certainty, which is also a value in European law and whose observance on the European plane is a prerequisite for the Czech constitutional order permitting the application of European law in the domestic legal order (in the case of the implementation and application of the Framework Decision). Although Article 4 par. 7 of the Framework Decision was not explicitly implemented into the Czech legal order, in accordance with the principle of the constitutionally conforming interpretation, Czech criminal justice organs must pay heed to Czech citizens' trust in the fact that their conduct within the Czech Republic will be governed by Czech criminal law. If Czech citizens remain within the territory of the Czech Republic, domestic law is applied to their conduct, from which also follows these persons' constitutionally protected trust that legal consequences laid down in Czech law will be attributed to their legal conduct. The general value of legal certainty finds expression, on the constitutional plane, in the principle formulated in Art. 39 of the Charter, and on the sub-constitutional plane is expressed in the general principle of § 377 of the Criminal Procedure Code, which applies subsidiarily in relation to § 411 par. 6 lit. d) of the Criminal Procedure Code, that is, it will only be applied in the case that a criminal prosecution concerning the same act is not already in progress in the Czech Republic.

112. According to § 377 of the Criminal Procedure Code, interpreted in the light of Art. 4 par. 7 of the Framework Decision, a Czech citizen will not be surrendered to another EU Member State due to suspicion of having committed a criminal offense, if it was allegedly

committed within the Czech Republic, except in cases where, in view of the special circumstances of the commission of the criminal act, priority must be given to holding the criminal prosecution in the requesting state, for example, on grounds of adequate fact-finding concerning the conduct in question, if in the greater part it occurred abroad, or because prosecution in the given EU Member State would, in that particular case, be more appropriate than that person's prosecution in the Czech Republic. It is appropriate for the court which may, but need not, refuse to execute the European arrest warrant, to have sufficient decision-making discretion, as in a whole host of cases it would be appropriate for a person suspected of having committed a criminal offense to be surrendered, even though his activity occurred within the Czech Republic (for ex. organized criminal acts, which naturally were brought to fruition in the another EU Member State). This provision will be clarified in more detail only through the decision-making practice in this phase of such proceedings; it is not for the Constitutional Court to preempt that process.

113. The Constitutional Court would emphasize that the Czech constitutional order does not protect merely Czech citizens' trust in Czech law, rather it similarly protects also the trust and legal certainty of other persons, authorized to stay within the territory of the Czech Republic (for ex., aliens having permanent residence status in the Czech Republic).

114. "Distance" criminal offences, that is, those usually committed by means of computer technology, represents a specific category falling within the terms of the territoriality principle, as it theoretically admits of the possibility that conduct occurring in the Czech Republic could satisfy the material elements of a criminal offense in another EU Member State. The Constitutional Court concedes that, under quite exceptional circumstances, the application of the European arrest warrant would be in conflict with the Czech Republic's constitutional order, especially in the case that the "distance" delict would qualify as a criminal act under the law of the requesting state, but would not qualify as such under Czech criminal law, and perhaps would even enjoy constitutional protection in the Czech Republic (for ex., within the framework of the constitutional protection of free expression). The petitioners' objections are justified in this respect. In such an, albeit unlikely, case, the application of § 377 of the Criminal Procedure Code would come into consideration, as it contains a mechanism for precluding the unconstitutional consequences of the European arrest warrant, in the sense stated above.

115. Even though the contested provisions of the Criminal Procedure Code might be applied in an unconstitutional manner, such a hypothetical and unlikely situation does not provide grounds for their annulment. The Constitutional Court has already several times in its case law stated that "theoretically every provision of a legal enactment can naturally be applied incorrectly, hence even in conflict with constitutional acts, which in and of itself does not constitute grounds for the annulment of a provision which can conceivably be incorrectly applied." (Judgment No. Pl. US 8/98, published as No. 300/1998 Coll.). In other words, if a legal enactment is capable of being interpreted in several ways, only certain of which are unconstitutional, then a constitutionally conforming interpretation must be selected (Judgment No. Pl. US 48/95, published as No. 121/1996 Coll.) The purpose of a general norm control proceeding is not, however, to resolve every single

hypothetical situation which have not as yet come to pass, even though they may occur at some point. If the Constitutional Court were to proceed in this manner, it would go beyond the proper function appertaining to it within the framework of general norm control, and supplant the protection of fundamental rights which, in the nature of things, the ordinary and administrative courts must also provide.

116. As far as concerns the contested provisions' conformity with Art. 8 of the Charter, that is, with the right to personal liberty, the fundamental rights enshrined in this Article are ensured in the steps that criminal justice organs must take, as prescribed under § 409 and foll. of the Criminal Procedure Code.

117. By way of conclusion, the Constitutional Court would point out that the EU Council may, after consultation with the European Parliament, expand the list of criminal offenses, enumerated in Art. 2 par. 2 of the Framework Decision, for which the double criminality principle does not apply, by adding further categories of criminal offenses (Art. 2 par. 3 of the Framework Decision). It can does so only by unanimous decision, that is, solely with the assent of the Czech Republic's representative. When weighing whether to assent to the expanded list of those criminal offenses, that representative will also take into consideration the requirements of the Czech constitutional order. Naturally, repeated Constitutional Court review of such amended Czech criminal acts is not excluded.

118. In view of all of its above-stated legal conclusions, the Constitutional Court has, pursuant to § 82 par. 1 of Act No. 182/1993 Coll., on the Constitutional Court, as amended, rejected the petition on the merits.

Notice : No appeal lies against a Constitutional Court judgment.

Brno, 3 May 2006

Dissenting Opinion
of justices Eliška Wagnerová and Vlasta Formánková

I would like to emphasize that my dissenting opinion does not contest the Framework decision on the European arrest warrant (hereinafter "European arrest warrant"), rather I have reservation concerning its implementation by the national legislature, thus it is directed against the statement of judgment and the reasoning.

My reservations in relation to the majority opinion are of a dual character. First, in my view, the majority let pass the opportunity for the Czech Constitutional Court to formulate a doctrine of in relation to the EU Third Pillar, that is in the field of Justice and Home Affairs cooperation in criminal matters of the EU Member States (that is, to part of "Union law"). My second reservation concerns the method of assessing the implementation of the European arrest warrant into the Czech legal order, in other words, in relation to which

constitutional norm should this implementing act be assessed.

1.
The majority's reasoning rests on the application of the doctrine formulated by the Constitutional Court in its Judgment No. Pl. US 50/04, which however concerned Community law, that is, enactments which form a part of the acquis communautaire and the "First Pillar" of the EU. In this judgment, the Constitutional Court formulated a doctrine according to which the Czech Republic is, in view of Art. 10a of the Constitution of the Czech Republic, empowered to transfer certain powers of its organs to organs of the EC (EU). It was further stated in that judgment that it is necessary to find the grounds for the operation of Community law in the Czech Republic must be found in the dogma that the ECJ evolved in relation to Community law. In other words, the Constitutional Court at that time did not find, directly in the Constitution, the grounds for Community law to operate in the Czech milieu. However it also found in the Constitution the bounds for such operation, namely in Art. 9 par. 2 and in Art. 1 par. 1 of the Constitution of the Czech Republic.

Today's majority opinion shifts this doctrine, formulated by the Constitutional Court not even two months previously, by asserting that the Czech Republic's accession to the EU resulted „to a certain extent to the limition upon the Constitutional Court's jurisdiction" and that „where the Czech enactment reflects a mandatory norm of European law, in principle the doctrine of supremacy of Community law does not permit the Constitutional Court to review such Czech norm in terms of its conformity with the constitutional order of the Czech Republic." In actuality, in the cited judgment the Constitutional Court declared that in the case that powers are re-delegated from EC (EU) organs to organs of the Czech Republic (this still concerns the First Pillar of the EU), the Constitutional Court will review legal norms resulting from that re-delegation from the perspective of the Czech constitutional order, in which case, however, it will interpret it with a view toward the ECJ case law on those principles which are identical with the principles contained in the Czech constitutional order.

In assessing the implementation of treaty law arising from the Third Pillar, the majority opinion rested on these considerations. However, I cannot concur with this approach to the problem. First and foremost, in the Third Pillar of the EU, a transfer, pursuant to Art. 10a of the Czech Constitution, of a part of the Czech organs' powers to organs of the EU did not occur, nor could it have. Whereas the First Pillar of the EU is constructed on an enumeration of the substantively defined powers of the EC organs, if Art. 10a of the Constitution is applied in the case of the Third Pillar, that would represent a „blank check" given to the EU organs in vaguely defined areas, or an entirely „framework" definition – that is, in the criminal agenda connected with justice and police. Since criminal law, by its very nature, is that field which most intrudes upon the fundamental rights, and above all into their very foundation, that is, into the liberty of the individual, such a „blanket" transfer of powers to the EU organs, pursuant to Art. 10a of the Constitution, did not comport with the essential attributes of a democratic law-based state (Art. 9 par. 2 of the Constitution of the Czech Republic). After all, according to the Czech Constitutional Court's jurisprudence (III US 31/97), both respect for the individual endowed with

fundamental rights and the state's obligation to protect the fundamental rights of individual persons constitute an immanent component the essential attributes of a democratic law-based state. It is a question, which in my view must be answered in the negative, whether the Czech Republic is even permitted to transfer to EU organs, pursuant to Art. 10a of the Constitution, some part of its powers in the field of criminal law, with the consequence that the Czech Republic would be giving up constitutional control over this field, even assuming the reservation that the Czech organs would reassume these powers, should they be carried out by the EU in conflict, above all withe Art. 9 par. 2 of the Czech Constitution. My doubts about the possibility to transfer even precisely defined powers in the field of criminal law stems from the fact that, as of yet, the EU does not have its own constitution containing a catalogue of fundamental rights springing from commonly shared conceptions of the liberty of persons and of the possibilities to restrict them. In my conception the constitution is the unique legitimizing instrument which restricts the powers of the authorities of organized society, in the given case the EU authorities, exercise in this sensitive area, that is, in criminal law, even if merely on the plane of norm creation. The web of international agreements on which today's European Union is constructed does not, in my view, provide a sufficient guarantee of the protection of individual freedom in the literal sense.

I am thus convinced that, in the context of the Third Pillar, adopted framework agreements are, by their nature, "intergovernmental agreements", with all the consequences flowing therefrom. In terms of positive law, one can refer to Art. 34 par. 3 lit. b) of the Treaty on the EU, according to which framework decisions are a form of secondary union law that are binding only in terms of the objective set down therein. According to Art. 34 par. 2 lit. b) of the Treaty on the EU, framework decisions do not have direct effect and their application in national legal orders is left to implementation by national legislatures. "By including into the Treaty on the EU the provision that direct effect is excluded, the Member States wished, in particular, to prevent the ECJ's doctrine on the direct effect of directive from being extended to framework decisions as well" (decision of the German Federal Constitutional Court of 18 July 2005, no. 2 BVR 2236/04).

The nature of framework decisions excludes their classification as international treaties under Art. 10 of the Czech Constitution, alone due to the fact that they lack a constitutionally foreseen process of internal ratification (the assent of Parliament); thus, the preventive control of their constitutionality by the Constitutional Court is ruled out. In my view, the implementation of framework decisions is subject solely to the strictures of Art. 1 par. 2 of the Czech Constitution, and is subject to full constitutional review only in the case of implementation of the framework decision by act of the national legislature. I concur with the judgment to the extent that the national implementation cannot be enforced through ECJ proceedings, however, from my perspective, the view expressed in the judgment to the effect that implementation can be enforced by the European Commission bringing political and administrative pressure to bear on the Member States is unacceptable, as I consider it in conflict with the attributes of a democratic law-based state, in which politics must confine itself within the bounds prescribed in constitutional

principles.

All this led me to the conviction that the doctrine formulated by the Constitutional Court in relation to Community law cannot be applied in relation to acts in the Third Pillar, or to national enactments implementing framework decisions. In such cases, the threshold for review cannot be lowered all the way to the level of the essential attributes of the democratice law-based state, or the fundamental attributes of national sovereignty. On the contrary, in such cases the entire constitutional order must be applied as a referential criteria for the adjudication of constitutionality of the implemented framework decision. Accordingly, I think it necessary to observe that, when voting in the Council, the representative of the Government should always be mindful of the fact that their vote for the proposed act, which will need to be transposed into the Czech legal order, must pass muster from the perspective of the entire Czech constitutional order.

2.
I have no objections to the objective interpretation of Art. 14 par. 4 of the Charter given in the Court's opinion. Nonetheless, if its application as a referential standard was ruled out in this case, in my view it is only with great difficulty that one can comprehend the fact that in the entire Part VIII of the judgment, the implementation of the European arrest warrant is defined in relation to it. The majority opinion adopted the same approach in relation to the review of the contested provisions in terms of Art. 39 of the Charter, which according to the majority opinion is a guarantee tied to substantive law, not to procedural law, the contested provisions of the Criminal Procedure Code are nonetheless, further reviewed from its perspective.

In my view, the contested provisions should have been reviewed first and foremost in relation to Art. 8 of the Charter, particularly with emphasis on the issue of whether the domestic rules can be adjudged to be proportional. In my opinion it is not proportional, especially due to the fact that Art. 4 par. 7 of the Framework Decision was not implemented in the part which provides that a Member State can refuse to execute a European arrest warrant where it relates to offences which were committed in whole or in part within the Czech Republic or in some place treated as such, or which were committed outside the territory of the issuing Member State and the law of the Czech Republic does not allow prosecution for the same offences when committed outside its territory.

It is after all evident that a person suspected of a criminal offense (typically a citizen of the Czech Republic or a person with long-term or permanent residence in the Czech Republic), if faced with the execution of a European arrest warrant, finds herself in a situation which for her is less advantageous than that if she had been prosecuted in the Czech Republic, where she speaks the language, knows the cultural milieu in the wide sense of the word, has a better understanding of the domestic legal order and of the values to which it is subject. If this provision had been implemented, then it would have been possible to take these criteria into consideration when deciding on the European arrest warrant. I am convinced that, at the present, it is not possible to do so. I do not agree with the view that § 377 of the Criminal Procedure Code can be applied in such

cases. This is due not only to its purpose, as appears from the part in the margin which designates it, but especially due to the fact that the structure of § 411 par. 6 of the Criminal Procedure Code, which regulates the refusal to surrender a requested person, is the structure of a mandatory provision with an exhaustive enumeration of grounds which admits of no further extension of the grounds foreseen therein.

For that matter, as far as concerns the right to personal liberty as the criterion of review, one can refer to the decision of the Appellate Committee of the House of Lords in the matter, Office of the King's Prosecutor, Brussels v. Cando Armas, of 17 November 2005. The opinion of Lord Hope contained therein (par. 24) is based on the conviction that in applying the European arrest warrant, "the liberty of the subject is at stake here, and generosity must be balanced against the rights of the persons who are sought to be removed under these procedures." In her opinion, Baroness Hale (par. 60) then added that it would be unfortunate if the judicial authorities in other Member States, using the form of warrant prescribed by the Framework Decision, were to find that the English judicial authorities were unable to implement it. In her view, the chosen approach must be true to the spirit and requirements of the Framework Decision, of course, under the condition that they properly safeguard the liberty of the individual.

Conclusion

According to Art. 34 par. 2 lit. b) of the Treaty on the EU, the purpose of Framework decisions is the approximation of laws and regulations of the Member States in the area of justice and home affairs. In contrast to the field of civil law, however, criminal law is that field of law in which are manifested the values particular to each individual Member State of the EU and which is also very sensitive since, after all, it is tied to the intrusion of public power into the personal liberty of individuals. The values which a society has gained through its experience and which its members share are prominently projected into the definition and interpretation of particular criminal offenses, as well as into the area of criminal procedural. Therefore, I cannot accept even the premise, contained in the judgment, that a sufficient level of value convergence exists among EU Member States.

The rules contained in the Spanish Criminal Procedure Code, which was incorporated into it as an „anti-terrorist amendment", can be given as an example of differing value conceptions, undoubtedly founded on experience, on the possible interference with personal freedom. According to it, a suspect can be held in „incommunicado detention" (a sort of solitary confinement) for up to 10 days. During this period, that person is denied contact either with other persons, such as relatives, embassy, and similarly, or with an attorney or a doctor of their choice. After this period expires, that is, in the course of possible further pre-trial custody, the competent judge or tribunal can decide, if the investigation so requires, to impose an additional three days of incommunicado detention.

This situation was repeatedly criticized by the UN Commission on Human Rights when, for ex., in its resolution for the year 2003 declared that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel,

inhuman or degrading treatment or even torture."(UN Commission on Human Rights, resolution 2003/32, para 14; cited according to Human Rights Watch, January 2005, vol. 17, No. 1 (D), p. 24).

One can cite, as a value anti-pole, the decision of the Appellate Committee of the House of Lords (UK) of 8 December 2005 whether torture or other cruel, inhuman, or degrading treatment is permissible. In his opinion (par. 51) Lord Bingham stated, among other things, the "the English common law has regarded torture and its fruits with abhorrence for over 500 years ... The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer." In his opinion, Lord Hoffman stated (paras. 82-83): "The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it ... . [T]he rejection of torture by the common law has a special iconic importance as the touchstone of a humane and civilised legal system." Lord Hope noted (par. 126) that "[v]iews as to where the line [of acceptability] is to be drawn may differ sharply from state to state." Lord Carswell pointed out (par. 150): "[T]he use of torture ... would shock the conscience, abuse or degrade the proceedings and involve the state in moral defilement."

It is open to question whether the Czech Constitutional Court would consider as torture, cruel or inhuman treatment the holding of suspects, to whom the presumption of innocence applies, in the circumstances and for the period of time which is permitted by incommunicado detention. It is certain that Art. 8 par. 3 of the Charter of Fundamental Rights and Basic Freedoms guarantees a person accused of or suspected of having committed a criminal act, that within 48 hours they will either be released or turned over to a court, which must decide within 24 hours either to place that person in pre-trial detention or release him. In addition, Art. 37 par. 2 of the Charter guarantees each person, as a component of fair process, the right to assistance of council from the beginning of any proceeding.

What follows from these cases is that the conception of values connected with criminal proceedings varies from state to state, just as they diverge in their appraisal of what is in other states permitted by law, even despite the fact that all Member States of the EU are signatories of the European Convention for the Protection of Human Rights and Fundamental Freedoms. As the Constitutional Court held in its judgment Pl. US 36/01, however, it is not permissible to decrease the standard for the protection of human rights that has been attained.

The European arrest warrant is, in itself, definitely a highly necessary and desirable legal institution, without which the EU, which is, among other things, characterized by the free movement of persons, simply could not get by. Nor can one disregard the heightened security risked shared by all states associated in the EU. Nonetheless, I am still of the view that the European arrest warrant was implemented in the Czech Republic in a

negligent fashion. My reservation tied up to the failure to implement Art. 4 par. 7 of the Framework Decision was actually in the light of the above-mentioned minimal requirement, which would however have significantly contributed to the proportionality of the legislative solution contained in the Czech criminal law acts.

Brno 3 May 2006

Dissenting Opinion
of justice Stanislav Balík

With the notion that the petition should be granted, I voted against the judgment on the merits dismissing the petition, for the following reasons.

Enchanted as always when working with the Constitution and the Charter of Fundamental Rights and Basic Freedoms (hereinafter "Charter") by the gorgeous rich language in their preambles, I caressed first of all the little word, homeland, in Art. 14 par. 4, second sentence of the Charter. Choosing whether the word, patria or "country" [this word was in English in the original text], sounds better to me, personally I choose the older of these two words. There are definitely more synonyms for the word, homeland, the one closest to my heart – even despite the fact that a mobile phone user must first learn the T9 system – is fatherland, or perhaps also home. Although the issue is sometimes couched in the sense of "to force someone to leave the Czech Republic" (cf. also J. Filip, Evropský zatýkací rozkaz před ústavními soudy [The European Arrest Warrant before Constitutional Courts], Časopis pro právní vědu a praxi [The Journal for Legal Science and Practice], No. 2/2005, p. 162), in my view this does not concern leaving rei publicae, rather leaving patriae or – if you please – native soil, in the spirit of Kollár it is " . . . this land, first my cradle, now the nation of my coffin".

The concept of homeland, encompassing within itself the attributes of home and ancestry, corresponds to the designation of a language as mother tongue or Muttersprache or langue maternelle etc. The surrender of a citizen for criminal prosecution or the serving of a sentence – and I am now focusing strictly on a linguistic issue - is without doubt to tear him away from his above-described roots. "Homesickness and the inability to speak with someone in one's native language influences the quality of verse in terms of themes, style and even language", also in the case of a poet who justifiably wrote about his own work "ore legar populi perque omnia saecula fama vivam", while for our purposes we should not overlook the fact that this exile took place in the context of the same Roman Empire, nonetheless in language terms rather Greek Pont (comp. also the Ovidius, in The Encyclopedia of Europe's Personalities from Antiquity to the Present, Prague 1993, p. 494).

Let us move on, however, to the most practical problems which a surrendered person might encounter, even should the right to an interpreter be fully respected, "let us spend" with him in mosaic one of his "model" days in proper order.

x x x

In order to present our hero, for the time being he is still not, and may never be, a criminal as, in the first place, the presumption of innocence applies, in the second place, moreover, it might be shown in the future that, for ex., he never committed the act for which he was accused. For that matter, the following could happen to him as well:

He is placed in a cell with a Portuguese prisoner. The exchange of “Bom dia” for “topry ten”, occasionally “tekuji” or “obrigado”, otherwise a pair in silence. Where will be that Ptahotepa “relief” brought on “when a person is at least listened to”? (Papyrus versus Ptahotepa, translated by Z. Žába, Prague 1971, p. 35).

K obědu alfődi gulásleves. S „paprikou“ to snad nebude problém, jak však vykouzlit zápor a přidat maďarsky slůvko „žlučník“.

For lunch there will be alfődi gulásleves. It will not be a problem with “paprika”, but how to conjure up the drawback/antithesis and add the little Hungarian word, “gall bladder”.

In the afternoon, δικηγ?ρος will come on a visit, accompanied for sure by one of many court interpreters specialized in xenophobia, thus it will not be difficult to find an exhaustive interdisciplinary response to the question: „Ειναι Τσ?χος σ?μερα στην ?λλ?δα ακ?μα ο ξ?νος;“ There remains the utterly trivial matter of organizing from the detention prison the replacement of the advocate ex offo for a defense attorney with a power-of-attorney, which the accused’s spouse will certainly gladly take care of, when she can buy with her entire monthly salary a return air-ticket, Prague – Solun or Prague – Athens, and to be on the safe side she gets Euros in exchange for the Czech Crowns (which she got by emptying out the savings account for building their house), in case the Greek attorney rates by chance happen to be a tad higher than the Czech rates.

In the evening renal colic put in an appearance. Thanks to Monteverdi’s madrigal and to listening several time to an Italian production of Don Giovanni, it will be possible – before he succeeds on the state holiday in making contact with the Czech consulate – to say to the Italian doctor at least, “Non lasciate mi morire!”. Have we thought through, however, how that will be for a patient who does not have health insurance in Italy?

The maxim, “Primum vivere deinde philosophari”, definitely also applies in this case.

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Does Czech historical memory really not reach further back than to the "Rehabilitation Action"?

I do not wish at the present to enter into the expert discussion of historians on concrete historical events within the confines of Europe's multi-national coexistence, but we should probably understand "each other" [these words were in English in the original text]. I would thus recommend one to read, for example, the excellent study in legal history authored by Jiří Kejř, "Hus' Trial" (Prague 2000).

"Immediately after Hus' death – it is not even necessary to repeat it – in Bohemia resounded with outrage over the unjust and unfounded judgment, as expressed by the missive of protest sent to Constance by the nobility already on 2 September 1415, in which it was shown that Hus neither confessed nor was found guilty. The Council of Constance was denounced even in Basel as an unjust judgment on Hus, as the Czech repeatedly declared in their statements. . . . But, what conclusions have modern historians drawn on this issue? After all, the mere question as to whether the judgment in Constance was passed justly and in conformity with law, whether it honestly reflected Hus' guilt, whether it was not a product of the judges' partiality and influenced by political interests, has been responded to with irreconcilable divergence," writes Jiří Kejř, among other things, and he adds, "Let us not indulge in the excessive hope that following our study there will not remain a strong residuum of the previous condemnations with which it was so difficult to reconcile."

Hus' trial, held outside of his homeland with judges of other nationalities, with Latin as the language of the proceeding, errors in the defense caused by the failure to adapt the rules of Canon procedure. Did not these considerations reverberate as well in the heads of those who formulated Art. 14 of the Charter?

Each moderately educated Czech was familiarized, during her school years, with the fate of Karel Havlíček Borovský. The "Banishment" in Brixen, that is a city situated in the Hapsburg joint-state. One of the recent submissions is the following:

"During the night between 15 and 16 December 1851, he was arrested and, with police escort, taken to the Tyrolean city of Brixen, where he was forced to live for more than three years. Being cut off from Czech society and public activity induced in Havlíček severe internal crises, but it did not break him" (cf. Who Was Who in our History through 1918, Prague 1993, p. 97).

Can we be certain that elementary and secondary school students in Czech schools have not until today heard this (possibly even traditional) interpretation?

I ask myself this question in order to meditate on the legal consciousness of citizens of the Czech Republic de lege ferenda in the moment when their Government proposed, together with the amendment to the Criminal Procedure Code and the Criminal Code, an amendment to Art. 14 of the Charter.

I asked myself this question in connection with the debate preceding the adoption of the Framework Decision of the Council of the European Union, No. 2002/584/JHA of 13 June 2002, what is nearly already long ago from the contemporary perspective of persons with short historical memories. Do we know "each other"? [these words were in English in the original text] Acting as devil's advocate I made only a few marginal Anglo-American comments on the praise in the judgment's reasoning of the British model of extradition – "convicts servants" [these words were in English in the original text] in the North-American Colonial period, the American Fugitive Slave Act of 1850 or the 1857 decision of the Supreme Court of the United States of America in the Dred Scott case ...

Let us devote a moment to reciprocity ...

x x x

Cui prodest?
Are there really so many Europeans who commit what are, from the Czech perspective, criminal offenses, after whom the criminal justice authorities would pine and who would otherwise escape punishment? Or did the intent to transpose more than was necessary prevail?

I forgot about my humble period of law practice and briefly had some doubts that pre-trial detention in the Czech Republic is Europeanized in a qualified manner.

Further consequences occurred to me; I promised myself that I would await a consoling response.

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As has been shown, the legislature is something of a Superbus.

In its statement of views on the petition, the Chamber of Deputies emphasized that the Parliament is the sovereign representative of the constituent and legislative power, thus it is not bound by the legal opinion of the person proposing an amendment to the Charter and is entitled to adopt its own view on a matter.

And what about perhaps listening to the view of the public? Couldn't it be said of a greater number of views that "more is more"? Was the adage, "Measure twice, cut once", forgotten?

I was interested by the responses to questions connected with the practical realization of the discussed legal rules. I did not find in the record from the debates in the Assembly any allusion which would lead me along these tracks. I asked myself then whether the deputies had available comparative law data concerning of the system for detention and the course of the preliminary proceeding in individual countries, whether they had available information on the numbers and levels of interpreters, what they knew about the guarantees of the right to a defense, whether there was some awareness concerning the rules governing the compensation of damage for incorrect official conduct (see the record from the Constitutional Court's public hearing held on 3 May 2006).

I will paraphrase what I learned. Those who were not members of the "Guarantee" Committee voted by putting their trust in that Committee's report, alternatively in the officer from their parliamentary club. I admit that the response to the question on the degree to which President's position in his veto message was objectively thought through; however, out of concern for the sudden drop in the level of optimism on the state of political culture, I deemed it more advisable to let such considerations remain hypothetical.

Does not norm truth, however, fall within the constitutional conformity of a statute, in the case under review projected into certainties that citizens of the Czech Republic will actually be under the protective wing of their homeland, even in common situations which are outlined above?

xxx

I have attempted to climb down from the heights of the definition of a law-based state to examples from practice indicating that a unified model of the law-based state, or criminal law policy, does not as yet exist. And the divergences, for which a person facing a criminal proceeding is not necessarily prepared, might significantly worsen his position, for ex. in the pre-trial proceedings.
A further subject for consideration presents itself.

I quote from the speech of the Paris bâtonnier [translator's note - President of the Bar Association] Jean–Marie Burgubur at the occasion of the Opening of the Judicial Year in

Paris on 18 November 2005:

„Yes, justice is in a poor state, and if judges have clearly told you that, Mr. Minister, advocates are going to repeat it once again.

- What is the case, for example, with the presumption of innocence? It is a lovely theme to enchant a solemn assembly, but is this presumption reflected as well in the conduct of the investigating judge, the representative of the prosecution or the judge deciding whether to leave a person at liberty or place him into custody, the JLD (Juge des Libertés et de la Détention), who could be called the judge of liberty – so exceptionally – and of detention – so frequently?

That is to say, the presumption of innocence has its place in the statutes, similarly as in treaties, however, in practice in the course of a court dispute when a judge – whether an investigating judge or the judge deciding whether to leave a person at liberty or place him into custody - must decide, at that point the presumption of innocence no longer exists.

Of course, we have in our country money laundering, organized crime, even terrorism, all of which would be a reason for a judge to simply and without more adopt a police and security decision: a certain person is brought before a judge, it is thus necessary to lock him up. Not guilty, we say?

- There are so many unjustified cases of placing persons into custody (and most of the required matters in a file are, according to the current method, already under the control of the examining judge), combined with others already being detained or being prosecuted, that it is impossible, just as evidence is losing cogency and the danger of the investigated person is often smaller than evident.

Is it disgraceful to refer here to the scandalousness of placing people in custody just as much for the too often, even systematic, resort to this means, as for the conditions in which such detention occurs? The condition of our custodial facilities puts our country into the situation in which it breaches the most basic human rights.

What is the most significant factor for recidivism? Incarceration, the conditions in which the punishment of imprisonment is carried out. The failure to observe the condition of respecting detainees and their dignity leads to recidivism, which neither an electronic bracelet nor measures extending punishments is able to prevent.

Advocates cannot remain silent about this deplorable and outrageous situation which the European Commissioner for Human Rights recently condemned, especially as regards the Paris detention prison.

It is not merely a matter of money; it is above all a lack of political will. I would do wrong if I failed to censure this situation." (cf. J.-M.Burgubur, Respektujte advokáty [Respect Advocates], Bulletin advokacie [The Bulletin of Advocacy], No. 3/2006, p. 7).

Is this the solitary voice of the elected representative of more than 6000 advocates registered in the top French bar association?

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It would certainly be possible to repeat the President's arguments, as well as those of the petitioners. The overwhelming majority of them refer to it with a comment that merits attention even for the future. But I should not forget my own reflection de lege ferenda.

The resolution of the substantive criminal law relations primarily in a procedural enactment is unsystematic, to say the least.I

t seems to me appropriate to adopt the Criminal Code and the Criminal Procedure Code in the same time frame.

Wouldn't it be more appropriate to reach agreement on a "European" definition of the constituent elements of serious criminal offense and a unitary form of criminal proceeding against the accused of such offenses?

Wouldn't it be possible to establish in each state at least one specialized "alien" pre-trial detention prison for just such cases?

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The reasoning of the judgment proceeds, among others, from the Constitutional Court's case law in the sense that "theoretically every provision of a legal enactment can naturally be applied incorrectly, hence even in conflict with constitutional acts, which in and of itself does not constitute grounds for the annulment of a provision which can conceivably be incorrectly applied".

This dissenting opinion rests on the principle of dubitandi. It is not the classic in dubio pro reo, although it should sound in its favor. I did not get the impression that I have an unambiguous response in all cases to the questions which I have attempted haphazardly to select and submit to the kind reader.

I see the unconstitutionality of the contested provisions primarily in the fact that, in my view, the legislative rush caught the legislature rather unprepared, and as far as concerns the resolution of the relations of the bill to amend the statute together with the bill to amend the Charter, impetuous up to the outer edge of constitutional conformity of the constitutional amendment process and the legislative process. This is an issue in the resolution of which it would probably be best not to test how much the Constitutional Court will bear but, on the contrary, proceed with respect for the constitutional order, just as the person who submitted the proposed amendment originally attempted to do in the Parliament of the Czech Republic. In the existing situation then, as regards their constitutionality, the contested provisions of the Criminal Procedure Code and the Criminal Code are open to question, to say the least, and for a host of relevant reasons, to which the petitioners, the President, even my co-dissenting colleague, draw attention in this proceeding.

x x x

Completely at the end - as they often say in a certain milieu – “to be fair”. Let us imagine that this dissenting opinion were the final word of a defendant. With all respect to interpreters, I would ask that they attempted “from the hip” an exercise in translation, and if possible literally, into Finnish, Hungarian, Modern Greek, Dutch, ... French, and English.