**Constitutional Court Judgment 26/2014, of 13 February 2014.**

The Constitutional Court, in full bench, composed of the Honour Judges Mr. Francisco Pérez de los Cobos Orihuel, President, Ms. Adela Asua Batarrita, Mr. Luis Ignacio Ortega Álvarez, Ms. Encarnación Roca Trías, Mr. Andrés Ollero Tassara, Mr. Fernando Valdés Dal-Re, Mr. Juan José González Rivas, Mr. Santiago Martínez-Vares García, Mr. Juan Antonio Xiol Ríos, Mr. Pedro José González-Trevijano Sánchez and Mr. Enrique López y López, has pronounced

**IN THE NAME OF THE KING**

the following

**JUDGMENT**

In the amparo appeal 6922-2008, brought by Mr. Stefano Melloni, represented by the Attorney Ms. Paloma Rubio Peláez and assisted by the Lawyer Mr. Luis Casaubón Carles, against the Order issued by Section One of the Criminal Chamber of the *Audiencia Nacional*, on 12 September 2008, entered into the Chamber records under no. 373-2008, agreeing to surrender the appellant to the Italian authorities in order to complete the conviction ordered by the Appellate Court of Bologna, further to European Arrest Warrant No. 157-2008. The Public Prosecutor has been party to the proceedings. The judgment has been drawn up by Judge Ms. Encarnación Roca Trias, who expresses the opinion of the Court.

## I. Background Facts

1. By means of a writ received at the General Registry of this Court on 17 September 2008, the Attorney Ms. Paloma Rubio Peláez, acting on behalf and in the name of Mr. Stefano Melloni and assisted by the Lawyer Mr. Luis Casaubón Carles, lodged an amparo appeal against the Order issued by Section One of the Criminal Chamber of the *Audiencia Nacional* on 12 September 2008, authorising the appellant's surrender to the Italian authorities in order to complete a conviction ordered by the Ferrara Court, further to European Arrest Warrant no. 157-2008.

2. The relevant facts for the resolution of this amparo appeal are basically the following:

a) Section One of the Criminal Chamber of the *Audiencia Nacional*, in an Order dated 1 October 1996, approved the extradition to Italy of Mr. Stefano Melloni, to be tried for the facts described in arrest warrants nos. 554-1993 and 444-1993, respectively issued on 13 May and 15 June 1993 by the Ferrara Court. The resolution states that during the necessary appearance at courts, the requested person challenged the extradition "because he never thought that criminal irregularities existed, but believed that an economic crisis merely entailed civil liability, manifesting that should he be released, he undertook to voluntarily return to his country and render the necessary

accounts to the Italian courts." Also according to this resolution, by means of an Order delivered by Central Investigation Court (*Juzgado Central de Instrucción*) No. 1, on 19 April 1996, his release on bail was approved, subject to a 5,000,000-peseta deposit, that he provided the following day. According to subsequent resolutions held in the case, the appellant escaped and was therefore not surrendered to Italy.

b) By means of a Decree of 27 March 1997, the Ferrara Court declared the now appellant *in absentia* , given that he had evaded justice, and agreed that any notifications be subsequently made to Lawyers of his choice he had already appointed. Through a Judgment dated 21 June 2000, subsequently upheld by the Judgment of 14 March 2003 delivered by the Appellate Court of Bologna, the plaintiff was held *in absentia* as the perpetrator of an offence of fraudulent bankruptcy and sentenced to ten years' imprisonment. At both instances he was counselled by Lawyers Mr. Vittorio Rossi —belonging to the Modena Bar Association— and Mr. Bruno Senatore —of the Milan Bar Association— who, in this position, were informed of the Decree —for the present purposes— which ordered commencement of a public hearing prior to the Ferrara Court's conviction, including European Arrest Warrant no. 271-2004, delivered on 8 June 2004 by the Public Prosecution Office of the Republic before the Appellate Court of Bologna, further to which proceedings commenced giving rise to this constitutional suit. By means of a Judgment dated 7 June 2004, Criminal Section Five of the Supreme Court of Cassation rejected the appeal lodged by the plaintiff's Lawyers, Mr. Vitorio Rossi, Mr. Bruno Senatore and Mr. Luciano Teneggni.

c) As a result of his arrest by the Spanish police, on 1 August 2008, Central Investigation Court No. 6 commenced proceedings for European Arrest Warrant (EAW) no. 157-2008, in relation to EAW no. 271-2004, issued by the Public Prosecution Office of the Republic before the Appellate Court of Bologna in order to complete the conviction ordered by the Ferrara Court. Through an Order dated 2 August 2008, the same Court ordered a lifting of the EAW and applied for surrender before Section One of the Criminal Chamber of the *Audiencia Nacional*. The appellant challenged his surrender, claiming, in the first place, that during the appeal stage he had appointed another Lawyer, revoking the appointment of the two previous lawyers, although the latter continued to receive the relevant notifications. Second, he claimed that Italian procedural law does not contemplate the possibility of appealing convictions delivered *in absentia*, which is why the EAW and his surrender, in any case, were conditional upon Italy guaranteeing an appeal against the Judgment.

d) First Section of the Criminal Chamber of the *Audiencia Nacional*, by means of an Order dated 12 September 2008, which is hereby challenged in this amparo appeal, agreed to surrender the appellant to the Italian authorities in order to complete the conviction imposed by the Ferrara Court, as the perpetrator of an offence of fraudulent bankruptcy. First of all, the *Audiencia Nacional* did not consider as proven that the Lawyers appointed by the appellant no longer represented him as of 2001. According to the challenged Order, this allegation is contradicted by the issuing

authority in a complementary report requested to the Public Prosecution Office of the Republic. Second, the *Audiencia Nacional* also rejected his pleading regarding the lack of defence based on the information included in the arrest warrant and the documents provided by the requested person himself, indicating that the requested person was aware that a future trial would be held, voluntarily incurred *in absentia* and had designated two Lawyers of his choice for his representation and defence; these Lawyers participated at first instance, on appeal and on cassation, thereby exhausting all appeal channels. In light of the foregoing, the *Audiencia Nacional* reached the conclusion that, in a case such as the one tried in the main suit, "the conviction *in absentia* and the holding of a trial *in absentia* were not disproportionate, precisely because the accused had been technically defended and had waived his personal defence by incurring *in absentia*," in such a way that "it cannot be affirmed that the requested party was unprotected during the suit, and the issuing authorities need not provide any guarantees in this respect."

e) The applicant requested the nullity of the proceedings —thereby meeting the requirement to grant this amparo appeal leave to proceed, i.e. to exhaust prior judicial channels— and Section One of the Criminal Chamber of the *Audiencia Nacional*, rejected his petition by means of a resolution dated 16 September 2008.

3. The appellant sustains his amparo appeal on the violation of his right to a fair trial, acknowledged in Article 24.2 of the Spanish Constitution. He claims that the challenged Order "indirectly infringes the absolute requirements stemming from the right enshrined in Article 24.2 of the Spanish Constitution, by hindering the essential content of a fair trial, in such a way as to affect human dignity, given that agreeing on an extradition to countries which, in the case of very serious offences, uphold convictions *in absentia*, without making surrender conditional upon the convicted party being able to challenge them in order to uphold his rights of defence, constitutes a violation of the right to a process with full guarantees." The appellant also claims that his appeal has special constitutional relevance, because the challenged Order apparently departed from consolidated case-law of the Constitutional Court, whereby, in the case of convictions for serious offences ordered *in absentia*, surrender must be conditional upon the possibility of reviewing the Judgment, recalling to this effect Constitutional Court Judgments (in Spanish, *Sentencia del Tribunal Constitucional* [STC]) 91/2000, of 30 March, and 177/2006, of 5 June.

4. By means of a resolution dated 18 September 2008, Section One of this Constitutional Court agreed to grant the claim leave to proceed and, further to the provisions established in Article 56.6 of Organic Law 2/1979, of 3 October, of the Constitutional Court, it suspended the execution of the Order dated 12 September 2008 issued by Section One of the Criminal Chamber of the *Audiencia Nacional*. The appellant, who has still not been surrendered to the Italian authorities, is currently free.

5. By means of a resolution dated 10 October 2008, it was agreed that the Public Prosecutor and the parties be forwarded the proceedings and granted a common term of 20 days to submit any pleadings deemed appropriate.

6. The Public Prosecutor completed the pleadings stage with a writ, received by the Constitutional Court on 21 November 2008, which concluded against the amparo appeal, on the grounds that the plaintiff's right to a fair trial had not been violated.

According to the case-law laid down by STC 91/2000, it considered that the Constitution does not forbid convictions *in absentia*, not even in the case of serious offences, but only makes this conditional upon the possibility of a later challenge. This is why, consequently, since STC 120/2002 and 160/2002 or, even in relation to EAWs, since STC 177/2006, a resolution that gathers the possibility of challenging the conviction cannot be refuted in any way. Consequently, the Prosecutor states that the possibility of challenging a conviction is gathered in Article 175 of the Procedural Law of the Italian Republic; the Constitutional Court has indicated that this possibility was irrelevant in the present case, given that a possible challenge is inapplicable if the accused party has voluntarily waived his right to be party to the trial, as this would not harm his right of defence, due to being informed about the lawsuit, as accredited by the appointment of his procedural representative.

The Public Prosecutor believes that there is no lack of substantive defence if the party claiming it has not been duly diligent when upholding his rights, as indicated in the proceedings. The foregoing was upheld by Section One of the Criminal Chamber of the *Audiencia Nacional*, which believed that the accused party's failure to act diligently by not voluntarily standing before the court on trial, determined the conclusion that it was unnecessary to provide the accused party with further guarantees, given that his own decision to evade justice cannot now be used as an excuse to subsequently claim the fact of non-attendance at the hearing. Thus, and regarding the plaintiff's claim about his revocation of the appointed Lawyers, the Public Prosecutor considered that the Court had thoroughly explained why the documents provided by the appellant to justify his claims were rejected, and why it had accepted those directly sent by the Public Prosecutor of the Italian Republic, whereby the plaintiff had designated the Lawyers Vittorio Rossi and Bruno Senatore at his own initiative, refuting the alleged revocation claimed by the appellant.

7. The appellant's attorneys completed the pleadings stage with a writ filed on 12 November 2008, indicating that the then plaintiff and now appellant had not been informed of the date and place of the hearing, and was not eventually surrendered to Italy in order to be tried. In addition to substantially reiterating the arguments included in his amparo appeal, for example that his surrender should has been made conditional upon the possibility of reviewing his conviction, he enlarges that, although it is true that neither the Council's Framework Decision on European Arrest Warrants nor implementing Spanish Act 3/2003 includes this requirement as a *sine qua non* condition

for the executing State to proceed with the surrender requested, this does not remove the requirement derived from the fundamental right to a fair trial, and in this particular case to a fair extradition process. Finally, it mentions that Article 5 of the Framework Decision contemplates the possibility of conditioning the decision to a new lawsuit in such cases.

8. By means of a resolution dated 1 March 2011, the Constitutional Court, in full bench, agreed, further to a proposal from Chamber One and pursuant to Article 10.1 n) of the Organic Law on the Constitutional Court, to undertake the examination of this appeal .

9. By means of a resolution dated 31 March 2011, the Constitutional Court, in full bench, agreed to hear the appellant and the Public Prosecutor, who, within a common term of ten days, could submit any pleadings in relation to the possibility of filing a preliminary ruling before the European Court of Justice. Both parties filed their writs on 18 April 2011. Unlike the appellant, the Public Prosecutor challenged a preliminary ruling because, in its opinion, Council Framework Decision 2009/299/JHA, of 26 February, was not applicable *ratione temporis* to the lawsuit giving rise to this amparo appeal, thereby the preliminary ruling before the European Court of Justice wouldn't be necessary for the final resolution.

10. The Constitutional Court, in full bench, by an Order dated 9 June 2011, agreed to suspend the processing of this amparo appeal and to apply to the European Court of Justice for a decision on the following preliminary rulings:

> "1. Must Article 4a(1) of Framework Decision 2002/584/JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?
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> 2. In the event of the first question being answered in the affirmative, is Article 4a(1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter …, and from the rights of defence guaranteed under Article 48(2) of the Charter?
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> 3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law,

in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?"

11. The Grand Chamber of the European Court of Justice, by Judgement dated on 26 February 2013, replying to the preliminary issues, stated as follows:

"1. Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State.

2. Article 4a(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, is compatible with the requirements under Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union.

3. Article 53 of the Charter of Fundamental Rights of the European Union must be interpreted as not allowing a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution."

12. By means of a resolution dated 11 February 2014, it was scheduled the date of 13 February 2014 for the discussion and voting of this Judgment.

## II. Grounds

1. As established in the Background Facts above, this amparo appeal is challenging the Order issued by Section One of the Criminal Chamber of the *Audiencia Nacional*, on 12 September 2008, ordering surrender of the appellant to the Italian authorities in order to complete the rest of his ten years' imprisonment, of which he was convicted for an offence of fraudulent bankruptcy. The appeal is based on a breach of the right to a fair trial (Article 24.2 of the Spanish Constitution), because the challenged resolution agreed to surrender the plaintiff to Italy —where convictions in absentia are valid— without conditioning his surrender to the possibility of challenging his conviction for a very serious offence in order to safeguard his rights of defence, as required by the case-law of the Constitutional Court concerning indirect infringements of fundamental rights.

The Public Prosecutor proposes the rejection of the appeal. In its opinion, sustained on the reasoning exposed in the Background Facts, the appellant's right to a fair trial has not been infringed, because there was no lack of protection.

2. We shall begin recalling that this Court, acting as a "court of a Member State" in the terms of Article 267 of the Treaty on the Functioning of the European Union [Order of the Constitutional Court (in Spanish *Auto del Tribunal Constitucional*, hereinafter ATC) 86/2011, of 9 June, Ground (in Spanish *Fundamento Jurídico*, hereinafter FJ) 4 e)], applied to the European Court of Justice for three preliminary rulings —two regarding interpretation and one about validity— in relation to Article 4a (1) of the Framework Decision 2002, subsequently amended by Council Framework Decision 2009/2009, of 26 February (hereinafter, the 2009 Framework Decision). Amongst other reasons, as we had stated in ATC 86/2001, of 9 June, "the standard control applicable to examine the constitutionality of the Order delivered on 12 September 2008 by the, First Section of the Criminal Chamber, of the Audiencia Nacional, authorising the surrender of the appellant to the Italian authorities, should be based on European Union laws that imply the protection of the fundamental rights, as well as the regulation of European Arrest Warrants (EAWs), which obviously point out the constitutional relevance of the interpretation given to the European Union law" [FJ 4 b)]. As we highlighted in the Order, of 9 June 2011, "European Union law is an instrument to define part of the content of the fundamental right that deploys ad extra effects, i.e. the rights and guarantees, unawareness of which by foreign authorities may entail an indirect infringement if unconditional surrender is ordered" [FJ 4 c)]. Thus, in the Order raising the preliminary ruling, we pointed out that the European Court of Justice had still not pronounced "on the specific meaning of Articles 47.II and 48.2 of the European Charter of Fundamental Rights (hereinafter, the Charter), and its pertinent application to judgments of conviction imposed in absentia in very serious crimes [FJ 6 d)]." Nor is there any pronouncement about the content of Article. 53 of the Charter, "in order to clarify the scope and function of the European system to protect fundamental rights, and its articulation with respect to the declarations of rights contained in Member State Constitutions" (FJ 7). These preliminary issues have been replied in the Judgment of the Court (Gran Chamber) of 26 February 2013, C-399/11, Melloni. This response will be of great use when determining the content of a right to a process with full guarantees (Article 24.2 of the Spanish Constitution) deploying ad extra effects.

3. Before determining the content of the right to a fair trial deploying ad extra effects, we should however complete the response given in the Judgment of the European Court of Justice delivered in the *Melloni* case, with the criteria laid down in our Declaration [in Spanish: *Declaración del Tribunal Constitucional* (hereinafter DTC)] 1/2004, of 13 December.

At that Declaration, we firstly pointed out that "the operation of the transfer of the exercise of competences to the European Union and the consequent integration of Community legislation into our own impose unavoidable limits to the sovereign

faculties of the State, acceptable only when European legislation is compatible with the fundamental principles of the social and democratic State of Law established by the national Constitution. Consequently, the constitutional transfer enabled by Art. 93 CE is subject to material limits imposed on the transfer itself. Said material limits, not expressly included in the constitutional precept, but which implicitly result from the Constitution and from the essential meaning of the precept itself, are understood as the respect for the sovereignty of the State, or our basic constitutional structures and of the system of fundamental principles and values set forth in our Constitution, where the fundamental rights acquire their own substantive nature (Art. 10.1 CE)" [DTC 1/2004, of 13 December, Ground 2].

Likewise, the primacy of European Union law, jurisdictionally proclaimed, is applied to the European legal order, which is constructed upon common values of the European Union Member States' Constitutions and their constitutional traditions, leading us to point out that it is European law which would guarantee, through a series of devices foreseen in the Treaties, respect for basic constitutional structures in each country, to include fundamental human rights (DTC 1/2004, of 13 December, Ground 3).

As a result, the Court stated that "After the integration, emphasis must be placed on the fact that the Constitution is no longer the framework of validity of Community legislation, but rather the Treaty itself, which carried out the sovereign operation of transfer of the exercise of competences resulting from the former, although the Constitution requires that the legislation accepted as a result of the transfer be compatible with its basic values and principles." (DTC 1/2004, of 13 December, Ground 2).

Consequently, this Court is not entitled to check the validity of the law adopted by European institutions; this control should be, in any case, carried out by the European Court of Justice when settling, amongst others, any preliminary rulings on validity that may eventually be raised. It is basically through these procedures, including preliminary rulings on interpretation, that the European Court of Justice guarantees and effectively safeguards a high level of protection for the fundamental rights contained in the Charter.

Notwithstanding, the Constitutional Court also upheld that "In the unlikely case where, in the ulterior dynamics of the legislation of the European Union, said law is considered irreconcilable with the Spanish Constitution, without the hypothetical excesses of the European legislation with regard to the European Constitution itself being remedied by the ordinary channels set forth therein, in a final instance, the conservation of the sovereignty of the Spanish people and the given supremacy of the Constitution could lead this Court to approach the problems which, in such a case, would arise. Under current circumstances, said problems are considered inexistent

through the corresponding constitutional procedures." (DTC 1/2004, of 13 December, Ground 4).

4. In order to resolve this amparo appeal we must take into consideration our previous decisions concerning indirect infringements of fundamental rights and their specific application to the scope of fundamental rights as regards the right to a fair trial, regulated in Article. 24.2 of the Spanish Constitution.

According to our case-law, when national authorities (including the Judiciary) recognise, certify or validate a resolution adopted by a foreign authority, this may "indirectly" breach a fundamental right subject to special protection by amparo appeal. The Spanish public powers are unconditionally bound *ad intra* by fundamental rights —as enshrined in the Constitution—, but the binding content of fundamental rights when projected *ad extra* is more limited. Thus, regarding to the right to a fair trial, its content does not include all the guarantees established by Article. 24 of the Spanish Constitution, but only those contents that constitute the very essence of the notion of fair trial and that, as such, can be used in the assessment of the conduct of foreign public authorities, determining if necessary the "indirect" unconstitutionality of the Spanish authorities which, in fact, is the only object of our control (STC 91/2000, of 30 March, FFJJ 7 and 8).

In the STC 91/2000, of 30 March, above mentioned, we reached the conclusion that an "indirect" breach of the requirements stemming from the right proclaimed in Article 24.2 of the Spanish Constitution —projected *ad extra*— will arise if the Spanish courts decide to order an extradition to countries where, in cases of a very serious offence, convictions *in absentia* are upheld without conditioning surrender to the convicted party being able to challenge the conviction in order to safeguard his rights of defence. In our opinion, this would be detrimental to the essential content of a fair trial, in such a way as to affect human dignity (STC 91/2000, of 30 March, FJ 14).

In subsequent Judgments (STC 177/2006, of 5 June, or STC 199/2009, of 28 September), we have stated that this approach to indirect infringements of the right to a fair trial is also applicable under the EAW system which replaces the extradition procedure foreseen in the 1957 European Convention on Extradition, in compliance with the Council Framework Decision 2002/584/JHA, of 13 June, already implemented into Spanish law, by Law 3/2003, of 14 March, on European Arrest Warrants.

After having referred to our case-law on indirect infringements of fundamental rights and its specific application to a fundamental right to a fair trial, we must overrule the way how this Court has construed the notion "absolute contents" of the right to a fair trial (Article 24.2 of the Spanish Constitution).

In order to precise the specific rights, faculties or facets contained in the absolute contents of a fundamental right, whose infringement may determine an indirect

violation of that very right by the Spanish public authorities, we have highlighted the decisive relevance of international treaties and agreements on the protection of fundamental rights and public freedoms, ratified by Spain (STC 91/2000, of 30 March, FJ 7). As a result, this Court has stated that the constitutional value system coincides with the values and interests protected by such treaties and agreement, thereby, allowing us to determine the most elementary requirements that may be projected on a valuation of the conduct of foreign public powers, determining the "indirect" unconstitutionality of the conduct of the Spanish authorities.

Thus, according to our case-law relating to indirect infringements of the right to defence and to a fair trial (Article 24.2 of the Spanish Constitution), the standard of control applicable to examine the constitutionality of the Order delivered by the First Section of the Criminal Chamber of the *Audiencia Nacional*, dated 12 September 2008, which authorised the surrender of the appellant to the Italian authorities, should include any international treaties and agreements on the protection of fundamental human rights and public freedoms, ratified by Spain. Amongst these treaties, we may emphasize the importance of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, ECHR), and the Charter, which, along with the interpretation thereof by the supervising bodies established by these same international treaties and agreements, become essential when interpreting the absolute contents of the right proclaimed in Article 24.2 of the Spanish Constitution. Unawareness of these contents would cause indirect breach of this fundamental right by the Spanish courts.

Consequently, we must analyse the interpretation of the contents of the right to a fair trial made by the European Court of Human Rights and the European Court of Justice, established in the ECHR and in the Charter.

According to ECHR, the right to a fair trial, laid down in Article 6, includes the right of any person convicted in absentia to have the court issue another decision on the merits of the case, after hearing the defendant. However, the inclusion of this right within the one regulated in Article 6 ECHR has been conditioned, in the case-law of the European Court of Human Rights to the absence by such persons —when effectively informed of the proceedings— of an unequivocal waiver of their right to be heard [ECtHR Judgment *Sejdovic v. Italy*, 1 March 2006, paragraphs 82 ff.].

Thus, European Court of Human Rights case-law has acknowledged that the presence of the defendant in the hearings is one of his basic rights, but Article 6 ECHR is not breached if the defendant, after being duly summoned, freely decides to waive his hearing at the trial, and, as long as, throughout these proceedings he is counselled by a Lawyer to defend his interests. According to the European Court of Human Rights case-law, "the fact that the defendant, in spite of having been properly summoned, does not appear, cannot —even in the absence of an excuse— justify depriving him of his right ... to be defended by counsel." (ECtHR Judgment *Pelladoah v. the Netherlands*, of 22 September 1994, paragraph 40; mutatis mutandi, Judgments Poitrimol v. France, of 23

November 1993, paragraph 35; Lala v. the Netherlands, of 22 September 1994, paragraph 33; *Van Greyseghem v. Belgium*, of 21 January 1999, paragraph 34).

On the other hand, the European Court of Justice has stated that "Regarding the scope of the right to an effective judicial remedy and to a fair trial provided for in Article 47 of the Charter, and the rights of the defence guaranteed by Article 48(2) thereof, it should be observed that, although the right of the accused to appear in person at his trial is an essential component of the right to a fair trial, that right is not absolute (see, inter alia, Case C 619/10 Trade Agency [2012] ECR I 0000, paragraphs 52 and 55). The accused may waive that right of his free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so." [Judgment of 26 February 2013, C-399/11, Melloni, paragraph 49]

So, the European Court of Human Rights has construed the right to a fair trial, proclaimed in Article 6 of the ECHR in a way largely coincidental with the interpretation given by the European Court of Justice of the rights to an effective judicial protection, to a fair trial and defence, regulated in Articles 47 and 48.2 of the Charter. Their interpretations are hermeneutic criteria we must use to define the absolute contents of the fundamental right to a fair trial which deploys *ad extra* effects. In other word, they help to define those rights and guarantees which, if not upheld by foreign authorities, may cause an indirect infringement when surrender is agreed by the Spanish public powers.

Consequently overruling the doctrine laid down in STC 91/2000 and state that a conviction in absentia does not involve an infringement of the absolute contents of the fundamental right to a fair trial, even if there is no remedy for the absent defendant, when this absence has been voluntarily and unambiguously decided by a defendant who was duly summoned, and has been effectively defended by an appointed Lawyer (Article 24.2 of the Spanish Constitution).

Therefore, we shall reject this appeal since the judicial body (*Audiencia Nacional*), pursuant to Article. 12 of Law 3/2003, of 14 March, considered that none of the situations had arisen that could hinder surrender of the convicted party in absentia to the Italian State and, consequently, it was not necessary to require additional guarantees from the Italian authorities. This conclusion was reached after examining an entire series of files (the complementary report requested from the Public Prosecution Service of the Italian Republic, the arrest warrant and the documentation provided by the now appellant himself). From the review of that documentation resulted: on the one hand, that there was no evidence that the Lawyers appointed by the defendant had stopped representing him since 2001; and, on the other hand, that there was no lack of defence,

given that the defendant, aware that a hearing was to be held, voluntarily incurred in absence. Moreover, the defendant had designated two lawyers of his choice for his representation and defence, who acted as such at first instance, on appeal and on cassation, thereby exhausting all appeal channels. In light of the foregoing, the Order issued by the *Audiencia Nacional* allowing the unconditional surrender of the appellant to the Italian authorities has not incurred in an indirect violation of the fundamental right to a fair trial, because it has been proved that the defendant had legal defense and had voluntarily waived his right to be heard.

For all the reasons previously stated, and given that what is being discussed in this amparo appeal is whether the surrender authorised did or did not constitute an "indirect" breach of the right to a fair trial (Article 24.2 of the Spanish Constitution), this Court hereby rejects this appeal, insofar the First Section of the Criminal Chamber of the *Audiencia Nacional*, in its Order of 12 September 2008, decided to surrender Mr. Stefano Melloni without infringing the requirements derived from the absolute content of this fundamental right.

RULING

For all of the above, the Constitutional Court, BY THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To reject this amparo appeal.

Let this Judgment be published in the Official State Gazette.

This Judgment was handed down in Madrid, on February, 13th 2014.

**Concurrent Opinion of the Judge Ms. Adela Asua Batarrita in relation to the Judgment delivered in the amparo appeal no. 6922-2008.**

According to the right granted to me under Article 90.2 of the Organic Law of the Constitutional Court, and with my utmost respect for the opinion of the majority of the Court, I hereby explain why I disagree with the legal grounds of the Judgment, according to the arguments I upheld during the Chamber's discussion.

I would like to point out that my disagreement does not refer to rejection of the amparo appeal —which I totally agree with— but to the legal grounds of the Judgment, both due to what it states and to what it omits. I will begin by stating what, in my opinion, is ignored and omitted by the Judgment (1), to later explain the reasons for my

disagreement with what it implicitly does state (2) and, finally, to explain my disagreement with what the Judgment actually does (3).

1. The Judgment that resolves this amparo appeal was preceded, as is well known, by the application for our first preliminary ruling before the European Court of Justice. This was a milestone in the history of the Constitutional Court of Spain, and has been subsequently followed by other European constitutional courts. A direct dialogue between the European Court of Justice and the national constitutional courts is worthy of celebration, in the sense that this dialogue will gradually help to construct a common European constitutionalism. Furthermore, the European Court of Justice Judgment of 26 February 2013, which replied to our preliminary ruling, encloses crucial aspects for the future articulation of fundamental rights protection systems in the European Union.

Consequently, I consider that this Judgment provided an excellent opportunity —to continue with this dialogue— to specify the relevance of the fundamental rights acknowledged in the European Union, not only within the scope of the Spanish Constitution but also in terms of the Court's jurisdictional function as the guarantor of the Constitution's supremacy, which is partly conditioned by the case-law laid down by the European Court of Justice in fundamental rights matters.

Constitutional Court Order 86/2011, of 9 June, had justified the request for a ruling on interpretation of Article 53 of the Charter of Fundamental Rights of the European Union (the Charter), on which the European Court of Justice had not yet issued a decision; that said provision declares "it was truly essential in order to clarify the scope and mission of fundamental rights protection systems in the European Union, as well as its articulation with respect to the declarations of rights contained in Member State Constitutions" (FJ 7).

However, the Judgment adopted by the majority ignores these central issues and, instead, aligns itself with precedent case-law, which had been reiterating that European Union law does not cover our constitutionality standard, and it is not a Constitutional Court's task to guarantee the application of EU law, and that EU law is only relevant from the perspective of Article 10.2 of the Spanish Constitution, that only refers to the interpretation of the constitutional fundamental rights´ scope.

Thus, the Judgment adopted by the majority does not take advantage of the opportunity to reflect and establish the important transformations the Court's jurisdictional task has undergone, as a result of EU membership, including the constitutional processes whereby the Constitution is rendered pre-eminent. In particular, it does not discuss the implications of the European Court of Justice's considerations in this Judgment of 26 February 2013 on the meaning of Article 53 of the Charter about relations between national and EU system, and relations between the different Constitutional Courts.

In order to carry out a reflection on the matter, the Court should have begun by placing the *Melloni* Judgment within the broader scope of recent European Court of Justice case-law, taking into account other important pronouncements, such as the Judgment delivered by the Grand Chamber also on 26 February 2013, *Akerberg Fransson* case, or the subsequent Judgment of 30 May 2013, delivered in reply to a preliminary ruling requested by the French *Conseil Constitutionnel* in a matter also related to the European arrest warrant, but which was not totally harmonized.

2. Moreover, I believe that references contained in Ground 3 resolving the amparo appeal are totally unnecessary and inconsistent in relation to the finally adopted resolution.

Ground 2 of the Judgment refers to the terms of the preliminary rulings in our Order 86/2011, as well as the response given by the European Court of Justice in its Judgment of 26 February 2013. Immediately after that, Ground 3 starts stating that, before determining the absolute contents of the fundamental right claimed by the applicant, "We should however complete the response given by the European Court of Justice's Judgment with the case-law at the time laid down by the Spanish Constitutional Court in our Declaration 1/2004, of 13 December." I do not understand why this Court has to complete the European Court of Justice´s Judgments delivered by preliminary rulings at our request, or at the request of any other European Union judicial authorities. Then, Ground 3 makes several generic affirmations without providing an accurate explanation of their purpose or utility in relation to this amparo appeal; but I am concerned about the fact that Ground 3 content, context and tone may be interpreted as an implicit resistance to assume the European Court of Justice Judgment of 26 February 2013, specifically the response given to our third question.

Answering that question, the European Court of Justice has stated that Article 53 of the Charter does not allow Spain to apply a level of protection higher than the one foreseen by the Charter in a subject —the European arrest warrant—regulated by European Union common rules. Consequently (taking into account that it is materialized in that way in the legal arguments of the Judgment), the European Court of Justice rejects outright our interpretation included in the question, upheld by the Constitutional Court Order: Article 53 of the Charter does not permit Member States to apply a higher level of protection within the Charter scope (which is it the application of EU law scope).

Constitutional Court Declaration 1/2004 about the compatibility between the Constitutional Treaty and the Spanish Constitution, upheld the compatibility of the Charter with the Spanish Constitution, among other reasons, referred to an interpretation of Article 53 of the Charter that has now been flatly rejected by the European Court of Justice. The Judgment, consequently, by "completing the response given by the European Court of Justice with the case-law at the time laid down by the Spanish Constitutional Court in our Declaration 1/2004, of 13 December," seems to be

suggesting that it does not accept the response to the third question provided by the European Court of Justice, and that the Constitutional Court is entitled to apply a level of protection that is eventually higher than the one that may arise from the Spanish Constitution further to the EU law application scope. If I read Ground 3 correctly, the Judgment adopted by the majority would be implicitly stating its rejection of the EU law primacy, which the European Court of Justice has again precisely confirmed in Judgment of 26 February 2013. All the citations of the Declaration 1/2004 included in Ground 3 suggest the same, as they highlight the limits of Europe's integration. Acceptance of the primacy of EU law primacy —which is reiterated up to three times in different ways— is conditioned to respect for Spanish Constitution basic principles and values.

In my opinion, it is inconsistent that, in a matter where there is no compatibility with EU law and the Spanish Constitution (the Judgment itself reinterprets and clarifies the absolute contents of the fundamental right affected in Ground 4), the unconditional European Union law primacy is now called into question, in relation to domestic law, emphatically referring to its limits. A reiteration of these limits may suggest that a deep conflict exists between both legal orders, but this is not indicated by our case-law, nor do I believe it to be the majority opinion of the Court.

Ground 3 does not end there. I also guess a blurred criticism of the European Court of Justice case-law, by reminding the necessity to "guarantee and *effectively* safeguard a *high level of protection* for the fundamental rights contained in the Charter" (emphasis added). If this was the underlying purpose of these words, I totally disagree with it. This Court should not remind European Court of Justice of the necessity to effectively guarantee fundamental rights, or to do so with *a high level of protection*. Each jurisdiction should apply its own rules on the protection of fundamental rights, with the consequent level of protection; it cannot and should not guarantee a higher level of protection than the one enshrined in said rules, let alone a level of protection that exactly coincides with the one provided by each Member State Constitution. Without a doubt, it is bound by an explicit or implicit mandate to optimize the rights acknowledged, but this is not the same as applying a high level of protection, which may collide with other rights or other constitutional values and purposes and, even with constitutional guarantees recognised in some Member States.

The critical perspective to European Court of Justice is real and not only my suspicion, and it is accredited by the paragraph that follows, which fully reproduces the admonishment given in the Constitutional Court Declaration 1/2004, saying that in the case of excess conduct not remedied by the European Court of Justice, the supremacy of the Constitution would oblige the Constitutional Court to handle this excess. I sincerely do not understand why, in a case where no conflictive interpretation problem nor contradiction with a constitutional rule apparently arise, the Court reiterates and refers to the doctrine laid down in the Declaration 1/2004 for hypothetical and unlikely cases where the Spanish Constitution is incompatible with the future dynamics of EU law. If

the majority of the Court considers that this was in fact the case, it should have argued the matter in a clear and straightforward manner; but if this was not the case, this admonishment was unnecessary.

In short, in my opinion, the Judgment should have excluded Ground 3 entirely, because it ultimately suggests that this Court is somehow dissatisfied with the response given by the European Court of Justice.

3. In order to resolve this amparo appeal, the Judgment adopted by the majority proceeds in Ground 4 to reinterpret —further to Article 10.2 of the Spanish Constitution— the absolute contents of a fundamental right to a fair trial, respectfully with the interpretation made until then by the Spanish Constitutional Court. In my opinion, this interpretation returns to the traditional position of the Constitutional Court —criticized in various fields— which take for granted that Article 10.2 of the Spanish Constitution exclusively justifies the effectiveness of fundamental rights recognised within the European Union. This is not consistent with the application itself of our three preliminary rulings about the validity and interpretation of several European rules that are relevant to resolve the amparo appeal; it is particularly not consistent with the content of the responses given by the European Court of Justice. Both the filing of our preliminary rulings and the European Court of Justice's response agree on one point: European Court of Justice's exclusive and excluding jurisdiction recognised to protect and interpret the fundamental rights recognised within the European Union.

In fact, in response to the preliminary rulings raised in our Order 86/2011, the Judgment of 26 February 2013 declared that the conditions to execute a European arrest warrant are harmonized in EU law and, consequently, it is not possible to apply a higher level of protection derived from domestic law, but only the level of protection of fundamental rights recognised in Articles 47 and 48.2 of the Charter.

The response given by the European Court of Justice to our preliminary rulings could be used to integrate, through Article 10.2 of the Spanish Constitution, our standard about the absolute contents of the fundamental right to a fair trial (Article 24.2 of the Spanish Constitution), in cases "not related to the application scope of European Union law." However, in cases such as the one at hand, which fully examine the application scope of EU law, it cannot be used as a hermeneutic criterion freely applied, along with others, in order to specify *ex* Article 10.2 of the Spanish Constitution, the absolute contents of this fundamental right. By contrast, it provides the standard applicable further to Article 93 of the Spanish Constitution as a result of being part of the European Union: regulations on the execution of European arrest warrants are totally harmonized, so only European Union fundamental rights should exclusively be applied. In this case, the fundamental rights recognised in Articles 47 and 48 of the Charter, have been specifically interpreted, at our request, by the European Court of Justice in its Judgment of 26 February 2013.

In other words, the legal reasoning to apply cannot consist in a domestic rule, such as Article 24.2 of the Spanish Constitution, although it has been interpreted via Article 10.2 of the Spanish Constitution, according to what the European Court of Justice's declarations on the matter; the foregoing should consist of fundamental rights recognised by the EU, as it has been interpreted by the European Court of Justice. These EU fundamental rights should be applied under Spanish jurisdiction taking into account the EU law primacy, as the Constitutional Court has already recognised in Declaration 1/2004 (Ground 4) and, furthermore, with respect to what rhetorical Ground 3 of the majority Judgment implies, there is no discrepancy with the level of protection we consider is extended *ad extra* by Article 24.2 of the Spanish Constitution.

4. For the reasons set out herein, I consider unsatisfactory the legal reasoning of the Judgment adopted by the majority. This legal reasoning may encourage the idea that the Constitutional Court does not recognise the EU law primacy and that the Court adopts a defensive approach to its legal autonomy against EU law, evading the EU law primacy with interpretations it believes may be controlled under Article 10.2 of the Spanish Constitution. The idea that the Constitutional Court does not apply EU rights but fundamental rights of the Spanish Constitution- albeit adequately interpreted in order to perfectly coincide with the level of protection recognised in the EU still remains unreal and hardly convincing.

Madrid, on February 13th 2014.

**Concurrent Opinion of the Judge Ms. Encarnación Roca Trías in relation to the Judgment delivered in amparo appeal no. 6922-2008.**

1. With my utmost respect for the opinion of the majority, I hereby issue my Concurrent Opinion on the Judgment which has rejected the amparo appeal lodged by Mr. Stefano *Melloni*.

The heart of the matter in the *Melloni* case is that the Constitutional Court of Spain, when protecting the right of defence, has been requiring *in presentia* convictions; otherwise, in order to surrender the alleged criminal requested to the country where proceedings was underway, a new trial, this time *in presentia*, should be guaranteed. However, the EAW, whereby Italy is requesting that Spain immediately surrender Mr. Melloni, convicted in absentia, though represented by his lawyers, does not accept this requirement and prevents a European country from refusing to surrender the convicted party in these circumstances.

The framework decision that implements the EAW procedure just follows the path already taken in other aspects of EU law, as in the enforcement of decisions related to family matters, divorce, parental responsibility, maintenance, succession, European titles, etc. Nevertheless, the Framework Decision on the European arrest warrant is not equivalent to these other cases. According to previous resolutions by the Court, when *in*

*absentia* convictions are concerned, Spain has acknowledged a higher standard of protection of the right of defence than the one established in said regulations (without prejudice to thoroughly examining other Brussels regulations that affect the standards of protection of fundamental rights in family matters, to specifically include Articles 8 and 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

The case that has been brought to this Court has been ongoing for some time. As gleaned from the Background Facts of this Judgment, the Court decided to apply to the European Court of Justice for three preliminary rulings, in ATC 86/2011, of 9 June. In an apparently straightforward Judgment of the European Court of Justice, dated 26 February 2013, a crucial matter in this case and for the near future is examined: the relations between Constitutional Courts of the Member States and the European Court of Justice, the supreme body of the European jurisdiction, according to Article 19.1 of the European Union Treaty, which provides that "the Court of Justice will guarantee that the law is upheld when interpreting and applying the Treaties" (see also Articles 251 ff. of the Treaty on the Functioning of the European Union).

Specifically, paragraph 59 of the European Court of Justice Judgment of 23 February 2013 states as follows: "It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, paragraph 21, and Opinion 1/09 [2011] ECR I-1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3, and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 61)." Although the Judgment allows exceptions in accordance with Article 53 of the Charter, the decision states that "Article 4a(1) of Framework Decision 2002/584 does not allow Member States to refuse to execute a European arrest warrant when the person concerned is in one of the situations provided for therein," consequently, the scope of the EAW, which "effects a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered *in absentia*, which reflects the consensus reached by all the Member States" "allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision." (Judgment *Melloni*, paragraphs 61, 62 and 63).

2. For the first time, the Constitutional Court of Spain was facing the execution of a decision delivered by the Court of Justice which, further to its competence and as a

result of the filing of three preliminary rulings, required a standard of protection for the right of defence in EAW proceedings that was less than the one held until now. I should say that although I share the ruling of the Judgment refusing to grant constitutional protection —where a request was made to apply the standard followed by the Court until now— I disagree with the legal reasoning on which it justifies this overruling.

In fact, I cannot accept that a change in consolidated case-law, laid down by this Court when interpreting Article 24.2 of the Spanish Constitution since STC 91/2000, of 30 March, should not arise as a result of the European Court of Justice Judgment of 26 February 2013 (*Melloni* case), which interprets the conditions to execute a EAW delivered in absentia, despite procedural representation of the accused; leaving out by the Spanish Court that the European Court of Justice has delivered this resolution at the Spanish Court's request, as a result of the filing of a preliminary ruling, but because the Constitutional Court has legitimately reconsidered its prior doctrine. Thus, the Constitutional Court in full bench, despite fulfilling the European standard, adds ambiguity to truly important issues that do not benefit the logic underlying the European Union, which is based on the principles of loyalty and loyal cooperation, primacy and subsidiarity of EU law within the scope of its competences, and respect for reciprocal constitutional identity.

In my opinion, this means of collaboration, which began with the filing of preliminary rulings, should have ended with a respect for the aforementioned principles, particularly the principles of primacy, unity and effectiveness of European law, contained in the Charter. To acknowledge each Court's task, when upholding each one's competences, also helps the actual effectiveness of the so-called "dialogue between the Courts." In the scope of EU law —and after ascertaining that there was no breach of the national Constitution, explained below— it should be applied based on arguments that conform to Europe's reality.

As Mr Pedro Cruz Villalón stated in his Concurrent Opinion to STC 91/2000, of 30 March, FJ 4, "indirect infringements should be significantly played down in the case of States which, for half a century, have belonged to the same community of rights and freedoms." As regards rights, furthermore, one cannot ignore the binding nature granted by Article 6.1 of the European Union Treaty to the European Charter of Fundamental Rights (see the Concurrent Opinions issued by Mr. Jorge Rodríguez-Zapata Pérez and Mr. Pablo Pérez Tremps, in STC 199/2009, of 28 September).

Thus, and with even more reason now given the new European scenario we are currently in, the Spanish Constitutional Court in full bench should have based its decision to lower the standard within Europe —which until then applied for the extradition— from the perspective of these informative principles. Bear in mind that this is a new standard of protection of the right of defence, further to Article 24.2 of the Spanish Constitution, which the Court had established, amongst other decisions, in STC 91/2000, of 30 March, and which was agreed by European countries (Framework

Decision 2002, subsequently amended by Framework Decision 2009/299), including Spain, greatly by its request.

3. Article 2 of the Treaty of Lisbon provides that "*the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights*…" The prevalence of EU law generates new issues when fundamental rights are concerned. In this regard, there are resolutions delivered by the European Courts that deny European integration to be detrimental to the fundamental rights of their national citizens. Thus, the doctrine refers to Italian Judgments of 27 December 1973 (*Frontini* case), 8 June 1984 (*Granital* case) and 21 April 1989 (*Fragd* case). Particularly relevant is the Judgment of the German Constitutional Court (*Bundsverfassungsgericht*), known as *Solange I* (29 May 1974), which affirmed that "insofar" as the European Communities did not have a catalogue of fundamental rights, any national judge, after applying for a preliminary ruling to the Court of Justice, could address the Constitutional Court if the response given was not convincing; the Court, however, in the case known as *Solange II* (22 October 1986), stated that "insofar" as the European Communities provide general effective protection for fundamental rights vis-à-vis national sovereignty, the Court would not be entitled to examine whether the fundamental rights acknowledged in German law conformed to EU law.

The European Constitutional Courts have used two standards to examine a hypothetical conflict between the prevalence of European law and the domestic constitutional protection of fundamental rights acknowledged in each Constitution. The first is based on the German decision *Solange II*, establishing the "equivalent protection" doctrine: in the case of rights acknowledged within Europe (albeit not by the Convention for the Protection of Human Rights and Fundamental Freedoms), national courts should not examine any hypothetical conflict (see the decision of the French Constitutional Court of 29 October 2004 and the Judgment of the European Court of Justice *Bosphorus*, of 30 June 2005). The second one consists of the so-called "minimum standard of protection." This principle was somewhat upheld in our Declaration 1/2004, of 13 December, which indicated that "it is clear that the Charter is conceived, in whatsoever case, as a guarantee of minimums on which the content of each right and freedom may be developed up to the density of content assured in each case by internal legislation." It also stated that "In the unlikely case where, in the ulterior dynamics of the legislation of the European Union, said law is considered irreconcilable with the Spanish Constitution, without the hypothetical excesses of the European legislation with regard to the European Constitution itself being remedied by the ordinary channels set forth therein," the Court would ultimately rule in favour of the sovereignty of the Spanish people and the supremacy of the Constitution, through the relevant constitutional procedures.

As stated in the Concurrent Opinion issued by Mr. Pablo Pérez Tremps in the STC 199/2009, First paragraph, as part of the common fundamental rights culture applied by European Union Member States, "an equivalent protection of these rights

does not mean, or should entail, a merely formal equivalence, but also entails the acceptance of the sufficiency of 'substantive guarantees offered and the controlling devices foreseen' (European Court of Justice Decision *Bosphorus v. Ireland*, of 30 June 2005, § 155), crowned in any case, as already indicated, by the work of the European Court of Human Rights. This equivalence and sufficiency principle in protection terms is particularly clear and enforceable within the European Union, which only becomes clear as a political and legal project when there is an underlying legitimate trust in Community institutions and other Member States."

4. However, as above stated,, the Judgment delivered by the majority merely reconsiders —albeit legitimately— our prior doctrine. Consequently, it indicated that, at the bottom, always underlies this type of situation, where two competent Courts —the European Court of Justice and this Constitutional Court— coincide within Europe, without forgetting the European Court of Human Rights, which is not applicable here: the protection of the Constitutional Court's jurisdiction within the scope of fundamental rights. But, above all, given the absence of a clear recognition of the European Court of Justice's competence on this matter —which, however, is accepted in the case of preliminary rulings— not only are matters ignored which I consider fundamental to understand the logic behind the European Union, but also lead to conclusions that I disagree with. Certainly, from the moment the European Charter of Fundamental Rights was incorporated into EU law and, according to Art. 6.1 of the European Union Treaty, "is given the same legal value as treaties," competences overlap on the same matter. As a result of Spain's adhesion to the European Economy Community, in 1985, this Constitutional Court has not lost any jurisdiction in the protection of fundamental rights, but insofar as there are rights protected within Europe, as a result of incorporation of the Charter into European law, we should examine our competence when applying these fundamental rights. This has led the Court to uphold certain decisions of the European Court of Justice, particularly when applying the principle of equal treatment (see SSTC 41/2013, of 14 February, and 61/2013, of 14 March).

Consequently, in my opinion, after ascertaining that the Judgment of the European Court of Justice was delivered within the scope of its competence and that an interpretation of the requirements derived from Articles 47 and 48.2 of the European Charter of Fundamental Rights —established in the Judgment of the European Court of Justice of 26 February 2013— did not affect the substantive limits of the Constitution, this Court should have openly applied the common standard established by the European Court of Justice, particularly when, according to the Judgment I disagree with it is clear that the European Court of Justice upholds the case-law of the European Court of Human Rights, as required by Article 52.3 of the Charter of Fundamental Rights of the European Union. Nevertheless, although said limits are not expressly included in Article 93 of the Spanish Constitution, I believe it may be understood —as this Court stated at the time in Declaration 1/2004, of 13 December, Ground 2— that "they implicitly arise from the Constitution and from the essential meaning of the precept," and "are understood as the respect for the sovereignty of the State, or our basic

constitutional structures and of the system of fundamental principles and values set forth in our Constitution, where the fundamental rights acquire their own substantive nature (Article 10.1 of the Spanish Constitution)."

I hereby corroborate, except for any obvious regulatory differences, what Judge Pedro Cruz Villalón said in his Concurrent Opinion to the STC 91/2000: "I believe … that an examination of the absolute content of the right of defence (Article 24.2 of the Spanish Constitution) is unnecessary if a supranational rule exists, which does not generate any constitutionality doubts and specifically covers the extradition of convicted parties in default further to the European Extradition Convention, Art. 3.1 of its Second Additional Protocol, ratified by Spain with no reservations whatsoever" (Paragraph 4). This affirmation is even more relevant here: the present case does not involve an International Treaty for the purposes of Article 10.2 of the Spanish Constitution, but a system included as a result of the assignment of competences carried out through Article 93 of the Spanish Constitution.

5. The Judgment's reasoning begins by referring to the aforementioned Decision 1/2004 (see Ground 3), which, it claims, should be used to complete the response given by the Court of Justice. This is an affirmation which, given the absence of any explanation, does not merit any consideration whatsoever. Nevertheless, I do consider it pertinent that the use of the hermeneutic criteria of aforementioned Declaration should be applied in the understanding that this Declaration dealt with a text, the *non nata* European Constitution, which is not the one that is currently in force. I will add that the Court has not had the chance to pronounce itself on the Treaty of Lisbon, as it may only do so at a party's petition and that the Treaty was signed without reservations. Having said this, certainly the Judgment, after referring to certain extracts of Declaration 1/2004, particularly on the Court's work when facing a hypothetical incompatibility, is silent on a fundamental issue: the absence of all constitutionality doubts. Consequently, albeit by omission, it may be concluded that the Court in full bench considers that the Judgment of the European Court of Justice does not exceed the limits at the time imposed by this Court, in light of the ratification of the European Constitution, an opinion that I also share.

After transcribing several paragraphs of the Judgment of the European Court of Justice, which are not applicable to the case, the majoritarian Judgment merely states that this Court "is not entitled to check the validity of the law adopted by European institutions; this control should be, in any case, carried out by the European Court of Justice when settling, amongst others, any preliminary rulings on validity that may eventually be raised. It is basically through these procedures, including preliminary rulings on interpretation, that the European Court of Justice guarantees and effectively safeguards a high level of protection for the fundamental rights contained in the Charter." This "high level of protection," I assume, does not mean the highest level.

These references in relation to EU law become, however, illogical if the control standard the Judgment considers should apply to examine the constitutionality of the challenged Order "should include any international treaties and agreements on the protection of fundamental rights and public freedoms, ratified by Spain." In other words, the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Charter of Fundamental Rights, and the interpretation made thereof by the controlling bodies established in these same international treaties and agreements.

This apparently innocuous reasoning, however, does in fact have consequences, in my opinion, resulting from issues that are not adequately resolved in the Judgment.

6. In effect, when the Judgment renders the two standards of protection — European Court of Justice and European Court of Human Rights— equivalent, it questions principles that I consider basic for the construction of Europe. This Court should have based the decision on these principles, thus encouraging an effective —not merely apparent— dialogue between the Courts, once it was confirmed in Ground 3 — albeit by omission— that there was no conflict with the Spanish Constitution. The foregoing may be explained for the following reasons:

a.- First of all, EU law does not act as international law in the territory of Member States; decisions are not of the European Union, but of the members belonging to Community bodies and the European Parliament, which is why Regulations are immediately effective in national legal orders. The States have assigned part of their sovereignty to the European Union, which is why Article 93 of the Spanish Constitution provides: "Organic Acts may be enacted to authorise the conclusion of treaties that entrust an international organization or institution the exercise of competences derived from the Constitution. The *Cortes Generales* (National Parliament) or the Government, as the case may be, should ensure compliance with these Treaties and any resolutions delivered by international or supranational bodies enjoying this assignment." This is a fundamental article for the present case..

b.- As regards the application of EU law, the content of fundamental rights is determined by its rules and by the interpretation made thereof, and of the Charter's rights, by the European Court of Justice, providing a standard substantive interpretation; a supranational standard, parameter or level of rights, to be founded on respect for the common constitutional traditions of Member States and the rights protected by the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6.3 of the Treaty on the Functioning of the European Union), as said rights are interpreted by the European Court of Human Rights (Article 52.3 of the Charter and Judgment of the European Court of Justice of 22 December 2010, *DEB Deutsche Energiehandels und Beratungsgesellchaft mbH*, C-279/09, section 35). This supranational standard, parameter or level cannot be avoided, unless the aforementioned limits are exceeded. This is particularly true in the case of the EAW: a cooperation device between the

judicial authorities of European Union Member States, which share a common realm of freedom, security and justice based on a respect for human rights and the rule of law.

c.- All national Judges and Courts should apply European law and, consequently, they are all, without exception, "European judges" in application matters. Also in relation to fundamental rights and the application of EU law, they should apply the European standard, with the possibility however, should Community regulations allow a margin of discretion, of challenging, if they so wish, the national standard (Judgment of the European Court of Justice of 26 February 2013, matter *Akerberg Frannson*).

The constitutional courts should also act in this way, as proven by the fact that this Constitutional Court, in the Order applying for a preliminary ruling, recognised that it acted as a "jurisdictional body" in the terms of Article 267 of the Treaty on the Functioning of the European Union [ATC 86/2011, of 9 June, FJ 4 e)]. According to Article 267, the European Court of Justice will be competent to issue preliminary rulings about interpretation of the Treaties and the validity and interpretation of acts adopted by EU institutions, bodies or authorities, if this is requested by a jurisdictional body of a Member State, which considers it is necessary to have a decision on the matter in order to rule on a case. Further to the foregoing, it is clear that whenever a Member State court decides to apply for this type of ruling, it is acknowledging that the Court presented with this issue is competent to resolve it, unless its decision affects substantive constitutional limits, in the terms described. Certainly, this is a complex matter that has produced different solutions amongst the various European courts (case of Czechoslovakia), but this should be examined in relation to the standards referred to above.

d.- The European Arrest Warrant replaces extradition in European countries, but not in relation to third countries in which, due to not sharing the same principles, it was not considered necessary or even appropriate to establish a single standard of protection of the right of defence.

In fact, as a fundamental difference, please note that European Union members share a policy of fundamental rights precisely derived from their membership of this supranational body (Article 93 of the Spanish Constitution), which is lacking in other countries. The recognition of a level of protection that is lower than the right of defence in relation to the EAW derives from an application of the so-called principle of mutual trust, because all European countries share the same or equivalent protection system, upon their acceptance of the rights recognised in the Treaty of Lisbon.

This is precisely why the Court is not subject to compliance with EU law in extradition matters related to non-European countries, where it need not be restricted by European standards. The constitutional standard, parameter or level applied in such case

may be different; it may have even remained the same, though as a result- as in this case- of the application of Article 10.2 of the Spanish Constitution.

The Judgment generally proclaims that "The Spanish public powers are unconditionally bound *ad intra* by fundamental rights —as enshrined in the Constitution—, but the binding content of fundamental rights when projected *ad extra* is more limited." And I wonder if even in those States requesting an extradition that do not share the same concept of rights and freedoms? What is the reason for this standard's more limited nature? These and other questions arise as a result of this Judgment. Such a radical change of position following constant case-law laid down since the year 2000 would need, with all due respect, more justified grounds; unless we had clearly recognised that the Judgment was one of execution, not delivered in an amparo appeal with a change of doctrine which, in my opinion, would have been more in line with our task as an European judicial body and would have avoided bringing up the tangential issue of "extradition," when in fact what was being discussed was the European Arrest Warrant.

Judge Jorge Rodríguez-Zapata Pérez, in his aforementioned Concurrent Opinion, already advised that the nature of both institutions —extradition and the EAW— is clearly different and that the decisions referred to in the Judgment he did not agree with had not "stopped to reason or refute it, thereby precluding the possibility of knowing what logical process advised that the former's effects be extended to the latter." The foregoing is applicable to this Judgment.

7. To conclude, I do not agree with the reasoning contained in the text of the Judgment approved in full bench, for the following reasons explained above:

1st This Judgment does not specify the grounds on which the Court decides to change the standards used until now in our system, as part of our interpretation of the right of defence.

2nd No reference is made to the nature of EU law with respect to the rights and duties contained in the.

3rd There are no constitutional criteria or standards that should govern extraditions to third countries, leaving the problem unresolved.

4th In short, the Court does not assume its role as a European judge.

The foregoing represents my Concurrent Opinion.

Madrid, on February 13th 2014.

**Concurrent Opinion of the Judge Mr. Andrés Ollero Tassara in relation to the Judgment delivered in amparo appeal no. 6922-2008.**

With my utmost respect for the opinion of the rest of the Court, and further to the right conferred by Article 90.2 of the Organic Law on the Constitutional Court, I hereby issue my concurrent opinion on the aforementioned Judgment.

1. First of all, let it be said that I share the ruling and part of the legal grounds. As I indicated in the discussion, my difference of opinion refers to the scope of our resolution, based on such grounds.

I agree with our acknowledgement of the binding effects arising, via Article 93 of the Spanish Constitution, for the Kingdom of Spain as a European Union Member State. But I also agree with the statement of Declaration 1/2004, of 13 December, Ground 2, cited in Ground 3 of this Judgment: "the constitutional transfer enabled by Art. 93 CE is subject to material limits imposed," "expressly included in the constitutional precept, but which implicitly result from the Constitution and from the essential meaning of the precept itself, are understood as the respect for the sovereignty of the State, or our basic constitutional structures and of the system of fundamental principles and values set forth in our Constitution, where the fundamental rights acquire their own substantive nature (Article 10.1 of the Spanish Constitution)." Not in vain, "the Constitution demands that the legal order accepted as a consequence of the assignment be compatible with its basic principles and values."

In fact, the European Court of Justice, with headquarters in Luxembourg, has been gradually consolidating its case-law, inspired by the constitutional traditions of Member States about the minimum content covered by the protection of fundamental rights to which they are bound. A decisive factor in the foregoing has been the incorporation of the Charter of the Fundamental Rights of the European Union amongst the Treaties. In no case was the plan to condition possible over-protection in force in different countries. Similarly, Spain is bound to the European Convention on Human Rights, and to the case-law laid down by the European Court of Human Rights, with headquarters in Strasbourg. Also in this case, European Court of Human Rights case-law establishes certain unavoidable contents as regards the protection of rights, without consequently excluding any possible over-protection in the signatory States.

As regards European Court of Justice case-law, the facts have eventually evidenced that sometimes, both in Spain and in other Member States, a certain over-protection is however obligatorily excluded as a result of EC rules; in the case, the European Arrest Warrant scope has been used to fight cross-border delinquency more effectively inside the European Union.

2. Accepting that this interpretation should lead us to recognise certain exceptions on the level of protection of rights established in our case-law, further to

relations with other States also bound by the EAW, I do not agree with the affirmation stated in Ground 4 of the Judgment, which only uses as an argument the European Court of Justice's response to our first preliminary ruling the following statement: "After having referred to our case-law on indirect infringements of fundamental rights and its specific application to a fundamental right to a fair trial, we must overrule the way how this Court has construed the notion of "absolute contents" of the right to a fair trial (Article 24.2 of the Spanish Constitution).", which has been governing our relations with countries. I see no reason why the exceptional treatment arising from Article 93 of the Spanish Constitution should be extended to the immense majority of non-EU countries. This diverse treatment is not that different from the one generated —with a constitutional reform of Article 13 of the Spanish Constitution— from the fundamental right to be elected, not just to vote, in local elections.

Even if, for other reasons not included in the Judgment, the opinion is that we should abandon the excessive judicial protection implicit in our doctrine, this case is not the most appropriate time for such justification: specifically, an appeal for constitutional protection filed by a citizen belonging to a European Union Member State, which is likewise bound by the EAW. I do not think that the best way to inaugurate what seems to be a laborious "dialogue between the Courts" (the Spanish Constitutional Court and the European Court of Justice) is to unnecessarily turn it into a monologue that needs to be accepted.

3. I consider that the situation raised should have encouraged the Court to review the adequacy of the European Union also subscribing the Treaty of Rome, in order to avoid its Member States from being obliged in a strained perspective to carry out a three-way dialogue, in order to establish the mandatory minimum contents involved in the protection of human rights.

The foregoing represents my Concurrent Opinion.

Madrid, on February 13th 2014