



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

**CASE OF G.I.E.M. S.R.L. AND OTHERS v. ITALY**

*(Applications nos. 1828/06 and 2 others – see appended list)*

JUDGMENT  
*(Merits)*

STRASBOURG

28 June 2018

*This judgment is final but it may be subject to editorial revision.*



**In the case of G.I.E.M. S.r.l. and Others v. Italy,**

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luis López Guerra, *President*,  
Guido Raimondi,  
Robert Spano,  
Işıl Karakaş,  
Kristina Pardalos,  
Paulo Pinto de Albuquerque,  
Erik Møse,  
Helen Keller,  
Paul Lemmens,  
Faris Vehabović,  
Egidijus Kūris,  
Iulia Motoc,  
Jon Fridrik Kjølbro,  
Branko Lubarda,  
Yonko Grozev,  
Khanlar Hajiyev,  
András Sajó, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 7 September 2015, on 23 November 2016, on 5 July 2017 and on 1 February 2018,

Delivers the following judgment, which was adopted on the last-mentioned date:

## PROCEDURE

1. The case originated in three applications (nos. 1828/06, 34163/07 and 19029/11) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four Italian companies and one Italian national: G.I.E.M. S.r.l., Hotel Promotion Bureau S.r.l. (company in administration), R.I.T.A. Sarda S.r.l. (company in administration), Falgest S.r.l. and Mr Filippo Girona (“the applicants”), on 21 December 2005, 2 August 2007 and 23 December 2011 respectively.

2. The applicants were represented respectively by Mr G. Mariani and Mr F. Rotunno, lawyers practising in Bari; Mr G. Lavitola, lawyer practising in Rome and Mr V. Manes, lawyer practising in Bologna; and Mr A.G. Lana and Mr A. Saccucci, lawyers practising in Rome.

The Italian Government (“the Government”) were represented by their Agent, Ms E. Spatafora, and their co-Agent, Ms P. Accardo.

3. The applicants submitted the following complaints:

(a) G.I.E.M. S.r.l alleged that there had been a violation of Article 6 § 1, Article 7 and Article 13 of the Convention, and also of Article 1 of Protocol No. 1, on account of the confiscation of its property.

(b) Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l. alleged that there had been a violation of Article 7 of the Convention and of Article 1 of Protocol No. 1, on account of the confiscation of their property.

(c) Falgest S.r.l. and Mr Gironda alleged that there had been a violation of Articles 7 and 13 of the Convention and of Article 1 of Protocol No. 1, on account of the confiscation of their property. Mr Gironda also argued that Article 6 § 2 of the Convention (presumption of innocence) had been breached.

4. Notice of the complaints under the above-mentioned Articles was given to the Government, respectively, on 30 March 2009 for application no. 1828/06, on 5 June 2012 for application no. 34163/07 and on 30 April 2013 for application no. 19029/11. Applications nos. 34163/07 and 19029/11 were declared inadmissible in respect of the other complaints submitted therein.

5. On 17 February 2015 a Chamber of the Second Section, composed of Işıl Karakaş, President, Guido Raimondi, András Sajó, Helen Keller, Paul Lemmens, Robert Spano and Jon Fridrik Kjølbro, relinquished jurisdiction in favour of the Grand Chamber, none of the parties to the case having objected (Article 30 of the Convention and Rule 72).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 September 2015 (Rule 59 § 3 of the Rules of Court).

There appeared before the Court:

(a) *for the Government*

Ms P. ACCARDO,

*Co-Agent;*

(b) *for the applicant company G.I.E.M. S.r.l.*

Mr G. MARIANI,

Mr F. ROTUNNO,

Ms C. MILLASEAU,

*Counsel,  
Adviser;*

(c) *for the applicant companies Hotel Promotion Bureau S.r.l and R.I.T.A. Sarda S.r.l.*

Mr G. LAVITOLA,

Mr V. MANES,

Mr F. MAZZACUVA,

Mr N. RECCHIA,

Ms A. SANTANGELO,

*Counsel,  
Advisers;*

(d) *for the applicant company Falgest S.r.l and the applicant Mr Filippo Gironda*

Mr A.G. LANA,

Mr A. SACCUCCI,

Mr A. SANGIORGI,

Ms G. BORGNA,

*Counsel,*

*Advisers.*

The Court heard addresses by Ms Accardo, Mr Mariani, Mr Rotunno, Mr Lavitola, Mr Manes, Mr Lana and Mr Saccucci, and the answers of Ms Accardo, Mr Rotunno, Mr Manes, Mr Lana and Mr Saccucci in reply to questions from judges.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

7. The applicant companies have their registered offices respectively in Bari (G.I.E.M. S.r.l.), Rome (Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l.), and Pellaro (Reggio di Calabria) (Falgest S.r.l.).

Mr F. Gironda was born in December 1959 and lives in Pellaro.

#### A. G.I.E.M. S.r.l.

##### *1. Building work on the applicant company's land*

8. The applicant company owned a plot of land in Bari on the coast at Punta Perotti, with a total area of 10,365 sq. m, adjacent to land belonging at the time to a limited liability company Sud Fondi S.r.l. The land was classified as suitable for building in the general land-use plan (*piano regolatore generale*) in respect of two plots, the rest being earmarked for use by small businesses according to the plan's specifications.

9. In By-Law no. 1042 of 11 May 1992 the Bari municipal council approved a site division and development plan (*piano di lottizzazione* - hereinafter "site development plan") submitted by Sud Fondi S.r.l. The plan provided for the construction of a multi-purpose complex, comprising housing, offices and shops. According to the applicant company, its land was automatically incorporated into the development plan by the municipal council.

10. On 27 October 1992 the Bari municipal authority asked the applicant company if it wished to be party to a site development agreement in order to be able to build on the land. If its response was negative, the authority

would have to expropriate the land under Law no. 6 (1979) of the Apulia Region.

11. On 28 October 1992 the applicant company informed the Bari municipal authority that it wished to participate in a site development agreement. The authority did not reply.

12. On 19 October 1995 the Bari municipal authority issued a building permit to Sud Fondi S.r.l.

13. On 14 February 1996 Sud Fondi S.r.l. began the building work, which had mostly been completed by 17 March 1997.

## 2. *Criminal proceedings against the directors of Sud Fondi S.r.l.*

14. On 27 April 1996, following the publication of a newspaper article about the building work carried out near the sea at Punta Perotti, the public prosecutor of Bari opened a criminal investigation.

15. On 17 March 1997 the public prosecutor ordered a temporary measure restraining disposal of property in respect of all the buildings in question. He also added the names of certain individuals to the register of persons prosecuted, including those of the authorised representative of Sud Fondi S.r.l. and the managers and foremen responsible for the building work. In his decision the public prosecutor expressed the view that the locality known as Punta Perotti was a protected natural site and that the building of the complex was therefore illegal.

16. The representatives of Sud Fondi S.r.l. challenged the temporary restraining measure before the Court of Cassation. In a decision of 17 November 1997 that court declared the measure null and void and ordered the return of all the buildings to their owners, on the ground that it was not prohibited to build on the site according to the land-use plan.

17. In a judgment of 10 February 1999 the Bari District Court acknowledged the illegality of the buildings erected at Punta Perotti as they had been built in breach of Law no. 431 of 8 August 1985 (“Law no. 431/1985”), which prohibited the granting of planning permission in respect of sites of natural interest, including coastal areas. However, since in the present case the local authority had issued the building permits, and in view of the lack of coordination between Law no. 431/1985 and the regional legislation, which was incomplete, the court found that no negligence or criminal intent could be imputed to the defendants. All the defendants were thus acquitted on the ground that the mental element of the offence had not been made out (“*perché il fatto non costituisce reato*”).

18. In the same judgment, finding that the development plans were materially in breach of Law no. 47/1985 and illegal, the Bari District Court ordered, in accordance with section 19 of that Law, the confiscation of all the developed land at Punta Perotti, including that belonging to the applicant company, together with the buildings thereon, and the

incorporation of the property, without compensation, into the estate of the municipal authority of Bari.

19. In an order of 30 June 1999 the Heritage Minister (*Ministro dei beni culturali*) prohibited any building in the coastal area near the city of Bari, including at Punta Perotti, on the ground that it was a site of significant natural interest. That measure was declared null and void by the Regional Administrative Court the following year.

20. The public prosecutor appealed against the judgment of the Bari District Court, calling for the defendants to be convicted.

21. In a judgment of 5 June 2000 the Bari Court of Appeal overturned the decision of the court below. It found that the granting of planning permission had been legal, in the absence of any ban on building at Punta Perotti, and there having been no appearance of illegality in the procedure for the adoption and approval of the site development agreements.

22. The Court of Appeal thus acquitted the defendants on the ground that no material element of an offence had been made out (“*perché il fatto non sussiste*”) and revoked the confiscation measure in respect of all the buildings and land. On 27 October 2000 the public prosecutor appealed on points of law.

23. In a judgment of 29 January 2001 the Court of Cassation quashed the Court of Appeal’s decision without remitting it. It acknowledged the material illegality of the site development plans on the ground that the land in question was subject to an absolute ban on building and to a landscape protection measure, both provided for by law. In that connection, the court noted that at the time the development plans had been adopted (20 March 1990), Regional Law no. 30/1990 on landscape protection had not yet entered into force. Consequently, the applicable provisions in the present case were those of Regional Law no. 56 of 1980 (on land use and development) and National Law no. 431/1985 (on landscape protection).

24. The Court of Cassation observed that Law no. 56/1980 in fact imposed a prohibition on building within the meaning of section 51(F), from which the circumstances of the case allowed no derogation, because the site development plans concerned plots of land that were not situated within the city limits. The court added that, at the time when the site development agreements were adopted, the land in question was included in an implementation plan (*piano di attuazione*) for the general land-use plan which post-dated the entry into force of Regional Law no. 56/1980.

25. The Court of Cassation noted that in March 1990 (see paragraph 23 above), at the time when the site development plans had been approved, no implementation scheme (*programma di attuazione*) had been in force. In that connection the court referred to its case-law to the effect that an implementation scheme had to be in force at the time of the approval of site development plans (Court of Cassation, Section 3, 21 January 1997, *Volpe*; 9 June 1997, *Varvara*; 24 March 1998, *Lucifero*). The reason for this

was - again according to the case-law – that once an implementation scheme had expired, a building ban which had been discontinued by the scheme would become effective once again. Consequently, it was necessary to find that the land in question had been subject to a building ban at the time of the approval of the site development plans.

26. The Court of Cassation further referred to the existence of a landscape protection measure, under section 1 of National Law no. 431/1985. In the present case, as the competent authorities had not issued a notice of conformity with the requirements of landscape protection (that is, neither the *nulla osta* approval issued by the national authorities attesting to such conformity – under section 28 of Law no. 150/1942 – nor the prior approval of the regional authorities under sections 21 and 27 of Law no. 150/1942, nor the approval of the Regional Planning Committee under sections 21 and 27 of Regional Law no. 56/1980).

27. Lastly, the Court of Cassation noted that the site development plans concerned only 41,885 sq. m, whereas, according to the specifications of the general land-use plan for the city of Bari, the minimum area was set at 50,000 sq. m.

28. In the light of those considerations, the Court of Cassation thus found that the site development plans and building permits had been illegal. It acquitted the defendants on the grounds that they could not be found to have negligently or intentionally committed offences and that they had made an “unavoidable and excusable mistake” in the interpretation of the regional legislation, which was “obscure and poorly worded” and interfered with the national law. The Court of Cassation also took into account the conduct of the administrative authorities, and in particular the following facts: on obtaining the building permits, the defendants had been reassured by the director of the relevant municipal office; the site-protection prohibitions with which the construction project was at odds did not appear in the land-use plan; and the competent national authority had not intervened. Lastly, the Court of Cassation found that in the absence of any investigation concerning the reasons for the conduct of the public bodies, it was not possible to speculate on those reasons.

29. In the same judgment the Court of Cassation ordered the confiscation of all the buildings and plots of land, on the ground that, in accordance with its case-law, the application of section 19 of Law no. 47 of 1985 was mandatory in the case of illegal site development, even where the property developers had not been convicted.

30. The judgment was deposited in the court Registry on 26 March 2001.

31. In the meantime, on 1 February 2001 the applicant company had again asked the Bari municipal authority for permission to enter into a site development agreement.



32. On 15 February 2001 the Bari municipal authority informed the applicant company that, following the judgment of the Court of Cassation of 29 January 2001, the ownership of the land at Punta Perotti, including that belonging to the applicant company, had been transferred to the municipality.

33. The criminal proceedings described above gave rise to another application to the Court (see *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, 20 January 2009).

### 3. *Actions taken by the applicant company for the return of its land*

34. On 3 May 2001 the applicant company applied to the Court of Appeal of Bari seeking the return of its land. It alleged that, in line with case-law of the Court of Cassation, the confiscation of property belonging to a third party in relation to criminal proceedings could be ordered only to the extent that the latter had participated in the commission of the offence, in terms of either material or mental elements.

35. In a decision of 27 July 2001 the Court of Appeal upheld the applicant company's appeal.

36. The public prosecutor appealed on points of law.

37. In a judgment of 9 April 2002 the Court of Cassation quashed the decision of the Bari Court of Appeal and remitted the case to the Bari District Court.

38. The applicant company lodged an interlocutory application for review of the enforcement order, seeking the return of its land.

39. In a decision deposited in the court's Registry on 18 March 2004, the Bari preliminary investigations judge (*giudice per le indagini preliminari*) dismissed the applicant company's application. He first observed that the company's grievances concerned neither the existence nor the formal lawfulness of the impugned measure, which was a mandatory administrative sanction that the criminal court was also entitled to impose in respect of the property of third parties which had not taken part in the commission of the offence of unlawful site development offence. The judge found that the public imperative of protecting land had to prevail over the individual interests.

40. The applicant company appealed on points of law. It emphasised that no construction work had actually been carried out on its land, which had not been the subject of a building permit. By its very nature, it argued, a confiscation measure should be directed solely against land upon which unlawful construction had taken place.

41. In a judgment of 22 June 2005, deposited in the court's Registry on 18 January 2006, the Court of Cassation, finding that the Bari preliminary investigations judge had addressed all the points in dispute giving logical and correct reasons, dismissed the applicant company's appeal on points of law. The court noted that the confiscation of the applicant company's land

had been compliant with its settled case-law whereby the measure provided for in section 19 of Law no. 47 of 1985 was a mandatory administrative sanction imposed by the criminal court on the basis of the incompatibility of the situation of the property in question with the legislation on unlawful site development, even where the defendants had been acquitted. Property owners who were not parties to the criminal proceedings and who claimed to have acted in good faith would be entitled to seek redress before the civil courts.

#### 4. *Recent developments*

42. According to the information provided by the parties, in October 2012 the Bari municipal authority, having regard to the principles set out and the violations found by the Court in its *Sud Fondi S.r.l. and Others* judgments (*merits* and *just satisfaction*, no. 75909/01, 10 May 2012), asked the Bari District Court to return the confiscated land to the applicant company. In a decision of 12 March 2013 the preliminary investigations judge of that court revoked the confiscation measure and ordered the return of the land on account of the fact that, first, the Court had found a violation of Article 7 of the Convention in *Sud Fondi S.r.l. and Others* and, secondly, that the company was to be regarded as a *bona fide* third party because none of its directors had been found liable for the offence of unlawful site development. The judge's decision was entered in the land register on 14 June 2013 and the applicant company was thus able to recover its property on 2 December 2013.

43. On 7 April 2005 the applicant company had applied to the Bari District Court, seeking compensation for the damage it had sustained as a result of the conduct of the Bari municipal authority and the consequences for the company's assets. It reproached the municipal authority for: (1) failing to adopt an alternative to the land-use plan; (2) failing to clarify the existence of the constraints arising as to the authorised use of the areas concerned by the site development at issue; and (3) approving site development procedures which had apparently been lawful but had led to the confiscation of the land and had caused a significant economic loss.

According to the information provided by the parties, the proceedings were still pending, as the expert's report evaluating the damage, estimated at 52 million euros by the applicant company, had not yet been filed.

### **B. Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l.**

#### *1 The site development plan*

44. The applicant company R.I.T.A. Sarda S.r.l. was the owner of land suitable for building with an area of 33 hectares at Golfo Aranci.

45. Under the municipal development scheme (*programma comunale di fabbricazione*) for Golfo Aranci, approved on 21 December 1981, the land in question belonged to zone F – classified as a tourist zone – and was suitable for building within a given volume. It was possible to exceed that volume in the context of hotel or hotel-type development.

46. Wishing to build a hotel-type residential complex for tourists with a number of accommodation units (*produttiva alberghiera*), R.I.T.A. Sarda S.r.l. submitted a site development plan (*piano di lottizzazione*) to the competent authorities.

47. On 27 March 1991, under section 13 of Regional Law no. 45 of 1989, the Sardinia Region issued its *nulla osta* approval for building at a minimum distance of 150 metres from the sea, provided that once erected the buildings would actually be used for tourist accommodation. That obligation had to be recorded in the land register.

48. On 29 November 1991 the Sardinia Region granted the landscape transformation permit, under Law no. 431/1985 and section 7 of Law no. 1497/1939, to R.I.T.A. Sarda S.r.l. (see paragraphs 93-96 below).

49. The municipality of Golfo Aranci approved the site development plan with final effect on 17 December 1991.

50. On 22 April 1992, subject to the regional approval, the municipality of Golfo Aranci authorised the mayor to issue a derogating building permit allowing a greater construction volume than that provided for by its municipal development scheme, for the purposes of a hotel-type structure (*opere alberghiere ricettive*). The file shows that the site development plan concerned an area of 330,026 sq. m.

51. On 17 July 1992 the Sardinia Region issued its final approval of the plan.

52. In the meantime, on 22 June 1992, Regional Law no. 11/1992 had entered into force. It removed the possibility of derogating from the prohibition on building near the sea and fixed the minimum distance at 2 kilometres for dwellings and 500 metres for hotels. As regards buildings intended for hotel-type use, such as the hotel-type residential complexes for tourists in the present case, they were to be treated as dwellings. Under the same law, the minimum distance of 2 kilometres thus had to be maintained, except in the cases where, before 17 November 1989, a site development agreement had already been signed and the infrastructure work had already begun.

53. On 17 July 1992 the Sardinia Region authorised the mayor to grant a building permit to R.I.T.A. Sarda S.r.l. by way of derogation from the municipal land-use plan.

54. On 13 August 1992 the mayor of Golfo Aranci and R.I.T.A. Sarda S.r.l. entered into a site development agreement. Under Article 10 thereof the buildings erected on the site would continue to be used for tourist-hotel purposes and could not be sold off in separate units for a period of twenty

years. The agreement stipulated that the development plan was compliant with section 13 of Regional Law no. 45/1989 and with the other planning regulations; it certified that the applicant company had paid a deposit of an amount equivalent to the total cost of the amenities. That work was to be paid for by the applicant company, which would also be required to assign 30% of the land free of charge to the municipality for the primary infrastructure (*urbanizzazione primaria*).

55. On 31 August 1992 the municipality of Golfo Aranci issued a permit for the primary infrastructure. On 23 November 1992 the municipality issued the building permit for the construction work.

56. On 19 February 1993, following the entry into force on 22 June 1992 (see paragraph 52 above) of Regional Law no. 11/1992, amending Regional Law no. 45/1989, the regional authority revoked certain permits that had been granted under the previous legislation. The applicant company was not affected.

57. The work began in 1993. In 1997 eighty-eight housing units, less than one third of the total number, had been built. A number of them had been sold to individuals, subject to a clause stipulating that the property had to remain assigned, for a number of years, for tourist-hotel use.

58. On 28 January 1995 R.I.T.A. Sarda S.r.l., which was seeking new partners to optimise the project and share the risks, asked the municipal authority whether the sale of the buildings to third parties was compatible with the development agreement. On 14 February 1995 the municipal authority stated that the agreement had been drafted clearly enough; it therefore did not need clarification. It gave a favourable opinion as to the possibility of selling the buildings, but not in single units and provided the intended use of the properties remained unchanged.

59. On 11 March 1996 the municipal authority, again approached by the applicant company, confirmed the opinion issued on 14 February 1995.

60. At an unknown date, R.I.T.A. Sarda S.r.l. entered into a preliminary contract of sale with Hotel Promotion Bureau S.r.l. concerning part of the land covered by the development agreement and certain buildings erected in the meantime. In addition, on 15 January 1996, Hotel Promotion Bureau S.r.l. entered into an agreement (*contratto di appalto*) with R.I.T.A. Sarda S.r.l. under which the latter undertook to carry out construction work on the land forming the object of the preliminary contract of sale.

61. With a view to becoming the owner of the land and buildings, on 26 February 1997 Hotel Promotion Bureau S.r.l. also signed agreements with a travel agent for the purpose of renting out units on a weekly basis.

62. On 22 October 1997 R.I.T.A. Sarda S.r.l. sold to Hotel Promotion Bureau S.r.l. 36,859 sq. m of land and the buildings known as "C2", namely sixteen units for residential-tourist use. In addition to the buildings R.I.T.A. Sarda S.r.l. assigned the construction rights to Hotel Promotion Bureau S.r.l.

The price of the transaction was fixed at 7,200,000,000 Italian lire (ITL), equivalent to 3,718,489.67 euros (EUR).

63. In November 1997 R.I.T.A. Sarda S.r.l. was the owner of sixteen housing units and the plots of land covered by the site development plan, with the exception of plot no. 644 and those previously sold to Hotel Promotion Bureau S.r.l., which was the owner of the land it had purchased and of sixteen units.

64. On 26 March 1998 the municipal authority approved the transfer (*voltura*) of the building permit concerning the land and buildings purchased by Hotel Promotion Bureau S.r.l.

65. On 3 April 2006, further to a request by R.I.T.A. Sarda S.r.l. for a planning certificate in respect of the relevant property for the period 1990-1997, the municipal authority stated that the development agreement signed with R.I.T.A. Sarda S.r.l. and the permits granted were compatible with the planning regulations in force at the material time, and in particular with Regional Law no. 45/1989, and it therefore considered that the offence of unlawful site development was not made out in the circumstances.

## 2. *The criminal proceedings*

66. In 1997 the public prosecutor of Olbia opened a criminal investigation in respect of Mr M.C. and Mr L.C., the legal representatives of the applicant companies. They were suspected of a number of offences, including that of unlawful site development within the meaning of section 20 of Law no. 47/1985 for building too close to the sea and without planning permission, together with fraud for changing the intended use of the properties in breach of the development agreement.

67. On 20 November 1997 a court order restraining disposal of property was imposed on the land and buildings.

68. In a decision of 17 January 2000 the Sassari District Court returned the land and buildings to their rightful owners.

69. In a judgment of 31 March 2003 the Olbia District Court acquitted M.C. and L.C. on the merits in respect of all the offences, with the exception of that of unlawful site development, the prosecution of which was declared statute-barred.

70. Having regard to the entry into force of Regional Law no. 11 of 1992 (see paragraph 52 above) and the new minimum distance from the sea introduced therein, the District Court took the view that the municipality of Golfo Aranci should never have issued the building permits and that the previously issued authorisations could not legitimise the situation. The building permits were thus in breach of the law or, at least, ineffective (*inefficaci*). Although erected in accordance with the permits issued by the municipal authority, the constructions were thus incompatible with the statutory provisions and their existence thus constituted unlawful site development. In addition, the sale of the housing units to individuals cast

doubt on their continued use for tourist-hotel purposes and this change of purpose also placed the buildings in breach of the law. In conclusion, the District Court ordered the confiscation of the property previously placed under a restraining order and the transfer of ownership to the municipality of Golfo Aranci within the meaning of section 19 of Law no. 47/1985.

71. As regards, in particular, the charge of fraud, the court took the view that the offence was not made out because there had been no financial loss to the municipality, since the cost of the infrastructure work remained the same even if the intended use changed. In addition, the mental element, that is to say the existence of intent to defraud the municipality, had not been proved in view of the fact that the sale had been carried out as a result of the financial difficulties of R.I.T.A. Sarda S.r.l. Moreover, the court pointed out that the municipal authority had issued the company with a favourable opinion as regards the sale of the buildings.

72. In a judgment of 11 October 2004 the Cagliari Court of Appeal upheld the Olbia District Court's finding of dismissal (*non doversi procedere*) in respect of the offence which was statute-barred and reiterated that the municipality of Golfo Aranci should not have issued the building permits, which were illegal and in any event ineffective. The constructions erected were *de facto* incompatible with the regional legislation prohibiting them. In addition, between March 1995 and November 1997 most of the housing units had been sold off, thus changing their intended use. As to the charge of fraud, the Court of Appeal upheld the acquittal of the applicant companies' legal representatives on the basis of the same considerations, on this point, as those of the District Court. It confirmed the confiscation order.

73. Mr M.C. and Mr L.C. appealed on points of law but their appeal was dismissed by the Court of Cassation in a judgment of 15 February 2007.

### 3. *Recent developments*

74. According to the information provided by the Government, on 29 July 2015 the individual purchasers of the confiscated property still retained full possession. Shortly before that, on 21 May 2015, a resolution of the municipality of Golfo Aranci had acknowledged the genuine interest of the community in keeping the confiscated complex, referring in particular to the possibility of using the housing to cope with situations of urgency in the event that the local authorities should decide to assign the use of the property, directly or indirectly, for rent by persons with low income.

## **C. Falgest S.r.l. and Mr Gironda**

### 1. *Site development plan*

75. The company Falgest S.r.l. and Mr Filippo Gironda were the co-owners, each with a 50% interest, of a plot of land at Testa di Cane and

Fiumarella di Pellaro (Reggio di Calabria) with a total surface area of 11,870 sq. m. The land-use plan provided solely for the possibility of building hotel-type residential complexes for tourists on that land.

76. On 12 October 1994 the applicants applied for a building permit to erect a tourist residential complex consisting of forty-two houses and sports facilities.

77. On 15 September 1997 the municipality of Reggio di Calabria issued the building permit.

78. After verification by the municipality, a number of variations from the plan were noted. The municipality ordered the suspension of the work on 26 January 1998.

79. On 29 January 1998 the applicants filed an amended plan (*variante in corso d'opera*), which provided for fewer houses (forty instead of forty-two) and restricted the construction area. This amended plan sought to regularise the work as already carried out, within the meaning of Law no. 47/1985.

80. On 10 February 1998 the mayor of Reggio di Calabria cancelled the order suspending the work on the ground that the discrepancies in relation to the initial construction project could be regularised by means of the amended plan submitted in respect of ongoing work under section 15 of Law no. 47/1985.

81. On 1 October 1998 the inspector of the municipality of Reggio di Calabria noted that the work was in conformity with the amended plan. The work was pursued.

## 2. Criminal proceedings

82. In 2002 the public prosecutor of Reggio di Calabria opened an investigation in respect of Mr Gironda, in his capacity as co-owner of the property, and five others: a director of the company, two signatories to the development project and two foremen. They were all suspected of committing a number of offences, in particular that of unlawful site development within the meaning of section 20 of Law no. 47/1985.

83. In a judgment of 22 January 2007 the Reggio di Calabria District Court acquitted all the defendants on the merits (*perché il fatto non sussiste*) in respect of all the charges, except for the offence of unlawful site development, the prosecution of which it declared statute-barred. The court noted that the project had provided for the construction of residences for hotel-type tourist accommodation. However, the structural specifications of the buildings (*caratteristiche strutturali*) and the evidence suggested that the real purpose of the project was the sale of houses to individuals, thus casting doubt on the intended hotel-type tourist use. This change of purpose rendered the site development unlawful. In conclusion, the court ordered the confiscation of the land and buildings and the transfer of the property to the municipality of Reggio di Calabria under section 19 of Law no. 47 of 1985.

84. In a judgment of 28 April 2009 the Reggio di Calabria Court of Appeal acquitted the applicants on the merits (*perché il fatto non sussiste*) in respect of all the charges, including that of unlawful site development. It revoked the confiscation of the property and ordered its return to the owners.

85. The Court of Appeal took the view, in particular, that the approved project was compatible with the land-use plan and the planning regulations. Given that there had been no preliminary or final contract of sale, there was no evidence of any change in the purpose of the constructions and therefore no unlawful development.

86. In a judgment of 22 April 2010, deposited in the Registry on 27 September 2010, the Court of Cassation quashed the judgment of the Court of Appeal without remitting it, finding that the change in purpose of the constructions was proved by statements made by third parties and by documents in the file. For the Court of Cassation, the offence of unlawful site development (the prosecution of which was statute-barred, entailing the dismissal of the case) had thus indeed been knowingly committed by the defendants. Consequently, the property in question again became subject to the confiscation order made at first instance by the Reggio di Calabria District Court. The acquittals were maintained.

### 3. *Current state of confiscated property*

87. According to an expert's report of 5 May 2015, the expert having been appointed by the applicants, the complex confiscated from the latter was in an advanced state of abandonment and neglect. In the applicants' submission, the municipal authority, which was the owner of the property, had not carried out any work to keep the open spaces maintained.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. **General principles of criminal law**

88. Article 27 § 1 of the Italian Constitution provides that "criminal liability is personal". The Constitutional Court has affirmed on several occasions that there can be no strict liability in criminal matters (see, *inter alia*, Constitutional Court judgment no. 1 of 10 January 1997). Article 27 § 3 of the Constitution provides: "Punishments ... shall aim at rehabilitating the convicted person".

89. The second and third paragraphs of Article 25 of the Constitution provide that "no punishment may be inflicted except by virtue of a law in force at the time the offence was committed", and that "no restriction may be placed on a person's liberty save for as provided by law".



90. Article 1 of the Criminal Code states that “no one may be punished for an act which is not expressly defined by law as constituting a criminal offence, under any penalty which is not prescribed by law”. Article 199 of the Criminal Code on security measures provides that no one may be subject to security measures which are not provided for by law, or in cases other than those provided for by law.

91. The first paragraph of Article 42 of the Criminal Code provides that “no one may be punished for an act or omission constituting a criminal offence provided by law if, in committing the acts, the perpetrator did not have the corresponding awareness and intent [*coscienza e volontà*]”. The same rule is set out in section 3 of Law no. 689 of 25 November 1989 as regards administrative offences.

92. Article 5 of the Criminal Code provides that “no one may plead ignorance of criminal law in order to obtain exemption from liability”. The Constitutional Court (in judgment no. 364/1988) ruled that this principle did not apply in the case of an unavoidable error, so that the provision must henceforth be read as follows: “no one may plead ignorance of criminal law in order to obtain exemption from liability, save in the case of an unavoidable error”. The Constitutional Court stated that the possible origin of any objectively unavoidable error regarding criminal law was the “absolute obscurity of the law”, the “erroneous assurances” of persons institutionally responsible for assessing the lawfulness of the acts to be performed, or the “extremely chaotic” state of case-law.

## **B. Rules on land planning and development**

93. The protection of areas of outstanding natural beauty (*bellezze naturali*) is regulated by Law no. 1497 of 29 June 1939, which lays down the State’s right to impose “special landscape protection orders” (*vincolo paesaggistico*) in respect of the sites to be protected.

94. Under Presidential Decree no. 616 of 24 July 1977 the State delegated administrative functions regarding the protection of exceptional natural sites to the regional authorities.

### *1. Law no. 431 of 8 August 1985 (emergency provisions regarding sites of major environmental importance)*

95. Section 1 of this Law imposes limitations geared to protecting landscapes and the environment within the meaning of Law No. 1497/1939 (*vincolo paesaggistico e ambientale*), including on coastal areas located at less than 300 metres from the surf line, even for land rising directly above the sea. This provision imposes a requirement to apply to the competent authorities for a notice of compliance with landscape protection for any development project affecting the relevant areas. Such limitations do not apply to land included in “urban zones A and B”, that is to say town centres

and adjacent areas. In the case of land located in other zones, the limitations do not apply to plots included in any “implementation plan”.

96. This legislation placed the entire territory of Italy under general protection. Anyone failing to comply with the constraints set out in section 1 is punishable under the terms of section 20 of Law no. 47/1985 (sanctions in land planning matters; see paragraph 104 below).

2. *Law no. 10 of 27 January 1977 (rules on the development potential of land)*

97. Section 13 of this Law provides that general land-use plans may be implemented subject to the existence of an implementation plan or scheme (*piano o programma di attuazione*). Such implementation schemes must delimit the zones in which the provisions of the general land-use plans are to be implemented.

98. It is incumbent on the regional authorities to decide on the content of implementation plans and the procedure for establishing them, and to draw up a list of towns and cities exempted from the requirement to adopt such plans.

99. Where a town or city is required to adopt an implementation plan, building permits can be issued by the municipal authority only if they cover an area included in the implementation scheme (with exceptions as prescribed by law), and provided that the project complies with the general land-use plan.

100. Under section 9, towns and cities exempted from the requirement to adopt an implementation plan may issue building permits.

3. *Apulia Regional Law no. 56 of 31 May 1980*

101. Section 51(f) of this Law provides:

“... Pending the entry into force of the territorial land-use plans ...

(f) It is forbidden to build at a distance of less than 300 metres from the surf line or from the highest point overhanging the sea.

Where a land-use plan (*strumento urbanistico*) is already in force or has already been adopted at the time of entry into force of the present law, building is only possible in zones A, B and C within inhabited centres and tourist facilities. Furthermore, it is permissible to construct public infrastructure and to complete industrial and small-business installations whose construction was already under way when this law came into force.”

4. *Law no. 47 of 28 February 1985 (rules on the oversight of development and building activities, sanctions, restitution and regularisation of constructions)*

102. Section 18, as in force at the material time, provided as follows:

“Unlawful site development by means of construction obtains in cases where building work commences on a given plot of land involving development that is inconsistent with land-use plans [*strumenti urbanistici*] which are already in force or have been adopted, or is at least incompatible with national or regional legislation, or otherwise does not have the requisite authorisation ...; and also where the development is carried out by dividing up and selling (or otherwise fragmenting) the land, creating plots which, by their very nature, ... clearly demonstrate their actual intended use. ...”

103. Section 19 of this law provides for the confiscation of unlawful constructions and unlawfully developed land, in cases where the criminal courts have delivered a final judgment as to the unlawfulness of the development. The criminal judgment is immediately entered in the land register.

104. Section 20 provides that in the event of unlawful site development – as defined in section 18 of the same law – the corresponding criminal penalties are a maximum two-year prison sentence and a fine of up to 100 million Italian lire (approximately EUR 51,646). Confiscation is not mentioned.

*5. The Construction Code (Presidential Decree no. 380 of 6 June 2001)*

105. Presidential Decree no. 380 of 6 June 2001 (*Testo unico delle disposizioni legislative e regolamentari in materia edilizia*) codified previously existing provisions in the field of planning permission in particular.

106. Article 30 § 1 of the Construction Code, which incorporates section 18(1) of Law no. 47/1985, unamended, provides as follows:

“Unlawful site development obtains in cases where building work commences on a given plot of land involving a development project which is incompatible with planning regulations (that is to say the local development plan, land-use plan or any other provision governing territorial and urban planning at the level of a given territory [*strumenti urbanistici*]) ... or otherwise lacks the requisite authorisation ...; and also where the development project is implemented by dividing up and selling or otherwise fragmenting the land, creating plots which, by their very nature, ... clearly demonstrate their actual intended use.”

107. Under Article 30 §§ 7 and 8 of the Construction Code, which incorporates, unamended, section 18 (7) and (8) of Law no. 47/1985, in the case of site development without municipal authorisation, the municipal authority must issue an order suspending all work on the plots of land in question. The authority in question must also ensure that the land and the constructions thereon cannot be the subject of any transaction. The suspension order must be entered in the land register. Unless the suspension decision is revoked within the ensuing ninety days, the developed land passes automatically and free of charge into the estate of the municipality on whose territory the site development has been carried out.

The municipal authority must arrange for the subsequent demolition of the constructions. Should that authority fail to act, the regional authority may order the measures it deems necessary, and must simultaneously inform the public prosecutor's office with a view to possible criminal proceedings.

108. At the time of the codification, sections 19 and 20 of Law no. 47/1985 were merged without amendment into a single provision, namely Article 44 of the Code, under the following heading: "Art. 44 (L) - Criminal sanctions ...". Article 44 § 2 of the Construction Code incorporates, unamended, section 19 of Law no. 47/1985 as amended by Article 3 of Legislative Decree no. 146 of 23 April 1985, which was converted into Law no. 298 of 21 June 1985. Article 44 provides:

"2. In a final judgment [*sentenza definitiva*] establishing that there has been unlawful site development, the criminal court shall order the confiscation of the unlawfully developed land and the illegally erected buildings. Following the confiscation, the land shall pass into the estate of the municipality on whose territory the site development has been carried out. The final judgment shall constitute a document of title for immediate entry in the land register."

### C. The offence of unlawful site development

#### 1. Forms of the offence

109. According to the definition in section 18(1) of Law no. 47/1985, and Article 30 § 1 of the Construction Code, unlawful site development may take four different forms:

(a) "material" unlawful site development (*Lotizzazione abusiva materiale*);

(b) "contractual" (*negoziale*) unlawful site development (*Lottizzazione abusiva negoziale*);

(c) "hybrid" unlawful site development (*Lottizzazione cosiddetta mista*); and

(d) site development involving a change of intended use of buildings (*Lotizzazione abusiva mediante mutamento della destinazione d'uso di edifici*).

#### (a) "Material" unlawful site development

110. The offence of "material" unlawful site development refers to an urban development project involving the construction of buildings or amenities, or urban development projects liable to cause a given territory to be used in a different manner from that laid down in the planning regulations. There are two different forms of unlawful site development in this category, depending on the types of regulations breached:

(i) procedural "material" unlawful site development, referring to a development project which is unauthorised or incompatible with the authorisation granted; or

(ii) substantive “material” unlawful site development, where the development project has been authorised by the authorities (the municipality or possibly the regional council) but such authorisation is illegal on grounds of incompatibility with planning regulations and regional or national legislation.

111. Prior to judgment no. 5115 (2002) of the plenary Court of Cassation (*Salvini and Others*), there was some controversy as to the notion of the substantive type of “material” unlawful site development. According to a line of Court of Cassation case-law, this type of development was not unlawful where it had been authorised by the competent authorities (Court of Cassation, 1988, *Brunotti*, and Court of Cassation, no. 6094, 1991, *Ligresti and Others*). Land planning was regulated by a series of administrative acts which, on the basis of the broader land-use plan, led to the adoption of decisions on individual cases. The criminal courts had no power to waive the implementation of the administrative decision authorising individual projects, save where it was deemed non-existent or invalid (Court of Cassation, *Ligresti and Others*, cited above). In so far as the unlawful site development encroached on the powers of the public authorities in matters of land planning, the offence was made out where a new developed area was created without any preventive supervision on the part of the municipality (Court of Cassation, 1980, *Peta*, and Court of Cassation, *Brunotti*, cited above). In conclusion, under this approach the development was unlawful only where it was not authorised, and not where, despite planning permission, the activity was deemed inconsistent with other planning regulations.

112. In its judgment no. 5115 of 2002, however, the plenary Court of Cassation rejected this line of case-law in favour of a second approach, which is now well established, whereby the offence is made out not only where the construction is under way in the absence or in breach of any planning permission, but also in the case of permission which is not in conformity with other planning regulations, in particular at regional or national level (“substantive” material offence of unlawful site development). According to that line of case-law, the “procedural” material offence of unlawful site development should be regarded as a residual hypothesis in relation to “contractual” unlawful site development.

**(b) “Contractual” unlawful site development**

113. The offence of unlawful site development is also made out where a development project is implemented by dividing up and selling (or otherwise fragmenting) land, creating plots which, by their very nature, clearly demonstrate their actual intended use, which is different from that provided for by the planning regulations. In this scenario, the development project exclusively stems from a legal procedure rather than a physical activity (building work) (Court of Cassation, 2009, *Quarta*). Where legal

acts are combined with building activity, the status of “contractual” development shifts to that of “hybrid” unlawful site development (see Court of Cassation, no. 618, 2012). Contractual unlawful site development is an offence which involves multiple perpetrators, that is to say, at least the vendor and the purchaser of the plots of land.

**(c) “Hybrid” unlawful site development**

114. This type of unlawful site development comprises the legal activity of dividing up a piece of land into plots and the ensuing building activity (Court of Cassation, no. 6080, 2008, *Casile*; Court of Cassation no. 45732, 2012, *Farabegoli*; and Court of Cassation, no. 3454, 2013, *Martino*).

**(d) Unlawful site development by changing the intended use of buildings**

115. Lastly, case-law has included in the concept of unlawful development the scenario of changing the intended use of buildings erected in a zone already covered by an approved site development plan. The change may, for instance, involve splitting up a tourist/hotel complex and selling the units separately as private dwellings. Such a change of intended use must be such as to affect the land-use plan. This mode of development fits into either the material or the contractual category of site development depending on whether the emphasis is placed on the existence of constructions (material element) or on the manner in which the development project is implemented, that is to say by a legal act (see, to that effect, Court of Cassation, no. 20569, 2015). Even though this mode of development does not involve unauthorised building activity, case-law considers that it is one of the situations provided for in Article 30 of the Construction Code, given that the separate sale of buildings necessarily entails dividing up the land on which they are built (*Farabegoli*, cited above).

*2. The legal interests affected by the unlawful site development*

116. According to the Court of Cassation, in creating the offence of unlawful site development the legislature intended to protect two different interests: on the one hand, it wished to ensure that land development proceeded under the supervision of the public authorities responsible for land-use planning (in particular by criminalising the procedural material and contractual offences of unlawful site development) (Court of Cassation, *Salvini and Others*, cited above; Court of Cassation, no. 4424, 2005; and *Consiglio di Stato*, no. 5843, 2003), thus avoiding the risk of infrastructure development that is unplanned or different from that originally planned (Court of Cassation, no. 27289, 2012, *Dotta*); on the other hand, it sought to guarantee that the land development complies with planning regulations (this applies to development projects which have been authorised but in a manner incompatible with other laws, that is to say the substantive material

offence of unlawful development) (Court of Cassation, *Salvini and Others*, cited above; Court of Cassation, no. 4424, cited above; and *Consiglio di Stato*, no. 5843, cited above).

117. The Court of Cassation has explicitly stated that the offence of unlawful development constitutes an offence of endangerment. In one particular case, drawing a parallel with the offence of unlawful erection of a building, it referred to an abstract danger, that is, an irrebuttable presumption of danger, justifying that the perpetrator should be penalised regardless of the existence of an actual danger (Court of Cassation, no. 20243, 2009, *De Filippis*).

#### **D. Confiscation as a sanction for unlawful site development**

##### *1. Nature of the confiscation*

118. The Court of Cassation has always regarded confiscation as a “sanction”, and in fact initially classified it as a criminal sanction. That meant that it could be applied solely in respect of the property of an accused who was found guilty of the offence of unlawful site development, in accordance with Article 240 of the Criminal Code (*Brunotti*, cited above; Plenary Court of Cassation, 1990, *Cancelleri*; and *Ligresti*, cited above).

119. In a judgment of 12 November 1990 the Court of Cassation (*Licastro* case) found that confiscation was a mandatory administrative sanction, unconnected to a criminal conviction. It could therefore, in that court’s view, be imposed on third parties when it stemmed from a situation (construction or site development) which was factually unlawful, regardless of the existence of a mental element. This meant that confiscation could be ordered even if the perpetrator had been acquitted on the grounds of a lack of any mental element (“*perché il fatto non costituisce reato*”). It could not be ordered if the perpetrator had been acquitted on the grounds that the charge had no material basis (“*perché il fatto non sussiste*”).

120. This line of case-law has frequently been followed (Court of Cassation, 1995, *Besana*; Court of Cassation, no. 331, 15 May 1997, *Sucato*; Court of Cassation, no. 3900, 23 December 1997, *Farano*; Court of Cassation, no. 777, 6 May 1999, *Iacoangeli*; and Court of Cassation, 25 June 1999, *Negro*). The Constitutional Court acknowledged the administrative nature of confiscation in its decision no. 187 of 1998.

121. Despite the approach adopted by the Court in the *Sud Fondi S.r.l. and Others* decision of 2007 (*Sud Fondi S.r.l. and Others v. Italy* (dec.), no. 75909/01, 30 August 2007), as confirmed by the 2009 *Sud Fondi S.r.l. and Others v. Italy* judgment (merits, cited above) and the 2013 *Varvara v. Italy* judgment (no. 17475/09, 29 October 2013), the Court of Cassation and the Constitutional Court have reiterated the position that the impugned confiscation is an administrative sanction (Court of Cassation, no. 42741,

2008; Plenary Court of Cassation, no. 4880, 2015; and Constitutional Court, no. 49, 2015). Nevertheless, these courts have accepted that the criminal court must order such measures with regard for the standards of protection laid down in Articles 6 and 7 of the Convention (see, for example, Court of Cassation, Ord., no. 24877, 2014). The Court of Cassation has explicitly acknowledged the punitive (*afflittivo*) nature of confiscation (Court of Cassation, no. 39078, 2009, and Court of Cassation, no. 5857, 2011). In its judgment no. 21125 of 2007 it held that the primary function of confiscation was deterrence.

122. Consequently, the sanction is authorised even where the criminal proceedings for unlawful site development do not lead to the “formal” conviction of the accused (see Court of Cassation, judgment no. 39078, 2009, and Constitutional Court judgment no. 49, 2015), unless the accused has had nothing to do with the perpetration of the offence and his good faith has been formally ascertained (Court of Cassation, no. 36844, 2009).

## 2. *Role of the criminal court in the application of the sanction*

123. Confiscation for unlawful site development is a measure which can be ordered by an administrative authority (the municipality or, failing that, the region) or by a criminal court.

124. The jurisdiction of the criminal courts in matters of confiscation is strictly tied to their power to establish the criminal liability of individuals in cases of unlawful site development. Consequently, where the offence of unlawful site development becomes statute-barred before the commencement of the criminal proceedings, a court which subsequently dismisses the proceedings cannot order any confiscation measure. It may only do so if the limitation period expires after the commencement of criminal proceedings.

125. In the case of an unlawful site development (the procedural material offence or the contractual offence) which has been carried out in the absence or in breach of planning permission, two different approaches have emerged in domestic case-law. Under the first, the criminal court replaces the administrative authority (*svolge un ruolo di supplenza*: see Court of Cassation, no. 42741, 2008; Court of Cassation, no. 5857, 2011; and Court of Cassation, decision no. 24877, 2014).

126. Under the other approach, the confiscation provided for in Article 44 of the Construction Code is the expression of a punitive (*sanzionatorio*) power assigned by law to the criminal court, that power being neither secondary or alternative but independent from that of the administrative authorities. According to the Court of Cassation, the idea that the criminal court replaces the administrative authority should now be considered obsolete in matters of planning, because the criminalisation of unlawful site development is intended to guarantee territorial protection



(Court of Cassation, no. 37274, 2008, *Varvara*, and Court of Cassation, no. 34881, 2010, *Franzese*).

127. Moreover, in the case of the substantive material offence of unlawful site development, the criminal court's role is not merely to ensure that no site development is conducted in the absence or in breach of planning permission, but also to ascertain that the development, whether authorised or not, is compatible with norms of a higher rank in relation to the authorisation decision. If it wishes to order confiscation, a criminal court must ascertain that the material element of the offence of unlawful site development is made out, which means that it must establish the existence of all the constituent elements of the unlawful conduct. Under section 18 of Law no. 47 of 1985, the notion of unlawful conduct is not confined to activities carried on without authorisation, but also includes acts in breach of planning regulations and of regional and national norms (Court of Cassation, *Salvini and Others*, cited above). In this context, the Court of Cassation has clarified the relationship between the administrative decision authorising site development and the power of the criminal court to make a finding of unlawful site development and to order confiscation. The Court of Cassation has explained that where the planning permission does not comply with other planning regulations, the criminal court may find against the perpetrator of the development and order confiscation without the need for any administrative assessment of the permission granted. Given that the criminal court is not empowered to declare the permission null and void, it will remain valid (Court of Cassation, *Salvini and Others*, cited above; Court of Cassation, *Varvara*, cited above; and Court of Cassation, no. 36366, 2015, *Faiola*).

### 3. *Effects on confiscation of subsequent regularisation of site development (sanatoria)*

128. Where the unlawful site development has been carried out in the absence of, or in breach of, planning permission, the administrative authority can prevent confiscation being ordered by the criminal court only if all the following conditions are met: (a) the site development has subsequently been regularised (*sanato*) by the municipal authority; (b) the act of regularisation is lawful; and (c) the subsequent planning permission (or the amendment of the land-use plan) is issued before the criminal conviction becomes final. Thus, once the conviction has become final, the confiscation measure can no longer be revoked, even in the case of subsequent regularisation of the development by the administrative authority (Court of Cassation, no. 21125, 2007, *Licciardello*; Court of Cassation, no. 37274, 2008, *Varvara* and *Franzese*, cited above).

129. On the other hand, in the case of all unlawful site development projects which have been authorised but which infringe other rules of a higher order – those cases, according to the Court of Cassation, representing

the most frequent kind (substantive “material” unlawful site development) - the administrative authority has no power of regularisation. In such cases the criminal court acts completely autonomously and independently from the administrative authority (Court of Cassation, nos. 21125 of 2007, 39078 of 2009, 34881 of 2010 and 25883 of 2013).

### **E. Constitutional Court case-law**

130. In its judgments nos. 348 and 349 of 22 October 2007 the Constitutional Court clarified the Convention’s rank in the hierarchy of sources of domestic law. Article 117 of the Constitution, as amended by Constitutional Law no. 3 of 18 October 2001, requires the legislature to comply with international obligations. Thus the Constitutional Court took the view that the Convention was a norm of intermediate rank between ordinary statute law and the Constitution and that it had to be applied as interpreted by the European Court of Human Rights.

131. Consequently, according to the Constitutional Court, it was for the ordinary domestic court to interpret the domestic rule in conformity with the Convention and with the Court’s case-law but, when such an interpretation was impossible or the court had some doubt as to the compatibility of the domestic rule with the Convention, the court was required to refer a question of constitutionality.

132. In January and May 2014 two questions of constitutionality were referred to the Constitutional Court, by the Teramo District Court and the Court of Cassation respectively, on the subject of Article 44 § 2 of Legislative Decree no. 380/2001 following the *Varvara v. Italy* judgment (no. 17475/09, 29 October 2013).

133. In its judgment no. 49 of 26 March 2015, the Constitutional Court found as follows (translation from the court’s website):

“6.– The question raised by the Court of Cassation along with that raised by the *Tribunale di Teramo* is also inadmissible on the grounds that both are based on an interpretative assumption which is mistaken on two counts.

Whilst differing as regards the effects which the *Varvara* judgment supposedly generates within the national legal order, both referring courts are convinced that in making this judgment the Strasbourg Court laid down a principle of law which was both innovative and binding on the courts required to apply it by adopting a new approach to the interpretation of Article 7 ECHR.

The first misunderstanding attributable to the referring courts relates to the meaning which they have inferred from the judgment of the Strasbourg Court.

Ultimately, the European Court is alleged to have asserted that, once a sanction has been classified under Article 7 ECHR, and thus once a ‘penalty’ has been deemed to fall within its scope, it can only be imposed by a criminal court at the same time as a conviction for an offence. As a result, confiscation in accordance with spatial planning provisions – which until now has continued to operate as an administrative penalty under national law, which may be imposed first and foremost by the public

administration, albeit buttressed by the guarantees provided by Article 7 ECHR – is claimed to have been incorporated in full into the area of criminal law or, to put it differently, the substantive protection guaranteed by Article 7 is claimed to have been supplemented by a further formal safeguard consisting in the reservation of competence over the application of the measure comprising a ‘penalty’ to the criminal courts, thus meaning that they can only be imposed at the same time as a conviction.

This is claimed to result in a corollary: as soon as the administrative offence, which the legislator distinguishes with broad discretion from a criminal offence (see Order no. 159 of 1994; followed by Judgments no. 273 of 2010, no. 364 of 2004 and no. 317 of 1996; and Orders no. 212 of 2004 and no. 177 of 2003), was capable of providing self-standing criteria for classifying the ‘offence’ under the ECHR, it would be attracted into the scope of the criminal law of the contracting state. This accordingly supposedly results in a merger between the concept of criminal sanction on national level and that on European level. As a result, the area of criminal law is claimed to have expanded beyond the discretionary evaluations of legislators, even in cases involving sanctions that, whilst minor, would still constitute ‘penalties’ for the purposes of Article 7 ECHR on other grounds (Grand Chamber, judgment of 23 November 2006 in *Jussila v. Finland*).

In asserting this argument, the referring courts do not appreciate that its compatibility both with the Constitution and with the ECHR itself, as interpreted in the rulings of the Strasbourg Court, would be questionable.

6.1.– ... As is known, since its judgments of 8 June 1976 in *Engel [and Others] v. the Netherlands* and of 21 February 1984 in *Öztürk v. Germany*, the Strasbourg Court has developed specific criteria for establishing when a sanction can be classified as a ‘penalty’ within the meaning of Article 7 ECHR precisely in order to ensure that the wide-scale processes of decriminalisation which have been launched by the member states since the 1960s do not have the effect of depriving offences of the substantive guarantees assured by Articles 6 and 7 ECHR after decriminalisation (see *Öztürk* [cited above]).

Thus, the discretion of national legislators to stem the proliferation of the criminal law through the recourse to regimes of sanctions considered to be more appropriate, with reference both to the nature of the sanction imposed and the simplified procedures applicable during the initial administrative stage in which the sanction is imposed, has not been called into question. The aim has rather been to avoid this route from resulting in the dissipation of the bundle of protection which had historically been associated with the development of criminal law, the protection of which ECHR is intended to further.

It is within this twin-track approach – under which on the one hand the state’s criminal policy choices are not opposed but where on the other hand the detrimental effects of those policies on individual guarantees are kept in check – that the nature of the ECHR is vividly demonstrated as an instrument charged with looking beyond the aspects related to the formal classification of an offence, without however impinging upon the legislative discretion of the states but rather assessing the substance of the human rights in play and safeguarding their efficacy.

It is in fact a consolidated principle that the ‘penalty’ may also be applied by an administrative authority, albeit upon condition that an appeal may be lodged against the decision before a court of law offering the guarantees provided for under Article 6 ECHR, even if it does not necessarily exercise criminal jurisdiction (see most recently the judgment of 4 March 2014 in *Grande Stevens and Others v. Italy*, with reference to a sanction considered to be serious). It has been added that the ‘penalty’ may result

from the completion of an administrative procedure even without any formal declaration of guilt by a criminal court (see the judgment of 11 January 2007 in *Mamidakis v. Greece*).

6.2.– ... Expressions of this type, which are linguistically open to an interpretation that does not require a finding of responsibility exclusively in the form of a criminal conviction, are entirely consistent in logical terms with the Strasbourg Court's function of perceiving the violation of the human right in its tangible dimension, irrespective of the abstract formula used by the national legislator to classify the conduct.

This Court must conclude that the referring courts were not only not required to infer the principle of law on which the current interlocutory questions of constitutionality are based from the *Varvara* judgment but should also have read the judgment as having the opposite effect. In fact, this judgment is compatible with the text of the decision and the facts of the case ruled upon, which is more in keeping with the traditional logic underpinning the case-law of the European Court, and in any case respects the constitutional principle of subsidiarity in the area of criminal law, as well as the legislative discretion over the policy on the punishment of offences, as the case may be opting to classify the sanction as administrative in nature (for internal purposes).

Within the perspective of the Strasbourg Court, the guarantees which Article 7 ECHR offers in relation to confiscation in accordance with spatial planning provisions are certainly mandated by the excessive result which such a measure may lead to beyond the restoration of the breach of the law (see the judgment of 20 January 2009 in *Sud Fondi S.r.l. and Others v. Italy*), which in turn results from the manner in which that institute is configured under Italian law.

However, they do not detract from the possibility that the power to impose administrative sanctions, which is the task of such a measure prior to any involvement by the criminal courts, may indeed be linked to the public interest in the 'construction planning of the territory' (see Judgment no. 148 of 1994), the furtherance of which is a task for the public administration. It is important to add that this interest is by no means foreign to the ECHR perspective (see the judgment of 8 November 2005 in *Saliba v. Malta*).

As things currently stand, unless there are any further developments in the case-law of the European court (following the referral to the Grand Chamber of disputes relating to national confiscations based on spatial planning provisions in applications no. 19029/11, no. 34163/07 and no. 1828/06), the argument proposed by the referring courts as a starting point for their doubts concerning the constitutionality of the contested provisions that the *Varvara* judgment may be unequivocally interpreted to the effect that confiscation in accordance with spatial planning provisions may only be ordered in parallel with a conviction by the courts for the offence of unlawful parcelling must accordingly be concluded to be mistaken.

7.– ... It is not always immediately clear whether a certain interpretation of the provisions of the ECHR has become sufficiently consolidated at Strasbourg, especially in cases involving rulings intended to resolve cases that turn on highly specific facts, which have moreover been adopted with reference to the impact of the ECHR on legal systems different from that of Italy. In spite of this, there are without doubt signs that are capable of directing the national courts during their examination: the creativity of the principle asserted compared to the traditional approach of European case-law; the potential for points of distinction or even contrast from other rulings of the Strasbourg Court; the existence of dissenting opinions, especially if

fuelled by robust arguments; the fact that the decision made originates from an ordinary division and has not been endorsed by the Grand Chamber; the fact that, in the case before it, the European court has not been able to assess the particular characteristics of the national legal system, and has extended to it criteria for assessment devised with reference to other member states which, in terms of those characteristics, by contrast prove to be little suited to Italy.

When all or some of these signs are apparent, as established in a judgment which cannot disregard the specific features of each individual case, there is no reason to require the ordinary courts to use the interpretation chosen by the Strasbourg Court in order to resolve a particular dispute, unless it relates to a ‘pilot judgment’ in a strict sense.”

#### **F. Non-conviction-based confiscation in Italian law**

134. Confiscation is generally a criminal-law measure under Article 240 of the Criminal Code. In principle, the application of this measure, particularly as regards the confiscation provided for in the first paragraph of that Article, depends on the defendant’s conviction. There are other forms of non-conviction-based confiscation (*confisca senza condanna*) in Italian law such as the direct confiscation of proceeds of crime (Court of Cassation, no. 31617, 2015, *Lucci*); preventive confiscation under section 2(3) of Law no. 575 of 31 May 1965 and Article 24 of the Anti-mafia Code; confiscation related to contraband offences under Article 301 of Presidential Decree no. 43/1973, as amended by section 11 of Law no. 413/1991 (Court of Cassation, no. 8330, 2014, *Antonicelli and Others*); confiscation of animals (section 4 of Law no. 150 of 1992, see Court of Cassation, no. 24815, 2013); and the confiscation of works of art and cultural items (Article 174 § 3 of Legislative Decree no. 42 of 2004, see Court of Cassation, no. 42458, 2015, *Amalgia*).

#### **G. Other provisions**

135. Under Article 676 of the Code of Criminal Procedure, any third parties in relation to criminal proceedings which might have repercussions for their property are entitled to seek revocation of the confiscation measure in accordance with Articles 665 et seq. of that Code.

136. Under Article 31 § 9 of the Construction Code, the criminal court orders the demolition of the illegal building itself as a penalty for the offence of unlawful construction.

137. Law no. 102 of 3 August 2009 amending Legislative Decree no. 78 of 2009 introduced a provision into the latter, Article 4 § 4<sup>ter</sup>, which laid down, in addition to the lifting of the confiscation measure ordered by the criminal court, the conditions in which compensation was awarded for any damage sustained as a result of a confiscation that was found to constitute a violation of the Convention by the European Court of Human Rights.

138. Article 579, paragraph 3, of the Code of Criminal Procedure provides that where confiscation is imposed as a security measure under domestic law, it may be appealed against in accordance with the ordinary rules applying to criminal liability.

### III. RELEVANT INTERNATIONAL LAW

139. Different types of confiscation procedure have been created to ensure greater efficiency in the fight against cross-border crime, organised crime and other serious offences. The most important international law provisions on confiscation are Article 37 of the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol thereto; Article 5 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Articles 77 § 2 (b), 93 § 1 (k) and 109 § 1 of the Rome Statute of the International Criminal Court, established in 1998; Article 8 of the 1999 International Convention for the Suppression of the Financing of Terrorism; Article 12 of the 2000 United Nations Convention against Transnational Organised Crime; Article 31 of the 2003 United Nations Convention against Corruption; and Article 16 of the 2003 Convention of the African Union on Preventing and Combating Corruption.

140. A study of these international agreements reveals a general acceptance of the principle of confiscating the physical object of an offence (*objectum sceleris*), the instruments used to commit an offence (*instrumentum sceleris*), the proceeds of crime (*productum sceleris*) or other property of equivalent value (“value confiscation”), proceeds which have been transformed or intermingled with other property, and any income or other benefits derived indirectly from proceeds. All of these confiscation measures depend on a prior conviction. Confiscation measures cannot be imposed on legal entities or individuals who are not parties to the proceedings, except in the case of third parties without a *bona fide* defence.

141. Non-conviction-based confiscation remains relatively exceptional in international law. Among the above-mentioned instruments, only Article 54 § 1 (c) of the 2003 United Nations Convention against Corruption recommends that parties, for the purposes of mutual legal assistance, should consider taking such measures as may be necessary to allow confiscation of property without a criminal conviction in cases in which the offender cannot be prosecuted “by reason of death, flight or absence or in other appropriate cases”.

142. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, which was opened for signature on 8 November 1990 in Strasbourg and which entered into force on 1 September 1993 (the “Strasbourg Convention”), defined confiscation as “a penalty or a measure, ordered by a court following proceedings in

relation to a criminal offence or criminal offences resulting in the final deprivation of property”.

143. The parties to the Strasbourg Convention undertake in particular to make the laundering of proceeds of crime a criminal offence and to confiscate the instruments and proceeds, or property of an equivalent value. The Strasbourg Convention lays down specific grounds for refusal to acknowledge the decisions of the other signatory States concerning confiscation *in rem* or non-conviction-based confiscation, for example: “the action sought would be contrary to the fundamental principles of the legal system of the requested Party”; “the offence to which the request relates would not be an offence under the law of the requested Party”; “the request does not relate to a previous conviction, or a decision of a judicial nature or a statement in such a decision that an offence or several offences have been committed, on the basis of which the confiscation has been ordered or is sought”.

144. These obligations were maintained in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, which was opened for signature on 16 May 2005 in Warsaw and which entered into force on 1 May 2008 (the “Warsaw Convention”). Intended to supersede the Strasbourg Convention, it has been ratified by twenty-eight States, including fifteen member States of the European Union.

145. As regards non-conviction-based confiscation. Article 23 § 5 requires States to “co-operate to the widest extent possible” for the execution of measures equivalent to confiscation which are not criminal sanctions, in so far as such measures are ordered by a judicial authority in relation to a criminal offence.

146. In view of the heterogeneity of domestic legislation, some international organisations such as the OECD’s Financial Action Task Force (FATF), the International Bank for Reconstruction and Development and the World Bank, have produced good practice guides and recommendations. The FATF Recommendations, entitled “International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation” (updated October 2016) include: recommendation no. 4, which states that countries should consider adopting measures that allow non-conviction-based confiscation “to the extent that such a requirement is consistent with the principles of their domestic law”; and recommendation no. 38, which calls on States to ensure they have the authority to respond to requests made on the basis of non-conviction-based confiscation proceedings and related provisional measures, unless this is inconsistent with fundamental principles of their domestic law.

#### IV. EUROPEAN UNION LAW

147. In the European Union context, a Council Framework Decision of 26 June 2001 (no. 2001/500/JHA), on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, first imposed on States an obligation not to limit the application of the Strasbourg Convention in respect of offences which are punishable by deprivation of liberty for a maximum of more than one year, and an obligation to allow the confiscation of property of a value corresponding to that of the instrumentalities and proceeds of crime.

148. A subsequent Council Framework Decision of 24 February 2005 (2005/212/JHA), on confiscation of crime-related proceeds, instrumentalities and property, provided for ordinary confiscation, including value confiscation, in respect of all offences subject to imprisonment of a maximum period of one year, and confiscation of some or all assets held by a person who had been found guilty of specified serious offences, where they had been “committed within the framework of a criminal organisation”, without establishing a link between the assets deemed to be of criminal origin and a specific offence. The latter approach was characterised as “extended powers of confiscation”.

The Framework Decision provided for three different series of minimum requirements from which the member States could choose in order to exercise such extended powers. When transposing the Framework Decision they chose different options, thus resulting in extended confiscation mechanisms of varying content depending on the domestic system.

149. EU Directive no. 2014/42 of the European Parliament and of the Council of 3 April 2014, on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, applies as stated by Article 3 to the criminal offences covered by the following:

“(a) Convention drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union (‘Convention on the fight against corruption involving officials’);

(b) Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro;

(c) Council Framework Decision 2001/413/JHA of 28 May 2001 on combating fraud and counterfeiting on non-cash means of payment;

(d) Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;

(e) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism;



(f) Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector;

(g) Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking;

(h) Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime;

(i) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA;

(j) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA;

(k) Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA ( 8 ), as well as other legal instruments if those instruments provide specifically that this Directive applies to the criminal offences harmonised therein.”

150. Article 4 § 1 of that Directive provides that States must enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for one of the criminal offences provided for in Article 3, which may also result from proceedings *in absentia*. Article 4 § 2 contains a provision concerning non-conviction-based confiscation:

“Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.”

151. Directive 2014/42 has harmonised the provisions on extended powers of confiscation by laying down a common minimum rule. Article 5 thus reads:

“Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.”

152. The Directive also provides, in Article 6, for the confiscation of assets from third parties:

“Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.”

153. Article 8 of the Directive provides for the following safeguards:

“1. Member States shall take the necessary measures to ensure that the persons affected by the measures provided for under this Directive have the right to an effective remedy and a fair trial in order to uphold their rights.

2. Member States shall take the necessary measures to ensure that the freezing order is communicated to the affected person as soon as possible after its execution. Such communication shall indicate, at least briefly, the reason or reasons for the order concerned. When it is necessary to avoid jeopardising a criminal investigation, the competent authorities may postpone communicating the freezing order to the affected person.

3. The freezing order shall remain in force only for as long as it is necessary to preserve the property with a view to possible subsequent confiscation.

4. Member States shall provide for the effective possibility for the person whose property is affected to challenge the freezing order before a court, in accordance with procedures provided for in national law. Such procedures may provide that when the initial freezing order has been taken by a competent authority other than a judicial authority, such order shall first be submitted for validation or review to a judicial authority before it can be challenged before a court.

5. Frozen property which is not subsequently confiscated shall be returned immediately. The conditions or procedural rules under which such property is returned shall be determined by national law.

6. Member States shall take the necessary measures to ensure that reasons are given for any confiscation order and that the order is communicated to the person affected. Member States shall provide for the effective possibility for a person in respect of whom confiscation is ordered to challenge the order before a court.

7. Without prejudice to Directive 2012/13/EU and Directive 2013/48/EU, persons whose property is affected by a confiscation order shall have the right of access to a lawyer throughout the confiscation proceedings relating to the determination of the proceeds and instrumentalities in order to uphold their rights. The persons concerned shall be informed of that right.

8. In proceedings referred to in Article 5, the affected person shall have an effective possibility to challenge the circumstances of the case, including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.

9. Third parties shall be entitled to claim title of ownership or other property rights, including in the cases referred to in Article 6.

10. Where, as a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided for under this Directive, Member

States shall take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking compensation for their claims.”

## THE LAW

### I. JOINDER OF THE APPLICATIONS

154. The Court would first point out that, in the interest of the proper administration of justice, and in accordance with Rule 42 § 1 of the Rules of Court, it is appropriate to join the applications, the events giving rise to the three applications and the legislative context being the same.

### II. PRELIMINARY OBSERVATION

155. It should be noted at the outset that the applications in question concern solely the issue of the compatibility with the Convention of non-conviction-based confiscation within the meaning of section 18(1) of Law no. 47/1985, as incorporated in Article 30 § 1 of the Construction Code (see paragraphs 102 and 106 above).

### III. THE GOVERNMENT’S PRELIMINARY OBJECTIONS

#### A. The Government’s submissions

156. The Government raised preliminary objections in respect of all three applications.

##### *1. G.I.E.M. S.r.l.*

157. As to the first applicant company, the Government pointed out that they had informed the Court during the Chamber proceedings that prior to lodging its application in Strasbourg, G.I.E.M. S.r.l. had brought proceedings before the Bari District Court to obtain compensation for the damage sustained as a result of the Bari municipal council’s acts, the confiscation of its land and the negative economic consequences for the company’s assets.

In the Government’s view, the subject matter of those proceedings was the same as that of the complaints raised in the application. As the applicant company had failed to inform the Court of that essential fact, there had been an abuse of the right of application and the application should be declared inadmissible pursuant to Article 35 § 3 (a) of the Convention.

158. In addition, as the domestic proceedings in question were still pending – an expert’s report evaluating the damage alleged by the applicant company had not yet been filed – the application was in any event premature (Article 35 § 1).

159. The Government additionally pointed out that the land had already been returned to the applicant company in December 2013. Lastly, they indicated in this connection that section *4ter* of Law no. 102 of 3 August 2009 (see paragraph 137 above), in addition to requiring the lifting of the confiscation measure, which would be ordered by the criminal court, provided for the compensation to be awarded for any damage sustained as a result of a confiscation that was “unjustified under the Convention”. In their submission, however, the applicant company had failed to seek such compensation and had thus not availed itself of this effective remedy.

## 2. *Falgest S.r.l. and Mr Gironda*

160. As regards the applicant company Falgest S.r.l., the Government objected that domestic remedies had not been exhausted since, as proven by the successful action of G.I.E.M. S.r.l., the applicant company could and should, in accordance with Article 676 of the Code of Criminal Procedure (see paragraph 135 above), have lodged an interlocutory application for review of the enforcement order (Article 665 of the Code of Criminal Procedure) and asked the enforcement judge to restore its title to the confiscated property.

Under the above-mentioned Article 676, any third parties in relation to criminal proceedings which might have repercussions for their property could seek revocation of the confiscation measure. The effectiveness of this remedy had been shown, for instance, by the fact that the materials provided to candidates sitting for a professional examination in 2012 at a lawyers’ training college in Rome had included a standard form for seeking the review of a confiscation measure decided on grounds of unlawful site development and it had been based on the principles laid down in the *Sud Fondi S.r.l. and Others* judgment (merits, cited above). The form had explained that the remedy could also be used by third parties which had suffered from the negative effects of the measure.

161. The Government further observed, again in respect of Falgest S.r.l., that the applicant company had not sought to recover the confiscated land, but merely compensation for its loss. In their view, the company should have brought before the domestic courts “an action against the State seeking compensation for the economic loss sustained as a result of the alleged unlawful confiscation”.

162. The Government added that the applicant company could also have used the remedy provided for under Article 579 § 3 of the Code of Criminal Procedure (see paragraph 138 above), whereby a defendant, after dismissal

of the criminal case, could challenge that decision specifically in respect of a confiscation measure in order to have the case re-examined on the merits.

163. The Government lastly reiterated their objection of non-exhaustion, already raised in respect of G.I.E.M. S.r.l., explaining that the applicant company had not used the remedy provided for by section 4*ter* of Law no. 102 of 3 August 2009 (see paragraphs 137 and 159 above).

164. The Government concluded that the application should be declared inadmissible pursuant to Article 35 § 1 of the Convention for non-exhaustion of domestic remedies.

### 3. *Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l.*

165. Lastly, in respect of Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l., the Government repeated their arguments on the need to lodge an interlocutory application for review of the enforcement order (see paragraph 160 above).

## **B. Submissions of the applicant companies**

### 1. *G.I.E.M. S.r.l.*

166. According to counsel for G.I.E.M. S.r.l., while it was true that their client had brought civil proceedings before lodging its application with the Court, there had been no abuse of the right of application, nor was the application premature.

167. They argued that the facts set out in the application were not erroneous and that there had been no attempt to mislead the Court. The domestic proceedings concerned the acknowledgment of the non-contractual liability of the Bari municipal authority for damage arising from its decisions, while the complaints raised before the Court concerned the unlawfulness of the deprivation of title on account of the unforeseeable imposition of a criminal sanction. Moreover, the proceedings before the Bari District Court had not yet been concluded by a final decision resolving the dispute.

168. As to the possibility of relying on section 4*ter* of Law no. 102 of 3 August 2009, counsel for G.I.E.M. S.r.l. complained that the remedy in question, setting criteria for the evaluation of real property to be returned following a judgment of the Court finding that the confiscation breached the Convention, was ineffective. They explained that, in their client's case, the land confiscated had already been returned in 2013 and, since there were no constructions on that land, it would not have been possible to obtain any compensation.

169. In their view, the Government should have, following the Court's two judgments in *Sud Fondi S.r.l. and Others* (both cited above), offered

their client a sum by way of compensation for all the damage sustained, instead of continuing to dispute the merits of the application.

## 2. *Falgest S.r.l.*

170. The representatives of the company Falgest S.r.l. stated that an interlocutory application for review of the enforcement order would have allowed it only to raise questions pertaining to the existence, implementation, scope and substantive and procedural legitimacy of the order, thus precluding a fresh assessment of the facts by the enforcement judge. They concluded that, even if the applicant company had used this remedy, it would not have succeeded in recovering the confiscated property. They pointed out that the lower domestic courts had already found that the mental and material elements of the offence of unlawful site development were made out and that the sanction imposed on the company had been ordered in accordance with the settled case-law of the Court of Cassation. As it could not provide appropriate redress, the interlocutory application was not therefore an effective remedy within the meaning of Article 35 § 1 of the Convention.

## 3. *Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l.*

171. Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l., for their part, questioned, in substance, whether the interlocutory application for review of the enforcement order was an effective remedy.

# C. The Court's assessment

## 1. *G.I.E.M. S.r.l.*

### (a) Whether there has been an abuse of the right of individual application

172. The Court reiterates that under Article 35 § 3 (a) an application may be rejected as an abuse of the right of individual application if, among other reasons, it was knowingly based on untrue facts (see *Gross v. Switzerland* [GC], no. 67810/10, § 28, ECHR 2014).

173. The Court finds that the applicant company acknowledged that it had taken its case to the civil courts and had not informed the Court of that fact when it lodged its application in Strasbourg. Having regard to the explanation provided by G.I.E.M. S.r.l., namely that the civil proceedings still pending before the domestic courts and the present application had different objectives, the Court finds it impossible to accept the argument put forward by the Government.

174. The omission in question cannot be seen as an attempt to conceal from the Court any essential information or, in any event, information that would be relevant to its decision. The Bari District Court has been requested

to provide redress for any damage that might stem from the acts of the Bari municipal authority, which is alleged to have misled the applicant company as to the use of the relevant land for building, whereas the planning regulations prohibited any development activity (see paragraph 42 above). However, the application lodged in Strasbourg sought to obtain a finding that there had been violations of Article 7 of the Convention and of Article 1 of Protocol No. 1 on account of a confiscation measure that the applicant company regarded as devoid of legal basis.

175. In conclusion, not having found any fraudulent intent on the part of the applicant company, the Court dismisses the objection that there has been an abuse of the right of application.

**(b) Exhaustion of domestic remedies**

176. The Court reiterates that the purpose of the rule on the exhaustion of domestic remedies is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it (see, among many other authorities, *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011 (extracts)). At the relevant time, the company G.I.E.M. S.r.l. gave the domestic courts the possibility of examining its complaints and of remedying the alleged violations. The Court observes, however, that the civil proceedings brought by the applicant company on 7 April 2005 (see paragraph 43 above) pursued a different purpose from that of the present application.

177. As regards the remedy under Law no. 102/2009, the Government's objection cannot be upheld, as the land was returned to the applicant company not as a result of a judgment of the Court finding a violation of its rights (see paragraph 137 above), but following proceedings brought by the Bari municipal authority in October 2012 (see paragraph 42 above). The Court therefore dismisses the objection that the company G.I.E.M. S.r.l. failed to exhaust domestic remedies.

*2. Falgest S.r.l.*

178. As regards the company Falgest S.r.l. the Court would refer to its grounds and findings in paragraph 177 above as far as Law no. 102/2009 is concerned.

179. As to the Government's reference to a remedy under Article 579 § 3 of the Code of Criminal Procedure (see paragraphs 138 and 162 above), the Court would merely observe that this remedy is available to a defendant when the criminal case has been dismissed, enabling that person to appeal against the judgment specifically in respect of a confiscation which has been imposed as a security measure. The applicant company cannot therefore be reproached for not using that remedy, as the confiscation in question was not a security measure.

180. As regards the remedy provided for in Article 676 of the Code of Criminal Procedure (see paragraphs 135 and 160 above), this remedy proved ineffective before the judgment in *Sud Fondi S.r.l. and Others* (merits, cited above). On 31 May 2001, long before that judgment, G.I.E.M. S.r.l. had used the remedy in question and the Court of Cassation had dismissed its appeal in June 2005 on the ground that the confiscation could also be applied to property belonging to *bona fide* third parties (see paragraphs 34-41 above). The Government have failed to show, based on case-law, that this remedy has been upheld since the *Sud Fondi S.r.l. and Others* judgment in a situation where, as in the present case, the prosecution had become statute-barred.

181. Admittedly, in the second set of enforcement proceedings concerning G.I.E.M. S.r.l., on 12 March 2013 the enforcement judge, on an application from the Bari municipal authority in October 2012, revoked the confiscation measure on account of the fact, firstly, that the Court had found a violation of Article 7 of the Convention in the *Sud Fondi S.r.l. and Others* judgment (merits, cited above) and, secondly, that the company had been regarded as a *bona fide* third party, because none of its directors had been found liable for the offence of unlawful site development (see paragraph 42 above).

That is not the case for the company Falgest S.r.l. The above-mentioned decision of the executions judge of 12 March 2013 concerned the need to prove the existence of the mental element of the offence of unlawful site development, whereas in the case of Falgest S.r.l. the judicial authorities found that the offence was made out (see paragraphs 82-86 above). The reason why its company directors were not convicted was that the proceedings had become statute-barred. The remedy indicated by the Government did not therefore provide redress for the violations alleged by the applicant company.

182. As to the Government's argument that the applicants should have brought civil proceedings against the State to obtain compensation for the confiscation (see paragraph 161 above), the Court reiterates that under Article 35 § 1 of the Convention there is no obligation to have recourse to remedies which are inadequate or ineffective. To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 73-74, 25 March 2014). In the present case, having regard to the fact that at the time the application was lodged the confiscation was considered lawful, the Court fails to see how the remedy mentioned by the Government could have proved effective.

183. In conclusion, the Court dismisses the objections raised by the Government in respect of Falgest S.r.l.



### 3. *Hotel Promotion Bureau S.r.l and R.I.T.A. Sarda S.r.l.*

184. As regards this application, the Court would merely refer to the conclusion that it reached in paragraphs 180-81 above on the subject of the same objection by the Government to the application lodged by the company Falgest S.r.l. and Mr Girona.

185. Having regard to the foregoing, the Court finds that the Government's preliminary objection must be dismissed.

## IV. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

186. All the applicants alleged that the confiscation of their property, in spite of the fact that they had not been convicted (*condamnés*), breached Article 7 of the Convention, which reads as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

### A. Admissibility

#### 1. *Submissions of the Government*

187. The Government disputed that argument and asserted that the three applications should be declared incompatible *ratione materiae* with the Convention provisions. They took the view that the offence of unlawful site development was made out where land had been altered by unlawful construction or by the unlawful sub-division of land in breach of the applicable legislation or land-use plans, or in the absence of the requisite administrative planning permission.

188. Pointing out the need to protect the landscape and the environment and to provide for urban spaces that were fit to live in and well organised, the Government stated that in order to combat the phenomenon of illegal development, which often interfered with the orderly use of land, the Italian State had “many legal instruments” at its disposal.

189. They observed that, under Article 30 of the Construction Code (Presidential Decree no. 380 of 6 June 2001), the purchase of land which had been developed illegally was null and void (Article 30 § 9), the illegal development of land could be suspended by the municipal authority by means of an interim measure (Article 30 § 7), and title to an illegally developed site was transferred to the competent municipality, whose responsibility it would be to demolish any buildings illegally erected

thereon (Article 30 § 8). Should the municipality fail to demolish such buildings, the regional authority would carry out the work in its place.

190. The Government added that under Article 44 § 2 of that Code, in cases where criminal proceedings had been brought against the person accused of being responsible for the unlawful site development, the court would order the confiscation of the site in question, in so far as it found the development to be unlawful. In such cases also, title to the land would be transferred to the municipality.

191. The Government explained that the administrative authority would order confiscation in cases where no criminal proceedings had been brought against the persons responsible for the unlawful site development or until such time as they were brought. Once criminal proceedings were initiated, however, it was the judicial authority dealing with the case which would order the confiscation, thereby replacing the administrative confiscation measure that would have been decided pursuant to Article 30 § 8. The confiscation would have the same effects regardless of the authority by which it was ordered.

192. As a general rule, confiscation was ordered by the administrative authority. The criminal courts would order confiscation only in the following situations: upon a conviction; where the liability of the defendant had been established but the case was dismissed because it was statute-barred (*sentenza di proscioglimento per intervenuta prescrizione del reato*); where the defendant had died; and following an amnesty.

193. In the Government's submission, Law no. 47/1985 had drawn a clear distinction between the penalties (detention up to two years and a fine) applicable to the offence of unlawful site development (section 20) and the confiscation measure ordered by a criminal court (section 19). They explained that after Decree no. 380/2001 had codified the existing rules, in particular with regard to planning permission, and had incorporated without amendment sections 19 and 20 of Law no. 47/1985, those two different provisions, owing to a "wrong choice" by the drafters of the new instrument, were both covered by Article 44 of the Construction Code (see paragraph 108 above).

194. The Government rejected the idea that the confiscation of land ordered by a criminal court pursuant to Article 44 § 2 of the Construction Code was a "penalty" (*pena*) in Italian law, or an additional penalty (*pena accessoria*) under Article 240 of the Criminal Code, observing as follows:

(a) the confiscation ordered by the criminal court deprived the owner of his property rights, as did the administrative measure under Article 30 of the Construction Code;

(b) the confiscation measure sought to restore the orderly use of the land; and

(c) the confiscated site was transferred to the municipality on the territory of which it was located (namely to the territorial body empowered to

oversee the proper use of land), and not to the State, as would be the case for confiscation ordered under Article 240 of the Criminal Code.

195. The Government were of the view that in order to understand the landscape protection instruments in Italian law the Court should consider the difference between, on the one hand, the provisions concerning building work in the absence of or in breach of planning permission, and on the other, the provisions governing the unlawful development of land.

196. The Government explained that, under the first set of provisions, after a finding of guilt (Article 31 § 9 of the Construction Code, see paragraph 136 above), the criminal court would order the demolition of the illegal building itself as an additional penalty for the offence of unlawful construction. In the case of unlawful site development, the court would order the confiscation of the land provided that the unlawfulness had been established (Article 44 § 2 of the Code), regardless of whether or not the defendant was convicted. The public interest in landscape protection was stronger in the second case, because it was not a matter of a single building but a complete transformation of land in relation to its natural use, consisting, for example, in the construction of a village of several dozen houses.

197. In the Government's opinion, the Court's interpretation of section 19 of Law no. 47/1985 in the case of *Sud Fondi S.r.l. and Others v. Italy* ((dec.), no. 75909/01, 30 August 2007), as confirmed in the *Varvara* judgment (cited above), was at odds with the provisions governing the confiscation of land in Italian law.

The Government observed that the Court had decided that the confiscation in question was a criminal penalty for the purposes of Article 7 of the Convention because:

- (a) it was connected to a criminal offence;
- (b) the Construction Code considered the confiscation to be a penalty;
- (c) the penalty was not aimed at compensation for damage but had an essentially punitive purpose, to prevent repeated breaches of the statutory conditions;
- (d) the penalty was particularly severe, because it extended to all the land within the development site; and
- (e) the substantively illegal nature of the development had been established by the criminal courts.

198. The Government were of the view that this conclusion by the Court was erroneous. Firstly, it was not true that confiscation was necessarily connected to a criminal offence as, pursuant to Article 30 § 8 of the Construction Code, it could be ordered by an administrative authority before a conviction became final, and it could also be imposed on a company, which could not be prosecuted for a criminal offence by virtue of the *societas delinquere non potest* principle.

199. The Court's second argument was also irrelevant, as it was illogical to find that confiscation could be different in nature – administrative or criminal – depending on whether it had been ordered by an administrative authority or a court.

200. Thirdly, the aim of confiscation was not to punish those responsible for the illegal act but to remove the effects of an unlawful site development and to protect the landscape from a use which was incompatible with land-use planning. The measure was therefore also preventive in nature.

201. The Government added that the criminal nature of the confiscation could not depend on the severity of the economic consequences for the assets of the owner of the confiscated land, or on its area, or on the dimension of the construction and its proportion to the total area. They argued that the nature of the measure had to be assessed in relation to its legal regime as determined by law and interpreted by national courts.

202. Lastly, the fact that confiscation was governed by Article 44 of the Construction Code, under the heading "Criminal sanctions" ("*sanzioni penali*"), did not prove that it should be classified as a criminal penalty, as this was the result of a mistake on the part of the drafters of this text.

203. In the Government's submission, since the Court's admissibility decision in *Sud Fondi S.r.l. and Others* (cited above), the Italian courts had construed the legal system of land confiscation in the light of the Convention principles as interpreted by the Court, giving an interpretation of Article 44 § 2 of the Construction Code that was in conformity with Article 7 of the Convention.

That adaptation had led not to a change in the legal classification of the measure but to the introduction in the Italian legal system of the safeguards provided for by Article 7 of the Convention. Consequently, confiscation could be ordered by a criminal court only if there was proof of both the material element (*elemento oggettivo*) and the mental element (*elemento soggettivo*) of the unlawful act.

The Government concluded from the foregoing that the confiscation of land pursuant to Article 44 of the Construction Code was not a "penalty" for the purposes of Article 7 of the Convention.

## 2. Submissions of the applicants

### (a) G.I.E.M. S.r.l.

204. The applicant company referred to the facts and grounds set out by the Court in its admissibility decision in *Sud Fondi S.r.l. and Others* (cited above) and concluded that the confiscation of its land, even though there had been no illegal activity on its part or on the part of its legal representative, had to be regarded as a penalty within the meaning of the Strasbourg case-law.

**(b) Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l.**

205. While accepting that, according to national law and the settled domestic case-law, confiscation for unlawful site development was regarded as an administrative sanction, the applicant companies pointed out that the Court had nevertheless clearly indicated, in its admissibility decision in *Sud Fondi S.r.l. and Others* (cited above), that the confiscation provided for in Article 44 § 2 of the Construction Code must be classified as, in effect, a criminal sanction and must therefore observe the fundamental principles governing criminal-law decisions, starting with the principle of legality under Article 7 of the Convention.

206. The applicant companies took the view that in spite of the statements of the Italian courts in the present case, the confiscation of “unlawfully developed” land could not be regarded as a mere administrative sanction not subject to the principle of personal criminal liability; on the contrary, it had to comply with the substantive and procedural rules governing the establishment of such liability.

207. In the applicants’ view, the “criminal” nature of this type of confiscation and therefore the applicability of Article 7, as confirmed by the Court in its *Varvara* judgment (cited above), were self-evident.

**(c) Falgest S.r.l. and Mr Gironda**

208. These applicants also argued that the impugned confiscation could not be regarded merely as an administrative sanction with the result that the principle of individual criminal liability was not applicable.

209. They observed that in spite of the Court’s position on the subject and notwithstanding the obligation on the national courts to follow the Strasbourg case-law, the Italian Court of Cassation had maintained its previous line of interpretation, going so far as to state that a confiscation measure had to be enforced even if there was no conviction because the prosecution of the offence was statute-barred, when the court had established the mental and material elements of the offence of unlawful site development.

*3. The Court’s assessment*

**(a) General principles**

210. The Court reiterates that the concept of a “penalty” in Article 7 has an autonomous meaning. To render the protection offered by this Article effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a “penalty” within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A, and *Jamil v. France*, 8 June 1995, § 30, Series A no. 317-B).

211. The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a “penalty” is whether the measure in question is imposed following a decision that a person is guilty of a criminal offence. However, other factors may also be taken into account as relevant in this connection, namely the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *Welch*, cited above, § 28; *Jamil*, cited above, § 31; *Kafkaris*, cited above, § 142; *M. v. Germany*, no. 19359/04, § 120, ECHR 2009; *Del Río Prada v. Spain* [GC], no. 42750/09, § 82, ECHR 2013; and *Société Oxygène Plus v. France* (dec.), no. 76959/11, § 47, 17 May 2016).

**(b) Application of general principles to the present case**

212. In the case of *Sud Fondi S.r.l. and Others* (admissibility decision of 30 August 2007, cited above), the Court took the view that the confiscation for unlawful site development imposed on the applicants could be regarded as a “penalty” within the meaning of Article 7 of the Convention in spite of the fact that no criminal conviction had been handed down against the applicant companies or their representatives. For that purpose it relied on the fact that the confiscation in question was connected to a “criminal offence” based on general legal provisions; that the material illegality of the developments had been established by criminal courts; that the sanction provided for by section 19 of Law no. 47 of 1985 sought mainly to deter, by way of punishment, further breaches of the statutory conditions; that the 2001 Construction Code classified confiscation for unlawful site development among the criminal sanctions; and, lastly, that the sanction was one of a certain severity. In its *Varvara* judgment (cited above, § 51), the Court confirmed that finding.

213. In the present case the applicability of Article 7 was denied by the Government.

214. The Court must therefore ascertain whether the impugned confiscations constitute “penalties” within the meaning of Article 7 of the Convention. To do so it will apply the criteria which stem from the general principles reiterated above.

*(i) Whether the confiscations were imposed following convictions for criminal offences*

215. As to whether the confiscations in question were imposed following convictions for criminal offences, the Court has generally found that this is only one criterion among others to be taken into consideration (see *Saliba v. Malta* (dec.), no. 4251/02, 23 November 2004; *Sud Fondi S.r.l. and Others* (decision cited above); *M. v. Germany* (cited above); and *Berland v. France*, no. 42875/10, § 42, 3 September 2015), without it being regarded as decisive when it comes to establishing the nature of the measure

(see *Valico S.r.l. v. Italy* (dec.), no. 70074/01, ECHR 2006-III, and *Société Oxygène Plus*, cited above, § 47). It is only more rarely that the Court has found this aspect decisive in declaring Article 7 inapplicable (see *Yildirim v. Italy* (dec.), no. 38602/02, ECHR 2003-IV, and *Bowler International Unit v. France*, no. 1946/06, § 67, 23 July 2009).

216. In the Court's view, if the criminal nature of a measure were to be established, for the purposes of the Convention, purely on the basis that the individual concerned had committed an act characterised as an offence in domestic law and had been found guilty of that offence by a criminal court, this would be inconsistent with the autonomous meaning of "penalty" (see, to this effect, *Valico S.r.l.*, decision cited above). Without an autonomous concept of penalty, States would be free to impose penalties without classifying them as such, and the individuals concerned would then be deprived of the safeguards under Article 7 § 1. That provision would thus be devoid of any practical effect. It is of crucial importance that the Convention be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory, and this principle thus applies to Article 7 (see *Del Río Prada*, cited above, § 88).

217. Consequently, while conviction by the domestic criminal courts may constitute one criterion, among others, for determining whether or not a measure constitutes a "penalty" within the meaning of Article 7, the absence of a conviction does not suffice to rule out the applicability of that provision.

218. In the present case, the Government did not agree, contrary to their position in the case of *Sud Fondi S.r.l. and Others* (decision cited above), that confiscations should necessarily be connected to a "criminal offence", thus taking the opposite view to the Chamber in that case, which had found that, even though "no prior criminal conviction [had been] handed down against the applicant companies or their representatives by the Italian courts", the impugned confiscation was nevertheless connected to a criminal offence based on general legal provisions.

219. Having regard to the circumstances of the situations in the present case, and after examining the Government's arguments, the Grand Chamber does not see any reason to depart from the Chamber's finding in the *Sud Fondi S.r.l. and Others* decision (cited above). In any event, even assuming that a different finding were called for, for the reasons set out above the Court finds that in itself this criterion cannot serve to rule out the "criminal" nature of the measure. The Court must therefore examine the other above-mentioned criteria.

(ii) *The classification of confiscation in domestic law*

220. As regards the classification of confiscation in domestic law, the Court would first observe that Article 44 of the Construction Code, which governs the confiscation measure at issue in the present case, bears the

heading “Criminal sanctions” (see paragraph 108 above). The Court further takes note of the Government’s argument that this wording was simply a mistake on the part of the drafters of this text when the relevant rules were codified. However, this argument is not supported by the legislative history of the provision. Moreover, as the law was approved in 2001, the legislature had sixteen years to correct it should it have chosen to do so.

221. This element indicates that confiscation is indeed a “penalty” within the meaning of Article 7 (see *Sud Fondi S.r.l. and Others*, decision cited above).

(iii) *The nature and purpose of the confiscation measure*

222. As to the nature and purpose of the confiscation measure, the Grand Chamber confirms the Chamber’s findings in the *Sud Fondi S.r.l. and Others* (merits) and *Varvara* judgments (both cited above) to the effect that the confiscation of the applicants’ property for unlawful site development was punitive in nature and purpose and was therefore a “penalty” within the meaning of Article 7 of the Convention. Three reasons may be put forward to justify that finding.

223. Firstly, the punitive (“*afflittivo*”) and deterrent nature of the impugned measure has been emphasised by the Italian Court of Cassation (see paragraph 121 above). As emphasised by the Government in their observations (see paragraph 203 above), the domestic courts have accepted the principle whereby the Article 7 guarantees apply in confiscation cases.

224. Secondly, the Government acknowledged in their observations that the confiscation was compatible with Article 1 of Protocol No. 1, in particular because it pursued the purpose of “punishing” those responsible for the illegal transformation of the land (see the Government’s observations of 5 June 2015, § 119). In other words, the Government themselves emphasised the punitive nature of the confiscation.

225. Thirdly, the Court notes that confiscation is a mandatory measure (see paragraphs 41 and 119 above). Its imposition is not subject to proof of a situation of actual danger or of concrete risk for the environment. Confiscation may thus be imposed even in the absence of any actual activity with the aim of transforming land, as in the cases of the company G.I.E.M. S.r.l. and Mr Girona.

226. For all these reasons, the Court takes the view that the purpose of the confiscation of the applicants’ property for unlawful site development was punitive.

(iv) *The severity of the effects of the confiscation*

227. As to the severity of the measure in question, the Court observes that a confiscation measure for unlawful site development is a particularly harsh and intrusive sanction. Within the boundaries of the site concerned, it applies not only to the land that is built upon, together with the land in



respect of which the owners' intention to build or a change of use has been demonstrated, but also to all the other plots of land making up the site. Moreover, the measure does not give rise to any compensation (see *Sud Fondi S.r.l. and Others*, decision cited above).

(v) *Procedures for the adoption and enforcement of a confiscation measure*

228. As regards the procedures for the adoption and enforcement of a confiscation measure, the Court observes that it is ordered by the criminal courts. This was the case for the applicants.

229. In addition, the Court does not find persuasive the argument that the criminal courts act in the place of the administrative authority.

230. Firstly, this is a matter of debate in domestic law, at least in cases of unlawful site development (the procedural material offence or contractual offence) in the absence of or in breach of planning permission, as there are two opposite approaches in the case-law (see paragraphs 123-27 above). In any event, once the criminal conviction has become final, the confiscation measure can no longer be lifted even in the case of subsequent regularisation of the development by the administrative authority (see paragraphs 128-29 above).

231. In addition, the fact that the criminal court does not take the place of the administrative authority is particularly clear in cases of the substantive material offence of unlawful site development. Where the administrative authority has authorised site development which is in breach of the planning regulations and is therefore unlawful, the court's power to confiscate the land and buildings thereon does not represent an act in which the court takes the place of the authority. On the contrary, it reflects a conflict between the criminal court and the administrative authority in the interpretation of the regional and national planning legislation. The criminal court's role is not simply to verify that no site development has been carried out in the absence of or in breach of planning permission, but also to ascertain whether the development, authorised or not, is compatible with all the other applicable rules.

232. That was true in particular in the cases of *Hotel Promotion Bureau S.r.l.* and *R.I.T.A. Sarda S.r.l.*, where the municipality declared, while the criminal proceedings for unlawful site development were still pending, that the site development agreement with R.I.T.A. Sarda S.r.l. and the planning permissions granted had complied with the planning regulations in force at the material time, and in particular with Regional Law no. 45/1989, and that, consequently, the offence of unlawful site development was not made out in that case (see paragraph 65 above). However, the criminal court rejected the authority's position and found the applicant companies liable. In other words, the criminal court acted independently of the administrative authority.

(c) **Conclusion**

233. Having regard to the foregoing, the Court concludes that the impugned confiscation measures can be regarded as “penalties” within the meaning of Article 7 of the Convention. This conclusion, which is the result of the autonomous interpretation of the notion of “penalty” within the meaning of Article 7, entails the applicability of that provision, even in the absence of criminal proceedings within the meaning of Article 6. Nevertheless, and as the Italian Constitutional Court emphasised in its judgment no. 49 of 2015 (see paragraph 133 above), it does not rule out the possibility for the domestic authorities to impose “penalties” through procedures other than those classified as criminal under domestic law.

234. The Court further finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds and must therefore be declared admissible.

**B. Merits**

235. In order to assess whether Article 7 has been complied with in the present case, the Court must now examine whether the impugned confiscation measures were conditional on the existence of a mental element, as stated in the *Sud Fondi S.r.l. and Others* judgment (merits, cited above), and whether the measures could be imposed without any prior formal conviction and without the companies being parties to the proceedings in question.

*1. Whether the impugned confiscation measures required a mental element*

(a) **The parties’ submissions**

236. The parties reiterated, in substance, the arguments that they had submitted on the applicability of Article 7.

237. In particular, the applicants were all of the view that, as the Court had noted in its *Sud Fondi S.r.l. and Others* (merits) and *Varvara* judgments (both cited above), section 18 of Law no. 47/1985 did not meet the requirement of foreseeability since it provided that there would be an unlawful site development not only when land was transformed in breach of local planning regulations, but also where those transformations infringed regional or national law. The Italian Court of Cassation itself had acknowledged that the existing legislation was obscure and poorly worded. The applicants further observed that the sanction of confiscation had been imposed in the absence of any criminally reprehensible conduct or any liability on the part of the applicant companies. As to Mr Gironda, the measure of deprivation had been imposed following dismissal of the case as

statute-barred by the Court of Cassation, which, on quashing the judgment of the Court of Appeal, had clearly reproached the applicant for his conduct but without finding any “substantive” liability in the operative part of its judgment.

238. The Government observed that, in the *Sud Fondi S.r.l. and Others* judgment (merits, cited above), the Court had found a violation of Article 7 of the Convention on the ground that confiscation was not a foreseeable consequence of the applicant companies’ conduct (they had been acquitted as the courts had not found them liable for the offence in question) and that the confiscation measure imposed on them had not therefore been provided for by law for the purposes of Article 7 of the Convention.

239. In the Government’s submission, the currently applicable legislation and Italian case-law were fully compliant with Article 7 as interpreted by the Court, for the following reasons:

(a) The confiscation of land as a consequence of its illegal transformation was regulated under Articles 30 and 44 of the Construction Code. Those responsible for such development (as defined in Article 30) were aware that if they proceeded with the transformation of land (*trasformazione urbanistica o edilizia dei terreni*) by carrying out construction work (*lottizzazione abusiva materiale*) or the unlawful subdivision of land (*lottizzazione abusiva negoziale*), they would be deprived of ownership of the land by the competent criminal court, which would order its confiscation pursuant to Article 44 § 2 of the Code.

(b) Since the Constitutional Court’s judgment no. 239 of 2009, inviting the Italian courts to give an interpretation of Article 44 § 2 of the Decree that was compliant with the Convention as interpreted by the Court, there had been well-established case-law to the effect that confiscation could be ordered provided it was proven, at least in substance, that the accused person was liable for the unlawful transformation of the land in question; the criminal court could order confiscation only if there was proof both of the material element and the mental element (see paragraph 203 above).

240. Accordingly, the Government asked the Court to find that Article 7 had been complied with in this respect in the present case.

**(b) The Court’s assessment**

241. The Court notes that in its *Sud Fondi S.r.l. and Others* judgment (merits, cited above) it reiterated the importance of the principle that offences and penalties must be provided for by law and the ensuing requirement of foreseeability of the effects of the criminal law (*ibid.*, §§ 105-10). Applying this notion to that particular case, it agreed with the findings of the Italian Court of Cassation that, as the rules that had been breached lacked foreseeability, the accused had committed an unavoidable and excusable error, thus ruling out the mental element that had to be

established for the offence to be made out, and their acquittal was justified (ibid., §§ 111-14). The Court further found as follows:

“115. A connected series of ideas should be developed. At domestic level, the classification ‘administrative’ ... that is given to the impugned confiscation measure allows the sanction in question to fall outside the constitutional principles governing criminal matters. Article 27/1 of the Constitution provides that ‘criminal liability is personal’ and the courts’ interpretation thereof is that a mental element is always necessary. Moreover, it would be difficult to apply Article 27/3 of the Constitution (‘Punishments .... must be aimed at the rehabilitation of the convicted person’) to a convicted person if he or she cannot be found liable.

116. As regards the Convention, Article 7 does not expressly mention any mental link between the material element of the offence and the person deemed to have committed it. Nevertheless, the rationale of the sentence and punishment, and the ‘guilty’ concept (in the English version) and the corresponding notion of ‘*personne coupable*’ (in the French version), support an interpretation whereby Article 7 requires, for the purposes of punishment, an intellectual link (awareness and intent) disclosing an element of liability in the conduct of the perpetrator of the offence, failing which the penalty will be unjustified. Moreover, it would be inconsistent, on the one hand, to require an accessible and foreseeable legal basis and, on the other, to allow an individual to be found ‘guilty’ and to ‘punish’ him even though he had not been in a position to know the criminal law owing to an unavoidable error for which the person falling foul of it could in no way be blamed.

117. Under Article 7, for the reasons set out above, a legislative framework which does not enable an accused person to know the meaning and scope of the criminal law is defective not only on the grounds of the general conditions of ‘quality’ of the ‘law’ but also in terms of the specific requirements of the principle of legality in criminal law.”

242. The Grand Chamber endorses the analysis to the effect that the rationale of the sentence and punishment, and the ‘guilty’ concept (in the English version) with the corresponding notion of ‘*personne coupable*’ (in the French version), support an interpretation whereby Article 7 requires, for the purposes of punishment, a mental link. As is explained in the *Sud Fondi S.r.l. and Others* judgment (merits, cited above), the principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable. This also means that, in principle, a measure can only be regarded as a penalty within the meaning of Article 7 where an element of personal liability on the part of the offender has been established. There is certainly, as the Italian Court of Cassation noted in the case of *Sud Fondi S.r.l. and Others* (see paragraph 112 of the Court’s judgment in that case, ibid.), a clear correlation between the degree of foreseeability of a criminal-law provision and the personal liability of the offender. The Grand Chamber

thus shares the Chamber's findings in that case to the effect that punishment under Article 7 requires the existence of a mental link through which an element of liability may be detected in the conduct of the person who physically committed the offence (*ibid.*, § 116).

243. Nevertheless, and as the Court indicated in its *Varvara* judgment (cited above, § 70), this requirement does not preclude the existence of certain forms of objective liability stemming from presumptions of liability, provided they comply with the Convention. In this connection, the Court would refer to its case-law under Article 6 § 2 of the Convention to the effect that in principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention (see *Engel and Others v. the Netherlands*, 8 June 1976, § 81, Series A no. 22, p. 34) and, accordingly, to define the constituent elements of the resulting offence. In particular, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence. Examples of such offences may be found in the laws of the Contracting States. Presumptions of fact or of law operate in every legal system. The Convention does not prohibit such presumptions in principle; it does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. According to the case-law, these limits will be overstepped where a presumption has the effect of making it impossible for an individual to exonerate himself from the accusations against him, thus depriving him of the benefit of Article 6 § 2 of the Convention (see, among other authorities, *Salabiaku v. France*, 7 October 1988, §§ 27-28, Series A no. 141-A; *Janosevic v. Sweden*, no. 34619/97, § 68; ECHR 2002 - VII and *Klouvi v. France*, no. 30754/03, § 48, 30 June 2011).

244. The Court reiterates that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see, among other authorities, *mutatis mutandis*, *Hammerton v. the United Kingdom*, no. 6287/10, § 84, 17 March 2016). Having regard to the common ground between Article 7 and Article 6 § 2, in their respective areas, namely that they protect the right of any individual not to be punished without his personal liability, involving a mental link with the offence, having been duly established, the Court finds that the case-law described above applies *mutatis mutandis* under Article 7.

245. Moreover, the Court notes that, following the *Sud Fondi S.r.l. and Others* judgment (merits, cited above), the domestic courts accepted this reasoning and altered their case-law accordingly in two significant aspects. First, even in cases of dismissal where prosecution of the offence has become statute-barred, in order to implement a confiscation measure it must be demonstrated that the offence is nevertheless made out, based on both the material element and the mental element. Secondly, since the *Sud Fondi*

*S.r.l. and Others* judgment (ibid.), the domestic courts have refrained from imposing that measure on *bona fide* third parties.

246. Having regard to the foregoing, the Court finds that in the present case Article 7 required that the impugned confiscation measures had to be foreseeable for the applicants and precluded any decision to impose those measures on the applicants in the absence of a mental link disclosing an element of liability in their conduct.

247. The question arising at this juncture is therefore whether this requirement could have been fulfilled, bearing in mind that (a) none of the applicants had been formally convicted in that connection, and (b) the applicant companies were never parties to the proceedings in question. The Court will now examine each of these points.

2. *Whether the confiscation measures could be applied in the absence of formal convictions*

248. The Court observes that in the present case all the applicants had their property confiscated even though none of them had received a formal conviction: in the case of the company G.I.E.M. S.r.l., neither the company itself nor its representatives had ever been prosecuted (see paragraphs 23-29 above); as to the other applicant companies, unlike their representatives, they had never been parties to the proceedings in question (see paragraphs 66-73 and 82-86 above); lastly the proceedings brought against Mr Girona had been discontinued as statute-barred.

249. The parties have clearly diverging views on the need for a formal conviction, an issue that has already been examined in *Varvara* (cited above). The applicants argued that, according to that judgment, the impugned confiscation measures could not be applied in the absence of formal convictions, and they asked the Court to confirm the *Varvara* case-law on that point.

The Government took the opposite view. They thus asked the Court to depart from *Varvara* on that point and confirm the position of the domestic courts, in particular that of the Constitutional Court (see paragraph 133 above).

250. The Grand Chamber would refer back to the following findings in the *Varvara* judgment (cited above):

“71. The ‘penalty’ and ‘punishment’ rationale and the ‘guilty’ concept (in the English version) and the corresponding notion of ‘*personne coupable*’ (in the French version) support an interpretation of Article 7 as requiring, in order to implement punishment, a finding of liability by the national courts enabling the offence to be attributed to and the penalty to be imposed on its perpetrator. Otherwise the punishment would be devoid of purpose (see *Sud Fondi S.r.l. and Others*, cited above, § 116). It would be inconsistent on the one hand to require an accessible and foreseeable legal basis and on the other to permit punishment where, as in the present case, the person in question has not been convicted.

72. In the present case, the criminal penalty which was imposed on the applicant despite the fact that the criminal offence had been statute-barred and his criminal liability had not been established in a verdict as to his guilt, is incompatible with the principle that only the law can define a crime and prescribe a penalty, which the Court has recently clarified and which is an integral part of the legality principle laid down in Article 7 of the Convention. Consequently, the penalty in issue is not prescribed by law for the purposes of Article 7 of the Convention and is arbitrary.”

251. It follows from the above that Article 7 precludes the imposition of a criminal sanction on an individual without his personal criminal liability being established and declared beforehand. Otherwise the principle of the presumption of innocence guaranteed by Article 6 § 2 of the Convention would also be breached.

252. However, while it is clear that, as indicated in *Varvara* (ibid.) the requisite declaration of criminal liability is often made in a criminal-court judgment formally convicting the defendant, this should not be seen as a mandatory rule. The *Varvara* judgment does not lead to the conclusion that confiscation measures for unlawful site development must necessarily be accompanied by convictions decided by criminal courts within the meaning of domestic law. The Court, for its part, must ensure that the declaration of criminal liability complies with the safeguards provided for in Article 7 and that it stems from proceedings complying with Article 6. In this connection, the Court would emphasise that its judgments all have the same legal value. Their binding nature and interpretative authority cannot therefore depend on the formation by which they were rendered.

253. It also follows from the above that, as the Court has already indicated concerning the autonomous nature of its interpretation of Article 7 (see paragraph 233 above), compliance with Article 7 as interpreted in the *Varvara* judgment does not require that all disputes under that Article must necessarily be dealt with in the context of criminal proceedings *stricto sensu*. In that sense, the applicability of this provision does not have the effect of imposing the “criminalisation” by States of procedures which, in exercising their discretion, they have not classified as falling strictly within the criminal law.

254. In this connection the Court observes that, relying on the principle established in the *Öztürk* judgment (cited above, §§ 49 and 56), it has found on many occasions that the “obligation to comply with Article 6 of the Convention does not preclude a ‘penalty’ being imposed by an administrative authority in the first instance” (see *Grande Stevens and Others v. Italy*, nos. 18640/10 and 4 others, §§ 138-139, 4 March 2014; see also *Kadubec v. Slovakia*, 2 September 1998, § 57, *Reports* 1998-VI; *Čanády v. Slovakia*, no. 53371/99, § 31, 16 November 2004; and *A. Menarini Diagnostics S.r.l. v. Italy*, no. 43509/08, §§ 58-59, 27 September 2011). This principle has also been confirmed in terms of the right to the presumption of innocence under Article 6 § 2 of the Convention.

Thus in the case of *Mamidakis v. Greece* (no. 35533/04, § 33, 11 January 2007) the Court found as follows:

“As to the complaint that the administrative courts did not take account of the fact that the applicant had not been prosecuted for the same offence, the Court takes the view that this situation cannot be analysed as a breach of the right to be presumed innocent. Such a finding would mean that no administrative proceedings could be brought in the absence of criminal proceedings and that no finding of an offence can be made by an administrative court in the absence of a formal declaration of guilt by a criminal court. In addition, the applicant has not raised any other argument which could lead the Court to conclude that the administrative courts had considered him to be guilty before reaching a final decision in his case.”

255. Having thus dismissed the need for there to be criminal proceedings, the Court must nevertheless ascertain whether the impugned confiscation measures at least required a formal declaration of criminal liability in respect of the applicants.

256. While the applicants emphasised the illegality of the confiscation measure in the absence of a formal conviction, the Government took the view that, except in the case of G.I.E.M. S.r.l., the applicant companies and their representatives, including Mr Gironda, had clearly been found guilty of contravening the planning regulations.

257. The Court observes that since the applicant companies were not prosecuted themselves, and nor were they parties to the proceedings (see paragraphs 248 above and 269 below), there cannot have been a prior declaration of their liability. Consequently, the question whether the declaration of criminal liability required by Article 7 must meet formal requirements arises only in respect of Mr Gironda.

258. In the present case the Court must therefore ascertain whether, even though the offence of which Mr Gironda stood accused was statute-barred, it is entitled to have regard to the elements of that offence, as established by the domestic courts, in order to find that, in substance, there had been a declaration of liability capable of satisfying the prerequisite for the imposition of a sanction compatible with Article 7 of the Convention.

259. The Court reiterates its case-law to the effect that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation (see *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 123, ECHR 2003-X). The Court is thus entitled to look behind the operative part of a judgment and take account of its substance, the reasoning being an integral part of the decision (see, *mutatis mutandis*, *Allen v. the United Kingdom* [GC], no. 25424/09, § 127, 12 July 2013).

260. In the Court's view, it is necessary to take into account, first, the importance in a democratic society of upholding the rule of law and public trust in the justice system, and secondly, the object and purpose of the rules applied by the Italian courts. In that connection it would appear that the relevant rules seek to prevent the impunity which would stem from a



situation where, by the combined effect of complex offences and relatively short limitation periods, the perpetrators of such offences systematically avoid prosecution and, above all, the consequences of their misconduct (see, *mutatis mutandis*, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 192, ECHR 2012).

261. The Court cannot overlook these considerations in applying Article 7 in the present case, provided that the domestic courts in question acted in strict compliance with the defence rights enshrined in Article 6 of the Convention. For this reason it takes the view that, where the courts find that all the elements of the offence of unlawful site development are made out, while discontinuing the proceedings solely on account of statutory limitation, those findings can be regarded, in substance, as a conviction for the purposes of Article 7, which in such cases will not be breached.

262. It follows that there has been no violation of Article 7 in respect of Mr Gironda.

*3. Whether the impugned confiscation measures could be imposed on the applicant companies, which were not parties to the proceedings*

**(a) The parties' submissions**

263. The applicant companies pointed out that they had not been parties to the criminal proceedings in respect of the offence of unlawful site development and that, moreover, this had not been possible for them as a matter of law. As regards the company G.I.E.M. S.r.l. in particular, its representatives had not even been prosecuted, and the confiscation of its property had merely been the result of its automatic incorporation into the Punta Perotti site.

264. The Government observed that the possibility of setting up a company had the undeniable advantage of confining the business risk to the legal entity created expressly to carry on this activity. In their view, a shareholder in a legal entity thus assumed risks only to the extent of his contribution to the company and it was the company itself which necessarily sustained the negative consequences of a confiscation measure. The Government argued that, unlike G.I.E.M. S.r.l., the companies Hotel Promotion Bureau S.r.l., R.I.T.A. Sarda S.r.l. and Falgest S.r.l. could clearly not claim to have been acting in good faith, because they were "legal instruments in the hands of their shareholders".

**(b) The Court's assessment**

265. The Court notes that Italian law ascribes to limited-liability companies, such as the applicant companies, a legal personality that is distinct from that of the companies' directors or shareholders. In principle it is thus necessary to ascertain whether the individuals involved in the

proceedings before the domestic courts were acting and were tried in a personal capacity or as legal representatives of the companies concerned.

266. However, the Court observes that under Italian law, as in force at the time, in accordance with the principle *societas delinquere non potest* (“a legal entity cannot commit a criminal offence”), limited-liability companies could not, as such, be parties to criminal proceedings, in spite of their distinct legal personality. Accordingly, they could not be legally represented in the context of the relevant criminal proceedings in the present case, even though the conduct (and resulting liability) of their respective legal representatives was directly attributed to them. The companies thus remained third parties in relation to those proceedings, as confirmed by the judgments of the domestic courts.

267. The Court has always recognised the principle that limited liability companies have a distinct legal personality, finding for example in *Agrotexim and Others v. Greece* (24 October 1995, § 66, Series A no. 330-A):

“... the Court considers that the piercing of the ‘corporate veil’ or the disregarding of a company’s legal personality will be justified only in exceptional circumstances, in particular where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation or – in the event of liquidation – through its liquidators.”

268. The Court applied this case-law in its decision on the admissibility of the applications lodged by Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l., in dismissing the complaints raised, in their own names, by the director and/or shareholders of the applicant companies under Article 7 of the Convention and Article 1 of Protocol No. 1, on account of the confiscation. Similarly, the complaints submitted by the applicant companies concerning the violation of Article 6 were declared inadmissible in the decisions on admissibility, in which the Court stated that as the impugned proceedings had not concerned Falgest S.r.l., Hotel Promotion Bureau S.r.l. or R.I.T.A. Sarda S.r.l., those applicant companies could not be considered victims of the alleged violation.

269. In the instant case, therefore, the question to be addressed concerns the imposition of a criminal sanction on legal entities which, on account of their distinct legal personality, have not been parties to any kind of proceedings (whether criminal, administrative, civil, etc.).

270. Under Italian law, confiscation of property is a sanction imposed by a criminal court as an automatic consequence of a finding of the offence of unlawful site development. No distinction is drawn for the situation where the owner of the property is a company, which cannot commit a criminal offence according to Italian law (see paragraph 266 above).

271. The Court has already ruled, in the *Varvara* judgment (cited above, § 65), that a “consequence of cardinal importance flows from the principle of legality in criminal law, namely a prohibition on punishing a person

where the offence has been committed by another”. In support of this argument the Court held as follows:

“64. The Court has previously examined this issue from the angle of Article 6 § 2 of the Convention.

65. In the case of *A.P., M.P. and T.P. v. Switzerland*, 29 August 1997, *Reports of Judgments and Decisions* 1997-V, a number of heirs had been punished for a criminal offence committed by the deceased. The Court considered that the criminal sanction imposed on the heirs for tax fraud attributed to the deceased was incompatible with the fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act (*ibid.*, § 48). Swiss law explicitly acknowledged this principle, and the Court affirmed that this rule was also required by the presumption of innocence enshrined in Article 6 § 2 of the Convention. Inheritance of the guilt of the dead is not compatible with the standards of criminal justice in a society governed by the rule of law. That principle was reaffirmed in the case of *Lagardère (Lagardère v. France)*, no. 18851/07, 12 April 2012, § 77), in which the Court reiterated that the rule that criminal liability does not survive the person who has committed the criminal act is not only required by the presumption of innocence enshrined in Article 6 § 2 of the Convention, but also by the principle that inheritance of the guilt of the dead is incompatible with the standards of criminal justice in a society governed by the rule of law.

66. Given the connection between Articles 6 § 2 and 7 § 1 of the Convention (see *Guzzardi v. Italy*, 6 November 1980, § 100, Series A no. 39), the Court considers that the rule reiterated by it in the preceding paragraph is also valid from the angle of Article 7 of the Convention, which requires that no one can be held guilty of a criminal offence committed by another. While it is true that anyone must be able at any time to ascertain what is permitted and what is prohibited via clear and detailed laws, a system which punished persons for an offence committed by another would be inconceivable.”

272. The Grand Chamber finds it appropriate to confirm the above reasoning. In the instant case, the companies G.I.E.M. S.r.l., Hotel Promotion Bureau S.r.l., R.I.T.A. Sarda S.r.l. and Falgest S.r.l. were not parties to proceedings of any kind. Only the legal representative of Hotel Promotion Bureau S.r.l. and Falgest S.r.l. and two shareholders in R.I.T.A. Sarda S.r.l. were indicted in a personal capacity. Thus the authorities imposed a sanction on the applicant companies for the actions of third parties, that is to say, except in the case of G.I.E.M. S.r.l., the actions of their legal representatives and/or shareholders acting in a personal capacity.

273. Lastly, in response to the Government’s allegation that Hotel Promotion Bureau, R.I.T.A. Sarda S.r.l. and Falgest had acted in bad faith (see paragraph 264 above), the Court notes that there is nothing in the case file to suggest that the ownership of the property had been transferred to the applicant companies by their legal representatives (see, to that effect, Article 6 of Directive 2014/42/EU, paragraph 152 above).

274. In conclusion, having regard to the principle that a person cannot be punished for an act engaging the criminal liability of another, a confiscation measure applied, as in the present case, to individuals or legal entities which

are not parties to the proceedings, is incompatible with Article 7 of the Convention.

#### *4. Conclusions*

275. In the light of those considerations the Court holds as follows.

(a) There has been a violation of Article 7 in respect of the applicant companies as they were not parties to the criminal proceedings (see paragraph 274 above).

(b) There has been no violation of Article 7 in respect of Mr Gironda, in that the domestic courts' findings in the proceedings against him can be regarded, in substance, as a declaration of liability meeting the requirements of this Article (see paragraph 262 above).

### V. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

276. The applicants complained of a violation of their property rights. They relied on Article 1 of Protocol No. 1, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

#### **A. Admissibility**

277. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

#### **B. Merits**

##### *1. The parties' submissions*

###### **(a) The applicants**

278. The applicant company G.I.E.M. S.r.l. submitted that the confiscation measure constituted a deprivation of property. It argued that, by allowing, through a general formulation, the extension of such confiscation beyond the land directly concerned by the unlawful development, section 19 of Law no. 47/1985 infringed Article 1 of Protocol No. 1. That Article allowed legitimate interference only on the basis of a law that was

accessible, precise and foreseeable. The applicant company took the view that section 19 should have indicated in greater detail the limits within which it was possible to decide on confiscation in relation to the established facts, by indicating, according to a principle of reason and proportionality, the extent of the land that could be confiscated in relation to the buildings erected thereon and the unlawful conduct as established in material and mental terms. It explained that the lack of clarity and precision of the national law, and of the regional law, which had been regarded by the Court as “obscure and poorly worded” in its *Sud Fondi S.r.l. and Others* judgment (merits, cited above), had made it possible to confiscate land of an area that was three times as large as that covered by the planning permission issued by the Bari municipal authority. An even more serious consequence was that this had also affected the applicant company’s property even though the company had not been involved in the acts in respect of which the criminal proceedings had been brought.

As to the proportionality of the impugned measure, the applicant company submitted that the transformation work linked to the construction by the owners of land adjacent to its own should, at most, have obliged it to forfeit the transformed land alone.

279. The companies Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l. pointed out that the Court, in its case-law, had attached particular weight to the requirement of legality. In the *Varvara* judgment (cited above), but also in the *Sud Fondi S.r.l. and Others* judgment (merits, cited above), it had established that the offence in respect of which the penalty had been imposed had no legal basis, in breach of the Convention, and that the penalty imposed on the applicant had been arbitrary. That finding had then led the Court to state that the interference with the applicant’s right to the peaceful enjoyment of his possessions was equally arbitrary and that there had been a violation of Article 1 of Protocol No. 1. Moreover, the applicant companies took the view that a State’s interference with the right to enjoyment of property had to strike a fair balance between the demands of the general interest of the community and the imperatives of guaranteeing the individual’s fundamental rights. They explained that, in the present case, the extent of the confiscation affecting the property had to be taken into account: the eighty-eight plots that were built upon totalled 15,920 sq. m, while the confiscation had affected an additional area that was 14.5 times as large.

280. The company Falgest S.r.l. and Mr Girona argued that the confiscation imposed on them constituted a deprivation of property within the meaning of the first paragraph of Article 1 of Protocol No. 1.

281. In their submission, the impugned measure ordered by the Court of Cassation was clearly illegal and arbitrary and, in any event, devoid of a sufficiently clear, accessible and foreseeable legal basis. The applicants referred to the finding in the *Varvara* judgment (cited above) to the effect

that the illegality in criminal terms of the sanction for unlawful site development that had been found under Article 7 of the Convention entailed the illegality “in property terms” of the confiscation under Article 1 of Protocol No. 1.

282. Should the Court take the view that the impugned confiscation had a legal basis, the applicants argued that it was disproportionate to the aim pursued and that it had not struck a fair balance between the interests at stake. In a case involving mere reservation documents for the future acquisition by private purchasers of individual housing units covering less than 11% of the area in question, the confiscation of the entire property had not constituted a proportionate measure. The general interest could have been served by less intrusive measures.

**(b) The Government**

283. The Government submitted that the confiscation measures in respect of the applicants’ property had been ordered in accordance with the second paragraph of Article 1 of Protocol No. 1 and that the resulting interference did not constitute a violation of that provision. The impugned measures had a legal basis, pursued a legitimate aim and were proportionate. As to the proportionality aspect, the Government explained that less restrictive measures could not have been envisaged. In their view, it would have been technically very difficult, if not impossible, to limit the confiscation merely to the areas that had been built upon and to have separated those areas from the undeveloped land. In the Government’s view, a purely partial confiscation of the land would have frustrated the legitimate aims pursued by the State, namely to ensure the conformity of the plots in question with the planning regulations, environmental protection and the punishment of those responsible for the unlawful land transformation. In any event, the Government argued that the State had to be afforded a broad margin of appreciation as to the choice of instruments to be used in order to find the best solutions to guarantee environmental protection.

284. As regards the first applicant company, the Government observed that the confiscated land had been returned.

285. As to the property of the companies Hotel Promotion Bureau S.r.l. and R.I.T.A. Sarda S.r.l, the Government argued that the confiscation was proportionate, as only sixteen of the eighty-eight housing units had been confiscated.

286. Lastly, as to the company Falgest S.r.l., the Government disputed the percentage of undeveloped land that had been confiscated and argued that it was not 89% but less than 50% of the whole property.

*2. The Court’s assessment*

287. The Court observes that in its judgments in the cases of *Sud Fondi S.r.l. and Others* (merits, cited above, §§ 125-29), and *Varvara* (cited

above, § 83), it found that the confiscation of the applicants' land and buildings had constituted an interference with their right to the peaceful enjoyment of their property as protected by Article 1 of Protocol No. 1.

288. The Grand Chamber reaches the same conclusion in the present case. It must therefore be determined which of the rules in that provision is applicable.

**(a) The applicable rule**

*(i) General principles*

289. Article 1 of Protocol No. 1 comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest and to secure the payment of penalties. The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among other authorities, *James and Others v. the United Kingdom*, 21 February 1986, § 37, Series A no. 98, and *Iatridis v. Greece* [GC], no. 31107/96, § 55, ECHR 1999-II).

*(ii) Application in the present case*

290. In the *Sud Fondi S.r.l. and Others* judgment (merits, cited above, §§ 128-29), the Court stated as follows:

"128. The Court notes that the present case can be distinguished from that of *AGOSI v. the United Kingdom* (24 October 1986, Series A no. 108), where confiscation was ordered in respect of property that was the subject-matter of an offence (*objectum sceleris*), following the conviction of the persons charged, for in the present case the confiscation was ordered following acquittal. For the same reason the present case can be distinguished from *C.M. v. France* ((dec.), no. 28078/95, ECHR 2001-VII) or *Air Canada v. the United Kingdom* (5 May 1995, Series A no. 316-A), in which the confiscation, ordered after the conviction of the accused, concerned property which was the *instrumentum sceleris* and was in the possession of third parties. As regards the proceeds of crime (*productum sceleris*), the Court observes that it has examined a case where the confiscation had followed the applicant's conviction (see *Phillips v. the United Kingdom*, no. 41087/98, §§ 9-18, ECHR 2001-VII) and cases where confiscation had been ordered independently of the existence of any criminal proceedings, because the applicant companies' property had been presumed to be of unlawful origin (see *Riela and Others v. Italy* (dec.), no. 52439/99, 4 September 2001; *Arcuri and Others v. Italy* (dec.), no. 52024/99, 5 July 2001; and *Raimondo v. Italy*, 22 February 1994, § 29, Series A no. 281-A) or to have been used for unlawful activities (*Butler v. the United Kingdom* (dec.), no. 41661/98, 27 June

2002). In the first case cited above, the Court held that the confiscation constituted a penalty for the purposes of the second paragraph of Article 1 of Protocol No. 1 (see *Phillips*, cited above, § 51, and, *mutatis mutandis*, *Welch v. the United Kingdom*, 9 February 1995, § 35, Series A no. 307-A), whereas in the other cases it took the view that it was a matter of control of the use of property.

129. In the present case, the Court takes the view that it is not necessary to determine whether the confiscation falls within the first or second category, as in any event it is the second paragraph of Article 1 of Protocol No. 1 which applies (see *Frizen v. Russia*, no. 58254/00, § 31, 24 March 2005)."

291. The Grand Chamber does not see any reason to reach a different conclusion in the present case.

### **(b) Compliance with Article 1 of Protocol No. 1**

#### *(i) General principles*

292. The Court reiterates that Article 1 of Protocol No. 1 above all requires that any interference by a public authority with the enjoyment of possessions be in accordance with the law: under the second sentence of the first paragraph of this Article, any deprivation of possessions must be "subject to the conditions provided for by law"; the second paragraph entitles the States to control the use of property by enforcing "laws". Moreover, the rule of law, which is one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III, and *Iatridis*, cited above, § 58).

293. Moreover, since the second paragraph of Article 1 of Protocol No. 1 is to be construed in the light of the general principle enunciated in the opening sentence of that Article, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised: the Court must determine whether a fair balance has been struck between the demands of the general interest in this respect and the interest of the individual company concerned. In so determining, the Court recognises that the State enjoys a wide margin of appreciation with regard to the means to be employed and to the question of whether the consequences are justified in the general interest for the purpose of achieving the objective pursued (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 149, ECHR 2005-VI).

#### *(ii) Application to the present case*

294. In the present case, it is not necessary to decide whether the violation of Article 7 found above (see paragraph 275 above) has the automatic consequence that the impugned confiscation measures were devoid of legal basis and therefore breached Article 1 of Protocol No. 1, having regard to the findings below as to whether the measures pursued a legitimate aim and whether they were proportionate.



295. The legitimacy of State policies in favour of environmental protection cannot be called into question, because the well-being and health of individuals are thereby also guaranteed and defended (see *Depalle v. France* [GC], no. 34044/02, § 84, ECHR 2010, and *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 87, 29 March 2010). However, it must be said that the examination of the current situation, which is based on information provided by the parties, leaves some doubt as to the fulfilment of the aim which was relied upon to justify the measures contested by the applicants.

296. Firstly, the land confiscated from G.I.E.M. S.r.l. was returned to the applicant company in 2013 following an application lodged with the Bari District Court by the mayor of that city. The return was carried out on the basis of the principles established by the Court in the *Sud Fondi S.r.l. and Others* judgment (merits, cited above) under Article 7 of the Convention and Article 1 of Protocol No. 1 (see paragraphs 42-43 above).

297. Secondly, as regards Hotel Promotion S.r.l. and R.I.T.A. Sarda S.r.l., as at 29 July 2015 the confiscated properties were still occupied by their owners. In addition, in May 2015 the municipal council of Golfo Aranci acknowledged that it was currently in the interest of the community to retain the confiscated real-estate complex in view of the possibility of using the units to deal with emergencies, by allowing the housing to be rented, directly or indirectly, by individuals with low income (see paragraph 74 above).

298. Lastly, in May 2015, the expert commissioned by Falgest S.r.l. and Mr Gironda reported on the state of disrepair in which the confiscated complex now stood, as it had not been maintained by the municipal authority, which was then the owner (see paragraph 87 above).

299. It may thus be questioned whether the confiscation of the property has actually contributed to the protection of the environment.

300. As to the proportionality of the measure, Article 1 of Protocol No. 1 requires of any interference that there should be a reasonable relationship of proportionality between the means employed and the aim pursued (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, §§ 83-95, ECHR 2005-VI). This fair balance will be upset if the person concerned has to bear an individual and excessive burden (see *Sporrong and Lönnroth*, cited above, §§ 69-74, and *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, § 57, 31 May 2011).

301. The following factors may be taken into account in order to assess whether the confiscation was proportionate: the possibility of less restrictive alternative measures such as the demolition of structures that were incompatible with the relevant regulations or the annulment of the development plan; the unlimited nature of the sanction, as it affected both developed and undeveloped land, and even areas belonging to third parties;

and the degree of culpability or negligence on the part of the applicants or, at the very least, the relationship between their conduct and the offence in question.

302. In addition, the importance of the procedural obligations under Article 1 of Protocol No. 1 must not be overlooked. Thus the Court has, on many occasions, noted that, although Article 1 of Protocol No. 1 contains no explicit procedural requirements, judicial proceedings concerning the right to the peaceful enjoyment of one's possessions must also afford the individual a reasonable opportunity of putting his or her case to the competent authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision (see *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96, ECHR 2002-VII; *Capital Bank AD v. Bulgaria*, no. 49429/99, § 134, ECHR 2005-XII; *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I; *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* [GC], no. 44302/02, § 57, ECHR 2007-III; *Zafranias v. Greece*, no. 4056/08, § 36, 4 October 2011; and *Giavi v. Greece*, no. 25816/09, § 44, 3 October 2013; see also, *mutatis mutandis*, *Al-Nashif v. Bulgaria*, no. 50963/99, § 123, 20 June 2002, and *Grande Stevens and Others*, cited above, § 188). An interference with the rights provided for by Article 1 of Protocol No. 1 cannot therefore have any legitimacy in the absence of adversarial proceedings that comply with the principle of equality of arms, allowing discussion of aspects that are important for the outcome of the case. In order to ensure that this condition is satisfied, the applicable procedures should be considered from a general standpoint (see, among other authorities, *AGOSI*, cited above, § 55; *Hentrich v. France*, § 49, 22 September 1994, Series A no. 296-A; *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002-IV; *Gáll v. Hungary*, no. 49570/11, § 63, 25 June 2013; and *Sociedad Anónima del Ucieza v. Spain*, no. 38963/08, § 74, 4 November 2014).

303. The automatic application of confiscation in cases of unlawful site development, as provided for – save in respect of *bona fide* third parties – by Italian legislation is clearly ill-suited to these principles since it does not allow the courts to ascertain which instruments are the most appropriate in relation to the specific circumstances of the case or, more generally, to weigh up the legitimate aim against the rights of those affected by the sanction. In addition, as the applicant companies were not parties to the impugned proceedings, they did not have the benefit of any of the procedural safeguards mentioned in paragraph 302 above.

304. In conclusion, the Court takes the view that there has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of all the applicants on account of the disproportionate nature of the confiscation measure.

## VI. ALLEGED VIOLATION OF ARTICLE 6 § 1 AND ARTICLE 13 OF THE CONVENTION

305. The company G.I.E.M. S.r.l. complained that it had not had access to a court, arguing that it had no opportunity to defend itself or to present arguments against the confiscation before a criminal court ruling on the merits or in civil proceedings. It alleged that the possibility of lodging an interlocutory application for review of enforcement had not allowed it to remedy those shortcomings. It relied on Article 6 § 1 and Article 13 of the Convention.

306. Referring to Article 13 of the Convention, the company Falgest S.r.l., for its part, alleged that there had been no accessible and effective domestic remedy by which to complain of a violation of Article 7 of the Convention or of Article 1 of Protocol No. 1 on account of the confiscation ordered by the Court of Cassation.

The relevant provisions read as follows:

### **Article 6 § 1**

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law. ...”

### **Article 13**

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

307. The Government disputed those arguments.

308. Finding that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that they are not barred by any other ground of inadmissibility, the Court declares them admissible.

309. The Court takes the view, however, that it is not necessary to examine these complaints because they are covered by the complaints already examined under Article 7 of the Convention and Article 1 of Protocol No. 1.

## VII. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

310. Mr Gironda also complained that the principle of the presumption of innocence had been breached by the Court of Cassation in deciding to order the confiscation of his land even though the case against him had been dismissed as statute-barred. He relied on Article 6 § 2 of the Convention, which reads as follows:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

### **A. Admissibility**

311. The Court notes that this complaint is related to that which it examined under Article 7 of the Convention and that it must therefore also be declared admissible.

### **B. Merits**

#### *1. The parties' submissions*

##### **(a) Mr Gironda**

312. The applicant emphasised that the Court of Cassation had not merely impugned the mistake of law committed by the Court of Appeal. In his view, by substituting its own ruling for that of the court below in a non-customary manner, the Court of Cassation had established the existence of all the necessary elements for the offence of unlawful site development to be made out, that is, in both its material and mental elements. The applicant explained that, according to the Court of Cassation, the change in use of the buildings was proved by the statements of third parties and by the documents in the file. In that court's view, according to the applicant, the unlawful nature of the development was not in doubt. This decision thus clearly breached the principle of the presumption of innocence enshrined in Article 6 § 2 of the Convention.

##### **(b) The Government**

313. The Government disputed this contention and referred to the applicants they had submitted under Article 7.

#### *2. The Court's assessment*

##### **(a) General principles**

314. Article 6 § 2 protects the right of any person to be “presumed innocent until proved guilty according to law”. Regarded as a procedural safeguard in the context of the criminal trial itself, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal

conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuance decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public. To a certain extent, the protection afforded under Article 6 § 2 in this connection may overlap with the protection afforded by Article 8 (see, for example, *Zollman v. the United Kingdom* (dec.), no. 62902/00, ECHR 2003-XII; *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, §§ 27 and 56-59, 16 October 2008; and *Allen*, cited above, §§ 93-94).

315. Moreover, guilt cannot be legally established where the proceedings have been closed by a court before the gathering of evidence or the conducting of hearings that would have allowed the court to determine the case on its merits (see *Baars v. the Netherlands*, no. 44320/98, §§ 25-32, 28 October 2003, and *Paraponiaris*, cited above, §§ 30-33). By way of example, in the case of *Didu v. Romania* (no. 34814/02, §§ 40-42, 14 April 2009), the Court found that the fact that the court ruling at last instance had quashed the acquittal decisions by the lower courts, and had found the person concerned guilty whilst closing the proceedings because criminal liability was statute-barred, had breached Article 6 § 2 of the Convention, since the defence rights had not been respected in the proceedings before it, even though that last-instance court was the first court to have found the applicant guilty. Similarly, in *Giosakis v. Greece* (no. 3) (no. 5689/08, § 41, 3 May 2011), the Court found that Article 6 § 2 of the Convention had been breached by the fact that the Court of Cassation had quashed the acquittal by the Court of Appeal whereas it had at the same time found the proceedings to be statute-barred.

316. It can be seen from this case-law that a problem arises under Article 6 § 2 of the Convention where a court which terminates proceedings because they are statute-barred simultaneously quashes acquittals handed down by the lower courts and, in addition, rules on the guilt of the person concerned.

**(b) Application in the present case**

317. In the present case, the applicant Mr Gironda was acquitted on appeal and the confiscation measure was revoked after the development plan had been found compatible with the land-use plan and planning regulations (see paragraph 84 above). Subsequently that decision was quashed, without being remitted, by the Court of Cassation, which found that the applicant's liability had been proved. The applicant was thus declared guilty, in substance, by the Court of Cassation, notwithstanding the fact that the prosecution of the offence in question was statute-barred. This fact breaches the right to the presumption of innocence.

318. Having regard to the foregoing, there has been a violation of Article 6 § 2 of the Convention in the present case in respect of Mr. Gironda.

#### VIII. OTHER ALLEGED VIOLATIONS

319. In their observations of 26 May 2015, the companies Hotel Promotion S.r.l. and R.I.T.A. Sarda S.r.l. reiterated their complaint concerning a violation of Article 6 of the Convention. Similarly, the company Falgest S.r.l. and Mr Gironda again complained of a violation of Article 6 § 2 of the Convention in respect of five other individuals who, like Mr Gironda, had been prosecuted for unlawful site development. Those persons were also originally applicants before the Court. The complaints in question were declared inadmissible by decisions on the relevant parts of the applications on 5 June 2012 and 30 April 2013.

320. Decisions as to admissibility are final. It follows that the Court lacks jurisdiction to entertain these complaints (see, *mutatis mutandis*, *Bulena v. the Czech Republic*, no. 57567/00, § 37, 20 April 2004).

#### IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

321. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

322. The applicants all filed their claims for just satisfaction within the time-limits fixed by the President of the Court.

323. In their observations before the Grand Chamber, the Government did not comment on the applicants’ claims for just satisfaction.

324. Having regard to the circumstances of the case, the Court takes the view that the question of the application of Article 41 of the Convention is not ready for decision. Consequently, it will reserve the question in its entirety and fix the subsequent procedure, bearing in mind the possibility of an agreement being reached between the respondent State and the applicants (Rule 75 § 1 of the Rules of Court). The Court gives the parties three months from the date of the present judgment for that purpose.

## FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;
2. *Declares*, unanimously, the applications admissible as to the complaints under Article 6 §§ 1 and 2 and Article 13 of the Convention, and Article 1 of Protocol No. 1 to the Convention;
3. *Declares*, by a majority, the applications admissible as to the complaint under Article 7 of the Convention;
4. *Holds*, by fifteen votes to two, that there has been a violation of Article 7 of the Convention in respect of all the applicant companies;
5. *Holds*, by ten votes to seven, that there has been no violation of Article 7 of the Convention in respect of Mr Gironda;
6. *Holds*, unanimously, that there has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of all the applicants;
7. *Holds*, by fifteen votes to two, that there is no need to decide whether there has been a violation of Article 6 § 1 of the Convention in respect of the company G.I.E.M. S.r.l., or of Article 13 in respect of the companies G.I.E.M. S.r.l. and Falgest S.r.l.;
8. *Holds*, by sixteen votes to one, that there has been a violation of Article 6 § 2 of the Convention in respect of Mr Gironda;
9. *Holds*, unanimously, that the question of the application of Article 41 of the Convention is not ready for decision;  
accordingly,
  - (a) *reserves* the said question in whole;
  - (b) *invites* the Government and the applicants to submit, within three months from the date of notification of this judgment, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
  - (c) *reserves* the further procedure and *delegates* to the President of the Court the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 June 2018.

Johan Callewaert  
Deputy to the Registrar

Luis López Guerra  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) Concurring opinion of Judge Motoc;
- (b) Partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque.
- (c) Joint partly dissenting, partly concurring opinion of Judges Spano and Lemmens;
- (d) Joint partly dissenting opinion of Judges Sajó, Karakaş, Pinto de Albuquerque, Keller, Vehabović, Kūris and Grozev.

L.L.G.  
J.C.



## CONCURRING OPINION OF JUDGE MOTOC

(Translation)

*‘Apri la mente a quel ch’io ti paleso  
e fermalvi entro; ché non fa scienza,  
sanza lo ritenere, avere inteso.’  
Dante, Divina commedia, Paradiso, Canto V*

### I. Introduction

In this case I voted with the majority, but for reasons related to the coherence of the judicial dialogue between our Court and the Italian domestic courts. Judicial dialogue – on the one hand with all the national authorities who have changed their case-law in line with our Court’s decisions, and on the other with the Italian Constitutional Court – is one of the central questions raised by the present case. This case highlights the difficulties inherent in that judicial dialogue, in particular with the domestic courts and especially in an area where, in my view, there has been a departure from precedent and where European or international law have been evolving. The question of judicial dialogue is all the more pertinent as the Protocol “of dialogue”, as it is known – Protocol No. 16 – has recently been ratified by the requisite number of States and is due to enter into force on 1 August 2018.<sup>1</sup>

If Protocol No. 16 had been in force, the Constitutional Court could have submitted an elegant question like the one it referred to the Court of Justice of the European Union after the *Taricco I* case. In that context one could have seen our *G.I.E.M. and Others* ruling as equivalent to *M.A.S. and M.B. (Taricco II)*<sup>2</sup>

*Ex turpi causa non oritur actio* (a person cannot benefit from his own illegal action) is a well-known Latin maxim. The subject of non-conviction-

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<sup>1</sup> Italy has signed but has not yet ratified Protocol No. 16.

<sup>2</sup> In late 2017 the Court of Justice of the European Union (CJEU) gave judgment in *M.A.S. and M.B.* (Case C-42/17, known as *Taricco II*). In that case it pointed out that the member States had to ensure that, in the event of serious VAT fraud, effective and deterrent criminal sanctions were adopted. Nevertheless, in the absence of harmonisation at EU level, it was for the member States to adopt the applicable rules on the statutory limitation of criminal proceedings in such matters. This means, in substance, that while a member State must impose effective and deterrent criminal sanctions in cases of serious VAT fraud, it is free to take the view, for example, that the statutory limitation rules are part of the substantive criminal law. The CJEU pointed out that in such cases the member States are required to adhere to the principle that offences and penalties must be defined by law, which corresponds to a fundamental right enshrined in Article 49 of the Charter of Fundamental Rights, even in a context of impunity in a significant number of serious VAT fraud cases.

based confiscation is highly topical in international legal circles. Criminal justice policy is increasingly targeting the proceeds of crime as a means of combating criminal activity and its consequences. Over the past few decades, an international criminal policy has been developing to ensure the forfeiture of monetary proceeds of crime, as part of the fight against acquisitive crime. It is my view that the Court, in the context of this case, has only partially addressed the question of the compatibility with our case-law of this evolution of international criminal policy.

As European judges, we look at the dialogue between judges from our own perspective, that of the application of the European Convention on Human Rights. But to avoid reverting to a monologue, we need to understand the national authorities and sometimes, as Churchill supposedly once said, “courage is what it takes to stand up and speak; courage is also what it takes to sit down and listen”.

### **Preliminary remarks**

The Court reached its conclusions in this case based on the principle that nobody can be found guilty of a criminal offence committed by a third party. The applicant companies were not present in the proceedings brought against them in Italy because, under Italian law, a company cannot commit a criminal offence.

In its assessment, the Court confirmed its case-law stemming from previous Chamber judgments on such matters, in particular *Sud Fondi v Italy*<sup>3</sup> and *Varvara v. Italy*.<sup>4</sup> It thus reiterated that the confiscation measure imposed by the Italian authorities constituted a “penalty” within the meaning of Article 7. It took the following factors into account: that the illegality of the acts had been established by the criminal courts; that the sanction was related to a criminal offence; that it had a deterrent effect; that it was classified as a criminal sanction under domestic law; and lastly that it was particularly severe.

Unlike the applicant companies, Mr Girona was a party to the criminal proceedings: they were directed against him personally. In addition, the Court of Cassation found that he had knowingly committed the offence of unlawful site development. In that sense he was guilty because the mental element had been established. Nevertheless, the charges were ultimately dropped because the offence was statute-barred.

Confirming the *Varvara v. Italy* judgment, the Court reiterates that for the imposition of a penalty to be compliant with Article 7, it is necessary for personal criminal liability to be established. It goes on to explain, however, that personal criminal liability may be established even in the absence of a

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<sup>3</sup> *Sud Fondi S.r.l. v. Italy*, no. 75909/01, 20 January 2009

<sup>4</sup> *Varvara v. Italy*, no. 17475/09, 29 October 2013

formal conviction. Thus “confiscation measures need not necessarily be accompanied by convictions”.<sup>5</sup>

In the present case, where the offence of unlawful site development was established but where no conviction could be handed down as a result of the statutory limitation period, the Court considers the confiscation to be compliant with Article 7. It thus finds that there has been no violation of Article 7 in respect of Mr Gironda.

However, it reaches the opposite conclusion as regards Mr Gironda’s complaint under Article 6 § 2 of an alleged violation of his right to be presumed innocent. It bases that conclusion on the fact that, in substance, the Court of Cassation declared Mr Gironda guilty even though the offence was time-barred. It thus confirms its earlier case-law, to the effect that where a judgment at last instance discontinues proceedings and at the same time decides on the defendant’s guilt, there will be a violation of Article 6 § 2.

The Court’s judgment refers to the international instruments but without drawing any conclusion from them or using them in its legal argument. In recent international conventions one can see an increasing emphasis on the importance of assets.<sup>6</sup>

In their judgement in the case of *R. v. Ahmad*, Lord Neuberger, Lord Hughes and Lord Toulson summarised the main challenges faced by state authorities in the context of asset confiscation<sup>7</sup>:

“First, there are the practical impediments in the way of identifying, locating and recovering assets actually obtained through crime and then held by the criminals. The defendants will often be as misleading as they can, and the sophistications and occasional corruptions in the international financial community are such as to render the task of locating the proceeds of crime very hard, often impossible. Secondly, again owing to the reticence and dishonesty of the defendants, there will often be considerable, or even complete, uncertainty as to (i) the number, identity and role of the conspirators involved in the crime, and (ii) the quantum of the total proceeds of the crime, or how, when, and pursuant to what understanding or arrangement, the proceeds were, or were to be, distributed between the various conspirators.”<sup>8</sup>

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<sup>5</sup> See paragraph 252 of the judgement

<sup>6</sup> For a detailed discussion concerning the usefulness of asset confiscation see: Boucht, J., *The Limits of Asset Confiscation*, Hart Publishing, 2017, pp. 2-5

<sup>7</sup> Boucht, *supra*, p. 4

<sup>8</sup> *R v. Ahmed* [2014] 3 WLR 23, para. [36].

## II. Dialogue between Strasbourg and the Italian courts in matters of non-conviction-based confiscation

The communication which takes place within a culture is based on certain accepted hypotheses which provide the requisite tools for attributing an implicit meaning and which are thus necessary for the purposes of communication, interpretation and comprehension. Interpretation is governed by preliminary comprehension or preconceptions about the subject matter in question. For example, Hans-Georg Gadamer characterises the precondition for any interpretation using the notion of subjective prejudice.<sup>9</sup> In his analysis, the interpreter can only attach meaning to an object based on a pre-judgment as to what has to be interpreted. As a result, any conscious interpretation requires preliminary comprehension of what is interpreted. Thus, strictly speaking, comprehension and interpretation cannot be differentiated conceptually.

Ronald Dworkin takes the view that in legal interpretation judges play the role of consecutive authors of a novel in which they each write a chapter, adding their own chapter to the story (that of the law) as they are writing. However, in writing a chapter each author must ensure that the story as a whole is coherent; the chapters must fit together in the work and constitute coherent parts in relation to the others. In that way, judges can be compared to authors of a serialised novel, with “The Law” as its title.<sup>10</sup>

Each judge, in adjudicating, is participating in a collective enterprise consisting in interpreting the story of the law – i.e. laws and precedents produced by other judges – in the context of the case at hand, and the judge adds his or her own chapter to this story. The task of each participant is to construct his or her own chapter such that the best possible novel (i.e. the legal system) is produced, in accordance with the collective political morality. Each judicial decision should thus contribute to the coherence of the legal system by giving effect to the collective political morality.

The Court’s dialogue with the Italian authorities has been spurred on by the impulsions of the relevant cases.

### 1. The *Sud Fondi* moment<sup>11</sup>

Prior to our Court’s judgment in the case of *Sud Fondi*, the Italian administrative authorities could order the confiscation of property which had been transformed in breach of the rules applicable to orderly land use

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<sup>9</sup> Gadamer, H-G., *Truth and Method*, Bloomsbury Academic; Reprint edition (June 27, 2013).

<sup>10</sup> Dworkin, R., *Law’s Empire*, Hart Publishing; New Ed edition (1 Oct. 1998)

<sup>11</sup> In using the word “moment” here, I am making reference to the term “constitutional moments” coined in: Ackerman, B., “Storrs Lectures: Discovering the Constitution”, *Yale Law Journal*, vol. 93, pp. 1013-1072 (1984).

(planning regulations). Those measures sought to restore legality: once criminal proceedings had been brought against an individual on charges of illegal transformation of land, the criminal court had jurisdiction to order the confiscation of the illegally transformed land, subject to establishing that the transformation was actually illegal. The court could thus order a measure similar to that which could be taken by the administrative authorities. According to the domestic law provisions existing at the time and the interpretation thereof by the national courts, confiscation ordered by criminal courts was an administrative sanction, because it was a measure intended to restore legality. It was not regarded as a punitive measure linked to the personal liability of the accused; it was warranted by the mere fact that the transformation was illegal. According to the *Sud Fondi* judgment, however, the confiscation measure was a “penalty” within the meaning of Article 7 § 1 of the Convention. That analysis entailed that such a measure could be imposed only on the basis of a sufficiently precise law and on the condition that there was a mental link between the objectively illegal acts and the person who committed them: an element of liability had to be established in that person’s conduct. The Italian courts attempted to implement the *Sud Fondi* judgment, thus leading to an interpretation of domestic law whereby a confiscation order could be issued only against a person “whose liability [had] been established through a mental link” (awareness and intent) with the acts in question.

In terms of our case-law, the applicability of Article 7 represented, in my view, a departure from precedent. There had previously been case-law to the effect that the confiscation of property belonging to A in the context of criminal proceedings against B was not equivalent to the opening of criminal proceedings against A: consequently, A could not rely on the criminal aspect of Article 6 or on Article 7, but would, however, be entitled to invoke the civil limb of Article 6 together with Article 1 of Protocol No. 1.

The question is therefore whether, in the present case, the confiscation measure must be regarded as a criminal sanction imposed on the applicant companies, or whether it should be compared with the above-mentioned line of case-law. The fact that criminal proceedings have been brought against third parties cannot be regarded as equivalent to the prosecution or indictment of the person affected, who therefore cannot rely on the criminal aspect of Article 6 or on Article 7. The Court has already had occasion to examine the imposition of confiscation measures decided following criminal proceedings against third parties, and generally after the latter have been convicted. In those cases it has often found that the person affected by the measure had not been convicted and therefore the criminal limb of Article 6

was not engaged.<sup>12</sup> Even though the Court has accepted that measures in connection with an act for which third parties have been prosecuted could interfere with an applicant's property rights, it has refused to find that this involved the "determination of any criminal charge" against the applicant himself or herself.<sup>13</sup> For the same reasons, it found Article 7 to be inapplicable to a case of confiscation of property which had been used by a third party to commit a criminal offence (confiscation of a vehicle used to assist unlawful immigration).<sup>14</sup>

Nevertheless, the Court has examined the compatibility of this type of confiscation with the civil limb of Article 6<sup>15</sup> and with Article 1 of Protocol No. 1.<sup>16</sup> Ruling on the application of Article 1 of Protocol No. 1, the Court found that, in striking a fair balance between the interests of the State and those of the individual, one of the factors to be taken into account was the behaviour of the owner of the property, including the degree of fault or care which he, she or it had displayed in acquiring the property in question. The Court had to consider whether the confiscation procedure was such as to enable reasonable account to be taken of the degree of fault or care of the person affected or, at least, of the relationship between the person's conduct and the breach of the law which had undoubtedly occurred; and also whether the procedures in question afforded a reasonable opportunity for the person to put his/her/its case to the competent authorities.<sup>17</sup>

Following the *Sud Fondi* case, the Italian courts, as the Constitutional Court mentioned in its judgment no. 49/2015, took the view that Article 7 was applicable to this type of case.

## 2. The *Varvara* moment

Subsequently, the Court confirmed that Article 7 was applicable in such cases,<sup>18</sup> without giving any reasons other than by referring to the *Sud Fondi* judgment. On the merits, it found that three consequences stemmed from the principle of no punishment without law: a prohibition on an extensive interpretation of criminal-law provisions; a prohibition on punishing a person when the offence has been committed by a third party; and a prohibition on imposing a sanction when the person's liability has not been established. On that last point, the Court uses rather equivocal language: it

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<sup>12</sup> See *AGOSI v. the United Kingdom*, 24 October 1986, § 66, Series A no. 108, and *CM v. France* (dec.), no. 28078/95, 26 June 2001

<sup>13</sup> See, for example, *AGOSI*, cited above, § 65.

<sup>14</sup> *Yildirim v. Italy* (dec.), no. 38602/02, ECHR 2003-IV

<sup>15</sup> See *Yildirim* decision, cited above

<sup>16</sup> see *AGOSI*, cited above, § 54, and *Air Canada v. the United Kingdom*, 5 May 1995, §§ 29-48, Series A no. 316-A

<sup>17</sup> *AGOSI*, cited above, § 55

<sup>18</sup> See the *Varvara* judgment, § 51

sometimes speaks more generally of “liability” and sometimes more specifically of a “conviction”, a term which is also used in the strictly criminal context of Article 5 § 1 (a), or “a verdict as to guilt”. The concluding paragraph of the *Varvara* judgment illustrates this ambiguity, because it emphasises the fact that the applicant’s liability “had not been established in a verdict as to his guilt”.<sup>19</sup> Applying that latter principle to the facts of that case, the Court found: “the criminal penalty which was imposed on the applicant despite the fact that the criminal offence had been statute-barred and his criminal liability had not been established in a verdict as to his guilt, is incompatible with the ... legality principle laid down in Article 7 of the Convention”.<sup>20</sup>

The Court of Cassation and the Teramo District Court interpreted *Varvara* (cited above) as requiring a “conviction” for a criminal offence, thus excluding the possibility of imposing a confiscation order in cases where the criminal offence had become time-barred. On the basis of that reading, and on the assumption that they would have to apply domestic law accordingly, they asked the Constitutional Court whether the requirement of a “conviction” would be compatible with the Italian Constitution.<sup>21</sup>

The Constitutional Court’s response was mainly that the referring courts’ questions were based on two erroneous interpretative assumptions.<sup>22</sup>

In the first place, the Constitutional Court was not convinced that the two referring courts had read *Varvara* correctly, by stating that it required a “conviction” for an offence that had to be “criminal” under domestic law. The Constitutional Court noted<sup>23</sup> that such an interpretation would be in conflict, not only with the Italian Constitution (as it would limit the legislature’s discretion to decide whether a given conduct should be “sanctioned” by criminal law or by administrative law), but also with the case-law of the European Court (which accepted that “penalties”, in the sense of the Convention, could be imposed by an administrative authority, without a formal declaration of guilt by a criminal court). Moreover, and more importantly, the Constitutional Court indicated that it was possible to interpret *Varvara* differently, namely by considering that it only required that “liability” be established, in whatever form (a “conviction” being one of several possible forms). As a consequence, it concluded that “as things currently stand” – that is, until the Grand Chamber ruled in *G.I.E.M. and Others*, one could not unequivocally interpret *Varvara* as implying that confiscation was possible only where there was a “conviction” for the offence of illegal transformation of land. Since it was possible to read

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<sup>19</sup> *Ibid.*, § 72

<sup>20</sup> *Ibid.*

<sup>21</sup> See referral order of 17 January 2014, summarised in the Constitutional Court’s judgment no. 49 of 2015, § 1

<sup>22</sup> Italian Constitutional Court Judgement 49/2015., § 6

<sup>23</sup> *Ibid.*, § 6.1

*Varvara* differently, the Constitutional Court took the view that the domestic courts should adopt that interpretation, which was in line with the European Court’s case-law and which was compatible with the Italian Constitution).<sup>24</sup>

In the same judgment no. 49/2015, the Constitutional Court found that the judgments of the Strasbourg Court did not all carry the same weight, depending on whether or not they stemmed from the pilot judgment procedure and whether or not they were part of well-established case-law. It added that, even if legislation had to be interpreted in harmony with the Convention, the Constitution had “axiological supremacy” over the latter.<sup>25</sup>

While the reactions in Italian literature were themselves highly critical of that decision,<sup>26</sup> our Court has merely reacted firmly but moderately by emphasising that “its judgments all have the same legal value. Their binding nature and interpretative authority cannot therefore depend on the formation by which they were rendered”.<sup>27</sup>

The Court had already met with similar criticisms in the past, but the criticism this time came from an institution which took the view that the Convention was a “norm of intermediate rank between statute law and the Constitution”. Moreover, as found by the Constitutional Court’s judgment,<sup>28</sup> Article 117 of the Constitution required the lawmaker to comply with international obligations, thus including the Convention, which had to be applied as interpreted by the European Court of Human Rights.

As the German courts have acknowledged, the European Convention on Human Rights must be given a legal interpretation that is methodologically justifiable. It is now appropriate to look further into the relationship between the Italian Constitutional Court and our Convention.

Before the “Revolution of 2007”, the Italian Constitutional Court took the view that the European Convention on Human Rights was not of a higher value than ordinary legislation.<sup>29</sup> The Italian Constitution provides that the Italian legal system must comply with recognised norms of

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<sup>24</sup> *Ibid.*, § 6.2

<sup>25</sup> Sabato, R, *The Experience of Italy in Judicial Dialogue and Human Rights*, Cambridge University Press, p. 275

<sup>26</sup> See, Bignami, M, “Le gemelle crescono in salute: la confisca urbanistica tra costituzione, CEDU e diritto vivente”; Martinico, G., “Corti costituzionali (o supreme) e ‘disobbedienza funzionale’” Pulitano, D., “Due approcci opposti sui rapporti fra Costituzionale e CEDU in materia penale. Questioni lasciate aperte de Corte cost. N.49/2015”; Ruggeri, A., “Fissati nuovi paletti alla Consulta a riguardo del rilievo della CEDU in ambito interno”; Viganò, F., “La consulta e la tela di Penelope”, Vol.2, *Diritto Penale Contemporaneo (Rivista Trimestrale)*, 2015

<sup>27</sup> See paragraph 252 of the judgement.

<sup>28</sup> See paragraph 130 of the judgment

<sup>29</sup> Barsotti, V., Carozza P. G., Cartabia, M., Simoncini, A., *Italian Constitutional justice in Global Context*, Oxford University Press, 2016, p. 224



international law. Article 2 of the Constitution states that the Republic “recognises and guarantees the inviolable rights of the person”.

In its decisions nos. 348/2007 and 349/2007, the Constitutional Court clarified the operation of the relationship between the domestic authorities and the European Convention on Human Rights together with the rank of the Convention in the national hierarchy of norms.<sup>30</sup>

In those decisions the Constitutional Court declared unconstitutional two laws concerning compensation for expropriation in the public interest and unlawful expropriation. It based its findings on Article 117 § 1 of the Italian Constitution, which provides that “legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.” It also held those laws to be in breach of Article 1 of Protocol No. 1 because the compensation amounts were inadequate.

In Italy, the Convention takes a supra-legislative rank in the hierarchy of norms, i.e. above statute law.<sup>31</sup> However, it is not at the level of the Constitution and must therefore be in conformity with it.<sup>32</sup> Nevertheless, in practice, this analysis of the Constitutional Court means that the domestic courts may suspend any proceedings stemming from national legislation which is incompatible with the Convention and refer a question of constitutionality to the Constitutional Court before deciding the case.<sup>33</sup> That court will then examine whether the Convention provisions, as interpreted by Strasbourg, are in conformity with the Constitution. In the absence of any conflict between the Convention and the Constitution, it will declare the Convention provisions compatible with the Italian constitutional order. If the legislation is incompatible with those provisions the court will declare it unconstitutional under Article 117 § 1 of the Constitution. Article 117 § 1 thus enables the Constitutional Court to make indirect use of the Convention to assess the constitutionality of national legislation, provided that the constitutional norms are upheld.<sup>34</sup>

The Constitutional Court has also acknowledged that the European Court of Human Rights is the only authority competent to give an authoritative interpretation of Convention provisions.<sup>35</sup> One of the implications of that decision goes to the constitutionality of domestic legislation. The limits to the powers of the ordinary courts thus become clear: those courts must refer the question to the Constitutional Court, and they cannot themselves

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<sup>30</sup> Ibid., p. 226

<sup>31</sup> Pollicino, O. *The ECtHR and the Italian Constitutional Court*, *The UK and European Human Rights: A strained Relationship?*, Bloomsbury, p. 366

<sup>32</sup> Barsotti and others, *supra*, p. 229

<sup>33</sup> Pollicino, *supra*, p. 366.

<sup>34</sup> Sabato, *supra*, pp. 273-274

<sup>35</sup> Pollicino, *supra*, p. 366.

examine the relationship between the legislation, the Convention and the Constitution.

The Constitutional Court changed its practice based on the decisions of our Court in the field of judgments *in absentia* (decision no. 317/2009) and the right to a public hearing in criminal proceedings (decisions nos. 93/2010 and 80/2011), and even envisaged a revision of criminal procedure to bring it into line with a finding of a violation of the right to a fair trial (decision no. 113/2011).<sup>36</sup> Prior to judgment no. 49/2015, it had also diverged from the European Court of Human Rights in decision no. 264/2012 (on the privileged treatment of a certain class of pensioner) and in decision no. 263/2011 (on the scope of the *lex mitior* principle).<sup>37</sup>

### Conclusion

In the case of *G.I.E.M. and Others* our Court has confirmed the *Varvara* case-law by endeavouring to clarify certain less clear aspects in that Chamber judgment. The case highlights the difficulties of judicial dialogue in a context where the need to put an end to cross-border crime has increased and has led to changes in international legislation; such development must be accompanied by human rights protection.

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<sup>36</sup> Barsotti and others, *supra*, p. 230

<sup>37</sup> *Ibid.*

PARTLY CONCURRING, PARTLY DISSENTING OPINION  
OF JUDGE PINTO DE ALBUQUERQUE

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## I. Introduction (§§ 1-2)

1. Although I have subscribed to the joint dissent of Judges Sajó, Karakaş, Keller, Vehabović, Kūris and Grozev (“the joint dissent”), I am also writing separately for three reasons. Firstly, I am convinced that the heart of this case lies in the way the Constitutional Court of Italy (the “Constitutional Court”<sup>1</sup>) interpreted the *Varvara* judgment<sup>2</sup>. To my mind, the joint dissent does not exhaust the reasons why the Constitutional Court misunderstood *Varvara*. I will elaborate further on this issue. Secondly, I feel that I owe an additional explanation for voting for a violation of Article 7 of the European Convention on Human Rights (“the Convention”) in the present case (in respect of the applicant Mr Gironde), while I voted in the opposite sense in the *Varvara* case.

2. Thirdly, the Constitutional Court reviewed, in its judgment no. 49 of 2015, the terms of the relationship between the Convention, as interpreted by the European Court of Human Rights (“the Court”), and the Italian Constitution. The innovative – but problematic – terms in which this relationship was framed merit the closest scrutiny by this Court, since they

<sup>1</sup> The Italian Constitutional Court, sitting in the *Palazzo della Consulta*, will also be referred to in this opinion as the “*Consulta*” or the “*Giudice delle leggi*”.

<sup>2</sup> *Varvara v. Italy*, no. 17475/09, 29 October 2013.

directly affect the operation of the Court’s case-law in Italy and may decisively influence other constitutional and supreme courts in the way they apply the Convention in their own jurisdictions, in view of the high reputation of the Constitutional Court of Italy. I do not think that a true dialogue between courts is served by ignoring the criticism addressed by some supreme and constitutional courts to the Court and its case-law. Neither reasons of judicial diplomacy nor considerations of political strategy have justified the Court’s deafening silence on such a burning issue in some instances in the past. This time it was different.

The message sent by the present judgment is neither sibylline, nor hesitant, but rather straightforward and firm: all judgments of the Court have the same legal value, binding nature and interpretative authority<sup>3</sup>. In view of its undeniable importance, not only for Italy, but for all Contracting Parties to the Convention, I will assess the impact of this principle for the European human rights protection system and draw all the consequences for the implementation of the Convention in Italy.

### **Part I – Rome talking to Strasbourg (§§ 3-56)**

## **II. The relationship between the Convention and the Constitution (§§ 3-20)**

### **A. The ground-breaking first “twin judgments” (§§ 3-7)**

#### **(i) The Convention as a norm of intermediate rank between Constitution and statute law (§§ 3-4)**

3. Prior to 2007<sup>4</sup>, the *Consulta* accorded to the Convention the rank of statute law in the Italian legal order, because the Convention had been implemented by statute, i.e., Law no. 848 of 4 August 1955<sup>5</sup>. On the basis of a dualist approach to international law, the Constitutional Court affirmed that Convention provisions had the same status as the statute which had incorporated it into the domestic legal order<sup>6</sup>. Yet simultaneously the

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<sup>3</sup> Paragraph 252 of the judgment.

<sup>4</sup> It is to be noted that the first reference to the Court’s case-law in the Constitutional Court President’s annual report to the media dates from 1989 (regarding the case-law on length of proceedings) and the first reference to the relationship between the Constitutional Court and the Court dates from 2004.

<sup>5</sup> Constitutional Court judgments no. 188/80, no. 153/87, no. 323/89, no. 315/90 and no. 388/99.

<sup>6</sup> It was only later that the Constitutional Court stated, in a well-known, but isolated *obiter dictum*, that the 1955 statute ratifying the Convention had a special force and could not be revoked by subsequent statute, because “these are provisions arising from a source with atypical competence, and, as such, they are unsusceptible to being repealed or modified by ordinary law” (judgment no. 10/93).

Constitutional Court admitted that “the interpretation in conformity with the Constitution is supported by significant regulatory instructions, including those with supranational origins”, referring to the Convention and the International Covenant on Civil and Political Rights<sup>7</sup>. Furthermore, in order to enrich the interpretation of the constitutional catalogue of fundamental rights, the Constitutional Court invoked not only Convention provisions, but also the Court’s case-law<sup>8</sup>. Nevertheless, the impact of the Convention in the constitutional landscape remained very limited<sup>9</sup>. This did not hinder the ordinary judges<sup>10</sup> from occasionally applying Convention law to the detriment of the conflicting domestic statutory provision<sup>11</sup>.

4. In its seminal judgments no. 348 and no. 349 of 2007, also known as the “twin judgments” (*sentenze gemelle*), the Constitutional Court reacted to this move of the ordinary judges, taking into account the new text of Article 117 of the Constitution, as amended by Constitutional Law no. 3 of 18 October 2001, which requires the legislature to comply with international obligations<sup>12</sup>. On this constitutional basis, the Constitutional Court took the

<sup>7</sup> Constitutional Court judgment no. 413 of 2004.

<sup>8</sup> Constitutional Court judgment no. 154 of 2004, which referred to the right protected by Article 6 of the Convention, in the light of its interpretation in *Cordova v. Italy*, no. 40877/98 (no. 1) and no. 45649/99 (no. 2), 30 January 2003.

<sup>9</sup> A. Pace, “La limitata incidenza della Cedu sulle libertà politiche e civili in Italia” (2001) 7 *Diritto pubblico* 1; M. Cartabia, “La CEDU e l’ordinamento italiano: rapporti tra fonti, rapporti tra giurisdizioni”, and F. Viganò, “‘Sistema CEDU’ e ordinamento interno: qualche spunto di riflessione in attesa delle decisioni della Corte costituzionale”, both in R. Bin et al. (eds), *All’incrocio tra Costituzione e CEDU. Il rango delle norme della Convenzione e l’efficacia interna delle sentenze di Strasburgo*, Turin: Giappichelli, 2007. The contributions to this Ferrara seminar give an excellent overview of the situation immediately before the delivery of the “twin judgments”.

<sup>10</sup> Ordinary judges (*giudici comuni*) will be used in this opinion in the sense of the ordinary domestic courts, i.e. by opposition to the Constitutional Court.

<sup>11</sup> See the emblematic Court of Cassation judgments no. 2194 of 1993, no. 6672 of 1998 and no. 28507 of 2005.

<sup>12</sup> The Italian scholarly work on the topics of this opinion is immensely rich. In order to reach a wider audience, I will give preference to literature in English and French, without neglecting the literature in Italian. On the judgments no. 348 and no. 349 see, among others, G. Repetto, “Rethinking a constitutional role for the ECHR, The dilemmas of incorporation into Italian domestic law” in G. Repetto, *The Constitutional Relevance of the ECHR in Domestic and European Law, an Italian perspective*, Cambridge: Intersentia, 2013, 37-53; M. Parodi, “Le sentenze della Corte Edu come fonte di diritto. La giurisprudenza costituzionale successiva alle sentenze n. 348 e n. 349 del 2007” (2012) *Diritti Comparati*; F. Jacquolot, “La réception de la CEDH par l’ordre juridique italien : itinéraire du dualisme italien à la lumière du monisme français” (2011) *Revue de Droit Public* 1235; A. Ruggeri, “Corte costituzionale e Corti europee: il modello, le esperienze, le prospettive”, in Del Canto and Rossi (eds), *Corte costituzionale e sistema istituzionale*, Turin: Giappichelli, 2011; P. Ridola, “La Corte costituzionale e la Convenzione europea dei diritti dell’uomo: tra gerarchia delle fonti nazionali e armonizzazione in via interpretativa”, in P. Ridola, *Diritto comparato e diritto comune europeo*, Turin: Giappichelli, 2010; E. Cannizzaro, “The effect of the ECHR on the Italian legal order: direct effect and supremacy” (2009) *XIX Italian Yearbook of International Law* 173; F.

view that the Convention was a norm of intermediate rank between statute law and the Constitution and asserted its monopoly over any conflict between Convention and domestic law. In a discourse focused on the formal placement of international treaties in the Italian system of sources of law, the supralegislative rank of Convention law was unambiguously affirmed. In case of conflict between the Convention, as interpreted by the Court, and domestic legislation subsequent to Law no. 848 of 4 August 1955, ordinary judges could not give priority to the former, and therefore could not set aside the conflicting domestic provision, but instead had to submit the conflict question to the “final say” of the Constitutional Court<sup>13</sup>.

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Lafaille, “CEDH et constitution italienne: la place du droit conventionnel au sein de la hiérarchie des normes” (2009) *Revue de Droit Public* 1137; F. Sorrentino, “Apologia delle “sentenze gemelle” (brevi note a margine delle sentenze nn. 348 e 349/2007 della Corte costituzionale”, in *Diritto e società*, 2/2009; AAVV, *Riflessioni sulle sentenze 348-349/2007 della Corte costituzionale*, a cura di C. Salazar e A. Spadaro, Milan, 2009; O. Pollicino, “Constitutional Court at the crossroads between parochialism and cooperative constitutionalism” (2008) 4 *European Constitutional Law Review* 363; F. Dal Monte and F. Fontanelli, “The Decisions no. 348 and 349 of 2007 of the Italian Constitutional Court: the efficacy of the European convention in the Italian legal system” (2008) 9 *German Law Journal* 889; F. Ghera, “Una svolta storica nei rapporti del diritto interno con il diritto internazionale pattizio (ma non in quelli con il diritto comunitario)” (2008) *Foro italiano* I, 50; M. Luciani, “Alcuni interrogativi sul nuovo corso della giurisprudenza costituzionale in ordine ai rapporti tra diritto italiano e diritto internazionale” (2008) *Corriere giuridico* 185; M. Cartabia, “Le sentenze gemelle: Diritti fondamentali, fonti, giudici” (2007) 52 *Giurisprudenza Costituzionale* 3564; F. Donati, “La CEDU nel sistema italiano delle fonti del diritto alla luce delle sentenze della Corte costituzionale del 24 ottobre 2007 (2007) *I Diritti dell’Uomo* 14; A. Guazzarotti, “La Corte e la CEDU: il problematico confronto di standard di tutela alla luce dell’art. 117, comma I, Cost.” (2007) *Giurisprudenza Costituzionale* 3574; and Pinelli, “Sul trattamento giurisdizionale della CEDU e delle leggi con essa confliggenti” (2007) 52 *Giurisprudenza Costituzionale* 3518.

<sup>13</sup> The fact is that some ordinary courts continued to disapply domestic law on the basis of the Convention, like the *Cassazione* (Court of Cassation) judgment (Section I) no. 27918 of 2011, which mentions the *immediata operatività* and the *diretta applicabilità* of the Convention, the *Cassazione* judgment (Section III) no. 19985 of 2011, which refers to the *precettività delle norme convenzionali*, and the *Consiglio di Stato* judgment of 2 March 2010, no. 1220, arguing that the Convention had become part of EU law *ipso jure*, after the entry into force of the Lisbon Treaty and, therefore, now had direct effect and primacy. The Constitutional Court opposed this latter interpretation, in its judgment no. 80 of 2011 and particularly in its judgment no. 210/2013, opining that the new version of Article 6 § 3 of the Treaty on European Union had not transformed the Convention into a part of EU law. The Court of Justice of Luxembourg confirmed the Constitutional Court’s opinion in its judgment of 24 April 2012, delivered in case C-571/10, *Kambejaj*. On the reaction of the ordinary courts see, among others, L. Fontaine and F. Laffaille, “La «communautarisation» de la Convention Européenne des Droits de l’Homme. Le juge administratif italien et les normes européennes” (2011) 127 *Revue de Droit Public* 1015; A. Ruggeri, “La Corte fa il punto sul rilievo interno della CEDU e della Carta di Nizza-Strasburgo (a prima lettura di Corte cost. n. 80 del 20/1)”, in *forumcostituzionale.it*, 23 March 2011; E. Lamarque, “Il vincolo alle leggi statali e regionali derivante dagli obblighi internazionali nella giurisprudenza comune”, in Corte costituzionale (ed), *Corte costituzionale, giudici comuni*

The Constitutional Court will then assess whether the Convention provision at stake, as interpreted by the Court, is compatible with the Constitution and, if so, whether the impugned statute is compatible with the Convention. In the event that the Convention provision at stake, as interpreted by the Court, were incompatible with the Constitution, Law no. 848 of 4 August 1955 would have to be partially struck down, in respect of the said provision, since the Convention itself cannot be found unconstitutional. Were the impugned statute incompatible with the Convention, the former would have to be struck down, because it would infringe Article 117 § 1 of the Constitution. Therefore the Strasbourg Court's interpretation of the Convention has normative value, in so far as it functions as a normative standard in the constitutionality assessment of ordinary laws.

**(ii) The ordinary judges' limited power to apply the Convention (§§ 5-7)**

5. According to the *Giudice delle leggi*, the Contracting Parties to the Convention did not create an international legal order and did not impose an obligation to incorporate the Convention into the domestic legal order. It could not therefore be asserted that there was an external legal order which, through decision-making bodies, adopted *omisso medio* norms with binding force over all domestic authorities. There was accordingly no limitation of national sovereignty. Individuals could not therefore directly enjoy the protection afforded by the Convention<sup>14</sup>. Nevertheless, again according to the Constitutional Court, it was for the ordinary judges to interpret the domestic norm in conformity with the Convention and with the Court's case-law. In case of doubt as to the compatibility of the domestic norm with the Convention, the ordinary judge would be required to raise a question of constitutionality and refer it to the Constitutional Court.

6. This reasoning was basically premised on the alleged distinction between the European Union legal order, which admittedly had direct effect, and the Convention, which in the Constitutional Court's understanding had no direct effect in the domestic legal order of the Contracting Parties in so far as the Convention did not allow ordinary judges to set aside conflicting statutory legislation<sup>15</sup>. Although admitting that the Convention was different from other international treaties, to the extent that its interpretation was not in the hands of the Contracting Parties, but in those of a Court, which had

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*e interpretazioni adeguate*, Milan: Giuffrè, 2010; and I. Carlotto, "I giudici comuni e gli obblighi internazionali dopo le sentenze n. 348 e n. 349 del 2007 della Corte costituzionale: un'analisi sul seguito giurisprudenziale" (2010) *Politica del Diritto* 41.

<sup>14</sup> This was not a unanimous view of the Italian highest courts. For example, in its judgment no. 1191/89, the Supreme Court had already stated that Article 6 of the Convention was self-executing.

<sup>15</sup> See paragraph 3.3 of the *cons. in dir.* (the legal reasoning) of Constitutional Court judgment no. 348/2007.



the “final say” (*ultima parola*)<sup>16</sup> with regard to such interpretation, the Constitutional Court stressed that the Convention should be understood as a multilateral agreement which did not limit the Contracting parties’ sovereignty<sup>17</sup>. Ultimately, human rights treaties, like the Convention, should be treated as any other international treaty, except in the case of an international treaty which encapsulated customary principles of international law<sup>18</sup>.

7. In the logic of the “twin judgments”, the Convention could not even provide a higher degree of protection than the Constitution, but only a “guarantee of fundamental rights at least equivalent to the level guaranteed by the Italian Constitution” (“*una tutela dei diritti fondamentali almeno equivalente al livello garantito dalla Costituzione italiana*”)<sup>19</sup>. The Convention thus remained an external source of law that should not imperil the unity of the Constitution. While the Constitutional Court had to strike a reasonable balance between the international law obligations, including Convention obligations, and the safeguarding of constitutionally protected interests contained in other provisions of the Constitution, the primacy of Convention law over statute law was ensured solely through the means of Article 117 § 1 of the Constitution, and the Convention provisions as well as the Court’s judgments interpreting them should be perceived as “external facts” in relation to the Italian legal order. The old-fashioned dualism *à la Anzilotti* remained alive, the Convention being clearly placed under the scrutiny of the Constitutional Court, as any other law<sup>20</sup>.

## **B. The refined second “twin judgments” (§§ 8-14)**

### **(i) The maximum expansion of Convention and Constitution guarantees (§§ 8-10)**

8. Two years later the Constitutional Court refined the “twin judgments” logic, with a new couple of “twin judgments”, judgments no. 311 of 2009 and no. 317 of 2009<sup>21</sup>. While highlighting the differentiated nature of some

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<sup>16</sup> See paragraph 6.2 of the *cons. in dir.* of Constitutional Court judgment no. 348/2007.

<sup>17</sup> See paragraph 6.1 of the *cons. in dir.* of Constitutional Court judgment no. 348/2007.

<sup>18</sup> See paragraph 6.1 of the *cons. in dir.* of Constitutional Court judgment no. 349/2007.

<sup>19</sup> *Ibid.*

<sup>20</sup> See paragraph 4.6 of the *cons. in dir.* of Constitutional Court judgment no. 348/2007.

<sup>21</sup> On the judgments no. 311 and 317 see, among others, V. Barsotti et al., *Italian Constitutional Justice in Global Context*, Oxford: Oxford University Press, 2015; N. Perlo, “Les juges italiens et la cour européenne des droits de l’homme : vers la construction d’un système juridique intégré de protection des droits”, in X. Magnon et al. (eds), *L’office du juge constitutionnel face aux exigences supranationales*, Brussels: Bruylant, 2015; and “La Cour Constitutionnelle italienne et ses résistances à la globalisation de la protection des droits de l’homme: « un barrage contre le pacifique »?” (2013) 95 *Revue française de droit constitutionnel* 717; C. Padula, “La Corte costituzionale ed i ‘controlimiti’ alle sentenze della Corte europea dei diritti dell’uomo: riflessioni sul bilanciamento dell’art. 117, co. 1,

Convention provisions, which included norms of a customary nature directly applicable by the ordinary judge in accordance with Article 10 of the Constitution<sup>22</sup>, and the role of the Court's case-law as the authoritative interpreter of the Convention, with the logical consequence that the Constitutional Court lacked power to substitute its own interpretation of a Convention provision for that of the Court<sup>23</sup>, the judges of the *Palazzo della Consulta* nevertheless limited the Court's interpretative authority to the "substance" (*la sostanza*) of its "consolidated" (*consolidatasi*) case-law<sup>24</sup>.

9. With the laudable purpose of providing the highest possible degree of protection to the fundamental rights that are common to both the Convention and the Constitution, the *Giudice costituzionale* engaged in a balancing exercise on the basis of the "interpenetration" (*compenetrazione*) between each catalogue of rights and "the normative interrelationships between the various levels of guarantee" (*interrelazioni normative tra i vari livelli delle garanzie*). Thus the judges of the *Consulta* explicitly admitted that the Convention as interpreted by the Court was on a par with the Constitution: "an ECHR provision, when it supplements Article 117 § 1 of the Constitution, receives from the latter its status within the system of

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Cost.", in *Federalismi.it*, 10 December 2014; G. Repetto, "L'effetto di vincolo delle sentenze della Corte europea dei diritti dell'uomo nel diritto interno: dalla riserva di bilanciamento al 'doppio binario'" (2014) 20 (3) *Diritto Pubblico* 1075; M. Cartabia, *La tutela multilivello dei diritti fondamentali-il cammino della giurisprudenza costituzionale italiana dopo l'entrata in vigore del Trattato di Lisbona*, Incontro trilaterale tra le Corti costituzionali italiana, portoghese e spagnola - Santiago del Compostela 16-18 ottobre 2014; F. Gallo, "Rapporti fra Corte Costituzionale e Corte EDU", Brussels, 24 maggio 2012, in *Rivista AIC* 1/2013; D. Tega, *I diritti in crisi tra Corti nazionali e Corte europea di Strasburgo*, Milan: Giuffrè, 2012; O. Pollicino, *Allargamento dell'Europa ad est e rapporti tra Corti costituzionali e corti europee. Verso una teoria generale dell'impatto interordinamentale del diritto sovranazionale*, Milan: Giuffrè, 2012; D. Tega, "L'ordinamento costituzionale italiano e il "sistema" CEDU: accordi e disaccordi", in V. Manes and V. Zagrebelsky (eds), *La CEDU nell'ordinamento penale italiano*, Milan: Giuffrè, 2011; E. Gianfrancesco, "Incroci pericolosi: CEDU, Carta dei diritti fondamentali e Costituzione italiana tra Corte costituzionale, Corte di giustizia e Corte di Strasburgo", in *Rivista dell'Associazione italiana dei costituzionalisti*, n. 1/2011; O. Pollicino, "Margine di apprezzamento, art 10, c.1, Cost. e bilanciamento "bidirezionale": evoluzione o svolta nei rapporti tra diritto interno e diritto convenzionale nelle due decisioni nn. 311 e 317 del 2009 della Corte costituzionale?", in *Forum di Quaderni costituzionali*, 16 December 2009; A. Ruggeri, "Conferme e novità di fine anno in tema di rapporti tra diritto interno e CEDU (a prima lettura di Corte cost. nn. 311 e 317 del 2009)", *Forum di Quaderni costituzionali*, 2009.

<sup>22</sup> See paragraph 6 of the *cons. in dir.* of Constitutional Court judgment no. 311/2009.

<sup>23</sup> See paragraph 7 of the *cons. in dir.* of Constitutional Court judgment no. 317/2009.

<sup>24</sup> See paragraph 6 of the *cons. in dir.* of Constitutional Court judgment no. 311/2009. In the recent judgment no. 49 of 2015, the Constitutional Court reiterated this interpretative principle: "Questa Corte ha già precisato, e qui ribadisce, che il giudice comune è tenuto ad uniformarsi alla «giurisprudenza europea consolidatasi sulla norma conferente» (sentenze n. 236 del 2011 e n. 311 del 2009), «in modo da rispettare la sostanza di quella giurisprudenza» (sentenza n. 311 del 2009; nello stesso senso, sentenza n. 303 del 2011)".

sources, with all implications in terms of interpretation and balancing ...”<sup>25</sup>. Consequently, Article 117 of the Constitution did not preclude a higher-level protection by the Convention, as interpreted by the Strasbourg Court’s case-law:

“It is evident that this court not only cannot permit the application of Article 117 § 1 of the Constitution to determine a lower level of protection compared to that already existing under domestic law, but neither can it accept that a higher level of protection which could be introduced through the same mechanism should be denied to the holders of a fundamental right. The consequence of this reasoning is that the comparison between the Convention protection and constitutional protection of fundamental rights must be carried out seeking to obtain the greatest expansion of guarantees, including through the development of the potential inherent in the constitutional norms which concern the same rights.”<sup>26</sup>

It is noteworthy that the Constitutional Court accorded itself the power to determine that the protection afforded by the Convention, as interpreted by the Strasbourg Court, may be stronger than that provided by the Constitution. But this also means, conversely, that it can determine the opposite, namely that the protection provided by the Constitution may be stronger than that of the Convention as interpreted by Strasbourg.

10. While pursuing “the maximum expansion of the guarantees” of both the Convention and the Constitution, it is the Constitutional Court’s task to perform the necessary balancing exercise with “other constitutionally protected interests, in other words, other constitutional provisions that in turn guarantee fundamental rights that might be affected by the expansion of individual protection”<sup>27</sup>. By so doing, the Constitutional Court puts the Convention application in the Italian legal order into a broader systemic perspective, underscoring the importance of the “constitutional environment” within which the Convention application takes place and the *Consulta*’s own role as the ultimate arbiter over the enforceability of the Court’s judgments in the Italian legal order.

In spite of the novel para-constitutional rank accorded to Convention law, the seeds of discord with Strasbourg were sown in so far as the breadth and limits of its incorporation are not only rhetorically, but effectively dependent on the domestic constitutional adjudication of the interests involved. As a matter of constitutional law, the constitutionality test imposed on Convention norms, as interpreted by the Court, is not even limited to any set of special core constitutional norms or interests. Unlike

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<sup>25</sup> See paragraph 7 of the *cons. in dir.* of Constitutional Court judgment no. 317/2009.

<sup>26</sup> *Ibid.*

<sup>27</sup> This is a refinement of the “*ragionevole bilanciamento*” already mentioned in paragraph 4.7 of the *cons. in dir.* of judgment no. 348/2007. The added value of the 2009 judgment is its emphasis on the less formalistic and hierarchical, more axiological and substantive relationship between the Constitution and the Convention, in view of the “maximum expansion of guarantees” principle.

the notorious “counter-limits” (*controlimiti*)<sup>28</sup> which may serve against the penetration of EU law<sup>29</sup> or even delimit certain rules of international customary law<sup>30</sup>, every constitutional norm or interest may serve as a legitimate bar to the penetration of the Convention.

**(ii) The “margin of appreciation” of the Court’s judgments (§§ 11-15)**

11. While there was a clear upgrading of Convention law, as interpreted by the Strasbourg Court, in the “second twin judgments”, in so far as it is no longer perceived as an external body of law in the Italian legal order, but as a body of law on a par with, and having an axiological affinity with, the Constitution, its application in domestic law remains in any event under the strict control of the Constitutional Court. In order to safeguard that control, the Constitutional Court makes use of a technical instrument derived from the Strasbourg case-law itself, the “margin of appreciation” (*margin di apprezzamento*), but applies it to the modulation of the legal effect of the Court’s judgments in the Italian legal order<sup>31</sup>.

12. For the sake of reinforcing this line of reasoning, the Constitutional Court insists on the distinction between the role of the Strasbourg Court, which is to “decide on the individual case and the individual fundamental right” (*alla Corte europea spetta di decidere sul singolo caso e sul singolo diritto fondamentale*), and the role of domestic authorities, including the Constitutional Court, which is to protect fundamental rights in a coordinated and systemic manner, and thus prevent the protection of certain fundamental rights “from developing in an unbalanced manner to the detriment of other rights also protected by the Constitution and by the European Convention”

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<sup>28</sup> This intangible core of constitutional identity and State sovereignty includes “the fundamental principles of our constitutional order” and “the inalienable rights of the human person”, as described by the Constitutional Court judgments no. 183/73, no. 170/84, no. 232/89 and no. 238/2014.

<sup>29</sup> See the *Consiglio di Stato* judgment of 8 August 2005, case 4207/2005.

<sup>30</sup> See Constitutional Court judgment no. 238/2014.

<sup>31</sup> The margin of appreciation was mentioned in both paragraph 7 of the judgment no. 317 of 2009 and paragraph 9 of the judgment no. 311 of 2009. But the meaning of the two references is very distinct. If the one of judgment no. 311 merely refers to the Court’s case-law on interpretation in certain social domains, the one of judgment no. 317 is different, since it pretends that there is margin of appreciation for states while implementing the Court’s judgments. On the use of the margin of appreciation doctrine by the Constitutional Court, see M. Cartabia, *La tutela multilivello...*, cited above, page 20, who justifies its use “where a consensus is not yet consolidated”; see also V. Schiarabba, “La dottrina del margine di apprezzamento e i rapporti con le corti nazionali”, in O. Pollicino and V. Sciarabba, “La Corte europea dei diritti dell’uomo e la Corte di Giustizia nella prospettiva della giustizia costituzionale”, in *forumcostituzionale.it*, 2010; and F. Bilancia, “Con l’obiettivo di assicurare l’effettività degli strumenti di garanzia la Corte costituzionale italiana funzionalizza il “margine di apprezzamento” statale, di cui alla giurisprudenza CEDU, alla garanzia degli stessi diritti fondamentali” (2009) *Giurisprudenza costituzionale* 4772.

(*si sviluppi in modo squilibrato, con sacrificio di altri diritti ugualmente tutelati dalla Carta costituzionale e dalla stessa Convenzione europea*)<sup>32</sup>.

13. Two critical claims regarding the nature of the Court's case-law are implicit in this line of argument, and they have been made explicit in subsequent constitutional case-law. On the one hand, for the *Consulta*, the Court's judgments are too case-specific and atomistic<sup>33</sup>, since they are very much dependent on the context and the individual circumstances of each case. In view of the precedent-oriented nature of the Court's jurisprudence, which warrants a long consolidation of its principles, not every judgment can be recognised as representing the Court's case-law. On the other hand, in the *Consulta*'s eyes, the Strasbourg judgments are too simplistic and linear, because they take into account only the subjective interests at stake, not all the involved objective interests; thus the Court's case-law does not consider fully the peculiarity of the Italian legal order<sup>34</sup>. If need be, the Constitutional Court may repeat the balancing of interests performed by Strasbourg in the light of the objective interests prevailing in the Italian constitutional order<sup>35</sup>. It is precisely for that reason that a certain margin of appreciation should be accorded to the domestic authorities in the implementation of the Court's judgments<sup>36</sup>.

14. The second "twin judgments" (judgments 311 and 317 of 2009) represent a certain change of heart of the judges of the *Consulta* with regard to the first "twin judgments" (judgments no. 348 and no. 349 of 2007). While the "first twins" were focused on establishing a Kelsenian-style, formal order of prevalence of the Constitution over the Convention and of

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<sup>32</sup> See paragraph 7 of the *cons. in dir.* of Constitutional Court judgment no. 311/2009.

<sup>33</sup> See Constitutional Court judgment no. 236/2011. Referring to the positions of the Strasbourg Court and the Constitutional Court, M. Cartabia considered that "if this case did not lead to a true and proper judicial conflict, the diversity of the positions kept by the two courts cannot be concealed" (*La tutela multilivello...*, cited above, page 18).

<sup>34</sup> See Constitutional Court judgment no. 236/2011.

<sup>35</sup> See Constitutional Court judgment no. 264/2012.

<sup>36</sup> It should be noted that, in its judgment no. 264/2012, the Constitutional Court used the margin of appreciation doctrine to disapply the judgment of the Court delivered, not the *controlimiti*, as the *giudice rimettente* had asked (paragraph 4.2). See on this judgment, among others, M. Cartabia, "I diritti in Europa: la prospettiva della giurisprudenza costituzionale italiana" (2015) *Rivista trimestrale di diritto pubblico*, I, 45, and *La tutela multilivello...*, cited above, pages 12-15; F. Viganò, "Convenzione europea dei diritti dell'uomo e resistenze nazionalistiche: Corte costituzionale italiana e Corte europea tra guerra e dialogo", in *Diritto Penale Contemporaneo* (DPC), 14 July 2014; R. Dickmann, "Corte costituzionale e controlimiti al diritto internazionale. Ancora sulle relazioni tra ordinamento costituzionale e Cedu", in *Federalismi.it, Focus Human Rights*, n. 3/2013, 16 September 2013; M. Massa, "La sentenza n. 264 del 2012 della Corte Costituzionale: dissonanze tra le corti sul tema della retroattività", in *Quaderni costituzionali*, 1/2013; and A. Ruggeri, "La Consulta rimette abilmente a punto la strategia dei suoi rapporti con la Corte EDU e, indossando la maschera della consonanza, cela il volto di un sostanziale, perdurante dissenso nei riguardi della giurisprudenza convenzionale, ("a prima lettura" di Corte cost. n. 264 del 2012)", in *Diritti Comparati*, 14 December 2012.

the Convention over statute, aimed at delimiting the respective roles of the ordinary judge and the constitutional judge when ensuring the hierarchy of the sources of law<sup>37</sup>, the “second twins” sought a substantive articulation between the Constitution and the Convention based on the principle of the maximisation of the protection of fundamental rights of both catalogues, but imposing the terms of a one-sided delimitation of power between Rome and Strasbourg<sup>38</sup>.

Ultimately, the Constitutional Court conveyed an unambiguous message that, while it was open to a certain degree of integration of Convention and constitutional law, it wanted to retain a considerable degree of discretion in the execution of the Court’s judgments in the domestic legal order, thus creating an obvious potential for conflict with Strasbourg and for legal uncertainty in the Italian legal order<sup>39</sup>.

15. Unsurprisingly, the conflict erupted three years later, with the “Swiss pensions case”. In *Maggio and Others v. Italy*<sup>40</sup> the Court contradicted Constitutional Court judgment no. 172 of 2008, by considering that in Law no. 296/2006 the Italian State had infringed the applicants’ rights under Article 6 § 1 of the Convention and thus rejected the Government’s argument that the Law had been necessary to re-establish equilibrium in the pension system, by removing any advantages enjoyed by individuals who had worked in Switzerland and paid lower contributions, as not compelling enough to overcome the dangers inherent in the use of retrospective legislation which had the effect of influencing the judicial determination of a pending dispute to which the State was a party. These divergent views between Strasbourg and Rome led to the Constitutional Court’s judgment no. 264 of 2012 repeating the Court’s balancing exercise in the light of “other constitutional interests” and finding that there indeed existed compelling general interest reasons justifying a retroactive application of the law. Oddly enough, the *Consulta* invoked “not only the national axiological system in its interaction, but also the substance of the Court’s decision at stake” (“*non solo il sistema nazionale di valori nella loro interazione, ma anche la sostanza della decisione della Corte EDU di cui si tratta*”), as if respect for the “substance” of the Strasbourg case-law would warrant disrespect for the Court’s *Maggio* judgment. Afterwards, in *Cataldo*

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<sup>37</sup> See the illuminating remarks of the former Judge of the Constitutional Court, Sabino Cassese, *Dentro la Corte. Diario di un giudice costituzionale*, Bologna: Il Mulino, 2015, 78, 88, 89 and 213.

<sup>38</sup> The Constitutional Court has not been consistent in its language since judgment no. 317/2009, sometimes still invoking the hierarchical type of language, as for example in judgment no. 93/2010.

<sup>39</sup> I had already anticipated this conflict in footnote 9 of my separate opinion in *Fabris v. France* [GC], no. 16574/08, 7 February 2013.

<sup>40</sup> *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011.

*and Others v. Italy*<sup>41</sup>, and *Stefanetti and Others v. Italy*<sup>42</sup>, the Court made it clear that it was adhering to its previous position. In its latest judgment no. 166 of 2017, the Constitutional Court did not change its position, reiterating that the “innovation” in Strasbourg’s *Stefanetti* judgment (“*il novum della sentenza Stefanetti*”) added nothing to the discussion on the constitutionality of the disputed domestic norm<sup>43</sup>.

### **C. The *revolutio* of judgment no. 49/2015 (§§ 16-20)**

#### **(i) The undisputed legacy of *Sud Fondi* (§§ 16-17)**

16. After the “double monologue” (*doppio monologo*) in the Swiss pensions case<sup>44</sup>, the occurrence of another serious conflict between the *Consulta* and the Strasbourg Court was predictable in view of the terms in which their relationship had been framed in the second “twin judgments”. The conflict arose in January and May 2014, when two questions of

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<sup>41</sup> *Cataldo and Others v. Italy*, nos. 54425/08, 58361/08, 58464/08, 60505/08, 60524/08 and 61827/08, 24 June 2014.

<sup>42</sup> *Stefanetti and Others v. Italy*, nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10, 15 April 2014.

<sup>43</sup> See paragraph 5 of *cons. in dir.* in Constitutional Court judgment no. 166/2017. The present situation can only be overcome with either an intervention by the legislator, as suggested by the Constitutional Court in paragraph 8 of that judgment, or a declaration of the partial unconstitutionality of Law no. 848 of 1955 with regard to Article 6 of the Convention and the consequent declaration of a reservation to the Convention in this regard. The Court would have the final say as to the Convention compatibility of this reservation. Were this legal avenue to fail, only the denunciation of the Convention would be left to the Italian State. In any event, the situation of refusal of execution of one of the Court’s judgments engages the international responsibility of the Italian State.

<sup>44</sup> In fact, contemporary to the Swiss pensions case there was another case regarding the constitutional legitimacy of legislative provisions of authentic interpretation (the so-called ATA staff case), in which the Court stated that “S’agissant de la décision de la Cour constitutionnelle, la Cour rappelle qu’elle ne saurait suffire à établir la conformité de la loi no 266 de 2005 avec les dispositions de la Convention” (*Agrati and Others v. Italy*, nos. 43549/08, 6107/09 and 5087/09, § 62, 7 June 2011), thus opposing the conclusions of Constitutional Court judgment no. 234/2007. In its judgment no. 257/2011, the Constitutional Court interpreted narrowly the *Agrati and Others* judgment, declaring the constitutionality of the provisions at stake. On these judgments see, among others, M. Bignami, “La Corte Edu e le leggi retroattive”, in *Questione Giustizia*, 13 September 2017; G. Bronzini, “I limiti alla retroattività della legge civile tra ordinamento interno e ordinamento convenzionale: dal “disallineamento” al dialogo?”, in AAVV, *Dialogando sui diritti. Corte di Cassazione e CEDU a confronto*, Naples: EGEA Editore, 2016; Servizio Studi Corte Costituzionale, *La legge di interpretazione autentica tra Costituzione e CEDU*, a cura di I. Rivera, 2015; M. Massa, “Difficoltà di dialogo. Ancora sulle divergenze tra Corte costituzionale e Corte europea in tema di leggi interpretative”, in *Giurisprudenza Costituzionale* 1/2012; and F. Bilancia, “Leggi retroattive ed interferenza nei processi in corso: la difficile sintesi di un confronto dialogico tra Corte costituzionale e Corte europea fondato sulla complessità del sistema dei reciproci rapporti”, in *Giurisprudenza Costituzionale*, 6/2012.

constitutionality were referred to the Constitutional Court by the Teramo District Court and the Court of Cassation, respectively, on the subject of Article 44 § 2 of Legislative Decree no. 380/2001 following the *Varvara* judgment<sup>45</sup>.

17. In its judgment no. 49/2015<sup>46</sup> the Constitutional Court reiterated the administrative nature of the confiscation measure set out in Article 44 § 2,

<sup>45</sup> On the reaction to *Varvara* see, among others, F. Viganò, “Confisca urbanistica e prescrizione: a Strasburgo il re è nudo (a proposito di Cass. pen., sez. III, ord. 30 aprile 2014)”, in DPC, 9 June 2014; A. Balsamo, “La Corte europea e la confisca senza condanna per la lottizzazione abusiva” (2014) *Cassazione Penale* 1396; and G. Civello, “La sentenza *Varvara* c. Italia “non vincola” il giudice italiano: dialogo fra Corti o monologhi di Corti?”, in *Archivio Penale*, 2015, no. 1.

<sup>46</sup> See among others, V. Lo Giudice, “Confisca senza condanna e prescrizione: il filo rosso dei controllimiti”, in DPC, 28 April 2017; A. Giannelli, “La confisca urbanistica (art. 7 CEDU)”, in Di Stasi, *CEDU e Ordinamento Italiano*, Vicenza: CEDAM, 2016, 563-590; C. Padula, “La Corte Edu e i giudici comuni nella prospettiva della recente giurisprudenza costituzionale”, in *Consulta online*, 2016 fasc. 2; D. Pulitanò, “Due approcci opposti sui rapporti fra Costituzione e CEDU in materia penale. Questioni lasciate aperte da Corte cost. n. 49/2015”, in DPC, 22 June 2015; O. Di Giovine, *Antiformalismo Interpretativo: Il pollo di Russell e la stabilizzazione del precedente giurisprudenziale*, in DPC, 5/2015; G. Martinico, “Corti costituzionali (o Supreme) e “disobbedienza funzionale”- Critica, dialogo e conflitti nel rapporto tra diritto interno e diritto delle convenzioni (CEDU e Convenzione americana sui diritti umani)”, in DPC, 28 April 2015; A. Ruggeri, “Fissati nuovi paletti dalla Consulta a riguardo del rilievo della Cedu in ambito interno”, in DPC, 2 April 2015; D. Tega, “La sentenza della Corte costituzionale no. 49/2015 sulla confisca: il predominio assiologico della Costituzione sulla CEDU” (2015) *Quaderni costituzionali* 400; and “A National Narrative: The Constitution’s Axiological Prevalence of the ECHR – A Comment on the Italian Constitutional Court Judgment No. 49/2015”, in the *Blog of the International Journal of Constitutional Law*, 1 May 2015; A. Pin, “A Jurisprudence to Handle with Care: The European Court of Human Rights’ Unsettled Case Law, its Authority, and its Future, According to the Italian Constitutional Court”, in the same blog; F. Viganò, “La Consulta e la tela di Penelope. Osservazioni a primissima lettura su C. cost., sent. 26 marzo 2015, n. 49, in materia di confisca di terreni abusivamente lottizzati e proscioglimento per prescrizione”, in DPC, 30 March 2015; M. Bignami, “Le gemelle crescono in salute: la confisca urbanistica tra Costituzione, CEDU e diritto vivente”, in DPC, 30 March 2015; A. Russo, “Prescrizione e confisca. La Corte costituzionale stacca un nuovo biglietto per Strasburgo”, in *Archivio Penale*; R. Conti, “La Corte assediata? Osservazioni a Corte cost. n. 49/2015”, in *Consulta online*, 10 April 2015; N. Colacino, “Convenzione europea e giudici comuni dopo Corte costituzionale n. 49/2015: sfugge il senso della «controriforma» imposta da Palazzo della Consulta”, in *Ordine Internazionale e Diritti Umani*, no. 3/2015; G. Civello, “Rimessa alla Grande Camera la questione della confisca urbanistica in presenza di reato prescritto: verso il superamento della sentenza *Varvara*?”, *Archivio Penale* 2015, no. 2; P. Mori, “Il “predominio assiologico della Costituzione sulla CEDU”: Corte costituzionale 49/2015 ovvero della ‘normalizzazione’ dei rapporti tra diritto interno e la CEDU”, in *SIDIBlog*, 2015; V. Zagrebelsky, “Corte cost. n. 49/2015, giurisprudenza della Corte europea dei diritti umani, art. 117 Cost., obblighi derivanti dalla ratifica della Convenzione”, in *Osservatorio costituzionale*, 2015, no. 5; G. Sorrenti, “Sul triplice rilievo di Corte cost., sent. n. 49/2015, che ridefinisce i rapporti tra ordinamento nazionale e CEDU e sulle prime reazioni di Strasburgo”, in *Forum di Quaderni Costituzionali*, 7 December 2015; D. Russo, “Ancora sul rapporto tra Costituzione e Convenzione europea dei diritti dell’uomo: brevi



but admitted that it was a “penalty” in the sense of Article 7 of the Convention<sup>47</sup> and that the presumption of innocence of Article 6 § 2 of the Convention applied<sup>48</sup>. The legacy of *Sud Fondi*<sup>49</sup> was undisputable and remained undisputed.

Nevertheless, the Constitutional Court affirmed that the dismissal of the case owing to the expiry of statutory time-limits might be accompanied “by the widest reasoning on responsibility with the sole purpose of the confiscation of the developed good”<sup>50</sup>. In other words, in the Italian legal order a decision of *prescrizione* (statutory limitation) of the offence is neither logically nor legally incompatible with the full assessment of responsibility<sup>51</sup>. Furthermore, in the Constitutional court’s view, after the reception of *Sud Fondi*<sup>52</sup> in the Italian legal order, this assessment is not a faculty (*facoltà*) of the judge, but an obligation (*obbligo*) on whose fulfilment depends the legality of the confiscation.

**(ii) *Varvara* interpreted in the “continuous stream” of the Strasbourg case-law (§§ 18-20)**

18. The *Consulta* found that the requesting judges’ assumption that *Varvara* had established an innovative and binding legal principle in contradiction with such a longstanding rule of the Italian legal order was wrong, for three reasons. Firstly, the requesting judges had ignored the nature of the Court’s case-law as “living law” (*diritto vivente*), pronounced in a “continuous stream” (*flusso continuo*) and attached to the “concrete situation” which was at its origin. In the Constitutional Court’s view, the rejection of the request for referral to the Grand Chamber only confirmed that no new principle had been established.

Secondly, the requesting judges had wrongly presupposed that *Varvara* had absorbed the administrative sanction of confiscation into the criminal law field. This would have contradicted the Court’s own case-law, which stressed the subsidiarity of penal punishment and the legislator’s discretion

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note sulla sentenza della Corte Costituzionale n. 49 del 2015”, in *Osservatorio delle fonti*, 2/2015; G. Repetto, “Vincolo al rispetto del diritto CEDU ‘consolidato’: proposta di adeguamento interpretativo” (2015) *Giurisprudenza Costituzionale* 411.

<sup>47</sup> See paragraph 6 of the *cons. in dir.* of Constitutional Court judgment no. 49/2015. Since the Constitutional Court itself accepts the applicability of Article 7 guarantees to *confisca urbanistica* I can no longer sustain the position defended in my separate opinion joined to the *Varvara* judgment that Article 7 does not apply. I would certainly not want to *essere più realista del re* (“be more royalist than the King”).

<sup>48</sup> See paragraph 5 of the *cons. in dir.* of Constitutional Court judgment no. 49/2015.

<sup>49</sup> The judgment in *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, 20 January 2009, had a positive reception in Constitutional Court judgment no. 239/2009. In its judgment no. 49/2015, the Constitutional Court confirmed this case-law.

<sup>50</sup> See paragraph 5 of the *cons. in dir.* of Constitutional Court judgment no. 49/2015.

<sup>51</sup> See paragraph 6.2 of the *cons. in dir.* of Constitutional Court judgment no. 49/2015.

<sup>52</sup> *Sud Fondi*, cited above.

as to the definition of the ambit of administrative offences as a measure to combat the “hypertrophy” of criminal law.

Thirdly, the requesting judges had misunderstood the Court’s focus on the protection of the “substance of human rights” (*la sostanza dei diritti umani*), if need be by overcoming the formal framework of the facts (*l’inquadramento formale di una fattispecie*). *Varvara* should be interpreted as only requiring a “substantive” declaration of liability and therefore as compatible with the simultaneous declaration that the offence was statute-barred according to the rules of domestic law. In other words, the rationale of *Varvara* was that the statute of limitations was compatible with a “substantive” conviction.

19. Between the Scylla of the solution of direct confrontation with the Strasbourg Court, as proposed by the Court of Cassation<sup>53</sup>, and the Charybdis of direct subordination to it, as suggested by the Tribunale di Teramo<sup>54</sup>, the Constitutional Court searched for a *via de mezzo*, placing the *Varvara* judgment in the context of a progressive, continuous stream of case-law<sup>55</sup> which does not always reveal clearly the principle upon which the case had been decided<sup>56</sup>. In the Constitutional Court’s view, *Varvara* did not set a new, binding principle and did not correspond to consolidated case-law, i.e., case-law from which “a norm capable of guaranteeing the legal certainty and uniformity in the Contracting States of a minimum level of protection of human rights” can be derived<sup>57</sup>.

20. The Constitutional Court restated the principle that the ordinary judge was required to follow the Court’s case-law. However, in case of doubt as to the conformity of that case-law with the Constitution, the ordinary judge was bound by it only where it was “well established” in the sense of Article 28 of the Convention or was laid down in a “pilot judgment”<sup>58</sup>. Consequently, the *Varvara* judgment, which had established the principle whereby Article 7 of the Convention required that a criminal sanction be preceded by a formal conviction, had not expressed a consolidated

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<sup>53</sup> The Court of Cassation considered that *Varvara* was not compatible with certain provisions of the Italian Constitution, in so far as it guaranteed a “form of hyper-protection of the right to property, in spite of the fact that the abusive property did not play a function of social utility (Articles 41 and 42 of the Constitution), with the sacrifice of principles of superior constitutional value or of the right to develop one’s own personality in a healthy environment (Articles 2, 9 and 32 of the Constitution)”. It should nevertheless be noted that the Court of Cassation had previously accepted the logic of the *Varvara* judgment (Criminal Section III, judgment of 11 March 2014, no. 23965, and Criminal Section III, judgment of 11 March-16 April 2014, no. 16694).

<sup>54</sup> The judge of Teramo considered that the current practice of confiscation in cases of time-barred offences had been considered contrary to Article 7 as interpreted by *Varvara*, and that there was no other interpretative solution for this contradiction.

<sup>55</sup> See paragraph 6.1 of the *cons. in dir.* of Constitutional Court judgment no. 49/2015.

<sup>56</sup> *Ibid.*

<sup>57</sup> See paragraph 7 of the *cons. in dir.* of Constitutional Court judgment no. 49/2015.

<sup>58</sup> *Ibid.*

jurisprudential approach and would thus not be binding on domestic courts. To shore up its reasoning, the Constitutional Court pointed out that, in the event of a conflict between Convention and constitutional norms, the latter must prevail on account of an “axiological supremacy of the Constitution over the ECHR” (*predominio assiologico della Costituzione sulla CEDU*)<sup>59</sup>.

### **III. The consequences of judgment no. 49/2015 in the Italian legal order (§§ 21-56)**

#### **A. The wrongful reading of *Varvara* (§§ 21-27)**

##### **(i) The obliteration of the “right to be forgotten” (§§ 21-24)**

21. In its discussion of *Varvara*, the Italian Constitutional Court claimed that it was a “consolidated principle” of European law that a “penalty” could be applied by an administrative authority provided it was subject to judicial review<sup>60</sup>. In this connection, it was “thus doubtful that the *Varvara* judgment did indeed pursue the path indicated by both of the referring courts by introducing an element of disharmony into the broader ECHR context”. Therefore, reasoned the Constitutional Court, when it came to the meaning of “conviction”, what the Court “had in mind” in its *Varvara* judgment was not “the form of the ruling by the court” (that is, a formal finding of guilt) but instead, “the substance which necessarily accompanies such a ruling where it imposes a criminal punishment pursuant to Article 7 of the ECHR, that is, a finding of responsibility”.

22. As demonstrated in the joint dissent, this is not a plausible reading of either *Varvara* or the relevant case-law<sup>61</sup>. For the application of a “penalty” *Varvara* requires that the offence (“criminal”, “administrative”, “tax” or other, according to the national law label) must not be time-barred and there has to be a formal “verdict as to ... guilt”. This formal verdict may evidently be delivered in the context of criminal proceedings *stricto sensu* or in the context of any proceedings within the meaning of Article 7 of the Convention, such as administrative, tax or other proceedings which apply

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<sup>59</sup> Paragraph 4 of the *cons. in dir.* of Constitutional Court judgment no. 49/2015. It is no surprise that the Constitutional Court echoed the position of the United Kingdom Supreme Court on the lack of *erga omnes* effect of the Court’s judgments which do not represent “clear and constant” case-law. See on the opinions of Lord Philip in *Horncastle* and Lord Bingham in *Ullah*, my separate opinion in *Hutchinson v. the United Kingdom* [GC], no. 57592/08, 17 January 2017.

<sup>60</sup> See paragraph 6 of Constitutional Court judgment no. 49/2015.

<sup>61</sup> As F. Viganò correctly notes, *Varvara* was in line with *Paraponiaris v. Greece*, no. 42132/06, 6 April 2009, and therefore did not show any discontinuity regarding the previous case-law (see “Confisca urbanistica...”, cited above, page 280).

“penalties”<sup>62</sup>. The scope of application of Article 7 of the Convention, which also applies to procedures not labelled “criminal” under national law, is not determinative of “whether the impugned confiscation measures at least required a formal declaration of criminal liability in respect of the applicants”<sup>63</sup>. One thing is the scope of the provision, another is its content.

23. As proclaimed in *Sud Fondi*<sup>64</sup>, and accepted by the *Giudici delle leggi*<sup>65</sup>, the content of the principle of legality includes the principle *nulla poena sine culpa*, which must be established (both the *culpa* and the *poena*) within the timeframe set by the relevant statute of limitations. In a State governed by the rule of law and the principle of legality, the power of the State to prosecute and punish offences, even complex offences, is limited by time constraints, or to use the elegant formulation of the Constitutional Court, “with the passage of time after the commission of the fact, the need for punishment is attenuated and a right to be forgotten matures for its author” (*trascorso del tempo dalla commissione del fatto, si attenuano le esigenze di punizione e maturi un diritto all’oblio in capo all’autore di esso*)<sup>66</sup>. Otherwise the values of legal certainty and predictability inherent in the principle of legality, and therefore the principle itself, would be sacrificed on the altar of the efficiency of the justice system.

24. Based on this premise, when an offence has become statute-barred, the reasons to prosecute it no longer prevail and the purposes of penal punishment no longer obtain. A declaration of a criminal offence as statute-barred precisely entails sacrificing the fight against impunity. If the goal of fighting against impunity always prevailed, there would be no statute-barred offences. This is the *Varvara* judgment’s core, “the right to be forgotten”

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<sup>62</sup> Nothing in *Varvara* demands a sentence by a criminal court. It is true that the English translation of *Varvara* does criticise the fact that “the criminal penalty ... was imposed on the applicant despite the fact that the criminal offence had been time-barred and his criminal liability had not been established in a verdict as to his guilt”. But the words “criminal liability” must be read in their context: in the *Varvara* case, the confiscation had been applied by the criminal court, so its criminal character was not a matter of dispute. This is all the clearer in the original French version, which takes issue merely with the fact that the applicant’s “*responsabilité n’a pas été consignée dans un jugement de condamnation*” (his liability was not recorded in a judgment of conviction).

<sup>63</sup> Paragraph 255 of the judgment.

<sup>64</sup> *Sud Fondi*, cited above.

<sup>65</sup> See Constitutional Court judgment no. 239/2009.

<sup>66</sup> This elegant formulation of Constitutional Court judgment no. 24/2017 is literally, logically and axiologically contradictory with the sentence of Constitutional Court judgment no. 49/2015: “*Nell’ordinamento giuridico italiano la sentenza che accerta la prescrizione di un reato non denuncia alcuna incompatibilità logica o giuridica con un pieno accertamento di responsabilità.*” They cannot both be right. One of them is wrong, and the understanding of this opinion is that in the 24/2017 judgment the Constitutional Court was right, but not in the 49/2015 judgment.

(*diritto all'oblio*)<sup>67</sup>, which is obliterated by the Constitutional Court. The *Varvara* requirement of the formal “verdict as to ... guilt”<sup>68</sup> is a mere logical derivation from the requirement of limitation periods. There can be no punishment without a formal declaration of guilt, because there can be no such declaration after the *prescrizione* of the offence. In other words, the core of the famous paragraph 72 of *Varvara* lies in the acknowledgment that the application of the statute of limitations is not a substantive conviction (*la prescrizione non è una sostanziale condanna*). While *Sud Fondi*<sup>69</sup> established the principle of *nulla poena sine culpa*, *Varvara* recognised the statute of limitations as an integral part of the principle of legality. Article 7 thus precludes the application of confiscation (which is a “penalty” according to Convention law, as interpreted by the Court, and Italian constitutional law, as interpreted by the Constitutional Court) to a time-barred offence, because *prescrizione* has the meaning of a substantive guarantee, and not a mere procedural meaning, in both Convention and national law<sup>70</sup>.

**(ii) The instrumentalisation of penal justice for administrative policy purposes (§§ 25-27)**

25. In this light, the Italian Constitutional Court’s choice to invoke the Court’s “function of perceiving the violation of the human right in its tangible dimension, irrespective of the abstract formula” used to classify the offence, may strike one as an attempt to deny the obvious fact that a “substantive” finding of guilt means very little, if it does not mean a formal declaration of guilt by a court. This line of argument is particularly unfortunate, since it distorts the meaning of the Court’s theory of the prevalence of substance (*la sostanza*) over form (*l'inquadramento formale*),

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<sup>67</sup> Quite rightly, F. Viganò identified the core of the *Varvara* judgment in the exact same terms: “*Quest’ultima osservazione ci consente, d’altra parte, di evidenziare che il problema qui in discussione non è soltanto quello della piena garanzia di un “giusto processo” in relazione all’accertamento del fatto e delle responsabilità individuali quali presupposto della misura ablatoria; ma anche quello, squisitamente sostanziale, del significato della declaratoria di prescrizione del reato dal punto di vista dell’imputato. (...) A Strasburgo, purtroppo, il re è nudo. La sottile retorica e le raffinate distinzioni della nostra giurisprudenza non valgono, avanti ai giudici europei, a difendere l’indifendibile: e cioè l’inflizione di una pena per un reato che lo stesso ordinamento giuridico italiano ritiene estinto per prescrizione, essendo ormai inutilmente trascorso il “tempo dell’oblio” legislativamente stabilito per quel medesimo reato.*” (“Confisca Urbanistica...”, cited above, page 286).

<sup>68</sup> *Varvara*, cited above, § 72.

<sup>69</sup> *Sud Fondi*, cited above.

<sup>70</sup> On the nature of the criminal statute of limitations in Convention law see my separate opinion in *Mocanu and Others v. Romania* [GC], nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, and my joint opinion with Judge Turkovic, in *Matytsina v. Russia*, no. 58428/10, 27 March 2014. This evidently departs from the limited view of *Previti v. Italy* (dec.), no. 1845/08, 12 February 2013.

which has always been used to ensure the protection of the defendant against disguised forms of punishment. The argument of the protection of the “substance of human rights” (*la sostanza dei diritti umani*) is used by the Constitutional Court to weaken the human rights of the defendant targeted by the *confisca senza condanna* (non-conviction-based confiscation). In my view, it is not admissible that the Constitutional Court uses *contra reum* a theory crafted by the Court for the benefit of the defendant.

26. That also applies to the argument derived from a need to combat the “hypertrophy” of criminal law<sup>71</sup>. If it is true that State policy in criminal law should be governed by the principle of the minimum intervention possible, it is inadmissible to use this argument in *malam partem*, in order to deprive the defendant of the Article 7 protection and subject him to confiscation without a formal conviction owing to the expiry of statutory time-limits. Subsidiarity of criminal law is turned upside down in order to expand punishment beyond *prescrizione*.

27. Indeed, when applying the *confisca urbanistica senza condanna* (non-conviction-based confiscation in matters of site development), the judge seeks to counter the local administration’s inertia and connivance with unlawful site development. In other words, the criminal justice system performs administrative functions. As a matter of constitutional law, it is clear that the transformation of the criminal judge into a subsidiary (*di supplenza*) body of the administration is incompatible with the principle of the separation of powers. This mixing of the two distinct roles, that of the judiciary and that of the administration, is an undue instrumentalisation of the criminal justice system for purely administrative policy purposes, reflecting a policy of pan-penalisation pursued by the Italian State. It is therefore the present policy choice of the Italian State, upheld by Constitutional Court judgment no. 49/2015, that can be reproached as contradicting the principle of subsidiarity of criminal law, not the *Varvara* judgment.

## **B. The illusory “substantive” declaration of liability (§§ 28-35)**

### **(i) The insurmountable lack of legal certainty (§§ 28-33)**

28. According to the Constitutional Court, a “substantive” declaration of guilt would not trigger concerns regarding the Convention. This leaves many questions unanswered – and unasked. The *Giudice costituzionale* did not clarify “the limits that the procedural system may. . . impose on the criminal judge regarding the activities that are necessary to reach the assessment of responsibility”<sup>72</sup>, and namely whether the *confisca*

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<sup>71</sup> This argument is reformulated by the majority in paragraph 253 of the judgment.

<sup>72</sup> Paragraph 5 of Constitutional Court judgment no. 49/2015.

*urbanistica* can be applied only when the objective and subjective elements of liability have already been established before the *prescrizione* of the offence or whether the judge can supplement the investigation after that time in order to establish the objective and subjective elements of liability; and, if so, what procedural guarantees would then apply. Nor did the Constitutional Court clarify what precise evidential test should be applied by the judge to establish “substantively” the pertinent facts in order to determine confiscation<sup>73</sup>. If statutes of limitations are a limitation upon the powers of the State to investigate people’s lives, how is this goal going to be ensured if all offences can nevertheless be investigated in order to reach “substantive” assessments of responsibility? Or are there special offences that admit of such “substantive” declarations of guilt and others that do not?

29. In the present judgment, the majority of the Grand Chamber do not see a problem with this legal “black hole” and its insurmountable lack of legal certainty. As a matter of fact, the “substantive” declaration of liability is a blank cheque for the domestic courts to do as they please. In the Weberian tension between *Wertrationalität* (value-rationality) and *Zweckrationalität* (purpose-rationality), judges, be they international or national, should always pursue the former, not the latter, which belongs to politics. One has the impression that in some respects the present judgment is more an exercise of the latter than of the former. It is stating the obvious that law enforcement agents in general and courts in particular have a much easier life with the regime of non-conviction-based confiscation for a statute-barred offence (*confisca senza condanna per reato prescritto*). This way, the alleged State policy purpose of the “rules applied by the Italian courts”, which is to “seek to prevent impunity”, to use the words of the majority in paragraph 260 of the present judgment, is much easier to achieve. But this reasoning is pure purpose-rationality. The judge is not supposed to embark on such calculating reasoning, acting as a subservient surrogate of the Government’s interests and policy choices, and especially not in such a delicate field of law as criminal law. Most importantly, the judge should not impute to defendants the shortcomings of an irrational State criminal policy, including a policy with a “combined effect of complex offences and relatively short limitation periods”<sup>74</sup>.

30. Even assuming that unlawful site development is “a complex offence”<sup>75</sup>, that the relevant limitation period was “relatively short”<sup>76</sup> and

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<sup>73</sup> Ibid. The only reference made is to “adequate evidential standards” (*attenendosi ad adeguati standard probatori*).

<sup>74</sup> Paragraph 260 of the judgment.

<sup>75</sup> The majority simply assume what must be proven. Worse still, they ignore Italian law. There is no evidence whatsoever in the judgment or the file that the offence of unlawful site development is more complex in Italian law than similar offences in other countries or that its prosecution is more difficult in Italy than that of similar offences in other countries. Neither is there evidence that the Italian legislator considers this offence *per se* complex. On the contrary, the legislator considers it a minor offence (*contravvenzione*), punishable

that their combined effect created a situation where the perpetrators of such offence “systematically”<sup>77</sup> avoided prosecution and punishment, the defendant does not have to carry the responsibility for such choices of criminal policy. That is exactly what paragraph 260 of the present judgment boils down to<sup>78</sup>.

31. More generally, the concept of a “substantive” declaration of liability in and of itself runs counter to the values of legal certainty and foreseeability, since the person/entity concerned cannot really predict if her/its assets are going to be confiscated. Apparently, the majority propose to limit the applicability of the concept of “conviction in substance”: it should apply only to prevent impunity against “complex offences”. However, as the “complexity” of offences is a very vague criterion, this approach calls into question the values of legal certainty and foreseeability.

32. Furthermore, the concept of a “substantive” declaration of liability is based on an analogy with a conviction<sup>79</sup>. To support this analogy, the majority equate the decision “where the courts find that all the elements of the offence of unlawful site development are made out, while discontinuing the proceedings solely on account of statutory limitation” with “a conviction

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with the maximum penalty of two years of imprisonment and a fine not higher than 51,645 euros, even allowing for the suspension of the penalty (Article 163 of the Italian Criminal Code). If the convicted person does not commit an offence during the two-year suspension period, “the offence is extinguished” (*il reato è estinto*), according to Article 167 of the Criminal Code. The suspension of the penalty does not, however, entail the suspension of confiscation.

<sup>76</sup> There is no evidence whatsoever in the judgment or the file that this is the case. No comparison of the relevant Italian statute of limitations with that of other countries was made. Furthermore, the majority should not overlook that States have numerous other policy choices, more consonant with the rule of law, to pursue their task of fighting against “complex offences”, for example by lengthening the relevant statutory limitations periods. In this regard, the majority ignore the change in the relevant statute of limitations introduced by the legislator himself in Law no. 103 of 13 June 2017, which lengthened the relevant limitation periods.

<sup>77</sup> Again, there is no evidence in the judgment or the file that there is a “systematic” lack of prosecution and punishment of unlawful site development in Italy, neither at the time of the facts nor at present. On the contrary, the available ministerial statistics show that the percentage of time-barred offences (*prescrizioni*) in the total number of final decisions (*definiti*) has been constantly decreasing, having been in 2004 14.69% and in 2014 9.48%. If one takes the available statistics by type of offence, the figures of the time-barred offences against the public administration and the environment before the first-instance courts are respectively 15.5% and 5.6% of the total of the decisions delivered. ([https://www.giustizia.it/resources/cms/documents/ANALISI PRESCRIZIONE CON CO\\_MMENTI.pdf](https://www.giustizia.it/resources/cms/documents/ANALISI_PRESCRIZIONE_CON_CO_MMENTI.pdf)). The figures simply do not support the majority’s reasoning.

<sup>78</sup> The shortcomings of the regime of the statute of limitations in Italian law have already been severely criticised by the Court on other occasions (see *Alikaj v. Italy*, no. 47357/08, § 99, 29 March 2011, and *Cestaro v. Italy*, no. 6884/11, § 208, 7 April 2015).

<sup>79</sup> See paragraph 261 of the judgment.



for the purposes of Article 7<sup>80</sup>. By so doing they make it possible to understand, from the reasoning of such a decision, that the elements of both *actus reus* and *mens rea* are proven. This analogy between reasoning and conviction is fundamentally wrong, because such extension of the concept of “conviction” to the detriment of the defendant corresponds to an inadmissible analogy *in malam partem*. The legal fiction of a “conviction in substance” contradicts the very essence of the prohibition of analogy to the detriment of the defendant, which lies at the heart of the principle of legality (*nulla poena sine lege certa, stricta*).

33. The Court has always refused this analogy. For example, in the case of *Margus v. Croatia*<sup>81</sup>, the Court was crystal clear in stating that “the discontinuance of criminal proceedings by a public prosecutor did not amount to either a conviction or an acquittal” and therefore that the discontinuance decision did not fall under Article 4 of Protocol No. 7 to the Convention. Evidently, these two outcomes (conviction or acquittal) can be found only in the operative part of a domestic decision, i.e., where the competent court proffers the case’s outcome. The reasoning is of no relevance for the application of the *ne bis in idem* principle in criminal procedure. The majority ignore this basic principle of criminal procedure law to the extent that they attempt to extract conclusions detrimental to the defendant (“in substance, a conviction”) from a judgment’s reasoning when they are absent from the operative part. Such effort, in so far as it seeks to find a “conviction in substance” regardless of the fact that the defendant has not been formally convicted, violates the core of the *ne bis in idem* principle<sup>82</sup>.

**(ii) The breach of the presumption of innocence principle (§§ 34-35)**

34. Lastly, the “substantive” declaration of liability blatantly violates the presumption of innocence principle. As the Court has repeatedly rejected any declaration of guilt, whether in acquittals or decisions of discontinuance or dismissal of a case, as a flagrant violation of Article 6 § 2 of the Convention<sup>83</sup>, the “*pieno accertamento di responsabilità*” (the full

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<sup>80</sup> Therefore the majority limit the use of *confisca senza condanna* to cases where the elements of the offence have already been made out at the time the offence becomes time-barred, not allowing for further investigation of those elements after that point.

<sup>81</sup> *Margus v. Croatia* [GC], no. 4455/10, § 120, 27 May 2014.

<sup>82</sup> This is not the place to expand on the implications of the “conviction in substance” thesis for the *ne bis in idem* principle. I would just refer to my separate opinion in *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, 15 November 2016.

<sup>83</sup> Among others, see *Cleve v. Germany*, no. 48144/09, 15 January 2015, and *Sekanina v. Austria*, no. 13126/87, 25 August 1993. Incidentally, the Constitutional Court misconstrues the Court’s case-law when making the case for a substantive declaration of guilt. The most egregious example is its use of *Minelli v. Switzerland*, no. 8660/79, 25 March 1983, to support the proposition that “[i]t is not about the form of the judgment but about its substance” (Constitutional Court judgment, § 6.2). What this Court said in

establishment of liability)<sup>84</sup> required by the Constitutional Court as the basis for the *confisca senza condanna* clearly breaches the right to be presumed innocent. Indeed, this is so obvious that it is hard to believe that in a State under the rule of law such as Italy a “penalty” within the meaning of Article 7 of the Convention could be applied with such a frontal violation of Article 6 § 2 of the same Convention.

35. The “substantive” declaration of liability reminds me of the verdict *à moitié acquitté* (“half acquitted”) back in the Middle Ages, where defendants were acquitted but, on the basis of certain evidence, some guilt was proven and some penalty was imposed. To my mind, the status of someone who benefits from a declaration of *prescrizione*, and yet is subjected to a confiscation order on the basis of a declaration that the facts are proven and the guilt is established, is quite similar to the status of those who were once *à moitié acquitté*. One has to recall, however, that there was a Revolution in 1789, among other things, to put an end to this absurdity. Learning with History would sometimes help not to repeat the same errors time and again.

### C. The volatile “consolidated law” test (§§ 36-56)

#### (i) The distortion of well-established case-law (§§ 36-42)

36. Against this background, the Constitutional Court sets the new terms of the relationship between Convention law, as interpreted by the Court, and constitutional law. In its understanding, the *inter partes* effect of the Court’s judgment is undeniable and binds the national judge subsequent to the delivery of the Court’s judgment, but it has to be distinguished from its *erga omnes* effect, which the Constitutional Court does not deny, but leaves to the discretion of the national judges<sup>85</sup>. National courts may accord that effect to a judgment corresponding to “consolidated law” and deny it to one which does not correspond to “consolidated law”. This conclusion is supposedly confirmed by the structure of the Court (five sections with a mechanism of referral to the Grand Chamber) and its working methods (dissenting opinions). Although the *Consulta* does not explicitly state what the criteria are in order to identify “consolidated” law, it indicates some indicia of “non-consolidated” case-law, such as the following: the novelty of the principle set out in the case-law *vis-à-vis* previous case-law; the

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§ 37 of *Minelli* is that even in formal acquittals a domestic court can violate the presumption of innocence by making assertions about an accused’s guilt. But while this Court describes the phenomenon to make it clear that it is banned, the Constitutional Court described the same phenomenon to empower domestic courts to carry on with such practice. This is not even an application in *malam partem* of a principle; it is a complete subversion of it.

<sup>84</sup> See paragraph 6.2 of the *cons. in dir.* of Constitutional Court judgment no. 49/2015.

<sup>85</sup> See paragraph 7 of the *cons. in dir.* of Constitutional Court judgment no. 49/2015.

existence of dissenting opinions; the judgment of a Chamber without confirmation by a Grand Chamber; and the doubt about the consideration of the specific features of the national legal order<sup>86</sup>.

37. The procedures and criteria through which the Italian judiciary ensure respect for the Convention are a matter of domestic law with which this Court does not concern itself. However, as both this Court and the Italian Constitutional Court readily acknowledge, it is this Court which is the organ endowed with the “final say” over the interpretation of the Convention<sup>87</sup>. Therefore, it is for this Court to make clear that the notion of “consolidated law” has no basis in the Strasbourg jurisprudence, as it did in the present judgment.

38. The judges of the *Palazzo della Consulta* assert that the notion of “consolidated case-law” is recognised in Article 28 of the Convention and that this demonstrates that, even under the Convention, it is accepted that the persuasive density of rulings is liable to fluctuate until “well-established case-law emerges”. To support this reading, they cite the explanatory report in respect of Article 8 of Protocol No. 14 to the Convention, explaining the concept of well-established case-law as “normally” meaning “case-law which has been consistently applied by a Chamber”, or “exceptionally”, well-established case-law can emerge from a single judgment on a “question of principle ... particularly when the Grand Chamber has rendered it”<sup>88</sup>.

39. The concept of well-established case-law, however, is totally different from that of the Constitutional Court’s “consolidated law”, despite some apparently similar label. Firstly, the function of well-established case-law is nothing akin to a change in the normative force or “persuasive density” of the Court’s judgments and decisions depending on some degree of “consolidation”. The only function of well-established case-law is to give a Committee the “competence”<sup>89</sup> to adjudicate a case instead of referring it to a Section of the Court. This is not because well-established case-law is superior in any way to the rest of the case-law, but only because it allows a more “simplified”<sup>90</sup> procedure for “repetitive”<sup>91</sup> cases. Furthermore, applicants can challenge the character of well-established case-law under Article 28 § 3 of the Convention. Well-established case-law permits this Court to differentiate case-law according to the simplicity of its interpretation, but this does not say anything about the binding force of its judgments.

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<sup>86</sup> See paragraph 7 of the *cons. in dir.* of Constitutional Court judgment no. 49/2015.

<sup>87</sup> See paragraph 6.2 of the *cons. in dir.* of Constitutional Court judgment no. 348/2007.

<sup>88</sup> Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, § 68.

<sup>89</sup> *Ibid.*, § 40.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

40. The Convention means what the Court considers the Convention to mean, with no further qualifications. Courts in member States, as well as the public in general, should expect this Court to abide by its previous decisions and judgments in any case that follows an analogous fact-pattern, no matter how numerous the precedents may be<sup>92</sup>. This evidently is also true for “pilot” and “quasi-pilot” judgment procedures. Although not grounded on the Convention, but on the Rules of Court<sup>93</sup>, they are typical constitutional review instruments which play a critical role in resolving the dysfunctional operation of domestic law or the legislator’s failure to regulate systemic dysfunctions, but have no special interpretative authority or distinct legal force. In fact, they mostly confirm previous case-law, delivered against the respondent Contracting Party or other Contracting Parties<sup>94</sup>. For this Court, any decision or judgment constitutes an authoritative source of interpretation of the Convention and represents, as the Italian Constitutional Court itself admits, “the final say”<sup>95</sup> as to its meaning. The Court states this principle in the following straightforward terms: “its judgments all have the same legal value. Their binding nature and interpretative authority cannot therefore depend on the formation by which they were rendered”<sup>96</sup>.

41. The Court has taken great care, not only to distinguish three concepts, namely “legal value”, “binding nature” and “interpretative authority”, but also to include the fundamental word “all”, so as to leave absolutely no doubt about its intent. For the Court, regardless of the type of competent formation, each of its final judgments becomes *res judicata* between the parties to the dispute and *res interpretata* with regard to all Contracting Parties. The principle of the “interpretative authority” (*res interpretata*) of “all” judgments of the Court has thus entered Strasbourg case-law through the grand door of this Grand Chamber judgment<sup>97</sup>.

42. This principle deprives judgment no. 49/2015 of its theoretical cornerstone. Conversely, the Court repudiates the notion of *diritto consolidato*, which is at the heart of that same judgment. Thus the Constitutional Court is called upon by the Grand Chamber to reframe the

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<sup>92</sup> On the precedential value of the Court’s judgments see my separate opinion in *Herrmann v. Germany* [GC], no. 9300/07, 26 June 2012.

<sup>93</sup> Rule 61 of the Rules of the Court.

<sup>94</sup> On the legal force of “pilot” and “quasi-pilot” judgments see my separate opinions in *Vallianatos v. Greece* [GC], no. 29381/09 and no. 32684/09, 7 November 2013, and *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016.

<sup>95</sup> See paragraph 6.2 of the *cons. in dir.* of Constitutional Court judgment no. 348/2007.

<sup>96</sup> Paragraph 252 of the judgment. The placement of this sentence may look odd, but it has an explanation. The Court wanted to set a principle before entering into the discussion of the value of *Varvara* in the following paragraphs 255 to 261. The principle, regarding the “binding nature and interpretative authority” of all Court’s judgments, is a direct response to Constitutional Court judgment no. 49/2015 and a message sent to all supreme and constitutional courts in Europe.

<sup>97</sup> See below Part II (V. A. i.) on the meaning of the “interpretative authority” of the Court’s judgment.

terms of its relationship with the Court, and there is no “margin of appreciation” not to do so, since the Court does not use the margin of appreciation in this case<sup>98</sup>; nor is it tenable to use it in the case of non-derogable provisions such as Article 7 of the Convention<sup>99</sup>; and nor is it permissible to use such doctrine to deny the execution of a final judgment of the Court in the domestic legal order<sup>100</sup>.

**(ii) The troubling criteria of “non-consolidation” of law (§§ 43-56)**

43. A detailed analysis of the criteria that the Italian Constitutional Court sets forth in order to identify “non-consolidated law” reveal their propensity to create a situation of dangerous legal uncertainty. What is more, closer attention will demonstrate that the sole concept of “consolidated law” is self-defeating. The first criterion that the Italian Court uses to discard the consolidation of European case-law is “the creativity of the principle asserted compared to the traditional approach of European case-law”. It is hard to understand what “creativity” means in this context. Particularly, any solution given to a factual situation that appears before the Court for the first time would be, *ipso facto*, “creative” in a relevant sense. No “consolidated law” would therefore emerge from a single case. If this were true, it would lead to the absurd result that, when the Court faces the same factual pattern for a second time, there would be no “consolidated law” yet to be relied upon. It would only be after an undetermined number of independent cases that they would conform to “consolidated law”.

44. Furthermore, ascertaining “creativity” entails comparing the relevant features of both the factual background and the legal reasoning of the various cases at hand, so as to decide whether the solution given to a case

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<sup>98</sup> It is noticeable that the majority do not solve the present case with the argument of the margin of appreciation, as has become frequent recently. The only marginal reference to the margin of appreciation in the Court’s assessment is in paragraph 293, regarding Article 1 of Protocol No. 1.

<sup>99</sup> A certain sense of decency still hinders the assault of the margin of appreciation doctrine against Article 7 of the Convention, which is, one has to remember, a non-derogable right.

<sup>100</sup> As F. Viganò rightly put it, “*L’accertamento della violazione presuppone, in altre parole, la valutazione della Corte di non riconoscere più alcun margine di apprezzamento da parte dello Stato ... una volta che sia stata accertata una violazione, lo Stato soccombente non ha più alcun margine di apprezzamento da far valere agli occhi della Corte, se non forse sulle concrete modalità con le quali eseguire la sentenza medesima*” (“Convenzione europea ...”, cited above, page 19). The judgment delivered in *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, 11 July 2017, changes nothing on this issue, since the unfortunate conclusions of the narrow majority on the merits are limited to the very specific circumstances of the case at hand, where the first *Moreira Ferreira* judgment had not been, still according to the majority, clear enough in the indication to reopen the criminal procedure. In any event, *Moreira Ferreira (no. 2)* is a case about an Article 6 violation, which is a derogable provision. Thus *Moreira Ferreira (no. 2)* is certainly not applicable to the execution of judgments on the non-derogable principle of legality of penalties.

was “creative” or “traditional”. However, this comparative work is an intellectual operation which is neither obvious nor innocent. Since all cases are different in some regard, all cases could be said to be “creative” in a non-trivial sense. The interpreter is left, therefore, with enormous discretion to recognise which cases are binding and which are not. This is even more clearly illustrated by the second criterion listed by the Constitutional Court: “the potential for points of distinction or even contrast from other rulings of the Strasbourg Court”. The exercise of “distinguishing” or “contrasting” cases from each other is not an obvious activity, and may lead to very different results according to the person in charge of that task and the context in which he or she is performing it.

45. The third criterion given by the Constitutional Court, “the existence of dissenting opinions, especially if fuelled by robust arguments”, is no less problematic. On the one hand, the “robustness” of the arguments seems too much of a subjective evaluation for it to be considered a serious indication of the binding nature of a ruling – or, as in this case, of the non-binding nature of its opposite reasoning. On the other hand, and more fundamentally, dissenting opinions do not demean in any way the legal force of the judgments to which they are appended. Furthermore, considering that dissenting opinions diminish in any way the legal force of judgments would be vesting individual judges with a power they cannot logically have, or be intended to have, within a collegial organ such as the Court.

46. The fourth criterion consists in “the fact that the decision made originates from an ordinary division and has not been endorsed by the Grand Chamber”. This criterion finds no ground in the Convention either. Final judgments issued by Chambers do not need a Grand Chamber ratification to have full legal force. The legal force of a Grand Chamber judgment is exactly the same as that of a Chamber judgment.

47. The fifth and final criterion given by the Constitutional Court is perhaps the one that most clearly reveals the practical inconveniences of that court’s approach. According to the Constitutional Court, “the fact that, in the case before it, the European Court has not been able to assess the particular characteristics of the national legal system, and has extended to it criteria for assessment devised with reference to other member States which, in terms of those characteristics, by contrast prove to be little suited to Italy” would deprive a judgment of binding force in similar cases. This situation would arise every time a domestic court considers that the Strasbourg Court misapplied to a certain State a legal principle that it found applicable to a different State. This criterion is not qualitatively different from saying that domestic courts should not follow the Strasbourg Court’s rulings when they think they are “little suited to Italy”.

48. Either way one looks at it, the fifth criterion is based on wrong assumptions. When admitting that the Court does not take into account the

particular characteristics of the national legal system, the judges of the *Palazzo della Consulta* assume that the Court either ignores the information on national law provided by both parties, the third parties and its own internal research division, or is ill-informed by all of them. In addition, the Constitutional Court overlooks the fact that the Court does take into account, in its balancing exercise, the multiple factors that relate to the “protection of the rights and freedoms of others” and to other objective social interests such as national security, territorial integrity or public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of public order, health or morals and the protection of the authority and impartiality of the judiciary (for example, Articles 8-11 of the Convention) and even the exigencies of the situation in time of emergency (Article 15 of the Convention), and performs this exercise in the framework of the Council of Europe legal system<sup>101</sup>. Worst still, when underscoring the prevalence of the particular characteristics of the national legal system in its own balancing of the Convention rights and constitutional interests at stake, the Constitutional Court assumes – or at least gives such impression – a stance that is unsympathetic to the cause of universal human rights and therefore limits drastically its own case-law on the *erga omnes* effect of the Court’s judgments<sup>102</sup>.

49. The problems with the last criterion are clearer if read in conjunction with the first two. If the Court decides a case arising in member State A by reference to an analogous case decided in member State B, the domestic court could accuse this Court of having performed an undue “extension” that does not adequately take into consideration the particularities of the country. By contrast, if the Court decides the case using a novel line of reasoning, the domestic court could accuse the decision of “creativity”. In neither case would the decision form “consolidated law”.

50. Finally, as troubling as the criteria themselves is the fact that the Constitutional Court considers that “consolidated” (and therefore binding) law does not exist every time “all or some” of the above-mentioned criteria are present. If each of the criteria presented would confer an egregious amount of discretion on the interpreter, the alternative combination of all of them would more straightforwardly call into question the very meaning of European jurisprudence.

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<sup>101</sup> In fact, the Constitutional Court itself recognises that the Council of Europe is a “legal, functional and institutional reality” (paragraph 6.1 of the *cons. in dir.* of judgment no. 349/2007). On the constitutional structure and mode of operation of the Council of Europe legal system see my separate opinion in *Mursic v. Croatia* [GC], no. 7334/13, 20 October 2016. The acknowledgment of the existence of this legal system is important because it allows for the Convention provisions and the Court’s case-law to be read in the light of Article 11 of the Italian Constitution.

<sup>102</sup> As will be shown below, the fifth criterion of the Constitutional Court contradicts its own noteworthy judgments no. 170/2013 and no. 210/2013.

51. The criteria of non-consolidated law troublingly misconstrue the Court's structure, since Articles 27, 28, 42 and 44 of the Convention provide the conditions under which judgments delivered and decisions taken by a single-judge formation, a committee, a Chamber and the Grand Chamber, respectively, are themselves final, and neither their letter nor their spirit confirms the Constitutional Court's underlying assumption of a difference in the legal force of these judgments and decisions. Furthermore, the criteria present an unflattering depiction of the Court's case-law that is largely unsubstantiated by evidence, as for instance, in the claims that there may be judgments in which the Court "in substance" says nothing (*non dica nulla*), or that judgments in novel arenas of law are susceptible to "revision", and more broadly, that some of the case-law of the Court is inconsistent with a more "traditional approach of European case-law", however that may be defined. Most importantly, the intended effect of these criteria is to free ordinary judges from their obligation under the Convention to give full effect to the Court's judgments<sup>103</sup>.

52. Surprisingly, the Constitutional Court is ready to accept a diffuse control by every ordinary judge of the "consolidated" nature of the Court's judgments. Thus, in 2015 the ordinary judges have regained a truly uncontrolled power over the application of the Convention, which the first "twin judgments" had intended to strictly limit. There is, however, one major difference. While until 2007 the ordinary judges had a final say on the application of the Convention to the detriment of national law, in 2015 they gained the power to disapply the Court's judgments when they find that they are not "consolidated law". To put it in sociological terms, the 2015 redistribution of power between the Court and the Constitutional Court strengthened the latter's position, but that came at a price internally, since the redistribution of power between ordinary and constitutional judges weakened the position of the latter. It would appear that the concern with the growing authority of the Court's case-law was so deeply seated after the *Maggio and Others* case<sup>104</sup> and the *Agrati and Others* case<sup>105</sup> that the *Giudice delle leggi* felt that they could rely on ordinary judges, not only as front-line screeners of that case-law, but also as allies in their confrontation with Strasbourg.

53. In the three years since judgment no 49 of 2015, the Constitutional Court has provided no further guidance on how the criteria to identify

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<sup>103</sup> It is noteworthy that the very judgment no. 49/2015 does not explain why *Sud Fondi* is consolidated law and *Varvara* is not. The Constitutional Court makes no attempt to show that *Sud Fondi* is more consistent with the Court's case-law than *Varvara*. Neither the "creative" nature of *Sud Fondi*, nor the fact that it is a Chamber judgment, not confirmed by the Grand Chamber, was considered. None of these factors was evidently taken into account in judgment no. 239/2009, which first took *Sud Fondi* to represent a change for Italian domestic law concerning the penal nature of confiscation.

<sup>104</sup> *Maggio and Others*, cited above.

<sup>105</sup> *Agrati and Others*, cited above.



consolidated law should be interpreted or applied. In its judgment no. 184 of 2015, for example, the Constitutional Court used the concept of *consolidata giurisprudenza europea* to interpret Article 6 of the Convention as applied domestically<sup>106</sup>. It did not explain how this “consolidation” was to be assessed. Similar superficial remarks about “consolidated law” are made, for example, in judgments no. 187 of 2015<sup>107</sup>, no. 36 of 2016<sup>108</sup>, no. 102 of 2016<sup>109</sup>, no. 200 of 2016<sup>110</sup> and no. 43 of 2018<sup>111</sup>. On other occasions, the Constitutional Court only made innuendos about disregarding this Court’s judgments on the basis of the criteria laid down in judgment no. 49 of 2015. For example, in its judgment no. 166 of 2017, it made no reference to the notion of *diritto consolidato* in its legal assessment, although the State had done so. However, the *Giudice delle leggi* did make the remark that *Stefanetti v. Italy* had been rendered by the Court “albeit with the dissenting opinion of two of its members”<sup>112</sup>.

54. Therefore, it comes as no surprise that the use of the “consolidated law” test by the ordinary judges has proved quite chaotic, to say the least, as the reception of the *De Tommaso* Grand Chamber judgment shows<sup>113</sup>. The way the criterion has been applied gives the impression that it is a bit of a “Jack of all trades” that allows for any conclusion that would be convenient for domestic authorities. One judge’s “consolidated” law is another judge’s “non-consolidated” law. All bets are off.

55. To sum up, in the current state of Italian constitutional case-law, the Constitution and the Convention contain interrelated sets of fundamental rights catalogues, which must be articulated with a view to the maximisation of the protection of the respective rights. This task belongs to the legislator and the domestic courts, which have a duty to interpret

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<sup>106</sup> See paragraph 5 of the *cons. in dir.* of Constitutional Court judgment no. 184/2015.

<sup>107</sup> Constitutional Court judgment no. 187/2015 (merely stating that *Varvara* “is not the expression of consolidated case-law of the Strasbourg Court”).

<sup>108</sup> See paragraph 8 of the *cons. in dir.* of Constitutional Court judgment no. 36/2016, only mentioning that “from consolidated European case-law stems the principle of law according to which ...”, citing three cases against Italy.

<sup>109</sup> See paragraphs 1, 4 and 6.1 of the *cons. in dir.* of Constitutional Court judgment no. 102/2016. This judgment is cited in judgment no. 43/2018.

<sup>110</sup> See paragraph 4 of the *cons. in dir.* of Constitutional Court judgment no. 200/2016, simply noting that “the Grand Chamber consolidated European case-law” concerning *ne bis in idem* since it resolved “a conflict between Sections of the European Court of Human Rights”.

<sup>111</sup> See paragraph 5 of the *cons. in dir.* of Constitutional Court judgment no. 43/2018. In spite of the “innovative” character of the principle set out in the *A. and B. v. Norway* [GC] judgment, which contradicted previous case-law of the Court, including case-law delivered against Italy, such as the *Grande Stevens v. Italy* judgment, the Constitutional Court ordered the *giudice a quo* to take into account the Grand Chamber judgment.

<sup>112</sup> See paragraph 4.1 of the *cons. in dir.* of Constitutional Court judgment no. 166/2017.

<sup>113</sup> See D. Galliani, “Sul mestiere del giudice, tra Costituzione e Convenzione”, in *Consulta online*, 23 March 2018, page 50.

domestic law in conformity with Convention norms, as interpreted by the Strasbourg Court<sup>114</sup>. In the event of conflict between domestic law and the Convention, it is for the Constitutional Court to resolve the conflict, as the ordinary judges do not have the power to refuse to apply an incompatible domestic rule. Only consolidated law may entail a conflict, since non-consolidated law does not even merit *erga omnes* effect. If the Court's consolidated case-law is incompatible with the Constitution, it is the Constitution which prevails and the law which implemented the Convention will be found by the Constitutional Court to be partially invalid.

56. From the Strasbourg perspective, the Constitutional Court's solution boils down to the omnipresent possibility of a declaration of partial unconstitutionality of the 1955 Law which could not be implemented before the Council of Europe other than by denouncing the Convention, since reservations made *à la carte* are not Convention-compatible and certainly not with regard to its Article 7.

## **Part II – Strasbourg replying to Rome (§§ 57-90)**

### **IV. The Court's place in Europe (§§ 57-71)**

#### **A. The spirit of the age (§§ 57-63)**

##### **(i) Strong headwinds against the Court (§§ 57-60)**

57. In a fiercely polarised and messy Europe, destabilised with the implosion of traditional, mainstream parties and the emergence of populist newcomers, troubled by rising economic strife and roiled by war on its borders, politics is turning towards pure, ethno-religious chauvinism. Chauvinism is not simply people acting against the inherent dignity of every

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<sup>114</sup> The interpretation should take place “within the limits permitted by the text of the norm” (paragraph 6.2 of *cons. in dir.* of judgment no. 349/2007 and paragraph 3 of *cons. in dir.* of judgment no. 239/2009), “according to the reading given by the Strasbourg Court” (paragraph 6 of the *cons. in dir.* of judgment no. 311/2009). See on this method of interpretation, V. Zagrebelsky et al., *Manuale dei diritti fondamentali in Europa*, Bologna: Il Mulino, 2016; E. Malfatti, “L’interpretazione conforme nel ‘seguito’ alle sentenze di condanna della Corte di Strasburgo”, in *Scritti in onore di G. Silvestre*, II, Turin: Giappichelli, 2016; I. Rivera, “L’obbligo di interpretazione conforme alla CEDU e i *controlimiti* del diritto convenzionale vivente”, in *federalismi.it*, 19/2015; B. Randazzo, “Interpretazione delle sentenze della Corte europea dei diritti ai fini dell’esecuzione (giudiziaria) e interpretazione della sua giurisprudenza ai fini dell’applicazione della CEDU”, in *Rivista AIC* 2/2015; E. Lamarque, “The Italian courts and interpretation in conformity with the Constitution, EU law and the ECHR”, in *Rivista AIC*, 4/2012; V. Marzuillo, “Giurisprudenza della Corte di Strasburgo e interpretazione conforme delle norme interne”, in F. Del Canto and E. Rossi, E. Sciso, “Il principio dell’interpretazione conforme alla Convenzione europea dei diritti dell’Uomo e la confisca per la lottizzazione abusiva”, in *Rivista di diritto internazionale*, 1/2010, 131.

human being, it is about the material benefits that the chauvinist and his or her class derive from the exercise of power, it is about the perverse way power is exercised in society. Putting fear at the core of individual consciousness in a primitive logic of *homo homini lupus* and sowing distrust among countries in a basic logic of *regnum regno lupus* are essential to their goal of undermining the credibility of the Convention system, further alienating Europeans from one another and weakening the cohesion of the Council of Europe and the European Union. That same scare has spurred purges, blacklists, deportations and, in some cases, State-sponsored discrimination and State-sanctioned murder.

58. Yesterday's political fault lines are disappearing for the benefit of hard-line parties and populist movements that have risen at either end of the political spectrum. One major commonality among these parties and movements is their unprecedented barrage of bellicose verbiage against the Court, based on flawed, inaccurate and easily debunked misinformation. Such abject attitude speaks volumes about the social and political values of these parties and movements and their lack of commitment to the European culture of human rights. In recent years the resentment against the Court has reached a new, alarming pitch, stoking sectarian rage against the Convention system itself. The rhetoric of the Convention as a "villain's charter", which protects the terrorists, the paedophiles and all sorts of criminals against the innocent majority, or the abusive, lazy migrants against the hard-working Mr Smith, or the privileged minorities against the underprivileged, common man on the street, echoes the whipped-up fear of the outsider – of that which is foreign or different.

59. Two strands of criticism seem to have fused. On the one hand, the pervasive idea that the Court's global reach is a threat to local democracy; on the other the cynical claim that human rights law as applied by the Court stretches the limits of the concept of law, or to put it frankly, is not law at all. These ideas have gained meretricious credibility with repetition. They are hard to untangle from other markers of a reactionary ideology, which hijacks the media space with the alarmist cries that government is losing control over borders and that Europe is losing control of its identity. This rhetoric is steeped in time-worn boutades about Europe being under attack from the near-heretics, sneering forces of modernity and governments being under constant siege from international organisations with an ever-growing political agenda. Such rhetoric has long erased the fine line between telling boastful untruths and criticising the advancements of case-law. It scorns the idea of universality of human rights with a view to revising the Court's civilisational *acquis* and putting the Court into reverse gear, in the belief that naming a desire will bring it about.

60. The excruciating problem for the Convention system is that this politically motivated narrative, which is aimed at the disruption of the Convention system as it was built and has evolved over the last sixty years,

has contaminated the discourse, if not the hearts, of the highest judicial representatives in some countries. The present case provided an excellent occasion for the Court to run against these strong headwinds and to stand up for the main asset of the European human rights protection system and the foundational guarantee of the Convention system itself, namely the binding force of the Court’s judgments. On the essential point, the Court has not missed the opportunity.

**(ii) The efficiency-interests-oriented approach to criminal law (§§ 61-63)**

61. It is true that the majority reject the administrative sanction nature of *confisca urbanistica*, but they do not provide a credible discussion of the opposite arguments of the respondent Government, which insist on considering it *una misura di natura reale e di carattere ripristinatorio* (a real-property measure of restorative nature)<sup>115</sup>. In fact, the majority choose not to heed the call in my separate opinion in *Varvara*, where I mentioned the problematic state of the jurisprudence regarding confiscation. Instead of putting some order in this respect into the Court’s case-law, the majority prefer to render a judgment that is strictly limited to the confines of the *confisca urbanistica*, as stated in paragraph 155 of the judgment, without articulating their legal assessment of this modality with other forms of confiscation already subjected to the Court’s scrutiny<sup>116</sup>.

After dispatching the issue of the applicability of Article 7 in such an unsatisfactory way, the majority go on to address the core of the case in the same manner. It is true that the majority confirm the principle *nulla poena*

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<sup>115</sup> See the Government’s observations before the Grand Chamber.

<sup>116</sup> It seems to me that research into the Court’s case-law on the modalities of penalties (such as confiscation) imposed in the absence of a criminal conviction would at least show the existence of four groups of cases: confiscation orders and similar measures in the framework of criminal proceedings imposed on third parties (for example, *AGOSI v. the United Kingdom*, 24 October 1986, Series A no. 108, § 66; and *Air Canada v. the United Kingdom*, 5 May 1995, §§ 29-48, Series A no. 316-A); confiscation orders and similar measures in the absence of criminal proceedings, including preventive measures against persons whose property had been presumed to be of unlawful origin (for example, *Riela and Others v. Italy* (dec.), no. 52439/99, 4 September 2001; and *Butler v. the United Kingdom* (dec.), no. 41661/98, 27 June 2002); imposition by an administrative judge of an administrative penalty despite an acquittal or a discontinuance decision in criminal proceedings (for example, *Vanjak v. Croatia*, no. 29889/04, §§ 69-72, 14 January 2010; *Šikić v. Croatia*, no. 9143/08, §§ 54-56, 15 July 2010; and *Kapetanios and Others v. Greece*, nos. 3453/12 and 2 others, § 88, 30 April 2015); and imposition by a criminal court of confiscation orders and similar measures despite an acquittal or a discontinuance decision in criminal proceedings (for example, *Saliba v. Malta* (dec.), no. 4251/02, 23 November 2004; *Geerings v. the Netherlands*, no. 30810/03, 1 March 2007; and *Paraponiari*, cited above). On this case law, see A. Maugeri, “La tutela della proprietà nella CEDU e la giurisprudenza della Corte europea in tema di confisca”, in M. Montagna (org), *Sequestro e confisca*, Torino: Giappichelli editore, 2017.

*sine culpa* set out in *Sud Fondi*<sup>117</sup>. According to paragraph 242 of the present judgment, Article 7 requires, for the purposes of punishment, a mental link<sup>118</sup>. But in spite of this confirmation, the majority immediately backtrack from their own position, by conceding in the following paragraph that this requirement does not preclude the existence of certain forms of “objective liability stemming from presumptions of liability”, keeping the bulk of the unfortunate paragraph 70 of *Varvara*. One could ask how two radically opposite perspectives of Article 7, indeed of criminal law itself, can be upheld by the same court, and one would expect the majority to provide the reader with an explication of this legal imbroglio. The majority simply omit to provide any articulation for the two logically and axiologically contradictory statements. The only justification given is that, since the Court has accepted certain forms of presumption of innocence under Article 6 § 2 of the Convention, “the Court finds that the case-law described above applies *mutatis mutandis* under Article 7”<sup>119</sup>. This deeply regrettable confusion between Article 6 procedural guarantees and Article 7 substantive guarantees does not end here.

62. In this regard, the present judgment chimes with the spirit of the age. Unfortunately, the majority seem misguided by a strictly efficiency-interests-oriented approach to criminal law. As pointed out in the joint dissent, paragraph 260 of the present judgment looks very much like an unconvinced effort to rubber-stamp *confisca urbanistica senza condanna* on the basis of the non-negotiable need to “prevent crime” and fight against “complex crime”, whatever that may mean. This kind of reasoning is part and parcel of the now prevailing ideologically retrogressive policy mix composed of a purely retributivist approach to criminal law<sup>120</sup>, a strictly police-interests-driven criminal procedure<sup>121</sup>, a purposefully hardened “just

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<sup>117</sup> *Sud Fondi*, cited above.

<sup>118</sup> The statement in paragraph 242 is formulated in general terms and is not attached to the circumstances of the present case. Thus the similar statement in paragraph 246, which is made dependent on “the present case”, must be regarded as an application to the present case of the principle set out in paragraph 242.

<sup>119</sup> Paragraph 244 of the judgment. As if it were a kind of consolation for an evident omission, the Court further notes in paragraph 245 that “the domestic courts accepted this reasoning”, meaning the mental element requirement and the principle of subjective responsibility in penal law, but this argument adds nothing to the fact that the Court itself does not justify the contradictory statements made in paragraphs 242 and 243 of the judgment.

<sup>120</sup> See *Armani da Silva v. the United Kingdom* [GC], no. 5878/08, 30 March 2016, on the justification of the shoot-to-kill policy of the police in anti-terrorism action and the application of a police-interests-driven, subjective test to putative self-defence by police officers.

<sup>121</sup> See *Ibrahim and Others v. the United Kingdom* [GC], nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, on the denial of the right of access to a lawyer without compelling reasons during the initial questioning of the suspect at the police station and the admission and assessment of the issuing incriminating evidence in trial, and my

deserts” prison law<sup>122</sup> and a truly inhuman “crimmigration” policy<sup>123</sup>, while it provides no justice whatsoever for victims of serious crimes such as torture<sup>124</sup>. Such liberticidal case-law shows the worst face of Europe in recent criminal law history, as if *Dei Delitti e delle Pene* had never been written.

63. In this misguided spirit, the majority go so far as to admit the inadmissible in a State governed by the rule of law when applying Article 7 to Mr Gironda: a trade-off between non-derogable Article 7 guarantees and derogable Article 6 rights<sup>125</sup>. What is more, in their apparent effort to save *confisca urbanistica senza condanna* at any cost in the case of Mr Gironda, the majority contradict themselves. Although they say that *confisca senza condanna* would only be admissible under Article 7 of the Convention “provided that the domestic courts in question acted in strict compliance with the defence rights enshrined in Article 6 of the Convention”<sup>126</sup>, they find a violation of Article 6 § 2 of the Convention with regard to Mr Gironda and no violation of Article 7 with regard to the same applicant. It is beyond my understanding why the majority do not apply their own test to the case of Mr Gironda. In his case, there was no “strict compliance” with the guarantees of Article 6 and, therefore, according to the majority’s own test, there should be a violation not only of Article 6, but also of Article 7. Be that as it may, at the end of the day, *confisca urbanistica senza condanna* is not saved, since it always breaches the presumption of innocence, as the almost unanimous Grand Chamber acknowledges<sup>127</sup>.

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separate opinion in *A and B*, cited above, on the downgrading of the *ne bis in idem* guarantee to a fluid, narrowly construed, in one word illusory, right.

<sup>122</sup> See *Hassan v. the United Kingdom* [GC], no. 29750/09, 16 September 2014, on the practice of internment without derogation under Article 15, and my separate opinion in *Hutchinson*, cited above, on the obstinate absence of a parole mechanism for whole-life prisoners.

<sup>123</sup> See my separate opinions in *SJ v. Belgium* [GC], no. 70055/10, judgment of 19 March 2015, on the shamelessly implacable expulsion policy of terminally ill aliens, and *Abdullahi Elmi and Aweys Abubakar v. Malta*, nos. 25794/13 and 28151/13, 22 November 2016, on the inhuman detention policy of asylum-seekers and unlawful migrants. In my view, the judgment in *Paposhvili v. Belgium* [GC], no. 41738/10, 13 December 2016, does not respond sufficiently to the concerns expressed in my opinion in *SJ v. Belgium*. This issue will be left for another occasion.

<sup>124</sup> See *Naït-Liman v. Switzerland* [GC], no. 51357/07, 15 March 2018, on the denial of forum of necessity or universal civil jurisdiction to a refugee who had seized a Swiss court with a civil claim for damages resulting from torture allegedly suffered in a third State, Tunisia; as well as *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, and *Jones and Others v. the United Kingdom*, no. 34356/06 and no. 40528/06, 14 January 2014, respectively on the grant of State immunity and of immunity to foreign State officials concerning civil claims for torture.

<sup>125</sup> It should be noted that neither *Paraponiaris*, cited above, nor *Geerings*, cited above, were even mentioned, let alone discussed in this context.

<sup>126</sup> Paragraph 261 of the judgment.

<sup>127</sup> Paragraphs 317 and 318 of the judgment.

## **B. The Court’s civilisational *acquis* (§§ 64-67)**

### **(i) The extraordinary legacy of the Court (§§ 64-65)**

64. For every ounce of criticism directed at the Court, there is a pound of praise. Through its binding judgments and decisions, the Court has exercised admirable worldwide leadership in the protection of human rights, inducing human progress in the Contracting Parties and beyond. In a Europe where far too many people have known far too much suffering and far too little opportunity, the Court has more often than not carried the torch for the progressive side, promoting the cause of the minorities, the marginalised, the excluded, the despised, the dispossessed, the disadvantaged, the disenfranchised, the outcast, the pariah, all those sons of a lesser God left behind by governments and domestic courts.

65. The Court has sought to be a roof under which everyone could huddle to stay safe from the multiple storms that have swept across Europe in the past, and for the many more that are brewing on the horizon. Much beyond the claims of injustice done to basic civil and political rights, the Court has listened to the voice of those who belong to the lowest rung of the social hierarchy, who feel held back, whose aspiration for self-improvement is squelched by an impoverished public education system, strangled by an underfunded and understaffed public health system and neglected by an overburdened, sometimes indifferent, justice system. In this troublesome context, the Court has not refrained from addressing the bread-and-butter concerns of the struggling common class, like for example in the access to social benefits by foreigners. Just take the telling case of Italy.

### **(ii) The telling example of Italy (§§ 66-67)**

66. In Italy, the Court’s legacy is immensely rich, having impacted upon, among other fields of law, criminal procedure (including the mandatory publicity of judicial debates<sup>128</sup>, the exclusion of proceedings *in absentia*<sup>129</sup>, compensation for excessively lengthy proceedings<sup>130</sup> and the mechanism for revision of *res judicata* on the basis of a judgment of the Court<sup>131</sup>), criminal law (the principle of retroactivity of the more favourable law<sup>132</sup> and rehabilitation after conviction<sup>133</sup>), prison law (the conditions of detention in overcrowded prisons<sup>134</sup> and phone conversations by prisoners<sup>135</sup>), civil law

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<sup>128</sup> Constitutional Court judgments no. 93/2010, 135/2014, 109/2015.

<sup>129</sup> Constitutional Court judgment no. 371/2009.

<sup>130</sup> Constitutional Court judgments no. 184/2015 and 36/2016.

<sup>131</sup> Constitutional Court judgment no. 113/2011.

<sup>132</sup> Constitutional Court judgment no. 210/2013.

<sup>133</sup> Constitutional Court judgment no. 234/2015.

<sup>134</sup> Constitutional Court judgment no. 279/2013.

<sup>135</sup> Constitutional Court judgement no. 143/2013.

(the principle of non-retroactivity<sup>136</sup>), family law (the right to marriage of foreigners<sup>137</sup>, the right to family reunification<sup>138</sup> and the retroactivity of law equating children born in and out of wedlock<sup>139</sup>), bankruptcy law (the personal status of the bankrupt<sup>140</sup>), medical law (medically-assisted procreation<sup>141</sup> and scientific research on embryos<sup>142</sup>), social-security law (non-discrimination in access to social benefits by foreigners<sup>143</sup>), labour law (trade union freedom<sup>144</sup>), administrative law (expropriation for public interest<sup>145</sup>) and constitutional law itself (parliamentary immunity<sup>146</sup>). In sum, the Italian style of constitutional adjudication has been profoundly influenced by the Court's case-law, which has “induced the Constitutional Court to revise its previous case-law and to develop new principles and standards”<sup>147</sup>.

67. By having such an impact in the past, the Court has attracted the antipathy of parties of both sides of the political spectrum as well as a powerful elite of skilled political knife-fighters, joining forces in a coalition comprising the neo-liberal-leaning supporters who hate the intervening State and the nation-State admirers who are viscerally opposed to any form of international comity and alliance. The mood is sanguine in some quarters in Europe. Some leaders pitch populations to their worst instincts and feed their political base red meat on sensitive policies, such as criminal, immigration and minorities policies. These ideas have gained new purchase.

<sup>136</sup> Constitutional Court judgment nos. 78/2012, 170/2013, 191/2014 and 260/2015.

<sup>137</sup> Constitutional Court judgment no. 254/2011.

<sup>138</sup> Constitutional Court judgment no. 202/2013.

<sup>139</sup> Constitutional Court judgment no. 146/2015.

<sup>140</sup> Constitutional Court judgment no. 39/2008.

<sup>141</sup> Constitutional Court judgment no. 229/2015.

<sup>142</sup> Constitutional Court judgment no. 84/2016.

<sup>143</sup> Constitutional Court judgments nos. 187/2010, 329/2011, 40/2013 and 22/2015.

<sup>144</sup> Constitutional Court judgment no. 178/2015.

<sup>145</sup> Constitutional Court judgments nos. 348 and 349/2007, 181/2011, 338/2011 and 187/2014.

<sup>146</sup> Constitutional Court judgment nos. 313/2013 and 115/2014.

<sup>147</sup> M. Cartabia, *Of Bridges and walls: the “Italian” style of constitutional adjudication*, Bled, 23 June 2016, page 12 (but the author also refers to judgments no. 264/2012 and no. 49/2015 as examples of the “difference and distinctiveness” of the Italian constitutional case-law); see also T. Groppi, “La jurisprudence de la Cour européenne des droits de l’homme dans les décisions de la Cour Constitutionnelle italienne, une recherche empirique”, in L. Burgorgue-Larsen (ed.), *Les défis de l’interprétation et de l’application des droits de l’homme, de l’ouverture au dialogue*, Paris: Pedone, 2017; E. Sciso, “The Italian Constitutional Court and the Impact of the European Convention of Human Rights in Italy”, in *Judging Human Rights - Courts of General Jurisdiction as Human Rights Courts*, 2017, Month 1, 1-15; L. Mezzetti, “Human rights between Supreme Court, Constitutional Court and Supranational Court: the Italian experience” (2016) 52 *IUS Gentium* 29; and M. D’Amico, “Il rilievo della CEDU nel ‘diritto vivente’: in particolare, il segno lasciato dalla giurisprudenza ‘convenzionale’ nella giurisprudenza costituzionale”, in L. D’Andrea et al., *Crisi dello Stato nazionale, dialogo intergiurisprudenziale, tutela dei diritti fondamentali*, Turin: Giappichelli, 2015.



They are championed by a populace every bit as puerile as their leaders. The narrow-minded, sovereigntist-leaning mood is in full display in the reaction to some “unpleasant” judgments of the Court. In a crusade against entrenched principles of international law and foundational principles of the Convention system, some governments and their protégés pretend that their possession of the Convention means that domestic courts have the final say on its interpretation and, above all, on the implementation of the Court’s judgments. The mesmerising effect of the message aims at losing sight of the difference between the Contracting Parties’ power over the fate of the Convention as an international treaty and the Court’s unique role and unconditioned power to determine its content in accordance with Article 19 of the Convention and impose its interpretation through judgments with direct and binding effect on the legal order of all Contracting Parties.

### C. What judicial dialogue? (§§ 68-71)

#### (i) The antagonistic “us and them” logic (§§ 68-69)

68. Some domestic courts have not resisted the current lurch towards the populist scapegoating of the Court for all the evils of Europe. Under the appealing motto of the “judicial dialogue” between domestic courts and the Court, a cynical ploy has unfolded to shake the pillars of the Convention system<sup>148</sup>. In a bitter, divisive and antagonistic logic of “us and them”, some

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<sup>148</sup> On the dialogue between the Court and the Contracting Parties’ supreme and constitutional courts, see B. Peters, “The Rule of Law Effects of Dialogues between National Courts and Strasbourg: An Outline”, in A. Nollkaemper and M. Kanetake (eds) *The rule of law at the national and international levels: contestations and deference*, Oxford: Hart, 2016; AAVV, *Dialogando sui diritti. Corte di Cassazione e CEDU a confronto*, Naples: EGEA Editore, 2016; D. Russo, “La “confisca in assenza di condanna” tra principio di legalità e tutela dei diritti fondamentali: un nuovo capitolo del dialogo tra le Corti”, in *Osservatorio sulle fonti*, April 2015; A. Baraggia, “La tutela dei diritti in Europa nel dialogo tra corti: ‘epifanie’ di una unione dai tratti ancora indefiniti”, in *Rivista AIC*, 2/2015; R. Conti, “Costituzione e diritti fondamentali: una partita da giocare alla pari”, in R. Cosio and R. Foglia (ed.), *Il diritto europeo nel dialogo delle Corti*, Milan: Giuffrè, 2013; G. Civello, “Il ‘dialogo’ fra le quattro corti: dalla sentenza ‘Varvara’ della CEDU (2013) alla sentenza ‘Taricco’ della CGUE (2015)” *Archivio Penale*, 2015, n. 3; A. Ruggeri, “‘Dialogo’ tra le corti e tecniche decisorie, a tutela dei diritti fondamentali”, in [www.federalismi.it](http://www.federalismi.it), 24/2013; G. Martinico, “Is the European Convention going to be ‘Supreme’? A comparative-constitutional overview of ECHR and EU law before national courts” (2012) 23 *EJIL* 415; Popelier et al. (eds), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts*, Cambridge: Intersentia, 2011; O. Pollicino and G. Martinico, *The National Judicial Treatment of the ECHR and EU laws. A Constitutional Comparative Perspective*, Groningen: Europa Law, 2010; M. Cartabia, “Europe and Rights: Taking dialogue seriously” (2009) *European Constitutional Law Review* 5; Fontanelli et al., *Shaping Rule of Law through Dialogue, International and Supranational Experiences*, Groningen: Europa Law, 2009; W. Sadursky, “Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of

domestic courts have called into question the legal force of the Court’s inconvenient judgments, by advocating a State-centred Westphalian interpretation of human rights, giving priority to regulatory discretion of governments over fundamental rights of citizens. The lessons of History could not be further from their mind. Whether these States bring the Court to heel will be a test of their rising ambitions.

69. Let us not become mired in legal jargon and technicalities. Pious-sounding statements that judicial dialogue will reaffirm the Contracting Parties’ commitment to long-standing principles that ensure the integrity of the Convention system have done nothing but disguise the ill-intended *animus* harboured towards the Court, to bog down the push for more ambitious action on the part of the Court. The Court has a shrinking amount of wiggle room within which to react.

**(ii) The proxy fight for the survival of international law (§§ 70-71)**

70. The present judgment has turned out to be a look at what ills might beset us in the near future. Some domestic authorities are betting on the failure of the European system of human rights. They leave no taboo unturned. After the approval of the law on the powers of the Constitutional Court of Russia, of 15 December 2015, which provides for the power to declare the judgments of international courts, including this Court, non-executable in the Russian legal order when they contradict the Russian Constitution, the alarm bells in Europe should have rung<sup>149</sup>. It is no calming sign that the Russian Constitutional Court’s judgment, which opened the door to such law<sup>150</sup>, cited precisely the Constitutional Court’s judgment no. 264/2012 in the Swiss pensions case, among others, as a source of inspiration. When the strongest taboo cracks, as it did in December 2015, lesser ones may crumble.

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Europe, and the Idea of Pilot Judgments” (2009) 3 *Human Rights Law Review* 397; H. Keller and A. Stone-Sweet, *A Europe of Rights, The Impact of the ECHR on National Legal Systems*, Oxford: Oxford University Press, 2008; G. Ferrari, *Corti nazionali e corti europee*, Naples: ESI, 2007; L. Montanari, *I diritti dell’uomo nell’area europea tra fonti internazionali e fonti interne*, Turin: Giappichelli, 2002. On the abuse of the notion of “dialogue” in this context, which indeed refers to an *actio finium regundorum* between the courts involved, see R. Bin, “L’interpretazione conforme. Due o tre cose che so di lei” *Rivista AIC*, 1/2015, and De Vergottini, *Oltre il dialogo tra le corti*, Bologna: Il Mulino, 2010.

<sup>149</sup> On this law and its impact on the Convention system, see my article “Plaidoyer for the European Court of Human Rights” (2018) *European Human Rights Law Review*, Issue 2, 119-133; A. Guazzarotti, “La Russia e la CEDU: I controlimiti visti da Mosca”, in (2016) *Quaderni costituzionali* 383; C. Filippini, “La “Russia e la CEDU: l’obiezione della Corte costituzionale all’esecuzione delle sentenze di Straburgo”, in (2016) *Quaderni costituzionali* 386; and A. De Gregorio, “Russia, Il confronto tra la corte costituzionale e la Corte europea per i diritti dell’uomo tra chiusure e segnali di distensione”, in *Federalismi-Focus Human Rights*, 27 July 2016.

<sup>150</sup> Constitutional Court of Russia no. 21-P/2015 of 14 July 2015.

71. In their ultimately losing battle against international law and courts, the cavaliers of parochialism will only be stopped by solid, principled legal reasoning which can both denounce their seemingly lofty and self-centred discourse and at the same time persuade the legal community and assuage the fears of the common class. The choice for domestic courts and in particular for constitutional and supreme courts is clear today: either to join the cosmopolitan view of universal human rights as a limitation of State sovereignty<sup>151</sup>; or to embrace the opposite, parochial view of domestic law as the inexpungible reserve of sovereignty and consequently of universal human rights as “nonsense upon stilts”, to borrow the expression of Bentham. This is a proxy fight between supporters and opponents of international law.

## V. The Court with the “final say” (§§ 72-90)

### A. The “interpretative authority” of the Court’s judgment (§§ 72-80)

#### (i) From *res interpretata* to the *erga omnes* effect of the Court’s judgment (§§ 72-77)

72. Convention obligations require States not only to uphold, pursuant to Article 46 of the Convention, the binding force of the Court’s judgment in respect of the parties to the dispute in question, but also to prevent any violations found in that judgment from being repeated in respect of others<sup>152</sup>. This is one of the consequences of the principle of subsidiarity and its key role in the architecture of the Convention system. In particular, the national courts must interpret and apply domestic law in accordance with the Convention and the Court’s case-law. Thus, while it is primarily for the national authorities to interpret and apply domestic law, the Court is required to verify whether the way in which that law is interpreted and applied produces consequences that are consistent with the principles of the Convention<sup>153</sup> as interpreted in the light of the Court’s case-law<sup>154</sup>.

73. In so far as it is a consequence of the subsidiarity principle, this rule also applies outside the strict confines of Articles 41 and 46 of the Convention, which primarily concern the relations between the parties to the dispute in question. This can also be seen from the Brighton Declaration, in

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<sup>151</sup> On this view see my separate opinion in *Al-Dulimi and Montana Management Inc.*, cited above.

<sup>152</sup> See my separate opinion in *Fabris*, cited above.

<sup>153</sup> *Carbonara and Ventura v. Italy*, no. 24638/94, § 68, ECHR 2000-VI; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 49, ECHR 2001-II; and *Storek v. Germany*, no. 61603/00, § 93, ECHR 2005-V.

<sup>154</sup> *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 191, ECHR 2006 V, and *Daddi v. Italy* (dec.), no. 15476/09.

which the member States undertook to guarantee “[t]he full implementation of the Convention at national level [, which] requires States Parties to take effective measures to prevent violations”<sup>155</sup>. To that end, “all laws and policies should be formulated, and all State officials should discharge their responsibilities, in a way that gives full effect to the Convention”. Thus, “[n]ational courts and tribunals should take into account the Convention and the case law of the Court”.

74. Furthermore, the measures to be taken by a State in executing a judgment are not confined to those which concern the individual applicant. That is the consequence of the above-mentioned considerations about subsidiarity. Where the violation stems from an underlying structural issue, the respondent State must, on the contrary, take general measures appropriate to the solution, in order to prevent the same violation from affecting others. According to the Court’s well-established case-law, in the event of a finding against a State:

“[t]he State Party in question will be under an obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded”.<sup>156</sup>

75. This evidently coalesces with the principled nature of the Court’s adjudication<sup>157</sup>. Time and again, the Court has reiterated that

“[t]he Court’s judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.”<sup>158</sup>

76. As the Court’s judgments all have the same legal value, binding nature and interpretative authority<sup>159</sup>, the application of this rule cannot depend, as suggested by the Italian Constitutional Court in its judgment no. 49/2015, on the formation by which the judgment in question has been delivered<sup>160</sup>. Admittedly, a need for clarification as to the significance of certain judgments cannot be ruled out. This need must then be met through a jurisprudential exchange between the Court and the domestic courts

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<sup>155</sup> High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, 20 April 2012, §§ 7 and 9.

<sup>156</sup> *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 85, 30 June 2009.

<sup>157</sup> On the need for a principled reasoning in the Court’s judgments, in contrast to its sometimes unfortunate casuistic approach, see also my separate opinion in *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, 17 July 2014.

<sup>158</sup> *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, § 154.

<sup>159</sup> Paragraph 252 of the present judgment.

<sup>160</sup> *Ibid.*

concerned, but the obligations of the latter in the light of Strasbourg jurisprudence will not, however, be suspended as a result.

To put the matter another way, the legal value of the Court’s judgment includes its binding effect *inter partes* (in the Court’s words, its “binding nature”), as well as its no less important “interpretative authority”. By naming it, the Court has converted the scholarly concept of the “interpretative authority” (*res interpretata*) of its judgments into a legally binding principle of Convention interpretation and application. This is no longer a mere doctrinal statement, but a judicially endorsed, fully-fledged legal principle governing the effect of a judgment of the Court. In this sense, the Court’s judgment has *erga omnes* effect in all Contracting Parties, regardless of the fact that it has been delivered against only one or more of them<sup>161</sup>. This corresponds to the judicial acknowledgment of a commitment of the Contracting Parties, taken already in the Interlaken Declaration:

“4. The Conference recalls that it is first and foremost the responsibility of the States Parties to guarantee the application and implementation of the Convention and consequently calls upon the States Parties to commit themselves to:

...

c) taking into account the Court’s developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system;”<sup>162</sup>

77. Confirmation of this approach can be found, once again, in the Brighton Declaration, which stated that “[r]epetitive applications mostly

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<sup>161</sup> The Court has already implicitly stated such a view on several occasions, such as in *Opuz v. Turkey*, no. 33401/02, § 163, 9 June 2009. Extrajudicially, several Presidents of the Court had already expressed this principle. For example, in the “Memorandum to the States with a view to preparing the Interlaken Conference”, 3 July 2009, the then President of the Court himself stressed this idea: “It is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system. The binding effect of interpretation by the Court goes beyond *res judicata* in the strict sense. Such a development would go hand in hand with the possibility for citizens to invoke the Convention directly in domestic law (‘direct effect’) and the notion of ownership of the Convention by the States”. This principle is also endorsed by the Opinion on the implementation of the judgments of the European Court of Human Rights, adopted by the Venice Commission at its 53rd Plenary Session, 2002, § 32. The notion of the “*de facto erga omnes*” effect of Strasbourg judgments has also been used (see President Costa’s Foreword to the 2008 Annual Report of the European Court of Human Rights, 2009; also D. Spielmann, “Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe” in Rosenfeld and Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, Chapter 59, at p. 1243).

<sup>162</sup> High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010. I note that the declaration refers to the Court’s “judgment” in the singular and not as a plurality of judgments from which a legal principle could consolidate.

arise from systemic or structural issues at the national level” and that “[i]t is the responsibility of a State Party, under the supervision of the Committee of Ministers, to ensure that such issues and resulting violations are resolved as part of the effective execution of judgments of the Court”<sup>163</sup>. Furthermore, “[t]hrough its supervision, the Committee of Ministers ensures that proper effect is given to the judgments of the Court, including by the implementation of general measures to resolve wider systemic issues”<sup>164</sup>. Lastly, the States are encouraged “to develop domestic capacities and mechanisms to ensure the rapid execution of the Court’s judgments”<sup>165</sup>.

**(ii) From constitutional parochialism to multilevel constitutionalism (§§ 78-80)**

78. These obligations extend to the constitutional law of the States Parties to the Convention. Article 1 of the Convention makes no distinction as to the type of norms or measures in question and does not remove any part of the “jurisdiction” of member States from the ambit of the Convention. It is therefore by the totality of their “jurisdiction” – which is often, first and foremost, exercised through their Constitution – that those States account for their compliance with the Convention<sup>166</sup>. In addition, this approach is in keeping with Article 27 of the Vienna Convention on the Law of Treaties, according to which a State cannot rely on provisions of its domestic law, including its constitutional law, to justify its failure to enforce a treaty<sup>167</sup>.

79. The time of constitutional parochialism is over in Europe. In the era of multilevel constitutionalism, the Convention is a “constitutional instrument of European public order”<sup>168</sup>. It thus prevails over constitutional provisions and interests of the Contracting Parties, not only in Malta<sup>169</sup>, Ireland<sup>170</sup>, Bosnia<sup>171</sup>, Russia<sup>172</sup> and Hungary<sup>173</sup>, but also in Italy and in all

<sup>163</sup> Brighton Declaration, cited above, § 18.

<sup>164</sup> Brighton Declaration, cited above, § 26.

<sup>165</sup> Brighton Declaration, cited above, § 29 (a) (i).

<sup>166</sup> *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, §§ 27 et seq., *Reports* 1998-I.

<sup>167</sup> See my separate opinion in *Fabris*, cited above.

<sup>168</sup> *Loizidou v. Turkey (preliminary objections)*, 23 March 1995, § 75, Series A no. 310, and the Court’s Opinion on the Reform of the control system of the ECHR, 4 September 1992, § I (5).

<sup>169</sup> In *Demicoli v. Malta*, no. 13057/87, 27 August 1991, the Court found that Article 11 of the Maltese Constitution, which provided for the competence of the House of Representatives to try the offence of breach of privilege, breached Article 6 § 1 of the Convention. Malta changed its Constitution after the delivery of the judgment. On the follow-up to this case, see my article “Plaidoyer for the European Court of Human Rights”, cited above, note 26.

<sup>170</sup> After *Open Door and Dublin Well Woman v. Ireland (Plenary)*, no. 14234/88 and no. 14235/88, 29 October 1992, Ireland changed its Constitution. On the follow-up to this case, see my article “Plaidoyer for the European Court of Human Rights”, cited above, note 26.

other Council of Europe member States. To put it in dogmatic terms, from the Strasbourg perspective, the old-fashioned distinction between monist and dualist constitutional orders has become irrelevant and does not impact upon the binding force of the Convention, as interpreted by the Court's judgments, in the domestic legal order of the Contracting Parties<sup>174</sup>. The multilevel constitutionalism sustained and practised by the Council of Europe is beyond such distinction, seeking a *reductio ad unitatem* in fundamental rights issues in all Contracting Parties<sup>175</sup>.

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<sup>171</sup> In *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, 22 December 2009, the Court reproached the constitutional ineligibility of the applicants to stand for election to the House of Peoples and the Presidency on the ground of their Roma and Jewish origin.

<sup>172</sup> In *Anchugov and Gladkov v. Russia*, no. 11157/04 and no. 15162/05, 4 July 2013, the Court censured Article 32 § 3 of the Russian Constitution, which provides for disenfranchisement of convicted prisoners.

<sup>173</sup> In *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016, the Court found a violation of Article 6 § 1 of the Convention, since section 11 (2) of the Transitional Provisions of the Fundamental Law of 31 December 2011 determined the premature termination of the applicant's term of office as President of the Supreme Court and this *ad hoc*, *ad hominem* constitutional provision was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers.

<sup>174</sup> In practical terms, as stated by a high-ranking official of the Council of Europe (translation from French), “[w]here the Committee of Ministers ... supervises execution of the judgments of the European Court of Human Rights, the fact that a State is monist or dualist, or whether a State has incorporated the provisions of the ECHR into its domestic law, is never taken into account” (A. Drzemczewski, “Les faux débats entre monisme et dualisme - droit international et droit français: l'exemple du contentieux des droits de l'homme” 1998 (51) *Boletim da sociedade brasileira de direito internacional* 100; original emphasis).

<sup>175</sup> On the multilevel protection of human rights in Europe and the creation of a *jus commune europeum* of fundamental rights, see B. Randazzo, *La tutela dei diritti fondamentali tra CEDU e Costituzione*, Milan: Giuffrè, 2017, and *Giustizia costituzionale sovranazionale. La Corte europea dei diritti dell'uomo*, Milan: Giuffrè, 2012; G. Amato and B. Barbisan, *Corte costituzionale e Corti europee. Fra diversità nazionali e visione comune*, Bologna: Il Mulino, 2016; R. Conti, “Il sistema multilivello e l'interazione tra ordinamento interno e fonti sovranazionali”, in *Questione Giustizia*, 4/2016; C. Padula (ed.), *La Corte europea dei diritti dell'uomo: quarto grado di giudizio o seconda Corte costituzionale?*, Naples: Editoriale Scientifica, 2016; G. Martinico, “Constitutionalism, Resistance and Openness: Comparative Law Reflections on Constitutionalism in Postnational Governance” (2016) 35 *Yearbook of European Law* 318; S. Sonelli, “La Cedu nel quadro di una tutela multilivello dei diritti e il suo impatto sul diritto italiano: direttrici di un dibattito”, in S. Sonelli (ed.), *La Convenzione europea dei diritti dell'uomo e l'ordinamento italiano. Problematiche attuali e prospettive per il futuro*, Turin: Giappichelli, 2015; E. Malfatti, *I “livelli” di tutela dei diritti fondamentali nella dimensione europea*, Turin: Giappichelli; S. Gambino, “Vantaggi e limiti della protezione multilevel dei diritti e delle libertà fondamentali, fra diritto dell'Unione, convenzioni internazionali e costituzioni nazionali”, in *Forum di Quaderni Costituzionali*, 11 January 2015; M. Cartabia, “La tutela multilivello...”, in *Fundamental Rights and the Relationship among the Court of Justice, the National Supreme Courts and the Strasbourg Court, 50ème anniversaire de l'arrêt Van Gend en Loos: 1963-2013: actes du colloque, Luxembourg*,

80. As is plain to see in the *Baka* case<sup>176</sup>, this principle of precedence of the Convention over constitutional provisions and interests of the Contracting Parties is particularly crucial in the present political circumstances in Europe, when “illiberal democracies” stretch the limits of their constitutions by incorporating provisions contradicting basic principles of Convention law, such as the principle of the independence of the judiciary. If the Contracting Parties still want a strong court in Strasbourg to stand up to *grundrechtsfeindlichen* (fundamental-rights-inimical) domestic authorities, then they will have to cope with that same strong court when it knocks at their door. The Convention system is evidently incompatible with a hypocritical NIMBY (“Not in my backyard!”) logic that would pretend that universal human rights is a good thing when it is for others, but a bad one when it is for ourselves.

### **B. A Convention-oriented constitutional theory of fundamental rights (§§ 81-86)**

#### **(i) The embedding of the Convention into the constitutional and legal order (§§ 81-84)**

81. It is worthy of note that the Constitutional Court has already incorporated many of the Convention principles into Italian constitutional law, developing a Convention-sensitive constitutional theory of fundamental rights. As pointed out by its judgment no. 349/2007, the Convention system “guarantees the application of a uniform level of protection internally in all member States”. To be precise, the Convention is a multilateral, law-making treaty, with a centralised and authoritative standard-setting mechanism and a collective enforcement system<sup>177</sup>.

82. Furthermore, in the view of the judges of the *Palazzo della Consulta*, Article 46 of the Convention requires States not only to adopt the individual measures necessary to put an end to the effects of the violation and provide redress, but also, if appropriate, any general measures capable or resolving

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*13 mai 2013*, Luxembourg, 2013, 155-168; and “L’universalità dei diritti umani nell’età dei ‘nuovi diritti’” (2009) *Quaderni costituzionali* 537; E. Lamarque, “Le relazioni tra l’ordinamento nazionale, supranazionale e internazionale nella tutela dei diritti”, in *Diritto pubblico* 3/2013; L. Casseti (ed.), *Diritti, principi e garanzie sotto la lente dei giudici di Strasburgo*, Naples: Jovene, 2012; L. Montanari, “La difficile definizione dei rapporti con la CEDU alla luce del nuovo art. 117 della Costituzione: un confronto con Francia e Regno Unito”, in *Diritto Pubblico Comparato ed Europeo*, 1/2008; G. Zagrebelsky, “Corti costituzionali e diritti universali”, in *Rivista trimestrale di diritto pubblico*, 2/2006; and G. Silvestri, “Verso uno *jus commune europeum* dei diritti fondamentali” (2006) *Quaderni costituzionali* 7.

<sup>176</sup> *Baka*, cited above.

<sup>177</sup> See my separate opinion in *Mursic*, cited above.



the structural issue at the heart of the violation<sup>178</sup>. Accordingly, in its laudable judgment in the *Dorigo* case, the Constitutional Court concluded that Article 630 of the Code of Criminal Procedure was unconstitutional in so far as it did not provide for the reopening of criminal proceedings after a final finding of an Article 6 violation.

83. Following the *Scoppola (no. 2)* judgment<sup>179</sup>, the Constitutional Court went a step further. In its exemplary judgment 210/2013, while dealing with the “younger brothers of *Scoppola*” (*i fratelli minori di Scoppola*), the *Consulta* referred not only to the obligation to replace the penalty of the defendant Scoppola, but also to the implicit obligation to put an end to the structural problem of the domestic legal framework which had led to the Convention violation and to remove its effects with regard to all prisoners in the same situation. This was the perfect occasion for the judges of the *Palazzo della Consulta* to fully acknowledge the *erga omnes* effect of the Court’s judgments. They lived up to the expectations, underscoring the existence of such effect even when the Court does not use the mechanism of the pilot judgment or impose the adoption of general measures<sup>180</sup>. The legal effect of a final judgment of the Court, whatever its subject or form, is binding for every Contracting Party. In an excellent display of this principle, the Constitutional Court affirmed unequivocally that the *erga omnes* effect of the Court’s judgments also encompassed the judgments of the Court delivered against other Contracting Parties<sup>181</sup>.

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<sup>178</sup> See Constitutional Court judgment no. 113/2011 on the reopening of criminal proceedings following a final finding by the Court of a violation of Article 6. This landmark case is particularly laudable because the *Consulta* was ready to reverse its recent judgment no. 129/2008. On these judgments see, among others, G. Grasso and F. Giuffrida, “L’incidenza sul giudicato interno delle sentenze della Corte Europea che accertano violazioni attinenti al diritto penale sostanziale”, in DPC, 25 Mai 2015; A. Cerruti, “Considerazioni in margine alla sent. No. 113/2011: esiste una “necessità di integrazione” tra ordinamento interno e sistema convenzionale?”, in *Giurisprudenza italiana*, 1/2012; “Gli effetti dei giudicati ‘europei’ sul giudicato italiano dopo la sentenza n. 113/2011 della Corte Costituzionale, Tavola rotonda con contributi di G. Canzio, R. Kostoris, A. Ruggeri”, *Rivista AIC* 2/2011; R. Greco, “Dialogo tra Corti ed effetti nell’ordinamento interno. Le implicazioni della sentenza della Corte costituzionale del 7 aprile 2011, n. 113”; and T. Guarnier, “Un ulteriore passo verso l’integrazione CEDU: il giudice nazionale come giudice comune della Convenzione?”, both the last two texts in *Consulta online*, 10 November 2011.

<sup>179</sup> *Scoppola v. Italy (no. 2)* [GC], no 10249/03, 17 September 2009.

<sup>180</sup> Paragraph 7.2 of the *cons. in dir.* of Constitutional Court judgment no. 210/2013. On this judgment see, among others, N. Perlo, “L’attribution des effets *erga omnes* aux arrêts de la Cour européenne des droits de l’homme en Italie : la révolution est en marche” (2015) *Revue française de droit constitutionnel*, 887; and E. Lamarque and F. Viganò, “Sulle ricadute interne della sentenza Scoppola, Ovvero: sul gioco di squadra tra Cassazione e Corte costituzionale nell’adeguamento del nostro ordinamento alle sentenze di Strasburgo (Nota a C. Cost. n. 210/2013)”, in *Giurisprudenza italiana*, no. 2/2014.

<sup>181</sup> Paragraph 4.4 of Constitutional Court judgment no. 170/213, referring to judgments delivered against France, Greece and the United Kingdom: “although not delivered against

84. The embeddedness of the Convention in the Italian legal order is further promoted by the substantive intertwinement of Constitution and Convention and the interplay between Convention and domestic guarantees. Such interplay is evidently facilitated by Article 2 of the Constitution and the openness of the constitutional catalogue of human rights in so far as an open clause such as that of the Italian Constitution is the natural way of embedding rights and freedoms not explicitly granted by the Constitution, but derived from international law<sup>182</sup>. Such openness to international law is indeed a feature of the Roman legal tradition and civilisation. In the cosmopolitan view of the eternal Gaius:

*“Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur; nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est vocaturque jus civile, quasi jus proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque jus gentium, quasi quo jure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum jure utitur.”*<sup>183</sup>

**(ii) Convention protection as a “floor”, not as a “ceiling” (§§ 85-86)**

85. Yet a Convention-sensitive constitutional theory of fundamental rights does not suffice today. There must be a Convention-oriented constitutional theory, which is something different and more demanding. From an axiological perspective, although the Convention and the Constitution are on a par, the former prevails over the latter in cases of unavoidable conflict. Constitutional theory must be founded on this bedrock principle, especially these days when the intrinsically counter-majoritarian nature of human rights is forgotten by legislators, courts and other domestic public authorities. The domestic over-sensitiveness to some constitutional interests or, even worse, the pure material transaction between Convention rights and “other constitutional interests”, cannot hide behind the argumentative tool of the maximisation of fundamental rights. This would twist the meaning of Article 53 of the Convention. As President Raimondi recently stated,

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Italy, the judgments last cited contain general statements which the same European court considers applicable beyond the specific case and that this Court considers also binding for the Italian legal order.”

<sup>182</sup> Constitutional Court judgments no. 404/88, no. 278/92 and no. 388/99.

<sup>183</sup> Gaius, *Institutiones, Commentarius Primus, I. De Iure Civili et Naturali, 1.1*: “All peoples who are governed by laws and customs use law which is partly theirs alone and partly shared by all mankind. The law which each people makes for itself is special to itself, it is called state law, the law peculiar to that state. But the law which natural reason makes for all mankind is applied in the same way everywhere. It is called the law of all peoples, because it is common to every nation. The law of the Roman people is also partly its own and partly common to all mankind.”

“the conformity with the Constitution of a determined legal provision does not guarantee the conformity with the Convention whose requirements in certain cases may be higher than those of the national Constitution.”<sup>184</sup>

86. Bearing in mind the true meaning of Article 53 of the Convention, the relationship between the Court and supreme and constitutional courts must respect the following bright, red line. Domestic courts may go beyond the degree of Convention protection afforded to the applicant, but they cannot lag behind, not even in view of an alleged systemic consideration of other constitutional interests involved. Figuratively, the Convention protection is a “floor”, but not a “ceiling”<sup>185</sup>. As a result, constitutional and supreme courts are indeed called upon to interpret the Court’s judgments and confront them with the domestic constitutional environment in which they will be implemented. But domestic courts cannot “redo” the Court’s judgment; in other words, they cannot retry the case in the light of “other constitutional interests” and find against an applicant who has already won the case in Strasbourg. Supreme and constitutional courts should not act as an appeal instance for the Government against Strasbourg judgments finding for the applicant. Supreme and constitutional courts should not provide a second<sup>186</sup> or third<sup>187</sup> chance for the Government to rediscuss a case after having lost it in Strasbourg. This would be an abstruse distortion of the Convention system. As Lord Rodger so brilliantly put it, *Argentoratum locutum, iudicium finitum* – “Strasbourg has spoken, the case is closed”<sup>188</sup>.

### C. The challenge of the “national identity” rhetoric (§§ 87-90)

#### (i) A lesson from the *Taricco* saga (§§ 87-88)

87. The above-mentioned risks are evidently compounded by the circumstance that “national identity” is a *bon à tout faire*, which is easily confounded with the opportunistic assessment of the “national interest” in the particular political and social context of a given case. The status of statutory limitations is a good example of this. How can the same State argue in Luxembourg the opposite of what it defends in Strasbourg? How

<sup>184</sup> G. Raimondi, “La Convenzione europea dei diritti dell’uomo e le corti costituzionali e supreme europee”, *Forum di Quaderni costituzionali*, 24 March 2018, page 10: “la conformità alla costituzione di una determinata disposizione legislativa non ne garantisce la conformità alla Convenzione, le cui esigenze, in certi casi, possono essere più elevate di quelle della costituzione nazionale”.

<sup>185</sup> See my separate opinion in *Hutchinson*, cited above.

<sup>186</sup> In case there is a finding of a violation by the Chamber and this judgment becomes final or where the Grand Chamber decides the case after relinquishment.

<sup>187</sup> In case there is a finding of a violation by the Grand Chamber after a Chamber judgment.

<sup>188</sup> Lord Rodger’s words in *AF v. Secretary of State for Home Department and Another* (2009) UKHL 28, § 98.

can the same Constitutional Court argue before the Court of Justice of the European Union that the statute of limitations is a substantive guarantee of criminal law, subject to the principle of legality<sup>189</sup> – a distinct, major feature of the “supreme constitutional principles of the constitutional order of a member State” and of the “inalienable rights of the person recognised by the Constitution of a member State”, in sum, of the Italian “national identity”<sup>190</sup> – and at the same time plead before the Strasbourg Court that it is an irrelevant feature of Italian law for the purposes of the legality principle, which does not even preclude non-conviction-based confiscation in matters of site development where the offence is statute-barred? Why does the mechanism of the right to be forgotten (*meccanismo del tempo dell’oblio*)<sup>191</sup> represent a crucial characteristic of Italian constitutional law to oppose the application of a penalty in Luxembourg, but not in Strasbourg?

88. These questions are not rhetorical: they seek to show that the relevance of the statute of limitations to the “national identity”, protected by the famous “counter-limits” invoked in judgment no. 24/2017, was totally ignored in judgment no. 49/2015, simply because it was not convenient for the purposes of the case. If it is true that, as judgment no. 24/2017 quite rightly argues and the European Court of Justice also confirmed<sup>192</sup>, *prescrizione* is a fundamental guarantee of defendants in the constitutional and legal order of Italy, and indeed in the European legal order, it is incomprehensible that the same guarantee played no role whatsoever in the reasoning of judgment no. 49/2015.

**(ii) The “Maginot line” between the Convention and the Charter of Fundamental Rights (§§ 89-90)**

89. Furthermore, no “counter-limits” can be invoked against Convention law, as interpreted by the Court. Italian “inalienable human rights” cannot be used as a weapon against European human rights, in view of the profound axiological affinity between the Convention and the democratic Constitution of the Italian Republic. To use the words of one of the finest examples of Italian constitutional case-law, human rights

“also guaranteed by universal or regional agreements signed by Italy, find expression, and no less intense guarantee in the Constitution ... not only for the value to be attributed to the general acknowledgment of the inviolable rights of man made by Article 2 of the Constitution ..., but also because, beyond coinciding with

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<sup>189</sup> See the second question put in Constitutional Court judgment no. 24/2017.

<sup>190</sup> See the third question put in Constitutional Court judgment no. 24/2017.

<sup>191</sup> See footnote 67 above.

<sup>192</sup> Court of Justice of the European Union, Grand Chamber, 5 December 2017, C-42/17. As an introduction to this judgment, see Bassini and Pollicino, “Defusing the Taricco bomb through fostering constitutional tolerance: all roads lead to Rome”, in *verfassungsblog.de*.

catalogues of these rights, the different formulas that express them integrate each other, complementing one another in their interpretation.”<sup>193</sup>

Thus, it is certainly not admissible to invoke “other constitutional interests”, such as the protection of the environment, *in malam partem*, in order to extend non-conviction-based confiscation to a time-barred offence of unlawful site development<sup>194</sup>.

90. At the end of the day, the “Maginot line” once drawn between Convention law and European Union law has evaporated. In fact, it was always an elusive defensive barrier against the full implementation of the Convention that inspired a false sense of security, but did not represent the truly imbricated nature of Convention law and European Union law with its Charter of Fundamental Rights. They both limit State sovereignty. Primacy over domestic law, even over constitutional law, and direct effect in the domestic legal order are also intrinsic features of the Convention system<sup>195</sup>. This evidently means that all ordinary judges are “ordinary judges of the Convention” (*giudici comuni della Convenzione*), entitled to disapply domestic law contradicting Convention law, as interpreted by the Court<sup>196</sup>. Such “diffuse control of conventionality” (*sindacato diffuso di convenzionalità*) not only furthers international comity, but also domestic judicial transparency, avoiding the temptation of a “forced” interpretation of domestic law according to the Convention which would lead to “masked disapplication” (*disapplicazione mascherata*). The convergence of Strasbourg and Luxembourg jurisprudence and the mutual influence of their legal standards contribute to the constitutionalisation of the European legal order<sup>197</sup>. If any preponderance has to be given, Article 52 § 3 and Article 53

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<sup>193</sup> Constitutional Court judgment no. 388 of 1999.

<sup>194</sup> In fact, not even international law on non-conviction-based confiscation favours this extension, as shown in the research done by the Court (see paragraphs 139-146 and 150 of the present judgment). In all instances of non-conviction-based confiscation the offences listed in the international documents mentioned there are much more serious than that of unlawful site development.

<sup>195</sup> The Court has given an indication of this primacy in paragraphs 98 and 99 of *Parrillo v. Italy* [GC], no. 46470/11, §§ 98-99, 27 August 2015.

<sup>196</sup> In this regard, there is no difference between the Convention and the Charter of fundamental rights. Recently, the Court of Justice, in case C-42/17, cited above, also reasserted the obligations of the Italian judges as ordinary judges of the Charter of Fundamental Rights and in general of European Union law. This is not the place to discuss the enigmatic *obiter dictum* included in paragraphs 5.1 and 5.2 in the law part of Constitutional Court judgment no. 269 of 2017, which refers to the relationship between the Constitutional Court and the ordinary judges in the application of the Charter. Its compatibility with the Court of Justice (Grand Chamber) judgment of 22 June 2010, in the *Melki and Abdeli* case, C-188 and 189/10, is an open question. In any event, that *obiter dictum* certainly does not suffice to change the Court’s firm position on the nature of the constitutionality review mechanism in Italy (*Parrillo*, cited above, §§ 101-104).

<sup>197</sup> In spite of its special features, the advisory mechanism of Protocol No. 16 will only reinforce this constitutionalisation.

of the Charter themselves are crystal clear about it: they establish the axiological subordination of the Charter and consequently of all European law to the human rights standards set by the Convention, as interpreted by the Court<sup>198</sup>.

## VI. Conclusion (§§ 91-95)

91. I regret that the present judgment does not provide the answer to my call for clarity in *Varvara*. That will be for another day. The majority prefer to circumvent the main substantive issues at stake, such as the position of the principle of *nulla poena sine culpa* within Article 7 of the Convention and the thorny question of the compatibility of the mental element requirement in *Sud Fondi*<sup>199</sup> with the Court's confusing and confused case-law on presumptions of liability. Instead they aggravate the situation, by apodictically importing this case-law into Article 7 without any plausible explanation and neglecting the non-derogable nature of Article 7. On this shaky doctrinal basis, the majority choose to depart from *Varvara* in respect of Mr Girona, but do not provide any principled reasoning for that departure, taking a purely efficiency-oriented stance on the matter. This stance chimes with the spirit of the age. At the end of the day, *confisca urbanistica senza condanna* is not saved, since it will always breach the presumption of innocence, as the majority themselves acknowledge.

92. In holding that penalties related to unlawful site development require no formal finding of guilt under Italian law, that the Court's case-law on this point means the opposite of what it clearly states and that, more broadly, the Court's judgments may be conveniently ignored where their "effective principle" is unclear, the practical effect of judgment no. 49/2015 is to leave domestic courts free to ignore the *erga omnes* effect of any of the Court's judgments, or to apply them selectively, at best. The principles enunciated in judgment no. 49/2015 threaten to narrow the practical effect of the Court's jurisprudence upon domestic legal systems in a manner quite obviously deleterious to the continued operation of the entire Convention system. No less obvious is the risk of a contagion of disobedience among Council of Europe member States, as recent examples in the United Kingdom and Russia demonstrate. The whole Convention system is in danger.

93. Acknowledging this danger, the Court uses this opportunity to give a response and affirm a principle. On the vexed question of "consolidated

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<sup>198</sup> See the "Explanations relating to the Charter of Fundamental Rights", 14 December 2017, 2007/C 303/02: "The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union." See also my separate opinion in *Al-Dulimi and Montana Management Inc.*, cited above.

<sup>199</sup> *Sud Fondi*, cited above.

law” (*diritto consolidato*), the present judgment is highly significant and will be remembered as a great step forward in the protection of human rights in Europe. The *Giudice delle leggi* cannot ignore the most important message sent from Strasbourg in this judgment: that all judgments of the Court “have the same legal value [and that] their binding nature and interpretative authority cannot therefore depend on the formation by which they were rendered”<sup>200</sup>. This principle deprives judgment no. 49/2015 of its theoretical cornerstone. Consequently, the Court repudiates the notion of “consolidated law”, which is at the heart of that same judgment. Accordingly, the Constitutional Court is called upon by the Grand Chamber to reframe the terms of its relationship with the Court, and there is no “margin of appreciation” that would allow it not to do so. While doing this, the Constitutional Court must be attentive to the value of the Convention as a constitutional instrument of European public order and the unique authoritative role of the Court in the legal landscape of Europe<sup>201</sup>.

94. This opinion is a pledge for the principle of universality of human rights. In Europe, the Court is the first interpreter of this universality. Yet its interpretative authority is questioned and its judgments are not implemented by domestic authorities and in particular by some constitutional and supreme courts. In addition to the political pressure recently exerted upon the Court, this “reluctance” of some constitutional and supreme courts is putting an undue strain on the entire Convention system<sup>202</sup>. This mistrustful attitude (*atteggiamento diffidente*)<sup>203</sup> must be overcome.

95. This is a time of awakening for the unprecedented systemic risk with which the European human rights system is confronted. It is not a time for dealing in constitutional euphemisms, still less for stoking the flames in Strasbourg with “national identity” rhetoric spiked up with an anti-cosmopolitan imagery. As a founding father of the system, Italy has a special responsibility in this difficult time that the Convention system is now going through. It is up to the founding fathers to set an example for the

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<sup>200</sup> Paragraph 252 of the judgment.

<sup>201</sup> In the past, the Constitutional Court has already given noteworthy examples of its capability to develop its case-law in order to stay on the side of human rights, such as when it changed its position from judgment no. 129/2008 to judgment no. 113/2011.

<sup>202</sup> “Reluctance” is the word used by the Court itself to characterise the reaction of the Constitutional Court to *Maggio and Others*, cited above (Seminar background paper, “Implementation of the Judgments of the European Court of Human Rights: a shared judicial responsibility?”, European Court of Human Rights 2014). On the recent political pressure on the Court, see P. Leach and A. Donald, *A Wolf in Sheep’s Clothing: Why the Draft Copenhagen Declaration Must be Rewritten*, EJIL: Talk!, 21 February 2018; and *Copenhagen: Keeping on Keeping on. A Reply to Mikael Rask Madsen and Jonas Christoffersen on the Draft Copenhagen Declaration*, EJIL: Talk!, 24 February 2018; and A. Follesdal and G. Ulfstein, *The Draft Copenhagen Declaration: Whose Responsibility and Dialogue?*, EJIL: Talk!, 22 February 2018.

<sup>203</sup> F. Viganò, “La Consulta e la tela di Penelope ...”, cited above, at p. 334.

others. Nothing else is to be expected from a Nation that has done so much for European legal culture.



## JOINT PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGES SPANO AND LEMMENS

### **I. Introduction**

1. We are unable to agree with a significant part of the judgment. In our opinion, the majority miss the opportunity to engage in a meaningful dialogue with the Italian Constitutional Court and to correct the Court's case-law. Instead, they continue to force upon the domestic authorities an interpretation of domestic law which ignores its essential features and to submit the domestic system of environmental protection to Convention requirements that seriously weaken its effectiveness.

2. However, we agree with the majority that there are some flaws in the Italian system. For that reason, we voted with the majority, on somewhat different grounds, for finding a violation of Article 1 of Protocol No. 1 to the Convention.

Furthermore, unlike the majority, we would prefer to examine the complaints also under Articles 6 § 1 and 13 of the Convention, which we consider to have been violated, largely for the same reasons why we consider that Article 1 of Protocol No. 1 has been violated.

Our main disagreement is with the majority's examination of the Article 7 complaint. We consider that an analysis of the Italian system of confiscation in the area of site development must lead to the conclusion that this type of measure, even when imposed by a criminal court in criminal proceedings, is not a "penalty" within the meaning of Article 7 of the Convention, and therefore falls outside the scope of application of that provision. Moreover, assuming that Article 7 were applicable, we consider that, as a general matter, the majority read into that provision guarantees that have little or nothing to do with the principle of legality in criminal law.

Finally, we note that we ourselves have different views on whether Article 6 § 2 of the Convention has been violated. In our opinion, this is not a major issue. Therefore, we will not deal with it in depth in this separate opinion.

### **II. A short history of the interaction between the European Court and the Italian courts**

3. In order to understand what is at stake in the present case, it is important to highlight how the Court has dealt with confiscation measures in the context of unlawful site development in Italy, and how the Italian courts have reacted to the judgments of the Court. In our view, the history shows that, while the Italian system was based on a strict but coherent policy of environmental protection, from the very beginning the Court

rejected some of the features of that system. The Italian courts tried to align themselves, to the extent possible, with the principles of our Court's case-law, and at the same time to enforce the legislature's policy views.

4. *Before our Court's decision in Sud Fondi (2007)*<sup>1</sup>, the situation under Italian law was quite clear.

*Administrative authorities* (the municipality and, if the latter did not take action, the region) could order the confiscation of property that was transformed (developed) in violation of the applicable rules on the use of land. Ownership was transferred to the municipality, which could proceed with the demolition of any buildings illegally constructed; if the municipality did not take action, the region could. These measures were aimed at restoring legality, no more, no less. No punitive element was involved. This system of administrative action is still in force (see Article 30 §§ 7 and 8 of the Construction Code, mentioned in paragraph 107 of the judgment). Until now, it does not seem to have been the subject of any dispute between our Court and the domestic authorities.

Once criminal proceedings were brought against the person accused of being responsible for an unlawful site development, the *criminal court* became competent to order the confiscation of the unlawfully developed site, provided that it had established that the development was indeed "unlawful" (Article 44 § 2 of the Construction Code, quoted in paragraph 108 of the judgment). The criminal court could thus take a measure similar to that which could be taken by the administrative authorities. This was an effective instrument in the hands of the judiciary in order to overcome the inability or unwillingness of administrative authorities to take action against unlawful site development. As the Court of Cassation indicated in its request of 20 May 2014 for a preliminary ruling to the Constitutional Court (referred to in paragraph 132 of the present judgment), leading to judgment no. 49 of the Constitutional Court of 2015 (see paragraph 133 of the present judgment), this arrangement could be seen as an implementation of the constitutionally protected right to a healthy environment.

According to the interpretation given to the relevant domestic law by the domestic courts, the confiscation ordered by the criminal courts was not a penalty (in domestic law terms), but an "administrative sanction", in the sense of a measure to restore legality. It was not considered to be a punitive measure<sup>2</sup>, linked to any personal responsibility of the accused person; the mere fact that the site development was "unlawful" or incompatible with the law (which was not the same as saying that it was the result of a "criminal" act) justified the measure.

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<sup>1</sup> *Sud Fondi S.r.l. and Others v. Italy* (dec.), no. 75909/01, 30 August 2007.

<sup>2</sup> We note that the term "sanction" is somewhat ambiguous. It can denote a punishment of a *person* who has committed a reprehensible act, but it can also denote a mere reaction to an *illegal situation*. It is apparently in the latter sense that the term is understood by the domestic courts.

5. Then came the *decision of the Court in Sud Fondi* (2007, cited above), later followed by the *judgment on the merits in that case* (2009)<sup>3</sup>.

According to that decision, the confiscation measure was a “penalty” within the meaning of Article 7 § 1 of the Convention. As the judgment subsequently explained, this implied that the measure could be imposed only on the basis of a sufficiently precise law (*ibid.*, §§ 107-10 and 111-14) and provided that there was an “intellectual link (awareness and intent)” between the objectively illegal act and the person who committed it, establishing an “element of responsibility” in that person’s conduct (*ibid.*, § 116).

6. The Italian courts tried to implement *Sud Fondi* while at the same time upholding, as much as they could, the basic philosophy underlying the sanction mechanism relating to the orderly use of land. Or, in the words of the Constitutional Court, they tried to “ascribe a meaning to the provision of national law that [came] as close as possible to that endorsed by the European Court” (judgment no. 239 of 2009, referred to in paragraph 239 (b) of the present judgment). This resulted in an interpretation of domestic law according to which the confiscation order could be imposed only on a person “whose *responsibility* [had] been established by virtue of an intellectual link (awareness and intent) with the facts” (judgment no. 239 of 2009).

This development is also highlighted in the Government’s observations. They indicate that, following the Constitutional Court’s judgment no. 239 of 2009, the Court of Cassation ruled that a confiscation order could be imposed only if it was proved that the accused person was “responsible”, that is, if there was proof not only of the material element (“*elemento oggettivo*”), but also of the subjective or mental element (“*elemento soggettivo*”) of the unlawful site development (see the Government’s observations summarised in paragraphs 203 and 239 (b) of the present judgment; the Government refer to the judgment of the Court of Cassation of 13 July 2009 - 8 October 2009, no. 39078, mentioned in paragraphs 121, 122 and 129 of the present judgment). They further indicate that, by contrast, the confiscation of an unlawfully developed site could no longer be ordered against those persons who had not committed any crime and who acted in good faith (the Government refer to the judgment of the Court of Cassation of 6 October 2010 - 10 November 2010, no. 39715, mentioned in paragraph 122 of the present judgment). It should be noted that in its judgment no. 49 of 2015, the Constitutional Court emphasised that in criminal proceedings the burden of proof for establishing the bad faith of a third-party buyer, whether criminally liable or not, fell upon the prosecution.

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<sup>3</sup> *Sud Fondi S.r.l. and Others v. Italy*, no. 75909/01, 20 January 2009.

In our opinion, these are considerable changes to the interpretation and application of domestic law, prompted by the case-law of the Court<sup>4</sup>. As highlighted by the Constitutional Court in its judgment no. 49 of 2015, the domestic courts agreed to turn the administrative sanction from a measure which could be imposed on the mere basis of the existence of an *objectively* illegal situation, regardless of the existence or not of any personal responsibility of the owner of an illegal construction, into a measure that could be applied only to persons who were in some way or another *personally* responsible for the illegality.

However, the domestic courts did not change their opinion about the nature of the confiscation measure under domestic law. They considered the measure still to be an “administrative sanction”, not a “penalty”, and certainly not a penalty of a “criminal” nature (under domestic law) (see paragraph 121 of the present judgment). This explains, in our opinion, why the domestic courts accepted that confiscation could be ordered even if the owner had not been convicted for an offence, either because he could never be charged with a crime (like a *legal person*), or because, although found to be responsible for the illegality committed, he was acquitted (from the strictly criminal point of view) as a result of a *time bar* (*prescrizione* in Italian). This latter possibility is highlighted by the Constitutional Court in its judgment no. 49 of 2015, which states that, under domestic law, it is not in itself impossible that an acquittal on the grounds of time-barring may be accompanied by a statement of more detailed reasons relating to “responsibility”, for the sole purpose of the confiscation of land that has been unlawfully fragmented.

7. The next step is the Court’s judgment in *Varvara* (2013)<sup>5</sup>.

The Court confirmed that Article 7 was applicable, without giving any further reason than a reference to its decision in *Sud Fondi* (see *Varvara*, cited above, § 51).

On the merits, the Court held that three consequences flowed from the principle of legality in criminal law: a prohibition on giving an extensive interpretation to criminal-law provisions (*ibid.*, § 62), a prohibition on punishing a person whilst the offence had been committed by another person (*ibid.*, §§ 63-66), and a prohibition on imposing a penalty without the finding of responsibility (*ibid.*, §§ 67-71). Applying the latter principle to the facts of the case, it noted that “the criminal penalty [*sanction pénale*] [had been] imposed on the applicant despite the fact that the criminal offence had been time-barred and his criminal liability [*sa responsabilité*]<sup>6</sup> not established in a verdict as to his guilt [*jugement de condamnation*]”.

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<sup>4</sup> We regret that not more attention is paid to these changes in the description of the relevant domestic law, in particular in paragraph 121 of the judgment.

<sup>5</sup> *Varvara v. Italy*, no. 17475/09, 29 October 2013.

<sup>6</sup> We note the broad term in the original French text, and the stricter term in the English translation.

Imposing a “penalty” in these circumstances was incompatible with the principle of legality laid down in Article 7 (*ibid.*, § 72).

8. It was again for the *Italian courts* to react to this judgment of the Court.

The Court of Cassation and the Teramo District Court interpreted *Varvara* as requiring a formal “conviction” for a criminal offence, thus excluding the possibility of imposing a confiscation order where the criminal offence had become time-barred. On the basis of that reading, and on the assumption that they would have to apply domestic law accordingly, they asked the Constitutional Court whether the requirement of a “conviction” would be compatible with the Italian Constitution (see paragraph 132 of the present judgment).

The Constitutional Court’s response was mainly that the referring courts’ questions were based on two wrong interpretative assumptions (see § 6 of the Constitutional Court’s judgment, quoted in § 133 of the present judgment).

The first of these wrong assumptions is of relevance for our case<sup>7</sup>. The Constitutional Court stated that it was not convinced that the two referring courts had read *Varvara* correctly by assuming that it required a “conviction” for an offence that had to be “criminal” under domestic law. The Constitutional Court noted that such an interpretation would be in conflict, not only with the Italian Constitution (as it would limit the legislature’s discretion to decide whether a given conduct should be “sanctioned” by criminal law or by administrative law), but also with the case-law of the European Court (which accepted that “penalties”, in the autonomous sense of the Convention, could be imposed by an administrative authority, without a formal declaration of guilt by a criminal court) (§ 6.1). Also, and more importantly, the Constitutional Court indicated that it was possible to interpret *Varvara* differently, namely by considering that it only required that “responsibility” be established, in whatever form (a “conviction” for an offence being one of various possible forms). As a consequence, “as things currently stand” – that is, as long as the Grand Chamber would not hold otherwise in the present case – one could not *unambiguously* interpret *Varvara* as implying that confiscation was possible only in cases of a “conviction” for the offence of unlawful site development. Since it was *possible* to read *Varvara* differently, the domestic courts *had to* adopt that interpretation, which was in line with the European Court’s case-law and which was compatible with the Italian Constitution (§ 6.2).

9. What can we conclude from this overview?

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<sup>7</sup> The second wrong assumption is about the authority of the judgments of our Court (§ 7 of the judgment of the Constitutional Court).

It is our understanding that with *Sud Fondi* our Court seriously limited the efficiency of the Italian mechanism of dealing with unlawful site development. Nevertheless, the domestic courts, far from raising a conflict, tried to incorporate the Court's interpretation of Article 7 into their application of domestic law, without however considering that the intrinsic nature of confiscation had changed (a measure aimed at restoring legality, not at punishing an individual for criminal conduct).

With *Varvara* our Court went a step further. This time there was genuine concern within the Italian judiciary, including the Constitutional Court. If *Varvara* meant that confiscation required a "conviction" for an offence (under domestic law) and that it could no longer be ordered when the offence had become time-barred, this would make it in many cases impossible for the criminal courts to take action against companies and natural persons, even if they had blatantly acted in bad faith.

We are satisfied that the majority do not go as far as *Varvara*. We disagree however with their endorsement of the reasoning in *Sud Fondi*, as will be explained in more detail below.

### III. Article 1 of Protocol No. 1 to the Convention

10. In our opinion, Article 1 of Protocol No. 1 is the key provision in the present case. The applicants' properties have been taken away. We voted with our colleagues for finding a violation of this provision. However, we arrived at this conclusion without having to characterise the confiscation measure as a "penalty".

11. The first issue in the analysis is the determination of the *applicable norm* of Article 1 of Protocol No. 1 (see paragraphs 289-91 of the judgment).

As in *Sud Fondi*, the majority leave open the question whether the confiscation is to be considered a matter of "control of the use of property" or a measure "to secure the payment of (a penalty)" (paragraphs 290-91 of the judgment).

In our opinion, the Court could have taken a clear stance. The confiscation measures ordered in the present case were a reaction to the violation of domestic rules relating to the use of land. In our view it is therefore clear that they constitute measures involving the "control of the use of property". By contrast, confiscation is not a means of "securing the payment" of any "penalties" (the French text of Article 1 of Protocol No. 1 reads "*amendes*"). It is an autonomous measure, imposed in cases of unlawful site development, irrespective of whether or not the owner has committed an offence and has been fined.

12. For a measure relating to the control of the use of land to be compatible with the second paragraph of Article 1 of Protocol No. 1, it must be "lawful" (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC],

no. 38433/09, § 187, ECHR 2012), must pursue an aim in the “general interest”, and must maintain a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (see, among other authorities, *Depalle v. France* [GC], no. 34044/02, § 83, ECHR 2010, and *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 86, 29 March 2010).

As far as the lawfulness of the measure is concerned, the majority leave this question open (see paragraph 294 of the judgment). In our opinion, there is no reason to doubt that this first condition is fulfilled.

With respect to the general interest, we agree with the majority that State policies in favour of environmental protection pursue such an aim (see paragraph 295 of the judgment). We also believe that the domestic courts acted in the general interest when they ordered the confiscation of the properties belonging to the applicants. It is true that the subsequent conduct of the municipal authorities was perhaps not as could be expected (see paragraphs 296-98 of the judgment), but that conduct does not in our opinion affect the justification for the courts’ orders. Moreover, except for the property returned to G.I.E.M., measures aimed at the concrete restoration of legality can still be taken by the competent authorities.

The main question is whether the courts achieved a fair balance between the general interest and the individual rights of the applicants. Like the majority, we are of the opinion that the Italian system does not make it possible to arrive at an adequate balancing of interests. Apart from the fact that confiscation is a measure imposed automatically once the unlawfulness of the site development is established and that in the present case the applicant companies were not even parties to the proceedings (see paragraph 303 of the judgment), we find it unacceptable that there has been no assessment of whether the confiscation did or did not impose a disproportionate burden on the owner. This is in our opinion an especially relevant consideration where the unlawful site development concerned only part of the land for which confiscation was ordered.

13. We are therefore of the opinion that Article 1 of Protocol No. 1 has been violated.

#### **IV. Article 6 § 1 and Article 13 of the Convention**

14. The majority declare admissible G.I.E.M.’s complaint relating to its lack of access to a court for the determination of its civil rights and obligations and Falgest’s complaint relating to the absence of an effective domestic remedy to deal with the alleged violations of Article 7 of the Convention and Article 1 of Protocol No. 1, but they hold that it is not necessary to examine these complaints on the merits (see paragraphs 308-09 of the judgment).

We voted against the latter conclusion.

We did so in order to stress that, as indicated above, in our discussion of the complaint under Article 1 of Protocol No. 1 (see § 12 above), the applicant companies did not enjoy any procedural protection against the impugned measures as they were not even parties to the proceedings. For that reason, there has in our opinion been a violation of Article 6 § 1 in the case of G.I.E.M., as well as a violation of Article 13, in combination with Article 1 of Protocol No. 1 (only), in the cases of G.I.E.M. and Falgest.

## V. Article 7 of the Convention

### 1. Applicability

15. The majority confirm the decision in *Sud Fondi* (cited above) according to which the confiscation order is a “penalty” within the meaning of Article 7 of the Convention.

We believe that it was a mistake to hold that Article 7 was applicable to confiscation orders as provided for in the Italian legislation on site development<sup>8</sup>. For the reasons explained below, we believe that such confiscation measures do not constitute a “penalty”. While the domestic courts drew conclusions from the Court’s holding in *Sud Fondi*, the Government explicitly invited the Court to overrule that decision. In our opinion, it would have been better to take a step back and to allow the confiscation measures to keep their essential features, which we do not consider to be incompatible as such with the Convention.

16. The majority stress that the concept of a “penalty” in Article 7 has an autonomous meaning (paragraph 210 of the judgment). They further state that, while the starting point in any assessment of the existence of a “penalty” is “whether the measure in question is imposed following a decision that a person is guilty of a criminal offence”, other factors may also be taken into account (paragraph 211 of the judgment).

We would have adopted a different approach. In order to assess whether a measure should qualify as a “penalty”, we consider that the Court should pay attention to its “intrinsic nature” (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 90, ECHR 2013), taking into account “the domestic law as a whole and the way it was applied at the material time” (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 145, ECHR 2008). It is, in other words, on the basis of the features assigned to a measure by domestic law that the Court should come to a characterisation of that measure under the Convention. And it is for the domestic courts to explain what the content of the relevant domestic law is (see *Hutchinson v. the United Kingdom* [GC], no. 57592/08, § 40, ECHR 2017). In its judgment no. 49 of 2015, the

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<sup>8</sup> We would like to note that confiscation as provided by Italian law on site development is quite different from confiscation in other areas of the law (for instance money laundering). See further, § 22 below.



Constitutional Court said the same thing, by stating that it was not for the Strasbourg Court to determine the meaning of domestic law, but only to verify whether domestic law, as defined and applied by the domestic courts, was in conformity with the Convention. We would add that our Court can only depart from the domestic courts' interpretation of domestic law when that interpretation is arbitrary or manifestly unreasonable (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 85, ECHR 2007-I; *Károly Nagy v. Hungary* [GC], no. 56665/09, § 71, ECHR 2017; and *Radomilja and Others v. Croatia* [GC], no. 37685/10, § 149, 20 March 2018).

As explained above, before and after *Sud Fondi* (cited above), the domestic courts have consistently interpreted the confiscation order in matters of urban policy as an “administrative sanction”, not as a “penalty” in the sense of domestic law (see §§ 4 and 6 above). There are, in our opinion, good reasons to say so: the primary competence to order the measure lies with the administrative authorities; the order is, under domestic law, not conditional upon a conviction for an offence; the order is aimed at restoring legality, that is, repairing the damage done to the general interest, and preventing further illegalities. The latter aspect is in our opinion the most relevant, if not the decisive one, when it comes to assessing the “intrinsic nature” of the measure.

17. The majority acknowledge that the confiscations in question were not imposed following convictions for criminal offences (see paragraphs 215-19 of the judgment). In our opinion, this is a very important element and a strong indication that the measures imposed were not “penalties” within the meaning of Article 7 of the Convention.

For the majority, the fact that the confiscation measure could be imposed without a prior conviction does not necessarily rule out the applicability of Article 7 (see paragraph 217 of the judgment). We do not dispute that statement, provided that there are convincing arguments pointing in the other direction. We fail, however, to see such arguments.

It seems that the majority consider it sufficient, in order to characterise a measure as a “penalty”, for it to be “connected to a criminal offence based on general legal provisions” (see paragraph 218 of the judgment). Such a link between the measure and an offence is, in our opinion, too vague and too remote. A measure actually imposed on a given individual cannot be considered a “penalty” merely because in other circumstances, with respect to other individuals, it may be of such a nature. And what is the relevance of the reference to “general legal provisions”? Are measures that do not constitute a “penalty” not also based on such provisions?

18. The majority give four reasons why, despite the fact that the confiscation orders were not imposed following a conviction for a criminal offence, they were nevertheless a “penalty” within the meaning of Article 7.

The majority thus develop the reasoning contained in the *Sud Fondi* decision (cited above).

In our opinion, these reasons are far from convincing.

19. The majority first refer to the fact that Article 44 of the Construction Code, which governs the confiscation measure at issue, bears the heading “Criminal sanctions”. This is considered to be an indication that the measure is characterised as a criminal sanction under domestic law (see paragraph 220 of the judgment).

It is true that in the Construction Code the penalties in the strict sense of the word (Article 44 § 1) and the confiscation orders (Article 44 § 2) are regulated in the same Article, under the heading “Criminal sanctions”. At first sight, this may seem to be a strong argument. However, upon closer analysis, we do not believe that this can be an argument at all. First of all, such a conclusion manifestly contradicts the consistent interpretation of the nature of the confiscation order by the domestic courts. Secondly, the Construction Code is the result of a codification of existing statutory provisions by presidential decree (decree no. 380 of 6 June 2001; see paragraph 105 of the judgment). A mere codification by the executive cannot alter the meaning of the statutory provisions that are codified. It is therefore relevant to look at the original provisions on criminal sanctions and confiscations, as they were contained in Act no. 47 of 28 February 1985. Sections 19 and 20 of that Act made a clear distinction between, respectively, confiscation measures and criminal penalties. Confiscation was not mentioned under the criminal penalties (see paragraphs 103 and 104 of the judgment). We therefore accept the Government’s submission that the authors of the codification made a mistake (see paragraph 202 of the judgment), and consider that this mistake cannot have any consequence as to the characterisation of a confiscation measure. Finally, it is questionable whether the wording of the heading of an Article in a legislative or regulatory text can be relevant at all. According to the maxim “*rubrica non fit ius*” (a heading does not create law), there is nothing normative that can flow from a heading.

20. The majority go on to refer to the nature and purpose of the confiscation, and state that the purpose of the confiscation of the applicants’ property was punitive (see paragraphs 222-26 of the judgment).

Although not decisive, as the concept is autonomous under Article 7 of the Convention, we note at the outset that this is an interpretation that is not in conformity with the purpose ascribed to the confiscation measures by the domestic courts, even after *Sud Fondi*<sup>9</sup>.

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<sup>9</sup> We note that in paragraph 121 of the judgment there is a reference to two judgments of the Court of Cassation (no. 39078 of 2009, and no. 5857 of 2011) according to which the confiscation does have a “punitive” nature, and to one judgment of the same court (no. 21125 of 2007) according to which its primary function is deterrence. However, the first two judgments speak of a “punitive” character *within the meaning of Article 7 of the*

The majority rely on three arguments for calling into question the understanding of the impugned measure by the domestic courts.

First, they refer to the post-*Sud Fondi* case-law of the domestic courts, which accept that the guarantees of Article 7 of the Convention apply (see paragraph 223 of the judgment). In our view, this cannot be a relevant argument for retrospectively justifying the finding in *Sud Fondi*. The Italian courts felt obliged to apply the guarantees of Article 7, as interpreted by the Court, because of the authority of the Court’s judgments, not because they considered that this could be derived from the nature of such a confiscation measure. Moreover, the domestic courts were careful to hold (only) that the *guarantees of Article 7* were to be applied, in particular the requirement of the responsibility of the person upon whom the confiscation order was to be imposed; the courts did not change their assessment of the *nature of a confiscation order*, in particular their view that such confiscation was a non-punitive measure.

Second, the majority refer to an “acknowledgment” by the Government, in their observations under Article 1 of Protocol No. 1, that the confiscation measure pursued the purpose of punishment (see paragraph 224 of the judgment). We find this an extremely weak argument. Under Article 7, the Government are very clear in their opinion that such confiscation is not a penalty, because its aim is not to punish, but to restore the orderly use of the land and to repair the effects of unlawful site development (see paragraphs 194 (b) and 200 of the judgment). In so far as they speak of “punishment” (which they place in inverted commas, see § 119 of their observations) the Government seek to show that the measure fulfilled the “public interest” aim under Article 1 of Protocol No. 1, and they do so on the premise that the Court would, contrary to their argument, find that the confiscation measure falls within the scope of Article 7 of the Convention. There is no acknowledgment at all of the punitive character of the measure for the purposes of the latter provision.

Third, the majority rely on the fact that such confiscation is a mandatory measure which the domestic court must impose, irrespective of whether there has been any actual danger or a concrete risk for the environment (paragraph 225 of the judgment). It is true that punitive measures can be imposed simply because someone’s conduct violated criminal law, irrespective of whether there was any harm to a victim or to the general

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*Convention*, following the case-law of our Court. As to the third judgment, handed down before the Court’s decision in *Sud Fondi*, it speaks of a “strong element of deterrence”, but does not link this to any punitive character of the measure; moreover, deterrence is not a feature of penalties only. For our part, we attach more importance to the fact that in other decisions, handed down after the judgments in *Sud Fondi* and *Varvara* and mentioned in the same paragraph, both the Constitutional Court and the Court of Cassation reiterated that the impugned confiscation was to be characterised as an “administrative sanction” (Constitutional Court, no. 49 of 2015; Court of Cassation, no. 42741 of 2008, and no. 4880 (Plenary Court) of 2015).

interest. But is the same not also true for non-punitive measures aimed at the restoration of legality? We do not see why the absence of an actual danger or of a concrete risk of damage would preclude a measure of a purely administrative nature, aimed at upholding respect for the applicable legal rules.

In our opinion, there are no strong reasons to deviate from the view of the domestic courts, based on an analysis of domestic law, that confiscation under the legislation on site development is aimed at restoring legality, not at punishing the perpetrator. Administrative law is full of non-punitive measures aimed at preventing illegalities and putting an end to illegal situations. As the Constitutional Court stated in judgment no. 49 of 2015, it is for the legislature to decide on the best instruments to ensure the effective imposition of obligations and duties. The majority attribute to the confiscation measure a purpose which is not that envisaged by the legislature.

21. The majority further rely on the severity of the effects of a confiscation measure. They point to the fact that confiscation “is a particularly harsh and intrusive sanction”, for which no compensation is due (see paragraph 227 of the judgment).

We agree with this assessment. It was partly because of the absence of an assessment of the burdens imposed on the applicants, in comparison with the general interest, that we concluded that Article 1 of Protocol No. 1 had been violated (see § 12 above). We also admit that the degree of severity of the penalty is relevant for the applicability of the criminal limb of Article 6 of the Convention, assuming that there is a “charge”. But when it comes to the assessment of whether confiscation is a “penalty” within the meaning of Article 7 of the Convention, “the severity of the measure ... is not in itself decisive, since many non-penal measures of a preventive nature may, just as measures which must be classified as a penalty, have a substantial impact on the person concerned” (see *Bergmann v. Germany*, no. 23279/14, § 150, 7 January 2016; see also, among other authorities, *Welch v. the United Kingdom*, 9 February 1995, § 32, Series A no. 307-A; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV; *M. v. Germany*, no. 19359/04, § 120, ECHR 2009; and *Del Río Prada*, cited above, § 82).

In short, the fact that confiscation is a harsh measure does not point decisively in the direction of a punitive nature.

22. The majority finally turn to the procedures for the adoption and enforcement of a confiscation measure (see paragraphs 228-32 of the judgment).

They observe in the first place that the measure is ordered by the criminal courts (see paragraph 228 of the judgment). This is undeniable, but it is not in our view a persuasive argument. It is indeed not uncommon for criminal courts to take decisions of a non-punitive nature. The best example is the possibility for criminal courts in a number of countries to order civil

reparation measures for the victim of the criminal act of which the accused has been found guilty. In any event, the Court must go behind appearances (see paragraph 210 of the judgment). While confiscation measures ordered by a criminal court often are an additional penalty, this is not necessarily so in all cases. Having regard to the specific legal framework for such confiscation orders under Italian site development law, their nature is different from that of “ordinary” confiscation orders. The majority do not seem to pay any attention to the specificity of the confiscation measures under review<sup>10</sup>.

The majority then reject the Government’s argument according to which the criminal courts act in the place of the competent administrative authority (see paragraphs 229-32 of the judgment). What the Government seem to argue is that the competence to order confiscation is primarily a competence of the administrative authorities, and that the criminal courts have the same competence, which they can exercise in cases of failure by the administrative authorities to make use of theirs. In other words, according to the Government, a confiscation order in a situation of unlawful site development has the same content, produces the same effects and therefore is of the same (non-punitive) nature, regardless of the authority by which it is ordered (see paragraph 191 of the judgment). It seems to us that there is no answer to the essence of this argument, to which we subscribe.

23. Having regard to the foregoing, we conclude that there are insufficient reasons to warrant the finding that a confiscation order in Italian law, imposed by a criminal court in cases of unlawful site development, is a “penalty” within the meaning of Article 7 of the Convention. The complaint based on that provision should therefore have been declared incompatible *ratione materiae* with the provisions of the Convention. We accordingly voted against declaring this complaint admissible.

Our analysis under Article 7 could stop here. However, we also strongly disagree with some of the requirements that the majority read into that provision. For that reason we will now also discuss the merits of the complaint.

## 2. Merits

24. Having found that the impugned confiscation measures can be regarded as “penalties” within the meaning of Article 7 of the Convention, the majority go on to conclude that Article 7 required that these measures had to be foreseeable for the applicants and that the said provision precluded any decision to impose those measures on the applicants in the absence of a

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<sup>10</sup> In the same vein, we consider that it may be somewhat misleading to refer, in the part of the judgment on relevant sources of international and European Union law, to instruments that deal with confiscation in areas that have nothing to do with the protection of the environment or the unlawful development of sites.

“mental link disclosing an element of liability in their conduct” (see paragraph 246 of the judgment). On this basis, the majority then proceed to assess whether this latter requirement was met, bearing in mind that none of the applicants had been formally convicted and that the applicant companies were never parties to the proceedings in question (see paragraph 247 of the judgment).

The majority rely in their findings on the reasoning set forth in §§ 116-17 of the Court’s judgment in *Sud Fondi* (cited above, as quoted in paragraph 241 of the present judgment). There the Court acknowledged that Article 7 did not expressly mention any mental link between the material element of the offence and the person deemed to have committed it. Nevertheless, the Court found that “the rationale of the sentence and punishment, and the ‘guilty’ concept (in the English version) and the corresponding notion of ‘*personne coupable*’ (in the French version), support[ed] an interpretation whereby Article 7 require[d], for the purposes of punishment, an intellectual link (awareness and intent) disclosing an element of liability in the conduct of the perpetrator of the offence, failing which the penalty [would] be unjustified” (ibid., § 116). Moreover, the Court continued, “it would be inconsistent, on the one hand, to require an accessible and foreseeable legal basis and, on the other, to allow an individual to be found ‘guilty’ and to ‘punish’ him even though he had not been in a position to know the criminal law owing to an unavoidable error for which the person falling foul of it could in no way be blamed” (ibid.). Thus, the Court concluded, a “legislative framework which does not enable an accused person to know the meaning and scope of the criminal law is defective not only on the grounds of the general conditions of ‘quality’ of the ‘law’ but also in terms of the ‘specific requirements of the principle of legality in criminal law’ provided for in Article 7 of the Convention (ibid., § 117).

We respectfully disagree.

25. Article 7 of the Convention bears the title “No punishment without law” (“*Pas de peine sans loi*” in the French version). Moreover, as the Court held, the guarantee enshrined in Article 7 is an essential element of the rule of law. It prohibits the retrospective application of the criminal law to an accused’s disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits, in particular, the extension of the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy. In other words offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts’ interpretation of it and after taking appropriate legal advice, what

acts and omissions will make him or her criminally liable and what penalty he or she faces on that account (see, among other authorities, *Del Río Prada*, cited above, §§ 77-79, and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, §§ 153-54, ECHR 2015).

Thus, in our view, it flows directly from settled case-law that the Court's task under Article 7 of the Convention is to verify that at the time when an accused person performed the act which led to his or her being prosecuted and convicted there was in force a legal provision which made that act punishable and that the punishment imposed did not exceed the limits fixed by that provision. Hence, Article 7 is, first and foremost, a rule-of-law guarantee limiting the Contracting States' ability to impose criminal penalties retroactively and in a manner which lacks foreseeability. However, it does not in our view, as the majority today conclude, limit the States' discretion in their legislative assessment when deciding on the formulation of the subjective and objective elements of criminal liability at national level. In other words, and to be clear, Article 7 is not, and has never been, a tool for the harmonisation of *substantive* criminal law in the Member States of the Council of Europe.

26. Proceeding to a more detailed analysis of the majority's opinion, we observe that it is firstly based on ascribing a direct correlation between the foreseeability requirement under Article 7 of the Convention and the finding that, in principle, "a measure can only be regarded as a penalty within the meaning of Article 7 where an element of personal liability on the part of the offender has been established" (see paragraph 242 of the judgment).

We disagree with this interpretation of the principle of legality under Article 7. In fact, the majority immediately backtrack in paragraph 243 from its finding in paragraph 242, described above, that Article 7 of the Convention requires a "mental link disclosing an element of liability", by stating that this requirement "does not preclude the existence of certain forms of objective liability stemming from presumptions of liability, provided they comply with the Convention". The majority then refer to the Court's case-law under Article 6 § 2 to the effect that in principle the Contracting States "may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence". This is commonly termed *strict* or *objective* criminal liability. Although the Court has not had an opportunity to define in more detail what those "conditions" are, limiting the imposition of strict criminal liability under the Convention, it is clear in our view that those limitations would flow from the requirements of Article 6 § 2, not from those of Article 7. In other words, whether a "simple or objective fact" may justifiably be penalised under the Convention, without the prosecution having to prove a mental link, is intimately linked to the interpretation and application of the presumption of innocence guaranteed by the former, but is not a requirement flowing from the latter. In sum, although we of course do

not call into question the majority's reliance on the settled methodological approach that the "Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions" (see paragraph 244 of the judgment), rather than applying that approach to clarifying the relationship between Article 6 § 2 and Article 7 of the Convention, the majority have sown seeds of confusion in the interpretation and application of these two important, but conceptually different, human rights guarantees.

27. The majority's opinion is, secondly, based on an attempt to extrapolate from the word "guilty" ("*personne coupable*") in Article 7 § 1 of the Convention, and from the rationale of the sentence and punishment, the requirement of an "intellectual link", understood as awareness and intent, disclosing an element of liability in the conduct of the perpetrator of the offence, failing which the penalty will be unjustified. This interpretation of Article 7 has no basis in the Court's case-law with the exception of the Chamber judgment in *Sud Fondi*, which the majority of the Grand Chamber now endorse. It does not, moreover, reflect in our view a correct reading of this provision.

The first sentence of Article 7 § 1 of the Convention states that no one "shall be held guilty" of any criminal offence on account of "any act or omission which did not constitute a criminal offence under national or international law at the time it was committed". The rule laid down by this sentence is clear: it prohibits the retroactive application of criminal laws and has in the case-law furthermore been interpreted to require foreseeability in the application of such laws, as described above (see § 25 above). Within that context the word "guilty" must be understood as referring to the traditional concept used to describe the finding of a criminal conviction under domestic laws on criminal procedure. In other words, when a national court has found that the prosecution has proved, to the required standard of proof, the subjective and objective elements of the criminal provision referred to in the indictment, it finds the accused "guilty" of the offence. By contrast, this concept, within the context of Article 7 of the Convention, does not entail any requirement as to the *substance* of domestic criminal laws. In other words, it does not imply that such laws should be formulated as requiring a particular type of subjective (*mens rea*) or objective (*actus reus*) elements for imposing criminal liability. That is the domain of the national authorities and not for the Court, at least not under Article 7 of the Convention. Indeed, as the Court held in its landmark judgment in *Engel and Others*, "the Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 81, Series A no. 22). Therefore, although other substantive provisions of the Convention may set limits on the Contracting States' ability to criminalise certain conduct (see for example *Dudgeon v. the*



*United Kingdom*, 22 October 1981, Series A no. 45, in the context of Article 8 of the Convention and the criminalisation of certain homosexual acts between consenting adults), Article 7 is confined to prohibiting, in general terms, the retroactive application of criminal laws and to require that these laws be foreseeable and accessible. It does not regulate the substance of such laws.

28. Finally, the majority's finding, requiring under Article 7 of the Convention a "mental link disclosing an element of liability in [the applicants'] conduct" (see paragraph 246 of the judgment), is the basis upon which they proceed to examine whether the imposition of the confiscation measure on Mr Gironda and on the applicant companies breached that provision, as either they were not convicted formally of the offence of unlawful site development, within the meaning of the Court's judgment in *Varvara*, or the measure was imposed without them being parties to the criminal proceedings (see paragraphs 248-75 of the judgment).

However, in our view there is no need to interpret Article 7 of the Convention out of context to provide for the necessary guarantees in such situations. Those protections flow naturally from Article 1 of Protocol No. 1 and Article 6 § 1. As we explained above, it is clear that imposing a confiscation measure on a party in judicial proceedings, where that party has not had the opportunity to defend itself, will hardly be considered a proportionate interference with the right to the enjoyment of property (see § 12 above). Furthermore, such proceedings will also invariably breach the requirement of a fair trial guaranteed by Article 6 § 1 of the Convention, irrespective of whether the imposition of the confiscation measure is examined under the civil or criminal limb of that provision (see § 14 above).

29. In sum, we consider that by interpreting Article 7 of the Convention to require a mental link for the imposition of a criminal measure, the majority have imbued content to the principle of legality in criminal law which does not rationally conform with the nature and purpose of this fundamental guarantee of the rule of law as it finds its expression in an international treaty on human rights setting minimum standards of non-retrospectiveness and foreseeability in criminal cases.

Lastly, the extensive understanding of the scope of application of Article 7 in *Sud Fondi* (cited above) had left the domestic courts with considerable difficulties. They nevertheless decided that they would apply the guarantees contained in Article 7 (see § 6 above). In *Varvara* (cited above) the Court also interpreted the substantive requirements of Article 7 in an extensive manner. While the present judgment does not follow *Varvara* all the way, we would have preferred it if, on the merits, it had returned to the undisputed pre-*Varvara* interpretation of Article 7, thus avoiding any unnecessary further upset to the Italian system of confiscations in site development cases.

## VI. Article 6 § 2 of the Convention

30. Under Article 6 § 2 of the Convention, the question arose whether the presumption of innocence had been violated in the case of Mr Gironda, having regard to the fact that confiscation of his property had been ordered notwithstanding the fact that the offence for which he was prosecuted was time-barred.

We each came to different conclusions on this point. We would like to briefly explain the reasons why we voted as we did.

Judge Spano agrees with the Court's finding of a violation of Article 6 § 2 of the Convention as the Court of Cassation declared Mr Gironda guilty in substance, notwithstanding the fact that the prosecution of the offence in question had become statute-barred (see paragraphs 310-18 of the judgment).

Judge Lemmens considers that there has been no violation of Article 6 § 2. Since the confiscation measure imposed on Mr Gironda was not a criminal sanction, based on a finding of "guilt", but a reparation measure, based on the material illegality of the situation, the fact that the criminal offence was time-barred did not preclude a finding according to which the conditions for ordering confiscation were met.

## VII. Conclusion

31. As we have explained in this opinion, today's judgment of the Grand Chamber brings a lack of clarity and coherence into the Court's case-law under Article 7 of the Convention.

On the one hand, the majority confirm *Sud Fondi* (cited above) in so far as the Court held that confiscation orders in the area of unlawful site development were "penalties" within the meaning of Article 7 (see paragraph 233 of the judgment). They also confirm *Sud Fondi* and *Varvara* (cited above) in so far as the Court considered that Article 7 required, for such a "penalty" to be imposed, that there be some personal liability of the owner of the confiscated property (see paragraph 242 of the judgment). In our view, the Court should rather have seized the opportunity to overrule these decisions.

On the other hand, the majority draw back from *Varvara*, in so far as the Court held in that case that, for a penalty to be imposed, a formal "conviction" was required. The majority now hold that it is sufficient for all the elements of the offence to be made out, thus making it possible for a criminal court to find a person "liable" even if the criminal proceedings are discontinued because of the application of a statute of limitations (see paragraph 261 of the judgment). This is, for us, a plaster on a wooden leg. It remains to be seen whether this adaptation of the Court's case-law

will be sufficient to allow the Italian judiciary to take effective action against unlawful site development.

JOINT PARTLY DISSENTING OPINION OF JUDGES SAJÓ,  
KARAKAŞ, PINTO DE ALBUQUERQUE, KELLER,  
VEHABOVIĆ, KŪRIS AND GROZEV

1. We respectfully disagree with the majority’s finding that there has been no violation of Article 7 of the Convention in respect of Mr Gironda.

2. In the following paragraphs, we will argue first that the majority depart from the general rule set out in *Varvara* (*Varvara v. Italy*, no. 17475/09, 29 October 2013). Second, we will show that it is not clear whether the majority’s finding represents a statement of a new, general rule in opposition to the general rule set out in *Varvara*, or a statement of an exception to this general rule. Finally, we will demonstrate that the majority’s finding of a violation of Article 6 is intrinsically inconsistent with their own finding of no violation of Article 7 in respect of Mr Gironda.

**I. Departure from *Varvara***

3. In our opinion, the majority depart from the holding of *Varvara*. The fact that they do so without providing strong reasons – and not acknowledging the departure – is significant. In any case, we argue below that the majority’s solution to Mr Gironda’s case is wrong on its own merits.

4. The Court has said in the past that “while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases” (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I).

5. In *Varvara*, just as in the present case, a confiscation was imposed “despite the fact that the criminal offence had been time-barred and [the applicant’s] criminal liability had not been established in a verdict as to his guilt” (see *Varvara*, cited above, § 72). The majority in the present judgment read this passage as not implying that “confiscation measures ... must necessarily be accompanied by convictions decided by criminal courts within the meaning of domestic law” (paragraph 252). It follows that *Varvara* “does not require that all disputes under [Article 7 of the Convention] must necessarily be dealt with in the context of criminal proceedings *stricto sensu*” (paragraph 253). We agree with these statements, which we believe to be consistent with *Varvara* and the Court’s case-law.

6. Then the majority go on to say that “[h]aving thus dismissed the need for there to be criminal proceedings, the Court must nevertheless ascertain whether the impugned confiscation measures at least required a formal declaration of criminal liability in respect of the applicants” (paragraph 255). It is here that the majority clearly depart from *Varvara*:

where *Varvara* states that Article 7 requires “a verdict as to [the applicant’s] guilt” or “*jugement de condamnation*” in the authentic French version (*Varvara*, cited above, § 72), the majority say that it is sufficient to have “in substance ... a declaration of liability” (paragraph 258). Whereas the Court in *Varvara* mentioned the non-existence of a formal “verdict” as to guilt as being one of the two conditions that rendered the confiscation incompatible with Article 7, the majority do not find this relevant.

7. The two conditions set forth in paragraph 72 of *Varvara* are cumulative: for a penalty such as confiscation to be applied, the offence must not be time-barred *and* there has to be a formal “verdict as to guilt” (or conviction, to use the wording of the present judgment). In other words, the general rule established in *Varvara* is that a penalty cannot be applied if the statutory time-limits have expired, nor can a penalty be imposed in the absence of a formal conviction. This formal conviction may be delivered in the context of criminal proceedings *stricto sensu* or in the context of any proceedings within the meaning of Article 7, such as administrative proceedings which apply “penalties” (paragraph 254). Contrary to the above-mentioned general rule of *Varvara*, the majority conclude that “where the courts find that all elements of the offence of unlawful site development are made out, while discontinuing the proceedings solely on account of statutory limitation, those findings can be regarded, in substance, as a conviction for the purposes of Article 7, which in such cases will not be breached” (paragraph 261).

## **II. Does the present judgment set a general rule?**

8. Regardless of the relationship between the present judgment and *Varvara*, it is not clear whether we should interpret the majority’s findings to be the statement of a general rule (namely, that the statute of limitations and the guarantee of a formal conviction are irrelevant for Article 7 purposes) or the statement of an exception to the general rule set forth in *Varvara* (that it is incompatible with Article 7 to impose penalties after the expiry of the time-limits set out in the statute of limitations and in the absence of a formal conviction). While it is true that the “preliminary observation” in paragraph 155 suggests that the present judgment should be interpreted restrictively, it is also true that the majority provide no rationale to distinguish this case from others. We will therefore explore the two alternatives.

9. In our opinion, the present judgment cannot be read as establishing a general rule that permits the application of penalties after a “substantive” finding of guilt, despite the expiry of the limitation period. Such a rule would rest on a distinction between “formal convictions” (paragraph 248) and “in substance ... a declaration of [criminal] liability” (paragraph 258).

According to the majority, Article 7 does not require the former, provided the existence of the latter is established.

10. Such a general rule would lead to a linguistic, or even logical, conundrum. What does it mean, a “substantive” finding of guilt followed by the imposition of a penalty? How is this different from “formal conviction”? We can only read the distinction made by the majority as a linguistic matter: a “substantive declaration” of guilt is one that is exactly the same as a “formal conviction” (because it must ascertain facts and law, it can be followed by the imposition of a penalty, etc.), but is not *called* a “formal conviction”. Statutory limitation periods would be no impediment to “substantive” declarations of guilt with the imposition of penalties, but only to the label “formal conviction”.

11. We find that conclusion hard to uphold, and we cannot think that the majority intended to endorse it. Even if the Court has previously afforded some latitude to member States in the application of statutory limitation periods, it has never found them to be completely irrelevant for Article 7 purposes. The Court has validated the *ex post facto* extension of limitation periods, for example, albeit with the important caveat that there should be no “arbitrariness” (see *Previti v. Italy* (dec.), no. 1845/08, § 81, 7 June 2012). A general rule based on a “substantive” declaration of guilt that transforms statutory limitations into meaningless formalities would be an invitation to arbitrariness.

12. This is all the more relevant if we recall that statutory limitation periods have a substantive character in some domestic constitutional systems. In Italy, for instance, the law regulating statutory limitations was found by the Constitutional Court to be a “substantive criminal law norm” and to be “subject to the legality principle” (*Ordinanza Costituzionale* no. 24/2017, § 8). The downgrading of statutory limitations to a meaningless formality would clearly be incompatible with the Constitutional Court’s own interpretation of such limitations as a substantive guarantee of criminal law.

### **III. The present judgment sets an exception**

13. For the above-mentioned reasons, the present judgment can only be interpreted as establishing an exception to the general rule in *Varvara* that imposing penalties is banned after the expiry of statutory limitation periods and in the absence of a formal conviction. That this was the majority’s intention is supported by the “preliminary observation” in paragraph 155. But if this is an exception, what are the cases that are exempt from the general rule? Are they some forms of offences, some forms of penalties, or some combination of both? And what is the rationale that restricts the exception to these cases? These are important questions that remain unanswered.

14. If the Court states an exception to a general rule that arises from the Convention and the Court's own case-law, it cannot do so out of judicial *fiat*. There have to be powerful reasons to do so, since these reasons perform a double function. On the one hand, the reasons perform a primordial normative function: the reasons provided must be compelling enough as to justify the lack of protection for some kinds of applicants or some kinds of cases. The applicant should be able to understand why his or her case is different from that of someone else who, in similar circumstances, would enjoy the protection provided by the Convention. On the other hand, reasons perform a more instrumental legal function: the reasons the Court should provide are meant to delimit the scope of the exception in future cases, so both Contracting States and the people living therein are able to adjust their conduct to abide by the Convention. This is all the more salient in a judgment about Article 7 which rightly emphasises the importance of foreseeability as a Convention value (paragraph 246).

15. Unfortunately, this is not the case in the present judgment. The only "considerations" that seem to have prompted the majority to draw this exception to the general rule in *Varvara* – no penalty without a formal conviction – are laid down in paragraph 260. It is worth citing it in full:

"260. In the Court's view, it is necessary to take into account, first, the importance in a democratic society of upholding the rule of law and public trust in the justice system, and secondly, the object and purpose of the rules applied by the Italian courts. In that connection it would appear that the relevant rules seek to prevent the impunity which would stem from a situation where, by the combined effect of complex offences and relatively short limitation periods, the perpetrators of such offences systematically avoid prosecution and, above all, the consequences of their misconduct (see, *mutatis mutandis*, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 192, ECHR 2012)."

This is, in our opinion, insufficient as a justification for the exception that the majority seem to put forward.

16. All punitive regimes are, tautologically, meant to fight impunity. The Contracting States were aware, when drafting the Convention, that the compliance with Article 7 to which they were committing themselves implied a limit to the State's ability to "prevent impunity". An unqualified fight against impunity cannot be a reason in and by itself to relax Convention rights.

17. The only case-law cited in paragraph 260 of the judgment, i.e. *El-Masri*, emphasises the importance of timely prosecutions in order to "prevent any appearance of impunity in respect of certain acts" (*El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 192, ECHR 2012). However, the facts and legal questions analysed in *El-Masri* (a violation of the procedural aspect of Article 3 stemming from the failure of State organs to investigate alleged ill-treatment committed by State officials) were different to those obtaining in the present case. In *El-Masri* there were no conflicting values to be balanced: no one in that case had

claimed that the State was forbidden from prosecuting by virtue of Article 7 or any other provision of the Convention. On the contrary, in *El-Masri* the State had an obligation to prosecute based precisely on a Convention right: The applicant had complained that the procedural limb of Article 3 had been violated by the State's inaction concerning the investigation of ill-treatment and the Court sided with him. Lastly, the obligation to prosecute torture is an obligation under international law, to which the Court is particularly deferential. All these differences suffice to show that the only authority the majority cite in support of their position is not pertinent in the present case.

18. We consider that the “complexity” of the offences at hand is also too poor a criterion for such an important exception. At least, the majority do not advance any means by which we could distinguish a “complex” case from a “simple” one. If domestic law is to be any reference, the Italian legislator does not seem to have considered that unlawful site development was particularly complex: there is no indication that the case was investigated by special agencies, pursued by special prosecutors, or heard before specialised courts. Furthermore, in Italian law, unlawful site development is a minor offence (*contravvenzione*), punishable with less than two years' imprisonment and a fine of less than 51,645 euros (Article 44 § 1 (c) of the Construction Code, as in Presidential Decree no. 380 of 6 June 2001).

19. That is not to say that there may not be any offences whose particular features demand some sort of special consideration. In some cases, for example, certain procedural safeguards may be in conflict with other persons' rights. Child abuse is one such example. In such cases, the Court has had “particular regard to the special features of proceedings relating to sexual abuse, especially where it involves minors” at the point of evaluating compliance with the right to challenge witnesses enshrined in Article 6 § 3 (d) (see *Magnusson v. Sweden* (dec.), no. 53972/00, see also *S.N. v. Sweden*, no. 34209/96, 2 July 2002, §§ 47-53). This is due, among other considerations, to respect for the victims' private life rights protected by Article 8 of the Convention. We are not faced with any conflict of this kind in the present case.

20. The Convention does not oblige States to have a short statutory limitation period, so if a member State finds its own limitation periods to be a burdensome impediment, it could lengthen them (see *Previti*, cited above, § 80, and *Coëme and Others v. Belgium*, nos. 32492/96 and 4 others, § 149, ECHR 2000-VII). In fact, Italy has lengthened the statutory limitation periods since the time of the facts of this case: the reform operated by Law no. 251 of 5 December 2005 lengthened the statutory limitation periods in the Criminal Code, while Law no. 103 of 23 June 2017 provided for the suspension of statutory limitation following certain procedural events. This means that, even assuming that at the time of the facts it was excessively difficult to prosecute cases like those under consideration in the present



judgment, owing to short limitation periods under Italian law, this resulted from a policy choice of the Italian State, which cannot be imputed to Mr Gironda.

#### **IV. The majority’s findings are inconsistent**

21. Finally, the majority’s findings are intrinsically inconsistent. In paragraph 252 the majority say that “[t]he Court, for its part, must ensure that the declaration of criminal liability complies with the safeguards provided for in Article 7 and that it stems from proceedings complying with Article 6”. The majority reiterate the same reasoning in paragraph 261.

22. We believe that this reasoning is legally untenable and sets a dangerous precedent. According to the majority, a violation of Article 7 depends on compliance with Article 6 guarantees, which means that respect for Article 6 may compensate for a violation of Article 7. It is imperative that those two analyses are kept separate. The principle of legality enshrined in Article 7 is a guarantee of substantive criminal law that cannot logically depend on procedural safeguards. Respect for Article 6 guarantees does not say anything about the permissibility of State action under Article 7. Compliance with Article 6 is no bargaining chip in respect of an Article 7 violation. The door of negotiation between procedural and substantive guarantees should not be opened.

23. The dangers of this reasoning are illustrated in the present judgment. In the majority’s reasoning, in cases of “substantive” findings of guilt, a violation of Article 6 should entail *ipso jure* a violation of Article 7 (see paragraphs 252 and 255). Yet the majority see no contradiction in finding a violation of Article 6 § 2 with no violation of Article 7 in the case of Mr Gironda. According to the majority’s own approach to Article 6, a finding of a violation of Article 6 § 2 should necessarily entail a violation of Article 7. It is not convincing, in the light of the majority’s reasoning, that no such finding of a violation of Article 7 was reached in respect of Mr Gironda.

24. It should be noted that this will be a problem in any other cases similar to that of Mr Gironda (cases which in Italian legal terminology would be called *fratelli minori di Gironda*, or “Gironda’s younger siblings”). A “substantive” declaration of guilt (and the subsequent application of a penalty of confiscation) when the criminal proceedings are time-barred will *always* entail a violation of Article 6 § 2, as the majority point out in paragraph 317 (for further reference, see the case-law cited in paragraphs 314-15). This obviously means that in all *fratelli minori di Gironda* there will necessarily be, according to the majority’s opinion, a violation of Article 6 § 2 and, in our view, also a violation of Article 7. Therefore the respondent State should not apply confiscation after an offence becomes time-barred and in the absence of a formal conviction,

otherwise it will engage international liability at least under Article 6 § 2 of the Convention.

## V. Conclusion

25. As demonstrated above, it is our view that respect for the *nulla poena sine lege* principle should have prompted the Grand Chamber to find a violation of Article 7 of the Convention in Mr Gironda's case. It is hard to exaggerate the importance of this principle as enshrined in Article 7.

26. The arguments of this Court are not only a source for future case-law, but also provide crucial input in the decisions of domestic courts within the Council of Europe States or third countries, and even in those of other human rights bodies across the globe. Lawyers, politicians, activists, and academics routinely look to our judgments to find arguments for their legal claims. We cannot know today how this relaxation of the principle of legality will be interpreted. We can only hope that this Court will, in the future, clarify the scope of the present judgment and will strongly reassert the principle that the State cannot apply penalties when the time-limits set out in a statute of limitations have expired and in the absence of a formal conviction.

## APPENDIX

<b>Application No.</b>	<b>Case Name</b>	<b>Date Of Intro</b>	<b>Applicant(s)</b>	<b>Representative</b>
1828/06	G.I.E.M. S.r.l.	21/12/2005	G.I.E.M. S.r.l.	Giuseppe MARIANI
34163/07	Hotel Promotion Bureau S.r.l. and R.I.T.A Sarda S.r.l. v. Italy	02/08/2007	Hotel Promotion Bureau S.r.l. R.I.T.A. Sarda S.r.l.	Giuseppe LAVITOLA
19029/11	Falgest S.r.l. and Gironda v. Italy	23/03/2011	Falgest S.r.l. Filippo GIRONDA	Anton Giulio LANA