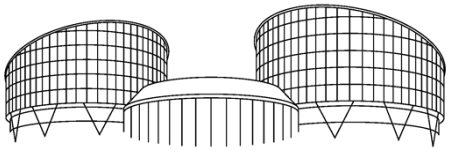

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF EPISCOPO AND BASSANI v. ITALY

(Applications nos. 47284/16 and 84604/17)

JUDGMENT

Art 6 § 1 (civil) • Fair hearing • Confiscation of the first applicant's assets, considered to be the direct proceeds of crime, despite the discontinuation of the proceedings due to the expiry of the statute of limitation • Divergence in the Court of Cassation's case-law, for over six years, on whether confiscation could be ordered in respect of an offence despite the extinction of the offence, amounted to "profound and long-standing differences" • Domestic-law mechanism, of a referral to the Plenary Court of Cassation, for putting an end to diverging case-law used effectively in the first applicant's case • Principle of legal certainty not breached
Art 6 § 2 • Presumption of innocence • Domestic courts, when ordering confiscation, did not merely assess the unlawful origin of the confiscated assets but explicitly stated that the first applicant was criminally liable • Confiscation order imputed criminal liability to the first applicant despite the discontinuance of the proceedings Art 1 P1 • Peaceful enjoyment of possessions • Confiscation of the second applicant's assets, considered to be the direct proceeds of crime, despite the discontinuation of the proceedings due to the expiry of the statute of limitation • Legal basis of the confiscation not sufficiently foreseeable as at the time when the order was issued the established case-law prohibited the confiscation of assets after the extinction of the offence

Prepared by the Registry. Does not bind the Court.

STRASBOURG

19 December 2024

FINAL

28/04/2025

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

In the case of Episcopo and Bassani v. Italy,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Ivana Jelić*, President*,
Alena Poláčková,
Krzysztof Wojtyczek,
Georgios A. Serghides,
Gilberto Felici,
Raffaele Sabato,
Artūrs Kučs*, judges*,
and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the applications (nos. 47284/16 and 84604/17) 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 two Italian nationals, Mr Luigi Episcopo and Mr Nelso Bassani ("the applicants"), on 3 August 2016 and 7 December 2017 respectively;

the decision to give notice to the Italian Government ("the Government") of the complaints raised under Article 6 §§ 1 and 2 of the Convention, under Article 7 of the Convention concerning the foreseeability of the confiscation, and under Article 1 of Protocol No. 1, and to declare the remainder of the applications inadmissible;

the parties' observations;

Having deliberated in private on 12 November 2024,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the confiscation of the applicants' assets, which were considered to constitute the direct proceeds of crime (*confisca diretta*) under Article 322 *ter* of the Italian Criminal Code ("CC"), despite the discontinuation of the proceedings in respect of the offences in question owing to the expiry of the statute of limitation.

THE FACTS

2. Mr Episcopo ("the first applicant") was born in 1956 and lives in Polla. He was represented by Mr A. Pagliano, a lawyer practising in Naples.

3. Mr Bassani ("the second applicant") was born in 1960 and lives in Arsiè. He was represented by Mr M. Paniz, a lawyer practising in Belluno.

4. The Government were represented by their Agent, Mr L. D'Ascia.

5. The facts of the case may be summarised as follows.

I. THE FIRST APPLICANT

6. The first applicant was the director of and a shareholder in P. s.r.l., a company active in the field of the construction and management of tourist facilities. Between 2001 and 2003, the company obtained public funds for the construction of a hotel.

7. In 2005 the first applicant was charged with aggravated fraud in obtaining public funds (*truffa aggravata per il conseguimento di erogazioni pubbliche*) under Article 640 *bis* of the Criminal Code ("CC"), and other related crimes. He was accused of, *inter alia*, having submitted, in his capacity as director of P. s.r.l., false information and documents to the public authorities in order to obtain public funds.

8. By a judgment of 6 March 2008, the Sala Consilina District Court convicted the applicant of most of the charges, including that of aggravated fraud. It sentenced him to three and a half years' detention, ordered him to pay damages to the public authorities and ordered the confiscation of assets equivalent to the profit of the offence pursuant to Articles 640 *bis* and 322 *ter* of the CC. Having established that the public funds unlawfully obtained by the applicant amounted to 844,120.95 euros (EUR), the District Court ordered the confiscation of the applicant's shares in P. s.r.l. up to that value. The applicant appealed.

9. By a judgment of 26 June 2014, the Salerno Court of Appeal declared that the offences had become statute-barred, and discontinued the proceedings against the applicant.

Nevertheless, the Court of Appeal examined whether the applicant had advanced sufficient arguments to justify – under Article 129 § 2 of the CC – the quashing of the first-instance conviction and the delivery of an acquittal judgment on the merits. The Court of Appeal found that the applicant's arguments and evidence did not justify his acquittal; on the contrary, it concluded that "the evidence adduced can only uphold the finding of liability of Mr Episcopo in respect of the criminal charges".

The Court of Appeal revoked the confiscation of the applicant's shares in P. s.r.l and ordered, instead, the confiscation of the hotel building up to the value of EUR 844,120.95. It considered, in this respect, that there was no need to resort to confiscation by equivalent means, since Article 322 *ter* of the CC provided that direct confiscation should prevail whenever feasible over value confiscation; in the present case, it was possible to confiscate the direct proceeds of the crime, which consisted of the building that had been erected with the unlawfully obtained funds.

The Court of Appeal further deemed, in line with the recent relevant case-law of the Court of Cassation (in particular, judgment no. 31957 of 23 July 2013, *Cordaro*), that the "extinction" (*estinzione*) of the offence did not preclude the imposition of a measure of confiscation, since the criminal

liability of the applicant had been established. It stated, in particular, as follows:

> "When, as in the present case, there is an actual finding of liability, then there is the possibility of ordering confiscation – even in relation to an offence that has become extinct. In the case under examination, in particular, the offence had become extinct after the first-instance conviction, within a context in which the judges were able to ascertain the facts relating to the offence and the liability of the defendants, as well as the unlawful provenance of the money and of the goods subject to confiscation; it follows that the guarantee of a full finding of liability – which is ensured by the term "conviction" referred to by Article 240 of the Criminal Code as the necessary precondition of the deprivation of assets – has to be considered as fulfilled".

10. The applicant appealed to the Court of Cassation, which – by a judgment of 13 January 2016 that was published on 26 February 2016 – upheld the previous judgment.

The Court of Cassation referred, in particular, to a recent judgment of the Plenary Court of Cassation (no. 31617 of 21 July 2015, *Lucci*) which, settling a previous divergence in case-law, established that the direct confiscation of assets could be ordered even if the proceedings in question had been discontinued, provided that there had first been a conviction and that the finding of liability in respect of the accused had subsequently remained unaltered.

The Court of Cassation also addressed the fact that the building was owned by P. s.r.l. and not by the first applicant; however, since the crime in question had been committed in order to further the company's interests and by its legal representative, the court deemed that fact to be immaterial.

II. THE SECOND APPLICANT

11. The second applicant was the director and sole shareholder of the company C.T. s.r.l.

12. He was charged, together with other persons, of participating in a criminal organisation under Article 416 of the CC and of issuing false tax statements (namely, invoices for non-existing operations) under Article 2 of Legislative Decree no. 74/2000, from 2002 to 2004.

13. On 6 December 2004 the Bassano del Grappa preliminary investigations judge ordered the preliminary seizure of the applicant's money which was deposited in two bank accounts and invested in a life insurance policy, in the overall amount of EUR 32,409.99.

14. In judgment of 7 May 2008, the Bassano del Grappa District Court convicted the applicant on all charges. It sentenced him to three years and four months' detention and ordered the confiscation of the seized assets, pursuant to section 1 § 143 of Law no. 244/2007 and Article 322 *ter* of the CC. The applicant appealed.

15. In a judgment of 22 May 2013, the Venice Court of Appeal noted that the offences had become statute-barred at the latest in April 2013; as a

consequence, it discontinued the proceedings, without deliberating on the question of the confiscation of the applicant's assets.

16. The applicant appealed, submitting that the Court of Appeal had delivered its judgment without first conducting an adversarial hearing – thus not allowing him to present his arguments (particularly in respect of the above-mentioned confiscation). On 27 May 2014, the Court of Cassation quashed the appellate judgment and remitted the case to the Venice Court of Appeal.

17. In the meantime, following the discontinuance of the proceedings, the applicant lodged an application with the Court of Appeal seeking that the seized assets be restituted to him. On 20 August 2013, the court rejected that application, noting that the case was still ongoing.

18. In a judgment of 12 February 2016, the Venice Court of Appeal acquitted the applicant of the offence of participation in a criminal association. In respect of the charges of making false tax declarations, the Court of Appeal stated that "the adduced evidence demonstrates without any doubt [the existence of] an agreement between Bassani and S. to commit the crimes" and that "the liability of Bassani in respect of the charges must be confirmed". Nevertheless, because the offences had become statute-barred, the proceedings were discontinued.

The Court of Appeal further deemed that the above-mentioned confiscation ordered in the case at hand had constituted a form of direct confiscation of the proceeds of crime which, according to the recent judgment of the Plenary Court of Cassation (no. 31617 of 21 July 2015, *Lucci*) could be applied despite the discontinuance of the proceedings in question, since the applicant had been convicted at first instance and the finding of his criminal liability had subsequently been left unaltered on the merits.

19. The applicant appealed to the Court of Cassation, which – by a judgment of 19 January 2017 that was published on 9 June 2017 – found that the previous judgments had "adequately explained ... why the applicant's liability had to be considered as fully ascertained" and confirmed the confiscation.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW AND PRACTICE

A. Confiscation

20. Article 240 of the CC, which is part of a chapter dedicated to "property security measures" (*misure di sicurezza patrimoniali*), provides in its relevant parts for a direct form of confiscation. The provision reads as follows:

"1. In the event of conviction, the judge may order the confiscation of the things that were used or intended for the commission of the offence, and of the things that constitute the product or profit thereof.

2. [The judge] always orders the confiscation:

1) of things that constitute the price of the offence;

1-*bis*) ...

2) of things whose manufacturing, use, harbouring, possession or sale constitutes an offence – even if no conviction has been pronounced. ..."

21. Article 322 *ter* of the CC – introduced by Law no. 300 of 2000 and subsequently amended by Law no. 190 of 2012 – provides that confiscation is mandatory in respect of certain crimes. Such confiscation must be carried out, whenever possible, in respect of the direct profit or price of the crimes ("direct confiscation"); in the alternative, it must be carried out in respect of assets of equivalent value ("value confiscation" or "confiscation by equivalent means"). The provision reads as follows:

"1. In the event of conviction or of an [agreement to reach a] plea bargain at the request of the parties pursuant to Article 444 of the Code of Criminal Procedure in respect of one of the offences provided by Articles 314 to 320 ..., [the judge] shall always order the confiscation of the goods constituting the profit or price of the offences, unless they belong to a third party who has not taken part in the commission of the offence, or, when this is not possible, the confiscation of goods at the disposal of [*nella disponibilità di*] the offender for a value corresponding to such price or profit.

...

3. ... the judge, in delivering the judgment of conviction, shall determine the amount of money or identify the goods to be confiscated insofar as they constitute the profit or price of the offence or their value corresponds to the profit or price of the offence."

22. The application of this provision has been subsequently extended to other crimes. In so far as is relevant for the present case, Article 640 *quarter* of the CC established that Article 322 *ter* applied also in respect of the offence of aggravated fraud, as provided by Article 640 *bis*.

23. Additionally, section 1 § 143 of Law no. 244 of 2007 (*Legge finanziaria 2008*) established that Article 322 *ter* of the CC applied in respect of the offences of false tax statements provided by sections 2 et seq. of Law no. 74 of 2000.

By Legislative Decree no. 158 of 2015, section 1 § 143 of Law no. 244 of 2007 was replaced by a substantially similar provision, which is now contained in section 12 *bis* of Law no. 74 of 2000.

24. Article 210 § 1 of the CC provides that the extinction (*estinzione*) of an offence – which may occur (among other reasons) because it has become statute-barred – precludes the application of security measures. However, Article 236 of the CC excludes the applicability of Article 210 of the CC in respect of confiscation.

B. Nature and purpose of the confiscation under domestic law

25. The domestic legal order distinguishes between penalties and security measures. In principle, penalties are aimed at sanctioning an offence that has been committed, whereas security measures are aimed at preventing the commission of a further offence.

26. Unlike Article 240 of the CC (see paragraph 20 above), Article 322 *ter* of the CC does not explicitly state whether the form of confiscation provided by Article 322 *ter* constitutes a penalty or a security measure.

27. The relevant domestic case-law, given that Article 322 *ter* provides for both direct confiscation and confiscation by equivalent means, classifies direct confiscation as a security measure and confiscation by equivalent means as a penalty.

The Plenary Court of Cassation (judgment no. 31617 of 21 July 2015, *Lucci*) has reasoned, in this respect, that direct confiscation applies to assets which directly derive from an unlawful transaction and which the accused was not entitled to obtain, even when assessed from a civil law perspective; it has therefore no punitive purpose, but is rather aimed at restoring the previously prevailing economic situation and avoiding the accumulation by the offender of assets of unlawful origin.

On the other hand, confiscation by equivalent means, which lacks a direct link between the offence and the assets, is aimed at restoring the previously prevailing economic situation by imposing a corresponding sacrifice on the offender, and therefore has a punitive character.

28. Within this context, the classification of the confiscation of a sum of money has given rise to diverging interpretations. One line of case-law holds that the confiscation of money should always be considered to constitute confiscation by equivalent means, since it is impossible to materially identify the profit or price of the offence in question (see, for instance, judgment no. 36293 of 2011). A second line of case-law holds that the confiscation of money can be considered to constitute direct confiscation only if there is evidence that the money directly derives from the commission of the offence in question (see, for instance, judgment no. 11288 of 2010).

29. In judgment no. 10561 of 30 January 2014 (*Gubert*), the Plenary Court of Cassation introduced a third interpretation, which holds that the confiscation of money must always be considered to constitute direct confiscation.

30. In judgment no. 31617 of 21 July 2015 (*Lucci*), the Plenary Court of Cassation, acknowledging the existing divergence in case-law, upheld the solution arrived at by virtue of the *Gubert* judgment, thus confirming that the confiscation of money should always be considered to constitute direct confiscation and that there was therefore no need to prove that the money in question directly derived from the stated criminal activity.

C. Applicability of confiscation when the offence in question is statute-barred

31. The possibility to apply confiscation under Articles 240 and 322 *ter* of the CC despite the fact that the offence has become statute-barred has given rise to diverging interpretations on the part of the Court of Cassation.

32. This divergence was first addressed by the Plenary Court of Cassation in judgment no. 5 of 25 March 1993 (*Carlea*), which clarified that confiscation under Article 240 of the CC required that the accused be convicted and that confiscation could not be applied in the event that the offence became extinct. Moreover, the Plenary Court of Cassation noted that confiscation required an assessment on the merits, which is incompatible with a declaration that the offence had become extinct.

33. Several years later, the same issue was again submitted for consideration to the Plenary Court of Cassation, which addressed it in judgment no. 38834 of 15 October 2008 (*De Maio*). On that occasion, the Plenary Court of Cassation noted that no real divergence in case-law had developed after the *Carlea* judgment, and confirmed that, according to the wording of Article 240 of the CC – reproduced in Article 322 *ter* of the CC – confiscation could not be applied in the event of extinction of the offence.

At the same time, the Plenary Court of Cassation distanced itself from the *Carlea* judgment, noting that the extinction of the offence did not necessarily preclude a further assessment on the merits, and invited the legislature to reconsider the possibility of extending the applicability of the confiscation to cases in which offences had been extinguished, in order to prevent accused persons from benefiting from assets of unlawful origin.

34. After the delivery of the *De Maio* judgment, part of the case-law of the Court of Cassation followed the interpretation provided by the Plenary Court of Cassation and excluded the applicability of the confiscation when offences had become statute-barred (Court of Cassation judgments no. 12325 of 2010, no. 17716 of 2010, no. 8382 of 2011, and no. 7860 of 2015).

Another line of case-law, however (drawing from the considerations addressed in the *De Maio* judgment), held that confiscation could be ordered even if the offence in question had become extinct, provided that there had been a finding of liability and that the assets had been found to be linked to the commission of the offence (Court of Cassation judgments no. 2453 of 2009, no. 32273 of 2010, no. 39756 of 2011, no. 48680 of 2012 and no. 31957 of 2013).

35. The issue was then again remitted to the Plenary Court of Cassation which, in judgment no. 31617 of 21 July 2015 (*Lucci*), upheld the most recent development and found that direct confiscation could be applied despite the extinction of the offence in question. The principle set out by the Plenary Court of Cassation reads as follows:

> "The judge, in declaring the extinction of an offence owing to the expiry of the statute of limitations, may apply, under Article 240 § 2 (1) of the CC, the confiscation of the price of the offence and, under 322 *ter* of the CC, the confiscation of the price of or profit [derived from] the offence, provided that it amounts to direct confiscation and that there has first been a conviction, in respect of which the findings on the merits remain unaltered as to the existence of the offence, the liability of the accused and the classification of the property to be confiscated as the profit or the price of the offence."

The Plenary Court of Cassation also clarified that an incidental finding of liability was insufficient: there had to be a formal conviction at a lower level, which was left unaltered in substance by the subsequent decisions declaring the offence statute-barred.

36. Article 578 *bis* of the Code of Criminal Procedure ("CCP") – which was introduced by Legislative Decree no. 21 of 2018 and subsequently amended by Law no. 3 of 2019 – currently reads as follows:

> "1. When ... confiscation as provided for in Article 322 *ter* of the Criminal Code has been ordered, the Court of Appeal or the Court of Cassation – when declaring that the offence in question has become extinct owing to the expiry of the statute of limitation or to [the promulgation of] an amnesty – shall decide on the appeal only for the purpose of [deciding on issues relating to] the confiscation, based on a prior ascertainment of the defendant's criminal liability."

D. Other relevant provisions

37. Article 129 § 2 of the CCP provides that, when an offence has become statute-barred but it can clearly be established that the defendants have not committed that offence or that the alleged events never in fact occurred or did not constitute an offence or did not fall under criminal law, the courts must acquit the defendants on the merits.

38. Article 618 of the CCP provides that, if an individual section of the Court of Cassation (*sezione semplice*) finds that a certain issue has prompted (or may prompt) the relevant case-law to diverge, it may refer the case to the Plenary Court of Cassation (*Sezioni Unite*) of its own motion or at the request of one of the parties involved.

By Law no. 102 of 23 June 2017, an additional paragraph 1 *bis* was added to Article 618 stating that, in the event that an individual section of the Court of Cassation ever intended to diverge from a principle established by the Plenary Court of Cassation, it had to refer the case to the latter.

II. INTERNATIONAL LAW

39. Several international agreements provide for the confiscation of the proceeds of crime or of property of equivalent value following a criminal conviction.

The origins of such an approach may be traced to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Article 5 of which provided for – in addition to the more

traditional confiscation of instruments used in the commission of such an offence (*instrumentum sceleris*) – the confiscation of the proceeds of drug-related offences (*productum sceleris*) or property of equivalent value.

Over time, the provisions on confiscation broadened to encompass cross-border crime, organised crime and other serious offences (for instance, under Article 8 of 1999 International Convention for the Suppression of the Financing of Terrorism and under Article 12 of the 2000 United Nations Convention against Transnational Organised Crime).

40. By acceding to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the "Strasbourg Convention") – which was opened for signature on 8 November 1990 in Strasbourg and which entered into force on 1 September 1993 (in respect of Italy, on 1 May 1994) – the signatory parties undertook to adopt measures that would enable them to confiscate instrumentalities and proceeds of crimes (or property of equivalent value), to adopt legislation establishing as an offence the laundering of proceeds of crime, and to cooperate in the enforcement of such measures. The Strasbourg Convention allowed States parties thereto to limit its application to selected offences and to refuse cooperation in a large number of cases – including when the confiscation sought did 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".

41. Article 31 of the 2003 United Nations Convention against Corruption provided for the confiscation of instrumentalities or proceeds of crime or property of equivalent value. The Convention also provided a form of non-conviction-based confiscation: under Article 54 § 1 (c) it provided that parties should "consider taking such measures as may be necessary to allow confiscation of such 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".

42. 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"; in respect of Italy, it entered into force on 1 June 2017), was intended to supersede the Strasbourg Convention but was not ratified by all member States of the Council of Europe. Although containing substantially similar undertakings in respect of the confiscation of proceeds of crimes, it added under Article 23 § 5 the provision that States were required to cooperate with each other on the execution of measures equivalent to confiscation that did not constitute criminal sanctions, in so far as they were ordered by a judicial authority in relation to a criminal offence.

43. Additionally, some international organisations have produced good practice guides and recommendations regarding non-conviction-based

confiscation, such as the 2004 publication entitled "G8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets", the 2009 World Bank publication "Stolen Asset Recovery : A Good Practices Guide for Non-Conviction-Based Asset Forfeiture" and the OECD's Financial Action Task Force Recommendations entitled "International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation" (adopted in 2012 and last updated in 2023).

III. EUROPEAN UNION LAW

44. Within the framework of the European Union, a number of instruments have been adopted in order to further progressive harmonisation and cooperation in the field of the confiscation of the proceeds of crime.

45. By a Joint Action of 3 December 1998 (98/699/JHA) on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, the EU member States undertook not to derogate from the Strasbourg Convention in respect of offences that are punishable by deprivation of liberty for a maximum of more than one year. Substantially similar provisions were subsequently included in the Council Framework Decision of 26 June 2001 (2001/500/JHA) on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

46. The Council Framework Decision of 24 February 2005 (2005/2012/JHA) on the confiscation of crime-related proceeds, instrumentalities and property reiterated these obligations (Article 2) and introduced a form of extended confiscation that was applicable to persons convicted of a number of serious crimes, in the event that the domestic courts were fully convinced that the assets in question derived from criminal activities (Article 3).

47. The Directive on the freezing and confiscation of the proceeds of crime in the European Union of 3 April 2014 (2014/42/EU) provided the obligation to enable the confiscation of instrumentalities and proceeds of crime or property of equivalent value, subject to a final conviction for a criminal offence (Article 4 § 1). The Directive provided for a form of non-conviction-based confiscation that was applicable in the event that criminal proceedings had been initiated and could have led to a criminal conviction in respect of an offence that could have afforded economic benefit to the accused, but conviction was not possible owing to illness or absconding of the accused person (Article 4 § 2). The Directive also provided for a form of extended confiscation of property belonging to a person convicted of a criminal offence that could have afforded him economic benefit, in the event that the domestic courts were convinced that that property derived from criminal conduct (Article 5).

48. All the European Union instruments mentioned above have been replaced by the recent Directive on asset recovery and confiscation of 24 April 2024 (2024/1260/EU). The Directive substantially extended the forms of non-conviction-based confiscation. In addition to the traditional conviction-based confiscation of instrumentalities and proceeds of crimes or property of equivalent value (Article 12) and to the extended confiscation already provided for under the previous legislation (Article 14), it provided for the confiscation of assets in the event that a conviction was not possible owing to illness, absconding or death of the accused person, or to the expiry of a limitation period lower than fifteen years (Article 15); furthermore, it provided for the confiscation of property where the domestic courts were convinced that the property in question derived from criminal conduct committed within the framework of a criminal organisation and could give rise to substantial economic benefit (Article 16).

THE LAW

I. JOINDER OF THE APPLICATIONS

49. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

50. The applicants complained that the confiscation of the proceeds of crimes after such crimes had become statute-barred had not been based on a sufficiently foreseeable law, as required by 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. ..."

Admissibility

1. The parties' arguments

(a) The Government

51. The Government argued that the complaints raised by the applicants under Article 7 of the Convention should be declared incompatible *ratione materiae*, since the confiscation had not amounted to a penalty under that provision.

52. In that respect, the Government acknowledged that the form of confiscation in question was closely connected to a criminal offence, since it was ordered by a criminal court following a finding of criminal liability in

substance. Nevertheless, all other relevant criteria established by the Court's case-law led to the conclusion that it did not amount to a penalty.

53. As regards the classification of direct confiscation under domestic law, the Government noted that direct confiscation under Article 240 of the CC – which was substantially similar to the measure applied in the case at hand – was explicitly classified as a property security measure. Additionally, according to the established related case-law, the direct confiscation of the price or proceeds of crime – as provided by Article 240 of the CC, by Article 322 *ter* of the CC or by any other similar provision – was classified as a security measure. The Government noted, among others, judgments delivered by the Plenary Court of Cassation no. 3802 of 1983 (*Marinelli*), no. 26654 of 2008 (*Fisia Impianti*), no. 31617 of 2015 (*Lucci*) and no. 42415 of 2021 (*Coppola*), which had held that direct confiscation had a restorative and preventive function and should therefore be classified as a security measure rather than as a penalty.

54. As regards its nature and purpose, the Government noted that direct confiscation had a double function: restorative and preventive. As to the first, it was aimed at removing the effects of the unlawful conduct in question and restoring the previously prevailing economic situation, depriving the accused of an economic gain that he was not entitled to receive; as to the second function, that was aimed at preventing the reuse of assets of unlawful origin. Direct confiscation lacked, by contrast, the punitive function that was typical of penalties.

55. As to the effects of the measure of confiscation, the Government pointed out that, while direct confiscation resulted in a final deprivation of property, this did not exceed the economic gain derived from unlawful activities.

56. The Government also drew a parallel with the confiscation measure examined in the case of *Gogitidze and Others v. Georgia* (no. 36862/05, 12 May 2015), which had been marked by characteristics substantially similar to those of the measure of direct confiscation under Italian law and was considered to constitute a measure *in rem* aimed at the recovery of unlawfully obtained property.

By contrast, such a form of confiscation had to be distinguished from the form of confiscation examined in the case of *Welch v. the United Kingdom* (9 February 1995, Series A no. 307-A), which was considered to constitute a penalty in view of the fact that it could exceed the proceeds of the crime in question, that it required an assessment of the degree of fault of the accused and that it could lead to detention in the event of default. It also had to be distinguished from the form of confiscation examined in the case of *G.I.E.M. S.r.l. and Others v. Italy* ((merits) [GC], nos. 1828/06 and 2 others, § 210, 28 June 2018), which was considered to constitute a penalty in view of its classification under domestic law and the severity of its effects, which

extended beyond the restoration of the previously prevailing economic situation.

57. Ultimately, the Government concluded that direct confiscation under Article 322 *ter* of the CC did not constitute a "penalty" for the purposes of Article 7 of the Convention.

58. With particular regard to the second applicant, the Government added that the confiscation of his money had to be considered a form of direct confiscation, in line with established domestic case-law. They cited, in this respect, judgments of the Plenary Court of Cassation no. 10561 of 2014 (*Gubert*), no. 31617 of 2015 (*Lucci*) and no. 42415 of 2021 (*Coppola*).

(b) The first applicant

59. The first applicant maintained that, contrary to the Government's submissions, the confiscation in question had constituted a "penalty".

60. Relying on the criteria set forth in the case of *G.I.E.M. S.r.l. and Others* (cited above, §§ 215-34), he submitted that Article 322 *ter* did not provide an explicit classification of the form of confiscation in question and that domestic case-law was unclear in that regard, whereas the prevailing domestic legal scholarship considered that it constituted a penalty.

61. Moreover, the first applicant submitted that the form of confiscation in question had a punitive character, as shown by the fact that it was mandatory, required a criminal conviction at least in substance and could be converted to confiscation by equivalent means in the event that the direct confiscation could not be enforced.

62. The first applicant also pointed out that the legislature, when introducing Article 322 *ter*, had explicitly stipulated that Article 322 *ter* did not apply to offences committed before the Article's entry into force (Article 15 of Law no. 300 of 2000) – thus applying the principle of non-retroactivity, which is typical of penalties.

63. Ultimately the criminal nature of the confiscation would also be confirmed by the severity of its consequences.

(c) The second applicant

64. The second applicant, too, maintained that the confiscation, as applied to him, had to be considered as constituting a "penalty".

65. He mainly argued that, in his case, the domestic courts had applied a form of confiscation by equivalent means, as they had not examined whether the confiscated assets had a direct connection with the crime allegedly committed. Since confiscation by equivalent means was considered to constitute a penalty under established domestic case-law, it had to be considered to constitute a penalty for the purposes of Article 7 of the Convention.

66. Additionally, the absence of a direct connection between the offence and the confiscated assets – which, in the applicant's view, had been acquired before the commission of the crime in question – was indicative of the punitive purpose of the confiscation.

67. Lastly, the second applicant pointed out that confiscation had been ordered by criminal courts in close connection with criminal charges.

2. The Court's assessment

(a) General principles

68. The concept of "punishment" or "penalty" as set out in Article 7 § 1 of the Convention has an autonomous scope. To render the protection offered by this provision 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*, cited above, § 27; *Del Río Prada v. Spain* [GC], no. 42750/09, § 81, ECHR 2013; and *G.I.E.M. S.r.l. and Others*, cited above, § 210). The wording of the second sentence of Article 7 § 1 indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are 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; *Del Río Prada*, cited above, § 82; and *G.I.E.M. S.r.l. and Others*, cited above, § 211). The severity of the measure is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Del Río Prada*, cited above, § 82, and the references therein; see also *Rola v. Slovenia*, nos. 12096/14 and 39335/16, § 66, 4 June 2019).

(b) Application to the present case

(i) Whether the confiscation was imposed following a criminal conviction

69. As to the first criterion for determining whether the measure in question amounted to a "penalty"– namely whether the measure was imposed following a criminal conviction – the Court notes that the applicants were not in the end convicted, since the offences were declared statute-barred. Nevertheless, the measure of confiscation was imposed on the basis of the finding that they were liable in respect of the criminal charges, which was contained in the first-instance decision and was substantially upheld by the Court of Appeal and the Court of Cassation (see paragraphs 9 and 18 above). At any rate, this criterion is only one among others to be taken into consideration, without it being regarded as decisive when it comes to establishing the nature of the measure (see *G.I.E.M. S.r.l. and Others*, cited

above, § 217; *Balsamo v. San Marino*, nos. 20319/17 and 21414/17, § 60, 8 October 2019; and *Ulemek v. Serbia* (dec.), no. 41680/13, §§ 48 and 58, 2 February 2021).

(ii) The classification of different forms of confiscation in domestic law

70. As regards the classification of different forms of confiscation under domestic law, the Court observes that direct confiscation under Articles 240 and 322 *ter* of the CC is generally considered to constitute a security measure rather than a penalty. Domestic courts have also stated that direct confiscation has no punitive purpose, but is rather aimed at restoring the previously prevailing economic situation and avoiding the accumulation of assets of unlawful origin (see paragraphs 25-27 above).

71. In this respect, the first applicant pointed out that the legislature established the non-retroactivity of Article 322 *ter* of the CC, which is typical of penalties (see paragraph 62 above). Nevertheless, the Court notes that the non-retroactivity of new provisions is not a characteristic that applies only to criminal sanctions; on the contrary, were it clear that a certain provision constituted a criminal sanction, there would have been no need to clarify that it did not apply retroactively, this being an inherent guarantee of all penalties. Therefore, the Court does not see in the circumstance invoked by the first applicant any clear indicator that the legislature considered that the measure constituted a penalty.

72. As to the second applicant's argument that the classification of the confiscation of his assets as "direct confiscation" was incorrect, since the measure had amounted rather to confiscation by equivalent means (see paragraph 65 above), the Court takes note of the diverging interpretations given by domestic courts on the nature of the confiscation of money (see paragraphs 28-30 above). Nevertheless, it reiterates that it is not its task to interpret and apply domestic law. For this step of the analysis, it will therefore retain the interpretation subscribed to by the domestic courts in the present case and deem that, under domestic law, the confiscation ordered against the second applicant had not amounted to a penalty.

(iii) The nature and purpose of the confiscation

73. As regards the nature and purpose of the measure, the Court notes that the confiscation affected assets that were considered to directly derive from the commission of criminal offences. As such, its main purpose appears to have been that of depriving the applicants of the profits of their crimes.

74. The Court further observes that the measure in question has certain elements that render it more comparable to the restitution of unjustified enrichment under civil law than to a fine under criminal law.

Firstly, the form of confiscation applied to the applicants is directed at assets that are directly derived from the commission of a crime, and can

therefore not exceed the actual enrichment of the offender (see *Dassa Foundation and Others v. Liechtenstein* (dec.), no. 696/05, 10 July 2007; also contrast *Welch*, cited above, § 33).

Secondly, the degree of culpability of an offender is irrelevant for the fixing of the amount of the assets to be confiscated, unlike in the case of criminal-law fines (see the above-cited cases of *Dassa Foundation*, and *Ulemek*, § 53; also contrast *Welch*, cited above, § 33). In this respect, the Court also points out that the measure of confiscation is imposed in addition to criminal sanctions and is not taken into account in the determination of their duration or amount.

Thirdly, being specifically directed at the profits of crime, confiscation may never be converted into a measure entailing a deprivation of liberty, which is another important characteristic of criminal-law fines (see, *mutatis mutandis*, the above-cited cases of *Dassa Foundation*, and *Ulemek*, § 53; also contrast *Welch*, cited above, § 33).

75. The Court acknowledges that other characteristics of the above-mentioned measures, which were also referred to by the first applicant (see paragraph 61 above), are comparable to those of criminal sanctions – notably the fact that confiscation can only be applied following a finding of criminal liability, and that, whenever direct confiscation is not possible, Article 322 *ter* provides for the possibility of confiscation by equivalent means (which is generally considered to constitute a penalty under domestic law). However, the Court does not consider these elements to be decisive.

76. On the contrary, the Court attaches particular importance to the fact that the confiscation in question was directed at assets that had been found to have originated in unlawful activities. Its primary purpose appears to have been to deprive the persons concerned of unlawful profits, a purpose that is not punitive in nature (see *Todorov and Others v. Bulgaria*, nos. 50705/11 and 6 others, § 304, 13 July 2021). Additionally, the measure of confiscation appears to constitute an expression of an increasing international consensus in favour of the use of confiscation measures in order to take out of circulation assets of unlawful origin – whether or not there has first been a finding of criminal liability (see paragraphs 41-43 and 47-48 above). The Court further notes that, according to its prevailing case-law (see the above-cited cases of *Dassa Foundation*; *Balsamo*, § 62; *Ulemek*, §§ 50-54; and *Todorov*, § 304), measures that pursued the same objective have been generally considered as having a restorative rather than a punitive aim, and the Court sees no reason to depart from this approach in respect of the present case.

77. Lastly, as to the second applicant's argument that the confiscation of his assets had had clear punitive connotations since it had been directed at assets that had been acquired prior to the commission of the crimes in question, the Court notes that that argument is unsubstantiated. The second applicant merely showed that the confiscated bank account had been opened,

and the insurance policy taken out, before the commission of those crimes – without any indication as to when the confiscated money had been acquired.

(iv) Procedures for the adoption and enforcement of confiscation measures

78. As regards the procedures for the adoption and enforcement of confiscation measures, the Court observes that the measure is imposed by the criminal courts. However, this fact cannot in itself be decisive, since it is common for criminal courts to take such decisions of a non-punitive nature as, for example, ordering the taking of civil reparation measures in respect of the victim of a criminal act (see *Balsamo*, cited above, § 63).

(v) The severity of the effects of confiscation

79. Lastly, as regards the severity of the measure of confiscation, the Court notes that, while confiscation may affect assets of a considerable value, it only applies to property deriving from criminal activity (see the above-cited cases of *Ulemek*, § 56, and *Dassa Foundation*).

(vi) Conclusions

80. Having regard to all the relevant factors, the Court concludes that the confiscation orders issued against the applicants did not amount to penalties within the meaning of Article 7 of the Convention.

81. The complaints must therefore be rejected as incompatible *ratione materiae* with the provisions of the Convention, in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

82. The first applicant complained that the diverging case-law of the Court of Cassation concerning the applicability of the confiscation of the proceeds of crime after a declaration that such crimes have become statute-barred had resulted in a breach of the principle of legal certainty, as set out in Article 6 § 1 of the Convention, which in so far as relevant reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ..."

A. Admissibility

83. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The first applicant

84. The first applicant argued that the diverging case-law of the Court of Cassation in respect of whether or not the measure of confiscation could be applied despite the discontinuance of the relevant proceedings had resulted in a breach of the principle of legal certainty.

85. He pointed out, in particular, that the issue had been addressed on two occasions by the Plenary Court of Cassation (in 1993 and 2008). Therefore, at the time of the commission of the offences (between 2001 and 2003) and of the filing of charges against him (2005), the established domestic case-law had excluded the applicability of confiscation following a declaration that the crimes in question had become statute-barred.

86. Following the *De Maio* judgment, however, two diverging lines of case-law had emerged (see paragraph 34 above) and the divergence had still existed in 2014, when an appeal judgment had been delivered in the applicant's case.

87. It was only in judgment no. 31617 of 2015 (*Lucci*) that the Plenary Court of Cassation had attempted to settle the divergence in case-law, stating – for the first time in respect of Article 322 *ter* – that a declaration that a crime had become statute-barred did not preclude confiscation (see paragraph 35 above).

88. Citing the principles set forth by the Court, the first applicant argued that this situation amounted to a long-standing divergence in case-law, and that the mechanism provided by domestic case-law for the resolution of such divergence – namely referral to the Plenary Court of Cassation – had proven ineffective.

(b) The Government

89. The Government, while acknowledging that the above-noted issue had been the subject of diverging case-law, did not consider that that divergence had led to a breach of the principle of legal certainty.

90. After reviewing the developments in the relevant domestic case-law (see paragraphs 31-36 above), the Government submitted that the case-law of the Court of Cassation had not been discontinuous and incoherent, but had rather followed a progressive and coherent development. In particular, the 2008 *De Maio* judgment had set the basis for future case-law developments, and had asserted the need to permit confiscation even if the relevant proceedings had been discontinued. Subsequently, an increasing number of judgments had adhered to this view until, ultimately, the Plenary Court of Cassation had endorsed it with the 2015 *Lucci* judgment.

The Government also noted that the *Lucci* approach had also been confirmed by the legislature, with the introduction of Article 578 *bis* of the CC.

91. Additionally, the Government argued that a mechanism existed to put an end to a divergence in case-law – namely the possibility to refer the case to the Plenary Court of Cassation upon the request of one of the parties concerned; they added that that mechanism had been used effectively in the present case, as shown by the 2015 *Lucci* judgment.

2. The Court's assessment

92. One of the fundamental aspects of the rule of law is the principle of legal certainty (see *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII), which, *inter alia*, guarantees a certain stability in legal situations and contributes to public confidence in the courts (see *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 57, 20 October 2011). The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law (see *Vinčić and Others v. Serbia*, nos. 44698/06 and others, § 56, 1 December 2009). However, the requirements of legal certainty and the protection of the legitimate confidence of the public do not confer an acquired right to consistency of case-law (see *Unédic v. France*, no. 20153/04, § 74, 18 December 2008), and case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement (see *Atanasovski v. the former Yugoslav Republic of Macedonia*, no. 36815/03, § 38, 14 January 2010, and *Borg v. Malta*, no. 37537/13, § 107, 12 January 2016).

93. The Court has acknowledged that the possibility of conflicting court decisions is an inherent trait of any judicial system which is based on a network of trial and appeal courts with authority over the area of their territorial jurisdiction. Such divergences may also arise within the same court. That, in itself, cannot be considered contrary to the Convention (see *Nejdet Şahin and Perihan Şahin*, cited above, § 51). At the same time, the Court has emphasised on many occasions that the role of a supreme court is precisely to resolve such conflicts. In consequence, if diverging practice develops within one of the highest judicial authorities in a country, that court itself becomes a source of legal uncertainty, thereby undermining the principle of legal certainty and weakening public confidence in the judicial system (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 123, 29 November 2016).

94. The Court has been called upon a number of times to examine cases concerning conflicting court decisions and has thus had an opportunity to pronounce judgment on the conditions in which conflicting decisions of

domestic supreme courts were in breach of the fair trial requirement enshrined in Article 6 § 1 of the Convention. In so doing it has explained the criteria that guided its assessment, which consist in establishing whether "profound and long-standing differences" exist in the case-law of a supreme court, whether the domestic law provides for machinery for overcoming these inconsistencies, whether that machinery has been applied, and if appropriate to what effect (ibid., § 116; see also *Borg*, cited above, § 108).

95. In the present case it is undisputed that the issue of the applicability of direct confiscation following the discontinuance of proceedings gave rise to a divergence in the case-law of the Court of Cassation between 2009 and 2015 (see paragraphs 34-35 above). Nevertheless, the parties disagreed on whether that divergence had breached the principle of legal certainty.

96. The Court will therefore examine, in line with the above-mentioned principles, whether the diverging decisions delivered between 2009 and 2015 amounted to "profound and long-standing differences", whether the domestic law provided for machinery for overcoming those differences, whether that machinery has been applied and if so, to what effect.

(a) The existence of "profound and long-standing differences"

97. An analysis of the relevant domestic practice reveals the existence of a divergence in the case-law of the Court of Cassation regarding the issue of whether confiscation can be ordered in respect of an offence, despite the extinction of the offence.

98. This divergence had already arisen prior to the events of the instant case and had been addressed by the judgment of the Plenary Court of Cassation in the *Carlea* judgment of 1993, according to which confiscation could not be applied in case of extinction of the offence (see paragraph 32 above). This interpretation was subsequently upheld by the Plenary Court of Cassation in the *De Maio* judgment of 2008 (see paragraph 33 above).

99. Despite these authoritative interpretations, the issue was again the subject of diverging views, starting from 2009, when the Court of Cassation began to render decisions which – in open contradiction of the *Carlea* and *De Maio* judgments – held that confiscation could be applied despite the extinction of the offence. Concomitantly, a separate line of case-law continued to adhere to the approach taken by the Plenary Court of Cassation (see paragraph 34 above).

100. These fluctuations lasted until 2015, when the Plenary Court of Cassation – again called upon to address the divergence in case-law – held that confiscation could be applied despite the extinction of the offence, provided that there had been first been a finding of liability (see paragraph 35 above).

101. It therefore follows that, in the present case, a single court of final instance delivered a number of judgments that reached diametrically opposite conclusions over a period of more than six years. Those judgments, which

concerned an issue that had already in the past been subject to diverging interpretations, cannot be regarded as constituting coherently evolving case-law (see *Lupeni Greek Catholic Parish and Others*, cited above, § 126, and *Ferreira Santos Pardal v. Portugal*, no. 30123/10, § 48, 30 July 2015).

102. As to whether that divergence was profound and long-standing, the Court takes into account its duration, scale, and the potential number of affected cases (see *Lo Fermo v. Italy* (dec.), no. 58977/12, § 56, 20 June 2023, and *Mariyka Popova and Asen Popov v. Bulgaria*, no. 11260/10, § 43, 11 April 2019).

103. In the present case, the divergence lasted for over six years and concerned a matter of general importance that was potentially applicable to a large number of persons (see *Lupeni Greek Catholic Parish and Others*, cited above, § 126; *Sine Tsaggarakis A.E.E. v. Greece*, no. 17257/13, § 51, 23 May 2019; and *Mariyka Popova and Asen Popov*, cited above, § 43; also contrast *Lo Fermo*, cited above, § 58); additionally, the same issue had already constituted the subject of previous divergences in case-law.

104. Given those circumstance, the Court considers that the case-law of the Court of Cassation was characterised by "profound and long-standing differences".

(b) The existence and use of a domestic-law mechanism to overcome inconsistencies in the case-law

105. The Court notes that, under the Italian judicial system, the task of resolving a divergence in case-law is entrusted to the Plenary Court of Cassation. Nevertheless, the interpretation provided by the Plenary Court of Cassation is not formally binding upon the individual sections of the Court of Cassation. It is only since the introduction of Article 618 § 1 *bis* in 2017 – that is to say after the events of the present case – that the individual sections have been obliged, when disagreeing with a principle established by the Plenary Court, to refer that case to the latter (see paragraph 38 above).

106. The Court is not called upon to examine the effectiveness of the mechanism of referral to the Plenary Court of Cassation *in abstracto*, but only to determine whether, in the present case, it proved capable of avoiding a persisting state of uncertainty.

107. In this respect, the Court notes first of all that the mechanism of referral to the Plenary Court of Cassation had been already used twice in the past in respect of the same issue, leading to the judgments in the *Carlea* and *De Maio* cases (see paragraphs 32-33 above), which had put an end to the case-law divergences at issue in those cases. Reiterating the importance of case-law development, the Court does not consider that these two judgments could have prevented any further change in the judicial interpretation of the same issue. Therefore, the emergence of a new divergence in case-law following these pronouncements does not in itself breach the principle of legal certainty, provided that that new divergence has been resolved.

108. In this respect, the Court notes that the issue was again referred to the Plenary Court of Cassation which, by the *Lucci* judgment of 2015 (see paragraph 35 above), put an end to the divergence. There is indeed no indication that, after that judgment, the divergence persisted.

109. The Court further reiterates that achieving consistency in the application of the relevant law may take time, and that periods of conflicting case-law may be tolerated without undermining legal certainty, provided that the domestic legal system proves (as in the present case) capable of accommodating them (see *Albu and Others v. Romania*, nos. 34796/09 and 63 others, § 42, 10 May 2012, and *Nejdet Şahin and Perihan Şahin*, cited above, § 83).

110. Additionally, the Court notes that, while the judgment of the Court of Appeal was delivered while the divergence in case-law still persisted, the final judgment was issued by the Court of Cassation after the *Lucci* judgment and followed the indications reached by the Plenary Court of Cassation (see *Svilengaćanin and Others v. Serbia*, nos. 50104/10 and 9 others, § 82, 12 January 2021, and *Zelca and Others v. Romania* (dec.), no. 65161/10, § 14, 6 September 2011).

111. It follows that a mechanism for putting an end to the diverging case-law not only existed, but was used effectively in the first applicant's case.

112. Having regard to all of the above, the Court considers that there was no breach of the principle of legal certainty in the first applicant's case. There has accordingly been no violation of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

113. The first applicant complained that the domestic courts had found him guilty of the crimes he had been charged with despite the declaration that those crimes had become statute-barred, in breach of Article 6 § 2 of the Convention, which reads as follows:

> "2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. Admissibility

114. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The first applicant

115. The first applicant argued that the domestic courts, in applying the measure of confiscation, had found him guilty of the crimes he had been accused of. That finding of guilt, despite the declaration that those crimes had become statute-barred, had constituted a violation of his right to be presumed innocent until proved guilty, as provided by Article 6 § 2 of the Convention. He relied on a number of cases in which the Court had found a violation of that provision – namely, *G.I.E.M. S.r.l. and Others* (cited above, §§ 314-18), *Geerings v. the Netherlands* (no. 30810/03, §§ 41-51, 1 March 2007) and *Paraponiaris v. Greece* (no. 42132/06, §§ 30-33, 25 September 2008).

(b) The Government

116. The Government, although acknowledging that the judgment of the Salerno Court of Appeal had discontinued the proceedings while "confirming the finding of liability contained in the conviction at first instance", argued that neither that finding nor the confiscation order had breached the applicant's right that he be presumed innocent.

117. The Government firstly argued that the present case had to be distinguished from those relied on by the first applicant. In particular, unlike the above-cited cases of *G.I.E.M. S.r.l. and Others* and *Geerings*, in the present case the applicant had never been acquitted on the merits, but had been convicted at first instance. As a consequence, the Court of Appeal, when finding that the applicant was criminally liable, had not quashed a previous acquittal decision. Additionally, unlike in the case of *Paraponiaris*, the finding of liability had been aimed at confiscating the applicant's assets (thus removing them from the economic sphere), and not at imposing a penalty.

118. Secondly, the Government pointed out that it was an important safeguard in respect of criminal proceedings that the courts, before discontinuing proceedings in the event that the crime in question had become statute-barred, had to verify whether an acquittal on the merits could be pronounced under Article 129 § 2 of the CCP. An inevitable consequence of this was that, despite the expiry of the statute of limitations, the domestic courts had to determine whether the applicant was liable or not.

119. Thirdly, the Government argued that the possibility to apply a confiscation on the basis of a finding of liability in substance, even in the absence of a formal conviction, had been deemed by the Court to be compatible with the Convention in the case of *G.I.E.M. S.r.l. and Others* (cited above). Additionally, the Government argued, confiscation without a finding of liability would be unjustified and disproportionate.

Accordingly, the Government considered that Article 6 § 2 of the Convention should be interpreted in a way that allowed for confiscation based on a finding of liability in substance, despite the discontinuance of the proceedings.

120. Lastly, the Government pointed out that the applicant had had the possibility to defend himself at all levels of jurisdiction.

2. The Court's assessment

(a) General principles

121. Article 6 § 2 safeguards the right to be "presumed innocent until proved guilty according to law". Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, *inter alia*, the burden of proof, legal presumptions of fact and law, the privilege against self-incrimination, pre-trial publicity and premature expressions, by the trial court or by other public officials, of a defendant's guilt (see *Allen v. the United Kingdom* [GC], no. 25424/09, § 93, ECHR 2013). When carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged, and any doubt should benefit the accused (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 77, Series A no. 146).

122. However, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, 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 discontinuation decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory (see *Allen*, cited above, § 94).

While these principles have been set forth in respect of statements made in the context of subsequent proceedings, they have been applied also to statements contained in the same decision pronouncing the acquittal or the discontinuance of the proceedings (see *Pasquini v. San Marino (no. 2),* no. 23349/17, §§ 48-49 and 55, 20 October 2020; *G.I.E.M. S.r.l. and Others*, cited above, §§ 314 and 317; and *Cleve v. Germany*, no. 48144/09, §§ 53 and 56, 15 January 2015).

123. In the recent case of *Nealon and Hallam v. the United Kingdom* ([GC], nos. 32483/19 and 35049/19, §§ 168-169, 11 June 2024), the Court clarified that – regardless of whether the criminal proceedings in question

ended in an acquittal or the discontinuance of those proceedings – the decisions (and their reasoning) delivered by the domestic courts or other authorities in the subsequent proceedings (when considered as a whole, and taken within the context of the exercise that they are required by domestic law to undertake) would violate Article 6 § 2 of the Convention in its second aspect if they amounted to the imputation of criminal liability to the applicant. Additionally, the Court clarified that the protection afforded by Article 6 § 2 in its second aspect should not be interpreted in such a way as to preclude national courts in subsequent proceedings – in which they would be exercising a different function to that of the criminal judge, in accordance with the relevant provisions of domestic law – from engaging with the same facts as had been decided in the previous criminal proceedings, provided that in doing so they did not impute criminal liability to the person concerned.

124. The Court reiterates that a judicial decision may reflect the opinion that the applicant is guilty even in the absence of any formal finding of guilt; it suffices that there is some reasoning suggesting that the court regards the accused as guilty (see *Böhmer v. Germany*, no. 37568/97, § 54, 3 October 2002; *Baars v. the Netherlands*, no. 44320/98, § 26, 28 October 2003; and *Cleve*, cited above, § 53).

125. The Court further reiterates that in cases concerning compliance with the presumption of innocence, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2 (compare *Allen*, cited above, § 126 with further references). Regard must be had, in this respect, to the nature and context of the particular proceedings in which the impugned statements were made. The Court must determine the true sense of the impugned statements, having regard to the particular circumstances in which they were made (compare *Petyo Petkov v. Bulgaria*, no. 32130/03, § 90, 7 January 2010). Depending on the circumstances, even the use of some unfortunate language may thus be found not to be in breach of Article 6 § 2 (compare *Englert v. Germany*, 25 August 1987, §§ 39 and 41, Series A no. 123; *Allen*, cited above § 126; and *Cleve*, cited above §§ 54-55).

126. It can be seen from the above examination of the Court's case-law that in examining the compliance of a statement or decision with Article 6 § 2, it is decisive to have regard to the nature and context of the proceedings in which the statement was made or the decision was adopted (see *Bikas v. Germany*, no. 76607/13, § 47, 25 January 2018).

(b) Application of the above-stated principles to the present case

127. The Court notes that, in the present case, the first applicant did not complain of any specific language used in the domestic courts' judgments. He argued that the confiscation order, which had rested on a finding of criminal liability in substance, necessarily entailed the finding that the first applicant was guilty – despite the discontinuance of the proceedings.

128. In the present case, the domestic courts ordered the confiscation of the applicant's assets despite the discontinuance of the proceedings and, therefore, in the absence of a formal conviction.

129. In this regard, the Court is aware of the increasing recourse – both under the domestic legal order and at the international level – to forms of non-conviction-based confiscation (see paragraphs 41-43 and 47-48 above), under which judges may be called upon to order the confiscation of assets of unlawful origin even in the absence of a conviction. In this respect, the Court finds that the protection afforded by Article 6 § 2 in its second aspect should not be interpreted in such a way as to preclude national courts from engaging with the same facts as were decided in the criminal proceedings for the purpose of ordering a form of non-conviction-based confiscation, provided that in doing so they do not impute criminal liability to the person concerned (see, *mutatis mutandis*, *Nealon and Hallam*, cited above, § 169).

130. The Court will therefore examine whether, in the present case, the domestic courts' judgments entailed an imputation of criminal liability in respect of the applicant. In this regard, it will take into account both the language and reasoning of the domestic decisions, and the surrounding context.

131. The Court notes that it is a formal requirement of a confiscation under Article 322 *ter* of the CC that there be a "conviction" (see paragraph 21 above). According to the interpretation followed by domestic courts in the case at hand, that requirement will be met even in the event that the offence in question has become extinct, provided that the applicant was found liable at first instance and that that judgment was subsequently left unaltered on the merits (see paragraphs 34-35 above).

132. Accordingly, in respect of the present case the Salerno Court of Appeal noted that the applicant had been convicted at first instance and that, on appeal, that finding of liability had been left substantially unaltered. It therefore found that the requirement of a "conviction" had been fulfilled and ordered the confiscation of the first applicant's assets (see paragraph 9 above).

133. The Court considers that the requirement of a criminal "conviction" as a necessary precondition for the confiscation – accompanied by the finding that the first-instance conviction had been left unaltered on the merits – constituted clear indicators that the confiscation was ordered because the applicant was considered criminally liable; additionally, the Court of Appeal explicitly equated those statements to a "full finding of liability" (see paragraph 9 above). In this case, the domestic courts did not merely assess the unlawful origin of the confiscated assets: on the contrary, it was explicitly stated that the first applicant was criminally liable. The Court therefore finds that, in the present case, the findings of the domestic courts reflected their opinion that the applicant was guilty of the offence in question and that, had

it not been for the discontinuance of the proceedings, he would have been convicted.

134. Such conclusion is further supported by the Government's acknowledgment that the Court of Appeal had substantially confirmed the finding of liability contained in the first-instance judgment (see paragraph 116 above), and by the language used by the Court of Appeal (albeit when examining not the confiscation but the application of Article 129 § 2 of the CCP), which stated that "the evidence adduced can only uphold the finding of liability of Mr Episcopo in respect of the criminal charges" (see paragraph 9 above).

135. The Court therefore finds that, in ordering the confiscation of his assets, the domestic courts imputed criminal liability to the first applicant.

136. Additionally, the Court is not convinced by the Government's arguments that a finding of liability would not affect the presumption of the applicant's innocence.

137. As to the Government's first argument, which rests on the fact that the applicant had been found guilty at first-instance (see paragraph 117 above), the Court has already clarified that it does not distinguish between cases where charges are discontinued (because they become time-barred) before any criminal determination is made, or those which are discontinued (for the same reason) after an initial finding of guilt. It follows that first-instance findings, which are not final, cannot taint subsequent determinations (see *Pasquini v. San Marino*, cited above, § 63, in which – similarly to the present case – the applicant had been convicted at first instance and the Court found a violation of Article 6 § 2 as the court of appeal, while discontinuing the proceedings due to the expiry of a limitation period, had imputed criminal liability to the applicant).

138. As to the Government's second argument that a finding of criminal liability would be an inevitable consequence of the guarantee provided by Article 129 § 2 of the CCP (see paragraph 118 above), that provision states that, when an offence has become statute-barred but it can clearly be established on the basis of the available elements that the defendants are not criminally liable, the domestic courts should pronounce an acquittal on the merits (see paragraph 37 above). The Court is doubtful that that provision indeed required a positive finding of liability. In any event, even assuming that that was the case, the need to comply with a domestic provision could not justify a breach of a Convention right.

139. Lastly, as to the Government's third argument (see paragraph 119 above), the Court sees no contradiction between any finding of a violation in the present case and the judgment delivered in *G.I.E.M. S.r.l. and Others* (cited above). In that case, while a confiscation based on a finding of liability in substance was found to be compatible with the requirements of Article 7 of the Convention (ibid, §§ 258-62), this was without prejudice to the

subsequent assessment of whether Article 6 § 2 of the Convention had been breached (ibid. §§ 317-18).

140. In the light of the above-noted considerations, the Court finds that the imputation of criminal liability to the first applicant despite the discontinuance of the proceedings breached his right to be presumed innocent.

141. There has therefore been a violation of Article 6 § 2 of the Convention in respect of the first applicant.

V. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1 TO THE CONVENTION

142. The second applicant complained that the confiscation of his assets had lacked a foreseeable legal basis and had been disproportionate, in breach of Article 1 of Protocol No. 1 to the Convention, which reads as follows:

> "1. 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.
>
> 2. 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

143. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The second applicant

144. The second applicant submitted that the applicability of the measure of confiscation despite the declaration that the crimes in question had become statute-barred had not rested on a sufficiently foreseeable legal basis. He argued, in particular, that before the *Lucci* judgment in 2015, it had been unclear whether the measure of confiscation could be applied in such cases; he noted in particular judgment no. 7860 of 2015, which had adhered to the opposing view (see paragraph 34 above). Additionally, he maintained that even after the delivery of the *Lucci* judgment, some uncertainty had remained; that uncertainty had rendered the introduction of Article 578 *bis* of the CC (see paragraph 36 above) necessary.

145. The second applicant also argued that the confiscation in question had been unjustified, as it had targeted assets that had been acquired before the commission of the above-mentioned offences. He noted, in particular, that the bank accounts had been opened, and the insurance policy taken out, before 2002.

(b) The Government

146. The Government argued that the applicability of the confiscation had been foreseeable, as it had been based on a progressive and coherent development of domestic law, which had already been envisaged by the *De Maio* judgment in 2008 and had been subsequently confirmed by the *Lucci* judgment (see paragraphs 89-91 above in respect of the complaint raised under Article 6 § 1 of the Convention).

2. The Court's assessment

147. The Court notes at the outset that the parties did not dispute that the confiscation of the second applicant's assets had amounted to an interference with his right to the peaceful enjoyment of his possessions, as guaranteed by Article 1 of Protocol No. 1 to the Convention.

148. Additionally, in the Court's view there is no need in the present case to determine under which of the three rules set out under Article 1 of Protocol No. 1 the instant case should be examined because, regardless of which of the three rules applies, the principles governing the question of justification are substantially the same (see, *mutatis mutandis, Todorov and Others*, cited above, § 182).

149. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises the deprivation of possessions only "subject to the conditions provided for by law", and the second paragraph recognises that States have the right to control the use of property by enforcing "laws". Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Lekić v. Slovenia* [GC], no. 36480/07, § 94, 11 December 2018).

150. The principle of lawfulness also presupposes a certain quality of the applicable provisions of domestic law. In this regard, it should be pointed out that when speaking of "law", Article 1 of Protocol No. 1 alludes to the very same concept as that to which the Convention refers elsewhere when using that term. It follows that the legal principles upon which an interference is based should be sufficiently accessible, precise and foreseeable in their application. In particular, a principle is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities. Any interference with the peaceful enjoyment of possessions must, therefore,

be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity to present their case to the relevant authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by that provision. In ascertaining whether that condition has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures (ibid. § 95).

151. The fact that a statutory provision is not sufficiently precise and foreseeable may be remedied by the domestic courts by giving a clear and precise interpretation of the provision in question (see *Vijatović v. Croatia*, no. 50200/13, § 54, 16 February 2016). In this respect, the Court has acknowledged in its case-law that the requirement of foreseeability that the term "law" implies cannot be read as outlawing the gradual clarification of the rules through judicial interpretation from case to case, provided that the resultant development remains consistent with the essence of the provision and could reasonably be foreseen. By contrast, an inconsistent case-law interpretation of the relevant domestic provisions is a factor that could result in unforeseeable or arbitrary outcomes and deprive individuals of the effective protection of their rights and which, as a consequence, is inconsistent with the requirement of lawfulness (see *The J. Paul Getty Trust and Others v. Italy*, no. 35271/19, § 297, 2 May 2024, with further references).

152. Turning to the examination of the present case, the Court notes that the second applicant's complaint that the law was not sufficiently foreseeable relates to a divergence in case-law that the Court has already found to have persisted between 2009 and 2015 (see paragraphs 99-100 above). It is therefore necessary to establish the relevant point in time for assessing whether the legal basis for the confiscation was sufficiently foreseeable.

153. In this respect, the Court has already stated that the point in time in respect of determining whether an interference rested on a sufficiently foreseeable law is when the interference complained of takes place (see *The J. Paul Getty Trust and Others*, cited above, § 306). In fact, the requirement of foreseeability is closely connected to protection against arbitrary interferences by public authorities and to the requirement that a person affected by such an interference must have a reasonable opportunity of challenging the measure (*Lekić*, cited above, § 95).

154. The Court therefore considers that the relevant point in time coincides with the issuance of the confiscation order (*The J. Paul Getty Trust and Others*, cited above, § 306). It is, in fact, at that moment that a defendant has to be aware of the legal requirements justifying the confiscation of his assets, in order that he may be able to verify whether the domestic authorities have complied with domestic law and be able to effectively challenge the measure.

155. In the present case, therefore, the degree of foreseeability must be assessed in respect of the time when the confiscation order against the

applicant was first issued by the Bassano del Grappa District Court, on 7 May 2008 (see paragraph 14 above).

156. The Court has found that, at that time, established case-law considered that the measure of confiscation could not be applied after an offence had ceased to be punishable (see paragraph 33 above). It was only later that the Court of Cassation started to recognise that the measure of confiscation could in fact be applied in such a situation; however, even then, the issue was subject to diverging case-law for several years (see paragraph 104 above).

157. The Court therefore concludes that, at the relevant time, the confiscation of the second applicant's assets did not rest on a sufficiently foreseeable legal basis.

158. There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

159. 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."

A. Damage

160. The first applicant claimed 844,120.95 euros (EUR) in respect of pecuniary damage (the sum that he submitted was equal to the value of the confiscated assets), plus statutory interest until the date of payment. He further claimed EUR 30,000 in respect of non-pecuniary damage.

161. The second applicant did not submit any claims in respect of just satisfaction.

162. The Government challenged the existence of the damage claimed by the first applicant and considered that the amounts claimed were excessive.

163. The Court notes that, in respect of the first applicant, it has found a violation only of Article 6 § 2 of the Convention on account of the fact that the domestic courts imputed criminal liability to the applicant despite the declaration that the offence had become statute-barred. The Court does not discern any causal link between the violation found and the pecuniary damage alleged. It therefore rejects this claim.

164. As regards non-pecuniary damage, the Court considers that, in the specific circumstances of the present case, it is not necessary to award any amount on that account.

165. As to the second applicant, the Court considers that there is no call to award him any sum.

B. Costs and expenses

166. The first applicant also claimed EUR 36,658.33 for the costs and expenses incurred before the domestic courts and EUR 14,591 for those incurred before the Court.

167. The second applicant did not request any amount in respect of costs and expenses.

168. The Government contested the sums requested by the first applicant as excessive.

169. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and to the above-noted criteria, the Court considers it reasonable to award to the first applicant the sum of EUR 20,000 covering costs under all heads, plus any tax that may be chargeable to the applicant.

170. As to the second applicant, the Court does not award him any sum.

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, the complaints raised by the first applicant under Articles 6 §§ 1 and 2 of the Convention and the complaint raised by the second applicant under Article 1 of Protocol No. 1 admissible and the remainder of the applications inadmissible;

3. *Holds*, unanimously, that there has been no violation of Article 6 § 1 of the Convention in respect of the first applicant;

4. *Holds*, by five votes to two, that there has been a violation of Article 6 § 2 of the Convention in respect of the first applicant;

5. *Holds*, by five votes to two, that there has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the second applicant;

6. *Holds*, by five votes to two,
   (a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable to the first applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses*, unanimously, the remainder of the first applicant's claim for just satisfaction.

Done in English, and notified in writing on 19 December 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Ivana Jelić
Registrar	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 Serghides;
(b) partly dissenting opinion of Judge Wojtyczek, joined by Judge Sabato;
(c) partly dissenting opinion of Judge Sabato.

CONCURRING OPINION OF JUDGE SERGHIDES

1. While I entirely agree with the judgment, and I therefore voted in favour of all the points of its operative provisions, I have nevertheless decided to express a separate opinion regarding the first applicant's complaint under Article 6 § 2. My purpose is to provide some further support for the finding of a violation of this provision. Article 6 § 2, which safeguards the pivotal guarantee of the presumption of innocence, reads:

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

2. The relevant complaint here is that the domestic courts, in applying the measure of confiscation, had in effect found Mr Episcopo, the first applicant, guilty of the offences he had been charged with, despite the discontinuance of the criminal proceedings against him on the basis that the offences had become statute-barred. This decision of the domestic courts, in the submission of the first applicant, undermined his right to be presumed innocent, as safeguarded by Article 6 § 2 of the Convention, by treating him as guilty without a formal conviction.

3. The presumption of innocence is vital for protecting the dignity of individuals facing criminal proceedings and for maintaining the integrity of trials and the credibility of the justice system. The importance of the presumption of innocence as a fundamental defence right is best illustrated by the words of Jean-Paul Costa, former President of the Court, who aptly observed[1]:

> "The right to be presumed innocent constitutes the first of the defence rights. Many unfair trials throughout history, from that of Socrates to that of Jesus, from the trial of Joan of Arc to the Dreyfus case, have completely disregarded the presumption of innocence, and that is still the case today in many countries. In other words, 'the case has been heard' even before the trial has taken place."

4. The pertinent facts, mentioned in paragraphs 8-10 of the judgment, are the following. In 2008 the Sala Consilina District Court convicted the first applicant for several offences, including fraud in public funding for the construction of a tourist accommodation facility by the company he directed, P. s.r.l. It sentenced him to three and a half years' imprisonment and ordered the confiscation of assets equivalent to the unlawfully obtained profits. In 2014 the Salerno Court of Appeal declared that the offences had become statute-barred and discontinued the proceedings against the applicant. The Court of Appeal nevertheless proceeded to examine whether the applicant

[1] See Jean-Paul Costa, *The European Court of Human Rights – Judges for Freedom* (English translation by James Brannan) in Vitaly Portnov (ed.), *Encyclopaedia of the European Court*, Vol. 4-I, "The European Court of Human Rights. Theory and Practice in Respect of Russia and Other Member States of the Council of Europe. Monographs" (Publishing House iRGa 5, Moscow, 2021), at p. 187.

had advanced sufficient arguments to justify, under Article 129 § 2 of the Criminal Code, the replacement of the first-instance conviction by a judgment of acquittal on the merits. The Court of Appeal found that the applicant's arguments and evidence were not sufficient to justify his acquittal. On the contrary, it concluded that the "evidence adduced [could] only uphold the finding of liability of Mr Episcopo in respect of the criminal charges". The Court of Appeal revoked the confiscation of the applicant's shares and ordered, instead, the confiscation of a hotel building up to the value of EUR 844,120.95. That was because it decided to confiscate the direct proceeds of crime, which consisted of the hotel building that had been erected with the unlawfully obtained funds. It further deemed, in line with the recent relevant case-law of the Court of Cassation that the "extinguishing" of the offence did not preclude a measure of confiscation, since the applicant's criminal liability had already been established (see paragraph 9 of the judgment). The Court of Cassation, to which the first applicant appealed, ultimately upheld the judgment of the Salerno Court of Appeal. It referred in particular to a recent judgment of the Court of Cassation (Combined Divisions)[2] which, resolving a divergence in the case-law, had established that the direct confiscation of assets could be ordered even if the proceedings in question had been discontinued, provided that there had first been a conviction and that the finding of liability in respect of the accused had subsequently remained unaltered. Concerning the present case, the Court of Cassation also addressed the fact that the building was owned by the company P. s.r.l. and not by the first applicant. However, since the offence in question had been committed in order to further the company's interests and, moreover, by its legal representative, the court deemed that fact to be immaterial.

5. Article 157 of the Italian Criminal Code provides that "[t]he statute of limitations 'extinguishes'[3] the offence once the period corresponding to the maximum statutory penalty has elapsed ...". As said above, in the present case, the Salerno Court of Appeal declared that the offences for which the first applicant was convicted and sentenced at first instance had become statute-barred, with the result that the criminal proceedings against him were discontinued. Thus, the following arguments can rightly be made by way of criticism of the practice and decision of the domestic courts. An offence is either statute-barred or not. Like the principle that there is no offence or sanction without law (*nullum crimen nulla poena sine lege*), it can be argued that there can be no criminal liability without the establishment of an offence and a final conviction. It can thus also be argued that there can be no criminal

[2] An extended bench of the *Corte Suprema di Cassazione* dealing with complex cases including statutory interpretation.

[3] This means that the charge or prosecution in respect of the offence is terminated (Italian *estingue*), for a number of reasons under the Criminal Code, in this case the expiry of the statutory limitation period.

liability for an offence which is statute-barred. Nor can there be criminal liability for one purpose but no criminal liability for another. Partial criminal liability cannot spring from an offence which is statute-barred, from a conviction which was never final or from criminal proceedings which have been discontinued. With all due respect, it is absurd to affirm that a person is not criminally liable for the offence he or she was charged with, without any final conviction, but that he or she is still criminally liable for the purpose of imposing the confiscation of his or her property. The protection afforded by the presumption of innocence ceases once the decision of the criminal court becomes final. If the court's decision does not attain finality, as in the present case, the guarantee of the presumption of innocence remains, in effect, indefinitely. This ongoing protection precludes the imputing of any criminal liability to a person in cases where the alleged offence has become statute-barred. When criminal proceedings are discontinued for this reason, this indicates that the State has forfeited its opportunity to prove guilt beyond reasonable doubt. By continuing to examine criminal liability for confiscatory purposes, the domestic court essentially circumvents this procedural safeguard. The mere implication of wrongdoing in confiscatory decisions erodes the legal presumption of innocence and casts a shadow over the defendant's reputation and legal standing, contrary to the Convention's pivotal guarantee of the presumption of innocence. Any such practice of domestic courts could lead to a divided system of justice. This disparity may weaken public trust in the fairness and integrity of the legal system. It may suggest that the procedural rights of defendants can be selectively disregarded in pursuit of State interests.

6. In spite of the above considerations, the Salerno Court of Appeal, while deciding that the offences were statute-barred and the criminal proceedings against the first applicant were discontinued, nevertheless proceeded and imputed criminal liability to the first applicant, which became the basis for ordering the confiscation (see paragraphs 130-136 of the judgment). In my humble submission, what was decided by the domestic courts was not only arbitrary, contradictory and paradoxical, but also logically and legally fallacious. Such a decision imputing criminal liability to the first applicant in the circumstances of the case and its use as the basis for confiscating the hotel, cannot, by any measure, be deemed to respect the right to the presumption of innocence. Such a decision conflicts with the principle that any measure which depends on the commission of a crime, including the confiscation in question, must follow a definitive finding of guilt through a fair trial. Pursuant to Article 6 § 2, any action or reasoning that assumes the guilt of an individual before their criminal liability is definitively established in a final judgment is prohibited.

7. What is most important is that the decision by the domestic courts, whether based on the existing case-law or on the provisions of the Criminal Code, is not Convention compatible, as it contravenes Article 6 § 2,

safeguarding the presumption of innocence, which is a fundamental guarantee for any accused person. In a more general sense, it is to be said that the respondent State, through either its statute law or the decisions of its courts, has violated Article 6 § 2.

8. It is my humble submission that the decision of the domestic courts contravened the principle of the rule of law and other democratic principles enshrined in Article 6 § 2 and the Convention in general, the integrity of criminal procedure and the human dignity which is integral to this provision. The said decision also runs counter to the fundamental Convention principle of effectiveness, since it renders the protection of the Article 6 § 2 right not practical and effective, as is required by the effectiveness principle, but merely theoretical and illusory. In the same vein, the Court in *G.I.E.M. S.r.l. and Others v. Italy* ([GC], nos. 1828/06 and 2 others, § 314, 28 June 2018), held that "[w]ithout protection to ensure respect for ... the discontinuance decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory". The effectiveness principle is also invoked by the present judgment in paragraph 122 where it states that, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence has another aspect: the general purpose of that right to protect individuals who have been acquitted of a criminal charge, or in respect of which criminal proceedings have been discontinued, from being treated by public officials and authorities – especially judicial authorities – as though they are in fact guilty of the offence in question. In this connection, the following passage from the judgment of the Grand Chamber in its recent judgment *Nealon and Hallam v. the United Kingdom* ([GC], nos. 32483/19 and 35049/19, § 168, 11 June 2024), provides significant support:

> "Consequently, henceforth, regardless of the nature of the subsequent linked proceedings, and regardless of whether the criminal proceedings ended in an acquittal or a discontinuance, the decisions and reasoning of the domestic courts or other authorities in those subsequent linked proceedings, when considered as a whole, and in the context of the exercise which they are required by domestic law to undertake, will violate Article 6 § 2 of the Convention in its second aspect if they amounted to the imputation of criminal liability to the applicant. To impute criminal liability to a person is to reflect an opinion that he or she is guilty to the criminal standard of the commission of a criminal offence ..., thereby suggesting that the criminal proceedings should have been determined differently."

9. I consider that the first applicant's position is well supported by the relevant case-law, on which he relied, where the Court has found a violation of Article 6 § 2 (see *G.I.E.M. S.r.l. and Others*, cited above, §§ 314-318; *Geerings v. the Netherlands*, no. 30810/03, §§ 41-51, 1 March 2007; *Paraponiaris v. Greece*, no. 42132/06, §§ 30-33, 25 September 2008; and the case-law referred to in these cases), as well as, of course, by the judgment in *Nealon and Hallam* (cited above). The purpose of this opinion, however, is

not to engage in an analysis of that case-law but rather to highlight the paradoxical conclusions reached by the domestic courts in the present case.

10. A concluding observation that I wish to make is that the fact of examining criminal liability with a view to confiscation in statute-barred cases, as occurred here, may constitute a profound violation of the presumption of innocence guaranteed by Article 6 § 2 of the Convention. Such practices may not only undermine the said pivotal right to the presumption of innocence, but may also jeopardise the balance between the protection of public interests and the safeguarding of the fundamental individual right to a fair trial, which lies at the heart of a fair and just legal system. It is vital that all stakeholders, legislatures and courts, refrain from introducing such procedures or practices or, where they already exist, reform them, to ensure that the presumption of innocence remains inviolable in all court proceedings.

11. In the light of the above-mentioned considerations and all the reasons provided in the judgment, I agree with the conclusion reached in paragraph 140, namely that the imputation of criminal liability to the first applicant, despite the statutory discontinuance of the criminal proceedings against him, breached his Convention right to be presumed innocent.

PARTLY DISSENTING OPINION OF JUDGE WOJTYCZEK, JOINED BY JUDGE SABATO

1. I respectfully disagree with the view that Article 6 § 2 has been violated in the instant case.

2. Under Article 6 § 2 of the Convention, "[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law" ("*Toute personne accusée d'une infraction est présumée innocente jusqu'à ce que sa culpabilité ait été légalement établie*").

3. I note that the reasoning of the present judgment explains the operation of the domestic legal system in the following way:

> "34. Another line of case-law, however (drawing from the considerations addressed in the *De Maio* judgment), held that confiscation could be ordered even if the offence in question had become extinct, provided that there had been a finding of liability and that the assets had been found to be linked to the commission of the offence (Court of Cassation judgments no. 2453 of 2009, 32273 of 2010, no. 39756 of 2011, no. 48680 of 2012 and no. 31957 of 2013).
>
> 35. The issue was then again remitted to the Plenary Court of Cassation which, in judgment no. 31617 of 21 July 2015 (*Lucci*), upheld the most recent development and found that direct confiscation could be applied despite the extinction of the offence in question. The principle set out by the Plenary Court of Cassation reads as follows:
>
> 'The judge, in declaring the extinction of an offence owing to the expiry of the statute of limitations, may apply, under Article 240 § 2 (1) of the CC, the confiscation of the price of the offence and, under 322 *ter* of the CC, the confiscation of the price of or profit [derived from] the offence, provided that it amounts to direct confiscation and that there has first been a conviction, in respect of which the findings on the merits remain unaltered as to the existence of the offence, the liability of the accused and the classification of the property to be confiscated as the profit or the price of the offence.'
>
> The Plenary Court of Cassation also clarified that an incidental finding of liability was insufficient: there had to be a formal conviction at a lower level, which was left unaltered in substance by the subsequent decisions declaring the offence statute-barred."

If I understand the domestic law correctly, the fact that a criminal offence becomes time-barred does prevent the sentencing of the accused but does not prevent the confiscation of illegally acquired assets. In other words, the discontinuance of time-barred proceedings has only a partial effect: criminal proceedings become time-barred for the purpose of sentencing (imposing a criminal punishment) but not for the purpose of confiscating assets or assessing criminal liability in connection with such potential confiscation. In the latter type of proceedings, the presumption of innocence may still be legally rebutted but only for the purpose of the confiscation measure.

4. In the instant case, both applicants were proved guilty according to domestic law (as interpreted in the line of domestic case-law which ultimately prevailed), for the purposes of confiscation, whereas the proceedings aimed at handing down a sentence were discontinued. In my view, Article 6 § 2 of

the Convention does not rule out such a fractioning of the effects of a statute of limitations in the domestic legal system.

PARTLY DISSENTING OPINION OF JUDGE SABATO

1. Introduction

1. I regret that I cannot share the majority's opinion that there have been violations of Article 6 § 2 of the Convention in respect of the first applicant and of Article 1 of Protocol No. 1 to the Convention in respect of the second applicant. Moreover, while I concur with the findings that the complaints of both applicants under Article 7 were inadmissible *ratione materiae* – since measures entailing the confiscation of the proceeds of crime do not amount to penalties under the Court's case-law – and that there has been no violation of Article 6 § 1 in respect of the first applicant, I believe that this latter outcome should have been based on reasons that differ significantly from those provided by the majority. Indeed, the majority's reasoning leading to the conclusion of no violation of Article 6 § 1 in respect of the first applicant is closely linked to the reasoning underlying their conclusion that there has been a violation of Article 1 of Protocol No. 1 in respect of the second applicant. I conclude, to the contrary, that there has been no such violation of Article 1 of Protocol No. 1.

As my approach diverges radically from that of the majority, although I am expressing what is technically a "partly" dissenting opinion, my dissent is, practically speaking, total.

The present separate opinion is meant to complement that of Judge Wojtyczek, covering other aspects of the case, which I have had the pleasure to join.

(a) The fragmented structure of the majority's judgment and a summary of my critical approach to it

2. Whereas, in my modest view, a proper assessment of the legal issues raised in the present case requires a comprehensive consideration of the links between the various aspects addressed under the different provisions of the Convention and its Protocols, the majority adopted a judgment which appears seriously fragmented in its structure, thus entailing serious inconsistencies and – with due respect – what I consider to be errors.

3. Regarding the complaints raised by both applicants under Article 7, the majority judgment recognises, based on the Court's case-law, that confiscations of the proceeds of crime under the respondent State's law do not amount to penalties (they are *misure di sicurezza*), and can be better equated to civil-law restitution orders, and therefore – since that civil nature precludes the application of Article 7 – declares the complaints inadmissible *ratione materiae*. I agree with this finding and, as mentioned above, my agreement ends here!

4. The judgment then abruptly shifts focus, perhaps to align with the order of provisions in the Convention: it comes to address the complaint raised by

the first applicant under Article 6 § 1 concerning an alleged lack of legal certainty due to diverging case-law as to whether confiscation was possible if the crime had become statute-barred. The majority conclude that between 2009 and 2015 there was a profound and long-standing divergence in case-law: according to the majority, while it was theoretically possible to refer the matter to the Combined Divisions of the Court of Cassation to resolve the conflict, this was only done after more than six years. Although this does not impact on the complaint of the first applicant, since the majority themselves find no violation because the alleged divergence had ended already when the domestic claim was to be finally adjudicated, the presumed "profound" and "long-standing" conflicting case-law will come into play later in the judgment, concerning the second applicant's complaint under Article 1 of Protocol 1. I "profoundly" disagree with the finding concerning the existence of diverging case-law having the characteristics indicated by the majority, which – again – impacts both upon the reasoning concerning the first applicant's complaint (although I agree with the outcome) and upon the reasoning and outcome of the second applicant's complaint.

5. At this juncture, the fragmented structure of the judgment becomes once more evident, and it is important for the reader to focus attention and not lose sight of the majority's earlier finding that direct confiscations are civil measures under both the respondent State's law and the Convention. Surprisingly, albeit in such a civil-law context (an aspect which, as I will demonstrate, is quite relevant), in addressing the first applicant's complaint under Article 6 § 2 the majority find that the confiscation of his assets as proceeds of crime following the discontinuance of criminal proceedings breached his right to be presumed innocent. The majority found their conclusion on the domestic legal requirement that a confiscation must be based on a positive judicial finding of criminal liability despite discontinuance of the criminal prosecution (a requirement which, as will be seen – but the majority neglect to consider – is provided for also by several international law and EU law sources, and is widely found in legislations of State parties to the Convention within the framework of so-called "non-conviction-based confiscations") and consider that such a requirement suggests *per se* the applicant's criminal liability, thereby denying his right to be presumed innocent. I, by contrast, strongly disagree that this can be considered a violation of Article 6 § 2: in my humble view, the majority not only totally disregard the European context concerning non-conviction-based confiscations (which I will therefore have to comment upon at some length), but also downplay the approach taken in the Grand Chamber judgment in *Nealon and Hallam v. the United Kingdom* ([GC], nos. 32483/19 and 35049/19, esp. §§ 168–169, 11 June 2024), revisiting the Court's case-law concerning the so-called "second aspect" (after criminal proceedings have concluded) of the presumption of innocence under Article 6 § 2.

6. Finally, regarding the complaint raised by the second applicant under Article 1 of Protocol No. 1 concerning the alleged lack of a foreseeable legal basis for the confiscation of proceeds of crime, due to alleged conflicting case-law at the time the confiscation order was issued, as already mentioned above the majority find a violation, basing this finding on their assessment that, at that time (2008), "established" domestic case-law "prohibited" confiscation of assets after the "extinguishment" of the offence[4]. According to the majority, the maintaining of such a measure notwithstanding the statute-barring of the relevant offence was thus unforeseeable. Here the fragmented structure of the judgment comes into play again, and the reader must not forget that, in their earlier finding, the majority had considered that diverging case-law existed well before 1993, it thus being excluded that the maintaining of the confiscation notwithstanding the "extinguishment" of the offence (one of the conflicting lines of case-law, according to that finding of the majority) was unforeseeable. Again, the majority's chosen order of analysis may obscure this contradiction. Although I have a more nuanced position on the divergence of case-law in the period before 2008, I cannot avoid highlighting this one further incoherence which is inherent in the majority's opinion. I therefore disagree also with this last conclusion and find it, with due respect, erroneous.

(b) The analytical framework to be used below

7. As the above summary demonstrates, the joint cases at hand involve two fundamentally distinct issues:

[4] The term "extinguishment" (in Italian, "*estinzione*"), is one of the elements relied upon by the majority in paragraphs 131 and 133 of their judgment, together with the term "conviction", both appearing in the relevant legislative framework, to conclude that there was a suggestion of criminal liability to the criminal standard. Leaving aside the discussion that took place in domestic case-law concerning the requirement of a "conviction", which is well reflected in the judgment, it is worth mentioning that it is clear in the letter of national law (and recognised by the same majority in paragraph 24 of the judgment) that the "extinguishment" of an offence because it has become statute-barred precludes the application of "security measures", but not of confiscation. Therefore, the offence is "extinguished", but not totally! In the same direction, Article 198 of the Criminal Code – albeit not mentioned by the majority – states that the "extinguishment" of an offence does not annul "civil obligations stemming from the offence". This adds merit to the argument contained in Judge Wojtyczek's separate opinion, which I have joined, according to which domestic legislation provides (and the Convention does not preclude) that the "extinguishment" of an offence based on statutory limitation only operates on the *stricto sensu* criminal consequences of an offence, but not on confiscation. The Court has previously examined, without finding any violation of the Convention, cases concerning the respondent State in which there had been civil consequences even after the "extinguishment" of a criminal offence, whose existence was nonetheless ascertained by domestic courts without suggesting criminal liability as such (see *Marinoni v. Italy*, no. 27801/12, 18 November 2021, and *Rigolio v. Italy*, no. 20148/09, 9 March 2023).

(i) The relationship between a civil measure of confiscation of proceeds of crime (which requires under domestic law a judicial ascertainment of the commission of a criminal offence) and the presumption of innocence when there is no conviction (non-conviction-based confiscation) because of the criminal prosecution being time-barred.

(ii) The existence (or lack) of a profound and long-standing divergence in case-law regarding the possibility of imposing non-conviction-based confiscation of proceeds of crime once the relevant criminal offence has become statute-barred.

8. I will address the issues summarised in paragraphs 3 and 5 of this opinion together in part 2, highlighting their interrelated nature despite the fragmentation in the majority judgment. The questions in paragraphs 4 and 6 of this opinion, likewise presented separately in the majority judgment, will be examined jointly in part 3. This combined analysis will reveal certain inconsistencies and contradictions, partly summarised above, that may be less apparent due to the fragmented structure of the majority's reasoning. I will conclude with some final observations in part 4.

2. *Non-conviction-based confiscation of proceeds of crime* vis-à-vis *the need to establish the commission of a criminal offence: the Court's case-law on the presumption of innocence and the relevant international and EU instruments*

(a) Confiscation of proceeds of crime is a restorative measure comparable to restitution in civil law

9. To begin with, I note that, in paragraph 70[5] the majority recognise that – aside from certain details regarding confiscations by equivalent value and those concerning money, which are not relevant in the present case (paragraphs 25-27) – under domestic law confiscation constitutes a "security measure" (*misura di sicurezza*) and not a penalty.

10. Indeed, in paragraphs 73-74 the majority state:

> "The Court notes that the confiscation affected assets that were considered to directly derive from the commission of criminal offences. As such, its main purpose appears to have been that of depriving the applicants of the profits of their crimes ... The measure in question has certain elements that render it more comparable to the restitution of unjustified enrichment under civil law than to a fine under criminal law."

In paragraph 76, the majority subsequently acknowledge:

> "Its primary purpose appears to have been to deprive the persons concerned of unlawful profits, a purpose that is not punitive in nature (see *Todorov and Others v. Bulgaria*, nos. 50705/11 and 6 others, § 304, 13 July 2021). Additionally, the measure of confiscation appears to constitute an expression of an increasing international consensus in favour of the use of confiscation measures to remove assets of unlawful

[5] In the continuation of this opinion, the citation of paragraphs without any other mention is intended to be made to the majority judgment, unless the context indicates otherwise.

> origin from circulation – whether or not there has first been a finding of criminal liability ... [M]easures that pursue the same objective have generally been considered as having a restorative rather than a punitive aim, and the Court sees no reason to depart from this approach in the present case. [6]"

11. On these grounds, in paragraph 80 the majority correctly conclude that the confiscation measure in question does not amount to a penalty under the Convention either, and thus Article 7 is not applicable, a finding on which I concur.

(b) The majority's obsolete argument that the requirement of criminal liability as a precondition for confiscation is "itself" in breach of the presumption of innocence if the offence has become statute-barred

12. At this juncture, the question must be answered whether it is compatible with the Convention for a State party to require, based on its domestic law and possibly international and European law sources, that "confiscation of proceeds of crime" be conditional upon a finding, even if only in substance, that a criminal offence has indeed been committed by the person concerned. I find it noteworthy that I am addressing, albeit within the context of a measure which is civil in nature and restorative in purpose, confiscation of "proceeds of crime": a "crime", therefore, is necessarily in the background (and not merely an assessment that the assets are of "unlawful origin", a concept which, as will be seen, the majority superimpose on that which is material to the present case).

13. As reflected in the Government's position (see paragraph 116), it is unequivocally clear that, under national law, there is "a formal requirement of a conviction" for the judicial measure ordering confiscation of proceeds of crime (see paragraph 131 and the references therein). In the respondent State (and – as will be seen – at least in several European Union countries), in cases where the offence is statute-barred, the requirement of a prior "conviction in essence" is satisfied if there has been a previous conviction and, at the time of discontinuance, evidence of the commission of the offence has remained unaltered (ibid., with references).

14. While the Government contended that it was fully compatible with the presumption of innocence for a criminal trial to be discontinued due to statute-barring, while an offence was simultaneously imputed, to the criminal standard, for civil purposes, the majority were not persuaded by this argument (see paragraph 136). The majority's main counter-argument is grounded in the case of *G.I.E.M. S.r.l. and Others v. Italy* ([GC], nos. 1828/06 and 2 others, 28 June 2018). According to the majority, the principle established in

[6] References are made to the Court's case-law such as *Dassa Foundation and Others v. Liechtenstein* (dec.), no. 696/05, 10 July 2007; *Balsamo v. San Marino*, nos. 20319/17 and 21414/17, 8 October 2019; *Ulemek v. Serbia*, no. 41680/13, 2 February 2021; *Todorov and Others v. Bulgaria*, nos. 50705/11 and 6 others, § 304, 13 July 2021; contrast with *Welch v. the United Kingdom*, 9 February 1995, § 33, Series A no. 307-A.

the latter precedent (which one assumes has been disavowed by the Grand Chamber in *Nealon and Hallam*, cited above, esp. §§ 168-69) remains valid even today in the sense that (paragraph 139):

> "while a confiscation based on a finding of liability in substance was found to be compatible with the requirements of Article 7 of the Convention ..., this was without prejudice to the subsequent assessment of whether Article 6 § 2 of the Convention had been breached ..."

15. It is noteworthy that, as the majority acknowledge, "in the present case, the first applicant did not complain of any specific language used in the domestic courts' judgments" and that in his submission "the confiscation order, which had rested on a finding of criminal liability in substance, necessarily entailed the finding that the first applicant was guilty – despite the discontinuance of the proceedings" (see paragraph 127). In this regard, the language used by the Court of Appeal was treated by the majority merely as a "supporting" element (paragraph 134) of a defect that, if it existed, would be systemic: the undisputed generalised requirement that confiscation of proceeds of crime must be based on a "full finding of liability" invariably leads to a violation of the presumption of innocence.

16. As mentioned before, the majority state in paragraph 133 that they would accept that there had been no breach of the presumption of innocence if the domestic courts were to "merely assess the unlawful origin of the confiscated assets". The majority do not clarify the relationship between this criterion of "unlawful origin" and the "proceeds of crime" criterion.

(c) The recent Grand Chamber judgment in *Nealon and Hallam* and the test it set, downplayed by the majority: did the domestic court, in dealing with the linked proceedings, suggest that the prior criminal proceedings "should have been determined differently" (*aliter statuendum*)?

17. It is now necessary to recall that, in *Nealon and Hallam* (cited above) the Grand Chamber was prompted – following significant criticism of the Court's case-law by the United Kingdom Supreme Court precisely on the second aspect of the presumption of innocence – to revisit its earlier case-law, which had primarily centred on *Allen v. the United Kingdom* ([GC], no. 25424/09, ECHR 2013; to which *G.I.E.M. S.r.l.* is, essentially, an extension as to the principles at stake). In *Nealon and Hallam*, the applicants, in a manner similar to the present case, "did not complain about the language used" in the domestic decisions but rather argued that the test provided by domestic law for awarding compensation for a miscarriage of justice, i.e. "the exercise that the Justice Secretary was required by domestic law to undertake – namely, the determination ... of whether ... the new or newly discovered facts responsible for the quashing of their convictions demonstrated beyond reasonable doubt that they did not commit the offence", was "itself incompatible with Article 6 § 2" (ibid., § 170).

18. While I will comment later on the relationship between the criminal standard of evidence ("beyond reasonable doubt") and the object of the assessment in *Nealon and Hallam* (non-commission of the offence, i.e. a negative finding), I note in the meantime that there are many similarities between that case and the case of the first applicant in the present proceedings. Specifically:

(i) Both situations involved a prior conviction, followed by either an acquittal or a discontinuance. It is noteworthy that the distinction between acquittal and discontinuance for the purposes of assessing the observance of the presumption of innocence in linked proceedings has now been rendered obsolete by paragraphs 167–169 of *Nealon and Hallam* (cited above) which clarified that, even in cases of full acquittal, further assessments of liability for non-criminal purposes are possible, while, previously, this had been restricted to cases of discontinuance only (ibid., § 169).

(ii) In both sets of cases, despite the quashing of the previous conviction, domestic law required the authorities to undertake a further assessment for non-criminal purposes by "engaging with the same facts as were decided in the previous criminal proceedings" (ibid.).

19. However, while in *Nealon and Hallam* (ibid., § 180) the conclusion that "it could not be shown ... that an applicant did not commit an offence" was deemed "not tantamount to a positive finding that he or she did commit the offence", in the present case of the first applicant a "positive finding" was required, with a different object (commission of the offence). Nevertheless, as I will show, the test laid down in *Nealon and Hallam* is fully applicable also to the present case.

20. It is useful to recall more specifically what I have mentioned already, that in *Nealon and Hallam*, after reviewing the general principles established in *Allen* (ibid., § 150) and how these principles were applied in subsequent cases following *Allen* (ibid., §§ 151-156), the Grand Chamber developed several considerations (ibid., §§ 157-165) and concluded, as a first step in refining its case-law, that it was "no longer convinced that decisions... following an acquittal [had] such distinctive features as to warrant a higher protection of the presumption of innocence... than that which applie[d] to a person in respect of whom the criminal proceedings ha[d] been discontinued" (ibid., § 166).

21. As a second, and more important, step in the development of the Court's case-law, the Grand Chamber clarified as follows (ibid., § 168, emphasis added):

> "Regardless of whether the criminal proceedings ended in an acquittal or a discontinuance, the decisions and reasoning of the domestic courts or other authorities ... when considered as a whole, and in the context of the exercise which they are required by domestic law to undertake, will violate Article 6 § 2 ... in its second aspect if they amounted to the imputation of criminal liability to the applicant. To impute criminal liability is to reflect an opinion that he or she is guilty to the criminal standard of the

> commission of the criminal offence ... thereby suggesting that the criminal proceedings should have been determined differently."

22. This important new test, aimed at establishing whether there was a breach of the presumption of innocence in the situations at stake, therefore, merely calls the Court to ascertain whether the domestic authorities, explicitly or implicitly, suggested that *aliter statuendum erat*. This *aliter statuendum* test clearly derives from the reasoning of the United Kingdom Supreme Court in the domestic case ([2019] UKSC 2), particularly the opinion of Lord Mance, who articulated the test as follows (*Nealon and Hallam*, cited above, § 32, emphasis added)[7]:

> "The real test is, or should be, whether the court in addressing the civil claim has suggested that the criminal proceedings should have been determined differently. If it has, it has exceeded its role."

(d) The imputation of liability "to the criminal standard" is a complementary element in the *Nealon and Hallam* test: in order to violate the presumption of innocence, the suggestion of *aliter statuendum* should be based on assessment "beyond reasonable doubt", whereas doubts based on the balance of probabilities remain permissible for non-criminal purposes; non-criminal assessments, even based on "beyond reasonable doubt", remain possible if there is no *aliter statuendum* suggestion

23. As mentioned earlier, a digression is now needed to discuss the reference that the *Nealon and Hallam* test makes to the imputation of a criminal offence "to the criminal standard" of evidence.

Lord Mance's opinion (ibid.) centred on this aspect by stating:

> "Once criminal proceedings have concluded with acquittal, or, indeed, a discontinuance, no court should in civil or other proceedings express itself in terms which take issue with the correctness of the criminal acquittal or discontinuance ... However, courts have often – in contexts not involving the pursuit of a criminal charge and using tools and language appropriate to such contexts – engaged with identical facts to those which have led to a criminal acquittal or discontinuance of criminal proceedings. In such circumstances, it is very commonly the case that the standard of proof will differ in the different contexts of criminal and other proceedings. It is, thus, entirely possible that a court may, in a context not involving the pursuit of any criminal charge, find on the balance of probabilities facts which could not be established beyond reasonable doubt in criminal proceedings."

It is noteworthy that a paraphrase of this passage was adopted by the Grand Chamber in *Nealon and Hallam* (ibid., § 169) to express its agreement with the point made.

As Lord Mance further argued, it is unreasonable to assume that (ibid., § 32[8]):

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[7] Citing paragraph 47 of Lord Mance's opinion, with whom Lord Lloyd-Jones agreed. Lady Hale also expressed her agreement with this test – see *Nealon and Hallam*, cited above, § 36, referencing paragraph 78 of Lady Hale's opinion.

[8] Citing paragraph 48 of Lord Mance's opinion.

> "either the press or the public is wholly ignorant that the criminal standard of proof may on occasions lead to acquittal or discontinuance, in circumstances where the commission of the offence could be established on the balance of probabilities".

He continued in the next paragraph by rightly criticising the Court for its equivocal approach in some cases:

> "Unfortunately ... the ECtHR has in a number of judgments condemned courts determining a civil issue for accurate descriptions of the elements of an offence constituting a tort simply because such elements also featured in past criminal proceedings. To require a civil court to tergiversate, by using words designed to obscure the fact that the law may find facts proved on a balance of probabilities which were not proved to the standard necessary for criminal conviction, does not assist either the law or the public or the defendant."

24. Building on this criticism, the Grand Chamber in *Nealon and Hallam* added a complementary element to the fundamental "*aliter statuendum*" test: the Grand Chamber clarified that the suggestion "that the criminal proceedings should have been determined differently" occurs only if an opinion is uttered that the individual is guilty "to the criminal standard of the commission of a criminal offence" (ibid., § 168).

In other words – and this a core finding in *Nealon and Hallam* – there is normally no suggestion of "*aliter statuendum*" if the standard employed to establish liability for non-criminal purposes is lower than the criminal standard. This made it possible for the Grand Chamber in *Nealon and Hallam* (ibid., § 163) to reiterate the possibility of establishing "civil liability to pay compensation to the victim arising out of the same facts on the basis of a less strict burden of proof", and now – differently from previous case-law – "regardless of whether the criminal proceedings ended in discontinuance or acquittal".

25. But the greater includes the lesser. The above cannot be intended to mean (what the majority implicitly consider in the case at hand) that the *Nealon and Hallam* test is not applicable if domestic law – as with non-conviction-based confiscation in many countries and under several international and European instruments – requires the establishment of the same facts to the criminal standard for non-criminal purposes: what matters is only that *aliter statuendum* is not suggested.

Indeed, if it is acceptable – and does not constitute an imputation of liability for a "criminal offence" – to find civil liability based on a lower standard of proof following an acquittal or discontinuance, it is all the more acceptable, in certain cases, to affirm civil liability based on a criminal standard of proof. In such cases, it is necessary to ensure that no "criminal offence" is imputed and that it is not suggested the criminal proceedings ought to have been decided differently.

Domestic systems, indeed, sometimes impose the use of the criminal standard of proof when the civil claim is necessarily linked to the assessment of the commission of a crime: one may think, for example, of a defamation

claim which, at the choice of the claimant, has been brought only before the civil court; or a compensation claim against the heirs of a deceased to be held civilly responsible for a crime; and, of course, all non-conviction-based confiscations, an important category in Europe of this type of civil claim necessarily linked to the commission of an offence. As the majority put it (in paragraph 76 of the judgment), "the measure of confiscation appears to constitute an expression of an increasing international consensus in favour of the use of confiscation measures to remove assets of unlawful origin from circulation – whether or not there has first been a finding of criminal liability": the finding of criminal liability is possible in many systems even after discontinuance.

26. One of these exceptional cases based on a "beyond reasonable doubt" rule of evidence was present in the situation in *Nealon and Hallam* (cited above), but it was very peculiar to the context of miscarriages of justice and not comparable to non-conviction-based confiscations. Indeed, under UK legislation on miscarriages of justice, the standard by which to obtain compensation is criminal ("beyond reasonable doubt" – ibid., § 180) but it does not relate to the (positive) imputation of a criminal offence (as needed in the present case of the first applicant under Italian law), but rather to the (negative) assessment that the person did not commit it. The Grand Chamber ruled that it did not violate the right to presumption of innocence for UK authorities to find "in the negative that it could not be shown to the very high standard of proof of beyond reasonable doubt that an applicant did not commit an offence". This is because such a negative finding "is not tantamount to a positive finding that he or she did commit the offence" (ibid., § 180).

Such additional consideration by the Grand Chamber, relating to the "criminal standard" of the imputation of a "criminal offence" (derived almost verbatim from Lord Mance's opinion) was therefore used to exclude the existence of an *aliter statuendum* suggestion in the specific case.

27. Having clarified this, I can start bringing my digression to a conclusion: the *Nealon and Hallam* test, essentially consisting of the *aliter statuendum* criterion, cannot be intended to preclude its application in cases where domestic law requires the criminal standard of proof for other non-criminal purposes. What matters is that – even if the criminal standard is used – it is not used to impute a "criminal offence", thereby avoiding any suggestion "that the criminal proceedings should have been determined differently".

28. It is worth recalling that Lord Mance himself, while affirming that in civil proceedings following acquittals or discontinuances "it is very commonly the case that the standard of proof will differ in the different contexts of criminal and other proceedings" (emphasis added), did not mean to exclude, by referring to what "is very commonly the case", the less "common" but nonetheless possible situation where the criminal standard is

required for certain civil purposes (which I summarised above in paragraph 25 of this opinion). The compatibility with the presumption of innocence of civil assessments based on the criminal standard, therefore, permeates the correct reading of paragraphs 168-169 of the Grand Chamber's judgment in *Nealon and Hallam* (cited above), whose test should be interpreted in harmony with its origins and context (in which the discussion of differing standards of proof was relevant to a specific situation concerning miscarriages of justice).

29. The majority in the case of the first applicant (see paragraphs 133 and 140) merely criticised the respondent State's system for imposing that the courts "explicitly [state] that the first applicant was criminally liable" as a condition for the issuance of a non-conviction-based confiscation measure, once the prosecution was to be discontinued. They did not go further, and in particular they totally omitted to explain why, in their view, the use of the criminal standard in itself "reflected their opinion that the applicant was guilty of the offence" (ibid.). The majority should have engaged in an analysis of whether this meant that the domestic courts should have decided otherwise as to the criminal offence (the answer to this question being rather obvious, since the same domestic court discontinued the criminal prosecution); they regrettably did not.

This way of by-passing the *aliter statuendum* test, as imposed by *Nealon and Hallam*, strikes a fatal blow to non-conviction-based confiscations in Europe (and also to all civil claims – as mentioned in paragraph 25 above – closely linked to the commission of a crime).

(e) For non-conviction-based confiscations of proceeds of crime, where it is necessary to establish all elements of a criminal offence, the concept of "innocence in the eyes of the law" is important

30. A litmus test of the role played by the second aspect of the presumption of innocence, in cases such as the one at hand, can be found in the concept of "innocence in the eyes of the law", which is crucial when, for the purpose of criminal proceedings, a person is acquitted (or a discontinuance takes place), while at the same time, as the *Nealon and Hallam* judgment (cited above) clarifies, some civil or other liability statements can be misunderstood in the sense that the person is nonetheless "guilty". In these cases, it is important to distinguish "innocence in the eyes of the law" from a broader concept of innocence.

The Grand Chamber's judgment in *Nealon and Hallam* affirms that Article 6 § 2 safeguards only "innocence in the eyes of the law", rather than a presumption of factual innocence (ibid., § 181).

31. If one resorts to the concept of "innocence in the eyes of the law", one can easily see that, in their judgment, the majority – in addition to downplaying the *aliter statuendum* test – have misinterpreted the scope of protection "in the eyes of the law". If a confiscation is ordered when

prosecution has been discontinued, legal innocence in respect of a "criminal offence" remains intact. Liability only refers to the civil measure, in its several elements (one of them being the commission of a crime, which is inherent in non-conviction-based confiscations of proceeds of "crime"), and does not compromise innocence in the eyes of the law.

32. Thus, the misinterpretation of the notion of "innocence" risks undermining the principle that non-conviction-based confiscations can – and often must, based also on international and European instruments – involve establishing all elements of a criminal offence, provided, of course, such findings do not suggest that the original criminal proceedings should have been resolved differently.

(f) International law and EU law not only explicitly favour non-conviction-based confiscations, but also require that proceeds of crime be confiscated only if a crime is positively ascertained, even if statute-barred

33. Furthermore, I regret that the majority have made only vague and non-specific references to the "increasing recourse ... to forms of non-conviction-based confiscation" in international and European Union law (see the material in paragraphs 39-48). Their acknowledgment of this trend, particularly in paragraph 129 of the judgment, amounts to little more than lip service, since a thorough consideration of the content of those legal sources is – with due respect – omitted from the majority judgment.

34. I thus feel compelled to emphasise that numerous international and European instruments not only provide for non-conviction-based confiscation but also require that courts be satisfied that all the elements of a criminal offence are made out in order to confiscate proceeds of "crime", even where a conviction is not possible due to circumstances such as limitation periods, death of the accused, or his or her absconding.

35. A notable example is EU Directive 2024/1260 (of 24 April 2024, "on asset recovery and confiscation"), which is to be implemented by November 2026 to take the place of pre-existing instruments. Although the Directive is briefly mentioned in paragraph 48 of the judgment, its critical Recital 30 is not addressed. This recital states as follows (emphasis added):

> "Confiscation should ... be possible where the limitation periods prescribed under national law for the relevant criminal offences are below 15 years and have expired after the criminal proceedings have been initiated. Confiscation in such cases should only be allowed where it would have been possible for the criminal proceedings to lead to a final conviction for a criminal offence in the absence of such circumstances, at least for offences liable to give rise, directly or indirectly, to substantial economic benefit, and where the court is satisfied that the instrumentalities, proceeds or property to be confiscated are derived from or directly or indirectly linked to the criminal offence."

Thus this provision decisively supports the position that, even when statutes of limitation apply, confiscation of instrumentalities, proceeds, or other relevant property is permissible only if the domestic court establishes the commission of a "criminal offence".

This seriously contrasts with the majority's acceptance, in paragraph 133 of the judgment, of the compatibility with the presumption of innocence of confiscations based on mere findings of "unlawful origin" of the assets, a term left insufficiently clarified, rather than on the commission of a "crime".

36. Further confirmation of the principle of necessity of ascertainment of a crime is found in Article 15 of the Directive, headed "Non-conviction-based confiscation", which reads in the relevant parts (emphasis added):

> "1. Member States shall take the necessary measures to enable, under the conditions set out in paragraph 2 of this Article, the confiscation of instrumentalities, proceeds or property as referred to in Article 12, or proceeds or property transferred to third parties as referred to in Article 13, where criminal proceedings have been initiated but could not be continued because of one or more of the following circumstances[9]:
>
> ...
>
> (d) the limitation period for the relevant criminal offence prescribed by national law is below 15 years and has expired after the initiation of criminal proceedings.
>
> 2. Confiscation without a prior conviction under this Article shall be limited to cases where, in the absence of the circumstances set out in paragraph 1, it would have been possible for the relevant criminal proceedings to lead to a criminal conviction for, at least, offences liable to give rise, directly or indirectly, to substantial economic benefit, and where the national court is satisfied that the instrumentalities, proceeds or property to be confiscated are derived from, or directly or indirectly linked to, the criminal offence in question."

37. I regret that the above Article 15 is mentioned only cursorily in paragraph 49 of the judgment, with no acknowledgment of its explicit requirement for "national courts" to be "satisfied" that the commission of a "criminal offence" is linked to the assets to be confiscated, even in cases where the statute of limitations has expired. This omission significantly weakens the majority's reasoning, as it disregards the robust safeguards built into the Directive to balance the goals of confiscation with the protection of fundamental rights.

38. Leaving aside other European Union materials[10], it is within the Council of Europe – an international organisation under whose umbrella the Court operates – that the elaboration of material on non-conviction-based confiscation is most advanced. The Council of Europe, through many of its bodies, has indeed actively promoted non-conviction-based confiscation with a view to balancing this important tool aimed at protecting integrity of the market with the protection of human rights[11]. In the context of the Council of

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[9] See also Directive (2014/42/EU), Freezing and Confiscation of the Proceeds of Crime in the European Union, Article 4(2).

[10] The EU materials on the topic are very numerous. See, e.g., https://www.europarl.europa.eu/legislative-train/package-organised-crime/file-common-rules-for-non-conviction-based-confiscation (last accessed 12/11/2024).

[11] The main bodies involved in this area within the Council of Europe are the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, known as MoneyVal (for a list of materials see

Europe approach, the judicial determination of the actual commission of a crime is usually not regarded formalistically as a misinterpreted violation of the right to presumption of innocence, but as an important safeguard for the Convention-compliance of confiscation measures.

39. This is especially evident with regard to some international law sources originating within the Council of Europe, but apt to be adopted at a global level, on which the majority judgment appears not to focus. Such a focus would reveal aspects that are inconsistent with their conclusions and, in my view, demonstrate that it is widely accepted that confiscation can coexist with a judicial determination of all the elements of a criminal offence, even where the offence is statute-barred, the offender is deceased, or the offender is a fugitive.

40. For example, one can consider the most recent international instrument, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (commonly referred to as the "Warsaw Convention"), which came into force on 1 May 2008. The majority, in paragraph 42, seem to downplay this Convention by noting that it "was not ratified by all member States of the Council of Europe". However, they fail to mention that it has in fact been ratified by 39 States, with only a few absences.

41. The majority do however acknowledge, in the same paragraph of the judgment, the fundamental provision of Article 23 § 5 of the Warsaw Convention. This provision, which governs international cooperation in the cross-border enforcement of non-conviction-based confiscation measures, contradicts the majority's conclusions by requiring that such measures, to be enforceable in a cross-border context, must be based on the judicial determination of a criminal offence in respect of which the confiscated property constitutes proceeds or other assets (i.e. exactly what the majority hold to be, in general, a violation of the right to presumption of innocence). It reads (emphasis added):

> "The Parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention."

42. Additionally, Article 28 § 4 of the Warsaw Convention (not mentioned in the judgment) provides for the refusal of cooperation if there is

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https://www.coe.int/en/web/moneyval/implementation/confiscation (last accessed 12/11/2024)) and the Economic Crime and Cooperation Division. The latter Division published an interesting paper including comparative materials and standards from Convention case-law: "The use of non-conviction-based seizure and confiscation", 15 April 2021 (see https://rm.coe.int/the-use-of-non-conviction-based-seizure-and-confiscation-2020/1680a0b9d3 (last accessed 12/11/2024)).

no such judicial determination or at least a judicial "statement" in the decision establishing the commission of an offence (emphasis added) [12]:

> "Co-operation under Section 4 of this chapter may also be refused if:
>
> ...
>
> (d) without prejudice to Article 23, paragraph 5, 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."

43. The most advanced text of international law, unfortunately also entirely overlooked by the majority in their judgment, which demonstrates how the establishment of a criminal offence for the purpose of confiscating proceeds of crime serves more as a safeguard of human rights (thereby imposing that the determination made by a court, and not a non-judicial authority) than a violation of the right to presumption of innocence, can be found in paragraph 233 of the Explanatory Report on the aforementioned Article 28 § 4 (d) of the Warsaw Convention. This report provides clear explanations, including references to the history of the negotiations that led to the 1990 Convention, reading as follows (emphasis added):

> "233. Sub-paragraph d was discussed at great length by the experts drafting the 1990 Convention. It is probable that most requests for co-operation under Chapter IV, Section 4, will concern cases where a previous conviction exists already. However, it is also possible in some States to confiscate proceeds without a formal conviction of the offender, sometimes because the offender is a fugitive or because he is deceased. In certain other States, the legislation makes it possible to take into account, when confiscating, offences other than the one which is adjudicated without a formal charge being made. The latter possibility concerns in particular certain states' drug legislation. The experts drafting the 1990 Convention agreed that international co-operation should not be excluded in such cases, provided however that a decision of a judicial nature exists or that a statement to the effect that an offence has or several offences have been committed is included in such a decision. The expression 'decision of a judicial nature' is meant to exclude purely administrative decisions. Decisions by administrative courts are however included."

This allows me to conclude that the approach of the majority severely contrasts with international and European law instruments.

(g) Total lack of a comparative-law approach in order to verify European consensus

44. To conclude this part of my opinion, I wish to point out that the Court often proceeds with a comparative analysis to support its arguments in the

[12] Similar language, which again contradicts the majority's position, is also found in the earlier Strasbourg Convention of 1990, as referenced in paragraph 40 of the majority judgment.

interpretation of the Convention. In a way, I consider that this should also be seen as an obligation, if it is important – as I believe it is at this juncture – to assess the possible level of uniformity in the legal frameworks of the member States of the Council of Europe on a particular topic ("European consensus"). I regret to note that no comparative analysis was made by the majority before asserting, in spite of the various indications to the contrary coming from international and EU practice, that ascertaining the commission of a criminal offence, without a conviction, in order to confiscate proceeds of crime is, in itself and of itself, a violation by national authorities of the right to presumption of innocence.

45. I hope that such an analysis will be carried out if this case and/or other cases are referred to the Grand Chamber (see part 4 below). For the time being, it appears to me – from a mere consultation of paragraph 2.2.3.2 of the Report of the EU Commission headed "Asset recovery and confiscation: Ensuring that crime does not pay" (COM(2020) 217 final)[13], containing comparative information based on the transposition of the relevant Directive of 2014 – that practically all the countries of the EU accept the principle that the majority oppose. Information should be obtained concerning other States Parties to the Convention.

3. The lack of a profound and long-standing divergence in case-law regarding the possibility of issuing direct confiscation measures once the prerequisite criminal offence has become statute-barred

(a) The impact on the first applicant's complaint under Article 6 § 1

46. With reference to the complaint raised by the first applicant, the majority proceed to an "analysis of the relevant domestic practice". According to the majority, this analysis "reveals the existence of a divergence in the case-law of the Court of Cassation regarding the issue of whether confiscation can be ordered in respect of an offence, despite the extinction of the offence" (paragraph 97). The majority recognise that these alleged divergences "had already arisen prior to the events of the instant case" but fail to specify any such prior divergences in the judgment (see paragraphs 98 and 31)[14].

47. However, paragraph 33 of the majority judgment acknowledges that the 2008 *De Maio* judgment, a highly detailed decision, clarified that no

[13] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0217 (last accessed 12/11/2024).

[14] I find paragraph 31 of the judgment to be flawed, as it asserts unspecified divergences predating 1993 without sufficient clarification. In fact, the *Carlea* judgment of 1993 by the Court of Cassation, mentioned in the subsequent paragraph 32, acknowledges a divergence concerning an entirely different matter – namely, the interpretation of Article 722 of the Criminal Code, a specific provision regarding confiscation in the context of gambling. However, it is true that subsequent jurisprudence built upon certain general statements made in the *Carlea* judgment.

divergence had developed, at least not since 1993. The majority judgment does not dispute this fact (see also paragraph 98 of the judgment).

48. In paragraphs 98 and 99, the majority – in my view rather hastily – then assert that "despite these authoritative interpretations" of 1993 and 2008, "the issue was again the subject of diverging views, starting from 2009, when the Court of Cassation began to render decisions which – in open contradiction of the *Carlea* and *De Maio* judgments – held that confiscation could be applied despite the extinction of the offence". On this point, I consider that the mere reading of the 2009 Court of Cassation judgment (in the so-called *Squillante* case), mentioned by the majority, suffices in order to understand, as the Government noted, that the examination of the case by the Court of Cassation involved a legislative framework that was very different from the one considered previously: while the 2008 *De Maio* judgment, as is clear from its reasoning, dealt with facts that were already statute-barred by 2002, the 2009 judgment considered facts declared statute-barred in 2007. Thus, while the 2008 *De Maio* judgment expressly excluded, for example, the applicability *ratione temporis* of Article 322-*ter* of the Criminal Code, the 2009 judgment expressly dealt with the latter, as well as with numerous additional new legislative provisions that had come into force in the meantime[15]. These provisions had significantly expanded the circumstances under which mandatory confiscation of instrumentalities of crime and the proceeds derived from it would apply. I regret therefore that the majority considered to be case-law divergences certain developments that were due to the impact of legislation, an issue that the Government expressly raised but which has been overlooked.

49. That said, while it is true, as the majority state in paragraph 99, that between 2009 and 2015 "concomitantly, a separate line of case-law continued to adhere to the approach taken by the Plenary Court of Cassation", the judgment lacks any detailed analysis of these "fluctuations". Allegedly, these "lasted until 2015, when the Plenary Court of Cassation – again called upon to address the divergence in case-law – held that confiscation could be applied despite the extinction of the offence, provided that there had first been a finding of liability" (paragraph 100 of the majority judgment, referring to the 2015 *Lucci* judgment).

In the absence of the requisite analysis, the judgment deprives its readers of the essential context needed to understand whether the cases addressed (or which of them) involved the legislative innovations that occurred in Italy during those years in this area of the law. In this part, with due respect, the majority judgment is simplistic, failing to examine the rationale of the jurisprudential evolution. Without such an analysis, it cannot be said that

[15] In addition to Article 322 *ter*, the 2009 judgment mentions Articles 600-*septies*, 640-*quater*, 644, 648-*quater* of the Criminal Code, Article 2641 of the Civil Code, Legislative Decree No. 58 of 1998 (Article 187), and Presidential Decree no. 380 of 2001 (Article 44, paragraph 2).

there existed "a number of judgments that reached diametrically opposite conclusions over a period of more than six years", allegedly concerning "an issue that had already in the past been subject to diverging interpretations" (paragraph 101 of the majority judgment). Consequently, the supposed divergence is in no way convincingly demonstrated.

50. In my reading, the national decisions listed in paragraph 34 of the majority judgment are all reasoned, often with reference to the ongoing legislative evolution. Even the 2015 *Lucci* judgment, which the majority claim resolved a conflict, confirms that the conflict involved only three judgments in opposition to two others (in addition to the earlier *De Maio* precedent), all dated between 2009 and 2011 (*Lucci* judgment, p. 6). Meanwhile, two other judgments (cited in paragraph 34 of the majority judgment) addressed specific issues. In this context, I cannot agree with the majority's conclusion that "the case-law of the Court of Cassation was characterised by 'profound and long-standing differences'". The jurisprudence, as noted, developed in response to legislative changes, and sometimes (e.g. the *Lucci* judgment) also addressing the Court's jurisprudence.

51. In this framework, the supposed divergence lacks both the characteristic of being "profound," as the differences were only apparent and contextually linked to the evolving legislative framework and new case-law also from the Court, and that of being "long-standing", as the conflict lasted six years but involved a very limited number of judgments, some of which pertained to specific cases.

52. Moreover, I believe that considering only the time-span of the alleged divergence in terms of years does not correctly reflect the principles established in the Court's case-law, which has emphasised that consideration of the duration of divergence should be integrated with the evaluation of the number of occasions on which the domestic courts were given an opportunity to rule, a limited number of occasions being a counterbalancing factor to a longer duration (see *Lo Fermo v. Italy* (dec.), no. 58977/12, § 55, 20 June 2023).

53. If, therefore, the jurisprudential divergences were irrelevant to the principle of legal certainty, as correctly argued by the Government, my agreement with the finding of no violation of Article 6 § 1 in respect of the first applicant is limited to the judgment's operative part. It is, in my view, unnecessary to examine – contrary to the majority's approach – whether the mechanism for resolving the divergence was effective (an effectiveness which leads the majority to find, at any rate, no violation).

(b) The impact on the second applicant's complaint under Article 1 of Protocol No. 1

54. My conclusion that the divergences in case-law were neither "profound" nor "long-standing" is, while relevant to the first applicant's

complaint about legal certainty under Article 6 § 1 in that it must be considered ill-founded without the need to examine (as the majority, instead, does) the operation of the domestic mechanism applied to resolve the divergence, even more significant for the second applicant's complaint regarding the foreseeability of confiscation where statutory limitation had occurred by the time of its enforcement on 7 May 2008 (see paragraphs 8 and 155 of the majority judgment).

55. The majority, as noted above, assert that even before 1993 "the possibility to apply confiscation ... despite the fact that the offence had become statute-barred [had] given rise to diverging interpretations" (paragraph 31) and that the issue was re-examined by the Court of Cassation on 15 October 2008 (paragraph 33).

56. I have contested the existence, nature, and scope of such alleged divergence, which the majority failed to clarify. Nevertheless, even from the majority's own perspective, I wonder how they can assert, when addressing the second applicant's complaint under Article 1 of Protocol No. 1, that "at that time" (i.e., 7 May 2008) "established case-law considered that the measure of confiscation could not be applied after an offence had ceased to be punishable" (paragraph 156). Had not the same majority already alleged that diverging lines of jurisprudence (albeit unproven) long predated 1993 (paragraph 31)? This is a significant inconsistency in a judgment that advocates consistency in adjudication ...

57. In this situation, whichever solution is preferred as to the duration, extent and nature of the alleged divergence in case-law, I cannot endorse the majority's reasoning and conclusion.

58. Finally, I must briefly express my doubts about the novel approach adopted by the majority in paragraph 155, namely that the requirement of foreseeability of the law underpinning the interference (notably for the purposes of Article 1 of Protocol No. 1) should be assessed at the time the interference (in this case, confiscation) occurs, also with reference to the possible impact of rules concerning statutory limitation. The majority thus conclude that since, at the time the confiscation was ordered, it would have to be "extinguished" by the time-barring of the prerequisite criminal offence, this regime of "extinguishment" (directly affecting the offence, but indirectly impacting on the confiscation because of the link existing at that time between the two) must be covered by foreseeability, so that it could not be altered by subsequent jurisprudential (or legislative) developments. In other words, according to the majority, if the confiscation had later been "extinguished" by a certain regulatory framework of time-barring in force at the time of its application, this regime would have to be immutable for foreseeability to be ensured, even if the statutory limitation had not yet occurred.

59. Beyond the references to case-law concerning the assessment of the interference as foreseeable at the time of its occurrence (paragraph 153 of the judgment), the novel approach taken by the majority concerning the

"sterilisation" of changes to the time-barring regime rests on a jurisprudential vacuum. Moreover, this approach appears very dangerous, as it takes away from legislation and case-law their task of adapting rules to changing circumstances.

60. My doubts are made stronger when considering that, even in the context of Article 7, the Court has held that the same Article 7 does not impede the immediate application to ongoing proceedings of laws extending limitation periods – procedural rather than substantive – where the alleged offences have not yet become time-barred (see *Coëme and Others v. Belgium*, nos. 32492/96 et al., § 149, ECHR 2000 VII; *Previti v. Italy* (dec.), no. 1845/08, § 80, 12 February 2013; *Borcea v. Romania* (dec.), no. 55959/14, § 64, 22 September 2015). Article 7 precludes only the revival of a prosecution after the expiry of a limitation period (see *Antia and Khupenia v. Georgia*, §§ 38-43, 18 June 2020; *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, § 77, 26 April 2022).

61. In other contexts, such as Article 6, the Court has considered whether statute-barring had already been established by a judicial decision, potentially with a *res judicata* effect, and has accepted that, absent such establishment, legal developments were permissible (see *Vegotex International S.A. v. Belgium* [GC], no. 49812/09, § 120, 3 November 2022).

62. It thus seems to me that in terms of the foreseeability of the applicable law as part of the requirement of lawfulness of the interference under Article 1 of Protocol No. 1 – which certainly engages a lower level of protection than Article 7 – once confiscation has been ordered in accordance with the law in force at the time of its application (which is undisputed), it is perfectly compliant with the Convention if the statutory limitation regime, indirectly impacting on the validity of the confiscation, as a procedural aspect, evolves over time, with the sole exception that an "extinguished" charge, already declared and recognised as such by a final judgment, cannot be revived.

4. Conclusions

63. I have discussed in this opinion two fundamentally distinct issues. The first issue – the relationship between a civil measure of confiscation of proceeds of crime (which requires under domestic law a judicial ascertainment of the commission of a criminal offence) and the presumption of innocence, when there is no conviction because of the criminal prosecution being time-barred – is by far the more important of the two. I am worried that the majority's approach – should it be enshrined in a final judgment – may strike a fatal blow to the way that non-conviction-based confiscations have been developing in Europe as an essential tool to remove from the market

assets which threaten its integrity. In particular, as far as the proceeds of crime are concerned, according to the majority they should be confiscated only if the person in question is convicted or – if I understand paragraph 133 of the judgment correctly – if the domestic courts confine themselves to stating that the assets are of "unlawful" origin.

64. I, on the contrary, find that non-conviction-based confiscations are best balanced with the protection of human rights if there is "a decision of a judicial nature" or "a statement in such a decision that an offence or several offences have been committed" (to use the wording of the Explanatory Report to the Warsaw Convention, cited above). Without a penetrating judicial review, "where the national court is satisfied that the instrumentalities, proceeds or property to be confiscated are derived from, or directly or indirectly linked to, the criminal offence" (to use the wording of the EU Directive cited above), an apparent protection of a misinterpreted presumption of innocence will be provided, but the rights of the owner of the assets and those of the victims might be in jeopardy. Such a judicial review, that the majority's approach makes impossible, is imposed by several international and European instruments, and is fully compatible with the Court's case-law after *Nealon and Hallam*.

65. I hope that this important issue can come to the attention of the Grand Chamber, while I am aware that only recently, in the *Nealon and Hallam* case, it has already attempted to set a clear test. But – evidently – more clarity is needed, as broad uncertainties exist surrounding the application of the presumption of innocence to confiscation cases, in particular in distinguishing permissible assessments from impermissible imputations of guilt in post-acquittal or discontinuance contexts[16].

66. The second – less important – issue I highlighted above could also benefit from clarification by a Grand Chamber judgment: the existence (or lack) of a profound and long-standing divergence in case-law should be assessed based on more refined criteria than those available at present in the Court's case-law.

The majority, as I have sought to show, have hastily reviewed domestic jurisprudence over an extended period of time in such a delicate area as non-conviction-based confiscation by employing a methodology which has resulted in contradictions and inconsistencies.

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[16] While I cannot comment at all on what is a pending case, I would merely flag that conflicting views in this area of the Court's case-law, even after *Nealon and Hallam*, have emerged in the Court's composition recently in adjudicating the case of *Cosovan v. Moldova* (no. 2) (no. 36013/13, 8 October 2024, not yet final). This judgment of no violation was adopted by a majority of four judges, while a dissenting opinion of three judges argued that the special confiscation order violated Article 6 § 2 by implying criminal liability without a prior conviction.

APPENDIX

List of applications:

No.	Application no.	Case name	Lodged on	Applicant Year of Birth Place of Residence Nationality	Represented by
1.	47284/16	Episcopo v. Italy	03/08/2016	**Luigi EPISCOPO** 1956 Polla Italian	Antonio PAGLIANO
2.	84604/17	Bassani v. Italy	07/12/2017	**Nelso BASSANI** 1960 Arsiè Italian	Maurizio PANIZ