APPLICATION/REQUÊTE N° 12386/86

M v/ITALY

M c/ITALIE

DECISION of 15 April 1991 on the admissibility of the application

DECISION du 15 avril 1991 sur la recevabilité de la requête

Article 6, paragraph 1 of the Convention

a) The notion of a criminal charge is an autonomous concept

b) Someone against whom proceedings are brought concerning the application of preventive measures under the Italian Acts of 1956 1965 and 1982 is not facing a criminal charge

Article 6, paragraph 2, and Article 7, paragraph 1 of the Convention *Not applicable to confiscation of property belonging to a person suspected of being a member of a mafia-type organisation decided in the context of proceedings for the application of preventive measures under the Italian Acts of 1956 1965 and 1982 as the measure does not involve a finding of guilt subsequent to a criminal charge and does not constitute a penalty*

Article 1, paragraph 2 of the First Protocol *Confiscation from a person suspected of belonging to a mafia-type organisation of property whose lawful origin he is unable to show decided by an Italian court in the context of proceedings for the application of preventive measures constitutes a control of the use of property*

Examination of whether the interference is lawful in the general interest and proportionate to the aim In determining the demands of the general interest the Contracting States enjoy a margin of appreciation

(TRANSLATION)

THE FACTS

The applicant, M , is an Italian national born in 1937 in Battipaglia (Salerno province) He is at present detained in Sulmona prison, where he is serving a sentence of imprisonment covering a total period of thirteen years and six months

For the proceedings before the Commission he is represented by Mr Giacomo Rosapepe, a lawyer practising in Rome

The facts of the case, as submitted by the parties, may be summarised as follows

1 *Particular circumstances of the case*

The applicant, suspected of belonging to a criminal organisation endemically established in Campania, was prosecuted on a number of charges, and proceedings for the application of preventive measures were instituted against him

a *The criminal proceedings*

On 28 May 1979 the Naples public prosecutor issued an arrest warrant (ordine di cattura) against the applicant, who was suspected of being a member of the Camorra gang led by R C On 19 April 1980 he was sent for trial in the Naples District Court, which sentenced him on 10 December 1980 to two years' imprisonment for membership of a criminal organisation, an offence under Article 416 of the Italian Criminal Code On 16 March 1982 this judgment was upheld by the Naples Court of Appeal The applicant's appeal to the Court of Cassation was dismissed on 9 December 1983

In the meantime, on 14 June 1983, further criminal proceedings had been opened against the applicant The Naples prosecuting authorities considered that the applicant's membership of R C 's criminal organisation, the "Nuova Camorra Organizzata" (NCO), had not ended after the judgment against him handed down by the Naples District Court on 10 December 1980

Consequently, on 17 July 1984 the applicant was again sent for trial in the above-mentioned court, which, on 17 September 1985, sentenced him to imprisonment for a term of eight years and four months The charges on which he was convicted were membership of a criminal organisation (Article 416 of the Criminal Code) and, for the period subsequent to 29 September 1982, membership of an organisation of the mafia type, an offence under Article 416 bis of the Criminal Code, created by Act No 646 of 13 September 1982 (the 1982 Act) On 15 September 1986 the Naples Court of Appeal reduced the applicant's sentence to six years and six months The appeal against this judgment was dismissed by the Court of Cassation on 13 June 1987

The applicant was also prosecuted on a number of other charges, particularly lending money at an extortionate rate, obtaining money with menaces and

demanding money with menaces. On 19 June 1987 the Salerno Court of Appeal sentenced him on these charges to five years' imprisonment. The applicant's appeal on points of law was dismissed on 11 March 1988.

b. *The proceedings for the application of preventive measures*

On account of the evidence that the applicant was a member of the NCO, the Salerno prosecuting authorities opened proceedings against him with a view to application of the preventive measures provided for by Act No. 1423 of 27 December 1956 (the 1956 Act) and Act No 575 of 31 May 1965 (the 1965 Act) as amended by the 1982 Act Accordingly, on 5 October 1983, the Salerno public prosecutor applied to the Salerno District Court for a compulsory residence order against the applicant.

On 9 December 1983 the public prosecutor requested the seizure of the property at the applicant's direct or indirect disposal, with a view to their confiscation if justified, pursuant to section 2 (3) paragraph 2 of the 1965 Act. The list of the assets affected was drawn up by the Salerno and Agropoli branches of the frontier police

On 23 March 1984 the Salerno District Court granted the seizure application On 18 June 1984 it decided to subject the applicant to special police supervision, at the same time ordering his compulsory residence in the district of Montiglio for a period of four years. On 10 January 1985 the court ordered the confiscation of the property seized, some of which belonged to the applicant's wife and to his son, pursuant to section 2 (3) paragraph 3 of the 1965 Act.

The compulsory residence order and the confiscation order were made on the basis of a substantial body of circumstantial evidence against the applicant.

In the reasons given for the confiscation in particular (which, moreover, concur with the grounds for the compulsory residence order) in its decision of 10 January 1985, the court noted first of all that two reports dated 23 June and 16 December 1982, the first drawn up by the Salerno carabinieri, the second by the Salerno police, identified the applicant as one of R.C 's principal associates. The applicant was described therein as an extremely violent character who had risen rapidly through the ranks of organised crime – via robbery, fraud, receiving stolen goods, lending money at an extortionate rate and obtaining money with menaces – and had become the main treasurer of the NCO and the most important of the people in charge of laundering the organisation's funds

The court went on to note that the applicant's criminal record was consistent with the conclusions of the two reports, since in the previous few years he had

been prosecuted for obtaining money with menaces, lending money at an extortionate rate, murder and membership of a mafia-type organisation, a charge which seemed to be the "culmination of a life devoted to crime

With regard to the specific evidence that the applicant belonged to the NCO, the court noted that on 30 October 1981 in a hotel belonging to the applicant the police had arrested A G , one of R C 's right-hand men, who had gone into hiding to evade a warrant for his arrest

Other known criminals acting as the applicant's bodyguards had been arrested on the same occasion Following these arrests the applicant had been prosecuted and convicted (though the judgment was not final) on a charge of impeding arrest

The court also referred to the fact that on 7 August 1981, during a 'gang war", the applicant had been caught in an ambush One of his men had been killed and the applicant had been seriously wounded Two murders had been committed as reprisals on 12 and 13 August 1981

Lastly, the court took into consideration the applicant s sizeable personal fortune (comprising a number of large urban and rural property holdings, plus a hotel complex and a mineral water bottling plant) and the speed and ease with which this fortune had been accumulated

The applicant had alleged that his fortune originated in his activity as a farmer and particularly as a stockbreeder, and that he had judiciously reinvested the profits He asserted that in his youth he had helped to cultivate a plot of land allocated to his father by the special department for rural land reform (sezione speciale della informa fondiaria) In 1963 he had himself received from the special department a plot of land 7 hectares in area Thereafter he had judiciously exploited the potential for buffalo breeding in the Paestum area, helped by small loans from his father It was alleged that in this way he had gradually accumulated the financial resources he needed for his successive ventures into the property market

The court held, however, that the applicant s activities did not explain how he had come by the very large sums of money he had used for his risky property ventures, which sometimes amounted to billions of lire These ventures, mostly launched between 1975 and 1977, had involved a dizzy succession of transactions, contracts of sale, repossessions and mortgage registrations

The court took the view that a fortune of that size could only have been accumulated from the proceeds of the applicant's unlawful activities, particularly

the systematic practice of lending money at extortionate rates and demanding money with menaces, or through the reinvestment of his illicit gains and those of the NCO

The applicant appealed against the decisions of 18 June 1984 and 10 January 1985 He claimed in particular that his trial on the charge of impeding the arrest of A G , which was based on mere suspicions, had not yet led to a final conviction , that he had not even been charged with the murders of 12 and 13 August 1981 , that he had never been convicted of lending money at an extortionate rate and that the existence of two sets of proceedings against him following complaints from certain debtors proved nothing, that in the "Piana del Sele" area, where he was supposed to have operated, Camorra activity had not appeared until after 1979, and that up to that time he had not been suspected of any offence, so that he could not have acquired his fortune through unlawful means

The applicant also criticised various aspects of the court's assessment concerning the profits he might have been able to earn from his farming activities and the reinvestment of the proceeds, and contested the overall valuation of his property, which had not taken into account the sums he still owed, among other things

On 10 July 1985 the Salerno Court of Appeal endorsed the District Court's approach and confirmed the compulsory residence order With regard to the confiscation order, the Court of Appeal held that the applicant had proved that he had acquired with his own money on 17 November 1975 a plot of land measuring more than 36 hectares known as Sabatella, together with the farm buildings on the land, and ordered their restitution to the applicant

The Court of Appeal reached the opposite conclusions in respect of all the applicant's other property It noted, firstly, that the applicant had adduced no evidence of their lawful origin, but had merely made general assertions, both at first instance and on appeal, to the effect that they represented lawful gains, the fruit of his honest labour and the fortunate result of the way he had reinvested the proceeds It further noted that these allegations, which were in themselves insufficient to explain the accumulation in a few years of such a large fortune, had been rebutted by the District Court in the reasons it gave for its decision and were invalidated by the nature and terms of the various acquisitions, which the Court of Appeal looked into one by one

The Court of Appeal also upheld the confiscation of the applicant's son's property On the other hand, in its ruling on the appeal lodged by the applicant's

wife, it ordered the restitution of the confiscated property which belonged to her, on the ground that there was no serious justification for confiscation of the property in question

The applicant appealed to the Court of Cassation against the above judgment, claiming that its reasoning was erroneous and inadequate The Court of Cassation dismissed the appeal in a judgment dated 17 February 1986, ruling that the reasons for the Court of Appeal's judgment had been properly set out

2 *Legal background to the case*

a *The legislation applied to the applicant*

Before the 1982 Act came into force the only provision made for the prosecution of common criminal organisations was Article 416 of the Criminal Code, the first two paragraphs of which read as follows

> "Where three or more persons conspire to commit a number of offences, those who initiate or organise the conspiracy, or incite others to join it, shall be liable, on that account alone, to a term of not less than three and not more than seven years imprisonment
>
> Those who participate in the conspiracy shall be liable, on that account alone to a term of not less than one and not more than three years' imprisonment "

The 1982 Act introduced into the Italian Criminal Code a new provision, Article 416 bis, which specifically makes it a punishable offence to be a member of a mafia type organisation Article 416 bis provides as follows

> "Any person belonging to an organisation of the mafia type composed of three or more persons shall be liable to imprisonment for a term of not less than three and not more than six years The promoters, leaders or organisers of the organisation shall be liable, on that account alone to imprisonment for a term of not less than four and not more than nine years
>
> An organisation is of the mafia type when its members use the intimidatory power of allegiance to the organisation and the resulting state of subjection and enforced silence to commit crimes, to acquire, directly or indirectly, management or at any rate control of economic activities concessions,

licences, public works contracts or public services or to obtain unfair gains or advantages for themselves or others

( )

The things used or intended to be used by a convicted person for the commission of the offence concerned, the rewards therefor, proceeds therefrom or profits thereof, and the things acquired with those rewards, proceeds or profits shall in all cases be confiscated

( )

The provisions of this Article shall also apply to the Camorra and other organisations, irrespective of their local names, which take advantage of the intimidatory power of allegiance to the organisation in order to pursue aims corresponding to those of organisations of the mafia type "

It is well known that prosecution alone has not been enough to block the rise of the mafia and other similar organisations The struggle against these organisations has therefore also followed the prevention approach

Under the 1956 Act which applies to "those whose conduct or life-style must be presumed to denote that their income is habitually derived, at least in part, from the proceeds of crime or rewards for their complicity" among others (section 1), a person who represents a danger to public security may be placed under special police supervision, combined, if necessary either with a prohibition on residence in one or more given districts or provinces or, in the case of a particularly dangerous person, with an order for compulsory residence in a specified district (section 3)

Only the District Court of the chieftown of the province has the power to order these measures, on the basis of a reasoned proposal submitted to the president of the court by the chief constable (section 4 paragraph 1)

Since the entry into force of the 1965 Act these measures can also be proposed by the public prosecutor in the case of persons suspected of belonging to an organisation of the mafia type, to the ' Camorra" or to other organisations, irrespective of their names, which pursue the same aims and make use of the same methods as organisations of the mafia type

The 1982 Act strengthens this legislative armoury with provisions incorporated into the 1965 Act intended to strike at the funds of mafia type organisations

For example under section 2 (3) of the 1965 Act, during proceedings for the application of the preventive measures provided for in the 1956 Act in respect of a person suspected of belonging to such organisations

> 'the District Court may issue a reasoned decision, even of its own motion ordering the seizure of property at the direct or indirect disposal of the person concerned, when there is sufficient circumstantial evidence, such as a considerable discrepancy between his life style and his apparent or declared income, to show that the property concerned forms the proceeds from unlawful activities or has been acquired with those proceeds
>
> Together with application of the preventive measure the District Court shall order the confiscation of any goods seized whose lawful origin has not been proved In the case of complex inquiries the measure may also be adopted at a later date, but not more than one year after the date of the seizure
>
> The District Court shall rescind a seizure order when the application for a preventive measure is dismissed or when the lawful origin of the goods is established (1)

Under section 24 of the 1982 Act, when a defendant stands trial for the offence defined in Article 416 bis of the Criminal Code, the criminal court has power to order the precautionary seizure provided for in section 2 (3) of the 1965 Act, in the event of final conviction, it may order confiscation of the property seized In that case, under section 3 (3) paragraph 3 of the 1965 Act the measures the court orders take precedence over those adopted in connection with the same property during the proceedings on the application for preventive measures

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(1) The Italian texte of the relevant provisions of section 2 (3) reads as follows

il tribunale anche d ufficio ordina con decreto motivato il sequestro dei beni dei quali la persona nei confronti della quale e stato iniziato il procedimento risultra poter disporre direttamente o indirettamente e che sulla base di sufficienti indizi come la notevole sperequazione fra il tenore di vita e l entita dei redditi apparenti o dichiarati si ha motivo di ritenere siano il frutto di attivita illecite o ne costituiscano il reimpiego

Con l applicazione della misura di prevenzione il tribunale dispone la confisca dei beni sequestrati dei quali non sia stata dimostrata la legittima provenienza Nel caso di indagini complesse il provvedimento puo essere emanato anche successivamente ma non oltre un anno dalla date dell avvenuto sequestro

Il sequestro e revocato dal tribunale quando e rispinta la proposta di applicazione dell a misura di prevenzione o quando e dimostrata la legittima provenienza dei beni

Under section 4 of the 1956 Act, when the District Court hears an application for preventive measures it must give a reasoned decision in chambers The prosecution and the person concerned are heard. The latter may submit memorials and be represented by counsel Both the prosecution and the person concerned may appeal against the court's decision The Court of Appeal decides the appeal in chambers, in a reasoned judgment Both the prosecution and the person concerned can appeal against this judgment on points of law The Court of Cassation decides the appeal in chambers In all of the above procedures the relevant provisions of the Code of Criminal Procedure are applied

b *Case-law on the application of preventive measures, particularly of a pecuniary nature*

The existence of preventive measures is not in itself contrary to the Italian Constitution The Constitutional Court has ruled that the basis for these measures is the need to guarantee the orderly and peaceful course of social relations, not only through a body of legislation penalising unlawful acts, but also through provisions intended to prevent the commission of such acts (Constitutional Court, judgment no 27 of 1959 and judgment no 23 of 1964)

Because of their particular object, preventive measures do not relate to the commission of a particular unlawful act but to a pattern of behaviour defined by law as conduct indicating the existence of danger to society (Constitutional Court, judgment no 23 of 1964)

Consequently, in the Italian legal system, there is a fundamental difference between criminal penalties and preventive measures The former constitute the response to an unlawful act and the consequences of that act , the latter are a means of preventing the commission of such an act

In other words, a criminal penalty relates to an offence already committed, whereas a preventive measure is intended to reduce the risk of future offences (see, mutatis mutandis, Constitutional Court, judgment no 53 of 1968, concerning security measures)

The danger must, of course, be a currently existing danger, and the Italian courts do not apply any preventive measure if the person concerned dies in the course of the proceedings The impossibility of ordering confiscation in such circumstances has been the subject of criticism in the Constitutional Court, which nevertheless held that it had no power to modify what the legislature had decided (Constitutional Court, decision no 721 of 1988)

Because criminal penalties and preventive measures are essentially different, not all the constitutional principles which should underpin the former necessarily apply to the latter. For example, the presumption of innocence enunciated in Article 27 of the Constitution does not concern preventive measures, which are not based on the criminal liability or guilt of the person concerned (Constitutional Court, judgment no. 23 of 1964).

Similarly, such measures do not fall within the scope of Article 25 para. 2 of the Constitution, which prohibits the retroactive application of criminal provisions. The infringement of this principle has been alleged on a number of occasions in the Court of Cassation with regard to confiscation orders under section 2 (3) of the 1965 Act The Court of Cassation has ruled, firstly, that the above principle is not applicable to preventive measures (see, for example, Court of Cassation, Piraino judgment of 30 January 1985). Secondly, the Court of Cassation has pointed out that the impugned provision is not in fact retroactive, as it relates to the property in the possession of the person concerned at the time when confiscation is ordered (Court of Cassation, Oliveri judgment of 12 May 1986) and the unlawful use of that property after its entry into force (Court of Cassation, Pipitone judgment of 4 January 1985).

In spite of these limitations, preventive measures remain open to thorough scrutiny of their compatibility with the Constitution.

As far back as 1956 the Constitutional Court ruled that in no case could the right to liberty be restricted except where such restriction was prescribed by law, where lawful proceedings had been instituted to that end and where the reasons therefor had been set out in a judicial decision (Constitutional Court, judgment no. 11 of 1956).

It subsequently ruled that preventive measures cannot be adopted on the basis of mere suspicion and are justified only when based on the objective establishment and assessment of facts which reveal the behaviour and life-style of the person concerned (Constitutional Court, judgment no. 23 of 1964).

More recently it confirmed that the constitutionality of preventive measures still depends on observance of the principle of legality and the possibility of applying to the courts for a remedy Furthermore, the above two conditions are closely linked. Thus it is not enough for the law to indicate vague criteria for the assessment of danger; it must set them forth with sufficient precision to make the right of access to a court and adversarial proceedings a meaningful one (Constitutional Court, judgment no. 177 of 1980)

The case-law of the Court of Cassation is in this respect entirely consistent with that of the Constitutional Court ; it affirms quite clearly that proceedings for the application of preventive measures must be adversarial and conducted with respect for the rights of the defence, any violation of those rights entailing their nullity (see, for example, Court of Cassation, judgment no. 1255 of 29 June 1984 in the Santoro case).

The Court of Cassation has dismissed a number of complaints alleging the unconstitutionality of the seizure and confiscation measures provided for in section 2 (3) of the 1965 Act. In particular, it has ruled that the presumption concerning the unlawful origin of the property of persons suspected of belonging to organisations of the mafia type is not incompatible with Article 24 of the Constitution, which guarantees the rights of the defence, since confiscation can only take place when there is sufficient circumstantial evidence concerning the unlawful origin of the property in question and in the absence of a rebuttal (Court of Cassation, previously cited Pipitone judgment).

In this connection, the Court of Cassation has explicitly held that the above presumption does not impose on the person concerned the burden of proof (onere della prova) but merely the burden of rebuttal (onere di allegazione) Accordingly, the person concerned does not have to prove the lawful origin of his possessions but rather to adduce evidence countering that adduced by the prosecuting authorities. It therefore falls to the latter to adduce evidence of the unlawful origin of each of the possessions in question (see, in this connection, Court of Cassation, Ragosta judgment of 21 April 1987 ; Sciara judgment of 26 May 1987 ; Chiazza judgment of 9 May 1988).

With regard to the compatibility of seizure and confiscation measures with the right to free exercise of private economic activities and the right to peaceful enjoyment of private property (Articles 41 and 42 of the Constitution), the Court of Cassation has ruled that these rights are not absolute and may be limited in accordance with the general interest. This applies in connection with possessions of unlawful origin or their use (Court of Cassation, previously cited Oliveri and Pipitone judgments).

The Court of Cassation has also given a number of rulings on the question of the relations between criminal proceedings and proceedings concerning applications for preventive measures, which, at the relevant time in this case were not governed by law, with the exception of the case provided for in section 3 (3) paragraph 3 of the 1965 Act (1).

(1) This provision was repealed by Act No 55 of 19 March 1990, which also provided for and regulated the possibility of suspending prevention proceedings when criminal proceedings are pending

On this question its case-law is based on one constant the different characters and functions of criminal penalties and preventive measures

This difference is reflected in the corresponding proceedings In criminal proceedings conviction must necessarily be based on establishment of the guilt of the accused, whose criminal liability in respect of this or that offence must be proved on the basis of the evidence placed before the court Such an approach has no place in prevention proceedings, whose object is not to establish whether any offence has been committed but to determine the dangerousness of the person concerned, which can be assessed even on the basis of evidence whose probative value does not reach the level of "proof"

Thus, for the purpose of applying the preventive measures provided for in the 1965 Act, membership of a mafia-type organisation does not have to be proved , it is sufficient if circumstantial evidence suggests that such membership is "probable" (see, for example, Court of Cassation, Amerato judgment of 14 March 1988) In such cases, therefore, reliance is placed on evidence which might have little or no importance in a criminal trial, such as criminal record, life-style, membership of a particular social circle, relations with members of criminal groups, wealth and information received by the police

However, this evidence must be established objectively (Court of Cassation, Scarfo judgment of 28 September 1987), mere suspicions and subjective speculation remaining, in any event, inadmissible (Court of Cassation, previously cited Amerato judgment)

Because of the differences between prevention proceedings and criminal proceedings, the Court of Cassation has affirmed the autonomy of each in relation to the other Consequently, it has ruled that preliminary questions cannot be raised, thus leading to the suspension of proceedings on an application for preventive measures, when criminal proceedings are pending at the same time (see, for example, Court of Cassation, previously cited Amerato judgment)

There is a major exception to this principle of autonomy, namely when the criminal proceedings end in an acquittal on the ground that the offence as charged has not been committed, or that the offence was not committed by the accused In such cases revocation of the preventive measure is justified, but only if judgment in the criminal case concerns the same matters as the prevention proceedings and discounts all the evidence adduced to establish the accused's dangerousness or if the existence of criminal proceedings has been used as such, without any consideration of the evidence underpinning the prosecution, as grounds for instituting the prevention proceedings (see for example, Court of Cassation, previously cited Ragosta and Amerato judgments)

However, this case-law does not seem to apply to a final confiscation order, which, by its nature, leads to immediate, permanent results.

It should be pointed out that section 3 (3) paragraph 3 of the 1965 Act merely confirms the autonomy of the two procedures, since it points to the possible co-existence of different measures concerning the same property, some taken in connection with the criminal proceedings and others in connection with the prevention proceedings, without either excluding the other

As the provision in question indicates, the predominance of the measure ordered in the criminal proceedings – which, being linked to final conviction, is in the nature of a security measure – is limited to the "effects" of the latter and thus comes into play only at the enforcement stage. In addition, the security measure may only partly overlap with the preventive measure, which, in that case, would have a parallel, complementary effect (Court of Cassation, Giovinazzo judgment of 26 October 1985)

COMPLAINTS

Before the Commission the applicant complains of the confiscation order which took away nearly all his property. This measure, adopted pursuant to a provision introduced in 1982 and concerning possessions whose lawful origin has not been proved, deprived him of possessions largely acquired between 1975 and 1977, i e at a time when he could not have been held to belong to a criminal organisation. He maintains that the Italian courts retroactively applied the relevant provisions and alleges a violation of Article 7 of the Convention.

THE LAW

Under a provision which came into force in 1982, the applicant was deprived of ownership of property he had acquired in the years 1975-77. He complains he is the victim of a retroactive application of the law and relies on Article 7 of the Convention

The Commission, taking into consideration all the facts submitted, particu larly the stated grounds of the confiscation order, has also examined the application in connection with Article 6 para 2 of the Convention and Article 1 of Protocol No 1 Admittedly, the applicant did not explicitly rely on these provi-

sions in his application but it is for the Commission to classify the complaints submitted to it and determine which of the Convention's provisions are actually applicable to the situation complained of

1 Complaints concerning Article 6 para 2 and Article 7 of the Convention

The applicant maintains that the impugned confiscation amounted to punishment without conviction, applied retroactively, and that there has therefore been a violation of Article 6 para 2 and Article 7 of the Convention

Article 6 para 2 of the Convention provides as follows

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

Article 7 para 1 of the Convention provides as follows

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"

The Italian Government maintain that these provisions are not applicable to the present case since they refer only to a finding of guilt at the end of proceedings brought in order to establish that a criminal offence has been committed In this connection they refer to the case law of the European Court of Human Rights in the Lawless case (judgment of 1 July 1961, Series A no 3)

They assert that in Italian law, according to the case-law of the Constitutional Court and the Court of Cassation, proceedings on an application for the adoption of preventive measures are fundamentally different from criminal proceedings, since their aim is not to establish that a particular offence has been committed and to impose the appropriate penalty It follows that preventive measures – ordered sine delicto – are not concerned with the issue of guilt and lack the features of punishment and retribution characteristic of criminal penalties Consequently they cannot be equated with the latter

The Government argue that the case-law of the Convention institutions supports this view, in that it was held, in the cases of Guzzardi (Eur Court H R, judgment of 6 November 1980, Series A no 39) and Ciulla (Eur Court H R,

judgment of 22 February 1989, Series A no. 148) that the preventive measures provided for in Italian law cannot be compared with criminal penalties. It is asserted that further confirmation of this was given in the Court's judgment in the case of Engel and Others (Eur. Court H.R., judgment of 8 June 1976, Series A no. 22), which set forth three criteria for determining whether a measure counts as criminal for the purposes of the Convention : the classification in domestic law, the nature of the offence and the severity of the penalty.

With regard to the first of these criteria, it is clear that under Italian law preventive measures are not regarded as criminal in character.

With regard to the second, a preventive measure does not relate to an offence. The question of the nature of such an offence therefore does not arise.

Lastly, with regard to the severity of the measure, confiscation, under rigorous conditions, of property whose unlawful origin has been established by a court, even though on the basis of circumstantial evidence, does not reach such a degree of severity that it can be classified as a punishment. There are other measures of the same type which do not come within the criminal sphere.

The Government consider that in any case the confiscation of the applicant's property is compatible with Article 6 para. 2 and Article 7 of the Convention. They assert that the presumption of the unlawful origin of the property in question required by section 2 (3) of the 1965 Act does not reverse the burden of proof. That provision merely imposes on the person concerned a burden of rebuttal, which is not incompatible with the presumption of innocence required by Article 6 para. 2 of the Convention.

With regard to the allegedly retroactive application of the above-mentioned provision, the confiscation complained of only concerned property in the applicant's possession at the time the order was issued, and was based on his dangerousness at that time.

The applicant replies that the case-law of the European Court of Human Rights cited by the Government is not relevant to his case. He maintains that the confiscation of his property is a measure which falls within the scope of Article 6 para. 2 and Article 7 of the Convention and infringes the principles set forth therein, particularly the prohibition of retroactive punishment. But the measure in question was introduced by the 1982 Act and applied in his case to property largely acquired between 1975 and 1977, i.e. at a time when he could not even have been suspected of being associated with the NCO.

The Commission notes in the first place that the parties disagree about whether, in the context of proceedings on an application for a preventive measure, the applicant faced a "criminal charge", according to the autonomous meaning which the Convention, particularly in Article 6, gives to that expression.

In that connection the Commission first refers to the Court's ruling in the Deweer case, in which it was held that :

> "The 'charge' could, for the purposes of Article 6 para 1, be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" (Eur Court H.R., Deweer judgment of 27 February 1990, Series A no 35, p. 24, para 46)

Secondly, the Commission points out that in its Guzzardi judgment the Court expressed the following view :

> "Comparison of Article 5 para. 1 (a) with Articles 6 para 2 and 7 para. 1 shows that for Convention purposes there cannot be a 'condamnation' (in the English text 'conviction') unless it has been established in accordance with the law that there has been an offence – either criminal or, if appropriate, disciplinary .. Moreover, to use 'conviction' for a preventive or security measure would [not] be consonant with the principle of narrow interpretation to be observed in this area" (Eur. Court H R., previously cited Guzzardi judgment, p 37, para 100)

Just before expressing this view the Court had made the following observation :

> "The order for Mr Guzzardi's compulsory residence was not a punishment for a specific offence but a preventive measure taken on the strength of indications of a propensity to crime" (Eur Court H.R., Guzzardi judgment, *loc cit*)

This approach was confirmed by the Court's judgment in the Ciulla case

> "In the Court's view, the preventive procedure provided for in the 1956 Law was designed for purposes different from those of criminal proceedings. The compulsory residence order authorised by section 3 [of the 1956 Law] may, unlike a conviction and prison sentence, be based on suspicion rather than proof" (Eur Court H R , previously cited Ciulla judgment, p. 17, para. 39)

Having regard to this case-law, the Commission takes the view that the argument that there is an affinity between criminal proceedings and proceedings on an application for a preventive measure is invalid. Preventive measures must, in principle, be regarded as distinct not only from criminal penalties but also from disciplinary penalties (which the Court looked into in the case of Engel and Others, previously cited judgment), administrative penalties (which the Court looked into in the Öztürk case, judgment of 21 February 1984, Series A no. 73) and other forms of penalty (see, with regard to tax surcharges, Application No. 11464/85, Dec. 12.5.87, D R. 53 p. 85), since they are not designed to punish a specific offence.

The Commission notes that the impugned measure in the present case was not a compulsory residence order but a confiscation order.

Admittedly, during the proceedings which ended with confiscation of his property, the applicant was, formally, neither charged with nor convicted of a criminal offence. However, the above finding is not sufficient in itself to render Article 6 para. 2 and Article 7 of the Convention inapplicable, and the Commission must still decide, looking beyond appearances, whether the applicant acquired the status of an accused person and whether the confiscation of his property constituted "in substance" a penalty covered by the provisions in question

The Commission observes, firstly, that according to the well-established case-law of the Court of Cassation proceedings on an application for a preventive measure are autonomous in relation to criminal proceedings and do not involve a finding of guilt

Secondly, the Commission notes that the confiscation provided for in section 2 (3) of the 1965 Act is conditional upon a prior declaration of dangerousness to society, based on suspected membership of a mafia-type organisation, and is subsidiary to the adoption of a preventive measure restrictive of personal liberty. In other words, it is not possible to confiscate property whose lawful origin has not been established unless the person in possession is suspected of belonging to a mafia-type organisation and, as such, has been subjected to a preventive measure restrictive of personal liberty.

Lastly, the Commission notes that the impugned confiscation measure, like a compulsory residence order, is based on "sufficient circumstantial evidence", corroborated by the absence of a rebuttal. This evidence, according to consistent case-law, has to be established objectively and is clearly distinguished from mere suspicions or subjective speculation

The Commission considers that this legal background confirms the preventive character of confiscation and shows that it is designed to prevent the unlawful use of the property which is the subject of the order It follows that the confiscation of the applicant's property does not imply a finding that he was guilty of a specific offence, any more than the compulsory residence order against him does.

The Commission further considers that the severity of the measure is not so great in this case as to warrant its classification as a criminal penalty for the purposes of the Convention. Confiscation is a measure not confined to the sphere of criminal law, it is encountered widely in the sphere of administrative law Items liable to confiscation include illegally imported goods (see the issue examined by the Court and the Commission in the Agosi case, Eur. Court H.R., judgment of 24 October 1986, Series A no. 108), the proceeds from unlawful activities not classified as criminal offences (such as buildings constructed without planning permission), certain items considered dangerous in themselves (such as weapons, explosives or infected cattle) and property connected, though only indirectly, with a criminal activity (cf. the confiscation under Italian law of the funds of secret societies pursuant to Law No 17 of 15 January 1982)

Thus it can be seen from the legislation of the Council of Europe member States that measures of great severity, but necessary and appropriate for protection of the public interest, are ordered even outside the criminal sphere.

The Commission notes that the impugned confiscation measure concerns property considered to be of unlawful origin. Its aim is to strike a blow against mafia-type organisations and the very considerable resources they have at their disposal to finance unlawful activities. The Commission therefore takes the view that the measure in question can be likened to those mentioned above

That being the case, and in the light of the Court's case-law, the Commission concludes that the confiscation complained of does not involve a finding of guilt subsequent to a criminal charge, and does not constitute a penalty. Consequently, the complaints of a violation of Article 6 para. 2 and Article 7 of the Convention are incompatible ratione materiae with those provisions and must be rejected pursuant to Article 27 para. 2.

2 *Complaint concerning Article 1 of Protocol No. 1*

The applicant complains that he was deprived of his possessions. The Commission has examined this complaint from the standpoint of Article 1 of Protocol No 1, which provides as follows

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

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

The Government assert that the confiscation measure at issue is provided for by law and pursues an aim compatible with the general interest, since it is designed to prevent the person concerned from using that part of his fortune which has been unlawfully acquired to produce profits for himself or for the criminal organisation at the expense of the community.

They point out that confiscation is an essential weapon in the battle against mafia-type organisations and that this measure, subject to all the procedural guarantees laid down by law, concerns only persons suspected on the basis of sufficient circumstantial evidence of belonging to such organisations.

They argue, in conclusion, that the fair balance which must be maintained between the requirements of the general interest and the individual's fundamental rights has been preserved in this case

The applicant replies that the confiscation measure at issue is a retroactive measure contrary to international law and cannot be held to serve the general interest. He claims that his business was entrusted to an inexperienced administrator, who ruined it, causing the loss of numerous jobs in an area hard-hit by unemployment.

The Commission notes that the confiscation at issue undoubtedly constituted interference with the applicant's right to "peaceful enjoyment of his possessions". Moreover, the Government do not dispute this. The Commission must therefore decide whether the interference concerned is covered by the second sentence of the first paragraph - which relates to deprivation of ownership - or by the second paragraph - which concerns control of the use of property.

The Commission recalls that, according to the Court's case-law, not all measures which lead to a deprivation of ownership are covered by the second sentence of the first paragraph.

In its judgment in the Handyside case the Court held that confiscation and destruction of the 'Schoolbook", while involving a deprivation of ownership, were nevertheless authorised by the second paragraph, interpreted in the light of the principle of law, common to the Contracting States, whereunder items whose use has been lawfully adjudged illicit and dangerous to the general interest are forfeited with a view to destruction (Eur Court H R, Handyside judgment of 7 December 1976, Series A no 24, p 30, para 63)

Similarly, in its judgment in the Agosi case, the Court held that confiscation of the Kruegerrands belonging to the applicant company amounted to control of the use of gold coins in the United Kingdom The Court accordingly applied the second paragraph (cf Eur Court H R, previously cited Agosi judgment, p 17, paras 51 *et seq*)

In this case, the Commission notes that the confiscation at issue concerned possessions held by the courts to be of unlawful origin and was designed to prevent the applicant from using them to produce further profits for himself or for the criminal organisation to which he is suspected of belonging, at the expense of the community

Consequently, even though the confiscation at issue led to a deprivation of ownership, this amounted in the present case to control of the use of property within the meaning of Article 1 para 2 of Protocol No 1, which gives the State the right to adopt 'such laws as it deems necessary to control the use of property in accordance with the general interest"

With regard to compliance with the conditions of that paragraph, the Government maintain that these conditions were satisfied, whereas the applicant argues that the confiscation of his possessions cannot be held to serve the general interest

The Commission notes, firstly, that confiscation of the applicant's property was ordered pursuant to section 2 (3) of the 1965 Act It was therefore interference provided for by law, as required by the second paragraph of Article 1 of Protocol No 1

Secondly, the Commission notes that the confiscation at issue was intended to prevent the illicit use, in a way dangerous to society, of possessions whose lawful origin has not been established It accordingly considers that the aim of the resulting interference was undoubtedly to serve the general interest Nevertheless, it remains to be considered whether this interference was proportionate to the legitimate aim pursued

In this connection the Commission points out that the impugned measure forms part of a crime prevention policy; it considers that in implementing such a policy the legislature must enjoy broad scope to state its views both on the existence of a problem affecting the public interest which requires control measures and on the appropriate way to apply such measures.

The Commission further observes that in Italy the problem of organised crime has reached a very disturbing level. Mafia-type organisations are so widespread that in certain areas the State's control has been seriously weakened as a result.

The enormous profits made by these organisations from their unlawful activities, particularly international drugs trafficking, gives them a level of power which places in jeopardy the rule of law within the State. The means adopted to combat this economic power, particularly the confiscation measure complained of, are therefore regarded by the Italian Government as essential for the successful prosecution of the battle against the organisations in question.

The Commission notes the specific circumstances which prompted the action taken by the Italian legislature, whose importance it does not seek to deny. However, it has a duty to satisfy itself that the rights guaranteed by the Convention are respected in every case.

The Commission notes that in this case section 2 (3) of the 1965 Act establishes, where there is "sufficient circumstantial evidence", a presumption that the property of a person suspected of belonging to a criminal organisation represents the proceeds from unlawful activities or has been acquired with those proceeds.

Every legal system recognises presumptions of fact or of law The Convention obviously does not prohibit such presumptions in principle. However, the applicant's right to peaceful enjoyment of his possessions implies the existence of an effective judicial guarantee. Consequently, the Commission must consider whether, having regard to the severity of the applicable measure, the proceedings in the Italian courts afforded the applicant a reasonable opportunity of putting his case to the responsible authorities (see, mutatis mutandis, previously cited Agosi judgment, p. 18, para. 55)

In this connection the Commission observes that, according to the case-law of the Court of Cassation, the presumption of the unlawful origin of the applicant's property did not impose on him the burden of proof, but merely the burden of rebuttal ; the prosecution was required to state the evidence of the unlawful origin of each of the items concerned and the applicant had the oppor-

tunity to rebut this evidence by adducing any relevant evidence to the contrary (see the rulings of the Italian Court of Cassation to that effect in the Ragosta and Sciara cases, cited above)

Moreover, the proceedings on the application for preventive measures were conducted in the presence of both parties in three successive courts the District Court, the Court of Appeal and the Court of Cassation The Commission takes the view that the restitution to the applicant of the Sabatella estate confirms the concrete nature of the guarantees surrounding the confiscation proceedings and particularly the effectiveness of the rights of the defence

In addition the Commission notes that the Italian courts were debarred from basing their decisions on mere suspicions, being required to establish and assess objectively the facts submitted by the parties There is nothing in the file which suggests that they assessed the evidence put before them arbitrarily

On the contrary, the weighty evidence against the applicant who had already been convicted of belonging to the Camorra in a judgment of the Naples Court of Appeal which became final on 9 December 1983 also led the criminal courts to convict him on a second charge of membership of a mafia type organisation

Lastly, the Commission notes that the applicant s argument that the property confiscated had been acquired before the introduction of the measure in question is completely invalid, having regard to the fact that the Salerno Court of Appeal held that each of the possessions concerned had been unlawfully acquired, and that the applicant might use them for unlawful purposes to the detriment of society

That being the case having regard to the margin of appreciation enjoyed by States when they control the use of property in accordance with the general interest , particularly in the context of a crime policy designed to combat major crime, the Commission concludes that the interference with the applicant's right to peaceful enjoyment of his possessions was not disproportionate in relation to the legitimate aim pursued

It follows that this part of the application is manifestly ill founded and must be rejected pursuant to Article 27 para 2 of the Convention

For these reasons, by a majority, the Commission

DECLARES THE APPLICATION INADMISSIBLE