

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

FIRST SECTION

CASE OF R.B. v. ITALY

(Application no. 20409/23)

JUDGMENT

Art 7 • *Nullum crimen sine lege* • *Nulla poena sine lege* • Applicant's conviction for the production of child pornography based on the application of a new interpretation of the relevant statutory provision removing the need to ascertain a real risk of dissemination of pornographic content for that offence to be made out • Offence not interpreted in a manner going beyond the wording of the relevant statutory provision • Domestic courts analysed the domestic and supranational legislation concerning child pornography and extensively explained why the new interpretation was more in line with the need to increase protection for the dignity and proper sexual development of minors • Effects of the new interpretation overtly addressed • New interpretation not a reversal of a pre-existing line of case-law but advanced a novel application of the concept of the production of child pornography to a factual background different to the one previously assessed by the domestic courts • Risk of dissemination of pornographic material depicting minors always present, being inherent in the availability of technical devices • Novel application based on a reasonable evolutive interpretation of the relevant statutory provision, compatible with its wording and "consistent with the essence of the offence" • No flagrant non-observance or arbitrariness in the application of the relevant law • In specific case-circumstances interpretation and application of domestic law did not produce consequences inconsistent with the Convention

Prepared by the Registry. Does not bind the Court.

STRASBOURG

16 July 2026

Request for referral to the Grand Chamber pending

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of R.B. v. Italy,

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

Ivana Jelić*, President*,
Erik Wennerström,
Gilberto Felici,
Raffaele Sabato,
Frédéric Krenc,
Alain Chablais,
Artūrs Kučs*, judges*,
and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the application (no. 20409/23) 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 an Italian national, Mr R.B. ("the applicant"), on 18 May 2023;

the decision to give notice to the Italian Government ("the Government") of the application;

the decision not to have the applicant's name disclosed;

the parties' observations;

Having deliberated in private on 7 October 2025 and 9 June 2026,

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

INTRODUCTION

1. The application concerns the foreseeability under Article 7 of the Convention of the applicant's conviction for the offence of production of child pornography under Article 600-*ter* § 1 of the Criminal Code.

THE FACTS

2. The applicant was born in 1948 and is detained in Genoa. He was represented by Mr R. Navarra, a lawyer practising in Genoa.

3. The Government were represented by their Agent, Mr L. D'Ascia, *Avvocato dello Stato*.

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

5. In 2019 the applicant was brought to trial before the Genoa District Court on counts of (i) sexual assault under Article 609-*bis* of the Criminal Code ("the CC"), and (ii) production of child pornography under Article 600-*ter* § 1 of the CC (see, respectively, paragraphs 20 and 22 below). According to the bill of indictment, he had repeatedly sexually assaulted L.B., the niece of his live-in partner and – taking advantage of the fact that he had

often been entrusted with the task of taking care of her – he had used her to create pornographic content depicting her.

6. The acts ascribed to him allegedly took place between 2014 and 2016. At the time, L.B. was a minor (she was born in 2010).

7. By a judgment of 17 September 2020 (which was filed with the registry of the Genoa District Court on 25 September 2020) the applicant was found guilty as charged, and was sentenced to an overall term of nine years' imprisonment and a fine of 80,000 euros (EUR). Specifically, for the offence of child pornography under Article 600-*ter* § 1 of the CC, he received a sentence of seven years' imprisonment and a EUR 50,000 fine. Ancillary penalties were also imposed. Lastly, L.B.'s parents, who had joined the proceedings as civil parties on her behalf, were each awarded an interim compensation payment (*provvisionale*) of EUR 10,000.

8. The District Court deemed that multiple items of evidence adduced proved that the applicant had sexually assaulted L.B. and should therefore be found guilty under Article 609-*bis* of the CC (see paragraph 22 below). Among those items of evidence were numerous photographs depicting L.B. in sexually explicit poses. The photographs had been obtained through a search of the applicant's telephone and personal computer; the photographs had been located in the memory of the two devices, since it had emerged that the applicant had tried to delete them two days after L.B.'s first revelations to her mother regarding the applicant's behaviour towards her.

9. According to the District Court, the photographs were also relevant under Article 600-*ter* § 1 of the CC (see paragraph 20 below), since (i) they showed that the applicant had indeed produced child pornography, and (ii) the Combined Divisions of the Court of Cassation (by judgment no. 51815 of 2018) had ruled that in order for it to be proved that the offence in question had been committed it was no longer necessary to demonstrate that there had been a specific risk that the pornographic content in question could be distributed or shared (see paragraph 40 below). Moreover, as the said judgment had explained (see paragraph 46 below), this "principle of law" (*principio di diritto*) laid down by the Combined Divisions did not amount to an innovation or a modification of the scope of the offence applied retrospectively to acts preceding the judgment; rather, it amounted to an interpretation (of a pre-existing guiding principle) that did not extend the scope of the offence to the defendant's detriment.

For these reasons, the applicant's argument that his conduct could at most be classified as falling under Article 600-*quater* of the CC (which punishes less severely the possession of pornographic content – see paragraph 21 below) was dismissed.

10. The applicant appealed against the conviction, contending, *inter alia*, that the Combined Divisions of the Court of Cassation – by virtue of the delivery of their judgment no. 51815 of 2018 – had unforeseeably departed from their settled case-law, namely, the case-law established by Combined

Divisions of the Court of Cassation judgment no. 13 of 31 May 2000 (see paragraphs 27 et seq. below). According to this judgment, Article 600-*ter* § 1 of the CC required that a clear risk of the dissemination of the pornographic content in question be ascertained in each case, for in the absence of such a risk the act of producing the child pornography in question would be classified as falling under the provision of Article 600-*quater* of the CC (see paragraph 28 below). Relying on Article 7 of the Convention, the applicant complained that under the above-noted interpretation the acts ascribed to him could not have been classified as constituting the offence set out by Article 600-*ter* § 1 of the CC. Indeed, there was no evidence of there having been a risk of the dissemination of the pornographic contents found in his possession, in view of the fact that the photographs had already been deleted and that he had no history of viewing or selling online child pornography.

11. The General Public Prosecutor requested that the applicant be acquitted of the offence under Article 600-*ter* § 1 of the CC on the same grounds.

12. By a judgment of 23 September 2021 (which was filed with the court registry on 13 December 2021) the Genoa Court of Appeal upheld the conviction and recalculated the overall sentence at eight years' imprisonment and a EUR 65,000 fine. The sentence imposed under Article 600-*ter* § 1 of the CC remained unaltered. The applicant's submissions as to the unforeseeability of his conviction under Article 600-*ter* § 1 of the CC were dismissed for the same reasons as those cited by the District Court.

13. The Court of Appeal expressly referred to the classification of the offence at hand as an "abstract risk of harm" offence, in line with the aforementioned judgment no. 51815 of 2018 of the Combined Divisions of the Court of Cassation. In respect of the applicant's complaint concerning the reversal of well-established case-law, the Court of Appeal reasoned as follows:

> "As to the legal classification of the act under count b) of the charge [Article 600-*ter* § 1 of the CC] (challenged both by the defence and by the General Public Prosecutor), it is the defence itself that emphasises the fact that judgment no. 51815 of 2018 of the Combined Divisions of the Court of Cassation – while interpreting the offence under Article 600-*ter* of the CC (which punishes, *inter alia*, the ... 'the production of child pornography using minors') as an abstract-risk (of dissemination) offence – overcomes any possible objections concerning a departure from case-law.
>
> The content of the judgment is reproduced verbatim on page 33 of the appeal. In sum, the Court of Cassation has excluded the possibility of it considering the new interpretation of Article 600-*ter* (amended after the Combined Division's first judgment of 2000) as [constituting] an "overruling" of the previous approach, emphasising how it is common knowledge (*massima di esperienza*) that a risk of dissemination is inherent in the use of instruments suitable for [facilitating] such dissemination.
>
> The fact that at the time of the seizure ... the most significant pornographic images depicting the minor had been erased – except for one which was left on the telephone – does not rule out the risk of their dissemination."

14. However, the Court of Appeal incidentally observed that the information concerning the date on which the applicant had erased the above-noted content from his devices could not be used as evidence, given that that information had been extracted by a person who could not be appointed as an expert under domestic law. Consequently, the finding that the applicant's actions fell within the scope of Article 600-*ter* § 1 of the CC (under the new interpretation thereof) was correct. Specifically, it reasoned as follows:

> "The inadmissibility as evidence of the expert opinion ... does not allow [the consideration of] the information concerning the time at which the photographs were deleted ....
>
> The interpretation of the offence – in keeping with that set out by the Combined Divisions – and the legal classification of the conduct are therefore correct."

15. The applicant lodged an appeal on points of law in which he reiterated, *inter alia*, his complaints regarding the interpretation of Article 600-*ter* § 1 of the CC that had been applied in his case. On the one hand, he challenged the validity of the principle set out by the Combined Divisions of the Court of Cassation in 2018, which had been referred to by the District Court and the Court of Appeal in his case; on the other hand, he disputed its applicability to acts committed prior to 2018 considering that it had amounted – to his detriment – to the retrospective application of a new, stricter criminal law. Furthermore, he specifically and extensively criticised the above-noted reasoning by the Court of Appeal, arguing that it had failed to carry out any assessment of the presence of a real risk of dissemination in his case, given that it had assumed such risk despite the fact that the photographs had been deleted from his devices.

16. By judgment no. 2606 of 27 September 2022 (which was filed with the court registry on 23 January 2023), the Court of Cassation dismissed the appeal on points of law; thus the conviction became final.

In respect of the applicant's above-noted complaints, the Court of Cassation found that the interpretation of the offence provided by Article 600-*ter* § 1 of the CC – as set out by the Combined Divisions in 2018 and referred to by the lower-instance courts – had not been unforeseeable given the "wide semantic scope" of that provision. The Court of Cassation also noted that a similar conclusion had already been reached in its judgments no. 1835 of 17 January 2022 and no. 46184 of 17 December 2021.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT LEGAL FRAMEWORK

A. Criminal Code

17. The offence of child pornography was added in the Italian Criminal Code by Law no. 269 of 3 August 1998 (which was entitled "Provisions against the exploitation of prostitution, pornography, sexual tourism to the detriment of a minor, as new forms of slavery"). In its original formulation it read as follows:

Article 600-*ter* – Child pornography

"1. Whoever exploits a minor under the age of eighteen years with a view to realising pornographic displays or producing pornographic material shall be punished by imprisonment of between 6 and 12 years and by a fine ranging from 50 million to 500 million Italian lire.

2. Whoever trades in the material referred to in the first paragraph shall incur the same penalty.

3. Whoever (save for in cases falling under the first and second paragraph) by any means – including telematic means – distributes, discloses or advertises such pornographic material as is referred to in the first paragraph, or distributes or discloses news or information aimed at the solicitation or sexual exploitation of minors under the age of 18 years, shall be punished by a term of imprisonment of between one and five years and a fine ranging from 5 million to 100 million Italian lire.

4. Whoever (outside such cases as are referred to in the first, second and third paragraph) knowingly transfers to others (even free of charge) pornographic material produced through the sexual exploitation of minors under the age of 18 years shall be punished by imprisonment of up to three years or by a fine ranging from 5,000,000 to 100,000,000 Italian lire."

18. Conduct falling under the first paragraph of the provision therefore constituted the "exploitation" of a minor; alternatively, it constituted actions undertaken with a view to realising pornographic displays or producing pornographic material.

19. The provision was subsequently amended by Law no. 38 of 6 February 2006 (which was entitled "Provisions on the fight against sexual exploitation of children and child pornography – including by means of the Internet"). The Law increased the penalties provided by Article 600-*ter* of the CC, added to the third paragraph a reference to the conduct of the "diffusion" (*diffusione* – that is, the dissemination) of pornographic material, and amended the first paragraph by erasing its reference to the "exploitation" of minors and replacing that reference with a reference to the "use" of minors. It consequently read as follows:

Article 600-*ter* – Child pornography

"1. Whoever, using minors under the age of eighteen years, realises pornographic displays or produces pornographic material or induces minors under the age of eighteen years to take part in pornographic displays shall be punished by imprisonment of between six and twelve years and by a fine of between EUR 28,822 and EUR 258,228.

..."

20. Article 600-*ter* was further amended by Law no. 172 of 1 October 2012 ("Ratification and enforcement of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, signed in Lanzarote on 25 October 2007, as well as adaptation provisions for the domestic framework"). The relevant parts, as amended by the Law and in force at the material time, read as follows:

Article 600-*ter* – Child pornography

"1. [The following shall be punished] by imprisonment of between six and twelve years and by a fine ranging from EUR 24,000 to EUR 240,000: whoever:

1) using minors under the age of eighteen years realises pornographic displays or performances, or produces pornographic material;

2) recruits or induces minors under the age of eighteen years to take part in pornographic displays or performances, or otherwise gains profit from such performances.

...

7. For the purposes of the present Article, the term "child pornography" shall mean any material that, by any means, visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for sexual purposes."

21. Article 600-*quater* of the CC – also added to the CC by Law no. 269 of 1998 and amended by Law no. 38 of 2006 – punishes the possession of child pornography. In its relevant parts, it reads as follows:

Article 600-*quater* – Possession of or access to child pornography

"Whoever, outside of the case referred to by Article 600-*ter*, knowingly obtains access to or possesses pornographic material realised using minors under the age of eighteen years is to be punished by imprisonment of up to three years and by a fine of not less than EUR 1,549.

..."

22. Article 609-*bis* of the CC punishes whomever, by means of violence or threats or abuse of authority, forces someone to engage in or undergo sexual acts.

B. Other relevant provisions

23. Article 618 of the Code of Criminal Procedure ("the CCP") provides that if a division of the Court of Cassation observes that a legal issue submitted to it has given rise to or may give rise to conflicting case-law, then at the request by the parties or of its own motion, it may refer that issue to the Combined Divisions.

24. Law no. 103 of 23 June 2017 amended that provision, inserting a new paragraph that reads as follows:

Article 618

"... 1-*bis*. If a division of the court does not agree with the principle of law set out by the Combined Divisions, it shall refer [in a reasoned decision] the [taking of the] decision on the appeal on points of law to them.

..."

25. In Italy, Article 628-*bis* of the CCP (introduced by Legislative Decree no. 150 of 10 October 2022) enables convicted persons to apply to the Court of Cassation for the reopening of proceedings following a judgment of the Court that finds a violation of the Convention. In the relevant parts, that provision reads as follows:

Article 628-*bis*

"A convicted person and a person subjected to a security measure may request the Court of Cassation to revoke the criminal judgment or the summary criminal order (*decreto penale di condanna*) pronounced against them, to order the reopening of the proceedings or, in any event, to take the necessary measures to eliminate the prejudicial effects resulting from a violation established by the European Court of Human Rights after they have lodged an application for the establishment of a violation of the rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms or in its Additional Protocols, and the European Court of Human Rights has allowed that application by a final decision, or has decided to strike out the application from its list of cases, pursuant to Article 37 of the Convention, following the unilateral acknowledgement of the violation by the State.

...".

II. RELEVANT DOMESTIC PRACTICE

A. Judgment no. 13 of 2000 of the Combined Divisions of the Court of Cassation

26. In its original version, Article 600-*ter* § 1 of the CC provided punishment for whomever "exploited" a minor with a view to realising pornographic displays or producing pornographic material (see paragraph 17 above). Called upon (by a single division of the Court of Cassation) to clarify whether the forms of exploitation set out therein implied that such conduct

had to be motivated by the prospect of financial gain, the Combined Divisions of the Court of Cassation gave their interpretation of the scope of the offence of child pornography.

27. In judgment no. 13 of 2000 the Court of Cassation held that a financial motive was not a prerequisite for it to be deemed that the minor in question had been exploited; the court observed that with the amendments introduced by Law no. 269 of 1998 (among which was the introduction of the offence set out under Article 600-*ter* of the CC – see paragraph 17 above) the legislature had intended to punish all the activities that were instrumental and "prodromal" (*prodromico*) to paedophilia. In other words, it had aimed to punish all forms of precursory conduct that jeopardised the free personal development of minors, commodified their bodies and introduced them to the realm of paedophilia.

28. Accordingly, the Court of Cassation held that the offence provided by Article 600-*ter* § 1 of the CC had to be classified as a "specific risk of harm" offence (*reato di pericolo concreto*); that is, the perpetrator's conduct needed to indicate a real risk that the pornographic material produced would be disseminated. In the view of the Court of Cassation, to deem otherwise would be inconsistent with the significant investigative measures targeting (together with the offence in question) the child-pornography market that the legislature had introduced.

29. Therefore, in each case the occurrence of a real risk of the dissemination of the material in question had to be assessed on the basis of the relevant features of the conduct in question, such as: the existence of a structure (albeit rudimentary) suitable to meet the needs of the market for child pornography; actual ties of the perpetrator with potential receivers of the material; the availability of technical devices capable of disseminating the pornographic content in question to a series of receivers; the utilisation of more than one minor in the production of the pornographic material in question; the criminal record, previous conduct and character of the perpetrator when they involved the commercial dissemination of the material; and other relevant signs indicating a risk of dissemination.

In the absence of such a real risk of dissemination, the Combined Divisions held, such conduct could be covered by Article 600-*quater* of the CC (see paragraph 21 above).

30. In the case brought to the attention of the Combined Divisions, they deemed that the actions of the perpetrator had not carried any risk that the pornographic contents in question might be disseminated, given that he had produced them for "affective" (*affettivo* – that is, his personal) use.

B. Subsequent case-law

31. The case-law developed by subsequent judgments of the Court of Cassation (see, *inter alia*, judgments no. 5774 of 2005, no. 25323 of 2005,

no. 1814 of 2007, no. 49604 of 2009, no. 16340 of 2015, no. 35295 of 2016) consistently reiterated the principle set out by the Court of Cassation in judgment no. 13 of 2000.

32. In keeping with the indications provided in that judgment, the Court of Cassation found that a real risk of dissemination would be present, *inter alia*:

- when the perpetrator had taken several pictures of a minor and had later saved them on the hard disk of his computer, blurring the face of the minor (judgment no. 5774 of 2015);
- when the pornographic content was shared *via* social network (judgment no. 16340 of 2015);
- when a video depicting a minor was stored by the perpetrator on his mobile telephone and then shared with other individuals, offence committed in 2013 (judgment no. 35295 of 2016); or
- when the pornographic material was stored in a shared folder – that is to say a folder that is accessible by others (judgment no. 33298 of 2016).

33. In judgment no. 37835 of 2017 the principle that the production of child pornography intended for the perpetrator's own use fell outside the scope of Article 600-*ter* § 1 of the CC was further reiterated in respect of actions which had occurred in 2014.

34. In its reasoning in judgment no. 27373 of 2012, the Court of Cassation observed in passing that the principle set out by the Court of Cassation in judgment no. 13 of 2000 (namely, that the offence required the assessment of a real risk of dissemination) had already been affirmed by the version of Article 600-*ter* § 1 of the CC that had existed before the amendments introduced by Law no. 38 of 2006 (see paragraphs 17 and 19 above); that principle was particularly relevant in respect of conduct punished by Article 600-*ter* § 3 of the CC (that is, the dissemination of material by a person who did not produce it).

35. In the reasoning in judgment no. 16340 of 2015 (see also in paragraph 32 above) the Court of Cassation expressed doubts as to whether the "specific risk of harm" criterion continued to be relevant in respect of the diffusion of pornographic material on social networks, given their ability to ensure the ubiquitous dissemination of content. Nonetheless, it reiterated the principle set out by the Combined Divisions in 2000 and upheld the conviction of the defendant in that case (since he had posted pornographic photographs of a minor on the social network Facebook – in so doing, facilitating their uncontrolled dissemination).

C. Judgment no. 51815 of 2018 of the Combined Divisions of the Court of Cassation

36. On 30 November 2017 the Third Section of the Court of Cassation – disagreeing with the interpretation made by the Court of Cassation in

judgment no. 13 of 2000 that the type of offence at hand constituted a "specific risk of harm" offence – referred the issue to the Combined Divisions of the same court under Article 618-*bis* of the CCP (see paragraph 24 above).

37. By judgment no. 51815 of 31 May 2018 (which was filed with the court registry on 15 November 2018) the Combined Divisions of the Court of Cassation examined the issue of the classification of the offence of child pornography under Article 600-*ter* § 1 of the CC (see paragraph 20 above).

The Court of Cassation provided an overview on the evolution of the domestic and international legal framework concerning the criminalisation of child pornography (see paragraphs 17-20 above). Within that context, it noted that the version of Article 600-*ter* of the CC in force at the time of the events of the instant case had resulted from the amendments introduced by Law no. 172 of 2012, notably providing a statutory definition of "child pornography' (see paragraph 20 above) in order to bring the domestic statutory framework into line with the parameters set by (i) the Lanzarote Convention (see paragraph 51 below) and (ii) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 (see paragraphs 52-53 below).

38. The Court of Cassation then noted that, aside from the above-mentioned judgments no. 27373 of 2012 and no. 16430 of 2015 (see paragraphs 34 and 35 above) – which did not appear to have been perfectly in line with the well-established case-law – the interpretation of the offence of child pornography has remained consistent over time. The reasoning read as follows:

> "The Court of Cassation (despite the amendments introduced over the years to the provisions at hand) has [consistently] – virtually in the entirety ("*in modo pressoché univoco*") of its case-law – interpreted Article 600-*ter* § 1 [of the CC] as requiring in all cases a specific assessment of [whether there was] a real risk of the dissemination of the material; that element has marked a distinction ["*il discrimine*"] between the above-mentioned offence and the residual offence under Article 600-*quater* of the CC."

39. In addition, the Court of Cassation highlighted the fact that specific elements indicating a real risk of the dissemination of the pornographic content in question (such as the accessibility of several photographs depicting minors in the hard disk of the computer of the perpetrator, the dissemination of the content over social networks, and images shared *via* instant-messaging and other applications) had in the past always been cited to justify convictions.

40. Moreover, the Court of Cassation stated that the need to ascertain a real risk of the dissemination of pornographic contents to secure a conviction under Article 600-*ter* § 1 of the CC should be no longer required (*non è più necessario*), it having been "surpassed by the evolution of the statutory framework and being, in any event, anachronistic", in so far as it pertained to a social context and to a standard of technological development that had radically changed in recent years.

41. From the first standpoint, the Court of Cassation observed that the previous interpretation (adopted in its judgment no. 13 of 2000 – see paragraphs 27-30 above) required that the above-mentioned risk of dissemination be ascertained. This assessment would be necessary in order to mitigate the severity of the penalties provided by Article 600-*ter* of the CC; it would also be appropriate in the light of the broad scope of the provision resulting from the approach whereby the "exploitation" of the minor was intended to equate the "utilisation" of the minor – later expressly inserted into the provision by Law no. 38 of 2006 (see paragraph 19 above). Accordingly, the Court of Cassation held that the production of child pornography for purely personal use could fall within the scope of Article 600-*quater* of the CC – and therefore be punished more leniently (see paragraph 21 above). Moreover, in the absence of a statutory definition of "child pornography' (which had only been introduced in Article 600-*ter* § 7 of the CC by Law no. 172 of 2012 – see paragraph 20 above), the target of the offence had been the production of pornographic content intended for third parties – as indicated by the fact that Article 600-*ter* § 1 of the CC also made reference to pornographic "displays".

42. The Court of Cassation reasoned as follows:

> "Therefore ... 'producing' pornographic material would mean 'producing material intended for use by third parties', as the "perverse viewing' (*la visione perversa*) by an indeterminate group of individuals ... was inherent in the notion of pornography itself (as defined at the time)."

43. From the second standpoint, the Court of Cassation emphasised that nowadays everyone had a device connected to the Internet and had constant access to communication technologies; therefore, any production of images or videos had the potential to be disseminated.

44. The Court of Cassation further observed that by Law no. 38 of 2006, the legislature substituted the conduct of "exploitation" with that of "utilisation" of the minor (see paragraph 19 above) and, in doing so, did not insert into Article 600-*ter* of the CC any explicit reference to the condition that there be a risk of the dissemination of the material. That law, in general, widened the protection afforded to minors with a view to punishing the entirety of the forms of conduct at the root of pornographic material depicting minors.

Consequently, it concluded that the offence of child pornography at issue should be classified as one of "danger" (*reato di danno*), in that using a minor with a view to producing pornographic material did not merely jeopardise but rather – in and of itself – infringed the dignity and the proper sexual development of the minor.

45. The Combined Divisions went on as follows:

> "Setting aside the requirement of a risk of dissemination and characterising the offence as one of danger appears more coherent from the standpoint of the interplay

(*sul piano sistematico*) between Article 600-*ter* and the subsequent Article 600-*quater* of the CC."

As regards the question of whether the former or the latter provision applied (see paragraphs 20 and 21 above), the Court of Cassation held that, under the new approach, the risk of dissemination of pornographic content was immaterial (*nel senso dell'irrilevanza del pericolo di diffusione*) for the purposes of establishing an offence under Article 600-*ter* of the Criminal Code. Consequently, any production of child pornography fell within Article 600-*ter* - including conduct that, under the previous interpretation, would have been classified under Article 600-*quater* - precisely because no risk of dissemination was required. As a result, the latter could now be applied only when the person possessing or having obtained access to pornographic material was a different individual from the one who had produced that material.

46. That said, the Court of Cassation examined the ramifications of what it defined as "the departure from the predominant line of case-law", and acknowledged (citing *Navalnyye v. Russia*, no. 101/15, 17 October 2017, and *Del Río Prada v. Spain* [GC], no. 42750/09, ECHR 2013) that the Court had found to be in breach of Article 7 of the Convention instances of a court overruling a previous interpretation *in malam partem* – that is, of departure from well-established case-law, to the defendant's detriment. In the Court of Cassation's view, however, the situation at hand did not fall into that category. Indeed, it held that ruling out the need to ascertain a real risk of dissemination of the pornographic content (in order for an offence to be made out) did not widen its scope, since such a risk is widespread and since the social and technological framework – as well as the national and supranational framework – had significantly changed.

47. Lastly, the Combined Divisions assessed the situation of the defendant in that case. They observed that, at any rate, his actions had disclosed a real risk of the dissemination of pornographic material, given that he had taken photographs of several minors, he had had a computer that had not been protected by a password and had been accessible to anyone (on which he had stored pornographic content downloaded from the Internet), and he had a "negative personality" (given that he had forged material in order to induce minors to perform in pornographic displays).

D. The Constitutional Court

48. By its judgment no. 91 of 16 April 2024, the Constitutional Court ruled that Article 600-*ter* of the CC was unconstitutional in the part where it did not allow for the penalty for the offence of child pornography to be reduced by two thirds in respect of less serious cases.

49. The Constitutional Court noted the evolution of the statutory framework and of the domestic practice in respect of Article 600-*ter* of the

CC, acknowledged that the Combined Divisions of the Court of Cassation had departed from their well-established case-law as regards the nature of the offence, and deemed that, as a result, the scope of the offence had been widened.

50. In the Constitutional Court's view, this warranted the introduction of a "safety valve" (*valvola di sicurezza*) allowing judges to reduce the imposable penalty in less serious cases, to be identified (*inter alia*) by reference to the absence of signs displaying "the traceability of the fact or even its mere contiguity to the circuit of dissemination of pornographic images or videos depicting children and, *a fortiori*, to the relevant market".

III. INTERNATIONAL LAW

A. Council of Europe

51. The Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse ("the Lanzarote Convention"), which was adopted by the Committee of Ministers on 12 July 2007, entered into force in respect of Italy on 1 May 2013. It is designed to prevent and combat sexual exploitation and sexual abuse of children, protect the rights of child victims of sexual exploitation and sexual abuse, and promote national and international cooperation against sexual exploitation and sexual abuse of children. It requires the States Parties, in particular, to criminalise all forms of sexual exploitation and sexual abuse of children (Articles 18 to 24) and to adopt measures to assist victims. The Convention also lays down certain requirements to be met as regards the investigation and prosecution of such offences. The relevant parts of this Convention provide as follows:

Chapter VI – Substantive criminal law
Article 20 – Offences concerning child pornography

"1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised:

a) producing child pornography;

b) offering or making available child pornography;

c) distributing or transmitting child pornography;

d) procuring child pornography for oneself or for another person;

e) possessing child pornography;

f) knowingly obtaining access, through information and communication technologies, to child pornography.

2. For the purpose of the present article, the term "child pornography" shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes.

3. Each Party may reserve the right not to apply, in whole or in part, paragraph 1.a) and e) to the production and possession of pornographic material:

– consisting exclusively of simulated representations or realistic images of a non-existent child;

– involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use.

4. Each Party may reserve the right not to apply, in whole or in part, paragraph 1.f).

Article 21 – Offences concerning the participation of a child in pornographic performances

1. Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct is criminalised:

a) recruiting a child into participating in pornographic performances or causing a child to participate in such performances;

b) coercing a child into participating in pornographic performances or profiting from or otherwise exploiting a child for such purposes;

c) knowingly attending pornographic performances involving the participation of children.

2. Each Party may reserve the right to limit the application of paragraph 1.c) to cases where children have been recruited or coerced in conformity with paragraph 1.a) or b)."

B. European Union Law

52. Within the European Union context, the Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and the sexual exploitation of children and child pornography is of relevance. The Directive was intended as an instrument providing a comprehensive legal framework covering the prosecution of offenders, the protection of child victims, and the prevention of the sexual abuse and sexual exploitation of children and child pornography (recital 6).

53. The Directive established minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and the sexual exploitation of children, child pornography, and the solicitation of children for sexual purposes. It also introduced provisions to strengthen the prevention of those crimes and the protection of the victims thereof. In its relevant parts, its Article 5 reads as follows:

Article 5
Offences concerning child pornography

"1. Member States shall take the necessary measures to ensure that the intentional conduct, when committed without right, referred to in paragraphs 2 to 6 is punishable.

2. Acquisition or possession of child pornography shall be punishable by a maximum term of imprisonment of at least 1 year.

3. Knowingly obtaining access, by means of information and communication technology, to child pornography shall be punishable by a maximum term of imprisonment of at least 1 year.

4. Distribution, dissemination or transmission of child pornography shall be punishable by a maximum term of imprisonment of at least 2 years.

5. Offering, supplying or making available child pornography shall be punishable by a maximum term of imprisonment of at least 2 years.

6. Production of child pornography shall be punishable by a maximum term of imprisonment of at least 3 years.

...

8. It shall be within the discretion of Member States to decide whether paragraphs 2 and 6 of this Article apply to cases where it is established that pornographic material as referred to in Article 2(c)(iv) is produced and possessed by the producer solely for his or her private use in so far as no pornographic material as referred to in Article 2(c)(i), (ii) or (iii) has been used for the purpose of its production and provided that the act involves no risk of dissemination of the material."

THE LAW

ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

54. The applicant complained that his conviction had been based, to his disadvantage, on a new interpretation of the provision defining the offence that had resulted from the Court of Cassation's departure from its previous well-established case-law. He relied on Articles 6 § 1 and 7 of the Convention.

55. Being the master of the characterisation to be given in law to the facts of the case (see, for example, *Radomilja and Others v. Croatia* [GC], no. 37685/10, §§ 114 and 126, 20 March 2018), the Court considers that the applicant's complaint is to be examined solely under Article 7 of the Convention (compare *Žaja v. Croatia*, no. 37462/09, § 64, 4 October 2016), 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 ... law at the time when it was committed ..."

A. Admissibility

56. The Court notes that the application 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' submissions

(a) The applicant

57. The applicant alleged that at the time of the commission of the acts ascribed to him the case-law of the Court of Cassation had been consistent in requiring the ascertainment of a real risk of the dissemination of pornographic content in question in order to find an individual guilty of the production of child pornography under Article 600-*ter* § 1 of the CC. In this respect, he relied on judgment no. 13 of 2000 of the Combined Divisions of the Court of Cassation (see paragraphs 27-28 above) and on the subsequent domestic practice (see paragraphs 31-32 above), submitting that the mere availability of technical devices alone was never considered as constituting an element capable of indicating a risk of dissemination.

58. In respect of the one judgment noted by the Combined Divisions as not perfectly in line with the relevant well-established case-law (namely, judgment no. 27373 of 2012 – see paragraph 34 above), he argued that it had not even been added to the Court of Cassation's collection of legal maxims (*Massimario della Corte di Cassazione*), which meant that he had not had any opportunity to gain knowledge of it.

59. He then contended that, as a result, he should at most have incurred criminal liability under Article 600-*quater* of the CC, which punished less severely the possession of child pornography (see paragraph 21 above).

60. The applicant accordingly complained that, by virtue of their reliance on the principle set forth by the Combined Divisions of the Court of Cassation by their judgment no. 51815 of 2018 (see paragraphs 37-40 above), the domestic courts had failed to assess whether in his case there had been an actual risk of the dissemination of the pornographic material in question and had retrospectively widened the scope of the offence to his disadvantage.

61. In his view, in 2018 the Combined Divisions of the Court of Cassation had radically changed the interpretation of the offence provided by Article 600-*ter* § 1 of the CC, from a "specific risk of harm" offence to an "abstract risk of harm" offence, on the basis of the widespread availability of technological devices suitable for content sharing.

In doing so, on the one hand, the Combined Divisions (citing the Court's case law, see paragraph 46 above) had assumed and generalised a potential for dissemination that could be lacking in some cases (such as his); on the other hand, they had unforeseeably departed from the Court of Cassation's case-law.

62. According to the applicant, in the light of the unambiguous and well-established domestic practice, it would have been impossible for him at the material time to foresee that he could be convicted of child pornography

under Article 600-*ter* § 1 of the CC (citing *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, § 44, 24 May 2007).

(b) The Government

63. The Government disputed the unforeseeability of the applicant's conviction, maintaining that his actions would also have fallen within the scope of Article 600-*ter* § 1 of the CC under its previous interpretation, as set out by the Combined Divisions of the Court of Cassation in judgment no. 13 of 2000 (see paragraph 28 above).

64. In this connection, they argued that the Court of Appeal had ascertained a real risk of the dissemination of the material in the applicant's possession, pointing out that the pornographic pictures had been saved on his computer and on his mobile telephone; therefore, they could have been shared with an indefinite number of people. To that effect, the Government reiterated that the availability of technological devices had already been deemed to constitute a potential sign of a risk of dissemination of pornographic material (see paragraph 29 above).

65. The Government further contended that, in any event, the interpretation of the offence of child pornography followed in the applicant's case had been foreseeable. They supported this argument by citing the following considerations.

66. Firstly, such an interpretation had been consistent with the wording of Article 600-*ter* § 1 of the CC (see paragraph 20 above), which referred to the mere "production" of child pornography, without referring to any additional requirement.

67. Secondly, the case-law according to which a real risk of dissemination of pornography was required had developed in respect of the original formulation of the provisions thereof, which had postulated conduct exploiting a minor with a view to producing child pornography (see paragraphs 17-18 above), rather than the simple production of child pornography (as the relevant case-law had provided at the material time). Consequently, the applicant could not rely on that case-law in support of his complaint.

68. In that respect, the Government pointed out that the provision of Article 600-*ter* § 1 of the CC had been amended in 2012 (see paragraph 20 above) – that is, less than two years before the commission of the acts attributed to the applicant. Therefore, he had had no reason to be sure that the previous interpretation would maintain its validity *vis-à-vis* the amended version of the provision.

69. The Government then argued that – in the light of the changes that had occurred within the social and technological framework – the interpretation of the Court of Cassation in 2018 of the offence as an "abstract risk of harm" offence could be considered to have been in line with the previous one. They emphasised that under the Italian legal system, judicial practice did not

constitute a source of law and pointed out that, accordingly, the Combined Divisions had not created a new offence, but had merely set forth an interpretation of Article 600-*ter* § 1 of the CC consistent with its wording (adapting that interpretation to reflect the changed technological context).

70. Lastly, the Government contended that prior to 2018 the Third Section of the Court of Cassation on one occasion had already expressed doubts as to the need to assess a real risk of the dissemination of the child pornography (see paragraph 35 above). For this reason, judgment no. 51518 of 2018 by the Combined Divisions should be deemed to constitute the result of a foreseeable case-law development.

2. The Court's assessment

(a) General principles

71. The Court observes that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 77, ECHR 2013 , and *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, § 237, 26 September 2023).

72. Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A).

73. The principle that offences and sanctions must be provided for by law entails that criminal law must clearly define the offences and the sanctions by which they are punished, such as to be accessible and foreseeable in its effects (see *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, § 242, 28 June 2018). This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account (see *Cantoni v. France*, 15 November 1996, § 29, *Reports of Judgments and Decisions* 1996-V; *Del Río Prada*, § 79; and *G.I.E.M. S.r.l. and Others*, § 242, both cited above).

74. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is

highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances (see the above-cited cases of *Del Río Prada*, § 92, and *Yüksel Yalçınkaya,* § 239). Moreover, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see *S.W. v. the United Kingdom*, 22 November 1995, § 36, Series A no. 335-B; *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96 and 2 others, § 50, ECHR 2001-II; and *Yüksel Yalçınkaya*, cited above, § 239). The lack of an accessible and reasonably foreseeable judicial interpretation can lead to a finding of a violation of the accused's Article 7 rights (see, in connection with the constituent elements of an offence, *Pessino v. France*, no. 40403/02, §§ 35-36, 10 October 2006, and *Dragotoniu and Militaru-Pidhorni*, cited above, §§ 43-44; see, as regards penalties, *Alimuçaj v. Albania*, nos. 20134/05, §§ 154-62, 7 February 2012). Were that not the case, the object and the purpose of this provision – namely, that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated (see *Del Río Prada*, § 93, and *Yüksel Yalçınkaya*, § 239, both cited above).

75. The Court finds that, as opposed to cases concerning a reversal of pre-existing case-law, an interpretation of the scope of the offence which was consistent with the essence of that offence must, as a rule, be considered as foreseeable (see *Jorgic v. Germany*, no. 74613/01, § 109, ECHR 2007-III).

76. When examining if the domestic courts' broad interpretation of the text of the law was reasonably foreseeable for the purposes of Article 7 § 1 of the Convention, the Court has regard to whether the interpretation in question was the resultant development of a perceptible line of case-law or its application in broader circumstances was nevertheless consistent with the essence of the offence (see *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 65, 3 December 2019, and *Tristan v. the Republic of Moldova*, no. 13451/15, § 51, 4 July 2023; see also *Total S.A. and Vitol S.A. v. France*, nos. 34634/18 and 43546/18, § 55, 12 October 2023). The domestic courts must exercise special diligence to clarify the elements of an offence in terms that make it foreseeable and compatible with its essence (see *Parmak and Bakır,* cited above, § 77).

77. Lastly, the Court reiterates that it is not its task to substitute itself for the domestic courts as regards the interpretation of domestic legislation or the assessment of the facts and their legal classification. It also stresses, however, that when exercising its supervisory function under Article 7 of the Convention, it will only defer to the conclusions reached by the domestic

courts to the extent that they are compatible with the object and purpose of Article 7 (see *Yüksel Yalçınkaya*, cited above, § 255).

(b) Application of the general principles to the circumstances of the instant case

78. The Court notes that the applicant was found guilty of the offence of producing child pornography under Article 600-*ter* § 1 of the CC, as in force at the relevant time, namely between 2014 and 2016 (see paragraphs 6, 7 and 16 above).

79. At the material time that provision punished whomever, using minors under the age of eighteen years, realised pornographic displays or performances, or produced pornographic material, or recruited or induced minors under the age of eighteen years to take part in pornographic displays or performances, or otherwise gained profit from such performances (see paragraph 20 above). The applicant's actions were classified by the domestic courts as the "production" of pornographic material (see paragraph 9 above). It is not disputed between the parties that the photographs found in the applicant's computer and mobile telephone depicting the niece of his live-in partner amounted to pornographic material.

80. The question the Court is required to answer in the present case is whether the applicant could have known from the wording of the relevant provisions – if need be, with the assistance of the courts' previous interpretation of them and after taking appropriate legal advice – that his conduct would render him criminally liable under Article 600-*ter* § 1 of the CC (see, *mutatis mutandis*, the above-cited cases of *Del Río Prada*, § 80, and *Cantoni*, § 32). In this connection, the Court reiterates that foreseeability must be appraised from the angle of the convicted person at the time of the commission of the offence charged. The foreseeability of judicial interpretation relates to the elements of the offence (see *Sacharuk v. Lithuania*, no. 39300/18, § 151, 23 April 2024 and the references therein).

81. The applicant submitted that in his view, until 2018, domestic practice had provided a consistent interpretation of the scope of Article 600-*ter* § 1 of the CC: namely, that for an offence to be made out, a perpetrator's conduct had to indicate that that perpetrator's character implied that there was a real risk that the pornographic material produced would be disseminated (see paragraphs 28-29 above). He submitted that such an interpretation had become well-established by the time of the commission of the acts ascribed to him.

82. The Court notes that, by virtue of their judgment no. 13 of 2000, the Combined Divisions of the Court of Cassation had ensured that that interpretation became case-law. According to that judgment, perpetrators' conduct had to be assessed on a case-by-case basis in order for it to be verified whether the conduct in question disclosed a real risk of the dissemination of the child pornography; in the absence of such a risk, the production of child pornography would be judged to constitute "possession" under

Article 600-*quater* of the CC – an offence that attracted a significantly less severe penalty (see paragraph 29 above).

83. In this respect, the Court observes that, as a result of his actions being classified as falling within the scope of Article 600-*ter* § 1 of the CC, the applicant faced a term of imprisonment of between six and twelve years; ultimately a penalty of seven years' imprisonment under that Article was imposed on him (see paragraphs 7 and 12 above). The Court takes note of the fact that had he been convicted of possession of child pornography under Article 600-*quater* of the CC, a maximum penalty of three years could have been imposed on him (see paragraph 21 above).

84. The Court reiterates that the fact that the applicant's conduct could have fallen within the scope of another criminal provision does not dispense the Court from assessing whether at the material time he could reasonably have foreseen that he would face being convicted of the offence of production of child pornography under Article 600-*ter* § 1 of the CC (compare *Tristan*, cited above, § 66). Indeed, the qualitative requirements of accessibility and foreseeability implied in the term "law" must be satisfied as regards both the definition of an offence and the penalty that the offence in question carries (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 140, ECHR 2008).

85. The Court takes note of the applicant's contention that the above-noted interpretation had been consistently followed by the domestic courts (and specifically, by the Court of Cassation) until 2018. Moreover, it observes that on 30 November 2017 the issue of the scope of the offence provided by Article 600-*ter* § 1 of the CC was referred again to the Combined Divisions of the Court of Cassation – pursuant to Article 618 § 1-*bis* of the CCP (see paragraph 31 above), which comes into play whenever a division of the court does not agree with a principle of law set out by the Combined Divisions (see paragraph 24 above).

86. The Court acknowledges that in judgment no. 51815 of 2018, the Combined Divisions of the Court of Cassation, while noting two cases which had not been in line with the its well-established case-law, stated that the offence of child pornography had been interpreted as a "specific risk of harm" offence – that is, meeting the criteria set out in their previous judgment no. 13 of 2000 – "virtually in the entirety" of its case-law (see paragraph 38 above).

87. When convicting the applicant under Article 600-*ter* of the CC the courts relied on the Combined Divisions' 2018 judgment (see paragraphs 9, 13 and 16 above). The Court observes that, in that judgment, the Combined Divisions set aside the requirement to ascertain a real risk of dissemination of the pornographic material, deeming that it had been "surpassed by the evolution of the statutory framework and [was], in any event, anachronistic" in so far as it pertained to a social context and to a standard of technological development that had radically changed (see paragraph 40 above).

88. The Court notes in the first place that Combined Divisions' 2018 judgment did not interpret the offence of Article 600-*ter* of the CC in a

manner going beyond the wording of that provision which clearly criminalises the production of child pornography.

89. Moreover, the Combined Divisions reached their conclusion that it was no longer necessary to ascertain a real risk of dissemination of that material on the basis of an overview of the evolution of the domestic and international legal framework concerning the criminalisation of child pornography (see paragraph 37 above). They noted, in particular, that the version of Article 600-*ter* § 1 of the CC in force at the time of the events of the instant case had resulted from the amendments introduced by Law no. 172 of 2012 (see paragraph 20 above) in order to bring the domestic statutory framework into line with the parameters set by (i) the Lanzarote Convention (see paragraph 51 above) and (ii) Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 (see paragraphs 52-53 above).

90. They further noted that the previous interpretation of Article 600-*ter* of the CC (adopted in its judgment no. 13 of 2000 – see paragraphs 27-30 above) had originated from the need to mitigate the severity of the penalties provided by that provision in its version predating the aforementioned amendments introduced in 2012 and within a context where no definition of "child pornography" was provided by the relevant legislation (see paragraph 41 above).

91. Regarding technological developments, the Combined Divisions of the Court of Cassation also placed emphasis on the current widespread availability of a device connected to the Internet and on the constant access to communication technologies to consider that nowadays any production of images or videos had the potential to be disseminated (see paragraph 43 above).

92. At this juncture, the Court reiterates that it is not its task to substitute itself for the domestic courts as regards the interpretation of domestic legislation or the assessment of the relevant facts and their legal classification. It also stresses, however, that when exercising its supervisory function under Article 7 of the Convention, it will only defer to the conclusions reached by the domestic courts to the extent that they are compatible with the object and purpose of Article 7 (see *Yüksel Yalçınkaya*, cited above, § 255).

93. The Court further reiterates that where the domestic courts are called on to interpret a provision of criminal law for the first time, as opposed to cases concerning a reversal of pre-existing case-law, an interpretation of the scope of the offence that was consistent with the essence of that offence must, as a rule, be considered as foreseeable (see paragraph 75 above). Even a new interpretation of the scope of an existing offence may be reasonably foreseeable for the purposes of Article 7 – provided that it is reasonable in terms of domestic law and is consistent with the essence of the offence (see *Saakashvili v. Georgia*, nos. 6232/20 and 22394/20, § 152, 23 May 2024, and the references therein).

94. In this regard, the Court observes that in the above-mentioned judgment no. 51815 of 2018 – referred to by the domestic courts in the applicant's case – the Combined Divisions of the Court of Cassation carefully analysed the domestic and supranational legislation concerning child pornography and extensively explained why they considered the new interpretation to be more in line with the need to increase protection for the dignity and proper sexual development of minors, which they considered to be infringed (in and of itself) by any production of child pornography (see paragraph 44 above; compare *Bavčar v. Slovenia*, no. 17053/20, §§ 152-153, 7 September 2023).

95. The Court further observes that the Combined Divisions overtly addressed the issue of the effects of the new interpretation and held that ruling out the need to ascertain a real risk of dissemination of pornographic content (in order for the offence under Article 600-*ter* § 1 of the CC to be made out) did not widen its scope, since such a risk is now widespread and since the social and technological framework – as well as the national and supranational framework – had significantly changed (see paragraph 46 above). In particular, they considered that, while the need for a case-by-case assessment could have been justified in the past, nowadays it was no longer relevant, given that everyone has access to the Internet and to devices facilitating content sharing (see paragraphs 40 and 43 above).

96. Against this backdrop, the Court is of the view that, rather than reversing a pre-existing line of case-law, by judgment no. 51815 of 2018 the Combined Divisions advanced a novel application of the concept of the production of child pornography to a factual background that was different to the one assessed in their previous judgment (namely, judgment no. 13 of 2000 – see paragraph 27 above) – that is, a context in which the risk of dissemination of pornographic material was always present, being inherent in the availability of a computer, a tablet or a smartphone (compare *Huhtamäki v. Finland*, no. 54468/09, § 50, 6 March 2012).

97. In this regard, the Court further reiterates that Article 7 of the Convention is not incompatible with judicial law-making and does not outlaw the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (see the case-law at paragraph 74 above and also, most recently, *Bădescu and Others v. Romania*, no. 22198/18, § 125, 15 April 2025).

98. In the present case, the Court observes that Article 600-*ter* § 1 of the CC punishes whomever, using a minor, produces child pornography (as defined by § 7 of the same Article, with no further express requirement – see paragraph 20 above). The same action is identified as an offence that States are required to criminalise by the Lanzarote Convention and by Directive 2011/93/EU (see, respectively, paragraphs 51 and 52 above).

99. The Court agrees with the Court of Cassation in so far as it considered inherent in the availability of technical devices a risk of dissemination of pornographic material depicting minors (see paragraphs 87-91 above). Incidentally, it shares the Court of Cassation's concerns as regards the need to ensure the adequate protection of the integrity, well-being and self-development of children, and reiterates that in respect of serious acts such as the sexual abuse of children it falls upon the member States to ensure that efficient criminal-law provisions are in place (see *X and Others v. Bulgaria* [GC], no. 22457/16, § 179, 2 February 2021).

100. In the instant case, the applicant may have fallen victim to a novel application of the concept of "production of child pornography", which holds that that concept is no longer confined to pornography intended for use by third parties. Even so, in the light of the considerations outlined above, the Court considers that that application (i) was based on a reasonable evolutive interpretation of Article 600-*ter* § 1 of the CC, (ii) and was both compatible with its wording and "consistent with the essence of the offence" (see, *mutatis mutandis*, *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 821, 25 July 2013). Neither can the Court discern any flagrant non-observance or arbitrariness in the application of the law in question to the applicant (see, *mutatis mutandis*, *Sacharuk*, cited above, § 159).

In this connection, the Court notes that child pornographic material had been found on the applicant's phone and computer and that the Court of Appeal when dealing with the applicant's argument that his conviction under Article 600-*ter* of the CC had not been foreseeable, observed that it was common knowledge that the risk of dissemination was inherent in the use of instruments suitable for dissemination (see paragraphs 12-13 above).

101. In the light of the specific circumstances of the present case and the foregoing considerations, the Court finds that the interpretation and application of national law by national courts have not produced consequences that are inconsistent with the Convention (see, *mutatis mutandis*, *Bavčar*, cited above, § 157, and the references therein).

102. There has accordingly been no violation of Article 7 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;

2. *Holds*, by four votes to three, that there has been no violation of Article 7 of the Convention.

Done in English, and notified in writing on 16 July 2026, 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) partly concurring and partly dissenting opinion of Judge Sabato;
(b) dissenting opinion of Judges Jelić, Felici and Kučs.

PARTLY CONCURRING, PARTLY DISSENTING OPINION OF JUDGE SABATO

I Introduction

1. I voted against the admissibility of the complaint in the present case because I consider it incompatible *ratione materiae* with Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). Once the formation proceeded to deliberate on the merits of the application, I joined my colleagues in finding that there had been no violation of Article 7 of the Convention, in accordance with the established practice of the European Court of Human Rights ("the Court"), whereby – once the majority has found a complaint admissible – a judge who considers it inadmissible must nevertheless express his or her position by adopting what should be regarded as subordinate reasoning, proceeding on the assumption that the complaint is admissible, although this is not his or her primary view.

2. In this partly concurring, partly dissenting opinion, therefore, I will first address the reasons for inadmissibility (see paragraphs 5-28 below). This will lead me to discuss, in a certain degree of detail, the implications of the present case with regard to the autonomous concepts of "criminal offence" and "penalty" within the meaning of Article 7 of the Convention; the expansionist pressures to which these concepts are undoubtedly subject at present, as a result of certain approaches in European criminal-law and constitutional scholarship; and, conversely, the reasons – particularly in the absence, at present, of the necessary European consensus, even though the Convention is a living instrument – for preserving, at least under the current conditions prevailing in European societies, the traditional approach adopted in the Court's case-law.

3. Having supported inadmissibility, I will nevertheless try to add some considerations to the majority's reasoning as to why – assuming that the complaint was admissible – it would still disclose no violation of Article 7 of the Convention on the part of the respondent State (see paragraphs 29-54 below). Since the case concerned the highly sensitive issue of the criminalisation of conduct involving the production of child pornography, an obligation freely undertaken by the High Contracting Parties under the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS 201 – "the Lanzarote Convention", opened for signature on 25 October 2007, ratified by Italy by Law no. 172 of 1 October 2012 and in force domestically since 23 October 2012, while internationally in force with respect of Italy on 1 May 2013 pursuant to Article 45 § 4 of the same Convention), I will, regrettably, have to address the fact that most of the separate opinion of the dissenting judges, as well as certain passages of the majority judgment, neglected to consider the impact on the respondent State's system of the legislative changes following the

ratification of the Lanzarote Convention. My distinguished colleagues went so far as almost to suggest that, in a continental legal system such as the Italian one, judicial interpretation should be regarded as an element of foreseeability that scarcely admits of any development, and even prevents the immediate implementation of a new legislative framework, such as that adopted by Italy prior to the events of the present case and, moreover, as I have said, required in order to give effect to the Lanzarote Convention. Thus, the approach adopted by the dissenting judges – and, to some extent, in the reasoning of the majority – is highly dangerous in the light of the proper implementation of the obligations of criminalisation imposed by the Lanzarote Convention, to which the Combined Divisions of the Italian Court of Cassation expressly referred in their 2018 judgment. I will try to argue that this approach cannot be justified in the light of the aim – especially as declared by the dissenting judges – of ensuring the purported foreseeability of criminal-law provisions under Article 7 of the Convention.

4. Lastly, I will draw some conclusions (see paragraphs 55-56 below). One concluding remark, however, I wish to set out in advance: should the present case be referred to the Grand Chamber (a possibility which I do not favour as my primary position), it would provide the Grand Chamber with an opportunity not only to deal with the Lanzarote obligations of criminalisation, but also to dispel the grey areas in the Court's case-law concerning the scope of Article 7, grey areas into which, in my view, part of the reasoning adopted by the majority – although I agree with the operative provisions of the judgment – and the entirety of the dissenting opinion nevertheless fall.

II Foreseeability of the "criminal offence" and the "penalty": the evolution of the concept of "penalty" in *Del Río Prada*

5. As is well established, Article 7 § 1 of the Convention embodies the principles that only the law may define a "criminal offence" and prescribe a "penalty" (*nullum crimen, nulla poena sine lege*). This "principle of legality" requires that both "offences" and the corresponding "penalties" – both autonomous concepts under the Convention – be clearly defined by domestic law, a requirement which implies a qualitative dimension, in particular concerning accessibility and foreseeability, which must be satisfied both as regards the definition of an offence and the penalty attaching to that offence or its scope (see, most recently, *Yüksel Yalçınkaya v. Türkiye* [GC], no. 15669/20, § 238, 26 September 2023). In my view, the last major development that these principles underwent in the Court's case-law dates back to the judgment in *Del Río Prada v. Spain* ([GC], no. 42750/09, § 79, ECHR 2013), which concerned the retrospective application of a new judicial interpretation of Spanish law governing the calculation of remission in respect of cumulative prison sentences. The Grand Chamber in that case held that Spain had violated, *inter alia*, Article 7 because the new interpretation

was not merely a change in the execution of the sentence but had the effect of retroactively increasing the applicant's actual period of imprisonment, whereas, at the time of her offences and convictions, the applicable legal framework, as interpreted by the domestic courts, had created for the applicant a sufficiently clear expectation as to the maximum period she would be required to serve.

6. Thus, the Court emphasised the importance of the principle of legality and foreseeability in criminal law by, in a sense, broadening the concept of "penalty": individuals must be able to know, at the time they commit an offence, the nature and extent of the "penalty" that may be imposed, even where this results from the calculation of remissions in respect of cumulative sentences. As is apparent from the separate opinions annexed to the Grand Chamber judgment in *Del Río Prada*, issued by certain judges who dissented wholly or in part and who extensively cited the Court's previous case-law, that earlier case-law had, prior to *Del Río Prada*, excluded legislative or judicial changes of the kind at issue from falling within the scope of the notion of "penalty".

III Since *Del Río Prada*, the Court has continued to declare inadmissible complaints that fall outside the concept of "penalty"

7. Once the notion of "penalty" had been redefined as encompassing not only the duration of the basic sentence (as had already been the case before *Del Río Prada*) but also the effects of cumulative sentences (following *Del Río Prada*), the Court did not hesitate to apply the treatment provided for by the Convention – namely, a finding of inadmissibility for incompatibility *ratione materiae* under Article 35 § 3 (a) – to complaints which, as regards the "penalty", concerned not its "extent" (including the effects of cumulative sentences), but rather aspects unrelated to that essential element.

8. For example, in *Smoković v. Croatia* ((dec.), no. 57849/12, §§ 52-54, 12 November 2019), the Court had the opportunity once again to determine whether a statutory limitation regime fell within the scope of Article 7, and in particular whether the regime in force at the time of the commission of the offence could be affected by subsequent reforms less favourable to the convicted person. The Court reiterated the principle set out in *Coëme and Others v. Belgium* (nos. 32492/96 and 4 others, § 149, ECHR 2000-VII) and *Previti v. Italy* ((dec.), no. 1845/08, 12 February 2013), reaffirming that "the guarantees under Article 7 of the Convention [did] not apply to the rules on statutory limitation periods when the extension of the statutory limitation period occurred prior to the expiry of the initially prescribed statutory limitation period" (see *Smoković*, cited above, § 52).

9. The complaint in *Smoković*, quite correctly in my view, was therefore declared by the Court to be "incompatible *ratione materiae* with the provisions of the Convention" (ibid., § 54). To that extent, the Court

reaffirmed that rules on statutory limitation periods are to be regarded as procedural, in so far as they do not define offences or penalties and may be construed as laying down merely a precondition for the examination of the case: this should be kept in mind, as we shall return to deal with the fact that procedure is not within the scope of Article 7. The Court subsequently went on to say that, concerning statutory limitation periods, Article 7 precludes only the revival of a prosecution after the expiry of such a period (see *Antia and Khupenia v. Georgia*, nos. 7523/10 and 21017/16, §§ 38-43, 18 June 2020, and *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).

10. Since I am dealing with statutory limitation periods and with the fact that, under the Convention, changes to such periods are regarded as procedural in nature, the respondent State's legal framework in this area deserves incidental mention, as it is virtually unique in the European landscape. In Italy, over recent years, the view has become firmly established that statutory limitation is substantive in nature, with the consequence that it constitutes an element which must itself satisfy the requirement of foreseeability. The impact of this approach has been significant as regards its interaction with European Union law. In *Taricco and Others* (C-105/14, EU:C:2015:555, 8 September 2015), the Grand Chamber of the Court of Justice of the European Union (CJEU) initially addressed the matter in accordance with the traditional procedural understanding, requiring Italy to disapply its national limitation regime. However, following a reference from the Italian Constitutional Court, the Luxembourg Court modified its position in *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, 5 December 2017). The CJEU held that Italian courts were not obligated to disapply statutory limitation rules conflicting with European Union law where doing so would infringe the constitutional principle of legality in criminal matters, in particular the requirements of legal certainty and foreseeability. The dialogue between the Italian Constitutional Court and the CJEU in the so-called *Taricco* saga remains one of the clearest examples of constitutional identity shaping the application of European Union law. The incidental reference to the *Taricco* saga here is relevant to my preceding and subsequent observations concerning the scope of Article 7, as it confirms that Europe offers examples of distinct conceptions as to what should fall within the protection afforded by Article 7. I will try to give more examples in this respect (see paragraphs 21-24 below). However, save for any possible application of Article 53 of the Convention, such distinct conceptions cannot be taken into account by the Court, as I shall clarify, in the absence at present of a discernible European consensus, although the emergence of such a consensus in the future cannot be ruled out.

11. Returning now to the use which the Court has made, following *Del Río Prada* (cited above), of findings of inadmissibility, it should be recalled

that, on the very same day on which *Smoković* (cited above) was deliberated, the Court also decided *Abedin v. the United Kingdom* ([Committee] (dec.), no. 54026/16, 12 November 2019), which may be cited here for illustrative purposes. In that case, the Court examined a situation which, at first sight, appeared very similar to *Del Río Prada*, to such an extent that the decision devoted a substantial part of its reasoning to distinguishing between the two situations. According to the Court, the nature and purpose of the new measure applied in the United Kingdom related exclusively to a change in the regime governing early release, which did not form part of the "penalty" within the meaning of Article 7. The new domestic provisions governing the duration of licence conditions therefore amounted to a change in the manner of execution of the applicant's sentence and, as such, did not fall within the scope of Article 7 § 1 (see *Abedin*, cited above, § 36). Once again, therefore, consistently with the case-law predating *Del Río Prada*, the complaint was declared incompatible *ratione materiae* with the provisions of the Convention.

12. The approach of declaring inadmissible *ratione materiae* complaints which do not concern, save only superficially, the notion of "penalty" has, in my view, correctly continued in the Court's case-law to the present day, and I welcome it. Bearing in mind the obvious difficulty of identifying all the relevant precedents, particularly where inadmissibility decisions are delivered by single judges of the Court, I would nevertheless point, by way of illustration, to the rulings in *De Jong v. the Netherlands* ([Committee] (dec.), no. 23106/19, 22 April 2025) and *Van der Zwan v. the Netherlands* ([Committee] (dec.), no. 27231/19, 22 April 2025). In those decisions, among other grounds of inadmissibility, the Court found that, with regard to a new restrictive judicial approach concerning the framework within which the national court examined of its own motion whether the offence was time-barred, "the applicant [had] not demonstrate[d] that the ... change ... [of] practice [had] pertained to the definition of the offence or penalty" (see *De Jong*, cited above, § 13). In my view, this formulation is of particular importance and deserves to be borne in mind: for Article 7 to apply, it must be demonstrated by the applicant that the complaint "pertains" to the definition of the "criminal offence" or the "penalty".

IV What about the scope of the concept of "criminal offence"?

13. While – as we have seen – there are recent examples in the Court's case-law concerning the scope of the autonomous notion of "penalty" under Article 7, there are comparatively fewer recent precedents, following *Del Río Prada* (cited above), addressing the scope of the notion of "criminal offence" for the purpose, in particular, of determining which aspects of that notion must be foreseeable at the time of the commission of the criminal conduct. This is, to some extent, understandable, since *Del Río Prada* concerned the

notion of "penalty", rather than that of "criminal offence". Yet, as I shall endeavour to demonstrate, this latter notion is, given the direction in which some European criminal-law and constitutional scholarship is currently evolving, under a degree of tension at least equal to that affecting the former (see paragraphs 21-24 below).

14. In general, on the notion of "offence", the Court has repeatedly held in recent years that an individual must know from the wording of the relevant legislative provision and, if need be, with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and/or omissions will render him or her criminally liable (and what penalty will be imposed for the act and/or omission – see *Del Río Prada*, cited above, § 79). This was, moreover, a principle expressly relied upon by the dissenting judges themselves in paragraph 3 of their separate opinion in the present case. It need only be added that it is also settled in the Court's case-law that, in principle and subject to certain exceptions, the domestic courts must establish that a mental link discloses an element of liability in the conduct of the actual perpetrator of the offence, as described in the statutory provision (see *Yüksel Yalçınkaya*, cited above, § 242). Acts and/or omissions and, sometimes, a mental link are therefore the "essence of the offence" (see, for example, the references cited in paragraph 16 below).

15. As regards the relationship between the wording of a criminal-law provision and judicial interpretation, the dissenting judges in the present case stated, again in paragraph 3 of their opinion, that "the foreseeability of judicial interpretation relate[d] to the elements of the offence". The same expression appears in paragraph 80, *in fine*, of the majority's judgment. I do not fully understand what this proposition, taken alone and in the given context, is intended to mean. I exclude that it may mean that judicial interpretation is "internal" to the essence of the offence for the purpose of which I have been discussing this notion. However, the phrase, taken as such, does indeed appear in *Sacharuk v. Lithuania* (no. 39300/18, § 151, 23 April 2024), which is the source my distinguished colleagues cite. I suppose that the phrase at issue is taken from a longer formulation – "the foreseeability of judicial interpretation relates both to the elements of the offence ... and to the applicable penalty" – which, with a much clearer significance, appears in a case-law guide prepared by the Registry of the Court with a view to presenting an overview of the Court's case-law, including some of the judgments cited in *Sacharuk*. What is beyond doubt is that the authorities relied upon in *Sacharuk* (ibid., § 151) do not themselves contain the truncated and ambiguous expression reproduced there.

16. Rather, as regards the relationship between the wording of a criminal-law provision and judicial interpretation, the Court has consistently held that it must determine whether the interpretation adopted was consistent with the wording of the provision read in its context and whether it was unreasonable (see, for example, *Yüksel Yalçınkaya*, cited above, §§ 255-68,

concerning the offence of membership of an armed terrorist organisation). As regards the reasonable foreseeability of judicial interpretation, the Court must assess whether the applicant could reasonably have foreseen at the material time, if necessary with the assistance of a lawyer, that he or she risked being charged with and convicted of the offence in question. In particular, it must determine whether the judicial interpretation merely continued a perceptible line of case-law development, provided that such development remained consistent with the "essence of the offence" and could reasonably be foreseen (see *S.W. v. the United Kingdom*, 22 November 1995, § 36, Series A no. 335-B), or whether the domestic courts had instead adopted a novel approach which the applicant could not reasonably have anticipated. Equally, a new interpretation of the scope of an existing offence may be reasonably foreseeable for the purposes of Article 7, provided that it is reasonable under domestic law and remains consistent with the "essence of the offence" (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 791-821, 25 July 2013, concerning a new interpretation of the concept of tax evasion, and – one should not be surprised! – *Sacharuk*, cited above, §§ 156-59, where the Court considered the judicial development concerning the notion of "major non-pecuniary damage to the State" to have been foreseeable).

17. The question arises whether these authorities have truly clarified which "elements" of the "criminal offence" must be foreseeable, and which matters – within the broader framework of statutory provisions and judicial interpretation contributing to the administration of criminal justice in democratic European societies – remain outside the scope of Article 7. To my understanding, in recent years the Court has tended, as a general rule, to adopt a case-by-case approach, no longer declaring complaints concerning aspects of the notion of "criminal offence" to fall outside the scope of Article 7 (as it continues to do where the notion of "penalty" is concerned – see paragraphs 7-12 above), but instead examining such complaints on the merits through the prism of foreseeability. While clarifying what is in the scope of Article 7 and what is not concerning the notion of "offence" can guide national judiciaries and the Court itself in future litigation, the case-by-case approach on the merits creates more uncertainty and does not foster a fruitful dialogue, inspired by the principle of subsidiarity, between the Court and national courts, the latter being frequently called upon to assess – as in the present case – what must be foreseeable and what not. What is to be wished is a clarification concerning the "offence" parallel to what *Del Río Prada* (cited above) and the subsequent declarations of inadmissibility clarified concerning the concept of "penalty".

18. An illustration of the difficulties arising in this field may be found in the Court's practice itself, namely in the Grand Chamber judgment in *Yüksel Yalçınkaya* (cited above). In paragraphs 267 and 268 of that judgment, the majority considered that the domestic courts had, in an unforeseeable manner,

found the offence of membership of a terrorist organisation to have been established solely on the basis of "the use of ByLock" (an electronic communication system), notwithstanding that such use "was technically not part of the *actus reus* of the offence" (ibid., § 267). According to the majority, what was foreseeable was the *actus reus* of membership of the terrorist organisation, namely the establishment of an "organic link" between the accused and the organisation, characterised by continuity, diversity and intensity (ibid., §§ 184 and 264). By contrast, in their powerful partly dissenting opinion, Judge Ravarani and five other colleagues maintained (see §§ 4-8 of that opinion) that the domestic courts had not based the convictions on the proposition that the use of the electronic communication system alone constituted the *actus reus*, but rather on an assessment of all the constituent elements of the offence. In the dissenting judges' view, although shortcomings perhaps concerned the assessment of the evidence, these did not relate to foreseeability under Article 7, but rather to other rights protected by the Convention.

19. In short, the difficulties revealed by *Yüksel Yalçınkaya* in the determination of the relevant elements of the "criminal offence" demonstrate that the time has come for the Court once again to elaborate on the basic concepts underlying the Convention. So far as the foreseeability of a "criminal offence" under Article 7 is concerned, those concepts revolve around the two synonymous, albeit formally distinct, notions of the "essence of the offence" (see the authorities cited above) and of its "constituent elements", whether material (*actus reus*) or mental (*mens rea*), objective or subjective (see *Yüksel Yalçınkaya*, cited above, §§ 254, 258 and 260).

V "What is essential is invisible to the eye"? The tension surrounding what is "essential" and must be foreseeable: development is possible only where a European consensus emerges

20. It is precisely in the identification of the essential elements that the difficulty arises: according to some approaches, the traditional description of criminal conduct, limited to acts and/or omissions, usually supplemented by a mental link, is no longer sufficient for the purposes of the foreseeability of the "criminal offence". On the other hand, the criminal-law systems of the 46 High Contracting Parties to the Convention display significant differences, differences so substantial as, in my view, to require great caution before concluding that – in the logic of subsidiarity and in the absence of a sufficiently developed European consensus – the Court may base its case-law on a form of judicial activism that expands the notion of "penalty". In my view, it is precisely the logic of judicial activism, inspired by approaches unsupported by any European consensus, that led my distinguished colleagues, in the present case, to treat as foreseeable (or not foreseeable) – despite the absence of any precedent and without offering any evolutionary

justification – a non-essential element (the assessment of the risk) that does not pertain to the offence understood as the *actus reus* (see paragraphs 24-28 below). I have already referred, above, to the example of the respondent State in the present case, which, in relation to the particular aspect of statutory limitation in criminal matters, stands virtually alone in requiring foreseeability as a substantive rather than procedural element (albeit in relation to the notion of "penalty" and not to that of "offence"). Even among the judges of the Court, there are divergent views (by way of example, for a vision holding as "illiberal" the concepts on which the majority bases its understanding of Article 7, regarded as "minimal" and inspired by common-law systems, see the dissenting opinion of Judge Pinto de Albuquerque joined by another judge in *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, §§ 90-94, 4 December 2018).

21. For the sake of clarity, however, it must be acknowledged that, particularly in some criminal-law and constitutional scholarship and some limited judicial practice in certain countries, it is argued that the principle of legality should not be confined to requiring merely the description in legislative texts of the prohibited conduct (and, where necessary, of the mental element), but should require the legislature to determine, with sufficient precision and in advance, a wide range of other elements capable of affecting criminal liability and sanctions. According to these approaches, foreseeability should not concern only the essence of the offence and of the penalty, but should be intended as a tool aimed at prohibiting excessively open legislative formulations and at excluding that judicial development could fill in the blanks. From the definition of conduct and penalty, proponents of these views advocate a shift towards the *ex ante* determination of the entirety of the criminal-law response.

22. At this stage of my analysis, I consider it my duty, albeit briefly and without any claim to be exhaustive, to provide some examples illustrating the kinds of elements which, under the approaches to which I have referred – approaches that currently enjoy no European consensus – would fall within the scope of foreseeability:

(a) According to some of these approaches, every criminal-law provision should, in addition to exhaustively describing the conduct as the "offence", determine whether an attempt is punishable (something which in many legal systems is regulated by general provisions), and specify in each case the damage and/or harm that judges should ascertain, as well as indicate which legal interest is protected, what type of injury or risk is relevant, and whether actual harm must be established or whether abstract endangerment suffices. The legislature should, as far as possible, specify the criteria for assessing pecuniary damage or social harm, thereby reducing the scope for interpretative discretion.

(b) A further aspect concerns additional conditions of punishability, which are already often expressly provided for in some systems; but since they are normally subject to change over time – as are, as mentioned, limitation periods – retrospective application should be banned.

(c) The law should also clearly specify the type of offender capable of incurring liability, that is to say, whether the offence is punishable only when committed by a principal offender or whether, for each offence, other participants are punishable in different capacities to be specified, such as instigators or accomplices contributing only in part to the conduct. Many systems regulate such matters through general provisions, which are not always regarded as sufficiently foreseeable.

(d) Furthermore, the law should specify, on a case-by-case basis, the required mental element, whereas here too many legal systems rely on general provisions: for each offence it should be indicated whether direct intent is required, whether eventual intent suffices, whether specific intent is necessary, whether a particular purpose is required, and whether negligence is also punishable.

(e) As regards the foreseeability of the "penalty", some scholars consider that the principle of legal certainty also applies to the statutory sentencing range between minimum and maximum penalties, and observe that an excessively wide range would confer on the judge an almost legislative function. Here too, general sentencing principles provided for in many legal systems are considered insufficient, and it is argued that a legislature which links sentencing ranges to broad concepts such as the seriousness of the act, the intensity of intent and degree of negligence, the consequences of the act, and subsequent conduct, is in reality delegating the determination of the penalty to the judge. For this reason, greater differentiation between levels of seriousness, the introduction of autonomous offences rather than mere aggravating circumstances, and the legislative provision of more detailed sentencing criteria are advocated.

(f) Beyond even the progress achieved by the Court in *Del Río Prada* (cited above, § 79), some scholars and certain constitutional courts consider that foreseeability should also extend to essential aspects of the execution of sentences, in particular that the fundamental conditions governing suspension of execution, conditional release, prison benefits and the like should be laid down by law and not left to purely discretionary decisions.

23. As I have said, I am fully aware of these trends and – I wish to be clear – to a certain extent I personally welcome many of them as the direction in which Europe should evolve. However, as a judge of the Court, I must look to the Court's case-law under Article 7 and apply it faithfully, pending the evolution of the Convention as a living instrument, on the basis of European

consensus, towards higher levels of protection. This cannot, however, occur without serious comparative and empirical analysis demonstrating that one or more of the above "aspirations" towards greater foreseeability of the criminal-law response have become realities across the European continent. Then, and only then, may a new reading of Article 7 take place. At present, I am not aware that any of those aspirations have become a reality in a sufficiently large part of Europe. For the time being, the essentiality of such additional elements within the notion of a "criminal offence" remains, so to speak, invisible.

VI Both the majority and the dissenting judges examined, on the merits, the foreseeability of an element that does not "pertain" to the offence; furthermore, that element regards evidence and is therefore "procedural" in nature: on either basis, it falls outside the scope of article 7

24. The present case is therefore one of the not-few cases, to my knowledge, in which the Court was asked to assess, under Article 7, the foreseeability of a non-essential element of the offence, belonging to the – admittedly not exhaustive – list of future "aspirations" which I have attempted to outline above. More specifically, the issue concerned the element of the type of danger or harm (distinct from both the conduct and the mental element) associated with the offence (see, in particular, paragraphs 28-29, 40 and 44 of the majority judgment). Yet, whatever the type of danger or harm to which the domestic case-law – moreover, in the absence of any express textual reference in the wording of the successive legislative provisions (see paragraphs 17-22 of the majority judgment) – attached criminal liability, such an element did not form part of the constituent elements of the "criminal offence", an autonomous concept under the Court's case-law. Accordingly, I am unable to agree with the assertion made at the end of paragraph 4 of the dissenting opinion in the present case, concerning the fact that the type of harm was a constituent element of the offence. If this reflects a particular domestic conception prior to the ratification of the Lanzarote Convention (see paragraph 29 *in fine* of the majority judgment), such an element of risk does not form part of the "essence of the offence" under the Court's case-law. It follows that, from the Convention's viewpoint, the complaint fell outside the scope of Article 7 and should therefore, as I stated at the outset, have been declared inadmissible.

25. If one were to begin to include – as the dissenting judges expressly advocated, but as the distinguished colleagues in the majority also, to some extent, accepted to do, in so far as they proceeded to examine the complaint on the merits rather than bringing the analysis to an end at the admissibility stage, as I had welcomed – among the constituent elements of the offence components of the judicial assessment which are plainly ancillary, such as the assessment of whether the offence created a risk or caused harm (matters

which may unquestionably be left to judicial interpretation, moreover allowing for a certain margin of appreciation), then the trend towards accepting that many, if not all, aspects of the criminal-law response should be foreseeable – such as those which I have sought to enumerate above and which are at present advocated only in certain strands of criminal-law and constitutional scholarship – would become impossible to arrest. And this, which is in itself a further source of concern, would occur without any corresponding shift having taken place at the level of European consensus.

26. The consequence of such developments in the Court's case-law would be to deprive the majority of European criminal-law systems – which are not presently equipped to accommodate the evolutionary "aspirations" outlined above – of much of their effectiveness, through the undoubtedly valuable, yet potentially overextended, prism of foreseeability. Indeed, it is not difficult to anticipate that, if the Court were to accept, as it did in the present case, that it may rule on the merits of complaints concerning foreseeability of elements of the criminal-law response other than the conduct and the mental element, as well as the penalty within the limits recognised in *Del Río Prada* (cited above, § 79), the door would be opened to findings of impunity through repeated determinations by the Court – inevitably confronted with an ever-increasing volume of litigation – that domestic criminal convictions were unforeseeable.

27. From another perspective, I cannot fail to emphasise that determining whether a particular type of conduct creates a risk to a given legal interest – for example, in the present case, the interest in preventing the dissemination of child pornography – inevitably concerns the assessment of evidence. Consequently, it constitutes, in any event, a procedural matter, in particular whether a presumption of danger is to be applied or concrete proof of danger is required. Procedural matters, however, fall outside the scope of Article 7, as is firmly established in the Court's case-law and as I have already mentioned (see paragraph 9 above).

28. In the light of all the considerations set out above, even if each were taken in isolation, I am surprised that both the majority and the dissenting judges considered themselves entitled to examine on the merits an issue which, in my view, did not fall within the scope of Article 7 and therefore ought not to have been addressed at all. More serious still is the fact that, by suddenly requiring European criminal justice systems – as both the majority and the dissenting judges have seen fit to do – to treat, as an element of the offence that must be foreseeable, an element (namely, the manner in which the risk is established) that had never previously featured in the Court's case-law as a constituent element of the offence, the Court itself has ceased to act as the guardian of foreseeability in criminal matters under Article 7 and has instead become the author of an unforeseeable development in its own case-law.

VII In any event, there would have been no violation of article 7, first, because the wording of the applicable provision did not require any risk to be established (the legislative framework had already been amended in 2006) and, second, because the implementation in Italy of the Lanzarote convention introduced an obligation to criminalise the relevant conduct unconditionally

29. As I have already explained, I must now proceed on the assumption that the complaint was admissible, for the sole purpose of making a number of additional observations. These observations would lead me to concur with the finding of the majority that there has nevertheless been no violation of Article 7. While this was indeed the conclusion reached by the majority, my line of reasoning – I will try to clarify – is different. Needless to say, my observations stand in even sharper contrast to the approach adopted by the dissenting judges, who concluded that there had been a violation on grounds which, with all due respect, I consider to be incorrect.

30. As is apparent from the majority judgment, at the time of the facts (2014-2016; see paragraph 6 of the judgment), Article 600-*ter* of the Italian Criminal Code ("CC"), as amended by the 2012 legislation ratifying the Lanzarote Convention (see paragraph 20 of the judgment), was in force. It unconditionally criminalised, under the offence of "child pornography", "whoever ... using minors ... produce[d] pornographic material", namely "material that, by any means, visually depict[ed] a child engaged in real or simulated sexually explicit conduct" (ibid.).

31. Does the reader of that provision find any reference to the need to establish a risk of dissemination of the material? Certainly not. No such limitation appears in the wording of the provision. The production of child pornography is literally criminalised *as such*, unconditionally.

32. For a number of reasons – including the reformulation of the provision following the ratification of the Lanzarote Convention – the Combined Divisions of the Italian Court of Cassation held, in 2018, that the new provision no longer required the domestic courts to establish any "risk" of dissemination of the material (as is needed, in some cases, *vis-à-vis* a *reato di pericolo*, a domestic doctrinal category which has further subcategories), since the offence (at least following the implementation of the Lanzarote Convention) constituted, under the same domestic doctrine, a "harm-based offence" (*reato di danno*) (see paragraphs 44 and 45 of the judgment). The mere production of child pornography was therefore sufficient for the offence to be established.

33. The dissenting judges based their disagreement on the view that the 2018 judgment brought about, allegedly, a change in the domestic case-law, said to have undermined foreseeability to the detriment of the applicant, by comparison with a judgment delivered by the same Combined Divisions in 2000 (see paragraphs 20 et seq. of the judgment and paragraphs 5 and 6 of

the dissenting opinion). Let me state at once that such a change undoubtedly occurred, and this was expressly acknowledged by the Italian Constitutional Court itself (see paragraph 49 of the judgment). But does that necessarily mean that the offence became unforeseeable? I do not believe that it does. And not only because – as I have already explained – the assessment of a risk or a harm does not fall within the "essence of the offence" or, alternatively, because it is an evidential element not covered by Article 7, but because of a legislative change.

34. In the view of the Combined Divisions in 2018, the new wording of the provision, introduced following the ratification of the Lanzarote Convention (and the transposition of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and the sexual exploitation of children and child pornography), as compared with the previous versions of Article 600-*ter* of the CC, in force from 1998 and 2006 respectively (see paragraphs 17 and 19 of the judgment), was itself sufficient to justify a new understanding of the offence, under which no additional element of danger was required to be established. It is regrettable that, whereas the majority briefly acknowledged this consistency between the domestic legislation and the relevant European and international framework (see paragraph 89 of the judgment), the dissenting judges focused almost exclusively on the alleged judicial change and paid virtually no attention to the legislative amendment, referring to it only to downplay its importance. Indeed, in paragraph 7 of the dissenting opinion, they pointed out that the Combined Divisions themselves had acknowledged that the previous line of case-law had continued "despite the amendments introduced over the years", and that the impact of the Lanzarote Convention had thus been recognised only six years after its ratification. In this connection, however, I must observe – and I shall return to this point later – that: (i) the Italian criminal justice system is founded upon legislation enacted by parliament, not upon judicial precedent; (ii) it is entirely normal that, following legislative reform, some time is required for the case-law to settle; (iii) moreover, the very purpose of the Combined Divisions is to resolve conflicting lines of authority within the case-law, while the existence of such divergences does not, in itself, dispense with the obligation to comply with the criminal law in its essence. As regards the emphasis placed on the fact that the Combined Divisions intervened six years after the ratification of the Lanzarote Convention, I do not consider that this is the correct way to assess the impact of reforms and conflicting case-law on legal certainty. The relevant starting point is not the date of the legislative reform (or of the Lanzarote Convention's ratification), but rather the point at which conflicting judicial decisions began to emerge. Indeed, as is apparent from paragraphs 32 and 33 of the majority judgment, before 2018 only two judgments of the Court of Cassation concerning offences committed after that Convention's ratification are identified, and those judgments date from 2016 and 2017 – that is, only

one or two years before the Combined Divisions delivered their ruling (compare, in this respect, *Lo Fermo v. Italy* (dec.), no. 58977/12, §§ 58-59, 20 June 2023, where a conflict in the case-law lasting four years was not regarded as long-standing, and *Episcopo and Bassani v. Italy*, nos. 47284/16 and 84604/17, §§ 97-112, 19 December 2024, where a more prolonged conflict was considered long-standing but ultimately regarded as having been adequately resolved by the Combined Divisions).

35. I shall return in a moment to the significance and implications of the Lanzarote Convention and shall now leave aside, for the sake of argumentation, the impact of the relevant European and international instruments. Indeed, the wording of Article 600-*ter* of the CC had itself undergone textual amendment, and in a manner clearly demonstrating the irrelevance of any requirement of dissemination. More specifically, the 1998 version – on which the Combined Divisions based their 2000 judgment – used language which made it possible to derive, through the use of a particular verb ("to exploit"), that the production of child pornography was criminalised in connection with the "exploitation" of the child, that is to say, from the perspective of financial or comparable gain. Against that background, it is understandable that the domestic courts considered it necessary – although the statutory text did not expressly so provide – to establish the existence of a risk of dissemination of the material. However, as early as 2006, "dissemination" itself became the subject of a specific aggravated duplicate of the offence (see paragraphs 26-28 of the judgment), a duplication of provisions which, in itself, contradicted the proposition that the risk of dissemination was already (and according to the dissenting judges, remained) implicit in the wording of the basic offence. In this regard, neither the majority nor the dissenting judges attached sufficient weight to the fact that the approach adopted by the Combined Divisions in 2000 had been developed under the 1998 version of the legislation, a provision which had already become obsolete following the 2006 reform.

36. More important still is the 2012 version of Article 600-*ter*, introduced through the legislation ratifying the Lanzarote Convention, which was interpreted by the Combined Divisions in 2018 and is the version applicable to the facts of the present case. The majority judgment explains, albeit succinctly, in paragraphs 37 and 41, that the new text no longer contains the notion of "exploitation", which provided the basis for the original judicial interpretation, an interpretation already undermined by the 2006 amendments. It further explains that, following the ratification of the Lanzarote Convention, the new definition of child pornography introduced by that Convention and incorporated into Italian law required the unconditional and autonomous criminalisation of the production of child pornography. Faced with such a legislative reform, could a person reasonably foresee that he or she might incur criminal liability irrespective of any risk of

dissemination? What significance could a line of domestic case-law developed more than a decade earlier still reasonably retain?

VIII Some doubts concerning the analysis of the domestic case-law

37. Yet, when reading paragraphs 81-82 and 87-88 of the judgment, and even more so the dissenting opinion, the reader is left with two distinct impressions. The first is that Italy is a country governed by judge-made law, comparable to common-law jurisdictions (although, even in those jurisdictions, the role of judge-made law has been steadily diminishing) or to those few continental legal systems in which the application of the law is still derived from medieval legal sources (albeit, in reality, predominantly in the field of private law). This is plainly not the case in Italy, where judicial decisions are not, as such, a source of law. What purpose, then, is served by the lengthy discussion undertaken by my distinguished colleagues concerning the coherence and continuity of the domestic case-law, when, in 2012, the provisions of the Lanzarote Convention entered the domestic legal order through an express amendment to Article 600-*ter* of the CC? One is reminded here of the aphorism by Julius Hermann von Kirchmann, later quoted by Carl Schmitt: "*Drei berichtigende Worte des Gesetzgebers, und ganze Bibliotheken werden zu Makulatur*" ("Three corrective words by the legislator and whole libraries become waste paper").

38. Yet even when one confines oneself to reading the majority judgment alone, leaving aside the dissenting opinion, it is necessary to reach paragraph 87 of the judgment (and thereafter paragraph 94) before finding any reference to the reasoning of the Combined Divisions in their 2018 judgment, which – as I have already observed – expressly relied on the intervening change in the statutory framework (see paragraph 37 of the judgment) and, *ad abundantiam*, on the anachronistic nature of the previous case-law because of technological developments (see paragraphs 39-40 of the judgment). It is only in paragraph 88 that the majority devoted a few words to the language of the statutory provision, which, in my opinion, and especially in a continental legal system, is the decisive consideration for the purposes of foreseeability – judicial interpretation being of only secondary importance.

39. This leads me to one further observation. As I have already noted, neither the 2012 version of Article 600-*ter* nor its earlier versions expressly referred to the risk of dissemination of child pornography as an element of the criminal offence (leaving aside, again, the issue of the "essence" of it). I would therefore point out – something which my distinguished colleagues appear to have overlooked – that, according to the Court's settled case-law, where the wording of a criminal provision is clear, even a long-standing judicial approach which neutralises or attenuates the practical application of that provision (paragraph 90 of the judgment itself refers to the Combined

Divisions' partly critical observation that, in an earlier period, the domestic courts had "mitigated" the severe penalties laid down by the legislature in this area), and which may even have developed into a form of *de facto* partial decriminalisation of certain conduct, is not capable of absolving a convicted person from criminal liability or rendering the ensuing conviction unforeseeable for the purposes of Article 7 (see *Khodorkovskiy and Lebedev*, cited above, §§ 816-20, and *Sacharuk*, cited above, § 153). I therefore find it difficult to understand, in particular, the approach adopted by the dissenting judges, who appear to have proceeded on the basis of an understanding of the Italian legal system that does not adequately reflect the respective constitutional functions of the legislature and the judiciary.

40. A second impression that the reader may derive from both the judgment and the dissenting opinion is that the parties devoted considerable attention throughout the proceedings to the evolution of the domestic case-law on the issue before the Court. I do not believe that this was in fact the case. This circumstance, regrettably, gives rise to even more serious doubts on my part as to the sources upon which – extensively in the dissenting opinion and, albeit less evidently, also in the majority judgment – the legal reasoning was ultimately founded. I note, in this connection, that the parties referred only sparingly to the domestic case-law in their written submissions. Restricting myself to the application form, the applicant relied exclusively on the judgments of the Combined Divisions delivered in 2000 and 2018, together with the interlocutory order preceding the latter judgment, which indeed contained a survey of the relevant authorities. Likewise, the Government relied, in their initial observations, only on those two judgments of the Combined Divisions, while adding, in paragraph 42 of their observations, an important reference to a judgment of the Court of Cassation delivered in 2012, which, according to the Government – and, in my view, correctly – demonstrated that, even under the earlier version of Article 600-*ter*, the allegedly "lenient" line of authority requiring proof of danger was by no means unanimous. That 2012 judgment is referred to in paragraph 34 of the majority judgment in a manner that is, unfortunately, so unclear that the reader is unable to ascertain whether the Government's submission is well founded.

41. While it is not for me, in the present opinion, to resolve that lack of clarity, I nevertheless consider it appropriate to observe that the methodology followed in the present case was not entirely satisfactory. Particular attention should be paid in this regard to the detailed survey contained in paragraphs 31-35 of the majority judgment and to the numerous references to domestic case-law made by the dissenting judges. If the Government themselves maintained that the domestic case-law was by no means uniform (I refer once again to their reliance on the 2012 judgment of the Court of Cassation), while the Combined Divisions expressly acknowledged (see paragraph 38 of the judgment) the existence of two previous judgments of the

Court of Cassation reaching the opposite conclusion, on what basis could my distinguished colleagues assess, with such confidence, the state of the Italian case-law as a whole?

42. Moreover, given that, in a legal system in which the case-law of the Court of Cassation is not formally binding and in which the decisions of the first-instance and appellate courts are, at least numerically, of considerable significance, why were the Court's *proprio motu* inquiries into case-law not extended to the judgments of those lower courts, with the resulting material, if considered relevant, subsequently being disclosed to the parties for observations?

43. Thus, I consider that the methodology adopted in the present case suffered from a number of shortcomings, affecting not only the procedural approach but also the substantive assessments made by the dissenting judges and, to a certain extent, by the majority itself.

IX The missed opportunity to consider the Lanzarote Convention, as incorporated into domestic law and imposing unconditional obligations of criminalisation

44. My final observation concerns the fact that, although the Combined Divisions of the Italian Court of Cassation attached considerable importance to the circumstance that the Italian legislative framework had been amended following the ratification of the Lanzarote Convention (as well as the transposition of the above-mentioned European Union Directive), the reasoning of the majority – while referring to and citing that Convention among the relevant legal sources – did not accord this aspect the emphasis it deserved. The dissenting judges, for their part, as I have already pointed out (see paragraph 34 above), took into account only the fact that the Combined Divisions had delivered their judgment six years after the ratification of the Convention, a line of reasoning which – as I have tried to demonstrate – is flawed. In my view, this represents a missed opportunity.

45. In this connection, I would respectfully refer to the concurring opinion of which I was part in the case of *X and Others v. Bulgaria* ([GC], no. 22457/16, 2 February 2021) and to the authorities cited therein. It was observed in that opinion that "the principles set out in the Lanzarote Convention (and the documents issued by the Lanzarote Committee as a follow-up to that international instrument)" may be "crucial" (ibid. § 10). Although it is not the Court's "task to review governments' compliance with instruments other than the European Convention on Human Rights and its Protocols", and in particular the Lanzarote Convention – "which, like the Convention itself, was drawn up within the Council of Europe" – the Lanzarote Convention may nevertheless "provide it with a source of inspiration", "like other international treaties" (ibid., § 11). Moreover, "[a]ccount should be taken, as indicated in Article 31 § 3 (c) of the Vienna

Convention on the Law of Treaties, of 'any relevant rules of international law applicable in relations between the parties'", in particular those concerning the international protection of human rights (ibid.). That concurring opinion also emphasised that "the Court ha[d] already referred to the Lanzarote Convention as a source of inspiration" (ibid.).

46. In the context of the present case, the Lanzarote Convention is of particular importance because it is one of the international instruments that has attracted considerable attention in contemporary public international law scholarship on account of its inclusion of genuine obligations to criminalise and to punish certain conduct by means of effective, proportionate and dissuasive sanctions (Article 27). It requires States, both within Europe and beyond, to adopt specific legislation and to take concrete measures to prevent sexual violence, protect child victims and prosecute perpetrators.

47. The technique of incorporating obligations to criminalise specific forms of conduct into international treaties constitutes an important means of promoting human dignity at the global level. It seeks to foster greater convergence among domestic legal systems by encouraging the dissemination of a common culture of protection for the rights of children and their effective safeguarding.

48. More specifically, Article 20 § 2 of the Lanzarote Convention provides the definition of child pornography, stating:

> "For the purpose of the present article, the term 'child pornography' shall mean any material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child's sexual organs for primarily sexual purposes."

Article 20 § 1, meanwhile, solemnly lays down the corresponding obligation of criminalisation, providing:

> "Each Party shall take the necessary legislative or other measures to ensure that the following intentional conduct, when committed without right, is criminalised:
>
> a producing child pornography;
>
> b offering or making available child pornography;
>
> c distributing or transmitting child pornography;
>
> d procuring child pornography for oneself or for another person;
>
> e possessing child pornography;
>
> f knowingly obtaining access, through information and communication technologies, to child pornography."

49. It is important to note that, as explained in paragraph 133 of the Explanatory Report to the Lanzarote Convention, in the section devoted to Article 20, that provision "is inspired by the Council of Europe's Convention on Cybercrime (Article 9 – offences related to child pornography) which aims at strengthening protective measures for children by modernising criminal law provisions to prevent computer systems from being used to further the sexual abuse and exploitation of children".

50. In this regard, I would point out that the Combined Divisions, in their 2018 judgment, rightly attached considerable importance to technological developments, observing that the evolution of digital technologies had rendered obsolete any approach centred on the physical media used for the production of child pornography. In today's digital society, it is necessary instead to take account of the inherently unlimited capacity for dissemination associated with computer systems and other electronic devices.

51. Furthermore, paragraph 135 of the Explanatory Report makes it perfectly clear that Article 20 § 1 (a) "criminalises the production of child pornography" *as such*, without requiring any additional element whatsoever. There is, in particular, no suggestion that, beyond the mere production of such material, courts must establish the existence of a risk of dissemination. As the Explanatory Report explains, this approach is necessary in order to "combat acts of sexual abuse and exploitation at their source" (ibid.). It is worth recalling that this unconditional obligation of criminalisation was expressly relied upon by the Combined Divisions in support of their conclusion that the legislative reform introduced by the Italian ratification of the Lanzarote Convention necessarily justified a corresponding evolution in the judicial interpretation of Article 600-*ter* of the CC.

52. The Lanzarote Committee – that is, the Committee of the Parties to the Lanzarote Convention – is the body established to monitor whether the Parties effectively implement that Convention, and entrusted with identifying good practices. While on a more general level the second monitoring round of the implementation of the Lanzarote Convention focused on the protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies, it is interesting here to note that in its Interpretative Opinion on the applicability of the Lanzarote Convention to sexual offences against children facilitated through the use of information and communication technologies (ICTs) (adopted on 12 May 2017), the Committee specifically called on Parties to ensure effective investigation and prosecution of ICT-facilitated sexual exploitation and sexual abuse by providing resources and training to the responsible authorities.

53. In this regard, in paragraphs 12 and 13 of that interpretative opinion, the Committee held:

> "12. The existing offences in the Lanzarote Convention remain criminalised by national law in the same way, whatever the means used by sexual offenders to commit them, be it through the use of ICTs or not, even when the text of the Lanzarote Convention does not specifically mention ICTs;
>
> 13. In implementing the Lanzarote Convention, Parties should ensure appropriate responses to technological developments and use all relevant tools, measures and strategies to effectively prevent and combat sexual offences against children which are facilitated through the use of ICTs ..."

54. Let me here then note that the Combined Divisions' approach – in the part in which they considered the impact of ICTs on the construction of the new legislative provision – is totally consistent with the Lanzarote Committee's opinion.

X Concluding Remarks

55. To conclude, I wish to reiterate that, for all the reasons I have attempted to set out above, I remain convinced that the present complaint fell outside the scope of the notion of "criminal offence" under Article 7 of the Convention and should therefore have been declared inadmissible as incompatible *ratione materiae*. Nevertheless, assuming that the complaint was admissible, I considered it important to explain why, in my view, no violation of Article 7 could in any event have been found. I have tried, however, to base that conclusion on considerations which, I respectfully suggest, deserve greater emphasis than they received in the judgment, as regards the proper understanding of the development of the domestic legal framework, including the respective roles of legislation and judicial interpretation in a continental legal system.

56. Above all, however, I believe that considerably greater weight should have been attached to the respondent State's implementation of the unconditional obligations of criminalisation arising under the Lanzarote Convention, which constituted the very background against which the domestic legislative reform and the subsequent interpretation adopted by the Combined Divisions had to be understood. It was ultimately this consideration that chiefly prompted me to set out my separate reasoning. While the Court must, of course, remain faithful to the Convention alone, it should also remain fully conscious that, in interpreting its provisions, it operates within a broader international legal order in which States have undertaken common commitments to combat the sexual abuse and exploitation of children. Greater sensitivity to those obligations is, in my view, indispensable if the Convention is to continue providing coherent and effective protection in one of the areas where the international community, especially in Europe, has to speak with a common voice.

DISSENTING OPINION OF JUDGES JELIĆ, FELICI AND KUČS

1. The applicant was convicted – in respect of acts taking place between 2014 and 2016 (see paragraph 6 of the present judgment) – of the offence of the "production of child pornography" (Article 600-*ter* § 1 of the Criminal Code ("the CC")). He alleged, in particular, that (a) at the time of the commission of the acts ascribed to him, the case-law of the Court of Cassation had consistently required the ascertainment of a real risk of the dissemination of the pornographic content in question in order to find an individual guilty, relying on judgment no. 13 of 2000 of the Combined Divisions of the Court of Cassation (and on the subsequent domestic practice, see paragraphs 27-28 and 31-32 of the present judgment), and (b) that the mere availability of technical devices alone had never been considered as constituting an element capable of indicating a risk of dissemination.

2. With all due respect to our colleagues in the majority, we are unable to concur with either their reasoning (see, in particular, paragraphs 99-100 of the present judgment), or their conclusion that there has been no violation of Article 7.

3. We agree with the approach and general principles established in the judgment, in particular in paragraph 80. It was necessary to ascertain whether the applicant could have known from the wording of the relevant provisions – if need be, with the assistance of the courts' previous interpretation of them and after taking appropriate legal advice – that his conduct would render him criminally liable under Article 600-*ter* § 1 CC (see, *mutatis mutandis*, *Del Río Prada v. Spain* [GC], no. 42750/09, § 80, ECHR 2013, and *Cantoni v. France*, 15 November 1996, § 32, *Reports of Judgments and Decisions* 1996-V). At the same time, it should be reiterated that foreseeability must be appraised from the perspective of the convicted person at the time of the commission of the offence with which he or she has been charged, and that the foreseeability of judicial interpretation relates to the elements of the offence (see *Sacharuk v. Lithuania*, no. 39300/18, § 151, 23 April 2024, and the cases cited therein).

4. The Court has always understood the term "law" in its "substantive" sense, not its "formal" one. It has thus included both enactments of lower rank than statutes and unwritten law (see *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010): the "law" is the provision in force as the competent courts have interpreted it (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 139, ECHR 2008). Accordingly, having regard to the legal provision in force (see paragraph 79 of the present judgment) and to its interpretation by the domestic courts, we note that at the material time – namely, between 2014 and 2016 – the offence provided for in Article 600-*ter* § 1 CC was interpreted in a manner requiring that the production of child pornography be accompanied by a real risk of dissemination of the pornographic material in

question (that is to say, that the material be intended for use by third parties). In fact, in the absence of such a risk, a different, less severe, criminal provision – namely Article 600-*quater* – would have applied (see paragraphs 29 and 45 of the present judgment). In other words, such a risk was a constitutive element of the offence of which the applicant was convicted.

5. When convicting the applicant under Article 600-*ter*, the national courts relied on judgment no. 51815 of 2018 of the Combined Divisions of the Court of Cassation (see paragraphs 9, 13 and 16 of the present judgment), in which it had expressly set aside the requirement to ascertain a real risk of dissemination of the pornographic material. The Combined Divisions deemed that that requirement had been "surpassed by the evolution of the statutory framework and [was], in any event, anachronistic" (see paragraph 40 of the present judgment). It is of decisive importance that the Combined Divisions themselves clearly stated that (a) they had set aside the requirement to ascertain the risk of the dissemination of the pornographic material, (b) that requirement had become irrelevant, and (c) as a result, the interplay between Article 600-*ter* and Article 600-*quater* CC had changed. In particular, the scope of the latter had become narrower, given that any production of child pornography would now be punishable under the former. Even the Constitutional Court, in its judgment no. 91 of 2024, acknowledged that the Combined Divisions of the Court of Cassation had departed from their well-established case-law as regards the nature of the offence provided for in Article 600-*ter* § 1 CC. The Constitutional Court consequently considered that, as a result, the scope of the offence had been widened (see paragraph 49 of the present judgment). We cannot, as a result, endorse the argument that no reversal of case-law occurred; on the contrary, the Court of Cassation departed from its previous case-law (see, *mutatis mutandis*, *Del Río Prada*, cited above, § 104).

6. This departure from well-established case-law was not foreseeable. As we have already pointed out (see paragraph 4 above), the "law" in the sense in which the term is used in the Convention includes in this case the unwritten law or case-law that had been applied consistently in the domestic practice for many years until the Combined Divisions of the Court of Cassation set out a different approach (see, *mutatis mutandis*, *Del Río Prada*, cited above, § 115). Therefore, the mere fact that the new approach was covered by the wording of the relevant provision cannot suffice to satisfy the Court that it was foreseeable.

7. In this connection, we attach paramount importance to the fact that, in judgment no. 51815 of 2018, the Combined Divisions themselves stated that the provision of Article 600-*ter* CC had been consistently interpreted as requiring in all cases a specific assessment of whether there was a real risk of the dissemination of the material "despite the amendments introduced over the years to the provisions at hand" (see paragraph 38 of the present

judgment). The Court of Cassation departed from its case-law six years after the previous amendments to the text of Article 600-*ter* § 1 CC, and several years after the Lanzarote Convention had been ratified by Italy (see paragraph 51 of the present judgment) and Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (see paragraph 52 of the present judgment) had entered into effect (compare *Del Río Prada*, cited above, § 114). In the light of these periods of time that had elapsed, it is difficult to state that the foreseeability of the Court of Cassation's departure from the case-law was based on amendments to the CC or the enactment of supranational provisions. The approach set out by the Combined Divisions in 2000 continued to be used (by the Court of Cassation) after the statutory amendments to Article 600-*ter* CC and after the issuance of the above-mentioned international instruments (see judgment no. 35295 of 2016, referred to in paragraph 32 of the present judgment)

8. The applicant submitted that, in accordance with the Court of Cassation's practice subsequent to the Combined Division's judgment no. 13 of 2000, the mere storage of pornographic content on a device suitable for its dissemination had not been considered to constitute an element that was in itself capable of indicating a real risk of dissemination (see paragraph 57 of the present judgment). This submission was, first, not specifically disputed by the Government, and, secondly, appears to be consistent with the findings of the Court of Cassation in the relevant judgments (see paragraph 32 of the present judgment). Additionally, the Court of Cassation in judgment no. 16340 of 2015 (see paragraph 35 of the present judgment) – referred to by the Combined Divisions in their 2018 ruling – , while expressing doubts as to whether the "specific risk of harm" criterion continued to be relevant, having regard in particular to social networks' ability to ensure the ubiquitous dissemination of content, did not set that criterion aside and followed the established approach, endorsing the reasoning of the lower court that had carried out an assessment of the risk of dissemination (see paragraph 35 of the present judgment). In consequence, in our view, that judgment could not have had a bearing on the applicant's possibility of foreseeing the departure from the case-law complained of.

9. Coming to the very specific circumstances of this case, it should be noted that the Court of Cassation unequivocally confirmed that the lower-instance courts had relied on the "new" interpretation of the scope of Article 600-*ter* CC when it dismissed the applicant's grounds for lodging an appeal on points of law on the basis of the affirmed foreseeability of that interpretation (see paragraph 16 of the present judgment). In particular, the Genoa Court of Appeal expressly reiterated the principle set forth by the Combined Divisions of the Court of Cassation in judgment no. 51815 of 2018, according to which the offence at hand had to be classified as an "abstract risk of harm" offence. That court dismissed the applicant's

complaint that his conviction had been the result of a reversal of case-law, reiterating the Combined Division's affirmation that the risk of the dissemination of child pornography should be considered inherent in the possession of instruments capable of carrying out such dissemination (see paragraphs 13-14 of the present judgment).

10. Accordingly, the present case does not concern the reasonable interpretation of a provision, consistency with the essence of the offence or a lack of pre-existing well-established case law. That would not have raised an issue under Article 7 (compare, among many other authorities, *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 821, 25 July 2013; *Total S.A. and Vitol S.A. v. France*, nos. 34634/18 and 43546/18, § 60, 12 October 2023; and *Delga v. France*, no. 38998/20, § 66, 9 July 2024). It was instead a situation of a clear reversal of pre-existing case-law (see *Jorgic v. Germany*, no. 74613/01, § 109, ECHR 2007-III, and *Bavčar v. Slovenia*, no. 17053/20, § 145, 7 September 2023). The scope of Article 600-*ter* § 1 CC was not being assessed for the first time or following new circumstances in the 2018 Combined Division's judgment: on the contrary, the specific aim of that judgment was to reverse a pre-existing line of case-law which was considered to no longer be valid (see paragraph 36 of the judgment) but which, nonetheless, had been consistently reiterated over time. The reasons provided in that judgment clearly support the change in interpretation, but they were not in themselves sufficient to render that change foreseeable for the applicant, in the absence of any indication that the Court of Cassation would depart from its well-established case-law and that as a result his actions would be punished under Article 600-*ter* § 1 CC (see *Del Río Prada*, cited above, § 117; *Dragotoniu and Militaru-Pidhorni v. Romania*, nos. 77193/01 and 77196/01, § 44, 24 May 2007; and *Pessino v. France*, no. 40403/02, §§ 36, 10 October 2006).

11. In view of the foregoing, we believe that there has been a violation of Article 7 of the Convention.