The Fork in the Road After Strasbourg: Effective Remedy or Moral Victory?

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The Fork in the Road After Strasbourg: Effective Remedy or Moral Victory? Whether Member States Really Comply With the Duty to “Abide by the Final Judgment” of the European Court of Human Rights and How the Compliance With This Duty Influences European Integration. The Italian Perspective.

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ABSTRACT

The article deals with the enforcement of judgments of the European Court of Human Rights in domestic systems, particularly focusing on the Italian law. After a historical background on European integration and Italy’s leadership role in this process (§ 1), it considers the main provision governing the matter, Art. 46 of the European Convention on Human Rights (that provides for the duty to “abide by the final judgment of the Court”), showing how the way this provision is construed influences European integration (§ 2).

Next, the article considers Italy, that – unlike other States – has never allowed any form of review through legislative reform, although the gap in the law has started being filled by the courts (§ 3). The principal thesis is that the only way to meet Art. 46 requirements is to allow a review and an immediate suspension of the enforcement of a judgment, with no conditions and for any kind of proceeding, whenever the European Court found it was in violation of the Convention (§ 4). Going back to Italy, the proposed approach is then contrasted to the bills on the matter pending before the Italian Parliament (§ 5).

Lastly, the article takes up European integration, arguing that the proposed legislative reform would jump-start it again, letting Europe follow the same path that Hamilton, Madison, and Jay drew for America in *The Federalist Papers* (actually a major inspiration for several fathers of European integration, like the Italians Spinelli, Rossi, and Einaudi) (§ 6).

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1. The origins and the state of the art of European integration: a short summary

If one takes the long view, the process of political integration in Europe has achieved outstanding results. But more recently, this process has come to a serious standstill, due to the failure to ratify the Constitutional Treaty of 2004 (because of its rejection by France and the Netherlands in two referenda held in 2005), and later the Treaty of Lisbon of 2007 (because of its rejection by the Irish people in a referendum held in 2008).

These two treaties sought to take significant steps towards an ever closer relationship among European countries. But even without these steps, what Europe has accomplished over the last six decades in terms of political stability and economic growth is still absolutely remarkable. Indeed, one has to consider what the history of this continent had been over the previous centuries: at least since modern nation states arose—a process that began already in the 13th century,—they were almost permanently at war with each other, which ravaged this area time and time again. One of the main conflicts of the earlier times was the Hundred Years’ War between France and England, that started in 1337 and lasted until 1453. The traditional date of birth of modern nation states is actually said to be 1648, when the Treaty of Westphalia was signed by the most important European sovereigns after another huge conflict, the Thirty Years’ War. The Peace of Westphalia shaped Europe as it has been ever since, but it could not grant an actual long-lasting peace.

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Many other conflicts followed, until the ultimate devastation was produced by World War II, which caused a tremendous number of civilian casualties and brought the economy of all European countries to its knees. But even during the fury of battle, some enlightened men laid the foundations of a new age of peace in European history, imagining the creation of a supranational entity able to prevent wars among European countries from happening again: this was the core idea of the so called Ventotene Manifesto (“For a Free and United Europe. A Draft Manifesto”), written by the Italian intellectuals and politicians Altiero Spinelli and Ernesto Rossi in 1941, during their exile on the island of Ventotene.4

Spinelli’s and Rossi’s idea was to create a new polity specifically directed at making it impossible for all the evil brought about by the conflict to occur a second time. This polity should be a federation of all European peoples, realized through the “definitive abolition of division of Europe into national, sovereign States.” Their Manifesto spread underground among the Italian Resistance to Fascism and after the end of the war it inspired the creation of the European Federalist Movement.


5 Id., II. In the same section, there is another passage worth quoting, probably the most famous of the whole Manifesto: “The dividing line between progressive and reactionary parties no longer follows the formal line of greater or lesser democracy, or of more or less socialism to be instituted; rather the division falls along the line, very new and substantial, that separates the party members into two groups. The first is made up of those who conceive the essential purpose and goal of struggle as the ancient one, that is, the conquest of national political power—and who, although involuntarily, play into the hands of reactionary forces, letting the incandescent lava of popular passions set in the old moulds, and thus allowing old absurdities to arise once again. The second are those who see the creation of a solid international State as the main purpose; they will direct
What at that time may have seemed to be a visionary project began to be implemented in the aftermath of World War II, thanks to a concurrence of different factors. Spinelli’s and Rossi’s work was certainly a major theoretical ally for those who stood for the creation of a new integrated state entity. But Spinelli and Rossi alone did not have enough influence over Europe to put their project into practice. Above all, another factor was determinant for its implementation: the role played by the United States.

Very briefly, it is probably not very well-known how strongly the American government encouraged European integration, as part of its policy in the Western zone. A key figure in this phase was the French statesman Jean Monnet, today considered, together with Spinelli, one of the fathers of European Union.

Monnet was the liaison between the American administration and the European governments, especially the one of his own country, France, and thanks to his diplomatic ability he basically created the conditions for making the European Recovery Program possible. The European Recovery Program (also known as Marshall Plan), enacted in 1947, provided for a huge money contribution from the U.S. to Western European countries in order to give them a chance to restart their economies.

The Marshall Plan was essential to European economy’s recovery, but what is generally not known is that the Marshall Plan was passed by the American government together with an implicit request that Europe pursue a consistent policy of political unity. Monnet strove to meet this popular forces toward this goal, and, having won national power, will use it first and foremost as an instrument for achieving international unity.”

6 About the influence of Spinelli’s thought over European integration, see, ALTIERO SPINELLI: FROM VENTOTENE TO THE EUROPEAN CONSTITUTION (Agustín J. Menéndez ed., 2007).

requirement, and he succeeded. His work led to the creation of three new international organizations: first the European Coal and Steel Community, in Paris in 1951, and then in Rome in 1957 the European Atomic Energy Community and the European Economic Community (EEC).

In particular, the most important entity is definitely the latter, created by the Treaty of Rome of March 25, 1957: the EEC later absorbed the other two Communities, then changed its name into simply European Community (in order to underline that the organization had also a political nature, not just economic), and is now the European Union (EU).

In any event, Spinelli’s and Rossi’s project was never thoroughly put into practice, since not even what is now the EU is yet a federal polity. Though what was accomplished in accordance with it proved very successful, considering that Europe has been experiencing for the past sixty years the longest period of peace in its history, which has coincided with probably its most prosperous age of all times.

Actually, the creation of the EEC has been the most significant and notable achievement in the process of European integration started thanks to the intuitions of men like Spinelli, Rossi, and Monnet. But it has not been the only one, and not even the first. Indeed, there is another, previous

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8 Treaty establishing the European Economic Community, 298 UNTS 11 (1957), signed on March 25, 1957.

9 To be more precise, EC did not just became the EU: the EU is made of three ‘pillars’, and the EC is by far the most important one (the other two being the Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters): see GEORGE A. BERMANN & ROGER J. GOEBEL & WILLIAM J. DAVEY & ELEANOR M. FOX (EDS.), CASES AND MATERIALS ON EUROPEAN UNION LAW 3 (2002). The EEC absorbed the other two Communities in 1967, with the Merger Treaty of April 8, 1965, while it changed its name into European Community with the Treaty on European Union, signed in Maastricht, the Netherlands on February 7, 1992.

10 Dinan, supra note 1.
milestone in this process: the European Convention for the Protection of Human Rights and Fundamental Freedoms\textsuperscript{11} (ECHR), signed in 1950, not accidentally in Rome too (Spinelli’s and Rossi’s contribution had made Italy one of the leading countries in the integration process, during these earlier times\textsuperscript{12}).

The ECHR was the first international legal document to make the protection of fundamental rights enforceable. It was signed originally by thirteen countries (Germany and Sweden joined only a few weeks later; over the years, the number of member states has constantly increased, currently amounting to forty-seven.) Also, the ECHR created its own set of organs and institutions to enforce the rights and freedoms it proclaimed, including a Court judging on the violation of fundamental rights committed by member states.

The European Union and the ECHR system are separate and have different competences, those of the former being much broader, although each system mutually influences the other in significant ways, and both have played a major role in bringing European integration to the advanced point it is today. Of course, European integration depends ultimately on symbols, values, statements of intent, declarations of principle, cultural changes, ideals, and political struggles. But all these components of European integration are embodied in and communicated by the rules and principles contained in the Rome Treaty and the European Convention and are realized in practice by the institutions created by them. Without the effective implementation of these treaties by the institutions they have established, European integration could not occur.


\textsuperscript{12} Much more recently, in 1998, another testimony of Italy’s leading role in integration, this time at the global level, has been the signature in Rome of the International Criminal Court Statute, alias Rome Statute, 2187 UNTS 90 (1998), signed on July 17, 1998.
2. The possible interpretations of the duty to “abide by the final judgment of the Court” of Strasbourg and how they reflect on European integration

The importance of some of the rules contained in the treaties is self-evident, like the rule about how decisions are made within the EU. The fact that the most important decisions still require a unanimous vote has often made it impossible to make any decision at all on matters of major importance, thus slowing down the integration process. As a result, there is general agreement that in restart of process of integration, the unanimity rule should be replaced by the majority-vote rule.

Other rules are more technical, and therefore their impact on European integration may be less evident at first sight. In this article, we are going to focus on one of these, namely the one that imposes on Member States the duty to “abide by the final judgment of the” European Court of Human Rights (CHR), which is provided for by Art. 46, para. 1 of the ECHR. This provision does not specify the content of this duty, leaving to Member States the decision about how to comply with it, thus leaving the door open to interpretations even very different from one another.

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13 For a general comment to this Article, see Andrew Drzemczewski, Art. 46, in COMMENTARIO ALLA CONVENZIONE PER LA TUTELA DEI DIRITTI DELL’UOMO E DELLE LIBERTÀ FONDAMENTALI 685 (Sergio Bartole & Benedetto Conforti & Guido Raimondi eds., 2001) (this author also quotes some relevant literature in English or French language). See also a work specifically dealing with Art. 46, PASQUALE PIRRONE, L’OBBLIGO DI CONFORMARSI ALLE SENTENZE DELLA CORTE EUROPEA DEI DIRITTI DELL’UOMO (2004).

14 See for example the following CHR judgments: Kollcaku v. Italy (no. 25701/03, judgment of February 8, 2007, para. 82); Zunic v. Italy (no. 14405/05, judgment of December 21, 2006, para. 75); Sannino v. Italy (no. 30961/03, judgment of April 27, 2006, para. 71). These three judgments are mentioned by Giulia Mantovani, La sent. n. 129 del 2008 e la “riparazione” delle violazioni dell’art. 6 Cedu, 53 GIURISPRUDENZA COSTITUZIONALE (GIUR. COST.) 2679, 2685, note 24 (2008).
On its turn, the way this provision is interpreted seriously affects the process of European integration. Evidently, if this duty is understood as requiring the States to adapt their whole legal systems to CHR dictates, then the States will be obliged to allow some form of review of their final judgments, and on several occasions also to amend their law. Instead, if one holds that the duty to “abide by the final judgment of the Court” only requires the States to pay the petitioners the compensation provided for by Art. 41, ECHR, when the CHR condemns them to pay it, then the consequences on the domestic systems will be far smaller.

In the first case, the process of European integration would be significantly strengthened, since the effect of CHR judgments would fall upon all Member States, hastening the ongoing reciprocal coming closer together, on the one side by Member States with one another, and on the other side by Member States and the ECHR system. Indeed individual States would become all the more part of a unitary system, and since all the ECHR Member States are also Members of the European Union, this would inevitably foster integration also at the EU level, even if the two systems continue to remain separate like they are now.

See also Piersack v. Belgium (no. 8692/79, Judgment of October 26, 1984, para. 12, on the former Art. 50), and Lyons and Others v. the UK (no. 15227/03, decision of July 8, 2003).

As for the literature, see Barbara Randazzo, Le pronunce della Corte europea dei diritti dell’uomo: effetti ed esecuzione nell’ordinamento italiano, in LE CORTI DELL’INTEGRAZIONE EUROPEA E LA CORTE COSTITUZIONALE ITALIANA: AVVICINAMENTI, DIALOGHI, DISSONANZE 303 (Nicolò Zanon ed., 2006), who described this duty as an “obbligo di risultato” (‘duty to obtain the result’–as opposed to “obbligo di mezzi,” that only request to do one’s best to obtain the result, but not require its actual achievement to be fulfilled). See also Paola Genito & Giovanni Romano, Efficacia delle sentenze di condanna della Corte di Strasburgo ed esecuzione delle stesse, in 40 GIURISPRUDENZA DI MERITO (GIUR. MER.) 31 (2008).
In the second case, nothing like that would happen, because the States would keep all their sovereignty, considering that the European judgments would not affect their own final judgments, let alone their law, so they would keep all their differences.\(^{15}\)

In this work, the focus will be on the impact of European judgments on the domestic judgments they refer to, leaving out their impact on domestic legislation\(^{16}\) (except for the reference to the cases when Italy amended its law in accordance with CHR dictates). The subject has been studied by many scholars, especially from the criminal procedure perspective,\(^ {17}\) where there seems to be a greater need to take the rights to a fair trial (Art. 6, para. 3, ECHR) seriously.\(^ {18}\) Keeping these studies in mind, this article will look at the same subject from the point of view of the constitutional law (with some comparison between the Italian and the French approach). We will keep the Italian legal system as a primary object of observation (especially in sections 3 and 5), but we believe that the conclusion we draw, when we discuss the choice between the two possible interpretations mentioned above

\(^{15}\) For a hint at how European integration is influenced by the interpretation of certain provisions, see Antonio Ruggeri, Sistema integrato di fonti, tecniche interpretative, tutela dei diritti fondamentali, http://www.associazionedecostituzionalisti.it/dotttrina/fontidiritto/ruggeri1.html.

\(^{16}\) On this issue, see for example Drzemczewski, supra note 13, 690.

\(^{17}\) Recently, see for example the following book, commenting the famous Dorigo case, that will be dealt with soon: Antonio Balsamo & Roberto E. Kostoris (eds.), Giurisprudenza Europea e Processo Penale Italiano: Nuovi Scenari Dopo il “Caso Dorigo” e Gli Interventi della Corte Costituzionale (2008).

\(^{18}\) We are clearly quoting the title of a very famous book: Ronald Dworkin, Taking Rights Seriously (1977). The quotation of this title is probably abused, but we chose to use it here and in some of the following passages as well because it seemed particularly appropriate to convey the idea of the need of a true, effective enforcement to ECHR rights.
sections 4 and 6), can be valid, mutatis mutandis, for any other Member State, since it is based on general arguments, not specific to the Italian law.

3. The Italian constitutional framework: the new wording of Art. 117, para. 1, of the Italian constitution and the case-law of the Corte di Cassazione and the Corte Costituzionale

Until recently, Italy has always chosen the latter interpretation between the two mentioned in the previous paragraph, i.e. the narrower one. Indeed the Italian Parliament has never provided for a general mechanism to abide by the European Court’s decisions. In the last decade, both the courts and the literature have repeatedly considered this gap in the law, against the background of the so called ‘multilevel protection’ of fundamental rights.19

19 The literature on ‘multilevel protection’ is very rich. Very recently, see Ingolf Pernice, The Treaty of Lisbon: Multilevel Constitutionalism in Action, 15 COLUM. J. EUR. L. 349 (2009) (Pernice is the author who coined the expression, using it to describe the EU system: Ingolf Pernice, CONSTITUTIONALISM AND THE TREATY OF AMSTERDAM: EUROPEAN CONSTITUTION-MAKING REVISITED?, 36 COMMON Mkt. L. Rev. 703 (1999). The expression was then used also to refer to the ECHR system: see for example Federico Sorrentino, LA TUTELA MULTILIVELLO DEI DIRITTI, 15 RIV. IT. DIR. PUB. COMUNIT. 79 (2005). See also ANTONIO D’ATENA, COSTITUZIONALISMO MULTILIVELLO E DINAMICHE ISTITUZIONALI (2007); GIUSEPPE BRONZINI & VALERIA PICCONE (eds.), LA CARTA E LE CORTI: I DIRITTI FONDAMENTALI NELLA GIURISPRUDENZA EUROPEA MULTILIVELLO (2007); Antonio Ruggeri, La tutela “multilivello” dei diritti fondamentali, tra esperienze di normazione e teorie costituzionali, 38 POLITICA DEL DIRITTO (POL. DIR.) 317 (2007); Paola Bilancia, Le nuove frontiere della tutela multilivello dei diritti, http://www.associazionedecostituzionalisti.it/materiali/anticipazioni/multilivello_frontiere/; Aldo Loiodice, Costituzione europea e tutela multilivello dei diritti fondamentali,
The turning point was the entry into force of Protocol no. 11, in 1998. This Protocol replaced Sections II to IV and Protocol no. 2, ECHR with a renewed Section II. As far as the topic of this work is concerned, the most important change by Protocol no. 11 regards Art. 46, ECHR. Protocol no. 11 added a second paragraph to this Article (that in the original version was Art. 53), stating that “the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

In this way, the drafters wanted to confirm and corroborate the “duty to abide by the final judgment of the Court,” providing for a specific review entrusted to the Committee of Ministers, in order to underline its importance.

Other relevant amendments by Protocol no. 11 will be considered afterwards. As for now, it just has to be added that three more paragraphs were added to Art. 46, ECHR, by Protocol no. 14, signed in Strasbourg on May 13, 2004, ratified by Italy with the Law December 15, 2005, no. 280, but not yet into force (because of the lack of Russia’s ratification). These three paragraphs regulate in detail a new proceeding for the domestic enforcement of CHR judgments, that involves the Committee of Ministers and, with a major role, the Court itself. These new provisions further confirm that the topic of the enforcement of CHR judgments is gaining increasing attention.

As was said, though, in the Italian law there is still a gap, that many authorities deem it necessary to fill as soon as possible. In order to find a possible way to do that, some authors have


See also the Interim Resolutions of the Committee of Ministers on the case Dorigo v. Italy (on this case, see infra): ResDH(99)258 of April 15, 1999, ResDH(2002)30 of February 19, 2002,
studied the solutions adopted by other Member States, that, unlike Italy, have complied with this duty\(^{21}\) (as was said, we will consider the French approach in detail in the next paragraph.) These


See also the references made by the Italian Corte Costituzionale in its Judgment April 30, 2008, no. 129 (see infra), and also the observations made by the Corte di Cassazione in the same case, Dorigo (Criminal Section I, December 1, 2006–January 25, 2007, no. 2800).

States are usually divided into two groups: a) those that enacted a special reform to grant full
effectiveness within their borders to CHR judgments;\textsuperscript{22} b) those that arrived at the same result
through their case-law.\textsuperscript{23} Usually, the first solution is considered to be better, because it would
assure more legal certainty.\textsuperscript{24}

In fact, in Italy both the \textit{Corte di Cassazione} (Italy’s Supreme Court) and the \textit{Corte Costituzionale} (Italy’s Constitutional Court) have taken very important steps towards the full
effectiveness of the European judgments, but so far these measures have been only partial and
incomplete. In two famous cases where CHR had found two different violations of Art. 6 ECHR,
the First Section of the \textit{Corte di Cassazione} got to grant respectively a leave to appeal out of time to

\begin{itemize}
\item[\textsuperscript{22}] Tega, \textit{supra} note 21 mentions Germany, Austria, Bulgaria, Croatia, France, Greece, Lithuania,
Luxembourg, Malta, Norway, United Kingdom, Republic of San Marino, Slovenia and Switzerland.
\item[\textsuperscript{23}] \textit{Id.}, where the following countries are mentioned: Belgium, Denmark, Finland, Spain, Slovakia,
Sweden, Russia.
\item[\textsuperscript{24}] This point will be touched again in the following section.
\end{itemize}
a default defendant to whom the court of appeal had denied this request, and even a stay against the enforcement of a final judgment.

However, this trend is not well-established. In another case, another Section of the Court, the Fifth, rejected the appeal against a decision by the Court of Appeal of Milan that had denied a stay and the reopening of a trial even though the CHR had found that the conviction violated the Convention. Indeed the court had observed that no rule of Italian law allows the enforcing court to

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25 Corte di Cassazione, Criminal Section I, Judgment of October 3, 2006, no. 32678 (case Somogyi). The judgment by the CHR in the case Somogyi v. Italy (no. 67972/01) was issued by the Second Section, and dates back to May 18, 2004.

26 Corte di Cassazione, supra note 20 (case Dorigo). The European ruling is Dorigo v. Italy (no. 46520/99, Fourth Section, Judgment of November 13, 2000). About the Corte di Cassazione’s Judgment, see Domenico Manzione, “Caso Dorigo” e dintorni: una “blessing in disguise” della Corte Suprema (e non solo)? A proposito di “processio equo” e ineseguibilità del giudicato, 27 LA LEGISLAZIONE PENALE (LEG. PEN.) 259 (2007). For critical standings, see also Mario Chiavario, Giudicato e processo «iniquo»: la Corte si pronuncia (ma non è la parola definitiva), 53 GIUR. COST. 1524 (2008); Daniele Negri, Rimedi al giudicato penale e legalità processuale: un connubio che gli obblighi sopranazionali non possono dissolvere, in ALL’INCROCIO TRA COSTITUZIONE E CEDU: IL RANGO DELLE NORME DELLA CONVENZIONE E L’EFFICACIA INTERNA DELLE SENTENZE DI STRASBURGO 169 (Roberto Bin & Giuditta Brunelli & Andrea Pugiotto & Paolo Veronesi eds., 2007).

27 Corte di Cassazione, Criminal Section V, judgment of February 2, 2007, no. 4395 (case Cat Berro).

interfere with the enforcement of a judgment or the imprisonment of a convict, nor to order the reopening of the trial and its repetition according to the fair trial rules.²⁹

The Milan decision came after the Corte di Cassazione had quashed³⁰ another decision by the same court,³¹ that had rejected a request to annul a detention order against the petitioner. In its first decision, the Cassazione had seemed more receptive to allowing a reopening of the trial, quashing the ordinance by the court of appeal that had deemed the request inadmissible on its face and mandating a reconsideration of the following question: “whether Art. 5, para. 2, a) ECHR (“No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a) the lawful detention of a person after conviction by a competent [court”]) prevents Italy from enforcing a sentence issued after a trial deemed “not fair” by the CHR, or, conversely, whether the principle of res judicata shall prevail, in the absence of a specific remedy.”

When reconsidering the case after the Cassazione’s judgment, the Milan court issued a decision saying the petitioner had no remedy under statute law, and with its second and definitive decision in this case the Cassazione rejected the appeal against this decision, even though it did so on formal grounds. Indeed the Cassazione explicitly specified that it was not saying that “in Italian law there is no chance to question a definitive conviction judged “not fair” at the European level, because the rules on the judgment by default did not respect civil rights: on the contrary, this chance is offered by the rule on the leave to appeal out of time, now amended with regard to judgment by default–Art. 175, Code of Criminal Procedure, para. 2 and 2-bis–(this conclusion is also supported

²⁹ The CHR Judgment in this case is F.C.B. v. Italy (no. 12151/86, judgment of August 28, 1991).

The petitioner was convicted by the Corte d’Assise d’Appello di Milano, Judgment of, April 9, 1984.

³⁰ Corte di Cassazione, Criminal Section I, judgment of October 3, 2005, no. 35616.

by this Court’s judgment, [Section I.] [Somogyi.] Therefore, the person convicted can rely just on
this rule, and only if he does that, the specifics of his case could be dealt with.”

Finally, even more recently, still another Section of the Court, the Sixth, allowed a “partial
‘exception’ to the principle of *res judicata*” and a reconsideration of the claim, insofar as the
Strasbourg ruling was concerned, applying by analogy to the case under consideration the remedy
provided for in Art. 625-bis, Code of Criminal Procedure (*ricorso straordinario per errore
materiale o di fatto*, extraordinary petition for factual error). Therefore, this judgment is in accord
with the two important aforesaid ones of the First Section.

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32 About this Judgment, see more extensively Ernesto Lupo, *La vincolatività delle sentenze della*
*Corte europea per il giudice interno e la svolta recente della Cassazione civile e penale*, 47
*CASSAZIONE PENALE* (CASS. PEN.) 2247 (2007), also available at
http://appinter.csm.it/incontri/relaz/14037.pdf. The Author observes that in fact “also the Judgment
of Section V held that the principle of *res judicata* can be put aside due to a violation of the ECHR
found by the European Court, even though only through the provision of the newly written Art. 175
of the code of criminal procedure”.

The very title of another comment to the 2007 Judgment shows that also its Author holds that this
judgment goes towards a putting aside of the principle of *res judicata*: Roberto Conti, *La Corte dei
diritti dell’uomo e la Convenzione europea prevalgono sul giudicato–e sul diritto–nazionale*, 2007
*CORRIERE GIURIDICO* (CORR. GIUR.) 689.

33 *Corte di Cassazione*, Criminal Section VI, judgment of December 11, 2008, no. 45807 (case
*Drassich*). The CHR judgment was issued on December 11, 2007 (case *Drassich v. Italy*, no.
25575/04).
In this review, we must also take into account the decisions that occasioned the judgments of the *Corte Costituzionale* which will be discussed below. These decisions\(^{34}\) stipulated that Italian judges shall not refuse to apply internal rules that conflict with the ECHR, arguing that “the idea that the ECHR has become part of the European Union law through Art. 6, para. 2 of the Maastricht Treaty cannot be accepted, because the protection of the fundamental rights, guaranteed by the Convention, is just a direction given to the EU institutions, not an EU rule imposed on Member States.”\(^{35}\)

As for the *Corte Costituzionale*, it has marked a historic turning point in the effectiveness of the ECHR in the Italian legal system with its well-known judgments of October 24, 2007, nos. 348 and 349. The constitutional scholarship has paid a great deal of attention to these judgments,\(^{36}\)

\(^{34}\) *Corte di Cassazione*, decisions of May 29, 2006 and October 19, 2006 (as for the above-mentioned Judgment no. 348 of 2007); *Corte di Cassazione*, decision May 20, 2006, and *Corte d’Appello di Palermo*, decision of June 29, 2006 (as for the above-mentioned Judgment no. 349 of 2007).

\(^{35}\) This outcome was then confirmed by *Corte di Cassazione*, Criminal Section I, judgment of January 7, 2008, no. 31, that reaffirmed that the duty to comply with the international obligations arising from the ECHR is not absolute but always has to be subject to the respect of the “principles and rules of the constitution.”

therefore we will not linger over it. We will only recall their fundamental holding, crucial to the
topic of this article: the Court has condemned for the first time the way Italian law determines the
amount of money awarded to a private individual in case of expropriation, and it did do because it
deemed the Italian approach to be in violation of the Convention (in particular, of Art. 1 of Protocol
No. 1), which the Court considered to be a norma interposta (‘interposed standard of review’\textsuperscript{37}).
Indeed the Court held that when the legislature passes a law infringing upon the ECHR, that law is

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\textit{The Efficacy of the European Convention in the Italian Legal System}, 9 \textsc{German Law Journal}\textsuperscript{(GLJ)} 889 (2008), \url{http://www.germanlawjournal.com/pdf/Vol09No07/PDF_Vol_09_No_07_889-932_Articles_Fontanelli.pdf}. Finally, about how the courts have been following Judgments 348 and 349 of 2007, see Ilaria Carlotto, \textit{I giudici comuni e gli obblighi internazionali dopo le sentenze n. 348 e n. 349 del 2007 della Corte costituzionale: un’analisi sul seguito giurisprudenziale}, \url{http://www.associazionedeicostituzionalisti.it/dottrina/giustizia_costituzionale/ilaria%20carlotto%20sent.348_349_2007.pdf} (on the same subject as the last article quoted, from a more theoretical point of view, see Marco Bignami, \textit{L’interpretazione del giudice comune nella « morsa » delle corti sovranaualiali}, 53 \textsc{Giur. Cost.} 595, 613 (2008)).
\end{flushright}

\textsuperscript{37} In the Italian constitutional jurisprudence, the norme interposte are provisions interposing
between the constitution and an ordinary law. They enforce a constitutional provision, therefore, an
ordinary law can never be contrary to a norma interposta, because otherwise it would indirectly
violate the constitution. Now that the Corte Costituzionale has said that the ECHR is a norma
interposta, the ECHR ranks higher than ordinary laws in the hierarchy of sources of law; therefore,
ordinary laws will be unconstitutional if they are contrary to the ECHR. The translation of norma
interposta into ‘interposed standard of review’ is the one adopted for example by Biondi Dal Monte
& Fontanelli, \textit{supra} note 36.
infringing upon a (major) ‘international obligation.’ Since the new text of Art. 117, para. 1\(^\text{38}\) of the constitution imposes on the State (and the Regions) to comply with ‘international obligations,’ any law that is against the ECHR and its Protocols (the \textit{norme interposte} in this case) is therefore automatically against Art. 117, para. 1, and then unconstitutional.

As is well-known, the new wording of Art. 117, para. 1 of the Italian constitution was introduced in order to explicitly legitimate the participation of Italy in the European Union.\(^\text{39}\) Indeed, until then, unlike most of other Member States, Italy had not revised its constitution to expressly allow participation in the EU. Therefore the \textit{Corte Costituzionale} had legitimated this participation on the basis of Art. 11\(^\text{40}\) (“Italy [agrees] to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between [nations]; it promotes and encourages international organizations furthering such ends”).

This interpretation was very well-established, so the rephrasing of Art. 117 did not change significantly the relationship between Italy and EU: “it is a shared view within the scholarship that the explicit provision, by art. 117, para. 1 of our constitution, for the subjection of the law-making

\(^{38}\) As is well-known, Art. 117 was completely rewritten on the occasion of the amendment of the Fifth Title of Part II of the Italian constitution, realized by Constitutional Laws November 22, 1999, no. 1, and October 18, 2001, no. 3 (in particular, Art. 117 was amended by Art. 3 of the latter).

\(^{39}\) \textit{See for example} Giovanni Serges, \textit{ART. 117, 1° CO.}, \textit{in COMMENTARIO ALLA COSTITUZIONE, VOLUME TERZO, ARTT. 101-139, DISPOSIZIONI TRANSITORIE E FINALI} 2213, 2219 (Raffaele Bifulco & Alfonso Celotto & Marco Olivetti eds., 2006).

by the State and the Regions to the “limits set by European Union law” is more a confirmation of something that already existed than a true innovation, and that it only gave a firmer basis to the acquired relationship between the Italian constitution and the EU legal system”.  

Yet that same innovation, if introduced having the EU in mind, may in fact have much greater impact on the relationship between Italy and the legal system created by the ECHR. Only some authors had anticipated the interpretation given by the above-mentioned Judgments nos. 348 and 349 of 2007, but now these rulings seem to to have exploited the whole potential of this innovation, placing the ECHR in an intermediate position “between the constitution and ordinary law” and acknowledging that “Art. 117, para. 1 has introduced a permanent cross-reference to the ECHR; that reference is made to a specific article of the Convention every time that article is relevant to the question under consideration.”

Now, these two judgments confirm that it is not possible to include the ECHR among “the generally recognised principles of international law” (Art. 10, Italian constitution), or among the

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41 Serges, supra note 39.

42 See for example Andrea Guazzarotti, I giudici comuni e la CEDU alla luce del nuovo art. 117 della Costituzione, 23 QUAD. COST. 25, 37 (2003).


organizations furthering “peace and justice between nations” (Art. 11, Italian constitution). Thus, the ECHR system remains different from that of the EU, so that ECHR law (unlike EU law) does not prevail over conflicting internal law.

Against the background of the new wording of Art. 117 and of the two judgments just discussed, the Corte Costituzionale, in its later judgment of April 30, 2008, no. 129, considered the problem of the lack of a rule on the effectiveness of CHR judgments. Though the Court said that this lack does not violate the Italian constitution, or at least the provisions considered in the petition (Article 3, on the principle of equality; Article 10, on the recognition of principles of international law; and Article 27, on the re-educational aim of punishment). 


Though the Court has also made clear that if the Parliament does not fill the gap in the law, and a new decision raises the same question, no longer under Articles 3, 10 or 27, but rather under the new Art. 117, para. 1, the result would likely be different. Actually, something like that may be happening: indeed, in the same trial that led to judgment no. 129 of 2008 of the Corte Costituzionale (the Dorigo controversy, already mentioned several times in the footnotes), the court of appeal has raised a new question of legitimacy, this time referring to Art. 117, para. 1.47

To sum up, the picture of the effectiveness of CHR judgments in Italy remains contradictory: notwithstanding some very significant case-law innovations, that are probably sufficient to allow us to say that the Italian system is no longer completely lacking in remedies,

47 Currently, the question is pending before the Corte Costituzionale. The decision that raised the question, and that could be the decisive turning-point not only of the case but of the whole problem considered in this article, was issued by the Corte d'Appello di Bologna on December 23, 2008. This decision can be read on the website of the online newspaper Norma, www.norma.dbi.it, with a case-note by Marco Lo Giudice, Revisione del processo penale non equo: la questione torna alla Corte Costituzionale. Mantovani, supra note 14, 2687, observes though that «a question of legitimacy aiming at increasing the number of cases when review can be requested would not have been necessarily successful even if the Court of Appeal had used Art. 117, para. 1 as a parameter», because «in any case, the Corte Costituzionale could have found that the constitution did not impose the solution proposed by the Court of Appeal; therefore, even in that case the Court could have left to the legislator to find a remedy for this gap in the law». Finally, Chiavari, supra note 26, 1524, imagines a possible «declaration of illegitimacy, at least ‘di principio’ (on principle)», of Art. 630, code of criminal procedure, on the basis of Art. 117, Italian constitution.
there is still some resistance to an automatic full enforcement of CHR judgments, mainly due to the
fact that judges deem it impossible to achieve this result without a legislative intervention.48

To be sure, there have been some limited innovations by the legislature.49 Two seem to be
the most significant ones:50 the first one is the provision that final judgments of the CHR are added
to the judicial register, right after the internal judgment or the administrative act they are related
to.51

48 For a recent summary of the current approach by the courts, and for some observations on the
need for a legislative intervention, see Luca De Matteis, Sentenze della Corte europea dei diritti
dell’uomo e giudicato penale: lo stato della questione, 40 GIUR. MER. 152 (2008).
49 Lupo, supra note 32, 2247.
50 Besides the ones that will be recalled in a moment, a complete review has to mention also the
Law January 9, 2006, no. 12, made of only one article, that added some new tasks to the list of the
competences of the President of the Council of Ministers (Law August 23, 1988, no. 400, Art. 5,
para. 3). His new tasks (provided for by the newly added letter a-bis) are to “encourage the
fulfillment of the duties of the government arising from CHR judgments regarding Italy; give good
time notice to the Senate and the Chamber of Deputies of the same judgments so that they are
examined by the competent parliamentary committees”; and to annually submit a report to the
Parliament on the degree of enforcement of those judgments. On this legislative innovation, see
Palmina Tanzarella, Nuovi compiti al Presidente del Consiglio per l’esecuzione delle sentenze di
Strasburgo, 26 QUAD. COST. 370 (2006). The Law no. 12 of 2006 was brought about by the Decreto
51 This provision is the sole article of the Decreto del Presidente della Repubblica November 28,
313 (Testo unico delle disposizioni legislative e regolamentari in materia di casellario giudiziale, di
The second item of significance is Art. 1, paragraphs 1216 and 1217 of legge finanziaria 2007 (Law December 27, 2006, no. 296). These provisions allow the State to be reimbursed by local governments for the enforcement of European Court of Justice (ECJ) and CHR judgments, when they are responsible for the decision by either of these two courts that the State is in breach of its treaty obligations.

The most important feature of these provisions is the “perfect parallelism” they draw between “the violations of EU law and the violations of CHR law;” indeed, this parallelism seems to “accept for the first time the thesis of the direct effect of CHR provisions, so far accepted only by the most recent case-law of the Corte di Cassazione.” Actually, “in the absence of further specification, the very wording of the latter provisions seems to suggest that the local governments are responsible even when they acted pursuant to an internal provision, if this provision conflicts with the ECHR law; so, logically speaking, this seems to imply for the local bodies the duty not to apply the national law if it conflicts with the ECHR law, which is exactly what already happens when they find a national law in conflict with EU law.”

52 The content of these two paragraphs is the same as the content of paragraphs 4 and 5 of Art. 181 (Misure per assicurare l’adempimento degli obblighi comunitari ed internazionali) of bill C-1746-bis (15th session of the Parliament). See Angela Cossiri & Andrea Guazzarotti, L’efficacia in Italia delle sentenze della Corte europea dei diritti dell’uomo secondo la prassi più recente, 58 RASSEGNA DELL’AVVOCATURA DELLO STATO (R. AVV. ST.) 15 (2006, issue no. 4).

53 Id. at 30.

54 Id. at 31.

55 Id.
These innovations, in particular the second one, show an increasing bent by the Italian legislature to fully respect the duties arising from the ECHR, although it can be argued that these measures are not sufficient to respond to the several calls by ECHR organs for Italy to fill the gap in its law and stop its ongoing violation of Art. 46 ECHR.

In order to remedy this situation, in every recent session of the Parliament there have been introduced bills precisely aimed at complying with the duty to abide by CHR final judgments. The purpose of this paper is to investigate the scope of this duty, and then try to assess if the above-mentioned bills are suitable for fulfilling it.

But before moving to this analysis, some more introductory observations are necessary.

Firstly, it has to be underlined that Article 46 ECHR must be read and interpreted together with Article 41, which reads: “If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.” Moreover, also Article 13 has also to be considered, according to which “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national [authority].”

On the whole, these provisions imply that, when the Court finds a violation of the Convention by a Member State, in principle it is that State that, through its “internal law,” shall grant the individual “an effective remedy” that allows the State to remedy the violation, thus “abid[ing] by the final judgment of the Court.” Only subject to the failure by the State law to afford full redress, the Court, if necessary, can “afford just satisfaction:” but the priority is given to the domestic remedy.56 Such remedy must necessarily be more effective than merely the award of damages; it must, if possible, put the individual in the exact position he would be without the violation (restitutio in

*integrum*: otherwise, there would have been no reason for the drafters to provide for this double level, when they could have just provided for a monetary recovery in any situation, and not just on a subordinate level like they did.

But what does the verb “abide” mean in this provision? Very different consequences can stem from the different ways it can be construed, and this can in its turn determine the compliance or not by Italy with its “international obligations.” (Art. 117, para. 1, new version, Italian constitution).

Now comes the choice between a zero-option (the one chosen by Italy so far, in spite of the above-mentioned case-law steps forward and the sporadic but not decisive legislative interventions) and an extreme one, one which has not been adopted by any Member State, but which is the central question of this article.

Basically, the Italian option “abides by” European judgments in the sense that Italy acknowledges that its nationals that prevail against it in Strasbourg may obtain the monetary indemnification that the Court may afford them. But the domestic judgment remains in force with its *res judicata* effect, even if it is now tainted by a violation, of any kind, of the Convention.

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57 This view is shared by the a very authoritative source, the Committee of Ministers: in their 2008 Report on the execution of CHR judgments, they reaffirm that individual remedies should “achieve, as far as possible, *restitutio in integrum*.” Council of Europe–Committee of Ministers, *Supervision of the execution of judgments of the European Court of Human Rights–2nd annual report 2008*, 18, available at the Council of Europe’s website, www.coe.int.

58 In the French version the verb is “*se conformer aux*”, in the Italian one it is “*conformarsi*”.

59 Laura Cesaris, *Le sentenze della Corte EDU e l’esecuzione della sentenza nazionale*, in Bin & Brunelli & Pugiotto & Veronesi eds., *supra* note 26, 65 observes that “perhaps we are the only one State that has not yet provided for a specific mechanism” (Cesaris was writing before the above-mentioned Judgments nos. 348 and 349 of 2007, though these judgments, as was explained, do not make her observation outdated, because a specific remedy still lacks in the Italian legal system).
As for the States that have complied with the duty provided for by Art. 46 ECHR, their solutions can all be considered intermediate between the narrowest interpretation, chosen by Italy, and the broadest one, that will be considered in the next paragraph. The remedies that can be imagined are basically two, and various States have adopted a combination of them: the suspension of the enforcement of the relevant domestic judgment and some form of reopening of the trial that brought to that judgment.

To conclude, the different variables that can be combined in order to give more or less effectiveness to the CHR’s judgments are the following: a) requirements for the suspension or the reopening (any violation or just the ones deemed most serious) of domestic judgments; b) allowing judges discretion in affording these measures (these remedies may be automatic when the State is found in violation of the ECHR, or more requirements must be satisfied); c) possible consequences of the suspension and the reopening (all the effects of the judgment can be nullified, or only some; a new trial may be ordered or the proceedings may be deemed concluded by the decision of the Strasbourg court, and in the former case to what extent is the domestic judge bound by the CHR’s findings of fact); d) remedies may be afforded only for criminal trials, or also for civil and administrative proceedings.

4. “Extreme option:” academic exercise or likely future?

Without considering the different possible combinations of these variables, since the choice among them is a matter for political decisions, let us focus on the maximum solution. This option is seldom considered, probably because at first sight it seems to be very unlikely to be put into effect, at least in the near future.

It would consist in a rule like the following: any time the CHR finds any violation of the ECHR, committed in a domestic trial or proceeding of any kind (civil, criminal or administrative), States shall automatically suspend the enforcement and all the effects of the judgment issued at the
end of that proceeding, and allow without condition the reopening of that proceeding before a
domestic court or other appropriate tribunal (a mechanism similar to what in Italy is called
cassazione con rinvio).\(^60\)

Whether this option would be manageable or appropriate on the political level or not, the
question for the lawyer is: is it compatible with the Convention? And most of all, as far as Italy is
concerned, if the Italian Parliament finally decides to deal with this matter, introducing a specific
regime, would the Italian constitution allow it to go that far?

As was said, at first sight this option may appear extreme. It is usually rejected on the grounds
that it would end up introducing a “fourth level” of judgment.\(^61\) Indeed, the drastic action of the
final overturning of a decision is normally the function of a court of last resort. Nevertheless, there
are enough arguments to conclude that the solution imagined would not lead to such a result, and,
on the contrary, would even be the best possible choice. The following considerations will explain
why moving towards the maximum option is appropriate, and probably also inevitable in the long
run. Therefore, it would be better if the Italian legislature, when choosing among the different
available options, ranging from the minimum to the maximum solution, decided to adhere as closely
as possible to the latter.

Certainly the original system created by the Convention did not provide for such an ambitious
role for the CHR. Until Protocol no. 11 came into force (in 1998), the Court could not even be
directly seized by individuals, and its jurisdiction was filtered by the European Commission of
Human Rights.\(^62\)

\(^60\) About the advisability of shaping the remedy on the cassazione con rinvio, see section 5.

\(^61\) About the question whether the CHR review ends up being a fourth level of judgment, see
Tega, supra note 21, 193, and also Lupo, supra note 32, 2253.

\(^62\) About the innovations of the Protocol no. 11 to the ECHR, see Antonio Bultrini, Corte europea
dei diritti dell’uomo, in Digesto delle Discipline Pubblichistiche, Aggiornamento 148, 151
However, especially in recent years, also due to the innovations introduced by Protocol no. 11, the CHR has started to have an increasingly important influence on the Member States’ legal systems, sometimes even urging them to make, or imposing on them, changes in their legislation.\textsuperscript{63}

The Court of Strasbourg has thus now acquired a central position for the protection of fundamental rights, assuming functions typical of a constitutional court as well as of a court of last resort. The main objections to the maximum solution can be traced to the following three: \textit{a}) not all violations are equal: some are less serious, therefore completely quashing a trial in any case of a violation seems to be too drastic; \textit{b}) the extreme solution would infringe on the principle of \textit{res judicata}; \textit{c}) more generally, the approach of the Strasbourg Court is different from that of national courts: indeed, its judgments usually make use of a ‘fuzzy logic’,\textsuperscript{64} so they cannot be treated like those of a court of last resort of a Member State, since they employ different ways of reasoning and their legal systems are not comparable.

Let us consider each of these arguments in order.

\textit{a}) The first objection explains the choice of affording remedies only for criminal judgments, and not for civil and administrative ones.

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\textsuperscript{63} As for Italy, the best examples are the Law March 24, 2001, no. 89 (so called \textit{legge Pinto}), concerning the reasonable length of the proceedings, and the amendment of Art. 175 of the code of criminal procedure, concerning the default judgments, by the \textit{decreto legge} February 21, 2005, no. 17, confirmed with amendments by Law April 22, 2005, no. 60.

\textsuperscript{64} This argument is made for example by Silvia Allegrezza, \textit{Violazione della CEDU e giudicato penale. Quali contaminazioni? Quali rimedi?}, in Bin & Brunelli & Pugiotto & Veronesi eds., \textit{supra} note 26, 21, 25.
As will be shown in the third paragraph, this is the choice made by most of the bills submitted to the Italian Parliament to regulate the subject; also, most European countries have made the same choice. The best example is France, whose approach we now consider briefly: pursuant to an amendment introduced by Law June 15, 2000, no. 516, the French code of criminal procedure now allows (Articles 626-1 et seq.), “le réexamen d’une décision pénale définitive” (the reexamining of a final criminal judgment), if a judgment by the CHR found that decision violated the ECHR or a Protocol to it; review is afforded “dès lors que, par sa nature et sa gravité, la violation constatée entraîne pour le condamné des conséquences dommageables auxquelles la “satisfaction équitable” allouée sur le fondement de l’article 41 de la convention ne pourrait mettre un terme” (“when the violation found is of such a nature and gravity that the “equitable satisfaction” afforded on the grounds of Art. 41 of the Convention would not terminate its damaging consequences.”).

Review can be requested, within a year from the date of the CHR’s judgment, by the Minister of Justice, the Procureur Général (Attorney General) of the Cour de Cassation (Supreme Court), or the person convicted (or his delegate or heirs); the request shall be addressed to a special committee of seven judges of the Cour de Cassation. The committee, if they consider the request well-grounded (thus not automatically), may refer the question either to the Cour de Cassation or to a judge on the same level of the judicial hierarchy as the one that issued the sentence considered unfair by the CHR. At any given moment, both the committee and the Cour de Cassation may (so it is a discretionary decision) suspend the enforcement of the sentence.

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65 As is recalled by Tega, supra note 21, only the following States allow the reopening also of civil and administrative proceedings: Bulgaria, Lithuania, Norway and Switzerland.

Other aspects of the French discipline will be considered in the last paragraph, to compare them
to the solutions proposed by the Italian bills; as for the choice of limiting the remedies to the
criminal sphere, it is based on the idea that in this field we are dealing with habeas corpus and
individual liberty, therefore it is necessary to afford the maximum level of protection.

Apparently, this is a self-evident observation; however, although it is possible to argue that
certainly the protection of individual liberty must be a primary concern, this does not necessarily
mean that the protection of other rights can be disregarded. Indeed there are other *fundamental*
rights that are frequently called into question in civil and administrative proceedings: such as, the
right to property, the right of privacy, the right to family life, the right not to be discriminated
against, or the right to vote. These rights enjoy full protection both by the ECHR and the Italian
constitution, therefore to consider them inferior to individual liberty, no matter how *fundamental*
it is, would be an unfair difference in treatment, contrary to reasonableness test.

In summary, as for the first part of this first argument, the solution most consistent with the
wording and the scope both of the CHR and the Italian constitution seems to be the one that affords
the broadest effect within the domestic jurisdictions to European judgments, both in criminal as
well as in civil and administrative proceedings, without distinction (a confirmation came from the
very recent *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*, no. 32772/02,
Judgment of June 30, 2009 by the Grand Chamber of the CHR, mentioned afterwards in this
section).

67 Respectively: the right to property, in Art. 42, Italian Constitution and Art. 1, Protocol no. 1 to
the ECHR; the right of privacy, in the general clause of Art. 2, Italian Constitution (or in Articles 14
and 15, according to a different construction), and Art. 8, ECHR; the right to family life, in Art. 29,
Italian Constitution, and Art. 8, ECHR; the right not to be discriminated against, in Art. 3, Italian
Constitution, and Art. 14 ECHR; the right to vote, in Art. 48, Italian Constitution, and Art. 3,
Protocol no. 1 to the ECHR.
Moreover, the idea that it is possible to rank violations, from the most to the least serious, is used also to make a distinction within the different sorts of defects that can affect a criminal judgment. In particular, some authors have argued that violations found by the CHR can be divided into three groups: 68 1) violations with no influence on the outcome of the decision (excessive length of the proceeding or violation of the right to a public trial); 2) violations that always affect negatively the outcome of the decision (violations of the rights of the defense); 3) intermediate situations (basically tainted evidence, whose influence on the outcome cannot be predetermined and has to be assessed in each specific situation: “it all depends on how much the conviction is influenced by and based on the tainted evidence,” thus “the alteration of the final outcome” has to be “proved every single time 69.”)

Dealing with this aspect would take us too far, because it would be necessary to consider whether a conviction can be deemed consistent with the sense of justice, or whether it is more consistent with justice to acquit a defendant who is certainly guilty because of a formal defect, or to ignore that defect, because otherwise the evidence that the defendant is guilty could not be used, thus aiming at a substantial outcome of justice, convicting the defendant that “everybody knows” is guilty. 70

As far as the first group of violations is concerned, it may only be observed that it cannot be excluded that the violation of the right to a public trial could influence the outcome of the decision: indeed a law that distinguished among violations and considered the violation of the right to a public trial less serious than others would likely run against Art. 101, para. 1 of the Italian constitution, according to which justice has to be “administered in the name of the people”. Moreover, such a rule would bring the code of criminal procedure back in time, reinstating a

68 Allegrezza, supra note 64, 22 et seq.
69 Id. at 25.
70 On these issues, see PAOLO FERRUA, IL GIUSTO PROCESSO 67 (2005).
typically inquisitorial rule (even though the 1989 code abandoned this model for the accusatorial one). But also the excessive length of a proceeding could play a role in determining if a decision is consistent with justice; after all, the CHR pays a great deal of attention to the right to the reasonable duration of a trial (especially owing to Italy’s violations), and this raises doubts as to whether it can be considered a sort of second-class right, less protected than others.\footnote{To be sure, even Allegrezza, supra note 64, 22, describes it as a violation “as a general rule irrelevant on the merits”, thus not ‘always and necessarily’ irrelevant.}

As far as violations of the right of defense are concerned, there is general agreement that they should lead to a suspension of the enforcement of the sentence and to a reopening of the trial. So we can move on.

Finally, let us consider the third category, that of intermediate violations (tainted evidence). On this point, a distinguished scholarship has dispelled a common misunderstanding. Contrary to what is often believed, it is an error of logic to distinguish among evidence that is more or less decisive for a conviction: either some evidence is decisive, or it is not, but \textit{tertium non datur}. In fact, either the outcome of the judgment changes if the evidence is dismissed, and in this case the evidence is decisive, or the outcome remains the same, and in that case the evidence is irrelevant for the conviction. In other words, it does not exist any evidence that \textit{partially} affects the outcome of a judgment.\footnote{\textsc{Ferrua}, supra note 70, 127.}

But if the category of ‘partial evidence’ fades, so does the need for a case-by-case distinction based on how much the tainted evidence influenced the outcome of the judgment. Therefore, if the Court finds some tainted evidence irrelevant for the outcome of the judgment it is reviewing, it shall rule that there was no violation of the ECHR. In every other case, the violation exists, so there is the need to adopt some domestic measures to remedy the violation with no exception.
b) Let us move now to the second argument made by those who advocate for a case-by-case distinction, and for excluding the automatic effectiveness of CHR judgments. The argument is that such automatic effectiveness would imply a systematic exception to the principle of *res judicata*, and this would be unacceptable because of the legal uncertainty it would engender.

To be sure, the choice is between maintaining in effect a tainted decision, for the sake of a principle that, no matter how fundamental, already has a number of exceptions, and on the other hand removing the unfair effects of that sentence, in order to effectively protect fundamental rights— in a word, in order to “take them seriously”.

The argument made in favor of the first alternative is that the principle of *res judicata* is essential for legal certainty, which cannot be sacrificed. However, it can be observed that certainty is adequately protected when everybody knows that a petition to Strasbourg can have such a consequence, and providing for that in a law would be enough to dispel all doubts.

After all, Italian law already provides for the situation when the protection of individual liberty and the rule of law prevail over the need for legal certainty, *i.e.* when a final conviction is based on a law that is later declared unconstitutional. Indeed in this case all the effects and the enforcement of the decision, regardless of the fact that it is final, are suspended (Law March 11, 1953, no. 87, Art. 30, para. 4). Thus the solution proposed would simply follow closely this approach.

Moreover, the same *Corte di Cassazione* has recently stated very clearly that “when it comes to the point of striking a balance between the two constitutional values of *res judicata*, on the one hand, and of “fair” trial, on the [other], it is necessary that the latter prevail.\(^{73}\)

Furthermore, the principle of *res judicata* has been recently considered subject to exceptions within the EU system, by a judgment issued on July 18, 2007 by the Grand Chamber of the ECJ (Case C-119/05, *Ministero dell’Industria, del Commercio e dell’Artigianato v. Lucchini SpA*): this ruling stated that “Community law precludes the application of a provision of national law, such as

\(^{73}\) *Corte di Cassazione, supra* note 33 (case Drassich).
Article 2909 of the Italian Civil Code, which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents” the full respect of EU law (para. 63).

To date, as was recalled above, the Italian Constitutional Court considers the EU and the ECHR systems substantially different, so this conclusion cannot be extended to CHR judgments, though it is important that the ECJ accepts the possibility of putting aside the principle of *res judicata* when that is necessary to meet what the Italian constitution calls “international obligations.”

Maybe this conclusion appears too drastic when it is a matter of minor violations, because it increases the risk of quashing, with no exception allowed, even very important judgments because of possibly trivial violations. The argument is very important, but it proves too much. First of all, it seems necessary to reconsider what is deemed to be a trivial violation. As was said before, there is also the need “to take seriously” many procedural rights, and, thus, for example, to acknowledge that the violation of the right to a public trial can invalidate the whole trial and the decision.

But most of all, it may be considered that the solution suggested here, even though it may in effect place the CHR in the position of a court of last resort, does not mean that the Court should reexamine the sentence *in the light of the Italian law*. Actually, this is probably what worries those who oppose this approach. If this were true, they would have reason to be worried. Italian codes of procedure already provide many grounds of invalidity, therefore adding a further reason to assert invalidity, thereby increasing the already high risk of having to begin the trial all over again, would in fact not be desirable.

But the ECHR would not apply Italian law; its role would necessarily remain the one it has had up to now, that of assessing the general behavior of domestic judges *in light of the Convention*. To sum up, nothing about the Court’s judicial function would change: what would change would just be the importance of its decisions in domestic systems, which would increase together with the protection of fundamental rights.

After all, some authors have correctly argued that it is the ECHR system itself that requires the putting aside of the principle of *res judicata*: the fact that the Court “may only deal with the matter
after all domestic remedies have been exhausted” (the fundamental rule of Art. 35 ECHR) necessarily implies that it considers only judgments that are final in the domestic jurisdiction. If one adds what derives from the above-mentioned Articles 13 and 46, the conclusion is that “when the Court finds a violation of the ECHR, the person who was affected by the violation shall have the right to file a petition in his domestic jurisdiction to remedy the violation through a so called \textit{restitutio in integrum}^{75}.

To be sure, it can be argued that these remarks inevitably lead to an even more radical conclusion: the reopening of the trial and the suspension should be afforded not only in case of procedural violations, but also when it is the result of a domestic decision, per se fair from the formal point of view (with respect to the violations provided for by Art. 6, para. 3, ECHR), but unfair from the substantive point of view, that is to say, on the merits.

For instance, it can be argued that freedom of expression (Art. 10, ECHR) should also be protected also when an individual was convicted in his country, and often subject to a criminal punishment, for uttering an opinion that the Court said it was his right to utter, even though the trial that led to his conviction respected all the rights provided for by Art. 6, para. 3, ECHR.

Indeed, denying protection in such a case would inevitably produce what American First Amendment doctrine calls a “chilling effect”\textsuperscript{76}: it is the self-censorship due to the fear arising from a previous conviction of oneself or another. Indeed, if the protection is not granted when it is a matter of merits, and the domestic sentence, even if formally fair, remains all the way into force, there would be good reason to fear similar legal exposure if one repeats the same expression. So the

\textsuperscript{74} Lupo, \textit{supra} note 32, 2252.

\textsuperscript{75} \textit{Id.} Instead, for some criticism towards the judgments “where the Court seems to order the liable State to afford the \textit{‘restitutio in integrum’}”, see PIRRONE, \textit{supra} note 13, 70.

\textsuperscript{76} The expression became widely used since when Justice Brennan of the U.S. Supreme Court used it in his \textit{majority opinion} in the case \textit{Dombrowski v. Pfister}, 380 U.S. 479 (1965).
fact that the CHR said that that expression was legitimate would end up meaning very little, with
the consequent impairment of the freedom of expression protected by the Convention.

c) The last argument is probably the hardest to counter, but also the most elusive: it is the
argument that, since the CHR and domestic judges work with different logical categories, it is
simply impossible to consider the former as a higher judge in the same hierarchy, because each still
belongs to a separate legal system.

It is undeniable that the Strasbourg Court traditionally uses a fuzzy logic: 77 namely, the CHR
doesn’t apply the classic alternative of the binary logic followed by domestic judges, e.g., guilty/not
guilty, but assesses the overall behavior of the State in a certain situation, considering different
aspects, according to the fundamental principle of proportionality. For instance, to go back to the
example of the freedom of expression (Art. 10 ECHR), judgments in these cases do not explicitly
say if a certain utterance, because of which the individual was convicted, was legitimate or not per
se, but rather they tend to find or not find a violation of Art. 10 considering all the circumstances of
the specific case, going from the type and severity of the punishment to the historical and political
background of the utterance. In short, they don’t say black or white (illegitimate/legitimate
behavior), but typically paint in shades of gray (violation or non-violation in this case but).

Another difficulty is that the Italian Corte Costituzionale has traditionally adhered to the dualist
theory of the relationship between the domestic system and the Convention. 78 In particular, “in the

77 About that, see Massimo Vogliotti, La logica floue della Corte Europea dei diritti dell’uomo tra
tutela del testimone e salvaguardia del contraddittorio: il caso delle “testimonianze anonime”, 149
GIUR. IT. 851 (1997).

78 Renzo Dickmann, Il rilievo del diritto internazionale dei diritti umani nell’interpretazione
costituzionale,
http://www.federalismi.it/ApplOpenFilePDF.cfm?dpath=document&dfile=02122008154326.pdf&c
past the Court has not considered the law of execution of the CHR to rank higher than domestic law (except in Judgment 10 of 1993, but no other judgment has followed it); therefore the violation of the Convention by an Italian statute does not result per se in any violation of the Italian constitution.\(^\text{79}\) However, the more recent trend described above, both on the legislative and the judicial side (involving both the *Corte di Cassazione* and the *Corte Costituzionale*) raises the possibility that this traditional view will soon be overruled.

Indeed, beyond the significant case-law opening, the most important fact is the above-mentioned amendment of Art. 117, para. 1 of the Italian constitution. As the *Corte Costituzionale* acknowledged in its Judgments 348 and 349 of 2007, and implicitly also in Judgment 129 of 2008, this amendment raised the ranking of the ECHR in the Italian hierarchy of sources of law, making them an ‘interposed standard of review’ (*norma interposta*\(^\text{80}\)), thus placing them on a higher level than the law, subject only to the constitution (therefore statutes that are contrary to the ECHR now indirectly violate the Italian constitution, and thus have to be considered unconstitutional). Especially after these rulings, meeting the obligations that the ECHR imposes on Italy is no longer avoidable, particularly as regards the duty to abide by the Court’s judgments.

But there is another reason why Italy should arguably change its present approach to CHR judgments, that is the need to assure the general consistency of its legal system as much as possible. Even if the two systems remain formally separated from a theoretical point of view, the demand for straightforward laws, as accessible as possible to the man in the street, must also be considered.

Indeed, recent experience has repeatedly shown, even if with regard to a different system, the EU, that integration faces serious obstacles if the man in the street views European institutions as

\(^{79}\) Sorrentino, *supra* note 19, 86.

\(^{80}\) For the concept of *norma interposta*, see, *supra*, note 37.
remote and difficult to understand. Therefore, if one wants to promote integration, it is necessary to make them as close and understandable as possible to the European citizen.

The same can be said about the ECHR system. From this perspective, it seems clear that a system that proclaims the Strasbourg Court to be the highest level of protection of fundamental rights, but then does not help in real terms the individual whose claim that Court has accepted, will convey to him the idea that the European remedy is in fact a blunt, ineffective remedy, only able to afford him a “moral” victory but not to affect what was ruled by the domestic judge. And this also brings a serious danger: that that individual believes the European remedy falls short of the expectations it had given rise to.

Indeed, it is hardly satisfying for him winning a case in Strasbourg (thereby seeing it acknowledged by the Court that, e.g., his detention was unlawful, that the expropriation of his land was against the law, or that he was unlawfully discriminated against because of his–most likely her–gender, or race or religion and so forth), yet realizing then that this acknowledgement does not have the automatic result of finally granting him the right the Court said he was entitled to.

After all, it is not by coincidence that the Convention provides for monetary satisfaction only on a contingent basis, preferring to impose on Member States the obligation to afford individuals the very right the Court found them entitled to. Compensation does not give him back his freedom; it does not clean up his criminal record; it does not give him back the property he was unlawfully dispossessed of; nor does it give his the job he is entitled to; and so forth. To be sure, that compensation is not a sufficient remedy is also proved by the fact that often petitioners do not even request it, even though they should be entitled to it if they win the case.

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81 This risk worsens the already “limited impact” that the ECHR has had on the Italian system of civil and political freedoms: this has been due to a different set of reasons, thoroughly studied by Alessandro Pace, *La limitata incidenza della C.E.D.U. sulle libertà politiche e civili in Italia*, in 7 *DIRITTO PUBBLICO* (DIR. PUB.) 1, 10 (2001).
Another indirect testimony of the insufficiency of compensation is the type of violations reported by individuals in relation to the State allegedly responsible for them. Indeed the feeling is that, for example, Turkish authorities won’t be persuaded to abide by Convention standards on a regular basis in dealing with the Kurdish minority by having to pay a monetary compensation, usually moderate and coming after a long time, to the people whose fundamental rights the Court found they had violated. Similarly, the Italian Parliament never amended Italian rules on the amount of the compensation afforded in cases of expropriation, in spite of the great number of times Italy was found to have violated the ECHR by the Strasbourg Court for affording too little money. Finally, the Corte Costituzionale had to intervene, with Judgments 348 and 349, and only after that, and only two months later, did the Parliament for the first time amend the challenged system.\(^82\)

It is true that in other cases the Italian legislature has acknowledged CHR instructions, e.g. for the law of default judgments,\(^83\) and most prominently for the reasonable length of the trials.\(^84\) However, especially if one considers the unsatisfactory results achieved in this second area by the so called legge Pinto (Law March 24, 2001, no. 89), the feeling is that until the Parliament binds

\(^{82}\) It did so with the legge finanziaria 2008 (Financial Law for 2008; Law December 24, 2007, no. 244). Art. 2, paras. 89 and 90 of this Law introduced new criteria, more respectful of the ECHR, to estimate the amount of money a person is entitled to in case of expropriation, and the sum to be awarded in case of constructive expropriation (the so called ‘occupazione acquisitiva’) (see Ciuffetti, supra note 46, 11).

\(^{83}\) The CHR ruling decisive for the change in the Italian approach to default judgment was Somogyi v. Italy (no. 67972/01), issued by the Second Section on May 18, 2004. This ruling was recalled supra, note 25.

\(^{84}\) There has been an incredible number of CHR judgments that found Italy in violation of Art. 6.1 of the ECHR, about the “reasonable length” of the proceedings, starting with Corigliano v. Italy (8304/78), dating back to December 10, 1982.
itself to systematically enforce Strasbourg judgments, like it would with a law like the one proposed in this article, it will always resist amending the domestic law found incompatible with the Convention, often choosing to (literally) pay the penalty for violations of European law, rather than conforming its legislation to the requested standards. It is clear that, if an Italian judgment based on a law that violated the ECHR were automatically quashed after a finding of a violation by the Strasbourg Court, as proposed in this article, Italy would lose a major incentive to maintaining the illegitimate status quo (and the same observation can be applied to any other state).

Finally, it still has to be pointed out that the approach followed in this article, according to which compensation is an insufficient remedy as a general rule, was embraced by the very recent above-mentioned ruling of the Grand Chamber of the CHR VgT v. Switzerland (no. 2). This case was about a failure by Switzerland to enforce a previous Judgment of the Court, VgT Verein gegen Tierfabriken Schweiz v. Switzerland, no. 24699/94 (judgment of June 28, 2001, Second Section). It is particularly relevant because it is referred to an administrative proceeding and not to a criminal one, confirming that there is no substantial difference in the way the ECHR and its organs consider the violations in the criminal sphere, on the one hand, and in the civil and administrative one, on the other, as was held above, under letter a).

The competent Swiss authorities had denied the applicant association the authorization to broadcast a tv advertisement. The Court, in its 2001 Judgment, had found this denial in violation of the association’s freedom of expression (Art. 10, ECHR). Relying on this Judgment, the association filed a new request of authorization to broadcast the ad at issue, but the request was again rejected by the Swiss authorities. VgT challenged also this rejection with a second application (in the meanwhile, the Committee of Ministers had adopted a final resolution on the enforcement of that first judgment, satisfied with the fact that the Swiss regime allowed to apply for the reopening of the proceeding, but without waiting for the outcome of that application). The Fifth Section ruled in favor of the applicant association (Judgment of October 4, 2007), and now the Grand Chamber has upheld this ruling.
We quote here some significant passages of the Grand Chamber’s ruling, that strengthen this article’s approach: “[§ 85] The State Party [will] be under an obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects, the aim being to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded (see, among many other authorities, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249 [and] *Assanidze v. Georgia* [GC], no. 71503/01, [§ 198]). [§ 86] These obligations reflect the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation which existed before the wrongful act was committed, provided that restitution is not “materially impossible” and “does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation” (Article 35 of the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts [adopted by the General Assembly at its 53rd session (2001), and reproduced in *Official Records of the General Assembly*, 56th Session, Supplement No. 10 (A/56/10)]). [§ 89]. With regard in particular to the reopening of proceedings, the Court clearly does not have jurisdiction to order such measures (see, among other authorities, *Saïdi v. France*, 20 September 1993, § 47 [and] *Pelladoah v. the Netherlands*, 22 September 1994, [§ 44]). However, where an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, the Court may indicate that a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation (see, among other authorities, *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003; *Öcalan*, [no. 46221/99], § 210; and *Claes and Others v. Belgium*, nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, § 53, 2 June 2005). This is in keeping with the guidelines of the Committee of Ministers, which in Recommendation R (2000) 2 called on the States Parties to the Convention to introduce mechanisms for re-examining the case and reopening
the proceedings at domestic level, finding that such measures represented ‘the most efficient, if not the only, means of achieving *restitutio in integrum.*’

To conclude, we now move to consider two more arguments in support of the “extreme option.” First of all, it should also be pointed out that an approach like the one proposed here would have the benefit of the clarity afforded by any automatic mechanism. Which by the way suggests that the best way to deal with the issue is actually via a legislative intervention: in a civil law system like the Italian one, entrusting this task to the courts would only increase litigation, because every individual who won a case in Strasbourg would have to bring a new suit to get Italy to abide by the European judgment, although every time there would be uncertainty about the outcome.

One could argue that the automatic solution would have all the downsides the law has when it has to be applied in specific cases, chiefly not allowing the court to consider the issues raised by the particular case, with the risk of quashing very important decisions for very trivial violations. However, other considerations should prevail: on the one hand, the need for legal certainty and clarity; on the other, the fact that it is difficult in these cases for the judges to afford a remedy equivalent to the one that could be afforded by the legislature. Indeed the *Corte di Cassazione* can suspend the enforcement of a judgment, but without legislative authorization that judgment will

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86 Though it has to be underlined that according to some authorities, Italy is already bound to the full enforcement of CHR judgments: Giulio Ubertis, *Conformarsi alle condanne europee per violazione dell’equità processuale: doveroso e già possibile*, 3 *Corriere del Merito* (CORR. MER.) 595 (2007).
remain in limbo, unenforceable but still existing in the legal system. This is not a desirable outcome.87

Moreover, it has to be considered what was said above about the need for “taking the Convention seriously”: indeed, taking it seriously requires that a country must accept the consequences of having trials nullified if the CHR finds a violation of the Convention.

In this situation, the CHR’s fuzzy logic is actually helpful: it is certainly true that domestic courts should never uphold a conviction if there was a procedural mistake, just because they consider the outcome fair on substantive grounds. But the European judge’s logic is different, since it has to look at the overall outcome of the trial, not specifically at compliance with particular domestic rules of procedure (thus remaining fundamentally different from an imaginary judge of a court of last resort); therefore, the actual risk of the CHR’s nullifying important trials for minor procedural mistakes is in fact more apparent than real.

Finally, one last argument in favor of full enforcement in the domestic system of CHR judgments could arise from a likely future change in the relationship between the EU system and the ECHR system: the accession of the EU to the ECHR. As is well-known, such accession is provided for by the Treaty of Lisbon.88 Although the ratification process has been suspended, it is likely that in the future the accession will be accomplished, since it is an achievement that has been discussed for a long time now.89

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87 It is just what happened in the mentioned case Dorigo, pursuant to the above-mentioned Judgment of the Corte di Cassazione no. 2800 of 2007.

88 Art. 1, number 8), that amended Art. 6 of the Treaty on EU; the accession to the ECHR was provided for by para. 2 of the newly written Art. 6.

The consequences of the accession still need to be studied in depth,\textsuperscript{90} but it can be argued that EU Member States (all members of the ECHR, too, as was said above) would have a heightened obligation to abide by the judgments of the CHR. Indeed, this obligation would become for EU Member States an obligation under EU law; therefore, even if the membership of the ECHR were still construed in a different and less obligatory way than membership of the EU, after the accession of the EU to the ECHR, EU membership would indirectly impose on each Member State the obligation of full compliance with the ECHR, since at that point every level of the Community (from its institutions to the single Member States) would be bound to abide by it.\textsuperscript{91}

Actually, it is true that, even after Judgments nos. 348 and 349 of 2007, the ECHR is still subordinate to the constitution in the Italian legal system; it is also true that some rulings by the Corte di Cassazione have clearly ruled out the so called communitarization of the ECHR,\textsuperscript{92} and it is equally true that the ECJ ruled against the accession of the EU to the ECHR without a relevant amendment of the Treaty.\textsuperscript{93} However, when accession occurs, as provided for by the Treaty of Lisbon and as is likely to happen in the future, the situation would change.

\textsuperscript{90} See Id. at 2.

\textsuperscript{91} About this issue, see Antonio Ruggeri, Ancora in tema di rapporti tra CEDU e Costituzione: profili teorici e questioni pratiche, 39 POL. DIR. 443, 452 (2008): the author observes that the EU law can be the “vehicle” of the Convention. See also the scholarship works recalled in this article, in note 21.

\textsuperscript{92} These rulings are recalled supra, notes 34 and 35.

\textsuperscript{93} ECJ, Opinion 2/94, Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, of 28 March 1996.
In this respect, it is interesting what the Italian Government itself stated in its second Annual Report on the Enforcement of CHR judgments, sent to the Italian Parliament on June 30, 2008. The Report reads: “If the Treaty of Lisbon enters into force, [Article 6] would imply that all the provisions of the Convention would become directly applicable in the Member States’ legal systems, with the same status and applicability as EU law, that is to say, by virtue of Art. 11 of the Italian constitution (as just interpreted by Judgments nos. 348 and 349 [of 2007]), and would no longer be subordinate to the constitution, as they are now because they would be applied by virtue of Art. 117, para. 1.”

Regarding this point, the Report, after recalling the Corte di Cassazione’s position, expressed in the judgments mentioned in the first paragraph, says two very interesting things: “The Italian Corte Costituzionale’s position does not seem to be compatible with the European Court’s, as expressed in its judgments and in its President’s statements,” but most of all: “The Corte Costituzionale’s standing does not seem to be perfectly compatible with the new structure of the EU outlined by the recent Treaty of Lisbon, where the so called communitarization of the ECHR principles was accomplished. Indeed, these principles were included in EU principles applicable

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94 The Report was written pursuant to the duty provided for by Law January 9, 2006, no. 12, and of the relevant Decreto del Presidente del Consiglio dei Ministri February 1, 2007, mentioned supra, note 50. The Report is available at www.governo.it. The Report for the following year, 2008, sent to the Parliament on June 30 and also available at www.governo.it, 2009, is less significant.

95 On the Court’s judgments, see Chapter IV of the Report. On its President’s statements, see the speech given on January 25, 2008 by the President of the Court, Mr. Jean-Paul Costa, on the occasion of the opening of the judicial year. The transcript of his speech is available at http://www.echr.coe.int/NR/rdonlyres/3847D848-1FD2-4ABC-8C97-3ADA953C3865/0/OpeningJudicialYear25_JanuaryCosta.pdf.
and binding *erga omnes*, whereas the Treaty of Maastricht had given those principles a mere programmatic value.”

Finally, the same Report observes that the accession of the EU to the ECHR would also affect the relationship between the two European courts, which would in have a significant effect on the solution to the problem considered in this work: “However, even as for the relationship between the EU and the Strasbourg Court, the explicit reference to ECHR principles in the Treaty of Lisbon, will change the relationship between the two Courts, and will most likely result in a claim for supremacy by the CHR with respect to the EU and to its Court of Justice, now a signatory to the Convention and not a parallel and independent institution any more.”

In any event, the way the relationship between the two Courts will be configured will directly influence the effect of CHR judgments in individual Member States. At the beginning, the ECJ stated that the protection of fundamental rights was not within EEC jurisdiction, and therefore within its own, because it was reserved to the jurisdiction of individual Member States.96

Later on, though, the ECJ changed its mind, coming to the point of stating that “fundamental rights of the [individual are] enshrined in the general principles of Community law and protected by the Court,”97 so that today the two Courts are moving so closely together that they appear as part of

96 ECJ, judgment of 4 February 1959 (case C-1/58, *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*).

97 ECJ, judgment of November 12, 1969 (case C-29/69, *Erich Stauder v. City of Ulm, Sozialamt*).
a unitary legal system. In particular, as for the ECJ, it is worth recalling its Judgment of September 12, 2006 (case C-145/04, Spain v. United Kingdom [Matthews]), that rebutted the petition of Spain against a UK law on the grounds that the UK had passed that law in order to abide by a previous judgment by the CHR, of February 18, 1999 (Matthews v. UK, no. 24833/94). As for the ECHR institutions, we can recall the Commission Decision of February 9, 1990 (M. & Co. v. the Federal Republic of Germany), that ruled that “the transfer of powers to an international organization is not incompatible with the Convention provided that within that organization fundamental rights will receive an equivalent protection,” therefore ECHR institutions will not hear complaints aimed at the protection of fundamental rights that are already presumptively protected by the EC system in a suitable manner; as well as the following CHR rulings: S.A. Dangeville v. France (no. 36677/97, Judgment of April 16, 2002) and S.A. Cabinet Diot and S.A. Gras Savoye v. France (nos. 49217/99 and 49218/99, Judgment of July 22, 2003), where the Court found that France had violated the Convention by not abiding by certain obligations imposed by EU directives; Bosphorus Airways v. Ireland (no. 45036/98, Judgment of June 30, 2005), where the Court concedes that the presumption set up by the Commission in M. & Co. can be rebutted, but nonetheless rejects the claim because “the protection of fundamental rights by EC law could have been considered to be, and to have been at the relevant time, “equivalent” to that of the Convention became then very common: recently, see for example judgments of June 26, 2007 (case C-305/05, Ordre des barreaux francophones et germanophones and Others v. Conseil des Ministres), where there is an explicit reference to the interpretation of Art. 6 ECHR given by the CHR (para. 31), and July 25, 2008 (case C-127/08, Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform, para. 79).

Maria Elena Gennusa, La Cedu e l’Unione europea, in I DIRITTI IN AZIONE. UNIVERSALITÀ E PLURALISMO DEI DIRITTI FONDAMENTALI NELLE CORTI EUROPEE 91, 141 (Marta Cartabia ed., 2007).
system”; and finally Aristimuño Mendizabal v. France (no. 51431/99, Judgment of January 17, 2006), which interprets Art. 8 CHR “in the light of Community law and in particular of Member States’ obligations regarding the rights of entry and residence of Community nationals.”

To sum up, this brief analysis seems to show a clear trend towards the progressive moving closer together by the two Courts. The expected final stage of all this process would seem to be the accession of the EU to the ECHR: from this perspective, Art. 6 of the Treaty of Lisbon would just have sanctioned formally an outcome already in some way reached by the two Courts’ case-law.

Therefore, even though accession has not yet been accomplished, and in spite of the resistance by the Corte di Cassazione and the Corte Costituzionale, considering what is already now the relationship between the two Courts, nothing would seem to prevent Italy, when deciding to amend the law currently in force, from anticipating the solution to a problem that is likely to come to the legislative agenda within the next few years. In fact, this seems to be by far the best solution.

Briefly, the argument proposed, that at first sight can appear to be far-fetched, seems to be the one that can better, more seriously, fulfill Italy’s international obligations arising from ECHR membership, especially now that this fulfillment is explicitly imposed on the legislature by the new wording of Art. 117, para. 1, of the constitution, and that the Corte Costituzionale has construed the ECHR as an ‘interposed standard of review’ (norma interposta\textsuperscript{99}) for compliance with that provision. Anyway, even though one might not want to accept a solution so oriented in favor of European integration, considering the inroads that it makes on the sovereignty of the Member States, let alone hold it to be imposed by the Italian constitution, the thesis assumed here should be at least included in the list of the solutions already allowed by the Italian constitution, besides

\textsuperscript{99} For the concept of norma interposta, see, supra, note 37.
being—but this is just a prediction—a likely final outcome which the relationship between the Italian and the ECHR legal systems will necessary reach, maybe even sooner than expected.  

5. The bills pending before the Italian Parliament: a step forward and two steps backward

So *quid juris*? After stating what principle should guide the legislature to assure an effective protection of fundamental rights, we now move briefly to the bills currently pending before the Italian Parliament, aimed at complying with a duty that Italy will not be able to ignore much longer. In the current session, the 16th, two bills have been presented to the Senate, S-839 and S-1156, and three at the Chamber of Deputies, C-1538, C-1780, and C-2163. Bill S-1156 has since been withdrawn, so we will focus on the other four.

First, all the bills introduce a new type of “Review pursuant to a judgment by the European Court of Human Rights,” but they only deal with criminal cases, and do not provide for any remedy

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100 We can also recall, in this perspective, CHR Judgment *Stoichkov v. Bulgaria* (no. 9808/02, Judgment of March 24, 2005), where the Court found in violation of Art. 5 (1), ECHR the imprisonment of a person to enforce a judgment that the Court found tainted by a violation of the Convention. Therefore, in these cases, Member States shall allow the reopening of the trial, and if they don’t, the detention is unfair from the moment they deny the reopening.

But see also the partly dissenting opinion of Judge Zupančič in *Cable and Others v. United Kingdom* (nos. 24436/94 and others, Judgment of February 18, 1999), according to which “the national legislation ought to provide for retrial of cases in which the proceedings have been found not to comply with essential procedural requirements. That, I think, is the purpose of the Article 41 words referring to the reparation allowed by internal law.”
for civil and administrative ones.\(^{101}\) As for this aspect, they follow the above-mentioned French model, but they differ from bill S-3354 of the 14th session, that would have added to the code of civil procedure a new ground for nullifying a judgment: that it conflicted with a decision of the European Court of Human Rights.\(^{102}\)

Bill C-1538 adds a new article, 630-\textit{bis}, to the code of criminal procedure, that would allow the review of convictions pursuant to a CHR judgment, “in cases not provided for by art. 630.” The other three bills, more detailed and very similar to each other, introduce the same provision,\(^{103}\) but placed in a new Title IV-\textit{bis} to be added to Book IX of the code of criminal procedure, and also make clear something that had remained implicit in the first bill, \textit{i.e.} that the Strasbourg judgment, in order to allow the revision, must be final.

Moreover, all the bills limit the review to violations enumerated in Art. 6, para., 3 of the ECHR, thus including among the violations that allow a request for review all the procedural violations, with no distinction among the more or less serious. They do not, however, allow review when the European judgment does not deal with a procedural violation, but concerns the merits of the Italian judgment, which is per se fair from a formal point of view.

Bills C-1780 and S-839 also add two further requisites that limit the chances to obtain a review: indeed they afford it only if “the violation found by the European Court of Human Rights

\(^{101}\) It is the most common approach among Member States, even though there are some that provide for the remedy in all subjects: criminal, civil and administrative (as was recalled in note 65, Tega, \textit{supra} note 21 mentions Bulgaria, Lithuania, Norway and Switzerland).

\(^{102}\) Instead, still in the 14th session, bill S-3362 provided for a very circumscribed innovation: a new form of quashing of civil judgments, but only of those regarding the adoption of minors.

\(^{103}\) Except for the omitted reference to the ‘\textit{decreti penali}’ (in the Italian code of criminal procedure, ‘\textit{decreti penali}’ are a form of conviction without a trial, that the defendant can accept in exchange for a reduced penalty).
had a decisive impact on the outcome of the trial” (and this decisive impact shall be proved in the petition as a condition for it to be admissible\textsuperscript{104}), and if, at the same time, “the person convicted, when the request for review is filed, is or will be imprisoned or is subject to a measure of diversion different from a fine.” (It should be noted that the French model also includes a specific condition, although slightly different, namely that the violation was of such a kind and seriousness as to make insufficient the monetary satisfaction afforded by Art. 41, ECHR.)

Other important provisions are the following: the expiration date for filing the petition, which is six months from the CHR final judgment in bill C-1538\textsuperscript{105} and three months for the other three (in the French law, the expiration date is one year); in the first bill, there is an exclusion of the review for violations already committed when the law came into force, whereas the other bills allow a request for review of judgments already issued, within one year for bill S-2163, and three months for the remaining two; the impossibility to impugn Corte di Cassazione decisions that rule on the admissibility of the petition, in bills C-1780, S-839 and S-2163;\textsuperscript{106} finally, these three bills also provide for the suspension of the enforcement of the sentence, unlike bill C-1538, but only if the court of appeal finds “that from the enforcement of the impugned sentence an unlawful detention could result,” and anyway in this case the Court can apply, “if necessary,” certain precautionary

\textsuperscript{104} As for the rules on the necessary contents of the petition, also bill S-2163 requires that it proves the decisive impact of the violation, as a condition for it to be admissible. As was said, though, this bill does not include expressly this requisite among the conditions to demand the review. It is clearly an oversight: indeed, the covering report of the bill takes for granted that the review is granted “only if the violations had a decisive impact on the outcome of the proceeding.”

\textsuperscript{105} Though the expiration date is strangely included in the provisional regulations.

\textsuperscript{106} As was said, these three bills provide for a new proceeding of review, extensively regulating it, whereas bill C-1538 only amends the already existing remedy of the review of judgments, simply allowing to demand it for a new motive.
measures (the French law is similar on this point: the suspension of the enforcement is discretionary and, if it is not afforded, the person is considered as if she were in “détention provisoire” (“provisional detention;”) Art. 626-5, para. 2 of the French code of criminal procedure also provides a maximum length of the procedure, precisely one year from the time that the special committee decided the petition was admissible.107)

To conclude, it appears that all four bills go down a very different path from the one described in this article as preferable, even though it is to their credit that they deal with the matter at all, since they offer a significant starting point for discussion.

There is one last question: are the choices made by these bills just less effective in granting the domestic enforcement of CHR judgments, but good enough to meet the “duty to abide by” them, or instead do they fall short of the minimum threshold of protection? If the answer is the latter, in case one of those bills were signed into law with no substantial amendment, that law would be unconstitutional because it would be contrary to Art. 117, para. 1, of the Italian constitution, because of the ‘interposed standard of review’ (norma interposta108) of the Convention (in particular, Art. 46.)

The strongest argument against the pending bills is the choice to focus exclusively on criminal procedure. For the reasons stated above, it would arguably run against the rationality test to distinguish among violations of the Convention in the criminal sphere, on the one hand, and in the civil and administrative one, on the other.

107 Bills C-1780, S-839 and S-2163 provide for an expiration date respectively of a month (the first two) and thirty days (the third) for the decision on the admissibility of the petition. This decision shall be made by the Corte di Cassazione. Also in the French regime this task is entrusted to a special committee made of judges of the Cour de Cassation.

108 For the concept of norma interposta, see, supra, note 37.
Another source of perplexity is the provision of further conditions, such as the “decisive impact” and the “condition of imprisonment,” that, besides making it more difficult to exercise an option that should arguably be encouraged as much as possible, clash with what was said about “proof of decisive impact” (the first condition), and with the likely irrationality of the choice of overlooking those subject to a measure of diversion (the second condition). The irrationality of the choice seems clear if one considers that this law with the understandable purpose of affording a higher protection in a case considered more sensitive, namely when a person is imprisoned, ends up treating more favorably a person guilty of a presumably more serious crime, considering he was imprisoned, than the person guilty of a less serious crime, for whom a lesser alternative to detention was considered sufficient, but this would evidently run counter not only to the principle of equality (Art. 3 of the constitution), but also to the necessary re-educational purpose of punishments (Art. 27, para. 3 of the constitution.)

Doubts are also raised by the choice of bill C-1538 not to suspend the effects of the sentence, and in general of all the bills to ignore totally the other effects of the conviction, different from the punishment itself, such as the inclusion of the conviction in the criminal records, the effects on subsequent punishment in case of a relapse into crime, and so forth, that cannot be overlooked. In this case, too, there would be little benefit of winning the case in Strasbourg, if one cannot remove all the effects of the relevant domestic judgment, thus having a contradictory outcome: satisfaction for a sentence found unfair, but at the same time the preservation of that sentence and its effects.

Furthermore, even the three bills that provide for a suspension of the sentence, take into consideration only the detention, and make the suspension subject to the assessment, on a case-by-case analysis, that “an unlawful detention could result.” Also in this case, there would arguably be a disparity of treatment with somebody whose conviction is struck down by the court of appeal or the Corte di Cassazione (with remand). Indeed in these cases the code of criminal procedure prescribes, with no exception, the release of the defendant if he was imprisoned pursuant to a precautionary
measure (Art. 300, para. 1), while in the bills examined not only is release discretionary and not automatic nor immediate, but precautionary measures may even be adopted *ex novo*. Even if such measures were based on a reasonable and understandable need, their employment would seriously risk compromising “compliance” with the European judgment.

A further reason for perplexity is the choice of limiting the review, within the criminal sphere, to Article 6, para. 3 ECHR, namely just to the procedural violations, without considering judgments that are formally fair, but that nonetheless are unfair from the point of view of the substantive outcome. This aspect seems more questionable; and for the reasons previously discussed it is arguably necessary to allow the reopening of the trial also in case of violations concerning the *merits* of the judgment, if one wants to grant a real effectiveness to CHR pronouncements.

Finally, one last observation concerns the review itself: indeed, it can be questioned if it is not about the conditions for requesting review, but the very choice of review itself as a remedy in this situation. Some authors have concluded that “review does not seem to be the most suitable remedy, unless it is amended to the extent that it becomes a different remedy.” This objection has been justified on the grounds of its “strict outcome”, *i.e.* “that sharp alternative between upholding

109 Allegrezza, *supra* note 64, 26. As is observed by Mantovani, *supra* note 14, the *Corte Costituzionale* itself (in Judgment no. 129 of 2008) “seems to question the rationality of simply widening the chances to demand the review, at least as the review is currently regulated;” indeed the Court (in Judgment of July 13, 2000, no. 395) would have considered the review “‘outlying’ [in relation to] the needs”. A ‘special’ form of review was provided for also by Bill S-1797 of the former Parliament session. About that bill, see Giulio Ubertis, *L’adeguamento italiano alle condanne europee per violazioni dell’equità processuale*, in BALSAMO & KOSTORIS EDS., *supra* note 17, 118, and Luca De Matteis, *Tra Convenzione, supra* note 46, 3994, 3999.
and acquittal.\textsuperscript{110} Actually, this is not really the problem, since the remedy would, in any case, be applied at the domestic level, where the appropriate binary logic is the “sharp alternative” guilty/not guilty.

Instead, the problem seems to be in the very rationale of the remedy, thought to be based on the reopening of a completed trial because there is something new about the facts.\textsuperscript{111} But in our case there is no new fact to consider, but only a judgment by a judge of a tribunal that is in some way higher that found a violation in a judgment considered final by the domestic legal system (so, if anything, what is new relates not to the facts, but to the law or its interpretation). Therefore, the most appropriate solution seems to be introducing a remedy not akin to review, but to vacating and remanding (cassazione con rinvio). Indeed, it would be desirable if the domestic judge were subject with respect to CHR judgments to something very similar to the principles of law stated by the Corte di Cassazione when it reverses and remands: indeed, such a construction would grant to the CHR that supremacy in the matter of fundamental rights that it is arguably entitled to.

6. Conclusion: towards the United States of Europe?

In any case, even if one does not want to accept the suggested solution, it is very important that the legislature carefully considers the different options it has in order to comply with the duty provided for by Art. 46 ECHR. It is a wonderful chance to promote, or even better, to keep up with, the process of European integration.

Indeed, a solution like the one suggested here would allow the CHR to play the leading role as a guardian of fundamental rights that is due to it, but that it has not been able to play at its full

\textsuperscript{110} Allegrezza, supra note 64, 26.

\textsuperscript{111} Id.
potential, also because of the lack of a mechanism like the one described in this article.  

A Court finally at its full potential would then be on its turn an extraordinary drive of integration between European States: indeed, the more central its role is, the more influential is the unifying power of its case-law.

On the contrary, if the amendments are too narrow, the CHR could find them insufficient. As far as Italy is concerned, the Corte Costituzionale would probably have then to engage in an ‘activist’ jurisprudence to fill the gaps in protection left by the Parliament (after all, it is what has happened so far). To avoid this scenario, the intervention of the Parliament must be adequate to fulfill Italy’s obligation of compliance with CHR judgments.

But most of all, an intervention by the Parliament to grant full effectiveness to CHR judgments seems necessary to make sure that it is really worth it, for the Italian nationals (as was said, though, we believe that this conclusion is valid for any other State’s nationals), to take on the burdens of a petition to the Strasbourg Court, or in other words to make sure they do not estimate those burdens superior to the benefit they could gain. Indeed, even though one is not in favor of the European integration, it seems necessary to consider that today the Court of Strasbourg is the European court that can better protect fundamental rights. In other words, the road to an effective and serious protection of fundamental rights in Europe starts from individual States and necessarily passes through Strasbourg, but that cannot be the last stop: in order for the road to be completed, it is necessary to go back to the individual States, and fully accomplish what was held in Strasbourg.

Let us conclude by saying that very good reasons for fostering European integration could be found by reading The Federalist Papers, a classic of the American political thought. Many of the issues and problems discussed there in the context of the American debate over the adoption of the

112 To be sure, this gap couples with other reasons: see Pace, supra note 81.

113 By using the so called ‘pronunce additive’, i.e. judgments by the Corte Costituzionale that add a provision to the law that the law did not include, but that the constitution requires.
federal constitution are relevant to today’s Europe. Indeed, most of the arguments made by
Hamilton, Madison, and Jay to advocate the adoption of the 1787 constitution by the thirteen
colonies, maintain all their relevance to the present, and could be used very successfully in the
current debate about how far European integration should go, whether in fact Europe needs a
constitution or not, and if so, what it should provide for.

In particular, in Federalist no. 21, Hamilton wrote: “[The most] palpable defect of the
existing confederation, is the total want of a SANCTION to its laws. The United States, as now
composed, have no power to exact obedience, or punish disobedience to their resolutions, either by
pecuniary mulcts, by a suspension or divestiture of privileges, or by any other constitutional means.
There is no express delegation of authority to them to use force against delinquent members.” In
Federalist no. 22, he added: “A circumstance, which crowns the defects of the confederation,
remains yet to be mentioned—the want of a judiciary power. Laws are a dead letter, without courts to
expound and define their true meaning and operation. The treaties of the United States, to have any
force at all, must be considered as part of the law of the land. Their true import, as far as respects
individuals, must, like all other laws, be ascertained by judicial determinations. To produce
uniformity in these determinations, they ought to be submitted, in the last resort, to
one SUPREME TRIBUNAL.”

In fact, both the EU and the ECHR system do have their own supreme judicial bodies, and
their impact on the law of member states is ever increasing. Nonetheless, Hamilton’s warnings are
still well worth remembering, and one reason is that they indirectly draw our attention exactly to the
problem we have dealt with in this article. Hamilton did not specifically dwell upon the importance
of the enforcement of judgments, or upon the need for such enforcement to be uniform. Evidently,
he must have seen it as obvious, implicit in his call for a uniform judiciary. Indeed his call for a


uniform judiciary cannot come without a similar uniformity in the enforcement of judgments, and most of all an effective system of enforcement. After all, “laws are a dead letter, without courts,” but we can add today that courts are a dead letter as well, without a proper enforcement of their dictates.

In response to that, one could argue that Hamilton was describing a federal government, which Europe is not, and actually several people, among intellectuals and ordinary people, oppose its evolution into a federal organization. That is true: but it should also be noted that when Spinelli and Rossi imagined the process of European integration, they envisaged “a federal reorganisation of Europe.” To be sure, a major source of inspiration for them was The Federalist Papers, and in particular the essays by Hamilton on federalism.

Maybe it is still going to take a long time, with a lot of going forward and going back; but we have to consider the hypothesis that it is in the European DNA to retrieve this Hamiltonian federal ‘soul’ instilled by Spinelli and Rossi, thus becoming the “United States of Europe,” like

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116 Spinelli & Rossi, supra note 4, II, emphasis added.


118 Actually, in 2003, Valéry Giscard d’Estaing, Jean-Luc Dehaene and Giuliano Amato (who had served respectively as Chairman and Vice-Chairmen of the European Convention) tried to do something similar to what Hamilton, Madison and Jay had done between 1787 and 1788. The historical context was very similar: just like the three American authors tried to persuade the thirteen colonies to ratify the Constitution adopted by the Philadelphia Convention, of which they had been leading actors, their three European imitators tried to persuade European states to ratify the Treaty Establishing a Constitution for Europe adopted by the European Convention, that they had chaired.

Unfortunately, the outcome was quite different. Indeed, not only did d’Estaing, Dehaene and Amato not succeed in their goal (as was recalled at the beginning of this work), unlike Hamilton, Madison,
Spinelli and Rossi themselves wrote in their Manifesto. If such a scenario does come to pass, then the solution argued for here will appear the most natural and inevitable choice. So let’s put it into effect now, thus finally “making Europe,” like another father of European integration, the Spanish intellectual and statesman Salvador de Madariaga, put it with these compelling words: “Above all, and Jay, but they even discontinued the publication of their articles in newspapers after only three had appeared (compared to the eighty-five Federalist Papers).

The three papers, meant to be the first of a series called ‘The European Convention Papers,’ were published simultaneously in several European newspapers between November and December 2003. The first one was published also by the Human Rights Law Journal: Valéry Giscard d’Estaing & Jean-Luc Dehaene & Giuliano Amato, 13.XI.03 – The European Convention’s Papers No. 1 – The varying size of the EU Member States and the double majority as an expression of the union of citizens and the union of States, 24 HRLJ 112 (2003). For the other two papers, see the French newspaper Le Monde: Id., L’Europe demain : la Commission, LE MONDE, December 4, 2003, at 1 and 18; Id., L’Europe demain : la seule grille de lecture, LE MONDE, December 12, 2003, at 1 and 13.

119 Spinelli & Rossi, supra note 4, II. Actually, the idea of the “United States of Europe” is older. One of the first intellectuals who wrote about it was another Italian statesman, the economist Luigi Einaudi (Italy’s second President of the Republic, the first appointed after the approval of the new Constitution of 1948.) In 1897, when he was only twenty-three, he wrote the newspaper article Un sacerdote della stampa e gli Stati Uniti d’Europa, in La Stampa, August 20, 1897, now in LUIGI EINAUDI, IL BUONGOVERNO: SAGGI DI ECONOMIA E POLITICA (1897-1954) 553 (2004). This collection of essays was published for the first time in 1954, not coincidentally edited by Ernesto Rossi, who had been one of his students at the University of Torino. Einaudi played a relevant influence on the thought of Spinelli, and on his turn he collaborated with the European Federalist Movement (it was again Ernesto Rossi who involved him in this activity.)
we must love Europe; our Europe, sonorous with the roaring laughter of Rabelais, luminous with
the smile of Erasmus, sparkling with the wit of Voltaire; in whose mental skies shine the fiery eyes
of Dante, the clear eyes of Shakespeare, the serene eyes of Goethe, the tormented eyes of
Dostoievski; this Europe to whom La Gioconda for ever smiles, where Moses and David spring to
perennial life from Michalangelo’s marble, and Bach’s genius rises spontaneous to be caught in his
intellectual geometry; where Hamlet seeks in thought the mystery of his inaction, and Faust seeks in
action comfort for the void of his thought; where Don Juan seeks in women met the woman never
found, and Don Quixote, spear in hand, gallops to force reality to rise above itself; this Europe
where Newton and Leibniz measure the infinitesimal, and the Cathedrals, as Musset once wrote,
pray on their knees in their robes of stone; where rivers, silver threads, link together strings of cities,
jewels wrought in the crystal of space by the chisel of time. [This] Europe must be born. And she
will, when Spaniards will say ‘our Chartres,’ Englishmen ‘our Cracow,’ Italians ‘our Copenhagen;’
when Germans say ‘our Bruges,’ and step back horror-stricken at the idea of laying a murderous
hand on it. Then will Europe live, for then it will be that the Spirit that leads history will have
uttered the creative words: FIAT EUROPA!\(^{120}\).

\(^{120}\) Salvador de Madariaga gave this passionate speech at the Hague Conference of 1948 organized
by the European Movement: he then quoted it in a book he wrote a few years later: SALVADOR DE
MADARIAGA, PORTRAIT OF EUROPE 2 (1952).