



# INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

*"dedicated since 1952 to the primacy, coherence and implementation of international law and principles that advance human rights"*

## Submission of the International Commission of Jurists to the Italian Senate

### ICJ Intervention on Senate Bill A.S. 1440<sup>1</sup>

*July 2009*

The International Commission of Jurists (ICJ) is a non-governmental organization dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. The Commission was founded in Berlin in 1952 and its membership is composed of up to sixty eminent jurists who are representatives of the different legal systems of the world. Based in Geneva, the International Secretariat is responsible for the realisation of the aims and objectives of the Commission.

The International Commission of Jurists (ICJ) herewith presents its comments to the Senate on Bill no. AS 1440.<sup>2</sup> In this intervention, the ICJ will address the compatibility of some of its provisions with the legal obligations of Italy under international law.

The ICJ recalls that article 117(1) of the Italian Constitution obliges the State to ensure that legislation enacted is in conformity with its obligations under international law. The Constitutional Court has held that a legislative provision in breach of an international obligation "violates, because of this, this constitutional requirement."<sup>3</sup> The Court has also enjoined judges to interpret primary legislation in conformity with international law and, when this is not possible, to seize the Constitutional Court of the issue in order to pass judgement as to the constitutionality of the relevant law. The consequence, in case of declaration of unconstitutionality, is that the legal provision affected by the judgment is rendered invalid.<sup>4</sup>

The ICJ expresses its views on certain provisions of the Bill which risk extending the already excessive length of judicial proceedings in Italy, such as concession of additional periods for the preparation of the defence (paragraph 1.2.1), new rules on evidence (paragraph 1.2.2), and the establishment of an additional judicial panel for judicial review of detention (paragraph 1.2.3). The ICJ also puts forward recommendations for the amelioration of the reform of the Pinto Law, the Italian remedy for excessive length of judicial proceedings (paragraph 1.3). Finally, the ICJ addresses the new rules on abstention and recusal of judges, which affect judges' independence and freedom of expression (paragraph 2.1); the rule on mandatory closure of criminal proceedings (paragraph 2.2); the new rules on revision of criminal trials (paragraph 2.3) and the provision on publication of European Court of Human Rights' decisions (paragraph 2.4).

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<sup>1</sup> A.S. 1440 "Disposizioni in materia di procedimento penale, ordinamento giudiziario ed equa riparazione in caso di violazione del termine ragionevole del processo. Delega al Governo per il riordino della disciplina delle comunicazioni e notificazioni nel procedimento penale, per l'attribuzione della competenza in materia di misure cautelari al tribunale in composizione collegiale, per la sospensione del processo in assenza dell'imputato, per la digitalizzazione dell'Amministrazione della giustizia, nonché per la elezione dei vice procuratori onorari presso il giudice di pace".

<sup>2</sup> This submission refers to the text present in the Senate on 30 May 2009.

<sup>3</sup> Sentence 349/2007, Constitutional Court, paragraph 6.2.

<sup>4</sup> Article 136, Italian Constitution.

## Chapter 1: Measures affecting the length of criminal proceedings

### 1.1. Italy and the length of judicial proceedings

Article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), to which Italy is a party, and guarantees the right to trial within a reasonable time. Article 14 (3)(c) of the *International Covenant on Civil and Political Rights* (ICCPR), to which Italy is a party, similarly guarantees to the right to a trial “without undue delay”<sup>5</sup> in both criminal and civil proceedings.<sup>6</sup>

The record of non-compliance by Italy in respect of its obligations to ensure a fair trial within a reasonable time is well established. The Council of Europe Committee of Ministers intervened most recently on this issue with Interim Resolution no. 42/2009,<sup>7</sup> identifying a total amount of 2183 cases resolved against Italy with regard to excessive length of judicial proceedings. On this occasion, as repeatedly in the past,<sup>8</sup> the Committee of Ministers called upon the Italian authorities to undertake reforms aimed at the roots of the structural problems of the judicial system,<sup>9</sup> recalling that “the dysfunction of the justice system, as a consequence of the length of proceedings, represents an important danger, not least for the respect of the Rule of law”.<sup>10</sup> The European Court of Human Rights (European Court) referred to the Italian situation in this respect as a practice incompatible with the Convention.<sup>11</sup> The Department for the Execution of Judgments of the European Court of Human Rights found that the clearance rate of Italy<sup>12</sup> of first instance criminal courts in 2007 was 98% and for the Courts of Appeals (criminal) 96%.<sup>13</sup>

The Council of Europe Committee of Ministers has recommended that “steps should be

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<sup>5</sup> The Human Rights Committee has stated that the right to be tried without undue delay is designed “to serve the interest of justice General Comment 32, paragraph 35.

<sup>6</sup> United Nations Human Rights Committee, General Comment 32, Article 14, Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (2007), General Comment 32 at, paragraph 27.

<sup>7</sup> Interim Resolution CM/ResDH(2009)42, *Execution of the judgments of the European Court of Human Rights concerning the excessive length of judicial proceedings in Italy*, adopted at the 1051<sup>st</sup> Meeting of the Ministers’ Deputies on 19 March 2009. See, list of cases at [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OI/DH\(2009\)1051&Language=lanEnglish&Ver=prel0007&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OI/DH(2009)1051&Language=lanEnglish&Ver=prel0007&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)

<sup>8</sup> See *inter alia*, Interim Resolutions CM/ResDH(2007)2, CM/ResDH(2005)114, CM/ResDH(2000)135, CM/ResDH(99)437, CM/ResDH(99)436, CM/ResDH(97)336.

<sup>9</sup> Interim Resolution CM/ResDH(2009)42, *Execution of the judgments of the European Court of Human Rights concerning the excessive length of judicial proceedings in Italy*, adopted at the 1051<sup>st</sup> Meeting of the Ministers’ Deputies on 19 March 2009. See also the report on the stay of execution of the European Court of Human Rights’ judgments as updated on 27 May 2009, at [http://www.coe.int/t/e/human\\_rights/execution/03\\_cases/Italy\\_en.pdf](http://www.coe.int/t/e/human_rights/execution/03_cases/Italy_en.pdf).

<sup>10</sup> Interim Resolution CM/ResDH(2009)42, *Execution of the judgments of the European Court of Human Rights concerning the excessive length of judicial proceedings in Italy*, adopted at the 1051<sup>st</sup> Meeting of the Ministers’ Deputies on 19 March 2009, Preamble. The last decision against Italy by the European Court of Human Rights is of 31 March 2009 in the case *Affaire Simaldone c. Italie*, Application no. 22644/03, in particular on the insufficiency of the remedy provided in the Pinto Law.

<sup>11</sup> See, *Case of Scordino v. Italy (No. 1)*, Grand Chamber, Application no. 36813/97, paragraph 224

<sup>12</sup> Clearance rate is the percentage deriving from the difference between solved cases and incoming cases. A rate of 100 percent is a balanced situation, a lower percentage means that more cases are incoming than being solved, ending up in increase case-load, while a higher rate shows that the backlog is reducing.

<sup>13</sup> See, *Stock-taking of the measures adopted by the Italian authorities in 2006-08 on the excessive length of judicial proceedings*, Department for the Execution of Judgments of the European Court of Human Rights, Council of Europe, CM/Inf/DH(2008)42, 28 November 2008, p.1 and Appendix 1.

taken to avoid undue delays in judicial proceedings and to reduce their cost<sup>14</sup> and has suggested measures a State could take to decongest its case-load, including “dispens[ing] with all formalities that are unnecessary”.<sup>15</sup>

The European Court of Human Rights since 1978 had repeatedly stated that, despite the increased protection of individual rights guarantees by some procedural actions, “[s]hould these efforts result in a procedural maze, it is for the State alone to draw the conclusions and, if need be, to simplify the system with a view to complying with Article 6 para. 1 (art. 6-1) of the Convention.”<sup>16</sup>

## 1.2. Provisions affecting the length of judicial proceedings

The ICJ is concerned at some of the Bill’s provisions whose implementation risks prompting a lengthening of judicial proceedings without bringing a significant amelioration of the guarantees for the defence, which is stated as the legislation’s aim.

### 1.2.1. Concession of further periods for preparation of defence

Article 4(1)(a) of the Bill provides an obligation for the judge to allow the defence, in criminal cases, at least 48 hours for the preparation of the defence after the appointment of a public defence lawyer because the defendant’s chosen lawyer or the assigned public defence lawyer did not appear, could not be found or abandoned the defence.

The existing legislation<sup>17</sup> already provides for a time for the defence of not less than seven days when it is deemed that the lawyer has renounced, revoked or abandoned the defence or his or her representation is incompatible with an effective defence.<sup>18</sup> In such cases, in which a proper defence is impaired, the law already provides a sufficient time for preparation, in particular when it is considered that, because of the overloaded timetable of Italian tribunals, the time granted will in practice be far greater than seven days.

The new regime addresses a different situation, which will most likely occur when the lawyer is absent without justification from the hearing and has not permanently abandoned the defence of his/her client. The ICJ is unclear as to the purpose of the proposed measure, which appears unlikely to provide additional protection for the right to have adequate time and facilities for the preparation of the defence, and may have the effect of extending the length of the trial.

The ICJ recalls that the Code of Criminal Procedure already provides in these cases for the possibility of the appointment of a substitute lawyer in case of absence of the principal one.<sup>19</sup> Furthermore, in case of justified and communicated absence of the only

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<sup>14</sup> Resolution Res(2002)12 establishing the European Commission for the efficiency of justice (CEPEJ), Adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers’ Deputies.

<sup>15</sup> Recommendation no. R(87)18 of the Committee of Ministers to Member States Concerning the Simplification of Criminal Justice, adopted on 17 September 1987 at the 410<sup>th</sup> Meeting of the Ministers’ Deputies, Ch. III, section (b), point 2.

<sup>16</sup> Case of Koenig v Germany, Application no. 6232/73, paragraph 100. See also, *inter alia*, Case of Scordino v. Italy (No. 1), Grand Chamber, Application no. 36813/97, paragraph 183; *Affaire Guerrero c. Portugal*, Application no. 45560/99, paragraph 35; *Affaire Dumont c. Belgique*, Application no. 43525/99, paragraph 20.

<sup>17</sup> Article 108, Criminal Procedure Code.

<sup>18</sup> See, articles 105, 106, 107, Code of Criminal Procedure.

<sup>19</sup> See, Article 102, Code of Criminal Procedure.

designated lawyer, the judge must adjourn the trial to the next hearing.<sup>20</sup> The Constitutional Court has repeatedly confirmed that the renunciation, revocation, abandonment or incompatibility of the lawyer is distinct from his/her mere absence.<sup>21</sup> The Court clarified that the absence of the lawyer could also be dictated by delaying strategies.<sup>22</sup> Furthermore, the Court reaffirmed the discretionary power of the judge to allow for a postponement in such cases and stressed the danger that a provision such as that proposed in Article 4(1)(a), “in the current conditions of the judicial life, [could lead ] to breaks of unbearable length for the ordinary development of justice and for the interest of the parties to the proceeding.”<sup>23</sup>

The ICJ agrees with the Italian Constitutional Court that the provision contained in the Bill will not provide effective guarantees to the defence, but rather will establish a procedural action which risks exacerbating the already excessive length of criminal proceedings in Italy, in breach of Italy’s obligations under Articles 6(1) ECHR and 14(3)(c) ICCPR.

**In light of the above, the ICJ recommends that the Senate remove Article 4(1)(a) from the Bill.**

### *1.2.2. New rules of evidence in criminal proceedings*

Article 4(1)(b) and (e) of the Bill reforms the regulation of admission of evidence in criminal proceedings. Currently, the judge<sup>24</sup> must exclude from the proceedings evidence that is forbidden by law, manifestly irrelevant or manifestly superfluous.<sup>25</sup> An example of manifestly superfluous evidence would be multiple witnesses repeating information in respect of the same point of fact.

The new provision strikes out the reference to “manifestly superfluous evidence”, therefore obliging the judge to admit it unless excludable on other grounds. The trial judge would still have the discretion, but not the obligation, to exclude “superfluous” evidence in the debate phase of the trial.<sup>26</sup> Nevertheless, at all other stages, the judge will be obliged to admit such evidence under sanction of nullity of the proceeding itself. This situation could give rise to “phone-book” calls of witnesses with the only purpose of delaying the trial in order to reach the expiration of the statute of limitations.<sup>27</sup> Apart from this dilatory strategy, such a rule does not appear to have any actual favourable effect for the rights of the defence.

Article 4(1)(c) of the Bill modifies article 238-bis of the Criminal Procedure Code, which, in its present formulation, establishes that final judgments issued in separate proceedings may be admitted in other criminal trials as demonstration of the facts

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<sup>20</sup> See, Articles 420-ter and 484, Code of Criminal Procedure.

<sup>21</sup> Constitutional Court, sentence no. 450/1997, and Orders nos. 162/1998 and 17/2006.

<sup>22</sup> See, Constitutional Court, sentence no. 450/1997, paragraph 3 (The Law).

<sup>23</sup> Constitutional Court, sentence no. 450/1997, paragraph 5 (The Law) (unofficial translation). See also, Constitutional Court, order no. 17/2006.

<sup>24</sup> It is important to remember that in the Italian criminal law system, different judges are involved at distinct stages of the proceeding: an Examining Judge during the investigations; a Preliminary Judge at the preliminary hearing where most of the evidence is admitted or rejected; one or three trial judges at the decision phase; three judges on the appeal; and five or more judges at the level of court of cassation (on issues of law).

<sup>25</sup> Article 190, Code of Criminal Procedure.

<sup>26</sup> Article 495, Code of Criminal Procedure.

<sup>27</sup> In Italy, the statute of limitations runs until a final decision is reached. It may therefore include the length of the trial until the final decision of the Court of Cassation. See, Articles 157-161, Criminal Code, and Article 531, Criminal Procedure Code.

therein contained. The appreciation of the facts, links and situations still remains within the competence of the presiding trial judge. The new provision will limit the functioning of such evidentiary rule only for certain serious crimes<sup>28</sup>

The rationale for these changes to the evidentiary rule, in respect of some crimes only, is unclear. The explanatory report of the Government justifies this reform as aiming to reduce the scope of derogation to the adversary principle, i.e. the possibility for the parties to the proceeding to introduce and contest evidence on an equal basis. Nevertheless, the Constitutional Court upheld the constitutionality of the existing provision and its compliance with the adversary principle during discovery. The Court clarified its rationale to be the “economy in the gathering of the material useful to the decision”.<sup>29</sup> In particular, it explained that such a principle does not enter into play at the moment of admission of evidence, but at that of its evaluation. The Court specified that the final judgment admitted as evidence is always open to be criticised and to counter-arguments or evidence by the parties.<sup>30</sup>

It is clear that the admittance of final judgments in the proceedings serves the purpose of sparing unnecessary calling of witnesses and use of documentary evidence in order to prove factual points that have been already ascertained in a judicial proceeding. The present regime leaves open the space to contest such findings, whenever new evidence to the contrary is available, and the particular situation of the defendant in relation to the ascertained facts. Furthermore, the evaluation of the evidence is left to the judge, notwithstanding the opinion on the facts expressed by the previous judges.

The Government’s justification for the new measure is contradicted by the exclusion of the most serious crimes from its scope. The ICJ believes that the new provision does not bring in practice an actual and effective improvement of the defendant’s guarantees. On the contrary, it may adversely impact the smooth operation of the criminal trial, and may lead to the lapse of the statute of limitations in many additional cases.

This ICJ therefore considers that these provisions may lead to serious consequences for the already serious situation of the excessive length of judicial proceedings.

**In light of the above, the ICJ recommends that the Senate delete Articles 4(1) (b), (c) and (e) from the Bill.**

### 1.2.3. Judicial review of custody and preventive measures

Article 25 of the Bill mandates the Government to draft a Legislative Decree<sup>31</sup> to transfer to a panel tribunal the present Examining Magistrate’s competence to decide on custody and preventive measures, issued during the investigative phase. A panel tribunal is composed of three judges. As for arrest *in flagrante*, it maintains the competence of the Examining Magistrate, but it still requires the subsequent validation by the three-judge panel. The Government’s explanatory report assured that this procedure is conceived in order to provide the person subject to these measures with additional guarantees.

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<sup>28</sup> See, offences enlisted in Articles 51 (3-bis) and (3-quater), and 407(2)(a) of the Code of Criminal Procedure.

<sup>29</sup> Constitutional Court, sentence no. 29/2009, paragraph 2 (The Law) (unofficial translation).

<sup>30</sup> See, Constitutional Court, sentence no. 29/2009, paragraph 4 (The Law).

<sup>31</sup> A Legislative Decree is a Governmental Decree with force of primary law, whose legitimacy derives from the delegation of the Parliament and establishes the criteria and the boundaries the Government must respect in drafting, under risk of declaration of unconstitutionality and consequent annulment of the law. See Article 76 of the Italian Constitution.

The ICJ considers that as constituted the present procedure already provides for the independence, impartiality and effectiveness of judicial review of detention. Indeed, the detainee or other person subject to preventive measures can appeal the Examining Magistrate's decision to the Review Tribunal, composed of three judges, and thereafter has final recourse to the Court of Cassation.<sup>32</sup> In the presence of such pre-existing guarantees, the measure proposed seems to place a much greater burden on the length of the proceedings, while failing to provide any actual augmentation of judicial guarantees.

The rules of abstention and recusal require that a judge who has already adjudicated in some parts of the proceeding or on the position of the defendant cannot sit in other parts of the criminal proceeding, thus further limiting the number of judges available for each particular case.<sup>33</sup> Under the new procedure, one case at the first-instance stage might involve up to eight judges. The new custodial competence on a judicial panel will increase this number to 10 judges, without considering the case of arrest *in flagrancia* where another judge must be added. Given the capacity of judicial offices, this is likely to overburden the workload of the judges with significant effects on the length of judicial proceedings, in contravention of Italy's obligations under Article 6 ECHR and Article 14(3)(c) ICCPR.<sup>34</sup>

In light of the above, **the ICJ recommends that the Senate delete Article 25 from the Bill.**

### **1.3. The Italian Remedy for Excessive Length of Judicial Proceedings: the Reform of the Pinto Law**

Article 23 of the Bill heavily modifies Law 89/2001 (Pinto Law) with the aim of expediting the procedures for claiming compensation due to excessive length of judicial proceedings. The Pinto Law was originally conceived in response to the numerous rulings against Italy of the European Court of Human Rights. In its present form, it allows for applications for compensation to be addressed to the Court of Appeal.<sup>35</sup>

This Law has been the subject of considerable criticism, including by the Committee of Ministers of the Council of Europe<sup>36</sup> and the First President of the Court of Cassation.<sup>37</sup> It

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<sup>32</sup> see, Articles 309, 310, 311, Code of Criminal Procedure.

<sup>33</sup> See, paragraph 2.1, below.

<sup>34</sup> The Government did not present a study on the impact this law will have on the organisation of the judicial offices and districts. The last *Report of the First President of the Court of Cassation for the Inauguration of the Judicial Year* highlighted that in Italy 56.35 percent of the judicial offices have no more than 20 Magistrates (among which we must count the public prosecutors, who are Magistrates themselves). In respect of the offices with not more than 30 Magistrates, the figures rise to 75.74 percent, or some three quarters of the judicial offices in Italy. The website of the High Council of the Magistrature shows that, at the time of writing, out of 8,889 Magistrates in Italy, 6,197 are Judges and 2,101 are Public Prosecutors, i.e. 23,66 percent. On average, it is not hazardous to say that in an office with 30 Magistrates, seven will be Public Prosecutors and 23 Judges, and in one with 20 Magistrates, 4-5 will be Public Prosecutors and 15-16 Judges.

<sup>35</sup> The competent Court of Appeal is that of the district in charge of hearing cases or complaints against the magistrates of the district that adjudicated the case the excessive length of which is the subject of the complaint. See, Article 3(1), Law 89/2001, recalling Article 11 of the Code of Criminal Procedure. The rationale of the Article is that the Court competent in such proceedings must be that of a different judicial district than that of the accused or concerned Magistrate. The Table with the listed competent districts is available on the website of the Ministry of Justice at [http://www.giustizia.it/cassazione/leggi/1199\\_03.html](http://www.giustizia.it/cassazione/leggi/1199_03.html)

<sup>36</sup> In 2009, the Committee strongly encouraged "the authorities to consider amending Act No. 89/2001 (the Pinto Law) with a view to setting up a financial system resolving the problems of delay in the payment of

is apparent that the Pinto Law has not effectively addressed the issues it was intended to solve, but instead has exacerbated the problem.<sup>38</sup>

The proposed reform seeks to address some problems presented by the Pinto Law. Article 23 of the Bill introduces a first-instance administrative phase.<sup>39</sup> The application for compensation for excessive length of judicial proceedings will have to be presented to the Secretariat of the President of the Court of Appeal in the district to be identified with the already-existing criteria.<sup>40</sup> The President or a judge delegated by the President, with the support of the judicial office administration, will decide on admissibility and merit of the application with the possibility to gather evidence also *ex officio*. The law does not seem to provide for any hearing. This procedure is free from costs.

The complainant can appeal to the Court of Appeal against the administrative decision within 60 days from the communication of the decision, which will follow the existing judicial procedures. The Court will also assign the payment of the costs. The administration can also oppose appeal of the first instance decision.<sup>41</sup>

The new law also provides for fixed time-criteria for the establishment of excessive length of proceedings: three years for first-instance stage; two years for the appellate stage; one year for the stage at the Court of Cassation; and one year for the possible remittance stage.<sup>42</sup> Periods of time falling within these terms are considered not to be excessive. The amount of the damage is compensated only for the period exceeding the reasonable time and according to the guidelines included in the Civil Code, i.e. the actual loss (*danno emergente*) and the missed earnings (*lucro cessante*).<sup>43</sup> The Court of Cassation has indicated that courts must take into account the jurisprudence of the European Court of Human Rights in assessing compensation.<sup>44</sup>

The ICJ welcomes such a reform, which addresses at least partially the problem of compensation for excessive length of judicial proceedings. The ICJ also welcomes the requirement that the authority in charge of the administrative stage of compensation is a judge, whose status can guarantee the respect of the principles of independence and impartiality of Article 6(1) of the European Convention and Article 14(1) ICCPR. Nevertheless, the ICJ has some reservations regarding the compliance of Article 23 with

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compensation awarded, to simplify the procedure and to extend the scope of the remedy to include injunctions to expedite proceedings”, Interim Resolution CM/ResDH(2009)42.

<sup>37</sup> The First President of the Court of Cassation underlined in its speech for the inauguration of the judicial year 2009 that the proceedings for the compensation for exceeding length of judicial proceedings (“Pinto proceedings”) are having such delays, due to the courts’ overload, that we assist to Pinto proceedings asking compensation for the excessive delays of a Pinto proceeding. <http://www.cortedicassazione.it/Documenti/Relazione%20anno%20giudiziario%202008.pdf>. pp. 30-31.

<sup>38</sup> *Case of Scordino v. Italy (No. 1)*, Grand Chamber, Application no. 36813/97, paragraph 223: “the Court does not see how the introduction of the Pinto remedy at domestic level has solved the problem of excessively lengthy proceedings. It has admittedly saved the Court the trouble of finding these violations, but the task has simply been transferred to the courts of appeal, which were already overburdened themselves.” See also, paragraph 183 in the same judgment, and *Case of Chiochiarella v Italy*, Application no. 64886/01, Grand Chamber, 29 March 2006, paragraph 74.

<sup>39</sup> See, Article 23(1)(b) of the Bill.

<sup>40</sup> See, footnote no. 35.

<sup>41</sup> See, Article 23(1)(b)(5) and (6) of the Bill.

<sup>42</sup> In the Italian legal system, the Court of Cassation can adjudicate a matter of law without giving a final decision on the entirety of the case. The Court will typically remand the case at the stage from which the writ of *certiorari* came for a final decision on the merits.

<sup>43</sup> Article 2(3), Pinto Law, which refers to Article 2056 of the Civil Code referring back to Articles 1223, 1226 and 1227 of the Civil Code.

<sup>44</sup> See the established jurisprudence of the Plenary of the Court of Cassation in sentences nos. 1338, 1339, 1340 and 1341 of 2004.

human rights obligations, in particular under the ECHR.

The ICJ is concerned that the establishment by law of fixed criteria for excessive length of proceedings does not correspond to the objective behind the jurisprudence of the European Court of Human Rights. The Court, indeed, has never decided cases according to fixed deadlines, but rather has developed four criteria by which to measure whether a violation of Article 6(1) has occurred for excessive length of judicial proceedings, according to the circumstances of the particular case. These criteria measure the complexity of the case; the applicant's conduct; the competent authorities' conduct; and the importance of that at stake for the applicant in the dispute.<sup>45</sup> While the first three criteria are already present in the Pinto Law (Article 2(2)), the fourth is still missing.

The ICJ recommends that the Senate insert a provision mandating the judge to establish the excessive length in accordance with the European Court of Human Rights jurisprudence.

The ICJ understands that the rationale for the establishment of fixed criteria is to establish legal certainty and to create the trigger for a mechanism that requires the complainant to have requested the judge for an acceleration of the proceedings within six months before the fixed dates. Such a mechanism creates, in practice, an obligation on the complainant to participate constructively in the expedited resolution of the judicial proceeding, and can lead to positive effects for the respect of Article 6(1) ECHR and Article 14(3)(c) ICCPR. Nevertheless, it is possible and necessary to formulate a solution that maintains the discretion of the Courts in the evaluation of the violation.

The ICJ suggests, accordingly, that the proposed article be reformed in order to establish terms beyond which excessive length is presumed, and to avoid the establishment of periods which are presumptively not excessive. Such a solution will require the abandonment of the collaborative mechanism as a requirement to access the "Pinto" remedy. Nonetheless, it is still possible to encourage the use of such a system by adding the use or non-use of it as a ground to be considered by courts in the establishment of the violation and the quantification of the damage.

The ICJ is also concerned at the criteria for the establishment of the amount of compensation. The ICJ recalls the decisions of the plenary of the Court of Cassation in 2004 mandating national courts to make use of the European Court of Human Rights' jurisprudence in the assessment and quantification of damages and just satisfaction.<sup>46</sup> The ICJ is confident that national courts will continue the application of this jurisprudence also to the new legal framework. Nevertheless, in the drafting of this new legislation, it is important that the Parliament insert these requirements in positive legislation, in order to assure that possible future changes in the jurisprudence will not affect the effectiveness of this remedy.<sup>47</sup>

Another problem arises from the maintenance of Article 2(3)(a) in the Pinto Law,

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<sup>45</sup> See, *inter alia*, *Case of Scordino v. Italy (No. 1)*, Grand Chamber, Application no. 36813/97, paragraph 177; *Case of Union Alimentaria Sanders SA v Spain*, Application no. 11681/85, paragraph 31; *Affaire Dumont c. Belgique*, Application no. 43525/99, paragraph 17; *Case of Wierciszewska v Poland*, Application no. 41431/98, paragraph 43.

<sup>46</sup> Court of Cassation, Plenary, 26 January 2004, sentences nos. 1338, 1339, 1340 and 1341, also recalled by the European Court of Human Rights in many cases, among which the case *Chiocchiarella v Italy*, Application no. 64886/01, Grand Chamber, 29 March 2006, paragraph 24.

<sup>47</sup> As in many civil law systems, the precedents of the Court of Cassation are not binding in respect of subsequent cases. This is why a shift of jurisprudence by either lower courts or the Supreme Court cannot be excluded and the establishment of the proposed criteria in positive legislation is preferable.



mandating courts to take in consideration for the quantification of damage only the period exceeding the reasonable time. This limitation is contrary to the jurisprudence of the European Court of Human Rights, which has established that the damage must be calculated according to the whole length of the trial.<sup>48</sup> This situation has led to inconsistencies in the Supreme Court's jurisprudence,<sup>49</sup> leaving the determination of criteria for the quantification of damages in specific cases still unclear and at risk of unconstitutionality.

According to the new Article 3(4) contemplated to be introduced in the Pinto Law, the Executive will be mandated by law to establish the minimum and maximum amounts that can be awarded as compensation, and only for the period exceeding the reasonable length. The provision also establishes a maximum term for the payment of compensation of 120 days, which is in line with the European Court's jurisprudence.<sup>50</sup> The ICJ recommends that the Parliament abandon the approach limiting the quantification of damages only to the period exceeding the reasonable length. The ICJ also recommends the addition of a requirement that the Government take into consideration the European Court's jurisprudence in the determination of the minimum and maximum amounts of compensation in order to avoid the risk of inappropriate awards.<sup>51</sup>

The ICJ welcomes the decision to establish the administrative proceeding free of charge. Nevertheless, the ICJ asks the Parliament to verify that people accessing this remedy will be covered by the Law on Legal Aid<sup>52</sup> and, in particular, whether the provision of its Article 15-bis (1) on legal aid in civil and administrative law proceedings will cover such claims.<sup>53</sup> If not, the ICJ recommends the inclusion of this remedy within those covered by legal aid. As the Pinto proceedings have been put in place in order to redress violations by the State, the ICJ recommends that the Court of Appeal stage and any other part of the proceeding be similarly exempted from any costs, unless the claim is manifestly ill-founded.

The ICJ further suggests the removal of the possibility for the Administration to file an appeal against the first-instance administrative decision. Any government appeal should be limited to the Court of Cassation on questions of law. Such a limitation will greatly increase the chances that this remedy itself in operation will accord with the principle of reasonable length, by avoiding an abuse of the appeal mechanism by the authorities.

In light of the above, the ICJ makes the following recommendations, in relation to Article 23 of the Bill:

- **That the paragraph 1 be reformed in order to establish terms beyond which**

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<sup>48</sup> See, *inter alia*, *Case of Riccardo Pizzati v Italy*, Application no. 62361/00, Grand Chamber, 29 March 2006, paragraphs 105, 112-113, and 143 (read together).

<sup>49</sup> See, for example, Court of Cassation, sentence no. 14/2008, declaring inadmissible a challenge of constitutionality of this article, and compare it with ECHR case law and Court of Cassation sentences 1338, 1339, 1340, and 1341 of 2004.

<sup>50</sup> See, *Case of Chiocchiarella v Italy*, Application no. 64886/01, Grand Chamber, 29 March 2006, paragraph 89, establishing six months as maximum term.

<sup>51</sup> The European Court of Human Rights case law has established in reference to the Pinto Law that " an analysis of the case-law should enable the courts of appeal to award sums that are not unreasonable in comparison with the awards made by the Court in similar cases." *Case of Scordino v. Italy (No. 1)*, Grand Chamber, Application no. 36813/97, paragraph 213.

<sup>52</sup> Law 30 July 1990, no. 217.

<sup>53</sup> In particular, this is necessary for the stage of appeal, where the presence of a lawyer is mandatory. Nevertheless, legal aid may also be necessary for the administrative stage.

- excessive length is presumed, and to avoid the establishment of periods which are presumptively not;
- To reconfigure the collaborative mechanism as a ground for the establishment of the violation and the quantification of the damage, abandoning its use as admissibility criteria;
  - To insert a provision mandating the judge to establish the excessive length in accordance with the European Court of Human Rights jurisprudence;
  - To add a provision, mandating the judge to evaluate the compensation in accordance with the jurisprudence of the European Court of Human Rights on Articles 6(1) and 41 of the European Convention;
  - To abandon the approach limiting the quantification of damages only to the period exceeding the reasonable length;
  - To add a requirement for the Government to take into account the European Court's jurisprudence in the determination of the minimum and maximum amounts of compensation;
  - To remove the possibility for the Administration to file an appeal against the first-instance administrative decision, and to limit it to the Court of Cassation on questions of law;
  - To verify the provision of Legal Aid in the Pinto proceedings as suggested above.

## *Chapter 2: Other Measures*

### **2.1. Grounds for abstention and recusal of judges**

In the Italian legal system, abstention and recusal are the only means by which a judge can withdraw or be removed from a trial, the judge having otherwise no power to abandon the judicial proceeding. The abstention occurs when the judge, by his own motion only, realises that his impartiality in the proceeding is not guaranteed. Abstention is possible only in the situations provided in Article 36 of the Code of Criminal Procedure.<sup>54</sup> The recusal is the action by which the parties can request the removal of the judge from the proceeding before the court of appeal. It is possible for the parties to appeal the court's decision on the action of removal before the Court of Cassation. Recusal must be grounded on the same situations enlisted in Article 36 of the Code of Criminal Procedure, apart from the last ground – i.e. letter (h) of Article 36, which is a general clause. Such a clause has been left only to the discretion of the judge

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<sup>54</sup> See, Article 36, Code of Criminal Procedure, which lists the following situations:

- a) He/she has an interest in the proceeding or if some of the private parties or defence lawyers is a debtor or creditor of him/her, of the husband/wife, or of his/her children;
- b) He/she is tutor, curator, procurator or employer of one of the private parties, or if the defence lawyer, procurator or curator of one of the parties is a close relative of him/her or of his/her wife or husband;
- c) He/she has given advices or expressed its opinion on the object of the proceeding out of the exercise of his/her judicial functions;
- d) If there is a serious enmity between him/her or a close relative of him/her and one of the private parties;
- e) If some of his/her or his/her husband's or wife's close relatives is harmed or damaged by the offence or by the private party;
- f) If one of his/her or his/her husband's or wife's close relatives exercises or has exercised the role of public prosecutor;
- g) He/she founds himself/herself in one of the situations of incompatibility of articles 34 and 35 of the Judiciary Law.
- h) If there are other serious reasons of convenience.

in order to leave to him the possibility to abstain from the trial in situation not configured by the other grounds of abstention.

Article 2 of the Bill adds a new ground on which a judge would be required to recuse him or herself from presiding over a case under Articles 36 and 37 of the Code of Criminal Procedure: where the judge has expressed extra-judicial opinions regarding the parties to the case. Article 2 of the Bill adds it to the last ground of abstention included in Article 36 h) of the Code of Criminal Procedure, which identifies “serious reasons of convenience”. The new element would add to this general open clause the clarification that those reasons could be “also represented by opinions expressed outside of the exercise of judicial functions towards the parties to the proceeding and such as to provoke grounded reasons of prejudice for the impartiality of the judge”.<sup>55</sup>

The Bill would also add it to the grounds on which the parties to the case can request the recusal of the judge under Articles 36 and 37 of the Code of Criminal Procedure. The Constitutional Court has already added to these grounds of recusal the situation in which “the judge in a different proceeding, also not criminal, has expressed an evaluation on the merit of the same fact and towards the same person”<sup>56</sup> subject to the proceedings. As this is a general clause, in the present regime, reasons of convenience are only a ground of abstention because they are left to the discretion of the judge. They have not been extended as ground of recusal in order to avoid repetitive requests with abusive intent.

In the explanatory report, the Government argues this provision is proposed in order to supplement the reasons for abstention of Article 36 (c), i.e. when “[the judge] has given advice or expressed his opinion on the object of the proceeding outside of the exercise of his/her judicial functions”.<sup>57</sup> Such a ground was already unsuccessfully pleaded before the Court of Cassation.<sup>58</sup>

The grounds and procedures for abstention and recusal of a judge are essential means to ensure the impartiality of the courts. This principle is cardinal in a legal system and, as the European Court of Human Rights has stressed, “of fundamental importance in a democratic society.”<sup>59</sup> The European Court has developed an extensive jurisprudence on the assessment of lack of impartiality of a court, by establishing two tests:

- a subjective approach, aimed at ascertaining “the personal conviction or interest of a given judge in a particular case”;<sup>60</sup> and
- an objective approach, that is “determining whether [the judge] offered sufficient guarantees to exclude any legitimate doubt in this respect.”<sup>61</sup>

Under the subjective approach, the impartiality of the judge is presumed until there is proof to the contrary. The Court needs, *inter alia*, to “ascertain whether a judge has displayed hostility or ill will or has arranged to have a case assigned to himself for personal reasons.”<sup>62</sup> Doubts as to the judge’s impartiality may arise “where [the judge] publicly used expressions which implied that he had already formed an unfavourable

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<sup>55</sup> Article 2(1)(a) of the Bill.

<sup>56</sup> Constitutional Court, sentence no. 283/2000, paragraph 6.

<sup>57</sup> See, explanatory report of the Government on the Bill, at [http://www.giustizia.it/dislegge/relazioni/xvileg/riforma\\_processo\\_penale\\_relazi.htm](http://www.giustizia.it/dislegge/relazioni/xvileg/riforma_processo_penale_relazi.htm)

<sup>58</sup> See, Court of Cassation, sentence no. 3499/2009.

<sup>59</sup> *Case of Kyprianou v. Cyprus*, Application no. 73797/01, 15 December 2005, Grand Chamber, paragraph 118.

<sup>60</sup> *Case of Kyprianou v. Cyprus*, Application no. 73797/01, 15 December 2005, Grand Chamber, paragraph 118.

<sup>61</sup> *Case of Kyprianou v. Cyprus*, Application no. 73797/01, 15 December 2005, Grand Chamber, paragraph 118.

<sup>62</sup> *Case of Kyprianou v. Cyprus*, Application no. 73797/01, 15 December 2005, Grand Chamber, paragraph 119.

view of the applicant's case before presiding over the court that had to decide it.”<sup>63</sup> The Court has rarely had occasion to apply this test. The Court has not found yet a sufficient impairment of a judge's impartiality in opinions expressed before the beginning of the judicial proceedings on one of the parties' activities which are unconnected with the subject-matter of the case. Unless certain previous unrelated statements demonstrate personal enmity between the judge and the party, considerations of the judge's opinions are limited to those expressed on the case itself.

The objective approach concerns “whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality.”<sup>64</sup> In the application of this test also the appearance of impartiality must be taken into account. The decisive factor will be whether the fear on the judge's impartiality “can be held objectively justified”.<sup>65</sup>

The Council of Europe's Consultative Council of European Judges (CCJE) also specified that, “[a]s long as they are dealing with a case or could be required to do so, [judges] should not consciously make any observations which could reasonably suggest some degree of pre-judgment of the resolution of the dispute or which could influence the fairness of the proceedings.”<sup>66</sup> The Council stresses the necessary connections between the judge's opinion and the case. Only in cases of particular enmity, the decision on the impartiality of the judge will not be limited to the connection between the subject-matter of the case and the judge's expressed opinions. Cases of enmity are already covered by of Article 36 (d) and (e) of the Criminal Procedure Code. As for the expression of opinion on the case outside of his/her judicial functions, Article 36 (c) already deals with this situation in accordance with the European Court's jurisprudence.

In light of the above, there does not seem to be a compelling need to add a ground of abstention and recusal based on opinions expressed towards the parties to the proceeding. Furthermore, the history of conflict between the judiciary and members of the political branches, and the fact that the proposal for the new grounds of recusal was first advocated before the Court of Cassation by the President of the Council of Ministers' lawyers, in this context, raises the concern that the provision is principally aimed at hindering the effectiveness and reasonable length of judicial proceedings and at attacking the freedom of expression of judges.<sup>67</sup>

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<sup>63</sup> *Case of Kyprianou v. Cyprus*, Application no. 73797/01, 15 December 2005, Grand Chamber, paragraph 120.

<sup>64</sup> *Case of Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, *Recueil* 1996-III, pp. 951-952, paragraph 58.

<sup>65</sup> *Case of Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, *Recueil* 1996-III, pp. 951-952, paragraph 58. see the Hauschildt judgment, cited above, p. 21, para. 48, and, mutatis mutandis, the Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 30. The European Court of Human Rights uses often such a criterion in order to determine a judge's impartiality. For examples of incompatible situations see, *Affaire Pescador Valerio c. Espagne*, Application no. 62435/00, paragraphs 27-28; *Case of Ferrantelli and Santangelo v. Italy*, Judgment of 7 August 1996, *Recueil* 1996-III, pp. 951-952, paragraph 58-59; *Affaire Cianetti c. Italie*, Application no. 55634/00, paragraphs 39-45, *Affaire Rojas Morales c. Italie*, Application no. 39676/98, paragraphs 33-35; *Piersack* case, judgment of 1 October 1982, Series A 53, para. 30; *Affaire Micallef c. Malte*, Application no. 17056/06, paragraphs 79-81.

<sup>66</sup> *Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality*, CCJE (2002) Op. N° 3, Strasbourg, 19 November 2002, paragraph 23.

<sup>67</sup> In July 2008, President Berlusconi's lawyer asked for the recusal of the President of the Tribunal who was trying Mr Berlusconi and his legal consultant, David Mills, on charges of corruption of the witness (Mr Mills) in criminal proceedings. The Court of Appeal rejected the claim and the Court of Cassation confirmed the decision, rejecting also the question of unconstitutionality (see footnote no. 60). In the meantime, the trial of Mr Berlusconi was severed from that of Mr Mills in virtue of an immunity law (Law no. 124/2008) approved in July 2008 by the Parliament which shields the four highest authorities of the State (including the President of the Council of Ministers) from criminal prosecution. David Mills has been convicted for

The ICJ recalls Principle 8 of the *UN Basic Principles on the Independence of the Judiciary*: “[i]n accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”<sup>68</sup> The ICJ is of the view that the existing grounds of abstention and recusal already protect the private parties to the proceedings or the defendant from opinions expressed by the judges which could impair the fairness of the trial and the judge’s impartiality, both subjectively and objectively. While a restrictive interpretation of the new ground may not give rise to particular concerns, the peculiarity of the Italian situation suggests the risk that such a provision might preemptively hinder the freedom of expression of the members of the judiciary. The recent attacks of the President of the Council of Ministers, Mr. Berlusconi, on the judge in a trial on charges of corrupting a witness, where he is alleged to be the corrupter, reinforce such fears.<sup>69</sup>

For the above-mentioned reasons, including the risk of infringement in practice of the exercise by judges of freedom of expression, belief, association and assembly, and considering the lack of necessity of this new ground of abstention and recusal, **the ICJ recommends that the Senate delete Article 2 from the Bill.**

## 2.2. Mandatory closure of the criminal proceeding

Article 6(1)(a)(n.1) of the Bill introduces the obligation for the public prosecutor to close the criminal investigations and/or proceedings (*archiviazione*) for any persons whose judicial detention has been annulled by a superior court, i.e. Court of Appeal or Court of Cassation, for lack of serious evidence of guilt, unless further elements against such a person, beyond those adduced as grounds for detention, have been presented before the request of closure.

The Constitutional Court has determined the current provision, which already provides for a similar process in regard to decisions of the Court of Cassation, to be unconstitutional, because of the lack of rational connection between the justification for detention and the decision on continuance of investigation or of sending someone to trial.<sup>70</sup> The ICJ is concerned that both the existing and the proposed provisions conflate the value of evidence gathered for the purposes of the issuance of a detention on remand order with the admittance and evaluation of evidence considered for discovery and for

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corruption at first instance in February 2009 (see, <http://www.lastampa.it/redazione/cmsSezioni/politica/200902articoli/41105girata.asp#>). The President of the Tribunal has been subject to repeated attacks by President Berlusconi. See *inter alia*, ICJ Press Release of 24 June 2008 at [http://www.icj.org/news.php3?id\\_article=4313&lang=en](http://www.icj.org/news.php3?id_article=4313&lang=en); “Il Corriere della Sera”, 20 June 2008, at [http://www.corriere.it/politica/08\\_giugno\\_20/processo\\_berlusconi\\_mills\\_bd4206d8-3ec2-11dd-ae8f-00144f02aabc.shtml](http://www.corriere.it/politica/08_giugno_20/processo_berlusconi_mills_bd4206d8-3ec2-11dd-ae8f-00144f02aabc.shtml); and footnote no. 71, below.

<sup>68</sup> *UN Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, principle 8.

<sup>69</sup> See, *inter alia*, “Il Corriere della Sera” of 20 May 2009 ([http://www.corriere.it/politica/09\\_maggio\\_20/berlusconi\\_gandus\\_estrema\\_sinistra\\_cc5078e4-455b-11de-982b-00144f02aabc.shtml](http://www.corriere.it/politica/09_maggio_20/berlusconi_gandus_estrema_sinistra_cc5078e4-455b-11de-982b-00144f02aabc.shtml)); “Reuters” of 20 May 2009 (<http://it.reuters.com/article/topNews/idITMIE54J0TL20090520>); and “Il Giornale” of 21 May 2009 (<http://www.ilgiornale.it/a.pic1?ID=352611>).

<sup>70</sup> Constitutional Court, sentence no. 121/2009.

verdict in a criminal trial. Such a conflation, instead of providing effective guarantees to the detained person, creates a situation of risk for assuring the proper investigation, prosecution and possible conviction of those responsible for crimes.

**The ICJ therefore recommends the Senate to abandon the proposed provision and to respect the decision of the Constitutional Court on the unconstitutionality of the current provision.**

### **2.3. Revision of criminal sentences in case of condemnation by the European Court of Human Rights for violation of fair trial rights**

Article 9(1)(a) modifies the provision of the Code of Criminal Procedure which enumerates the grounds for revision of a trial passed *in iudicato*. The new article would allow revision of a criminal trial when the European Court of Human Rights has found Italy to be in violation of Article 6(3) of the European Convention in relation to that specific criminal proceeding. The applicant will have its request of revision admitted only when, at the moment of its presentation, he or she is subject or is expecting to be subject to detention, or a restrictive measure alternative to detention other than a pecuniary one.

The ICJ welcomes this initiative of the Italian Government to bring its legal system in line with Article 46 and Article 1 ECHR. The ICJ recalls the Council of Europe's Committee of Ministers Recommendation no.R(2000)2 which encourages states to ensure that "there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention".<sup>71</sup> According to the Council of Europe's Steering Committee for Human Rights, the majority of the States Members of the Council of Europe allow for the reopening of criminal proceedings, and twenty of them allow for the reopening of civil proceedings.<sup>72</sup>

Nonetheless, the ICJ considers the new provision insufficient and invites the Italian Parliament to consider revising it to extend to all violations of European Convention rights which can be affected by a final judicial decision. The ICJ recalls that the European Court of Human Rights often declines to consider allegations of Article 6 ECHR violations when the underlying conduct is already considered under the breach of other Convention's right.<sup>73</sup> Furthermore, this provision does not take into consideration other violations of Article 6 such as the independence and impartiality of the judge or the absence of a public hearing. Finally, the prohibition of the use of evidence directly or indirectly obtained through torture or cruel, inhuman or degrading treatment or punishment, according to Article 3 ECHR, Article 7 ICCPR and Article 15 of the Convention against Torture, is not contemplated as a ground for revision.

The ICJ also finds that the exclusion of pecuniary measures from the application of the

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<sup>71</sup> Council of Europe, Committee of Ministers, Recommendation no. R(2000)2, adopted by the Committee of Ministers on 19 January 2000 at the 694<sup>th</sup> meeting of the Ministers' Deputies, paragraph II.

<sup>72</sup> See, Council of Europe's Steering Committee for Human Rights (CDDH), *Activity Report: Sustained action to ensure the effectiveness of the implementation of the ECHR at national and European levels*, as adopted by the CDDH at its 66<sup>th</sup> meeting, 25-28 March 2008, 3 April 2008, Doc. CDDH(2008)008 Add.I, Appendix V, paragraphs 8 and 17.

<sup>73</sup> This occurs, for example, for violations of Article 2 (right to life) when those arise from the insufficient investigations and prosecutions of the right's violation. This circumstance may also arise in respect of other rights such as, *inter alia*, the right to liberty (Article 5), the right to private and family life (Article 8), the principle of legality in criminal offences (Article 7), or the right to property (Article 1, Protocol 1).

revision seems to be grounded on a different evaluation between the right to liberty and the freedom of movement and the right to property. The ICJ recalls that all human rights “universal, indivisible and interdependent and interrelated”,<sup>74</sup> and that lack of revision of an unfair trial, according to Article 6(3) ECHR, when the sanction is a pecuniary measure may lead to an arbitrary deprivation of the right to property (Article 1, Protocol no. 1, ECHR), as the procedure did not follow “conditions provided for [...] by the general principles of international law”.<sup>75</sup>

**The ICJ recommends the extension of the revision of criminal final decisions to all cases in which the European Court of Human Rights finds a violation which may hinder the validity of the final judicial decision. The ICJ further recommends that the Senate remove the exception for pecuniary measures in order to grant the respect of the concerned person’s right to property.**

Finally, the ICJ recommends that the Parliament introduce a similar remedy for civil and administrative law proceedings.

#### **2.4. Publication of decisions of the European Court of Human Rights in the Official Gazette**

Article 12 introduces the obligation upon the Government to publish in the Official Gazette all the decisions of the European Court of Human Rights which find a violation of Article 6(3) against Italy.

The ICJ recalls the Recommendation (2002)13 of the Committee of Ministers of the Council of Europe and finds that the publication of sentences of the European Court in the Official Gazette is a notable initiative. This can also increase the knowledge of the European Court’s jurisprudence by domestic courts. The ICJ recalls the European Court’s finding that “domestic courts must [...] be able, under domestic law, to apply the European case-law directly and their knowledge of this case-law has to be facilitated by the State in question”.<sup>76</sup>

In light of the above consideration, **the ICJ recommends that the Italian Parliament extend the publication of the European Court of Human Rights decisions to all cases of violation of the ECHR by Italy.**

### *Chapter 3: Recommendations*

*On the concession of further periods for preparation of defence:*

- **the ICJ recommends that the Senate remove Article 4(1)(a) from the Bill.**

*On the new rules of evidence in criminal proceedings:*

- **the ICJ recommends that the Senate delete Articles 4(1) (b), (c) and (e) from the Bill.**

*On the judicial review of custody and preventive measures:*

- **the ICJ recommends that the Senate delete Article 25 from the Bill.**

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<sup>74</sup> *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Ch. I, paragraph 5.

<sup>75</sup> Article 1(1), Protocol no. 1 ECHR. Ratified by Italy on 26 October 1955.

<sup>76</sup> *Case of Scordino v Italy (No.1)*, Application no. 36813/97, Grand Chamber, 29 March 2006, paragraph 239.

*On the reform of the "Pinto Law" (Article 23 of the Bill), the ICJ puts forward the following recommendations:*

- **that the paragraph 1 be reformed in order to establish terms beyond which excessive length is presumed, and to avoid the establishment of periods which are presumptively not;**
- **to reconfigure the collaborative mechanism as a ground for the establishment of the violation and the quantification of the damage, abandoning its use as admissibility criteria;**
- **to insert a provision mandating the judge to establish the excessive length in accordance with the European Court of Human Rights jurisprudence;**
- **to add a provision, mandating the judge to evaluate the compensation in accordance with the jurisprudence of the European Court of Human Rights on Articles 6(1) and 41 of the European Convention;**
- **to abandon the approach limiting the quantification of damages only to the period exceeding the reasonable length;**
- **to add a requirement for the Government to take into account the European Court's jurisprudence in the determination of the minimum and maximum amounts of compensation;**
- **to remove the possibility for the Administration to file an appeal against the first-instance administrative decision, and to limit it to the Court of Cassation on questions of law;**
- **to verify the provision of Legal Aid in the Pinto proceedings as suggested above.**

*On the grounds for abstention and recusal of judges:*

- **the ICJ recommends that the Senate delete Article 2 from the Bill.**

*On the mandatory closure of the criminal proceeding:*

- **the ICJ recommends the Senate to abandon the proposed provision and to respect the decision of the Constitutional Court on the unconstitutionality of the current provision.**

*On the revision of criminal sentences in case of condemnation by the European Court of Human Rights for violation of fair trial rights:*

- **the ICJ recommends the extension of the revision of criminal final decisions to all cases in which the European Court of Human Rights finds a violation which may hinder the validity of the final judicial decision;**
- **the ICJ further recommends that the Senate remove the exception for pecuniary measures in order to grant the respect of the concerned person's right to property;**
- **the ICJ recommends that the Parliament introduce a similar remedy for civil and administrative law proceedings.**

*On the publication of decisions of the European Court of Human Rights in the Official Gazette*

- **the ICJ recommends that the Italian Parliament extend the publication of the European Court of Human Rights decisions to all cases of violation of the ECHR by Italy.**