BRILL

THE ITALIAN REVIEW OF INTERNATIONAL AND
COMPARATIVE LAW 1 (2021) 159-170

The Italian Review
of International and
Comparative Law

brill.com/iric

Recent Developments

The Failure by Italy to Ratify Protocol no. 16 to the ECHR

Left behind but not lost

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Abstract

When deciding to authorise the ratification of Protocol no. 15 to the ECHR, the Italian Parliament at the same time blocked adherence to Protocol no. 16. The author examines the reasons of refusal and explains why these reasons are completely unfounded, hoping that all doubts will be resolved and that the Protocol no. 16 will be ratified by Italy in a not too distant future.

Keywords

ECHR – Protocol no. 16 – Advisory opinions – Italy – implementation law – national highest courts and tribunals

1 Introduction

As specialists are well aware, Italy was the last of the 47 Member States of the Council of Europe to ratify Protocol no. 15 to the European Convention on Human Rights and Fundamental Freedoms (ECHR).

Italy's delay in doing so was in fact considerable, as the treaty was opened for signature as long ago as mid-2013, whilst the Italian law authorising its ratification and implementation was enacted at the start of 2021.¹ This has not been without its consequences, as Protocol no. 15 (which introduced a number of procedural changes to the mechanism governing individual applications to the European Court of Human Rights as well as the decision making procedures adopted by the Court with the aim of improving the efficiency of the system of judicial protection for ECHR rights) could not enter into force until it had been ratified by all Member States.²

By contrast, European commentators are much less widely aware of the fact that, when deciding to authorise the ratification of Protocol no. 15, the Italian Parliament at the same time blocked adherence to Protocol no. 16 to the ECHR. This treaty establishes the possibility for the highest courts and tribunals of the Member States that ratify it to request the Strasbourg Court "to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms" defined in the ECHR. In contrast to Protocol no. 15, Protocol no. 16 is optional and has already been fully applicable for almost three years, having been ratified by more than ten States, stipulated as the minimum number required for its entry into force.³

It is interesting to consider how this came about.

In a nutshell, events unfolded as follows. For some time,⁴ two bills had been pending before the Chamber of Deputies at the first reading stage, one of which had been tabled by Parliament and the other by the Government. Both of them sought to ratify simultaneously Protocols no. 15 and no. 16 to the ECHR.

Focusing on the Government's bill, between July and September 2020, the parliamentary committees removed the reference to Protocol no. 16. At the end of September the bill was approved by the Chamber of Deputies, naturally under a different title, which mentioned only the "ratification and implementation of Protocol no. 15". It was then sent to the Senate,⁵ where it was then definitively approved.

One could certainly argue that the political choice to separate the consideration of the two international commitments was a wise choice, even if they

¹ Law 15 January 2021, no. 11.

² It will enter into force on August 1st 2021.

³ It entered into force on August 1st 2018.

⁴ XVIII legislature, bill C.35, submitted on 23 March 2018 and bill C.1124, submitted on 10 August 2018 (but see also XVII legislature, bill C.2801, submitted on 30 December 2014 and voted only by one of the two branches of Parliament).

⁵ S.1958.

resulted from the same political process within the council of Europe. This entailed giving absolute priority to Protocol no. 15, given the absence of any discretion over the contents of the implementing law and the fact that it was of pressing urgency in terms of international relations. On the other hand, more time had to be taken to reflect on the arrangements for implementing Protocol no. 16, for instance in terms of the choice of the “highest courts” in Italy and whether or not to suspend national proceedings.

However, the removal of Protocol no. 16 from the bill does not appear to have been dictated by a stance of cautious prudence on the part of the legislature, coupled with a desire to enact a more considered text.

On the contrary, having heard the opinions expressed by authoritative scholars during the parliamentary hearings – who in my view were selected without any attempt to reflect the range of views expressed within academia⁶ and within the highest courts themselves⁷ – some deputies declared their “alarm” at what they had heard during hearings and branded the protocol “a matter of concern [...] for Italian justice and for the civil rights of the Italian people”, reflecting a “Europhile drift in the Italian legal system”, and expressing “fears” of a “European super constitutional court”.⁸

For her part, the rapporteur for the Foreign Affairs and EU Relations Committee,⁹ also speaking on behalf of the rapporteur of the Justice Committee,¹⁰ asserted that the bill had been amended “in order to defer until a future time” the ratification of Protocol no. 16 “due to the critical aspects associated with the risk of an erosion of the role of the highest courts in Italy and the fundamental principles of our legal order”. Nevertheless, she expressed her “hope” that Protocol no. 16 would be approved swiftly, in order to provide a further tangible evidence of our country’s commitment to the comprehensive

6 I refer, above all, to the hearing of LUCIANI, “Note critiche sui disegni di legge per l’autorizzazione alla ratifica dei Protocolli n. 15 e n. 16 della CEDU”, *sistemapenale.it*, 2019, p. 1 ff. In the same sense VARI, “Sulla (eventuale) ratifica dei Protocolli n. 15 e 16 alla CEDU”, *dirittifondamentali.it*, 2019, p. 1 ff., and in a more nuanced way CERRINA FERONI, “Il disegno di legge relativo alla ratifica dei Protocolli 15 e 16 recanti emendamenti alla Convenzione per la salvaguardia dei diritti dell’uomo e delle libertà fondamentali”, *Federalismi.it*, 2019, p. 1 ff.

7 The Parliament heard the First President of the Court of Cassation and the President of the Council of State, but did not call the President of the Constitutional Court. It is important to underline that the President of the Constitutional Court was, at that time, Marta Cartabia, a scholar who is well known for her position in favor of dialogue with the European Courts.

8 Di Muro (Lega), 28 September 2020.

9 Ehm (M5S).

10 Giuliano (M5S).

safeguarding of human rights at global level, which is a core pillar of our foreign policy".¹¹

2 How to Discuss Protocol no. 16 Again, and Better

The Italian Parliament's refusal to authorise the ratification of Protocol no. 16 triggered a barrage of criticism from scholars, as well as from various authoritative members of the judiciary.¹²

However, no genuine debate took place, as the numerous publications written after Parliament's decision are unanimous in calling for further discussion, based on new arguments, of the bill authorising the ratification of Protocol no. 16 with the aim – so it is hoped – of obtaining its approval.¹³ On the other hand, having secured the result of blocking parliamentary approval, those critical of Protocol no. 16 are evidently now satisfied and have remained silent.

I personally hope that these doubts will be resolved and that the Protocol will be ratified in a not too distant future.¹⁴ However, it is still possible that, as

¹¹ 28 September 2020.

¹² This article itself is an English version of a contribution of mine (LAMARQUE, "La ratifica del Protocollo n. 16 alla CEDU: lasciata ma non persa", *GiustiziaInsieme.it*, 18 November 2020) to the debate which took place in *Giustizia insieme*, available at: <www.giustiziainsieme.it>, following the editorial by CONTI, "L'estremo saluto al Protocollo n. 16 annesso alla CEDU", *GiustiziaInsieme.it*, 12 October 2020. See also RUGGERI, "Protocollo 16: funere mersit acerbum?", *ibid.*, 22 October 2020; PINELLI, "Il rinvio dell'autorizzazione alla ratifica del Protocollo n. 16 CEDU e le conseguenze inattese del sovranismo simbolico sull'interesse nazionale", *ibid.*, 3 November 2020; GIABARDO, "Il Protocollo 16 e l'ambizioso (ma accidentato) progetto di una global community of courts", *ibid.*, 28 November 2020; CANNIZZARO, "La singolare vicenda della ratifica del Protocollo n.16", *ibid.*, 8 December 2020; BIAVATI, "Giudici deresponsabilizzati? Note minime sulla mancata ratifica del Protocollo 16", *ibid.*, 17 December 2020; BARTOLE, "Le opinabili paure di pur autorevoli dottrine a proposito della ratifica del protocollo n. 16 alla CEDU e i reali danni dell'inerzia parlamentare", *ibid.*, 13 January 2021; NASCIMBENE, "La mancata ratifica del Protocollo n. 16. Rinvio consultivo e rinvio pregiudiziale a confronto", *ibid.*, 29 January 2021; ESPOSITO, "La riflessività del Protocollo n. 16 alla Cedu", *ibid.*, 11 March 2021. As for the other reviews, see CONTI, "Chi ha paura del Protocollo 16 – e perché", *sistemapenale.it*, 2020, p. 2 ff.; CRIVELLI, "La Corte Edu richiama in sede giurisdizionale la prima "Advisory opinion": un incentivo per l'Italia a ratificare il Protocollo 16?", *Quaderni costituzionali*, 2020, p. 450 ff. and TOMASI, "I paradossi della mancata ratifica del protocollo n. 16 alla Cedu", *Quaderni costituzionali*, 2021, p. 180 ff.

¹³ The intention to submit another bill on Protocol no. 16 has also been expressed by a number of deputies during the parliamentary debate (see, above all, Cabras, 23 September 2020).

¹⁴ The author's interest in Italy adopting this instrument is long-standing. In fact, the book *La richiesta di pareri consultivi alla Corte di Strasburgo da parte delle più alte giurisdizioni nazionali. Prime riflessioni in vista della ratifica del Protocollo 16 alla Convenzione europea dei diritti dell'uomo*, LAMARQUE (ed.), Torino, 2015, contains the acts of a conference concerning

the urgent need to authorise the ratification of Protocol no. 15 is no longer an issue, after more open and measured debate the Italian Parliament may nonetheless still consider this international instrument to be of no benefit for Italy, and definitively decide not to authorise its ratification.

Although I do not wish such a scenario to arise, I nonetheless fully expect that any refusal to adopt Protocol no. 16 will be based on more accurate and tangible arguments than those hitherto used – or rather, so it would appear, abused – in order to justify the deferral.

In fact, as the following sections will seek to demonstrate, both “critical aspects” raised within previous debates – i.e. the “risk of erosion” of both “the role of the highest courts in Italy” and also “the fundamental principles of our legal order” – are in actual fact entirely baseless.

The next section will seek to rebut this second argument, which will be referred to as “sovereignist” from a substantive point of view, whilst the final section of this short paper will engage with the “sovereignist” argument from a procedural point of view.

3 The Substantive Argument Against the Sovereignist Narrative

My view, expressed succinctly, is as follows: it is absolutely mistaken to conclude that, if the highest courts in Italy are given the opportunity to ask for opinions from the Strasbourg Court concerning the meaning of ECHR provisions, this will expose the Italian legal order to colonisation by that external court and its vision of rights.

If anything, the exact opposite is the case.

Let us briefly consider how things work at the moment. Normally, in order to ascribe specific content to the international obligation that Italy took on back in 1955 when it decided to implement the ECHR adopted in 1950, the Italian courts are obliged, as moreover the legislature also is, simply to be familiar with and to take account of the case law of the European Court of Human Rights. It is only in cases in which a pilot judgment is issued in relation to Italy or where there is a settled position within the case law of the Strasbourg Court – and exclusively in these two scenarios¹⁵ – that all Italian courts are *bound* by the European Court’s interpretation of the ECHR. As such, firstly they are *obliged* to interpret Italian law in a manner consistent with the ECHR with *that* precise

this issue organised by the author whilst procedures leading to the adoption of the Protocol were ongoing before the Council of Europe.

¹⁵ *Corte Costituzionale*, 14 January 2015, no. 49, available at: <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S49_2015_en.pdf>.

meaning and, secondly, where the wording of the Italian legislation concerned is not open to interpretation in a manner consistent with the ECHR, they are *obliged* to refer a question to the Constitutional Court concerning the constitutionality of the national provision due to a potential violation of Article 117(1) of the Constitution, referring as an “interposed” parameter to the provision of the ECHR as interpreted by the European Court. For its part, if the Constitutional Court concludes that the Italian legislation does indeed contrast with a pilot judgment or with the settled case law of the Strasbourg Court, it must strike down that national legislation. It may only refrain from doing so if, applying a sort of counter-limits against the ECHR, it concludes that, were the right guaranteed by the ECHR as interpreted by the Strasbourg Court to be incorporated into Italian law, it would lower rather than increase the overall level of protection for rights already guaranteed under internal constitutional law.

It is apparent that, if it is considered that the mechanism described above offers insufficient resistance to the values and dynamics embraced by the system of law based on the ECHR, this will mean that the feared colonisation by the ECHR and the Strasbourg Court has already occurred. Thus, the only way to escape that colonisation would – paradoxically – not be to refuse to ratify Protocol no. 16 but rather to denounce the ECHR itself, and hence terminate our membership of the Council of Europe. The ability of the highest courts in Italy to seek advisory opinions from the Strasbourg Court would not change any aspect of this mechanism, nor would it exacerbate the constraints already applicable to the Italian legal order.

On the contrary, as mentioned above, from the sovereignists’ own perspective, adherence to Protocol no. 16 might even improve the position by guaranteeing greater room for manoeuvre to the Italian legal order, and above all greater scope for negotiation with Strasbourg.

Upon closer consideration in fact, practically all European case law, including those rulings that are already capable of challenging internal balancing, results from individual applications brought by people against their own State in relation to injustices, or rather violations of ECHR rights, allegedly suffered by them.

So, it is the applicants who submit a statement of facts, allege which violations have occurred, invoke the relevant ECHR rights, provide reasons in support of the application and submit their requests for redress.

On the other hand, States, and for cases involving Italy the Italian Government in particular, are only able to play on the defensive, and never to attack, as they can only answer the questions put by applicants in the manner framed by applicants. Moreover, the Government usually cannot even draw on a direct knowledge of the facts, with a view to correcting the way in which

the issue has been framed by the applicant, whereas those facts are by contrast available to the national courts that dealt with the applicant's case in the first instance.

The consequences of this framework are very clear. As is known, the way in which a question is framed, the objectives that the question pursues and the very subject posing the question have an influence both on the quality and the very content of the answer.

If one wants to obtain a good answer one has to put a good question, or as IT specialists say "*garbage in, garbage out*" (GIGO). Above all, if the answer is not satisfactory, it is likely that the question put was the wrong one. This is encapsulated in the famous story from the East in which a monk asked the abbot whether he could smoke while praying, to which the latter answered that he could not; another monk then asked the same abbot whether he could pray while smoking, and was allowed to do so.

Thus, even from the sovereignist perspective itself, which – as became apparent within the parliamentary debate – places importance on the need for the Strasbourg Court not to interfere with issues such as surrogacy, the "hard prison" regime for organised criminals as well as immigration, is it genuinely better that questions only be put to the Strasbourg Court concerning the extent of the rights guaranteed under the ECHR, as well as the statement of facts underlying the alleged violations of rights in specific individual cases, only by those who consider that they have suffered a wrong? Considered in more tangible terms, do the sovereignists really prefer that these questions be put by those who have "ordered" a child from abroad paying to "rent a womb", by a prisoner serving a sentence under the "hard prison" regime or by an undocumented immigrant? I do not think so. Surely sovereignists would prefer that questions concerning these matters be put (also) by the Court of Cassation or the Council of State, i.e. one of the highest courts in Italy. They must be aware, in fact, that the task of these courts is not only to provide satisfaction for individual claims, but also to ensure systemic coherence, taking account of the full complexity of the rights and values at stake. Thus, when ruling on specific cases they also give due consideration to the requirements of the legal order as a whole.

In addition, the long-standing experience with the mechanism of incidental review – in relation both to constitutional review as well as references to the Court of Justice for preliminary rulings – shows that content is not only conveyed "downstream", i.e. from the court providing a response to the referring court, usually with binding effect (moreover, the advisory opinion mechanism provided for under Protocol no. 16 expressly excludes any binding effect).

By contrast, one of the hidden merits of the incidental mechanism is that it enables content to be conveyed first and foremost “upstream” by the court referring a question, which must then be answered. This merit can be appreciated above all where the two courts belong to different legal systems, which are based on different dynamics and values.

Accordingly, if Protocol no. 16 became applicable also in Italy, were one of the highest courts in Italy to decide to refer a question to Strasbourg, I am convinced that it would do so also, and above all, in order to draw the attention of the European Court of Human Rights to the perspective of Italian law. In doing so, it would illustrate that system’s manner of operation, the prevailing constitutional framework, the problems faced by the public administration, the specific characteristics of the country, the cultural movements represented within civil society and their current degree of prevalence, as well as the strong points and weak points of our judicial system for the protection of rights, and so on.

At present, it is very difficult for this body of knowledge to emerge within the submissions made by the Italian Government, which – as noted above – can only react specifically to an issue raised or an allegation made by the individual applicant to the Strasbourg Court, and do not have the great advantage of being able to set out the initial framework to the question on which the Strasbourg Court will then issue a ruling.

Moreover, it must not be forgotten that, even within any proceedings arising following a request for an advisory opinion from any of the highest courts in Italy, the Italian Government would in any case have the opportunity to present its own viewpoint, that is the viewpoint of the majority in Parliament at the relevant point in time. If this second, different perspective is added to the facts and arguments proffered by the referring Italian court, the result would be to offer the European Court a truly complete and reliable overview of the position under Italian law, as well as the facts and values embraced by our legal system.

From the point of view of the Italian legal order, there are two immediately apparent effects of providing the Strasbourg Court with full knowledge. First of all, having been fully informed and made aware of our point of view, the European Court will be unable to disregard it when ruling on the question. As a result, it will necessarily issue a better opinion, including from the viewpoint of the sovereignists themselves, than would have been given following an individual application concerning the same issue.

On the other hand, there is a tangible possibility that the constitutional culture of our country (as expressed within the request for an advisory opinion from one of the highest courts in Italy, duly supplemented by any intervention

by our Government, and subsequently incorporated into the Strasbourg Court's opinion) may make a significant and original contribution to the development of European case law, thus providing a general benefit to the ECHR system as a whole. One might also imagine that this will be a satisfactory outcome for Italian sovereigns themselves.

Moreover, the literature has already reached the same opinion regarding the similar, although in many respects different, mechanism for preliminary references to the Court of Justice: specifically, in order to have a say on questions concerning fundamental rights, it is even better for courts to have "the first say", thereby "setting the framework of references and problems",¹⁶ than to have "the final say". Indeed, this is also because, within a complex, multi-level system such as our current one, perhaps nobody actually ends up ever having the final say.¹⁷

However, this is not all. As has already been correctly pointed out, once it has been implemented, Protocol no. 16 would represent an extraordinary opportunity for Italian legal culture – which is not available under the current ordinary mechanism of individual applications – to be appreciated beyond our country's borders.

Indeed, following a request for an opinion from the highest national court, and considering the authoritativeness of that court – which might even be the Constitutional Court – Italian law could provide the impetus for the Strasbourg Court to correct, or to change, a consolidated line of interpretation.¹⁸

Italian constitutional culture and the balances struck under the Italian Constitution between rights could in fact be submitted to the European Court to beneficial effect in order to convince it, on the basis of valid argumentation, to change course in relation to a specific issue. Another fundamental practical consequence of this is that any Italian law that may have been at odds with an old approach of the ECHR would no longer have to be ruled unconstitutional

16 TEGA, *La Corte nel contesto. Percorsi di ri-accentramento della giustizia costituzionale in Italia*, Bologna, 2020, p. 252.

17 LUPO, "The Advantage of Having the 'First Word' in the Composite European Constitution", *Italian Journal of Public Law*, (special issue on "Constitutional Adjudication in Europe between Unity and Pluralism", eds. FARAGUNA, FASONE, PICCIRILLI), 2018, p. 186 ff. and MARTINICO and REPETTO, "Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath", *European Constitutional Law Review*, 2019, p. 734 ff. See also Corte Costituzionale, 23 January 2019, no. 20, para. 2.3., available at: <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_20_2019_EN.pdf>.

18 LIPARI, "Il rinvio pregiudiziale previsto dal Protocollo n. 16 annesso alla Convenzione Europea dei Diritti dell'Uomo (CEDU): il dialogo concreto tra le Corti e la nuova tutela dei diritti fondamentali davanti al giudice amministrativo", *Federalismi.it*, 2019, p. 35 ff.

due to a violation of Article 117(1) of the Constitution where the approach of the ECHR has been reviewed.

It would appear that this last aspect could also convince our sovereignists to consider the implementation of Protocol no. 16 as a guarantee for, and not a threat to, Italy's constitutional identity.

4 The Procedural Argument Against the Sovereignist Narrative

The second argument that appears to have resulted in the removal of Protocol no. 16 from the bill is "the risk of erosion of the role of the highest courts in Italy".

Only a few comments need be made in order to demonstrate that these types of fears are entirely unfounded.

The comments set out above show that the role of the highest national courts would be reinforced, and not eroded, by the ratification of the Protocol no. 16, because it would offer all of them the opportunity to exert an influence on the content of decisions of the Strasbourg Court.

On the contrary, were Italy not to ratify the Protocol, the highest Italian courts, including the Constitutional Court, would remain mute and passive in relation to any position taken by the European Court, whereas many of the other national highest courts in the countries that have ratified the Protocol are already able to submit their alternative points of view to the Strasbourg Court.

One final observation must be made as specifically regards the role of the Constitutional Court which, according to opponents of Protocol no. 16, would be placed in great jeopardy by ratification.

Two arguments have been raised concerning this issue. The first is the argument concerning a "European super constitutional court", evoked by some members of Parliament, although previously suggested during the parliamentary hearings by a colleague of mine. According to this view, the new procedure would enable the Strasbourg Court to intervene "in the most delicate cases", or the most "thorny", providing "its own interpretation of rights, which may differ from that embraced by the Italian Constitutional Court, thus relegating the Constitutional Court to a secondary role".¹⁹ This argument is difficult to understand.

First and foremost, one must consider that it might have been the Constitutional Court itself that requested the opinion in question, exercising

¹⁹ VARI, *cit. supra* note 2, pp. 7–8 and CERRINA FERONI, *cit. supra* note 2, p. 10.

its right to have the first say, and framing the issue in a targeted manner, giving due consideration to the balances struck under the Italian Constitution.

Secondly, it must be recalled that the rulings of the Strasbourg Court only affect the meaning of interposed parameters under Article 117(1) of the Constitution and that, in any case, only a pilot judgment or consolidated case law of the Strasbourg Court can establish an interpretation that is binding also for the Constitutional Court.

Thirdly, even if an advisory opinion given by the Strasbourg Court were to be incorporated into the case law to such an extent as to become consolidated, the Constitutional Court would in any case have the last say concerning the implications of that consolidated European case law on Italian law. Specifically, at least two instruments would be available to it should it wish to avoid having to declare unconstitutional any Italian law that was at odds with that case law. First of all, it could declare the interposed parameter itself unconstitutional. Secondly, as mentioned above, it could prevent a right originating from outside the legal system from having effects in Italy where its incorporation into Italian law would not increase the overall level of protection for rights already guaranteed under the Italian Constitution, but would rather have the opposite effect of reducing that protection.

The second concern focuses on the fact that, where the highest ordinary or administrative courts in Italy have reason to doubt that a particular law violates both the ECHR and the Italian Constitution, they may 'leapfrog' the Constitutional Court and decide to refer the matter in the first instance to the Strasbourg Court.²⁰

This second concern also appears to be unfounded. It must in fact be recalled that the problem concerning the priority to be afforded to incidental constitutional review is extremely serious, and the Constitutional Court, being fully aware of it, has been making attempts to resolve it for some time where the competitor mechanism is the preliminary reference to the Court of Justice.²¹ The stakes are in fact very high in those cases because to allow the courts to give priority to aspects involving a violation of EU law when it comes to fundamental rights guaranteed both under EU law (including in particular, although not exclusively, the Charter of Fundamental Rights) as well as under

²⁰ LUCIANI, *cit. supra* note 2, p. 6.

²¹ See CARTABIA and LAMARQUE, "La giustizia costituzionale europea cento anni dopo (1920-2020)", *Quederni costituzionali*, 2020, pp. 807-809 and MARTINICO and REPETTO, *cit. supra* note 17, p. 731 ff.

the Italian Constitution, would be tantamount to opening the floodgates – throughout all areas of Italian law that are affected by EU law to – to diffuse constitutional review by each individual court, enabling them to set aside any law considered to violate a fundamental right. In other words, the issue at stake is the very survival of centralised constitutional review.

However, none of this would be the case were Protocol no. 16 to be ratified by Italy.

In fact, Italian law never allows any law that violates the ECHR to be set aside. There is therefore no risk that any priority given by the highest ordinary and administrative courts to a request for an advisory opinion from Strasbourg could give rise to diffuse review of compatibility with the ECHR, thereby threatening the role and the very existence of the Constitutional Court.²²

²² SABATO, “Sulla ratifica dei Protocolli n. 15 e 16 della CEDU”, *sistemapenale.it*, 2019, p. 5 (Raffaele Sabato is the Italian judge at the ECtHR).