2010

All Human Rights are Equal, But Some are More Equal than Others: The Extraordinary Rendition of a Terror Suspect in Italy, the NATO SOFA, and Human Rights

Eric Talbot Jensen
BYU Law School

Chris Jenks
Southern Methodist University, Dedman School of Law

Volume 1—November 12, 2010

ARTICLE

All Human Rights Are Equal, But Some Are More Equal Than Others[†]: The Extraordinary Rendition Of A Terror Suspect In Italy, the NATO SOFA, and Human Rights

Chris Jenks[*] and Eric Talbot Jensen[**]

[†] While the concept of "more equal rights" is largely a play on the "more equal pigs" of George Orwell's 1984, there is an Italian corollary that reflects the relative subjectivity of due process norms at issue in this essay, albeit in a different context. Italian Prime Minister Silvio Burlasconi once testified during a trial over whether he had tried to bribe judges that, "It's true that the law is equal for all. But for me it is more equal. . . ." Peter Popham, *Berlusconi's Last Stand in Bribes Case Before Immunity Law Shield is Raised*, THE INDEPENDENT, June 18, 2003, *available at* http://www.independent.co.uk/news/world/europe/berlusconis-last-stand-in-bribes-case-before-immunity-law-shield-is-raised-541040.html.

[*] Lieutenant Colonel, U.S. Army Judge Advocate General's Corps, Chief, International Law Branch, Office of The Judge Advocate General, U.S. Army. Previously served as extern attorney-adviser, Human Rights & Refugee Section, Office of the Legal Adviser for the Department of State and Military Legal Advisor to U.S. forces in Mosul, Iraq and Uijongbu, South Korea. The views expressed in this article are those of the author and not The Judge Advocate General's Corps, the U.S. Army, or the Department of Defense.

[**] Visiting Assistant Professor, Fordham Law School. Previously Chief, International Law Branch, Office of The Judge Advocate General, U.S. Army; Military Legal Advisor to U.S. forces in Baghdad, Iraq and in Tuzla, Bosnia; Legal Advisor to the U.S. contingent of U.N. Forces in Macedonia.

I. Introduction

> *On February 12, 2003, at around 12:30 p.m., Mr. Osama Mustafa Nasr (Abu Omar) was walking from his house in Milan to the local mosque. He was stopped by a plain-clothes carabiniere (Italian military police officer) who asked for his documents. While he was searching for his refugee passport, he was immobilized and put into a white van by more plain-clothes officers, at least some of whom were U.S. agents. He was brought to a U.S. airbase in Aviano in Northeast Italy and from there, flown via the U.S. airbase in Ramstein, Germany to Egypt. He was held for approximately seven months at the Egyptian military intelligence headquarters in Cairo and was later transferred to Torah prison. His whereabouts were unknown for some time, and he was allegedly tortured. He was released in April 2004, rearrested in May 2004, and eventually subjected to a form of house arrest in Alexandria in February 2007.*[1]

During the break in his incarceration in 2004, Abu Omar was able to phone his family and provide details of his disappearance, information his family relayed to prosecutors in Milan. The Italian prosecutors then began an investigation into Abu Omar's abduction,[2] gathering information

---

[1] Francesco Messineo, *The Abu Omar Case in Italy: 'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture under the UN Torture Convention*, 7 J. INT. CRIM. JUST. 1023, 1023–24 (2009) (footnotes omitted).

[2] The abduction purportedly derailed Italy's investigation of Omar. An Italian counter-terrorism prosecutor claimed that "if Abu Omar had not been kidnapped, he would now be in [an Italian] prison, subject to a regular trial, and we would have probably identified his other accomplices." Craig Whitlock, *CIA Ruse Is Said to Have Damaged Probe in Milan*, WASH. POST, Dec. 6, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/12/04/AR2005120400885.html. Italian counter-terrorism officials claimed that Omar fought in Bosnia and Afghanistan and recruited fighters for extremist Islamic causes. Omar's attorney acknowledged that Omar illegally entered Italy in 1997 but that prior to that he had merely been traveling in Jordan, Yemen, Albania, and Germany. *Italy Indicts 31 in Alleged CIA Kidnapping*, ASSOCIATED PRESS, Feb. 16, 2007 *available at* http://www.msnbc.msn.com/id/17184663/. The court referred to Omar as a "[m]ilitant in Egypt of the Egyptian extremist organization Gama'a al Islamiya." Tribunale Ordinario di Milano, Sezione IV Penale, Nov. 4, 2009, no. 12428/09, filed Feb. 1, 2010 (on file with authors) [hereinafter Decision], at pt. 2 at 4. By 2002, the European Union listed Gama'a al Islamiya as a group or entity that committed or attempted to commit acts of terrorism. *See* Council Decision 2002/334/EC, art. 1(2)(3), 2002 O.J. (L 116) 33, 33 (referring to Council Regulation 2580/2001, art. 2(3), 2001 O.J. (L344) 70, 72). The court claimed that Omar "was — and still is — under investigation for the crime of

including phone records, documents, and computers, some of which they seized from a villa belonging to Robert Lady[3], purportedly[4] the U.S. Central Intelligence Agency (CIA) station chief in Milan.[5] By February 2005, prosecutors were seeking information from U.S. officials at Aviano Air Base in northern Italy about U.S. flights into and out of the airbase at the time of the abduction.[6] Between June and September 2005, Italian magistrates issued twenty-six arrest warrants for U.S. citizens, including one for Lady, who had disappeared shortly before the search of his villa.[7] By tapping phones of intelligence operatives and seizing documents from intelligence services, Italian investigators continued to glean information about what happened to Omar, including the role Italian military intelligence officials played in the abduction, and built a case ready for prosecution.[8]

The criminal trial began in June 2007. The defendants were seven members of the Italian military intelligence service and twenty-six Americans.[9] Of the U.S. defendants, twenty-five were allegedly CIA

---

association for purposes of international terrorism and other related offenses." Decision, *supra*, at pt. 2 at 5.

[3] The focus on Lady stemmed both from his alleged role in the abduction while serving as the head of the CIA's station in Milan and from the fact that by the time of the subsequent investigation, he had retired from the CIA, but was still living in Italy.

[4] Neither the U.S. government nor the CIA has ever formally acknowledged any involvement with Omar's abduction. Rather than alternating between the words purportedly and allegedly throughout this essay, the authors note at the outset that references to such involvement are solely based on the open source and unofficial sources cited.

[5] John Foot, *The Rendition of Abu Omar*, 29 LONDON REV. BOOKS, Aug. 2, 2007, at 24–25, *available at* http://www.lrb.co.uk/v29/n15/john-foot/the-rendition-of-abu-omar. At the time of the search, Lady was purportedly in Honduras, where he grew up. John Crewdson, *CIA Chiefs Reportedly Split Over Cleric Plot*, CHI. TRIB., Jan. 8, 2007, *available at* http://www.chicagotribune.com/news/nationworld/chi-0701080198jan08,0,5630268.story.

[6] Craig Whitlock, *Europeans Investigate CIA Role in Abductions*, WASH. POST, Mar. 13, 2005, at A1. According to the court, the plane used to transfer Omar from Italy to Cairo "made about 80 landings in European airports." Decision, *supra* note 2, at pt. 2 at 15.

[7] Crewdson, *supra* note 5.

[8] John Hooper, *Italian Court Finds CIA Agents Guilty of Kidnapping Terrorism Suspect*, THE GUARDIAN, Nov. 4, 2009, *available at* http://www.guardian.co.uk/world/2009/nov/04/cia-guilty-rendition-abu-omar.

[9] Daniel Flynn, *Italy Convicts Former CIA Agents in Rendition Trial*, REUTERS, Nov. 4, 2009, *available at* http://www.reuters.com/article/idUSTRE5A33QB20091104. The Italian military intelligence members brought to trial included the former head and the former

operatives at the time of the abduction, including Lady,[10] as well as Sabrina De Sousa, who denied any affiliation with the CIA.[11] The other American defendant was Lieutenant Colonel (Lt. Col.) Joseph Romano, a U.S. Air Force officer who had been stationed at Aviano Air Base at the time of the abduction.[12] Despite the arrest warrants issued by the Milan prosecutors, none of the U.S. defendants were present for any of the proceedings.[13] Although the Italian government refused to forward extradition requests from the Italian prosecutor to the U.S. government,[14] Italian law allows for *in absentia* trials.[15] With the exception of De Sousa and Romano, who secured private counsel, the remaining U.S. defendants were solely represented by court-appointed Italian attorneys, none of whom ever spoke with their clients.[16]

The case did not progress smoothly, as there were delays while the Italian Constitutional Court, the highest Italian court, ruled on the use of documents by the prosecutor "relating to the activities of Italian intelligence and security services" that the Italian government claimed were exempt

---

deputy head of the organization, both of whom had lost their jobs before the trial due to the abduction and the controversy that followed. *Id.*

[10] Lady later retired from the CIA in 2003. Crewdson, *supra* note 5.

[11] De Sousa claimed that she represented the United States as a diplomat in Italy, and as such, was entitled to immunity from prosecution. When the United States did not assert any such immunity on De Sousa's behalf, she filed suit in the United States against the Department of State, seeking to compel an immunity declaration. Scott Shane, *Woman in Rendition Case Sues for Immunity*, N.Y. TIMES, May 13, 2009, *available at* http://www.nytimes.com/2009/05/14/us/14diplo.html.

[12] Flynn, *supra* note 9.

[13] Hooper, *supra* note 8.

[14] *Convictions in Abu Omar Rendition Case a Step Toward Accountability*, AMNESTY INT'L, Nov. 5, 2009, http://www.amnesty.org/en/news-and-updates/news/convictions-abu-omar-rendition-case-step-toward-accountability-20091105.

[15] *Judge Orders Indicts of U.S. Soldier in Calipari Case*, ANSA ENGLISH MEDIA SERV., Feb. 7, 2007, *available at* LEXIS, CURNWS File. As one commentator explained "[a]ccording to Art. 420 *quater* of the Italian Code of Criminal Procedure, if an accused is unjustifiably absent at the preliminary hearing, the judge declares that the proceedings will take place *in absentia* (*contumacia*)." Messineo, *supra* note 1, at 1034.

[16] Hooper, *supra* note 8. One court-appointed attorney represented thirteen of the absent U.S. defendants, including Lady, another court attorney represented six, another three, and another two. Decision, *supra* note 2, at 1–2. As is discussed *infra*, the presence of even effective court-appointed counsel does not, by itself, preclude a determination that an *in absentia* trial violated the accused's fair trial rights. Yet one wonders how effectively one defense attorney could represent multiple defendants, particularly thirteen or six.

from the proceedings as Italian "state secrets."[17] Although many of these documents were excluded,[18] the case continued. In September 2009, the United States submitted notice to the Italian government that any acts or omissions by Romano were done in the performance of his official duties and that under the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) the United States and not Italy had primary jurisdiction over Romano.[19] The Italian Ministry of Justice agreed with the United States and asked the court to respect U.S. jurisdiction.[20] The Italian court, however, thought otherwise. To place the Abu Omar case in context, it appears to be the first time in the fifty-eight year history of the NATO SOFA in which a receiving state rejected the official duty assertion and corresponding primary jurisdiction of a sending state and proceeded to prosecute and convict a member of the sending state's armed forces.

On November 4, 2009, the court found twenty-two of the reported CIA operatives, including Lady and De Sousa, as well as Romano, guilty of kidnapping and association in committing kidnapping.[21] The court awarded €1 million ($1.47 million) to Abu Omar and €500,000 to his wife in

---

[17] Corte Cost., 11 marzo 2009, Foro it. 2009, I, 1656 (It.), *available at* http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2009106_Amirante_Quaranta_en.doc.

[18] Messineo, *supra* note 1.

[19] *See CIA Verdict in Italy Challenges Obama on Renditions*, REUTERS, Nov. 5, 2009, *available at* http://www.reuters.com/article/idUSTRE5A40SQ20091105 (quoting Pentagon sources as asserting the NATO SOFA jurisdiction right after attempts at a "diplomatic or legal solution failed.") [hereinafter *CIA Verdict*].

[20] *See id.*

[21] *See* Decision, *supra* note 2, at II–III and pt. 2 at 145–46. The court sentenced the majority of the Americans, including Romano and De Sousa, to five years imprisonment, while Lady received an eight-year sentence. *See* Hooper, *supra* note 8. The court determined that Lady's CIA boss in Rome and two other Americans, but not De Sousa, were entitled to diplomatic immunity because even though "the activity of 'extraordinary rendition' . . . constitutes a crime in Italy, [it] can and surely must be considered as part of their [diplomatic or consular] functions" under the Vienna Convention on Consular Relations. The court held that Lady and De Sousa were entitled to, at most, more limited consular immunity. Decision, *supra* note 2, at pt. 2 at 92. To what extent the actions of the CIA agents should, or should not, have been covered by diplomatic immunity, or perhaps fall under the law of armed conflict, is beyond the scope of this essay. In terms of the Italian military intelligence defendants, the court dropped the case against the former head, the former deputy, and three of the agents on state secrecy grounds. But the court found the remaining two agents guilty of being accomplices to the kidnapping, sentencing them to three- year prison terms. Hooper, *supra* note 8. The court issued its written decision, over 400 pages long, on Feb. 1, 2010. Decision, *supra* note 2.

damages, to be paid by all the defendants.[22] Human rights groups hailed the court's ruling as signaling an end to so-called U.S. impunity.[23] Lost in the politically charged rhetoric about the Bush administration and its "war on terror" is the fact that the Italian Court did not have jurisdiction over Romano and violated the human rights of the other U.S. defendants.

Regardless of whether what happened to Abu Omar is considered an extraordinary rendition[24] or state enabled kidnapping, the Italian proceedings should provide little comfort to those truly interested in the rule of law and human rights. Rather than supporting the rule of law, the Italian trial blatantly disregarded international law and treaty obligations and the conduct of the *in absentia* proceedings simply followed one alleged human

---

[22] Decision, *supra* note 2, at pt. 2 at 147. Stacy Meichtry & Siobhan Gorman, *Italy Rules in Rendition Case,* WALL ST. J., Nov. 5, 2009, at A12. In response to a request by the prosecutor, an Italian magistrate ordered the seizure and sale of Lady's Italian villa to pay the damages. Decision, *supra* note 2, at V. The Italian prosecutor labeled the villa "beautiful" and said that when Omar's attorney petitions the court, proceeds from the sale will go to Omar. Michael Isikoff, *To Pay Abu Omar, CIA's Man in Milan Loses Villa*, NEWSWEEK, Nov. 7, 2009, *available at* http://blog.newsweek.com/blogs/declassified/archive/2009/11/07/to-pay-abu-omar-cia-s-man-in-milan-loses-villa.aspx. Lady purchased the villa as a retirement home for himself and his wife. Given how events unfolded, it is perhaps cruelly ironic that Lady opposed the abduction. Crewdson, *supra* note 5.

[23] *Convictions in Abu Omar Rendition Case a Step Toward Accountability*, *supra* note 14. *But see Italy/US: Italian Court Rebukes CIA Rendition Practice*, HUMAN RIGHTS WATCH, Nov. 4, 2009, *available at* http://www.hrw.org/en/news/2009/11/04/italyus-italian-court-rebukes-cia-rendition-practice (commending the trial outcome, but noting, at least in part, the problematic nature of the *in absentia* trials).

[24] Considerable definitional confusion surrounds the variations of the term "rendition." For the purposes of this essay, rendition is a general term for the "[t]he surrender of a fugitive from one State to another . . . ." An example of rendition is extradition, "by which one State surrenders a person within its territorial jurisdiction to a requesting State via a formal legal process, typically established by treaty between the countries." MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32890, RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE 1 (2009). Transfers that occur outside a formal legal process, like that provided by an extradition treaty, are "irregular" or "extraordinary" renditions. *Id.* Unhelpfully, after Garcia explains the differences, he then states that he essentially will use the terms opposite of how he defined them; that is, rendition means extrajudicial transfers and not extraditions. *Id.*; *see also Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations, Joint Hearing Before the Subcomm. on Int'l Orgs., Human Rts., and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs*, 110th Cong. 3, 12–14 (2007) (statements of Amnesty International and Michael F. Scheuer, former head of the CIA's Bin Laden Unit) (both referring to extralegal transfers as rendition).

rights abuse with another. This article utilizes the *in absentia* trials of the American defendants in the Abu Omar case to explore Italy's violation of its treaty obligations under both the NATO SOFA and the European Convention on Human Rights. The article first explains the background and application of the NATO SOFA's criminal jurisdiction provisions before detailing how the trial of Lt. Col. Romano constituted a precedent-setting breach by Italy. The article then explains the application of the European Convention's fair trial rights to *in absentia* proceedings, Italy's reoccurring violations of those rights before the European Court of Human Rights on that very issue, and how the flawed *in absentia* trials of the CIA agents in the Abu Omar case constitute yet another violation of the European Convention. Ultimately this essay concludes that while Italy may have spoken out against extraordinary rendition, the price for doing so was Italy's own commitment to the rule of law and human rights.

II. Italy's Breach of its NATO SOFA Obligations

Since at least the Treaty of Westphalia in 1648, when state sovereignty became the international norm and state forces became the agent of the sovereign, states have made arrangements for the peaceful visit of their forces into the territory of other sovereigns. These arrangements were essential for both temporary and permanent visits of foreign forces and were mainly concerned with the issue of immunity.[25] The sovereign forces of one country that were visiting another country were generally granted some form of immunity. Those forces took their own law, or the "law of the flag," with them.[26] This was reinforced in U.S. practice as early as *The Schooner Exchange v. McFaddon*, where the Supreme Court held that "[i]t seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[27] Since these arrangements dealt with the status of the forces while in another country, they came to be known as "status of forces" agreements,[28] or SOFAs. As one of the authors has stated elsewhere,

---

[25] Dieter Fleck, *Introduction* to THE HANDBOOK OF THE LAW OF VISITING FORCES 3 (Dieter Fleck ed., 2001).

[26] Paul J. Conderman, *Status of Armed Forces on Foreign Territory Agreements*, ¶ 31 (on file with authors).

[27] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 145 (1812).

[28] The Department of Defense defines a SOFA as "[a]n agreement that defines the legal position of a visiting military force deployed in the territory of a friendly state. Agreements

"[s]tatus of forces agreements provide for the rights and privileges the sending State's military will have in the receiving State by 'addressing how the domestic laws of the [receiving State's] jurisdiction shall be applied' to the sending State's military."[29]

In another key passage from the *Schooner Exchange* case, the Court stated that "the grant of a free passage [for a state's armed forces through the territory of another state] therefore implies a waiver of all jurisdiction over the troops during their passage and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require."[30] The actual extent of this historical "waiver" is a matter of some discussion and it is unclear if there was a consensus practice throughout the international community.[31] What does seem clear is that prior to World War II, "[i]t was common for agreements to exempt members of the visiting armed forces from the military courts of other allies for breaches of the local law in the combat areas."[32]

A. NATO SOFA

In the aftermath of World War II, the victorious allies recognized that they would need a continued military presence in Western Europe and particularly in Germany. The Berlin crisis in 1948 confirmed this need, and the numbers of U.S. military members stationed in European countries continued to increase.[33] With the formation of NATO in 1949, it became clear that the focus of defense was the entire western European area and

---

delineating the status of visiting military forces may be bilateral or multilateral. Provisions pertaining to the status of visiting forces may be set forth in a separate agreement, or they may form a part of a more comprehensive agreement. These provisions describe how the authorities of a visiting force may control members of that force and the amenability of the force or its members to the local law or to the authority of local officials." JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 519 (Oct. 17, 2008).

[29] Chris Jenks, *A Sense of Duty: The Illusory Criminal Jurisdiction of the U.S./Iraq Status of Forces Agreement*, 11 San Diego J. Int'l L. 411, 419–20 (2010) (quoting in part R. CHUCK MASON, CONG. RESEARCH SERV., RL 34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW MIGHT ONE BE UTILIZED IN IRAQ? 2 (2009)).

[30] 11 U.S. (7 Cranch) at 140.

[31] Peter Rowe, *Historical Developments Influencing the Present Law of Visiting Forces*, *in* THE HANDBOOK OF THE LAW OF VISITING FORCES, *supra* note 25, at 11, 12–13.

[32] *Id.* at 13.

[33] *Id.* at 19.

that any NATO country could envision having forces from another NATO country either permanently or temporarily stationed within its borders.[34] This highlighted the need for a common approach to visiting forces.

The result was the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces (NATO SOFA), signed on June 19, 1951.[35] The NATO SOFA contains more than one hundred substantive paragraphs in twenty articles with provisions covering topics such as entry and departure requirements,[36] driving permits,[37] the effect of local taxes,[38] and foreign exchange regulations.[39]

Because the NATO members envisioned this agreement as a permanent one, they were determined to move away from the traditional "law of the flag" approach to one that reflected restricted territorial sovereignty.[40] The new approach was based on two fundamental principles: 1) forces should receive functional immunity for acts within the scope of their official duty on behalf of their sovereign, and 2) this immunity from host nation law is a procedural immunity, rather than a substantive immunity.[41] In other words, a member of the force was not immune from criminal process when violating local law, but rather was subject to his own nation's criminal procedure and justice system rather than that of the host nation. Nowhere is the application of these two fundamental principles more obvious and important than in the area of criminal jurisdiction.

1. Jurisdiction

As alluded to above, one of the most important provisions of the NATO SOFA, and certainly the most significant for this essay, is article VII, which addresses jurisdiction. Article VII establishes a system of concurrent jurisdiction.[42] While many nations have established SOFAs,[43]

---

[34] *Id.* at 21.
[35] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].
[36] *Id.* art. III.
[37] *Id.* art. IV.
[38] *Id.* art. X.
[39] *Id.* art. XIV.
[40] Conderman, *supra* note 25, ¶ 32.
[41] *Id.* ¶ 34.
[42] *Id.* ¶ 13.

the United States is certainly the world leader in SOFA promulgation[44] and uses the NATO SOFA's jurisdiction provisions as the "paradigm on which other SOFAs [it] has entered into are based."[45]

The key aspect of this "concurrent" jurisdiction system is that each nation has exclusive jurisdiction over cases in which they clearly have the sole interest, while all other cases are shared. In the words of one SOFA expert,

> Both the sending and receiving states are generally given exclusive jurisdiction over offenses which violate their own law, but not the law of the other state. Where a crime violates the law of both jurisdictions, a system of priorities is established. The sending state is given the primary right to exercise jurisdiction over its personnel as to offenses arising out of the performance of official duty and offenses solely against its security, property, or personnel. The host nation has primary jurisdiction in all other cases. In cases of particular importance to one state, a waiver of jurisdiction may be obtained.[46]

To illustrate this jurisdictional divide, consider a U.S. soldier stationed in Italy. If he decides to leave his duty station without getting proper approval, he could be punished by the U.S. military authorities for "absence without leave."[47] However, he would not have violated any

---

[43] Jenks, *supra* note 29, at 418–19 n.23 (explaining that SOFAs are used by countries around the world, including by way of example, an agreement between East Timor and Australia, New Zealand, Malaysia and Portugal as part of a peacekeeping mission; a 2003 SOFA between Germany and Russia that covers the transit of German troops through Russia to Afghanistan; and that the former Soviet Union utilized SOFAs with Warsaw Pact member countries).

[44] Leading up to the United States's agreement with Iraq, Secretary of Defense Gates and former Secretary of State Rice stated that the United States had entered into "more than 115" SOFAs with countries around the world. Condoleezza Rice & Robert Gates, *What We Need In Iraq*, WASH. POST, Feb. 13, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/02/12/AR2008021202001.html.

[45] Jenks, *supra* note 29, at 420.

[46] Paul J. Conderman, *Jurisdiction*, *in* THE HANDBOOK OF THE LAW OF VISITING FORCES *supra* note 25, at 103.

[47] Uniform Code of Military Justice art. 86 (absence without leave) (2008).

Italian law applicable to him so the United States would have exclusive jurisdiction.[48] On the other hand, if the same soldier somehow found himself spending time with members of the Italian mafia, he could be punished by Italian authorities for "associazione mafiosa" or associating with the mafia.[49] Since there is no applicable U.S. law for this offense, Italy would have exclusive jurisdiction.[50]

Because most criminal systems have similar provisions, exclusive jurisdiction is exercised only rarely. The vast majority of criminal cases result in concurrent jurisdiction.[51] It then becomes necessary to look at which state has primary jurisdiction. As noted above, the sending state will have primary jurisdiction in cases "arising out of the performance of official duty and offenses solely against its security, property, or personnel."[52] Considering those offenses solely against a nation's security, property, or personnel, assume the soldier in Italy steals a U.S. government-owned computer from his office. Larceny is a violation of the law in both the United States and Italy, but in this case, since the computer belonged to the U.S. government, the United States would have primary jurisdiction.[53] Cases such as larceny and assault are usually not the contentious ones. Rather, cases where the sending state asserts primary jurisdiction because the criminal act arose out of official duty cause the most friction. And it is just such a case with Abu Omar.

---

[48] NATO SOFA, *supra* note 35, art. VII, ¶ 2.

[49] *See* Benjamin Scotti, *Rico vs. 416-bis: A Comparison of U.S. and Italian Anti-Organized Crime Legislation*, 25 LOY. L.A. INT'L & COMP. L. REV. 143, 159 (2002) (contrasting Italy's mafia association law, 416-*bis*, with the United States's Racketeer Influenced Corrupt Organization (RICO) Act. While similar on some levels, Italy's law is broader as it criminalizes association with the mafia without requiring evidence of subsequent criminal action.).

[50] Turkey provides an example of how exclusive jurisdiction in the NATO SOFA could affect American service members. Under Turkish law, it is a criminal offense to besmirch the reputation of Kemal Attaturk, the founder of modern Turkey. It is also a criminal offense to seduce a virgin by promise of marriage. As neither of these offenses violates U.S. law, if American service members commit the acts while in Turkey, then Turkey has exclusive jurisdiction.

[51] NATO SOFA, *supra* note 35, art. VII, ¶ 3.

[52] Conderman, *supra* note 46.

[53] *See* Jenks, *supra* note 29, at 421.

2. Official Duty

As the NATO SOFA was being drafted, the term "official duty" was used as a basis for determining primary concurrent jurisdiction.[54] There is no question that a sending state has primary jurisdiction to try its own service member for offenses performed in the course of that service member's official duty.[55] The question lies in the meaning of "official duty" which is not defined in the SOFA. A working draft, which was never agreed upon, defined official duty as "'an offence arising out of an act done in the performance of official duty or pursuant to a lawful order issued by the military authorities' of the sending [s]tate."[56] Opposing the U.S. view on the definition of official duty, "the Italian Representative asserted that the wording should not only mean that the act was done in the performance of official duty, but that it was done within the limits of that official duty."[57] To clarify the difference in viewpoints,

> [t]he Italian Representative used the example of a driver on official business to illustrate his point. He explained that if the driver deviated from the direct route for reasons of official business and the accident occurred during such deviation, the driver could reasonably claim that he was acting in the performance of official duty. But if the driver deviated from the direct route for personal reasons and the accident occurred during such deviation, the driver could not claim that he was acting in the performance of official duty.[58]

This issue was never resolved during the negotiations.

Similar SOFAs between the United States and other states also use the term "official duty." Some, such as the SOFA with the Republic of Korea,[59] attempt to achieve more clarity, but such bilateral definitions would carry little weight in the European context. As these agreements are

---

[54] NATO SOFA, *supra* note 35, at art. VII, ¶ 3(a)(ii).
[55] Kimberly C. Priest-Hamilton, *Who Really Should Have Exercised Jurisdiction Over the Military Pilots Implicated in the 1988 Italy Gondola Accident?*, 65 J. AIR L. & COM. 605, 622 (2000).
[56] *Id.* at 623.
[57] *Id.*
[58] *Id.* at n.102.
[59] *See* Conderman, *supra* note 46, at 111.

bilateral or multilateral, the U.S. practice with Korea or some other third nation likely would be unconvincing to Italy or another member of NATO.[60] Thus, the meaning of "official duty" in the NATO SOFA remains undefined.

Unsurprisingly, the drafters also failed to agree on who should determine whether an offense was committed in the performance of official duty.[61] As a result of this failure to agree, in practice the sending state's official duty determination is conclusive. Given that it is the sending state that either did or did not assign that official duty to the service member, it is difficult to imagine how the receiving state could substitute its own understanding of what the scope of that official duty was or was not. This practice of the sending state making the official duty determination has been almost universally accepted. In fact, the only instances in which a NATO receiving state has refused to accept a sending state's assertion of a service member's official duty and corresponding primary jurisdiction involve Italy.[62]

The first such example occurred in 1998, after a U.S Marine Corps aircraft — flying off course and lower and faster than provided for in its preapproved flight plan — severed an Italian ski gondola cable, killing twenty passengers.[63] The United States asserted that an official duty determination applied to the accident and claimed primary jurisdiction. The Italian prosecutor opposed the U.S. assertion and sought manslaughter indictments against the aircraft crew, arguing that deviating from the flight plan so drastically meant the Marines were no longer on official duty.[64] Ultimately the Italian court dismissed the case, finding that the United States had primary jurisdiction under the NATO SOFA because the offense

---

[60] While it lies outside the NATO context, it bears noting that the European Union's model SOFA avoids this issue altogether by rendering European forces immune from the criminal jurisdiction of the host state "under all circumstances." Aurel Sari, *Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice*, 19 EUR. J. INT'L L. 67 (2008) (quoting art. 6(3) of the EU model SOFA).

[61] Jenks, *supra* note 29, at 421.

[62] More precisely, the Italian government accepted the United States's assertions. However, Italian prosecutors in both the Gondola Case discussed *infra* and now again in the Kidnapping Case refused to do so.

[63] Priest-Hamilton, *supra* note 55, at 605.

[64] Annalisa Ciampi, Case Note, Public Prosecutor v. Ashby, *Judgment No. 161/98, Court of Trento, Italy, July 13, 1998*, 93 AM. J. INT'L L. 219, 221–22 (1999).

arose out of the performance of the Marines' official duty.[65] While the jurisdiction issue was not complicated and should not have even reached the court,[66] at least in the Gondola Case the Italian court checked the Italian prosecutor's overreaching.

A similar decision was required in another recent Italian case involving a U.S. soldier[67] deployed to Iraq who shot and killed an Italian secret service agent and wounded two others, including a just-rescued journalist.[68] The United States and Italy did a combined investigation but arrived at different conclusions and recommendations.[69] Italian prosecutors brought the case to trial in Italy, and over the United States' objection tried the American soldier *in absentia*. The crucial element of the trial was not whether the soldier had fired the shots, but whether Italy had jurisdiction despite the United States's assertion of jurisdiction. While this case was not decided on the NATO SOFA, it was argued as a SOFA question. The soldier's attorney argued that as a "member[] of the multinational force in Iraq," the soldier was "under 'exclusive jurisdiction' of the country that sent [him]."[70] Judge Gargani, the presiding judge in the case, eventually ruled that Italy did not have jurisdiction.[71] Judge Gargani's decision was eventually upheld on appeal by the Court of Cassation, Italy's highest court.[72]

One of the authors has argued elsewhere that in cases such as the one outlined above, where jurisdiction is disputed between two sovereigns

---

[65] *Id.* at 220–21.

[66] In most instances, the sending state asserts the official duty statement prior to the case going to trial and the prosecutor takes action on the request by recognizing the sending state's jurisdiction.

[67] For an overview of the case, see Eric Talbot Jensen, *Exercising Passive Personality Jurisdiction Over Combatants: A Theory in Need of a Political Solution*, 42 INT'L LAW. 1107 (2008).

[68] Corte di Assise, 25 ottobre 2007, Foro it. 2008, II, 246 (It.), n. 5507/07 at 3 (E. A. Stace trans.) (translation on file with author).

[69] *Id.* at 4.

[70] Marta Falconi, *Trial of US Soldier Charged with Murder of Italian Agent in Iraq Resumes in Rome*, ASSOCIATED PRESS WORLDSTREAM, September 27, 2007, *available at* LEXIS, CURNWS File.

[71] *Court Throws Out Case Against US Soldier Charged Over 2005 Killing of Italian in Iraq*, ASSOCIATED PRESS WORLDSTREAM, October 25, 2007, *available at* LEXIS, CURNWS File.

[72] *Italian Court Quashes Case of US Soldier Who Killed Secret Agent*, AGENCE FRANCE PRESSE, June 19, 2008, *available at* LEXIS, CURNWS File.

based on international agreements to which they are both parties, claims against the member of the force should be resolved through political means, not through resort to individual criminal responsibility in domestic courts and an *in absentia* trial. Unfortunately this has not been the approach taken by Italy in its most recent controversy concerning a U.S. assertion of official duty — the Abu Omar case.

B. Application to the Abu Omar Case

The same basic NATO SOFA jurisdiction provisions should have applied in the case of Abu Omar. Italy is a party to the NATO Treaty and subsequent NATO SOFA. U.S. forces have been stationed in Italy since the end of World War II. The provisions of the NATO SOFA apply to those members of the force. In disregarding the NATO SOFA's applicability to Lt. Col. Romano, the Italian Court facilitated a breach of the SOFA, as this was the first time in its fifty-eight year history in which a receiving state rejected the official duty assertion and corresponding primary jurisdiction of a sending state and proceeded to prosecute and convict a member of the sending state's armed forces.

In the incident involving Abu Omar, the members of the CIA would not qualify as members of the force.[73] But one of those convicted, and sentenced to a five-year prison term, was Romano, a member of the U.S. Air Force stationed in Italy.[74] In Romano's case, the United States asserted jurisdiction, claiming any alleged misconduct would have occurred as part of his official duties.[75] At the time of the abduction, Romano was the

---

[73] The NATO SOFA defines "force" as "the personnel belonging to the land, sea or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connexion with their official duties, provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a 'force' for the purpose of the present Agreement." NATO SOFA, *supra* note 35, art. I, ¶ 1(a). Under this definition, Romano was the only person indicted who was a member of the "force." While members of the CIA are government employees, they are not part of the armed forces of the United States. *See* 10 U.S.C. § 101(a)(4) (2006).

[74] Hooper, *supra* note 8.

[75] While not altering the outcome that the United States and not Italy possessed the primary right of jurisdiction over Romano, that the United States waited until September 2009 to assert that right (even though the trial began in 2007) did not aid the orderly administration of justice. *See CIA Verdict*, *supra* note 19. One cannot help but wonder

commander of the military security forces that controlled access into, and provided security on, Aviano Air Base.[76]

The facts of this case, even more than those of the Gondola Case, seem to support the official duty determination. The Court claimed that Romano as "the US superior officer in charge of security on the Aviano base, [waited] for the abductors and the abducted person at the aforementioned base, guaranteeing the former safe entry and the possibility to embark the abducted person on an airplane that took him out of Italy."[77] Taking the facts as alleged, it is likely that the snatch and grab was handled by the CIA and that Romano's "role," if it can be called that, was to authorize entry onto Aviano and its airfield. The "support" he likely provided was within the normal course of his duties and similar to other tasks he would normally perform as part of his job.

Further, even if Romano played a key role in the actual kidnapping, he was presumably doing so as ordered by his superiors in support of CIA operations. While this point triggers an almost reflexive comparison to the failed "following orders" defense at Nuremburg,[78] such a comparison is invalid. That a member of the force was acting pursuant to orders is a fundamental component of the determination that his acts or omissions arose out of the performance of official duties, duties that include following lawful orders. That this must be the case is perhaps more evident when the opposite situation is considered. If a member of the force was not following orders, or acting in violation of his orders, this would undermine the sending state's argument that he was performing official duties. Returning to

---

whether the outcome, at least for Romano, may have been different had the United States made the assertion earlier in the process.

[76] Erik Holmes, *Colonel Faces Italian Rendition Trial*, A.F. TIMES, June 5, 2009, *available at* http://www.airforcetimes.com/news/2009/06/airforce_rendition_romano_060509/.

[77] Decision, *supra* note 2, at III.

[78] Article 8 of the Nuremburg Charter states, "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." These defenses were ineffectively raised by Keitel, Jodl, and others. Judgment of the International Military Tribunal for the Trial of the German Major War Criminals, Nuremberg, 30th September and 1st October, 1946. Nonetheless, the Italian prosecutor raised the straw man argument of the Nuremburg defense during his closing argument in the Abu Omar case. *See Italy/US: Italian Court Rebukes CIA Rendition Practice*, *supra* note 23. The International Criminal Court allows for a limited defense of superior orders in article 33.

Romano, where a member of the force is following clear orders from his government, taking that individual to trial over the objection of his government is generally inappropriate and in this case a violation of treaty obligations. Rather, as with the case involving the killing of the Italian journalist and secret service agents discussed above, this type of situation demands a political rather than judicial resolution.

C. Italy's Breach

As the case came to trial, the United States asserted jurisdiction over Romano, submitting a "written statement to the Italian Minister of Justice, having as a subject line '*Assertion of primary right of jurisdiction in the penal proceedings against Colonel Joseph L. Romano.*"[79] Terming the assertion as a "primary right" of jurisdiction makes it clear that the United States recognized that this was not a case of exclusive jurisdiction on either side, but a case of concurrent jurisdiction.

Under the concurrent jurisdiction paradigm, crimes committed in performance of official duty are under the primary jurisdiction of the sending state, in this case the United States. The Court correctly explained the differences between the bases for jurisdiction, but then relied on an argument that discredits its prior legal analysis. The Court determined that this case cannot be a case of concurrent jurisdiction because, while Romano is being charged under Article 605 of the Italian Penal Code which deals with an illegal detention, the action in the United States would be considered an "'extraordinary rendition,' which means an act not only admitted, but even ordered by the competent political authorities."[80]

The Court erred by not recognizing that the actual crime for determination of concurrent jurisdiction was illegal detention or kidnapping, clearly a crime under United States law.[81] Whether the alleged action amounts to a crime in each jurisdiction is a determination for that state to make, not the opposing state. Otherwise, through a semantic manipulation, one state could always infer the other state out of jurisdiction by simply saying that they did not have an exact equivalent of the crime. Because of

---

[79] Decision, *supra* note 2, at 85.
[80] *Id.* at 88.
[81] 18 U.S.C. § 1201 (2006).

the erroneous determination of the crime, the Court never reaches the discussion of the official duty principle, which applies only once concurrent jurisdiction is established.

To the extent that the examples discussed, notably this and the Gondola Case, involved the United States "benefiting" and Italy "suffering" from the application of the NATO SOFA, perspective tends to be situational and thus changes. A state's perspective towards the NATO SOFA's criminal jurisdiction provisions tends to vary when the state is a sending state, able to define and assert that acts or omissions were done in the course of official duties, compared to when the state is a receiving state, accepting the assertions. In this and the Gondola Case, Italy was the receiving state. Italy's perspective was likely different in 1988, when three Italian military jets collided in mid-air at an air show in Ramstein, Germany.[82] The result of the collision was a "fireball of shrapnel and jet fuel" that "exploded onto the crowd of thousands just a few hundred feet below" killing the three pilots and seventy spectators and seriously injuring 346.[83] Investigations concluded that Italian pilot error caused the crash.[84]

The Ramstein tragedy was one of the worst air show disasters in history, killing Germans (and Americans) on German soil. Yet had the Italian pilot in question survived or some other aspect of culpability by a member of the Italian armed forces arisen, Germany, as the receiving state, would not have possessed primary jurisdiction to proceed with a criminal trial. Italy, as the sending state, would have had the right to determine that the pilot's actions, while negligent, were performed in the course of his official duties and assert its superseding right of jurisdiction under the NATO SOFA. Italy would have been justified in asserting the criminal jurisdiction provisions to protect its interests concerning its military members, despite the great loss of life and serious injury.

Because there was no surviving Italian pilot and no subsequent criminal proceedings, we will never know what approach Italy would have

---

[82] Daniel Dumas, *Aug. 28, 1988: Ramstein Air Show Disaster Kills 70, Injures Hundreds*, WIRED, Aug. 28, 2009, http://www.wired.com/thisdayintech/2009/08/0828ramstein-air-disaster/.

[83] *Id.*

[84] *Id.* There is no record of any criminal proceedings by Germany, presumably because the pilot who caused the collisions died.

taken. However, it would have had to choose between relying on Germany's legal obligation under the NATO SOFA, an agreed multilateral treaty, to recognize its primary right to jurisdiction, or surrendering control of its pilot to the German legal system – exactly the decision the United States faces with Romano.

Despite Italy's important role in NATO and as a U.S. partner,[85] the Abu Omar case raises fundamental questions of Italy's commitment to meeting its international obligations. Given that the Italian government accepted the United States's assertion of jurisdiction and did not enable the trial, it is perhaps more accurate to direct those questions to the Italian prosecutor and judiciary. But that distinction is no less disquieting to the United States and to Romano.

Other NATO members should also consider the implications of Italy's affront. The North Atlantic Treaty Organization has served as a key pillar upon which European security has rested and European prosperity has flourished. The NATO SOFA is the very framework by which NATO operates. The NATO SOFA's criminal jurisdiction provisions provide crucial transparency and predictability, which Italy's actions have undermined. The Abu Omar case may be isolated, limited to Italy and the United States, and not repeated. Or perhaps Italy's precedent-setting flaunting of the NATO SOFA will prove the start of a fissure, expanding as repeated by Italy and even other NATO members, and causing long-term

---

[85] Commentators may incorrectly attempt to downplay the significance of Italy's role in NATO and with the United States and correspondingly Italy's breach of the NATO SOFA in the Abu Omar case. One commentator labeled NATO's efforts to find a post-Cold War rationale as "more cosmetic than real." Anthony Cordesman, *Rethinking NATO's Force Transformation,* NATO REV., Spring 2005, http://www.nato.int/docu/review/2005/issue1/english/art4.html. Yet in the military operations NATO has conducted, including in the former Yugoslavia and Afghanistan, Italy has played a vital role. Nor is Italy's military partnership with the United States a post-World War II anachronism — the U.S. Army recently designated forces in northern Italy to serve as part of the newly created U.S. Africa Command and fulfill the vitally important mission of "conduct[ing] sustained security engagement with African land forces to promote peace, stability, and security in Africa." *See History: Southern European Task Force / U.S. Army Africa*, U.S. ARMY AFRICA, http://www.usaraf.army.mil/history.html (describing the history of U.S. Army forces in Vicenza, Italy leading up to and including their transition to becoming the U.S. Army component command to Africa Command, which is headquartered in Germany). As such, U.S. Army Africa, as the organization is now called, is "dedicated to achieving positive change in Africa." *Id.*

and widespread damage to the alliance. Moreover, as the next section describes, the questions of Italy's commitment to international law go beyond its violation of the NATO SOFA as Italy also breached its human rights obligations.

III. Italy's Violation Of Its Human Rights Obligations

A. European Convention and Court

As a member of the Council of Europe, Italy, along with the forty-six other member countries, acceded to the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights ("ECHR").[86] Through the ECHR, Council of Europe member-states agree to secure fundamental civil and political rights and freedoms, not only for their own citizens, but also for all persons residing within their borders, regardless of nationality or ethnic origin.[87] Specifically, under Article 1, "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."[88] Article 6 of Section I provides, in essence, the right to a fair trial:

> Everyone charged with a criminal offence has the following minimum rights:
>
> (a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him*;
>
> (b) to have adequate time and the facilities for the preparation of his defence;

---

[86] *See The Council of Europe in Brief: 47 Countries, One Europe*, COUNCIL OF EUROPE, http://www.coe.int/aboutCoe/index.asp?page=47pays1europe (listing Italy as a member of the Council since 1949); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]. The ECHR entered into force in 1953. *See 50 Years of Activity: The European Court of Human Rights, Some Facts and Figures*, EUROPEAN COURT OF HUMAN RIGHTS, at 3 (2009), http://www.echr.coe.int/NR/rdonlyres/ACD46A0F-615A-48B9-89D6-8480AFCC29FD/0/FactsAndFiguresENAvril2010.pdf [hereinafter ECtHR Facts and Figures].

[87] ECtHR Facts and Figures, *supra* note 86.

[88] ECHR, *supra* note 86, art. 1.

> (c) *to defend himself in person or through legal assistance of his own choosing* or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.[89]

Most members of the Council of Europe have made the ECHR directly enforceable through their domestic legal system.[90] Nonetheless, to ensure that member-states are "securing" those and the other rights afforded by the convention, the ECHR also established a human rights court, which eventually became the European Court of Human Rights ("ECtHR").[91] The Court has "jurisdiction to rule, through binding judgments, on individual and interstate applications alleging violations of the Convention."[92] Final decisions of the ECtHR are generally considered binding.[93] Italy, however, has a troubled history with enforcement of ECtHR decisions stemming from its flawed *in absentia* trial process. Before delving into how those same problems exist in the Abu Omar case, a brief discussion of how the ECtHR views *in absentia* trials is warranted.

B. In Absentia *Trials Under the ECHR*

While listing the right to defend oneself in person, the ECHR does not expressly state a right of the accused to be present at trial.[94] Instead, the

---

[89] *Id.* art. 6(3)(a)–(e) (emphasis added).

[90] DAN STIGALL, COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION 117 (2009). The odd way in which Italy incorporates ECtHR decisions is discussed *infra*.

[91] ECHR, *supra* note 86, art. 19(2). The Council of Europe established the ECtHR in 1959.

[92] ECtHR Facts and Figures, supra note 86, at 1.

[93] STIGALL, *supra* note 90, at 16.

[94] By comparison, the International Covenant on Civil and Political Rights (ICCPR) provides that everyone charged with a criminal offense has the right to be tried in his or her presence. *See* International Covenant on Civil and Political Rights, art. 14(3)(d), Dec. 16,

right is implied by the fair trial provisions listed above. The ECtHR has held that "it is difficult to see how [an accused] could exercise [the ECHR's fair trial rights] without being present"[95] and that "the object and purpose of [Article 6] taken as a whole show that a person 'charged with a criminal offence' is entitled to take part in the hearing."[96]

This is not to say that *in absentia* trials are disallowed. The European Court has acknowledged that:

> Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial . . . . However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner . . . .[97]

Thus the key is whether a State can establish that the accused unequivocally waived his fair trial right to be present and take part in his hearing. The starting point for that analysis is whether the accused had proper notice of the proceedings. In fact, notice, or lack thereof, largely dictates the direction of the subsequent waiver analysis.[98]

1966, 999 U.N.T.S. 171. Italy is a party to the ICCPR and to its First Optional Protocol, which provides an individual complaint mechanism to the United Nations Human Rights Committee (HRC). Italy's conduct of *in absentia* trials and the uncertainty concerning a right to retrial under Italian law have run afoul of the HRC. *See* U.N. Human Rights Comm., *Communication No. 699/1996: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Protections*, U.N. Doc. CCPR/C/66/D/699/1996 (July 27, 1999). Here, the HRC stressed that the burden to establish notice was on Italy, not the accused, that for Italy to assume the accused had notice does not meet the burden, and that an *in absentia* trial held under such circumstances violated the ICCPR. The HRC added that court-appointed counsel does not remedy such a violation. A retrial would cure the violation but only an absolute right to retrial as applied to the defendant, not the theoretical possibility of a retrial Italy unpersuasively claimed was provided for by Italian law.

[95] Sejdovic v. Italy, App. No. 56581/00, 42 Eur. H.R. Rep. 17, ¶ 81 (2006) (citing Belziuk v. Poland, 1998-II Eur. Ct. H.R. 558, 570, ¶ 37; T. v. Italy, 245-C Eur. Ct. H.R. (ser. A) at 41, ¶ 26 (1993); F.C.B. v. Italy, 208-B Eur. Ct. H.R. (ser. A) at 21, ¶ 33 (1991); and Colozza v. Italy, 89 Eur. Ct. H.R. (ser. A) at 14, ¶ 27 (1985)).

[96] *Id.*

[97] *Id.* ¶ 86.

[98] The ECtHR added that "[i]n criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterization

Notice is the first of the ECHR fair trial rights discussed above, the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him."[99] To the ECtHR, the indictment "plays a crucial role in the criminal process" and service of the indictment is the trigger for the defendant being "formally put on notice of the factual and legal basis of the charges against him."[100]

It is unclear whether the ECtHR requires the state to provide formal notice. The Court has left open the possibility that less than formal notice may suffice, but has not yet been presented with such a situation. In theory, Italy could attempt a constructive notice argument in the Abu Omar case, but, practically, ECtHR case law suggests such an argument is unlikely to prevail.

In *Smogyi*, a 2004 *in absentia* case, Italy argued that the accused had notice from either an interview he had with a journalist about the case or from the local press.[101] In response, the Court stated "that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's right as is moreover clear from Article 6 § 3 (a) of the Convention; vague and informal knowledge cannot suffice . . . ."[102]

However, in 2006, in another Italian *in absentia* case, *Sejdovic*, the ECtHR held that it

> cannot . . . rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution.[103]

---

that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair." *Id.* ¶ 90.

[99] *Id.* ¶ 89.

[100] *Id.*

[101] Somogyi v. Italy, App. No. 67972/01, 46 Eur. H.R. Rep. 5, ¶ 75 (2008).

[102] *Id.* ¶ 75.

[103] *Sejdovic*, *supra* note 95, ¶ 99.

The Court goes on to list examples of the type of facts that allow the notice requirement to be met through less than formal means, including "where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities . . . ."[104] Though *Sejdovic* stands for the proposition that no *per se* requirement of formal service of the indictment exists, the bar that a state must meet is not appreciably lower.

What is clear is that states may not infer notice and waiver merely based on the classification of an accused as a fugitive[105] and that the burden of proof for establishing whether a person charged with an offense was seeking to evade justice is on the state.[106] Further, where notice is lacking, that the state provides court-appointed counsel does not remedy the notice violation.

In fact, the presence of court-appointed counsel seems almost irrelevant to the ECtHR's principle inquiry — did the accused have proper notice from which he could knowingly waive the right to defend himself in person? Make no mistake, a state that coupled improper notice with a failure to provide court-appointed counsel would undoubtedly fare poorly with the ECtHR. The Court would more easily identify an Article 6 violation and a more severe one at that. Yet in the two Italian *in absentia* cases discussed thus far, *Somogyi* and *Sejdovic*, Italy provided court-appointed counsel for the accused. While the Court mentions that fact, the presence of court-appointed counsel barely factors into its analysis and certainly did nothing to alter its conclusion that the trials violated the fair trial rights of those tried *in absentia*.

Ultimately, where the accused has proper notice, the ECtHR is more likely to consider the subsequent absence at trial a waiver and the accused would not be entitled to a retrial. But as is often the situation in Italian cases, where the ECtHR finds that proper notice was not given — and thus the accused could not knowingly waive his right to be present —

---

[104] *Id.*
[105] *Id.* ¶ 87.
[106] *Id.* ¶ 88.

the resulting *in absentia* trial violates Article 6. The remedy for the violation is "a fresh determination of the merits of the charges, in respect of both law and fact . . . ."[107] Nonetheless, Italy appears to have as much difficulty with providing that remedy as it does in holding permissible *in absentia* trials that would avoid the need altogether.

C. Italy and In Absentia *Trials*

During an ECHR compliance review in the spring of 2009, the Council of Europe listed seven different cases in which the ECtHR found Italy to have denied justice through unfair *in absentia* proceedings.[108] As a result, at least two European countries, the Netherlands and Germany, have declined to extradite fugitives convicted *in absentia* in Italy.[109]

According to the ECtHR, a review of Italy's *in absentia* procedures for 2006's *Sedjovic* decision "might suggest that there was a defect in the Italian legal system such that anyone convicted in absentia who had not been effectively informed of the proceedings against them could be denied a retrial."[110] The ECtHR also implied that Italy had "systemic or structural problems in [its] national legal order."[111]

---

[107] *Id.* ¶ 82.

[108] COUNCIL OF EUROPE HUMAN RIGHTS AND LEGAL AFFAIRS DIRECTORATE OF MONITORING, ITALY'S EXECUTION OF THE COURT'S JUDGMENT 15 (on file with author) [hereinafter COUNCIL OF EUROPE DIRECTORATE OF MONITORING].

[109] *See id.* at 16 (referring to the Hu case involving a Chinese national convicted *in absentia* in Italy and arrested in Amsterdam pursuant to an Italian arrest warrant. According to the Council of Europe, "[t]he Netherlands authorities rejected the [Italian] request for extradition on the grounds that [Hu] had not had the opportunity to defend himself."); *Sejdovic*, *supra* note 95, ¶ 19 (detailing how Germany refused to extradite an individual, Sejdovic, living in Hamburg to Italy. Italy had tried and convicted Sejdovic *in absentia* for murder. "The German authorities refused the Italian government's extradition request on the ground that the requesting country's domestic legislation did not guarantee with sufficient certainty that the applicant would have the opportunity of having his trial reopened."). Likely high on the Netherlands and Germany's list of reasons for not extraditing the fugitive to Italy was the possibility that in so doing they may violate the ECHR. *See* Chris Jenks, *Notice Otherwise Given: Will In Absentia Trials at the Special Tribunal for Lebanon Violate Human Rights?*, 33 FORDHAM J. INT'L L. 57 (2009) (describing the extraterritorial application of the ECHR).

[110] *Sejdovic*, *supra* note 95, ¶ 121.

[111] *Id.* ¶ 120.

The court then noted that Italy had modified its criminal procedure code and that it was "premature . . . to examine whether the reforms . . . achieved the result required by the Convention."[112] Italy had previously modified its criminal procedure code in 1989, but this insufficient change led to the seven cases in which the ECtHR held that Italy's *in absentia* proceedings were unfair.[113] Nonetheless, the Council of Europe indicates that the more recent 2005 change to Italy's criminal procedure code, combined with Court of Cassation case law, corrects any deficiencies.[114] While Italy did modify its provisions for requesting retrial[115] that alone did not cure the defect. Rather it is those provisions combined with the Court of Cassation's affirmation that "when a final judgment of the European Court sanctions a violation of Article 6 of the Convention, the national judge cannot dismiss an application for suspension of the time-limit for appeal . . . ."[116] In reality though, Italy has not corrected the almost systemized manner in which its *in absentia* trials violate the ECHR. Instead, Italy has streamlined the process by which the violation may be cured.

The Council's characterization of the revised process as "improved" is striking given that it will likely result in Italy conducting similarly flawed *in absentia* trials and initially — and improperly — denying a retrial when the fugitive is located. That is the status quo ante. The case would then head to the ECtHR, which would again find a violation of the fair trial rights afforded by Article 6 of the European Convention. What may have changed through Italy's "improved process" is that both sides, the ECtHR and Italy, avoid the awkward showdown where the Court claims that a retrial is mandated and where Italy responds that its system does not allow one under the circumstances. Now, per the Court of Cassation, once the ECtHR finds an Article 6 violation, the Italian lower court is precluded

---

[112] *Id.* ¶¶ 122–23.
[113] COUNCIL OF EUROPE DIRECTORATE OF MONITORING, *supra* note 108, at 17.
[114] *Id.* at 26–27.
[115] Under the change, "it is not possible to appeal against judgments rendered *in absentia* at first instance even if the normal deadlines have expired." *Id.* There are exceptions to the new rule, including when the accused had effective knowledge of the proceedings or judgment against him and also when the accused willfully decided not to appear. *Id.* The exceptions, and Italy's history of misconstruing what does and does not constitute "effective knowledge" or a "willful" decision not to appear, are likely why the Council of Europe claims the overall correction stems from the "combined application" of the CPP and Court of Cassation case law.
[116] *Id.* at 18.

from dismissing an application for suspension of the time limit for appeal. Because the individual improperly convicted *in absentia* is entitled to a retrial, the ECtHR will now hold that the violation is cured. But that is different than saying that the *in absentia* trial at issue did not violate the fair trial rights of the European Convention.

This convoluted approach does, however, reinforce Italy's acknowledgment of the direct effect and application of the European Convention. But to go to such lengths to streamline the correction of a human rights violation rather than to prevent the violation in the first place is perplexing.[117] Moreover, Italy's approach causes human rights violations against the very defendants Italy held accountable for violating the rights of Abu Omar.

D. Application to Abu Omar

Returning to the Abu Omar case, the Italians prosecuted twenty-six Americans, none of whom were present at any point during their trial. Of those defendants, two, Romano and De Sousa, secured their own counsel, which likely precludes them from successfully arguing that their trial was unfair — at least in the *in absentia* context.[118] Accordingly, this section focuses on the other twenty-four U.S. defendants represented only by court-appointed counsel who never spoke to their clients, and concludes that those *in absentia* trials likely violated the fair trial provisions of Article Six of the ECHR.

To begin with, the Americans were in Italy and as such, under Article 1 of the ECHR, Italy was obligated to "secure" the fair rights Article 6 provides to them.[119] Italy failed to do so, and as a result, violated the ECHR and its obligations to the Council of Europe.

---

[117] The Council of Europe notes that the Italian legislature recently considered a bill to further reform Italian law governing *in absentia* trials beyond the CCP change, but the Parliament dissolved in 2008 before the law could be passed. *Id.* at 17–18.

[118] Medenica v. Switzerland, App. No. 20491/92, 2001-VI Eur. Ct. H.R. (explaining how *in absentia* proceedings do not necessarily violate Article 6 where the accused has selected counsel).

[119] *See* ECHR, *supra* note 86, art. 1 (describing Italy's obligation: "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention").

The failure begins with Italy's inability to provide notice of "the nature and cause of the accusations" under Article 6(3)(a) — the "essential prerequisite for ensuring that the proceedings are fair."[120] The court issued indictments against the U.S. defendants in February 2007. Even assuming that the content was sufficient,[121] the indictments were not served on the defendants and thus, did not provide any notice.

In a roughly 400-page opinion, the Court devotes one page to discussing what it refers to as the "so called" *in absentia* proceedings.[122] The Court refers to the "scrupulousness" of the unsuccessful attempts at locating the defendants not present at trial.[123] The Court stated that the defendants voluntarily evaded the arrest warrants issued as a precautionary measure and therefore "must certainly be considered to be familiar with the existence of the accusations against them . . . ."[124] The Court impermissibly attempted to shift the notice burden by holding that the defendants would have to prove their failure to appear was involuntary due to illness or arrest in another country.[125] The Court then ruled out those possibilities, stating that "[t]his is not the case in question."[126]

Despite a 400-page opinion and Italy's checkered ECtHR history with *in absentia* trials, the Court did not elaborate on the attempts made at notifying the absent defendants and how or why the defendants "must" be familiar with the proceedings against them. There are several possibilities if the case is presented to the ECtHR. For example, the court or prosecutor may correctly claim that the indictments were provided to the Italian government and that the government's refusal to forward them to the appropriate U.S. officials is to blame.[127] Yet where within the Italian system the failure lies does not alter the fact that the burden for ensuring notice was on the state, a burden that Italy failed to meet.

---

[120] *Sejdovic*, *supra* note 95, ¶ 90.
[121] Whether the indictment in this case needed to be in English is unclear. *See* Hermi v. Italy, App. No. 18114/02, 46 Eur. H.R. Rep. 46, ¶ 68 (2006) (acknowledging that while the ECHR does not require that the notice be in writing and in a language that the defendant understands, not doing so may place the defendant at a disadvantage).
[122] Decision, *supra* note 2, at 3.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *See Italy/US: Italian Court Rebukes CIA Rendition Practice*, *supra* note 23 (describing the Italian government's refusal to forward extradition requests).

Absent formal notice, the Italian court may have assumed notice, based largely on the defendants' status as an "absconding party."[128] But as the ECtHR held in *Sejdovic*, Italy may not infer notice and waiver merely based on the classification of an accused as a fugitive and the burden of proof for establishing specific intent to avoid trial remains on the state.[129]

To the extent the Court's statement that the defendants must be familiar with the accusations against them is an argument of constructive notice via the torrent of media coverage surrounding the investigation and later trial, that argument is equally unpersuasive.[130] There is no reason to believe such an argument for constructive notice to the defendants would fare any better with the ECtHR than the last time Italy tried to do so, in *Somogyi*.[131]

Because the Court did not believe that any notice issues existed, it did not address the argument that the accused received a *per se* fair trial given the presence and involvement of court-appointed counsel. As a result,

---

[128] Decision, *supra* note 2, at 3.

[129] *Sejdovic*, *supra* note 95, ¶¶ 87, 88.

[130] A corollary to this argument would be that the CIA defendants "must" have known of the proceedings given that De Sousa and Romano knew enough to secure counsel. Such an argument, absent the ECtHR required "unequivocal" (read direct) evidence of waiver of the right to appear in person would not likely prevail.

[131] Somogyi, *supra* note 101. *Somogyi* was a 1999 Italian in *absentia* prosecution of a Hungarian, Somogyi, suspected of arms trafficking. The Italian investigating judge sent notice of the proceedings, in Hungarian, to Somogyi and claimed to have received a return receipt. Somogyi was arrested in Austria in 2000 pursuant to an Italian warrant. After the Italian courts denied Somogyi's request to reopen his case, he challenged the *in absentia* proceedings at the ECtHR, successfully arguing a case of mistaken identity and that he was not the individual to whom the notice had been sent and thus not the one who returned it. Of potential import to the *in absentia* proceedings against the Americans in the Abu Omar case, the Italians in *Somogyi* argued that even if their formal attempts at providing notice were unsuccessful, Somogyi could hardly claim lack of knowledge of the proceedings as he participated in an interview with a journalist about the proceedings against him. The ECtHR made very short work of that argument, stating that "as regards the Government's assertion that the applicant had in any event learned of the proceedings through a journalist who had interviewed him or from the local press, the Court points out that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, as is moreover clear from Article 6 § 3(a) of the Convention; vague and informal knowledge cannot suffice."

the Court, at least in this instance, avoids a claim that the ECtHR has previously rejected. The ECtHR is understandably reluctant to reduce this issue to its most basic level, possibly not wanting states to believe there is no incentive to provide counsel. That said, the ECHR affords the right of the accused to defend himself in person or through legal counsel of his choosing.[132] Well intentioned though the provision of court-appointed counsel may have been in this case, it simply does not meet the requirements of Article 6.

Ultimately, lacking unequivocal indication that the U.S. defendants (1) were aware, not just of the existence of the proceedings, but the nature and the cause of the accusation, and (2) were provided counsel of their choosing, Italy appears unlikely to meet its burden to establish that the U.S. defendants waived their right to be present and take part in the proceedings against them. As such, the proceedings violated the U.S. defendants' fair trial rights under the ECHR.

Admittedly any formal determination of such a violation would be a long time coming and may well not occur. The defendants would have to return to Italy, triggering the question of whether Italy would afford them a retrial. As discussed above, such a retrial would likely occur, but only after an ECtHR finding of yet another Italian ECHR violation stemming from *in absentia* trials coupled with the Court of Cassation's direction to the Italian trial courts. Interestingly, the Court refers to "problems [with how Italy conducts *in absentia* trials] indicated in the rulings of European Court of Human Rights," but claims that Italy had already effectively responded.[133] Yet as previously discussed, that "effective" response is in remedying fair trial violations of the ECHR, not preventing them from occurring in the first place.

That a formal determination will not likely occur should not overshadow the broader point that Italy violated the human rights of some twenty-four defendants, and did so ostensibly in the name of human rights and accountability. Yet considering the cases Italy is *not* taking to trial removes the thin veneer of a motive, leaving an unprincipled trial process untethered from the rule of law.

---

[132] Which is why Italy likely did not violate the ECHR rights of Romano and De Sousa, who had counsel of their choosing.
[133] Decision, *supra* note 2, at 4.

Were Italy confident in the validity of its process, one would expect Italian counter-terrorism prosecutors to seek indictments in cases where there is evidence of criminal wrong doing, but the suspect cannot be located. In fact, returning to the lead prosecutor's claim that but for Abu Omar's abduction, he would have been put on trial by Italy for his efforts to recruit fighters for extremist Islamic causes, one wonders — so why wasn't he?[134] Surely not being present in Italy doesn't preclude a fair trial?

Some may find the idea that CIA operatives are entitled to the protections of human rights law a perversity; others have the same reaction when applied to the suspected terrorist, Abu Omar, the suspected murderer, Sejdovic, or to the suspected arms trafficker, Somogyi. For any to have human rights, all must have them. If anything, the more reprehensible the alleged conduct, the more the individual is in need of human rights, like the right to a fair trial, and the more vigilant states, like Italy and the United States, should be in securing those rights. Yet the Italian prosecutor and court brought the CIA defendants to trial without notice and without counsel of their choosing. They knew or should have known of the previous instances where the ECtHR found such actions, by Italy no less, violate the European Convention. Problematically, the decision to proceed to trial was willful. That the prosecutor and court would subordinate the human rights of the majority of the defendants due to the human rights violations they may have committed, or to make a political statement, stands both criminal justice and human rights norms on their head. It also raises serious questions as to Italy's commitment to the ECHR, the ECtHR, and the primary aim of the Council of Europe, which is to "create a common democratic and legal area throughout the whole of the continent, ensuring respect for its fundamental values: human rights, democracy and the rule of law."[135] All Council of Europe members pledged to support this aim, but it

---

[134] Given that Abu Omar's alleged criminal activity occurred prior to his abduction, his abduction and subsequent torture would certainly be relevant when considering his possible punishment, but not the underlying issue of guilt or innocence. Indeed, if found guilty, a court might well find that the abduction was so egregious that no punishment was warranted; however, that is a separate inquiry from whether or not, as Italy claimed, he was recruiting militant fighters. *See* Peter Bergen, *Exclusive: I Was Kidnapped By the CIA*, MOTHER JONES, March/April 2008, *available at* http://motherjones.com/politics/2008/03/exclusive-i-was-kidnapped-cia (describing horrific treatment that purportedly left Abu Omar "a broken man").

[135] *The Council of Europe in Brief: Our Objectives*, COUNCIL OF EUROPE, http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en.

is ultimately state action that provides the true measure of commitment. For Italy in the Abu Omar case, such commitment was absent.

IV. Conclusion

There were certainly other options open to Italy in trying to right the alleged wrong to Abu Omar. Domestic trial of individuals involved is not the only recourse open to a state that feels aggrieved at the official actions of another state. International law provides a multitude of other means to express disapproval and seek redress and reparations.[136] However, rather than doing so, Italy breached its international obligations, refusing to comply with the recognized process for establishing jurisdiction under the NATO SOFA. Further, Italy violated the founding human rights convention of the Council of Europe and seemingly ignored the ECtHR, yet again.[137] Italy tried to fix a wrong with another wrong, using the very "ends justify the means" approach for which so many have criticized the United States. Such a course will not lead to stronger and more uniform preservation of human rights or confirm the validity of international agreements. More importantly, it casts serious doubt on Italy's own commitment to the rule of law.

---

[136] *See, e.g.*, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Rep. of the Int'l L. Comm'n, 53d Sess., U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001) *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

[137] As well as the United Nations Human Rights Committee. *See* U.N. Human Rights Comm., *Communication No. 699/1996*, *supra* note 94.