

Kent Academic Repository

Full text document (pdf)

Citation for published version

Messineo, Francesco (2009) Extraordinary Renditions and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy. *Journal of International Criminal Justice*, 7 (5). pp. 1023-1044. ISSN 1478-1387.

DOI

<https://doi.org/10.1093/jicj/mqp075>

Link to record in KAR

<https://kar.kent.ac.uk/25905/>

Document Version

UNSPECIFIED

Copyright & reuse

Content in the Kent Academic Repository is made available for research purposes. Unless otherwise stated all content is protected by copyright and in the absence of an open licence (eg Creative Commons), permissions for further reuse of content should be sought from the publisher, author or other copyright holder.

Versions of research

The version in the Kent Academic Repository may differ from the final published version.

Users are advised to check <http://kar.kent.ac.uk> for the status of the paper. **Users should always cite the published version of record.**

Enquiries

For any further enquiries regarding the licence status of this document, please contact:

researchsupport@kent.ac.uk

If you believe this document infringes copyright then please contact the KAR admin team with the take-down information provided at <http://kar.kent.ac.uk/contact.html>

The *Abu Omar* Case in Italy: ‘Extraordinary Renditions’ and State Obligations to Criminalize and Prosecute Torture under the UN Torture Convention

Francesco Messineo *

[This is the pre-print version of a paper accepted for publication in the *Journal of International Criminal Justice*, Vol. 7 (2009). Published by Oxford University Press.]

1. Introduction

On 12 February 2003, at around 12.30 p.m., Mr Osama Mustafa Hassan 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,¹ he was immobilised and put into a white van by more plain-clothes officers, at least some of whom were US agents. He was brought to a US airbase in Aviano in North-East Italy and from there, flown via the US airbase in Ramstein (Germany) to Egypt. He was held for approximately seven months at the Egyptian military intelligence headquarters in Cairo, and later transferred to *Torah* prison.² His whereabouts were unknown for a long time, and he was allegedly repeatedly tortured.³ He was released in April 2004, re-arrested in May 2004 and eventually subjected to a form of house arrest in Alexandria in February 2007.⁴ In June 2007, a criminal trial started in Milan against US and Italian agents accused of having been involved in *Abu*

* Dott. giur. (Catania), LL.M. (Cantab); PhD candidate, University of Cambridge. Many thanks to Dr Gary Brown, Professor James Crawford, Professor Christine Gray, Robin McCaig, Marko Milanović, Dr Roger O’Keefe, Brian Sloan and all participants of the Human Rights Forum in Cambridge. The earliest version of this paper could never have been written without the support of Ms Maíra Soares Salomão. All mistakes are the author’s own.

¹ He had been granted asylum in 2001.

² On conditions of detention there, see Human Rights Watch, ‘Black Hole: The Fate of Islamists Rendered to Egypt’, 17 *Human Rights Watch* (2005) No. 5 (E) 21; Amnesty International (AI), ‘Egypt - Systematic abuses in the name of security’, AI-Index MDE 12/001/2007, 11 April 2007.

³ *Abu Omar*, ‘This is how they kidnapped me from Italy’, *Chicago Tribune (online)*, 8 January 2007, available at <http://www.chicagotribune.com/news/nationworld/chi-cialetter-story,0,1548045.story> (last accessed on 26/07/2009).

⁴ For a more detailed account of the facts, see *Adler & 12 others, First arrest warrant for the kidnapping of Mr Abu Omar*, n. 10838/05 R.G.N.R. and n. 1966/05 R.G.GIP, official English translation, Milan Tribunal, Judge Presiding over Preliminary Investigations, 11 March 2004, at <http://www.statewatch.org/cia/documents/milan-tribunal-19-us-citizens-sought.pdf> (last accessed on 26/07/2009); S. Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St. Martin’s Press, 2006), 190 et seq.; AI, ‘Italy – Abu Omar: Italian authorities must cooperate fully with all investigations’, AI-Index EUR 30/006/2006, 16 November 2006, at 1-4; Council of Europe Parliamentary Assembly (PACE), ‘Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states’, report by Mr Dick Marty, Doc. 10957, 12 June 2006, at 37.

Omar's abduction. During the course of these proceedings, which are still ongoing as of September 2009, the Italian Constitutional Court was called on to decide whether the trial could lawfully continue despite the issues of 'state secrecy' which had arisen therein.

The case of Abu Omar illustrates a practice which is usually referred to as 'extraordinary rendition'. 'Renditions' may involve both the responsibility of states and the liability of individuals implicated under domestic and international law. This article deals with state obligations under the 1984 UN Convention against Torture⁵ ('the Convention') concerning the criminal prosecution of individuals for torture and complicity in torture incidental to 'extraordinary renditions' and focuses specifically on Italy's obligations arising from the Abu Omar case. Of course, Mr Abu Omar is only one among the many victims of 'renditions' who have allegedly been tortured while in detention.⁶ Torture or ill-treatment was reported in relation to virtually all places of detention where 'rendition' victims were held, whether run by the US government or by other countries.⁷ Italy's obligations in this particular case are an excellent case-study on how rules on complicity in torture should be employed to address the question of criminal responsibility for 'extraordinary renditions'. To begin with, this article will address what 'extraordinary renditions' are and the wider context in which they occur. It will then analyze how Italy is complying with the obligations arising from the Convention. Sections 3 and 4 will describe how the obligation to criminalize complicity in torture applies to the Abu Omar case and whether Italian domestic criminal law complies with this obligation. Sections 5 and 6 will assess whether Italy has complied with its obligation to prosecute complicity in torture by looking at the Abu Omar proceedings in Italy. The ongoing trial in Milan

⁵ 1465 UNTS 85 (1984).

⁶ See *supra* note 3; see also D. Weissbrodt and A. Bergquist, 'Extraordinary Rendition: A Human Rights Analysis', 19 *Harv. Hum. Rts. J.* (2006) 123-60; 'Interrogation Log of [Guantánamo] Detainee 063', *Time*, 3 March 2006, available at <http://www.time.com/time/2006/log/log.pdf> (last accessed on 26/07/2009).

⁷ See *supra* note 2 and *infra* notes 12 and 13 on prisons in Egypt, Syria and Morocco. As for US detention facilities, see e.g. K. J. Greenberg and J. L. Dratel (eds), *The torture papers: the road to Abu Ghraib* (New York: Cambridge University Press, 2005); Bassiouni, 'The Institutionalization of Torture under the Bush Administration', 37 *Case W. Res. J. Int'l L.* (2006) 389-425; P. Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (London: Allen Lane, 2008).

will also be analyzed in light of the judgment of the Italian Constitutional Court on ‘state secrecy’, a concept from Italian domestic law which has had a strong impact on the case.

2. The Notion of ‘Extraordinary Rendition’

For the purposes of this article, the expression ‘extraordinary rendition’ identifies a practice of the US government involving the capture of suspected terrorists outside the United States or a recognized battlefield such as Afghanistan or Iraq and their forcible transfer to another country for interrogation and often torture. These acts were carried out as a matter of US government policy: in September 2006, the US President acknowledged this by speaking of ‘the CIA program’, but he resolutely denied torture allegations.⁸

An ‘extraordinary rendition’ typically consists of a complex series of events. After being captured in a certain country, the rendered person is transferred to a detention facility in another country. There, he is interrogated, and in many cases tortured or subjected to other forms of inhuman treatment. He does not face any criminal charge or a trial by an independent judicial body. Depending on his destination, it is possible to identify three broad categories of ‘renditions’. First, the forced repatriation of someone to their country of nationality at birth and their detention therein, such as in the case of Abu Omar. Second, the forcible transfer of a person to a detention facility under US jurisdiction but located outside its mainland territory, such as Guantánamo Bay, the Bagram airbase in Afghanistan, CIA ‘secret’ prisons in Eastern Europe or ‘floating prisons’ on US military ships.⁹ For example, a group of five Algerians and one Yemeni national, who were either citizens or long-standing residents of Bosnia, were released from a Bosnian detention facility on 19 January 2002 by order of the Bosnian Supreme Court, but immediately afterwards they were

⁸ ‘President [George W. Bush] Discusses Creation of Military Commissions to Try Suspected Terrorists’, 6 September 2006 (Bush speech), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (last accessed on 26/07/2009) (‘I want to be absolutely clear with our people, and the world: The United States does not torture. It’s against our laws, and it’s against our values. I have not authorized it – and I will not authorize it.’)

⁹ On secret detention facilities, see PACE, *supra* note 4 and PACE, ‘Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report’, report by Mr Dick Marty, Doc. 11302 rev., 8 June 2007, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/EDOC11302.htm> (last accessed on 26/07/2009); on floating prisons, see Reprieve, ‘USS Batan’, <http://www.reprieve.org.uk/ussbataan> (last accessed on 26/07/2009).

abducted by a group of US officials and transferred to Guantánamo.¹⁰ Third, the forcible transfer of a person to a detention facility outside US jurisdiction located in a third country such as Egypt,¹¹ Syria,¹² Jordan, Libya or Morocco.¹³ For example, Jamil Qasim Saeed Mohammad, a Yemeni citizen wanted in connection with the attack on the USS Cole in Aden, Yemen, in October 2000, was surrendered to US authorities by Pakistani intelligence at Karachi airport and then transferred to Jordan on 23 October 2001.¹⁴

It should be noted that some authors use the term ‘extraordinary renditions’ more broadly as a catch-all expression for all allegedly illegal abduction and transfer of prisoners carried out by the USA in the past few years, including those concerning persons interned in Iraq or Afghanistan for alleged reasons of security.¹⁵ This broad use can be misleading. As former US President Bush recognized, the ‘CIA custody’ of ‘suspected terrorist leaders and operatives... held and questioned outside the United States’ was a ‘separate program’ from battlefield internment in Iraq and

¹⁰ As of December 2008, some of them were still detained despite the very recent *Boumediene* decision of the US Supreme Court declaring them to be entitled to *habeas corpus* privilege, and despite the fact that not even the Bush administration considered them to be ‘enemy combatants’: see *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

¹¹ Especially the *al-Aqrab* maximum security compound of the *Torah* Prison in Cairo, where Mr Abu Omar was detained.

¹² Especially the so-called Palestine Branch in Damascus, an ‘interrogation’ centre which is known for its particularly harsh conditions of detention (namely, the ‘coffin-like’ extremely small and dark cells): see Association of the Bar of the City of New York (ABCNY) and Center for Human Rights and Global Justice at New York University School of Law (CHRGJ), *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (New York: ABCNY and CHRGJ, 2004), 11; AI, ‘Sweden: The case of Mohammed El Zari and Ahmed Agiza: violations of fundamental human rights by Sweden confirmed’, AI-Index EUR 42/001/2006, 27 November 2006, at 17 et seq.; Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Factual background, voll. 1 and 2 and Analysis and Recommendations* (Ottawa: Public Works and Government Services Canada, 2006), 229 et seq.

¹³ Particularly the *Témara* prison run by the *Direction de la surveillance du territoire* (the secret security service), where Abu Al-Kassem Britel, an Italian-Moroccan dual national, was kept *incommunicado* for nine months in 2002: see Grey, *supra* note 4, at 362. For a detailed report about the type of torture systematically practiced in this detention facility, see AI, ‘Morocco/Western Sahara: Torture in the ‘anti-terrorism’ campaign – the case of Témara detention centre’, AI-Index MDE 29/004/2004, 24 June 2004.

¹⁴ ABCNY and CHRGJ, *supra* note 12, at 9; Grey, *supra* note 4, at 272. Note that some people were subsequently victims of more than one type of ‘rendition’: for instance, they were abducted, spent some time in Guantánamo and were then repatriated to be further detained and ‘interrogated’ in their own country.

¹⁵ For example, see AI, *supra* note 2, at 2. The term ‘rendition’ is sometimes employed also for other means of ‘outsourcing torture’, for example what has been termed ‘passive rendition’ (allowing someone who is under surveillance to leave the country and informing the foreign secret service of his or her imminent arrival, at times even providing the questions which should be asked to him or her during ‘interrogation’): see e.g. HC Deb., 8 July 2009, coll. 940-948 (Vol. 495, No. 107, not yet in record copy; available at <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/chan107.pdf>, last accessed on 26/07/2009).

Afghanistan.¹⁶ Of all those who were imprisoned in Guantánamo at any given time, only a minority were part of this program, while the majority were battlefield detainees transferred there from Iraq and Afghanistan. Despite the fact that some NGOs tend to blur the two phenomena, the legal assessment of these two types of detention must differ, because of the prominent (though not exclusive) application of the law of armed conflict to internment arising from armed conflict and military occupation.¹⁷

Furthermore, the expression ‘extraordinary rendition’ is used here only for the sake of clarity. It is admittedly somewhat of a misnomer. In international law, ‘rendition’ denotes the possible outcome of an extradition procedure, that is, the handover of a person accused or convicted of a criminal offence, with all guarantees of due process of law: precisely what ‘extraordinary renditions’ are not. Also, merely adding the adjective ‘extraordinary’ to the word ‘rendition’ does not provide any more clarity, because the reader may think that those transferred are ‘rendered’ to some form of justice, albeit ‘extraordinarily’. This is not the case, either: ‘renditions’ are not *male captus, bene detentus* instances in which a person accused of a criminal offence is seized abroad with a view to try him or her in the US.¹⁸ The expression ‘extraordinary renditions’ is a euphemism designed to avoid more proper terms like ‘abduction’, ‘enforced disappearance’, ‘kidnapping’ or simply ‘illegal transfer’.¹⁹

¹⁶ Bush speech, *supra* note 8.

¹⁷ See PACE (second report), *supra* note 9, at paras 55 ff.; M. Hakimi, ‘International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide’, 33 *Yale J. Int’l L.* (2008) 369, at 369-70. This does not mean that the law of armed conflict (LOAC) is irrelevant to the ‘CIA program’. For instance, numerous people were imprisoned in Pakistan by Pakistani authorities and then handed over to CIA custody in Afghanistan, such as former British resident and Saudi Arabian citizen Shaker Aamer (arrested in Pakistan in January 2002 and held in the CIA prison in Kabul known as the ‘dark prison’: Grey, *supra* note 4, at 273). In this and other cases, LOAC may apply, but this goes beyond the remit of the present article; see generally D. Weissbrodt and A. Bergquist, ‘Extraordinary Rendition and the Humanitarian Law of War and Occupation’, 47 *Va. J. Int’l L.* (2007) 295-356.

¹⁸ On the *Ker-Frisbie* doctrine of ‘*male captus bene detentus*’, see *Ker v. Illinois*, 119 US 436 (1886), para. 444; *Frisbie v. Collins*, 342 US 519 (1952); *United States of America v. Toscanino*, 500 F.2d 267 (1974); *United States of America v. Alvarez-Machain*, 504 US 655 (1992). For a contemporary statement of the principle, see 21 Am. Jur. 2d Criminal Law § 485. From the point of view of international law, see F. A. Mann, ‘Reflections on the Prosecution of Persons Abducted in Breach of International Law’, in Y. Dinstein and M. Tabory (eds.), *International law at a time of perplexity: essays in honour of Shabtai Rosenne* (Dordrecht; London: Martinus Nijhoff, 1989) 407-21, 417.

¹⁹ See European Commission for Democracy Through Law (Venice Commission), ‘Opinion on the International Legal Obligations of Council of Europe Member States in respect of Secret Detention Facilities and Inter-state Transport of Prisoners’, Opinion n. 363/2005, Council of Europe document n. CDL-AD(2006)009, 17-18 March 2006, available at

It might be argued that the CIA program to which the Abu Omar ‘rendition’ belonged was a direct consequence of the ‘war on terror’ which sprang from the attacks on the World Trade Center of September 2001. This is an overly simplified account of the facts. ‘Renditions’ have been occurring since at least 1995, when Egyptian citizen Abu Talal al-Qasimi was captured by CIA agents in Croatia, interrogated on a US ship in the Mediterranean Sea and later transferred to Egypt, where he was executed on the grounds of his alleged involvement with the assassination of Anwar Sadat, the Egyptian president.²⁰ Nonetheless, it appears that the practice increased after September 2001.²¹ Until then, all of the 13 known cases of ‘rendition’ had involved Egyptian citizens who were abducted in various countries, including Albania and Bulgaria, and forcibly transferred to their country of origin to face either criminal charges or the execution of convictions pronounced *in absentia*.²² After September 2001, the focus of the program shifted towards the two complementary purposes of preventive interrogation and incapacitation of suspected terrorists. There are no official or reliable statistics on how many people have been abducted since then but it has been estimated that the actual number of ‘extraordinary renditions’ is at least in the hundreds.²³ In September 2006, President Bush affirmed that the practice had concerned only a few people and had by then been temporarily suspended,²⁴ but some NGOs identified in 2007 at least 39 cases of prisoners whose fate and whereabouts remained unknown.²⁵ It is too early to say whether this practice will continue under the Obama administration. The Executive Order on ‘Ensuring Lawful

[http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp) (last accessed on 26/07/2009), at para. 30. Investigative journalist Stephen Grey reports that some of the CIA agents he interviewed simply referred to the practice as ‘snatches’: Grey, *supra* note 4, at 16.

²⁰ He had been condemned in absentia: Grey, *supra* note 4, at 270, referring to A. Shadid, ‘America Prepares the War on Terror; U.S., Egypt Raids Caught Militants’, *Boston Globe*, 7 October 2001; see also ABCNY and CHRGI, *supra* note 12, 9; J. Mayer, ‘Outsourcing Torture: the Secret History of America’s ‘Extraordinary Rendition’ Program’, *The New Yorker*, 14 February 2005.

²¹ Grey, *supra* note 4, at 269-283 (list of known ‘renditions’ since 1995).

²² See ABCNY and CHRGI, *supra* note 12, at 9; Grey, *supra* note 4, at 143 ff..

²³ See AI, *supra* note 12, at 2 ff.; Grey, *supra* note 4, at 39.

²⁴ Bush speech, *supra* note 8 (the practice would ‘continue to be crucial to getting life-saving information’ in the future).

²⁵ AI et al., ‘Off the Record – U.S. Responsibility for Enforced Disappearances in the “War on Terror”’, AI Index AMR 51/099/2007, 3 June 2007.

Interrogations’ signed by President Obama on 22 January 2009 confines itself to providing that the ‘practices of transferring individuals to other nations’ will be reviewed

in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.²⁶

3. The ‘Extraordinary Rendition’ of Abu Omar as Complicity in Torture

Abu Omar alleges that he was repeatedly tortured when in detention in Egypt. He has written that ‘cockroaches and rats and insects [would] walk all over [his] body night and day’, that he had electrodes applied to the whole of his body (in particular that he was subjected to electric shocks in the genital area), that he suffered sleep deprivation, sexual abuse and beatings, and that he was ‘not allowed to bathe except every four months’.²⁷ For the sake of argument, we will proceed here on two assumptions. First, that these allegations are on the whole credible; at the very least, given the pattern registered generally with respect to ‘renditions’,²⁸ and specifically at the places in which he was detained,²⁹ they would require judicial consideration so that they can be independently tested. Second, that those involved in the abduction of Abu Omar in Italy knew what would happen to him once he was handed over to Egyptian authorities.³⁰ It seems unlikely that the highly organized team

²⁶ Section 5(e), Exec. Order No. 13491, 74 Fed. Reg. 4893, at 4895 (mission of the ‘Special Interagency Task Force on Interrogation and Transfer Policies’).

²⁷ Abu Omar, *supra* note 3, at paras 40-56.

²⁸ See *supra* note 6.

²⁹ See *supra* note 2.

³⁰ This is a critical assumption to make: for if they did not, the question of complicity in the torture he suffered in Egypt would move from the relatively firm grounds of the Torture Convention to the much more muddied waters of the other modes of participation in the crime. For instance, is there anything under the Torture Convention which is analogous to what before international criminal tribunals is called ‘joint criminal enterprise’ (JCE)? The *Tadić* case before the ICTY, *Prosecutor v. Tadić (Appeals Chamber)*, n. IT-94-1-A, (ICTY, 15 July 1999), at paras 185-229 identified three types of JCE (‘same criminal intention’ shared by many, ‘concerted plan’ independently of a shared criminal intention, ‘natural and foreseeable consequence’ of a ‘common design’); see also ‘*Amicus curiae*’ brief of Professor Antonio Cassese and members of the *Journal of International Criminal Justice* on Joint Criminal Enterprise Doctrine’, case N. 001/18-07-2007-ECCC/OCIJ (PTC 02), 27 October 2008, available at http://www.eccc.gov.kh/english/cabinet/courtDoc/163/D99_3_24_EN_Cassese.pdf (last accessed on 26/07/2009). It

of ‘men in black’³¹ whose job was to abduct victims and transfer them to multiple destinations around the world in CIA-owned private jets were unaware of the type of ‘interrogation’ that was taking place at the other end of ‘renditions’. After all, ‘interrogation’ at Egyptian hands was the purpose of Abu Omar’s abduction in the first place.³² It is fair to say that the question whether those who carried it out knew he would be tortured would at least be worthy of judicial consideration. The question we are considering here is whether Italy is under any obligation to prosecute them in order to ascertain this. In other words, does the Torture Convention apply to such a situation?

The Convention was adopted in 1984 to provide the already existing prohibition against torture with a set of implementing measures, many of which are of a criminal nature.³³ Article 4 of the Convention obliges states parties to ‘ensure that all acts of torture are offences under [their own] criminal law’. To this end, Article 1 defines torture as the act of intentionally inflicting severe physical or mental pain for a specific (albeit loosely defined) purpose,³⁴ when such conduct is not

seems unlikely that this set of concepts could be transposed to the remit of the Torture Convention. The extent to which every domestic legal system criminalizes modes of participation in the crime varies, and what is required under the Convention is a minimum common denominator.

³¹ Grey, *supra* note 4, at 25 ff. (the expression ‘men in black’ comes from the black plain clothes described by many ‘rendition’ victims).

³² See Bush speech, *supra* note 8 (using the word ‘interrogation’ to explain the purpose of the ‘CIA program’).

³³ As of July 2009, there were 146 parties to the Convention: UN data, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last accessed 07/07/2009). The Convention is an instrument designed to provide ‘a more effective implementation of the *existing* prohibition under international law’, not a convention outlawing torture from scratch: A. Marchesi, ‘Il divieto di tortura nel diritto internazionale generale’, 76 *Riv. Dir. Int.* (1993) 979, at 984; see also *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980); United Nations General Assembly, ‘General Assembly Resolution on the adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, UN Doc. A/RES/39/46, 10 December 1984, at fifth preambular para. On the history of torture and its prohibition see e.g. R.S.J. Macdonald, ‘International Prohibitions Against Torture and Other Forms of Similar Treatment or Punishment’, in Dinstein and Tabory (eds.), *supra* note 18, at 385-406; M. Lippman, ‘The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, 17 *B.C. Int’l & Comp. L. Rev.* (1994) 275-335, at 275-307; S. Marks and A. Clapham, *International Human Rights Lexicon* (Oxford: Oxford University Press, 2005), at 359-384; W.A. Schabas, ‘The Crime of Torture and the International Criminal Tribunals’, 37 *Case W. Res. J. Int’l L.* (2006) 349, at 349 ff.. See also the analysis of torture as a standard feature of modern states in C. De Than and E. Shorts, *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003), at 182 ff.; J.T. Parry, ‘The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees’, 6 *Melb. J. Int’l L.* (2005) 516-33, at 521 ff..

³⁴ Torture has to be inflicted ‘for *such purposes as* obtaining from [the victim] or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or *for any reason based on discrimination of any kind*’ (Article 1 of the Convention). The list is open-ended, and it is designed to encompass a very broad set of purposes so that its interpretation could be stretched to the point of being ‘virtually meaningless’: W. Ferdinandusse, ‘Prosecutor v. N. – Case No. AO7178, at <http://www.rechtspraak.nl>, translated at 51 *Netherlands Int’l L. Rev.* 439, 444-49 (2004). Rotterdam District Court, April 7, 2004’, 99 *Am. J. Int’l L.* (2005) 689-90, at 689; see also Marchesi, *supra* note

part of a lawful sanction and is committed either by an official agent or by someone instigated, authorised or whose actions have been acquiesced in by an official agent. The treatment Abu Omar is alleged to have received satisfies all the five elements of this definition: electrocution would certainly qualify as an intense physical pain intentionally inflicted for the purpose of interrogation by Egyptian authorities operating outside the framework of any lawful sanction under Egyptian or international law. Those who applied electrodes to the body of Abu Omar and pushed the button in *Torah* prison in Cairo should clearly be prosecuted by Egypt, which has been a party to the Torture Convention since 1986.

The question here is to what extent the Convention requires that other modes of participation in such an act of torture be criminalized. Article 4 of the Convention provides that any ‘act by any person which constitutes complicity or participation in torture’ shall also be an offence under the domestic law of state parties to the Convention.³⁵ In other words, state parties have an obligation to criminalize complicity or participation in torture. Domestic courts will obviously rely on municipal rules on participation in the crime, which differ considerably from one state party to another. A state may satisfy the obligation to criminalize complicity and participation through the provision of differently labelled crimes, provided that the applicable punishment is appropriately serious.³⁶ In other words, because the domestic techniques of criminalization vary, it does not matter whether there is a separate crime of ‘complicity in torture’, or whether criminalization arises from the combination of other domestic provisions (such as a general provision on complicity combined with individual crimes). As long as complicity and participation in torture are generally prohibited with appropriate sanctions by the domestic criminal law, the criminalization obligation of the state is

33, at 989; A. Byrnes, ‘Torture and Other Offences Involving the Violation of the Physical or Mental Integrity of the Human Person’, in G. K. McDonald and O. Swaak-Goldman (eds), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol. 1 - Commentary* (The Hague: Kluwer Law International, 2000) 197-245, at 216. *Contra*, De Than and Shorts, *supra* note 33, at 187 interpret it as an ‘exhaustive list’ of ‘restricted purposes’.

³⁵ ‘Any’ (instead of ‘an’) is construed from Article 1: J. H. Burgers and H. Danelius, *The United Nations Convention against Torture: a handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht; London: Martinus Nijhoff, 1988), at 129-130.

³⁶ *Ibid.*, at 129.

satisfied. However, the wording of the Convention points to a minimum standard which all domestic system should abide by. This standard should be identified by the appropriate construction of the words ‘participation’ and ‘complicity’ in Article 4.

The plain meaning of the word ‘participation’ points to what most domestic legal systems would criminalize as ‘indirect perpetration’ or ‘co-perpetration’. For instance, it seems obvious from the combined reading of Article 4 and Article 1 of the Convention that the latter requires criminalisation of the conduct of those officials who order, consent to or acquiesce in an act of torture.³⁷ In our context, this could – theoretically – lead to the incrimination of the whole chain of command up to the US Secretary of Defence (or even the President) for ordering or acquiescing in torture incidental to ‘extraordinary renditions’.³⁸ However, one should bear in mind that we are dealing with a crime adjudicated upon by municipal courts. Issues of state immunity render such a type of indictment particularly difficult, albeit not necessarily impossible.³⁹

Aside from these cases of ‘participation’, it may be more difficult to ascertain the meaning of ‘complicity’. International tribunals have tried to construe the concept of ‘aiding and abetting’ in the different context of the two international crimes of torture (the war crime of torture and the crime against humanity of torture).⁴⁰ Aiders and abettors are those who ‘before or after’⁴¹ the commission of the crime assisted torturers ‘in some way which [had] a substantial effect on the perpetration of the crime, [insofar as they had] knowledge that torture [was] taking place’,⁴² and even if they ‘regretted the outcome of the offence’.⁴³ Of course, this jurisprudence is not directly

³⁷ Burgers and Danelius, *supra* note 35, at 130. See also Article 28(a), ICCSt., and ABCNY and CHRGI, *supra* note 12, at 75.

³⁸ Bassiouni, *supra* note 7, at 410.

³⁹ See *infra*, para. 5.

⁴⁰ See respectively Article 8(2)(a)(ii) and Article 7(1)(f), ICCSt..

⁴¹ *Prosecutor v. Blaškić (Appeals Chamber)*, n. IT-95-14-A, (ICTY, 29 July 2004), at para. 48.

⁴² *Prosecutor v. Furundžija (Trial Chamber)*, n. IT-95-17/1-T, (ICTY, 10 December 1998), at para. 257. See also Burgers and Danelius, *supra* note 35, at 129; K. Kittichaisaree, *International criminal law* (Oxford: Oxford University Press, 2001), at 245.

⁴³ *Prosecutor v. Akayesu (Trial Chamber I)*, n. ICTR-96-4, (ICTR, 2 September 1998), at para. 391. See also Article 25(3)c, ICCSt.; *Prosecutor v. Tadić (Trial Chamber II)*, n. IT-94-1-T, (ICTY, 7 May 1997), at para. 688; *Prosecutor v. Vasiljević (Appeals Chamber)*, n. IT-98-32-A, (ICTY, 25 February 2004), at para. 102; ABCNY and CHRGI, *supra* note 12, at 72 ff.; Bassiouni, *supra* note 7, at 412.

relevant in our context of domestic implementation of the Convention; states in 1984 avoided defining what ‘complicity’ meant as a minimum common standard and they certainly did not agree to follow the jurisprudence of (then non-existent) international criminal tribunals. Nonetheless, the definition of aiding and abetting just recalled may be of guidance in assessing the meaning of ‘complicity’ in Article 4, which can be construed as a substantial contribution to the perpetration of a crime combined with knowledge that it will be perpetrated. A domestic legal system which did not proscribe such conscious contributions to torture would fall short of its obligations under Article 4 of the Convention; on the other hand, nothing prevents domestic legal systems from employing a wider notion of complicity. In our context, this means that all US agents involved in the ‘rendition’ program and all Italian agents who helped in the abduction of Abu Omar should be tried for complicity in torture if they had knowledge that torture would be committed as a result of their actions. But the agents could also face prosecution on other grounds or modes of participation provided for by the domestic legal system that prosecutes them, even for modes of participation that do not require knowledge of torture taking place, but only its foreseeability.⁴⁴ This might even lead to the prosecution of those who intentionally provided legal advice to the US administration to the effect that ‘outsourcing’ torture was not prohibited under international law.⁴⁵

⁴⁴ The criminalization of situations like those considered *supra* at note 30 is permitted by the Convention, but not compulsory.

⁴⁵ Professor Cherif Bassiouni envisages criminal responsibility under domestic US law for those legal counsels of the US administration who unscrupulously ‘used their legal talent to subvert the law’ and substantially aided in establishing the US program of torturing suspected terrorists: Bassiouni, *supra* note 7, at 397-398. Some point to the arguable relevance of the Nuremberg Trial of Reich Justice Ministry lawyers, *United States of America vs. Josef Altstoetter, et al. (Case 3)*, reported in volume III of *Trials of war criminals before the Nuernberg Military Tribunals under Control Council law no. 10: Nuernberg, October 1946 – April 1949* (Washington: US Govt. Print. Off., 1949-53), available at <http://www.mazal.org/archive/nmt/03/NMT03-C001.htm> (last accessed on 26/07/2009), on which see K.J. Heller, ‘John Yoo and the *Justice Case*’, at <http://snipurl.com/o02tf> (last accessed on 26/07/09). Heller later convincingly argued (<http://snipurl.com/o02r3>, last accessed on 26/07/09) that the more pertinent Nuremberg case is *United States of America v. von Weizsaecker et al. (Case 11)*, reported in volumes XII-XIV of *Trials of war criminals before the Nuernberg Military Tribunals*, the digitalization of which is forthcoming at <http://www.mazal.org/NMT-HOME.htm>.

4. The Criminalization of Complicity in Torture in Italy

Italy signed and ratified the Torture Convention without reservations.⁴⁶ But despite Convention obligations and Italian constitutional provisions requiring the criminalization of torture,⁴⁷ Italy has failed to adopt all the required legislation. In particular, certain types of physical or mental torture under Article 1 of the Convention may not be covered by the criminal law, partly because of the absence of a specific crime of ‘torture’ in the Italian penal code.⁴⁸ Nonetheless, the kind of physical torture suffered by Abu Omar in Egypt would certainly be prohibited under multiple provisions of the Italian penal code such as assault and battery, and abuse of authority.⁴⁹ This is sufficient to satisfy the obligation of the Convention in this context, as long as the combination of these provisions potentially leads to sufficiently high penalties.⁵⁰ Because of the application of the far-reaching Italian rules on ‘*concorso di persone nel reato*’ (‘concurrency in crime’), ‘complicity and participation’ under Article 4 of the Convention would also be punishable under Italian criminal law. Indeed, the Italian *concorso* in crime embraces all types of causal link with the offence, that is both material co-perpetration and moral support, including instigation, planning, procuring, aiding and abetting and most types of so called ‘joint criminal enterprise’.⁵¹ All those who ‘concur in the crime’ (‘*concorrenti*’) are liable as principals for the same offence and under the same penalty, albeit punishment will obviously be graded according to different levels of culpability (and,

⁴⁶ See domestic law 498 of 1988 (of ratification of the Convention). The Convention obligations to criminalize just discussed have been in force for the country since 11 February 1989. Italy then declared in October 1989 that it would recognize the competence of the Committee Against Torture both for individual claims and for inter-state ones.

⁴⁷ See Articles 13(4) and 27(3) of the Italian Constitution.

⁴⁸ UNCAT, ‘Report of the Committee Against Torture to the General Assembly’, UN Doc. A/54/44, 26 June 1999, at para. 169, as reiterated in 2007 in ‘Conclusions and recommendations by the Committee against Torture: Italy’, UN Doc. CAT/C/ITA/CO/4, 16 July 2007, n. 5. See also A. Marchesi, ‘Implementing the UN Convention Definition of Torture in National Criminal Law (with reference to the Special Case of Italy)’, 6 *JICJ* (2008) 195-214, at 202 ff.

⁴⁹ See among others Articles 581, 582, 583 (certain forms of assault and battery), 323 (abuse of public powers), and 608 (‘abuse of authority’ against arrested or detained individuals) of the Italian penal code; see also article 7(4) and 7(5) of the Italian penal code with regards to the applicability of Italian criminal law to crimes committed outside of Italy.

⁵⁰ See Burgers and Danelius, *supra* note 35, at 129: ‘article 4 does not mean that there must be a specific, separate offence corresponding to torture under article 1 of the *Convention*’, as long as all conducts are in fact covered by the criminal law. The corresponding duty to prosecute is also connected to the conduct, not to the legal label.

⁵¹ See *supra* note 30.

inevitably, participation).⁵²

The applicability of these rules to the Abu Omar case depends on the extent to which Italy has implemented its Convention obligations concerning jurisdiction over torture. Can it be construed as a crime under Italian law for foreign agents to torture an Egyptian citizen in Egypt? The Convention does not only require that torture be a crime under the domestic law of member states; it also mandates states to establish their jurisdiction to prescribe the crime of torture under multiple ‘heads’ of jurisdiction. When these ‘heads’ are already the object of a permissive rule under customary international law (territoriality,⁵³ nationality of the perpetrator⁵⁴ or of the victim⁵⁵), the Convention has the effect of transforming that permission into a requirement to assert jurisdiction. In contrast, in the case of Article 5(2), the Convention establishes a further ‘head’ of jurisdiction, according to which states have to assert their jurisdiction to prescribe also with regards to any alleged offender who is present in their territory, regardless of the other ‘heads’ of jurisdiction.⁵⁶ Most states have not yet done so,⁵⁷ nor has Italy specifically adopted a provision in this sense.

However, Article 7(5) of the Italian penal code may be applicable to the same effect; it states that any Italian or foreign citizen ‘who commits abroad... a crime for which ... international conventions establish the applicability of Italian law... shall be punished according to Italian law’. This provision was adopted with the Lateran Treaty in mind, so that, for instance, a murder committed in St Peter’s Square by a British man could be punished by an Italian court under Italian

⁵² See article 110 of the Italian penal code as construed by G. Fiandaca and E. Musco, *Diritto penale: parte generale* (4th ed., 2001), at 447 ff.; see also M. Romano and G. Grasso, *Commentario sistematico del codice penale: vol. II, art. 85-149* (3rd ed., 2005).

⁵³ Article 5(1)(a), which encompasses also ships and aircrafts registered in the State.

⁵⁴ Article 5(1)(b).

⁵⁵ Article 5(1)(c).

⁵⁶ For the definition of this further ‘head’ of jurisdiction as ‘universal jurisdiction’, see R. O’Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’, 2 *JICJ* (2004) 735-760.

⁵⁷ In fact, it was more than twenty years after the entry into force of the Convention that the first trials under this ‘head’ of jurisdiction took place, notwithstanding the fact that some criminal codes had been already amended accordingly: see C. Ryngaert, ‘Universal Criminal Jurisdiction over Torture: a State of Affairs after 20 Years UN Torture Convention’, 23 *Neth. Q. Hum. Rts.* (2005) 571-611. At the time of writing, one such case is pending in the United States against Charles Taylor jr. (aka as Charles McArthur Emmanuel), who was found guilty in October 2008 for torture and conspiracy to commit torture in Liberia and is soon to be sentenced; the proceedings are known as *U.S. v. Emmanuel*, S.D.Fla. No. 06-20758-CR (US Southern District Court of Florida in Miami): see J. Couwels, ‘Ex-Liberian president’s son convicted of torture’, *CNN.com*, 30 October 2008, available at <http://edition.cnn.com/2008/CRIME/10/30/taylor.torture.verdict/index.html> (last accessed 26/07/2009).

law even if it took place in Vatican City territory at the hands of a foreigner.⁵⁸ But Article 7(5) of the Italian penal code is not limited to the Lateran, nor to St Peter's square. The Convention against torture is another 'international convention' which requires that Italy apply its own criminal law to situations to which it would not otherwise, namely to all torturers (and their accomplices) present in its territory regardless of where they tortured or whom.⁵⁹ Thus, by virtue of Article 7(5) of the Italian penal code, all Italian criminal law provisions which can be deemed to be a domestic implementation of the Torture Convention are also applicable to those agents who tortured Abu Omar in Egypt and happen to be in Italy. Because, as we have seen, rules on *concorso* are structured in such a way that 'concurrency' in any crime is in itself a crime, the same rules on the extent of Italian jurisdiction apply to all modes of participation in the crime covered by the doctrine of *concorso di persone nel reato*. Thus, through the gateway of Article 7(5) of the penal code, Italian law extends its reach also to all those who concurred in the torture of Abu Omar outside Italy and touch Italian soil. Italian law would also unquestionably apply to those American and Italian citizens who concurred with the torture through their acts of abduction which took place in Italy, because according to Article 6(2) of the code 'a crime is deemed to have been perpetrated within [Italian territory] when the action or omission constituting it took place therein, *either partially or completely*' (emphasis added). In sum, 'complicity and participation' in torture is punishable under Italian law wherever the actions constituting complicity took place.

5. The Ongoing Trial in Milan: Abduction rather than Torture

So far, this article has addressed the extent of Italy's compliance with its criminalization obligations with relation to complicity in torture. We have seen that Italian criminal law could apply to the abduction of Abu Omar as a form of complicity in torture. But it is one thing to have applicable crimes in the statute books, it is another thing to enforce them by prosecution. In the Torture Convention, the system of mandatory jurisdiction to prescribe which was just described is

⁵⁸ Articles 3 and 22, Treaty between the Holy See and Italy, Rome, 11 February 1929, (1929) 23 *Am. J. Int'l L. Sup* 187.

⁵⁹ See *supra* note 56 and accompanying text on Article 5(2) of the Convention.

complemented by the enforcement rule of *aut dedere aut prosequi*. According to Articles 6(1) and 7(1), if a suspected torturer is present in a state that is party to the Convention, that state is obliged to either extradite him or to arrest him and then to submit ‘the case to its competent authorities for the purpose of prosecution’. Therefore, Italy is under an obligation to prosecute all agents present in its territory who are suspected of involvement in torture or complicity in torture. In our context, this translates into an obligation to try all those who assisted in the abduction of Abu Omar knowing that he would be tortured in Egypt for the crime of *concorso* in assault and battery aggravated by the use of public authority, and for *concorso* in all other applicable crimes that constitute a domestic implementation of the Convention.⁶⁰

However, these trials for *concorso* in assault and battery and abuse of authority on detainees have not yet materialized. Another strategy has been followed so far by Italian prosecutors – one which both falls short and reaches beyond Convention obligations. As we have seen, the Convention enforcement duty of *aut dedere aut prosequi* is subject to the presence of the suspects. Thus, Italy is under no obligation under international law to prosecute and try any US or Egyptian agents for torture or complicity in torture until they touch Italian soil. Conversely, the Convention requires the country to prosecute those who are in Italy, for instance government officials who cooperated with US agents. Instead, Italy chose to prosecute both Italian and foreign officials, some of whom are not even present in Italy, although not actually for their complicity in torture.

At the time of his abduction, Abu Omar was himself under investigation ‘for crimes connected to international terrorism’.⁶¹ The Deputy Chief Public Prosecutor carrying out this investigation was Dr Armando Spataro, the same person who in December 2006 sought trial for 35 people involved in

⁶⁰ See *supra* note 49 and accompanying text.

⁶¹ *First arrest warrant for the kidnapping of Mr Abu Omar*, *supra* note 4, at 3. An arrest warrant against him is still in force in Italy, thus he would be arrested at the frontier if he went back there: P. Biondani, “Nessuna manovra sul rilascio. Impossibile trattenerlo ancora”: Parla Armando Spataro, procuratore aggiunto di Milano’, *Corriere della sera (online)*, 12 February 2006, available at http://www.corriere.it/Primo_Piano/Cronache/2007/02_Febbraio/12/biondani.shtml (last accessed on 26/07/2009).

Abu Omar's abduction. Among those accused of the abduction there is the former head of SISMI,⁶² Niccolò Pollari, together with nine other Italian citizens (mostly SISMI agents) and 26 US citizens (mostly CIA agents); the US citizens have absconded from EU arrest warrants.⁶³

At the preliminary hearing of 16 February 2007, Judge Caterina Interlandi upheld Dr Spataro's request (*'richiesta di rinvio a giudizio'*) and decreed that a trial would be instituted against them.⁶⁴ She also ratified the plea agreement concerning the *carabiniere* who had stopped Abu Omar and asked for his documents, and who was accordingly sentenced to a period of imprisonment. Proceedings begun on 8 June 2007 before Judge Oscar Magi in Milan, and they are still ongoing as of September 2009. Those absconding are being tried *in absentia*.⁶⁵ To secure their presence, the Public Prosecutor invited the Italian Minister of Justice to submit an extradition request to the US. None of the Ministers of Justice in office since then have submitted such a request, thereby exercising their discretionary power (not) to do so.⁶⁶

As for the scope of the indictment, while three of the Italians are accused of 'abetting a crime after it has been committed',⁶⁷ all the others are accused of 'concurrence'⁶⁸ in the crime of *sequestro di persona* (abduction).⁶⁹ Taking into account the aggravating circumstance of the large

⁶² *Servizio per le informazioni e la sicurezza militare*, Italian military intelligence and security service (hereinafter SISMI). SISMI has been replaced by the *Agenzia per l'Informazione e la Sicurezza Esterna* (External Security and Intelligence Agency, or AISE) by Law 124 of 2007.

⁶³ Arrest warrants issued in Italy in June 2005 (*supra* note 4), July 2005 and July 2006. Mr Robert Seldon Lady (Milan's chief of CIA operations at the time of the abduction), Mr Jeffrey Castelli (the head of CIA in Italy at the time of the abduction) and Joseph L. Romano (colonel in Aviano US airbase) are all among the accused. See AI, *supra* note 4, at 1-4.

⁶⁴ According to Italian criminal procedure, one becomes formally indicted when the Public Prosecutor seeks trial (*richiesta di rinvio a giudizio*), but it is only after a preliminary hearing judge (*giudice dell'udienza preliminare*) upholds the public prosecution's request with a decree (*decreto che dispone il giudizio*) that one faces trial (except for cases of plea bargaining): see Articles 405, 424 and 429 of the Italian Code of Criminal Procedure.

⁶⁵ According to Article 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*). See also Articles 489 (declarations rendered by the accused who is no longer absent), 490 (coercive accompanying of an absent accused before the court), 520 (notification of new indictments during a trial in absentia).

⁶⁶ Article 720, Italian Code of Criminal Procedure. Therefore, there is technically no extradition request 'pending' as asserted by Bassiouni, *supra* note 7, at 413.

⁶⁷ *Post-factum* abetting is a specific offence provided by article 378 (*'Favoreggiamento personale'*) of the Italian penal code, and is punishable with a maximum penalty of four years.

⁶⁸ See *supra* note 52 and accompanying text on *concorso di persone nel reato*.

⁶⁹ Abduction, kidnapping and false imprisonment are all covered by the general terms of Article 605 of the Italian penal code, according to which it is a crime to '[deprive] someone of their personal freedom'; the indictment in the Abu Omar

number of people involved in the crime, the penalty may range from 1 to 13 years and 4 months imprisonment for those who committed the crime by abusing their public authority status (or the public authority status of one of the other participants in the crime).⁷⁰ The further aggravating circumstance of being the leaders or organizers of the abduction could take the potential maximum to 17 years, 9 months and 10 days imprisonment for the head of SISMI (Mr Nicolò Pollari) and the head of CIA's Italian headquarters (Mr Jeffrey Castelli) at the time of the abduction.⁷¹

The factual grounds of the indictment are described as follows:

[they are charged with] having kidnapped [Mr Abu Omar], depriving him of personal freedom, apprehending him by force and forcibly making him enter a van, thereafter taking him first to the US military airbase at Aviano, where the United States of America Air Force 31st FW (Fighter Wing) is stationed, and thence to Egypt.⁷²

Thus, the acts upon which the indictment is formulated do not include the acts of torture in Egypt. Its focus is only on the Italian side of the 'extraordinary rendition'. However, the conduct that is the object of the indictment (abducting Abu Omar) is precisely that which would constitute 'complicity in torture' on the part of those who are accused thereof. By eschewing the indictment for *concorso* in any of the Convention-implementing crimes, Italian prosecutors are addressing only one element of a complex series of events leading to the torture of Abu Omar. In a sense, it is as if Italy was seeking the trial of someone for stealing the keys of a car, but not for stealing the car itself. One can only speculate as to why this has happened. For example, the Italian prosecutors might have found

case is therefore under article 110 (see *supra* note 52) combined with article 605 ('*Sequestro di persona*') of the Italian penal code.

⁷⁰ The maximum penalty of ten years of imprisonment under Articles 110 and 605 of the Italian penal code is augmented of a third according to the rule of Article 64 of the Italian penal code setting out the mode of application of one aggravating circumstance – in this case Article 112(1) of the Italian penal code.

⁷¹ The maximum penalty of thirteen years and four months of imprisonment mentioned above is augmented by one further third calculated as explained in Article 63(2) of the Italian penal code because of the addition of the aggravating circumstance of Article 112(2) of the Italian penal code to the one in Article 112(1). All these are only indicative figures because further aggravating (or extenuating) circumstances may be deemed relevant by the court: see e.g. Articles 61, 62, 62-bis, 112(3) of the Italian penal code.

⁷² *First arrest warrant for the kidnapping of Mr Abu Omar*, *supra* note 4, at 3: the charged facts have not changed in the final request for trial.

it difficult at the investigation stage to obtain evidence of the knowledge of US and Italian agents that Abu Omar would be tortured. Another reason might be ‘cultural’. The lack of a specific crime of torture in the Italian penal code does not make it obvious for Italian lawyers to address these issues as a question of implementation of the Torture Convention. Setting aside the criminal policy choices involved in ‘labelling’ (the question of under which label torture is criminalized being irrelevant from the point of view of Convention obligations),⁷³ the fact remains that it would in practice be easier to demand the prosecution of torture if such a crime was more easily recognizable in the Italian legal system as an implementation of Italian international obligations.⁷⁴

In sum, the ongoing trial in Milan cannot constitute an implementation of Italian Convention obligations to prosecute those who are present in Italy, despite the high penalties they might incur, unless the indictment is reformulated in order to take into account both the facts of the abduction and the *concorso* in assault and battery and other Convention-implementing crimes.⁷⁵ However, the trial does go beyond Italian obligations under the Convention by providing a form of criminal sanction under domestic law against those US agents who are not currently present in Italy. Also, by providing a judicial forum for the analysis of the facts surrounding a case of ‘extraordinary rendition’, this trial is the first occasion on which individual criminal accountability for ‘renditions’ might take place.

On a procedural level, however, US officials might attempt to claim immunity and inviolability either *ratione materiae* (functional immunity) or *ratione personae* (personal immunity). Although the defence of state immunity is traditionally unavailable in proceedings before international

⁷³ See *supra* note 50.

⁷⁴ In the different circumstances of a criminal trial for police abuses occurred during the G8 summit in Genoa in 2001, the trial court explicitly lamented that ‘the lack, in our penal system, of a specific crime of “torture” led the [Prosecutor’s] office to narrow down the inhuman and degrading conduct (which could without doubt be considered to fall within the notion of ‘torture’ adopted in International Conventions) ... suffered by the victims ... to the ... not entirely adequate remit of the crime of abuse of authority’: *Perugini Alessandro and 44 others*, n. D 3119/08, Genoa Tribunal, 14 July 2008, unrep., available at <http://download.repubblica.it/pdf/2008/MotivazioniBolzaneto.pdf> (last accessed on 26/07/2009), at 318.

⁷⁵ See Article 81 of the Italian penal code concerning acts which violate more than one criminal prohibition at the same time.

tribunals,⁷⁶ the same cannot be said of the implementation of Convention obligations before national courts other than the domestic court of the perpetrator; this is precisely the case with CIA agents tried before an Italian court. In principle, states enjoy immunity from foreign courts concerning all their acts *iure imperii*.⁷⁷ Since states only act through human beings, such immunity extends to those state officials who carried out those acts.⁷⁸ Problems arise when trying to establish if torture can ever be considered an ‘official state act’. While an affirmative answer appears the only one consistent with the definition of Article 1 of the Convention (according to which the official context is a requirement of torture), well known decisions of national courts have, somewhat surprisingly, found the opposite,⁷⁹ albeit not uncontroversially.⁸⁰ It is true that state immunity would eventually ‘render abortive’ the ‘whole elaborate structure of universal jurisdiction over torture’, as Lord Browne-Wilkinson put it in *Pinochet*.⁸¹ There could conceivably be two ways to circumvent the problem. First, some authors would invoke the alleged *ius cogens* nature of the prohibition of torture to affirm that *ius cogens* violations ‘constitute an implied waiver of sovereign immunity’.⁸²

⁷⁶ H. Fox, ‘State Immunity and the International Crime of Torture’, 2 *Eur. Hum. Rts. L. Rev.* (2006) 142, at 145-146.

⁷⁷ As opposed to those *iure gestionis*: see e.g. B. Conforti, *Diritto internazionale* (6th ed., 2002), at 249 ff.; M. N. Shaw, *International law* (6th ed., 2008), at 708 ff.; Fox, *supra* note 76, at 144 ff.. But see J. Crawford, ‘Execution of Judgments and Foreign Sovereign Immunity’, 75 *Am. J. Int’l L.* (1981) 820, at 855 (underlining how the distinction is difficult to reconcile with legal systems without a ‘developed distinction between “private” and “public” law’).

⁷⁸ Article 2(1)(b)(iv), UN Convention on Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508, adopted and opened for signature on 2 December 2004 by UN GA resolution A/RES/59/38, but not yet in force; the status of ratifications is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en (last accessed on 26/07/2009); see D.P. Stewart, ‘The UN Convention on Jurisdictional Immunities of States and Their Property’, 99 *Am. J. Int’l L.* (2005) 194, at 194 ff..

⁷⁹ In particular, see *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 3)*, [1999] UKHL 17, [2000] 1 AC 147 (UK House of Lords, 24 March 1999), at 204-206 (Lord Browne-Wilkinson).

⁸⁰ The reasoning in *Pinochet No. 3*, *supra* note 79, was later rejected in this respect in *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 AC 270 (UK House of Lords, 14 June 2006), at 285-287 (Lord Bingham). See also R. O’Keefe, ‘The European Convention on State Immunity and International Crimes’, 2 *Cambridge Y.B. Eur. Legal Stud.* (1999) 507-20, at 511-13.

⁸¹ *Pinochet No. 3*, *supra* note 79, at 205.

⁸² E. de Wet, ‘The Prohibition of Torture As An International Norm of Jus Cogens And Its Implications For National And Customary Law’, 15 *Eur. J. Int’l L.* (2004) 97-121, at 106, who refers to *Princz v. The Federal Republic of Germany*, 26 F.3d 1166 (1994). The Italian Court of Cassation in *Ferrini contro Repubblica Federale di Germania*, n. 5044/04, 87 *Riv. Dir. Int.* 539 (11 March 2004) blurred the concepts of state responsibility and international criminal liability while affirming the hierarchical nature of *jus cogens*: see P. De Sena and F. De Vittor, ‘State Immunity and Human Rights: the Italian Supreme Court Decision on the *Ferrini* case’, 16 *Eur. J. Int’l L.* (2005) 89-112, at 89; against this approach, see *Jones v. Saudi Arabia*, *supra* note 80, at 288-289. Germany instituted proceedings against Italy before the International Court of Justice in December 2008 on grounds of violation of state immunity because of the *Ferrini* jurisprudence: see <http://www.icj-cij.org/docket/files/143/14925.pdf> (last accessed on 26/07/2009).

Secondly, and more convincingly, one could highlight the ‘object and purpose’⁸³ of the Convention and argue that states implicitly waived their immunity for acts of torture of their own agents by ratifying the treaty and accepting rules on *aut dedere aut prosequi*.⁸⁴ In particular, since Article 7 of the Convention requires either extradition or prosecution domestically, *a fortiori* it must require either waiver of immunity or prosecution. In sum, US agents involved in the Abu Omar case and tried in Italy may invoke functional immunity, but such immunity should be deemed as having already been waived by the United States.

Similar problems concern personal immunity. The scope of application of these rules in the context of the Abu Omar trial is very limited, insofar as the officials charged do not seem to enjoy diplomatic status, albeit that one attempt at so claiming has been made by one defendant.⁸⁵ Some authors argue that the Convention does not permit exemption for personal immunity.⁸⁶ But this is controversial. The problem lies in the conflict between the obligations arising from the Convention and those arising from customary international law on diplomatic immunity and inviolability as crystallized in the Vienna Convention on Diplomatic Relations.⁸⁷ Some would maintain that *ius cogens* could provide a versatile ‘constitutional’ loophole out of the conundrum.⁸⁸ Others suggest that ‘the traditional immunity rules under customary international law [should] be interpreted in a narrow sense’ in light of the object and purpose of the Torture Convention and the evolution of international criminal law since the adoption of the Vienna Convention.⁸⁹ For example, while immunity could be granted to those serving as ‘Heads of State or Government, Ministers for Foreign Affairs and diplomats for the purpose of ensuring the effective performance of their

⁸³ Article 31(1), Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969).

⁸⁴ O’Keefe, *supra* note 80, at 513-514.

⁸⁵ On 13 May 2009, Ms Sabrina de Sousa brought an action before the US District Court for the District of Columbia in Washington against the US Department of State, requesting that the US invoked diplomatic immunity in the proceedings in Milan and provided her with legal representation in Italy. The complaint was published by the New York Times and is available at <http://graphics8.nytimes.com/packages/pdf/world/20090514complaintfinal.pdf> (last accessed on 26/07/2009), but no decision has been reported on the case as of July 2009.

⁸⁶ See e.g. A. Cassese, *International Criminal Law* (2nd ed., Oxford: Oxford University Press, 2008), 310.

⁸⁷ Esp. Articles 29 and 31(1), 500 UNTS 95 (1961).

⁸⁸ See de Wet, *supra* note 82, at 106. *Contra*, see *Jones v. Saudi Arabia*, *supra* note 80, at 288-289.

⁸⁹ M. Nowak and E. McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford University Press, 2008), 321-327 (subsection concerning ‘Immunity’ of the commentary on Article 5), at 326.

diplomatic functions' during their office, it could be withdrawn from them as soon as they leave office for any acts of torture 'committed before, during or after their terms of office'.⁹⁰ In order for this solution to work, however, the premise must be that functional immunity under the *acta iure imperii* doctrine above is implicitly waived by member states to the Convention, so that acts of torture carried out by state officials are never immune *qua* acts *iure imperii*. This narrow approach to immunities may be appealing as a matter of policy, but as the authors who advance it readily concede, if the drafters of the Torture Convention had intended to create exceptions (or restrictions) to state and diplomatic immunity, they could have done so, as was done with the Rome Statute of the ICC and the statutes of other international tribunals.⁹¹

6. 'State Secrets' and the Obligation to Prosecute Complicity in Torture

It seems unlikely that the trial in Milan will serve the purposes of accountability and discovery of the truth on 'extraordinary renditions' as was initially hoped for. The scope of what can be ascertained by Judge Magi was considerably narrowed down in March 2009 by the Italian Constitutional Court's broad interpretation of the role of 'state secrets'.⁹² 'State secrecy' is a domestic constitutional law concept according to which a 'secret' may be established by the President of the Council of Ministers with reference to 'acts, documents, news, activities and other things' whose dissemination would damage the (territorial and political) 'integrity of the Republic' in relation to (*inter alia*) its international agreements, the institutions established by the Italian constitution, the independence of Italy from foreign states, and military defence.⁹³ It is a crime to

⁹⁰ Ibid., at 327.

⁹¹ Nowak and McArthur, *supra* note 89, at 325-6.

⁹² *Conflitto di attribuzione tra poteri dello Stato (processo Abu Omar e segreto di stato)*, n. 106/2009, Gazz. Uff. 1° Serie Sp. published on 8/04/2009 (decided 11/03/2009) (hereinafter '*Judgment 106/2009*'). On the domestic constitutional law questions raised by state secrets and 'extraordinary renditions', see e.g. T.F. Giupponi, 'Stato di diritto e attività di intelligence: gli interrogativi del caso Abu Omar', 25 *Quaderni costituzionali* (2006) 810; A. Pace, 'L'apposizione del segreto di Stato nei principi costituzionali e nella legge n. 124 del 2007', 53 *Giurisprudenza costituzionale* (2008) 4041.

⁹³ Article 39(1) of domestic law 124 of 2007; see also, in almost identical terms, Article 12 of the previous law 801 of 1977, which was in force at the time of the abduction. The President of the Council of Ministers (*Presidente del Consiglio dei Ministri*, hereinafter 'President') is the head of the Italian government (both at the time of the Abu Omar

disclose the content of a ‘secret’, and state officials have a general duty not to disseminate ‘secret’ information, not even if called as witnesses during a criminal trial.⁹⁴

The question before the Constitutional Court was to what extent secrecy could constitute a bar to the continuation of the trial for the abduction of Abu Omar. In February and March 2007, the President of the Council of Ministers initiated proceedings demanding the annulment of both the indictment and the decree initiating the Abu Omar trial on grounds of conflict of state powers. The President argued that the Public Prosecutor in Milan had been in breach of his duty of ‘fair cooperation’ between state powers and had violated legal rules on ‘state secrecy’ by revealing details of the relationship between SISMI and the CIA and unduly inquiring about SISMI activities covered by ‘state secrecy’.⁹⁵ He complained that the Prosecutor had based his investigation (and the request for a trial) upon certain confidential documents he had seized during a search in SISMI offices in Rome in July 2006. The Prosecutor should immediately have realized the documents were confidential, and in any case should not have used them once he had learnt that a ‘state secret’ had been duly established by the President of the Council of Ministers as regards some parts of such documents.⁹⁶ The President also lamented that the Prosecutor had ordered the wire-tapping of 180 phone numbers belonging to secret services agents, thereby uncovering the whole communication network of the agency and the identity of 85 agents.⁹⁷ The preliminary hearing judge who had decreed that a trial should take place had also violated ‘state secrets’, because she had not expunged

abduction and since May 2008, Mr S. Berlusconi; from May 2006 to May 2008, Mr R. Prodi); his role is not to be confused with that of the President of the Republic, i.e. the head of State (since May 2006, Mr G. Napolitano).

⁹⁴ See Article 41 of law 124 of 2007 (prohibition to disclose state secrets), Article 261 of the penal code (crime of revealing state secrets) and Article 202 of the Italian Code of Criminal Procedure (provisions for witnesses in criminal trials).

⁹⁵ For a summary of the pleadings, see *judgment 106/2009, supra* note 92, at para. F2, and the two admissibility decisions by the Constitutional court: *Ammissibilità di conflitto di attribuzione tra poteri dello Stato (Presidente del Consiglio dei Ministri c. Procuratore della Repubblica Tribunale di Milano)*, n. 124/2007, Gazz. Uff. 1° Serie Sp. published on 26/04/2007 (decided 18/04/2007); *Ammissibilità di conflitto di attribuzione tra poteri dello Stato (Presidente del Consiglio dei Ministri c. Tribunale di Milano)*, n. 230/2008, Gazz. Uff. 1° Serie Sp. published on 2/07/2008 (decided 25/06/2008).

⁹⁶ *Judgment 106/2009, supra* note 92, at para. F2.1. In late October 2006, the Public Prosecutor had received a ‘censored’ version of those documents from SISMI; according to the Constitutional court, he should have inferred from that moment that a secret existed as to all censored parts of them even if they had been legitimately in his possession since the (unopposed) search and seizure of July 2006: *ibid.*, paras D8.2 and D8.4.

⁹⁷ *Ibid.*. The President also complained about the pre-trial deposition of a witness on facts covered by a ‘state secret’ (*ibid.*, at para. D9).

the secret documents from the proceedings and had allowed the trial to start on their basis.⁹⁸ By way of response, in June 2007 the Public Prosecutor Office also initiated proceedings before the Constitutional Court against the President on grounds of conflict of powers, arguing *inter alia* that a ‘state secret’ should not have been established on facts of a ‘subversive nature’ such as ‘extraordinary renditions’. The abduction, the Prosecutor pleaded, was such a grave human rights violation that it posed a threat to the very interests ‘state secrets’ were deemed to protect.⁹⁹

Because these cases on ‘state secrets’ were declared admissible by the Constitutional Court in Rome, Judge Magi initially suspended the abduction trial in Milan to wait for the Constitutional Court’s decision.¹⁰⁰ On 19 March 2008, however, he ordered that all the uncensored documents which were the object of the government’s complaint before the Constitutional Court should be expunged from the proceedings and that a censored version should be substituted, so that the trial could proceed even if the Constitutional Court had yet to decide.¹⁰¹ This removal of the secret documents could perhaps have led to a swift conclusion of the conflicts before the Constitutional Court, for the matter at issue seemed no longer pressing, but the President of the Council of Ministers held a different view.¹⁰² In May 2008, he initiated further proceedings before the Constitutional Court, this time against Judge Magi for his decision to carry on with the trial and to admit witnesses.¹⁰³

The abduction proceedings before Judge Magi continued and the first witnesses were heard, but soon the issue of state secrecy re-emerged. On 15 and 29 October 2008, two witnesses declared that

⁹⁸ Ibid., at para. F2.2.

⁹⁹ See *ibid.* at para. F3; see also the corresponding admissibility decision: *Ammissibilità di conflitto di attribuzione tra poteri dello Stato (Procuratore della Repubblica Tribunale di Milano c. Presidente del Consiglio dei Ministri)*, n. 337/2007, Gazz. Uff. 1° Serie Sp. published on 3/10/2007 (decided 26/09/2007).

¹⁰⁰ Order based on Article 479 of the criminal procedure code issued by Judge Magi on 18 June 2007, unreported (its content inferred from *Judgment 106/2009*, *supra* note 92, at para. F4.1).

¹⁰¹ Order by Judge Magi of 19 March 2008 (*ordinanza istruttoria*), unreported (its content inferred from *Judgment 106/2009*, *supra* note 92, at para. F4.1); this was deemed by the Constitutional court to be a lawful course of action: *ibid.*, at para. D11. See *supra* note 96.

¹⁰² The Constitutional court agreed that the matter at issue was indeed still relevant: see *Judgment 106/2009*, *supra* note 92, at para. D5.

¹⁰³ See the admissibility decision: *Ammissibilità di conflitto di attribuzione tra poteri dello Stato (Presidente del Consiglio dei Ministri c. G.U.P. Tribunale di Milano)*, n. 125/2007, Gazz. Uff. 1° Serie Sp. published on 26/04/2007 (decided 18/04/2007).

they could not answer certain questions without breaching a ‘state secret’, and invoked a letter that the President of the Council of Ministers had sent them to remind them of the secrecy of any information regarding the relationship between SISMI and foreign secret services (including CIA).¹⁰⁴ According to Article 202 of the Italian Code of Criminal Procedure, when a ‘state secret’ is invoked by a witness, the judge ‘informs the President of the Council of Ministers asking for a confirmation thereof’. Judge Magi proceeded in this way, and Mr Berlusconi responded on 15 November 2008 that a secret indeed existed in the way the two witnesses had described. Following these events, Judge Magi ordered the suspension of the trial on 3 December 2008. He also initiated another set of proceedings against the President before the Constitutional Court on grounds of conflict of powers. He argued that the President had always been unclear as to the exact extent of the ‘state secret’ surrounding the abduction of Mr Abu Omar. All subsequent Presidents of the Council of Ministers had always denied that the facts of the abduction were covered by a ‘state secret’; they had only declared that certain issues concerning the CIA-SISMI relationship were secret, but that the trial could otherwise proceed. However, the Berlusconi letter of October 2008 and its confirmation of November 2008 referred to a much more broadly formulated ‘state secret’ concerning *all* kinds of relationships between SISMI and any foreign secret service, including, specifically, circumstances surrounding the Abu Omar abduction. This meant that the power of the court to ascertain the facts and prosecute the crime was unduly restricted. Judge Magi asked the Constitutional Court to annul the government’s declaration of confirmation of the secret under Article 202 of the Italian Code of Criminal Procedure, so that the trial could continue.¹⁰⁵

¹⁰⁴ *Judgment 106/2009, supra* note 92, at para. F4.2. A witness (Mr Scandone) had been asked whether one of the accused, SISMI chief Niccolò Pollari, had issued any orders prohibiting illegal counter-terrorism measures including cooperation in ‘renditions’; another (Mr Murgolo) had been asked to refer on matters he had previously been questioned about during the investigation.

¹⁰⁵ *Judgment 106/2009, supra* note 92, at para. F4.2. See also the corresponding admissibility decision: *Ammissibilità di conflitto di attribuzione tra poteri dello Stato (Tribunale di Milano, Sez. IV Penale c. Presidente del Consiglio dei Ministri)*, n. 425/2008, Gazz. Uff. 1° Serie Sp. published on 24/12/2008 (decided 17/12/2008).

The Constitutional Court decided on all these conflicts of powers with an unavoidably long (and at times self-contradictory)¹⁰⁶ judgment delivered on 11 March 2009.¹⁰⁷ The court first reaffirmed its own previous jurisprudence on the concept and purpose of ‘state secrets’,¹⁰⁸ according to which state security is an interest which is ‘essential’ and ‘absolutely pre-eminent over any other’ – including that of the judiciary to try crimes – because it is meant to preserve ‘the very existence of the State, an aspect of which is [judicial] jurisdiction’.¹⁰⁹ The President of the Council of Ministers had a fully discretionary power to establish ‘state secrets’, and courts had no power to assess the criteria he or she employed; any form of ‘judicial review [was] excluded not only on the *an* [if], but also on the *quomodo* [how] of the power to establish secrets’.¹¹⁰ Only Parliament was in a position to control the exercise of such discretionary power of the President, the sole limit being the prohibition of establishing a secret on ‘subversive’ facts.¹¹¹ The court agreed ‘in general’ with ‘the European Parliament resolutions’ defining ‘extraordinary’ renditions as crimes which were ‘contrary to the constitutional traditions and legal principles’ of EU States.¹¹² But it could not agree with the Public Prosecutor that the Abu Omar abduction was a ‘subversive’ fact: the ongoing trial in Milan was for abduction, not for ‘subversive abduction’;¹¹³ and, in any case, a ‘single offence’, no matter how grave, could not constitute a ‘subversive fact’ unless it was autonomously ‘capable of subverting ... the overall structure of [Italian] democratic institutions’.¹¹⁴ Also, the ‘state secret’ had ‘never concerned the crime of abduction per se ... but, on one hand, the relationship between Italian

¹⁰⁶ For instance, compare para. D4 (on the ‘intrinsic’ characteristic of secrecy and its immediate recognizability) with para. D8.2 (on the necessity of a formal declaration of ‘secrecy’ for any obligation to arise).

¹⁰⁷ *Judgment 106/2009*, *supra* note 92.

¹⁰⁸ *Ibid.* at para. D3; see e.g. *Legittimità costituzionale degli artt. 342 e 352 del codice di procedura penale*, n. 82/1976, Gazz. Uff. 1° Serie Sp. published on 21/04/1976 (decided 06/04/1976) and *Conflitto di attribuzione fra Presidente del Consiglio dei Ministri e Procura della Repubblica di Bologna*, n. 110/1998, Gazz. Uff. 1° Serie Sp. published on 15/04/1998 (decided 09/04/1998).

¹⁰⁹ *Judgment 106/2009*, *supra* note 92, at para. D3, quoting from *Legittimità costituzionale degli artt. 342 e 352 del codice di procedura penale (II)*, n. 86/1977, Gazz. Uff. 1° Serie Sp. published on 1/06/1977 (decided 24/05/1977).

¹¹⁰ *Judgment 106/2009*, *supra* note 92, at para. D3; see also para. D12.4.

¹¹¹ *Ibid.*, at para. D12.4.

¹¹² *Ibid.*, at para. D8.5.

¹¹³ The Italian penal code has a separate offence dealing with ‘abduction with the purpose of terrorism or subversion of the constitutional order’ (Article 289-bis); the Public Prosecutor instead had contested the unqualified crime of abduction: see above note 69 and accompanying text.

¹¹⁴ *Judgment 106/2009*, *supra* note 92, at para. D8.5; this is a very narrow definition of ‘subversive fact’.

intelligence services and foreign ones and, on the other hand, the organizational and operational structure of SISMI'.¹¹⁵ The remit of the secret may indeed 'be somewhat connected to the fact of the crime', but the judge had to exclude from the proceedings any 'sources of evidence' which impinged upon the 'secret'. This meant that the trial in Milan could continue, but the judge had to proceed only on the basis of acceptable, non-secret evidence: should any 'source of evidence' he was planning to acquire be 'essential' for the decision of the matter before him, he had to 'declare that the trial should not go forward because of the existence of a State secret', as provided for in Article 202(3) of the Italian Code of Criminal Procedure.¹¹⁶

While not quashing the whole trial as requested by the President of the Council of Ministers, the decision by the Constitutional Court significantly narrowed the scope of what could be ascertained by Judge Magi in Milan. Although it is still technically ongoing, the trial could end up being an empty procedural shell on the road to nowhere, because the relationship between SISMI and CIA is at the heart of what happened in February 2003 in Milan. Some of the accused moved in April 2009 that the trial should be immediately be concluded with either a full acquittal or a declaration of the impossibility to proceed due to the 'state secret' on essential evidence,¹¹⁷ but Judge Magi decided on 20 May 2009 that the trial would continue with a scrupulous application of the limits as defined by the Constitutional Court.¹¹⁸ When heard by the judge on 27 May 2009, the former SISMI chief Niccolò Pollari declared that he could not prove that he was not involved with the abduction of Abu Omar because the '80 documents which irrefutably prove' his being opposed to the operation are all covered by a 'state secret'.¹¹⁹ The trial continued and the Public Prosecutor

¹¹⁵ Ibid., D12.3.

¹¹⁶ Ibid., D12.4.

¹¹⁷ 'Abu Omar, difese chiedono assoluzione assistiti', Reuters News Agency (online), 22/04/2009, available at <http://it.reuters.com/article/topNews/idITMIE53L0AW20090422> (last accessed on 26/07/2009).

¹¹⁸ 'Abu Omar, processo va avanti. No revoca arresti Cia', Reuters News Agency (online), 20/05/2009, available at <http://it.reuters.com/article/topNews/idITMIE54J0DG20090520> (last accessed on 26/07/2009).

¹¹⁹ 'Abu Omar, ex Sismi Pollari: documenti provano mia estraneità', Reuters News Service (online), 27/05/2009, available at <http://it.reuters.com/article/topNews/idITMIE54Q0EE20090527> (last accessed on 26/07/2009). A book which embraces the thesis that CIA chose to carry out Abu Omar's rendition despite the opposition of (rather than in cooperation with) SISMI is due to be published: M. Cole, 'The Terrorist and the Spy: The Inside Story of a CIA Rendition' (New York: Simon & Schuster, *forthcoming*).

attempted to initiate a new set of proceedings before the Constitutional Court, this time to challenge the constitutional legitimacy of the law on ‘state secrets’; but Judge Magi refused to uphold the request declaring the question asked manifestly unfounded and irrelevant to the proceedings at that stage.¹²⁰ The final phase of the trial will start on 23 September 2009 with the Prosecutor’s closing arguments.

It is not for us to determine whether the decision by the Constitutional Court was correct under Italian constitutional law. In our context, two considerations are relevant. The first is that the court construed the concept of ‘subversive fact’ in a very narrow way. One clear aim of ‘state secrets’ under Italian law is to protect the independence of Italy from other states.¹²¹ Human rights considerations aside, if the Abu Omar abduction had really taken place with the opposition of the Italian government and its secret services – as Mr Pollari claims in his own defence – then the Abu Omar abduction would be a violation of Italian jurisdiction by the US, that is a direct contradiction of one of the values ‘state secrets’ are meant to protect.¹²² But quite independently of whether it was agreed or not by the Italian government, the abduction impinged upon the distribution of power (namely, the power to arrest and detain) within the legal system: it was not ‘just’ a private abduction, but the exercise of foreign executive power on Italian soil; from the international perspective, it was an act ‘subverting’ the constitutional structure of power in Italy.

Secondly, it is striking that nowhere in the Constitutional Court judgment, or in the pleadings of the parties before it, were the international obligations of Italy as a state party to the Torture Convention considered or even mentioned. In order to comply with them, a derogation should have been introduced to the procedure in Article 202 of the Italian Code of Criminal Procedure, to the effect that a ‘state secret’ could not be invoked with relation to any proceedings in which the

¹²⁰ ‘Abu Omar: PM, questione costituzionalità su riforma servizi’, AGI News Service (online), 24/06/2009, available at <http://www.diritto-oggi.it/archives/00042006.html> (last accessed on 26/07/2009); ‘Abu Omar: giudice, no ad atti a consulta su legge per servizi’, AGI News Service (online), 01/07/2009, available at <http://www.diritto-oggi.it/archives/00042177.html> (last accessed on 26/07/2009).

¹²¹ Article 39(1) of domestic law 124 of 2007.

¹²² See Mann, *supra* note 18, at 417.

accused are indicted for torture or complicity in torture. Indeed, as regards the scope of Italy's obligations under the Convention against torture, nothing was changed because of this decision. It is a well known principle of international law that states cannot use domestic law, such as rules on 'state secrecy', as a justification for non-compliance with their international law obligations.¹²³ Articles 3 and 32 of the Articles on the Responsibility of States for Wrongful Acts make this clear.¹²⁴ Indeed, 'a State cannot, by pleading that its conduct conforms to the provisions of its internal law, escape the characterization of that conduct as wrongful by international law', because an act 'must be characterized as wrongful' if it breaches an international obligation, 'even if, under [its internal] law, the State was actually bound to act in that way'.¹²⁵ The drafters of the Torture Convention did not insert in the treaty any exception to this general rule. This may be deduced from three elements. First, nothing was said specifically to this effect in the Convention. Second, in the context of defining the scope of state obligations, Article 2(2) leaves no room for exceptional or security considerations as potential justifications for torture: 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'. Third, the general purpose of the Convention is to oblige states to punish torture committed *by their agents or with their acquiescence*, i.e. in an official context.¹²⁶ Allowing a 'state secret' or any other internal law justification to supersede Convention obligations would render meaningless this part of the definition of torture in Article 1 of the Convention, because by that definition torture is prohibited precisely as an official act.

¹²³ Unless international law itself so specifically provides; for instance, see Articles 72 and 93(4) ICC St. on the '[p]rotection of National Security Information'.

¹²⁴ International Law Commission, 'Articles on the Responsibility of States for Internationally Wrongful Acts', annexed to United Nations General Assembly Resolution 53/83 of 12 December 2001; see also J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), 86-90 and 207-208.

¹²⁵ Crawford, *supra* note 124, at 86 (Commentary to Article 3).

¹²⁶ Article 1 of the Convention.

7. Conclusion

There are various ‘strategies’ through which international law ‘provides for individual criminal responsibility’.¹²⁷ It may ‘directly provide for individual culpability’; it may oblige ‘some or all states ... to try and punish, or otherwise sanction, offenders’ through their domestic law, or it may merely authorize states to do so.¹²⁸ The Convention provides one such framework through which states are obliged to prosecute domestically torture and complicity in torture. This includes torture incidental to ‘extraordinary renditions’. Despite not being a trial implementing these Convention obligations, the one begun in Italy in June 2007 is a very rare (if not unique) opportunity to address the individual responsibility of Italian and US agents involved in the ‘extraordinary rendition’ of Mr Abu Omar. They are indicted for the domestic crime of abduction. With relation to Italian officials who are present in court this could only become a suitable implementation of Italian obligations to assert and exercise jurisdiction over complicity in torture if the indictment were reformulated by the Public Prosecutor in order to take torture into account. This now seems unlikely. As for US officials, Italy is permitted but under no obligation to prosecute them, and is trying them *in absentia*. However, had Italy requested an extradition, the US would be under an obligation either to try or to extradite them. Such an extradition request has not been sent yet, and it is not likely to be sent in the immediate future. In fact, subsequent Italian governments attempted to get the indictment (and consequently the trial) annulled by the Constitutional Court on grounds of conflict of powers for violation of a ‘state secret’. The Constitutional Court replied that some of the documents and depositions employed by the Public Prosecutor were indeed in violation of such a secret, and should be annulled, but the trial could nonetheless proceed with whatever elements of evidence were left. Because of these restrictions on the scope of the evidence admissible before the court in Milan, it is unlikely that the issue of the relationship between SISMI and CIA, which is at the heart of the question of complicity in torture, will be fully addressed. This is an unfortunate

¹²⁷ S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2nd ed., Oxford: Oxford University Press, 2001), at 11.

¹²⁸ *Ibid.*

outcome. Under Italian constitutional law, ‘state secrets’ should not be employed with reference to ‘subversive facts’. Any agreement between SISMI and CIA on the Abu Omar abduction would have been intrinsically subversive of the powers entrusted to Italian judges by the Constitution – even more so considering that foreign agents were allowed by the government to arrest in Italy someone who was at the time under investigation by Italian prosecutors. The Italian Parliament should perhaps consider exercising its power to investigate this matter further.¹²⁹ Moreover, Italian obligations under the Torture Convention were never considered, or even mentioned, by the Constitutional court when deciding how ‘state secrets’ would impact the trial for the abduction of Abu Omar. There is definitely a need for a more incisive implementation of Convention obligations in the Italian legal system.

¹²⁹ Former President of the Republic Francesco Cossiga (now a Life Member of the Italian Senate) introduced a bill in 2005 with a view to establish a Parliamentary Commission of Enquiry on the Abu Omar abduction, but it was never even discussed: see <http://www.senato.it/leg/14/BGT/Schede/Ddliter/23560.htm> (last accessed 26/07/2009).