

5-1-2013

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https://scholarship.shu.edu/student_scholarship/278

Removal of Diplomatic Immunity in the extraordinary rendition of Abu Omar – Can it be Done?

By Michael Noonan

Since the attacks of September 11, 2001 and the subsequent war on terror, the United States has been forced to find new means and methods of bringing foreign terrorists to justice. One of those methods is the process of extraordinary rendition, by which foreign nationals are forcibly taken from their respective countries for interrogation and possible trial in the U.S. Abducted targets are often held in CIA controlled “secret prisons” around the world for months or years at a time. The target’s family is not told when he is taken, and, despite allegations that some nations from which suspected terrorists are taken are implicit in the kidnapping, their own governments are typically none the wiser either.¹ Targets quite simply vanish. This process of extraordinary rendition has sparked a multitude of questions of international law and earned the condemnation of certain nations.²

One particular act of extraordinary rendition known to have occurred took place in Milan on February 17, 2003. Cleric Hassan Mustafa Osama Nasr, or Abu Omar, was abducted by a combination of Italian police and American CIA agents while on the way to his mosque. Omar was residing in Italy on political asylum from his home country of Egypt. He was taken to Germany and from there flown to Egypt. Only the United States’ government was aware of Omar’s whereabouts at any point in this process. Omar was then allegedly tortured via electric shock for information regarding terrorist activity. He was released after an Egyptian court finally ruled his detention unfounded, but questions remain regarding the legal culpability of his captors.

¹ Bruce Zagaris, U.S. ENCOUNTERS DIFFICULTIES in EUROPE OVER EXTRAORDINARY RENDITIONS, 22 No. 2 Int’l Enforcement L. Rep. 61 (2006).

² Id.

In 2005, warrants were issued throughout the European Union by Italian prosecutors for the arrest of 22 suspected CIA operatives.³ As they did not appear for trial in Italy, the suspects' trials were held *in absentia*, with court appointed attorneys representing the absent defendants. Attorneys for three of the defendants, Betnie Madero, Ralph Russomando, and Jeffrey Castelli, claimed diplomatic immunity. The trial judge acquitted all three on those grounds, but prosecutors have appealed the ruling. That appeal is still pending.⁴

This paper analyzes the potential criminal liability of Madero, Russomando, and Castelli, with a focus on their claims of immunity for the kidnapping of Abu Omar. As will be demonstrated, diplomatic immunity no longer serves as a form of absolute immunity in the context of liability for international crimes. International standards formed during the twentieth century do not allow for evasion of the criminal process quite so easily anymore. It must be concluded that a defense of diplomatic immunity will ultimately fail to shield the alleged CIA agents from Italian kidnapping charges.

This paper begins with a brief historical background of the doctrine of diplomatic immunity, leading into a discussion of the type of immunity available and its applicability to the present situation. Differing theories regarding the intersection of diplomatic immunity and international criminal law will be analyzed, each with varying successes and failures. Finally, the changing landscape of immunity defenses over the last century is detailed. Those changes, taking place in a far more globalized international community, lead to the conclusion that no one will be found above the law, and liability for international crimes must be recognized.

³ EU-wide warrant over 'CIA kidnap', BBC News (Dec. 23, 2005), <http://news.bbc.co.uk/2/hi/europe/4555660.stm>.

⁴ Rachel Donadio, Italy Convicts 23 Americans for Alleged Rendition of Terrorism Suspect, The New York Times (Nov. 4, 2009), http://www.nytimes.com/2009/11/05/world/europe/05italy.html?_r=0.

Diplomatic Immunity through History

The concept of immunity for foreigners conducting diplomatic missions is a customary tradition dating back to ancient times. Greek, Roman, and barbaric tribes all recognized the importance of envoys sent from other cities and countries to work out treaties and other agreements between powers. Though this customary practice was not always observed, doing harm to an envoy was largely considered abhorrent, even at times an act of war.⁵ Envoys were sent with the power to speak or negotiate on behalf of a kingdom. Harming them showed a willingness to harm the kingdom itself. This understanding and the desire for peace began the tradition of letting diplomats move about unbothered.

As European countries moved towards concepts of natural and universal law, discussion was taken up in earnest regarding the limits, if any, of the inviolability of diplomats. The fear that diplomats were only sent to other nations to gather information or otherwise plot against them was a very real one. Jurists and kings around the world had varying views on the subject, ranging from absolute immunity to simple immunity from trial for wrongs committed prior to becoming a diplomat. It was not until the Diplomatic Privileges Act of 1708, passed by the English legislature, that the world saw its first attempt to actually codify common law on diplomatic immunity.⁶ For the first time, diplomats (in England at least) did not have to fear sudden and drastic changes in their legal status on the whim of a ruler.

This shift towards normalizing diplomatic immunity has, in modern times, led to the creation of the Vienna Convention on Diplomatic Relations in 1961. This international treaty now creates the basis for diplomatic immunity worldwide. Specifically, Articles 29 and 31

⁵ Nick Hanrahan, A History of Diplomatic Immunity and the Development of International Organization Immunity, 2, http://www.caio-ch.org/reforms/Intern_Paper_I.pdf.

⁶ Id. at 7.

address diplomats' immunity from suit within a foreign nation's jurisdiction with limited exceptions. Article 31 provides in part: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction..."⁷ Article 31 prevents suit under foreign jurisdiction, but still allows for jurisdiction in the sending nation. However, given that sending nations are often reluctant to prosecute their own officials, there have been a number of attempts to avoid this preclusion.

Attempts to avoid the preclusion of jurisdiction from prosecution of diplomats and other privileged state officials have spawned a wide variety of theories on how to do so and spawned intense debate on whether it is right to remove absolute immunity from foreign diplomats. In practice it could just undo many of the practical benefits that immunity affords while offering little in return. Varying jurists have tried to get around such problems by finding new justifications or new theories from which to work, but the end goal remains somewhat elusive.

Theories for the Removal of Diplomatic Immunity

The strong desire to prosecute diplomats for their crimes is a basic one with an intense emotional appeal, particularly for the country in which the crime took place. Throughout time, people have wanted to see wrongs righted, justice done, and the guilty punished. However, that desire strongly conflicts with important practical consideration that must be taken into account before acting. Theories for the prosecution of diplomats have met this problem with varying degrees of success. This paper will focus on a few of the more popular theories for prosecution and their limitations.

⁷ Vienna Convention on Diplomatic Relations, art. 31(1), 500 UNTS 95; 23 UST 3227; 55 AJIL 1064 (1961).

The avoidance of show trials is one such limitation. The world of international politics is a complicated one in which cultures and national interests frequently collide. Any leverage that can be held against a competing nation is extremely valuable, and without immunity a diplomat could easily find himself suddenly held under trumped-up charges brought by a bitter receiving nation. Such a threat to a diplomat is never well received publicly, often requiring the sending nation to cede some position or resource in order to safely bring the diplomat home. The complete removal of immunity would incentivize foreign nations to threaten diplomats in hopes that they could extort other nations for political and financial gain.

Diplomatic immunity from criminal prosecution and civil suit also empowers diplomats to go about their work. In the same way that executive officers are given immunity so that they are not hampered by fears of suit, diplomats are given some peace of mind by their immunity. It allows them to concentrate on their missions without constantly also having to consider the legal repercussions. Diplomats can act in an otherwise unsure and constantly shifting field without fear. Immunity prevents the threat of suit and ensures that diplomatic relations remain open between nations, even in otherwise tense times. Theories for the removal of immunity must not be so broad that they destroy this highly practical and long standing idea.

Implied Waiver of Immunity

In the wake of WWII, many victims of the atrocities committed by the Axis powers sought reparations for their suffering. Many were left with little to nothing, as bank, medical, and personal records were often lost or destroyed in the fighting. This created an intense appeal for the idea of suing the responsible governments, but the doctrine of sovereign immunity created a seemingly insurmountable problem. The concept of sovereign immunity is basic – that

individuals may not bring a national government into court without the nation's consent. This principle is meant to give absolute discretion to the sovereign nation, allowing it to choose when and for what reasons it must devote time and resources to fighting through the judicial process. As it stood, that doctrine largely prevented individuals from bringing the German government into civil court for atrocities committed by German occupying forces.

This changed in Italian jurisprudence with the *Ferrini* decision. Luigi Ferrini, an Italian citizen, was captured by German forces in August of 1944. He was sent to a forced labor camp and later a concentration camp. There, Ferrini suffered physical and psychological trauma at the hands of his captors. In 1998, Ferrini petitioned Italian courts for reparation from the German government for international crimes committed against him.⁸ That petition was denied at the trial and appellate levels, but the Supreme Court reversed, holding that “Germany, by admitting its responsibility for such crimes, had implicitly waived such immunity.”⁹ This waiver is only established “if the facts ascertained make it possible to describe specific conduct as ‘abdicated.’”¹⁰ *Ferrini* recognized that defendant countries are heavily disinclined to voluntarily waive their rights and protections from civil suit, and the Italian court found a way to overcome such burdens in a morally persuasive manner.

The *Ferrini* test calls for a consideration of the facts and circumstances surrounding an alleged waiver of state immunity from suit. This means that one cannot sue simply because they were a victim of state action. The facts of the case must specifically infer a waiver of immunity. In the context of CIA abductions, the disregard of international law in committing the act could be taken as a sign that the United States and its agents waived their own protections by ignoring

⁸ Ferrini & SI, 93 Pasqual de Sena & Francesca de Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 *The Eur. J. of Int'l L.* no. 1, (2005).

⁹ *Ferrini v Germany*, no 5044/4; ILDC 19 (IT 2004) 11 March 2004.

¹⁰ *Id.* at 19.

Italian sovereign rights, as well as those of Abu Omar himself. Though *Ferrini* was a civil case pertaining to the right to sue a foreign government, the same principles work in the criminal context. The CIA agents were protected by sovereign right, but that right was waived upon disregard for the rights of other nations and people.

The concept of waiver of sovereign rights is heavily criticized, however. The court eschewed an abstract test for waiver in favor of a circumstantial one in an attempt to allay fears that the *Ferrini* test could be used to wrongly persecute people in foreign lands. The theory is that if a government entity must consider the specific facts of a case then it will be able to objectively consider whether waiver occurred. However, many would argue that such a hope is unfounded. The test is inherently subjective in that the judiciary decides, based on no articulated factors, whether waiver has been made. A corrupted judiciary could easily weigh what is ultimately a balancing test under *Ferrini* in favor of its government. Application of such a test to the criminal context throws open the doors for abuse in show trials that diplomatic immunity is intended to protect against.

The possible rise of show trials based upon a *Ferrini* test could severely undermine diplomatic relations globally. With separate nations having a variety of different cultural norms and opinions, a doctrine based on *Ferrini* would not even need to be abused in order to create disruption and wreak havoc across counties. What is acceptable in one nation may be completely taboo in another. The chance that one country misreads another's moral compass could quickly lead not only to an international dispute, but the chance that a national diplomat is imprisoned for actions that he believed to be justified.

Application of the *Ferrini* test to criminal cases also poses a practical procedural problem. Claims of diplomatic immunity are typically made at the beginning stages of a case, as an affirmative defense to the charges. *Ferrini* only considered a civil situation, but in order to eliminate such a defense in the criminal context a court would necessarily be required to consider whether the act waives immunity prior to the trial. A court would, in essence, pre-judge the defendant in violation of the most basic norms. There is a very real threat that such a procedure would impermissibly “color” the court’s perception of the defendant. A criminal *Ferrini* test carries with it a great threat that defendants will be prejudiced by any pretrial discussion of waiver.

An obvious counter to this point would be to have the court consider only the act itself, as alleged by the state. A well respected, impartial judicial officer could review that charges and facts alleged to determine whether the defendant raises a valid claim before returning that decision to the trial court. But of course this assumes that true impartiality in light of the facts, circumstances, and differing culture viewpoints, can be attained. There would be myriad factors to consider, and appellate courts could easily disagree on which ones hold the greatest weight, creating further confusion and holding up a trial for years on appeals. Further, it cannot be assumed that a trier of fact, after hearing the determination as to whether the defense stands, would not impute some assumption of guilt to the defendant. It is unrealistic to expect that a mere curative instruction to a jury would remove any potential bias stemming from that ruling in their deliberations.

Applying the *Ferrini* precedent to the CIA kidnapping of Abu Omar would be an enormous test to the doctrine. The CIA kidnapped Mr. Omar and transported him first to Germany, then to Egypt for interrogation. In applying *Ferrini*, the question would become to

what extent does the doctrine follow defendants. A major potential issue is the fact that the agents transported Mr. Omar across multiple countries. The agents may try to argue that Omar's removal from Italy constitutes one crime, and moving him from Germany to Egypt is an entirely separate one that German courts must pass judgment upon, if any is to be had. While *Ferrini* dealt with crimes committed against an Italian citizen in another nation, the question of what happens when the defendants move across multiple national lines has not been answered. It is possible that the charges follow defendants across national boundaries as part of a continuous conspiracy, but equally likely that the affected nations would want to vindicate their own interests in the incident. For example, the German government was apparently unaware of Mr. Omar's kidnapping and passage through the country's borders. Former prosecutors in Germany have lamented that they were unable to prosecute anyone for that abduction and others, including the abduction of Khaled el-Masri in 2003.¹¹

In the *Ferrini* case, the court looked to contemporary principles of international law for the inference that a nation could implicitly waive its right to immunity. It stated that "recognition of immunity from jurisdiction for States that are responsible for such offences is in blatant contrast with the normative framework."¹² The court here presumes that the "normative framework" for international law must be to see justice done between the parties, without regard for the future legal consequences of a decision. While this is certainly a noble position for the court to take, it presumes too much about the international community's values. The Italian high court makes its decision without the input of the rest of the world. This is a criticism that is also

¹¹ Prosecutor on Rendition Case: Kidnapping a 'Disgrace And Should Be Prosecuted', Spiegel Online (Feb. 18, 2013 2:20 PM), <http://www.spiegel.de/international/world/german-prosecutor-recalls-failure-to-probe-cia-rendition-of-abu-omar-a-884066.html>.

¹² *Ferrini v. Germany*, at 21.

raised in the next potential method for waiving diplomatic immunity from the CIA kidnapers – the peremptory norms balancing approach.

Peremptory Norms Balancing

A second approach to removing diplomatic immunity calls for a balancing of norms recognized and acknowledged by the international community. This approach is strikingly similar to the test under implied waiver of immunity, but is slightly less subjective in that it seeks to create a hierarchy of sorts among international standards. Peremptory norms, the most important and inalienable of human rights agreed upon by the nations of the world, sit at the top of the theoretical pyramid. Under peremptory norms balancing the theory is that any norm below a peremptory norm may be ignored for the purposes of vindicating a peremptory norm. In that case, “since sovereign immunity itself is a principle of international law, it is trumped” by peremptory norms.¹³ Because diplomatic immunity is simply an international norm that is often recognized between nations it would lose in priority to more crucial rights such as the right to life and the right to freedom from torture.

For the defendant CIA agents, a court utilizing the peremptory norms balancing approach would weigh their right to immunity against Abu Omar’s right to freedom from torture. The ultimate consequence of this balancing would be to abrogate the agents of their immunity and permit a prosecuting nation to hold them for a full criminal trial. The overall concept is simplistic in this regard – the most important human rights are protected at all costs, and violators cannot shield themselves through lesser guarantees. International law demands that ultimately justice be done between the parties.

¹³ Dapo Akande & Sangeeta Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, 21 Eur. J. Int’l L. 815, 833 (2010)

This core concept behind peremptory norms balancing has enormous moral appeal, particularly in cases that would be easy to judge such as the CIA kidnapping. Only two established norms are clearly involved, and between freedom from torture and immunity the choice seems fairly evident in the average moral calculus. To a layperson the question is only whether they would prefer one who leads another to be tortured to get away with the crime or not. In a more legally oriented mind, the problem is ordering priorities between keeping individuals free from torture and respecting traditional immunity for foreign diplomats. Again, most would say that freedom from torture is the more important ideal. Peremptory norm balancing asks the court to put aside other considerations and only weigh the importance of the norms involved.

Some courts have found this theory persuasive. In *Prosecutor v. Furundzija*, a member of the Croatian military police force known as the “Jokers” was on trial for ordering the assault and rape of detainees during their interrogation. In discussing the jurisdiction for the International Criminal Tribunal for the former Yugoslavia (ICTY), the court focused on the paramount importance of the detainees right to freedom from torture, stating:

“it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute, and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.”¹⁴

The ICTY not only emphasizes the importance of the right to freedom from torture in the normative hierarchy, but even goes as far as to suggest that this freedom calls for universal

¹⁴ *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, available at: <http://www.refworld.org/docid/40276a8a4.html> [accessed 3 April 2013]

jurisdiction to punish any violators. This would mean that any nation on earth may call a violator of such rights to answer for their crimes in court, without regard for any lesser international principles. The court notes that it would be highly inconsistent for the international community to refer to torture as one of the greatest threats to human rights yet permit an individual to avoid repercussions for the crime, and nullifying other rights claimed by the defendant is a straightforward, effective means of assuring that one does not escape punishment.

A clever argument against this approach is that the norms of diplomatic immunity and freedom from torture do not come into conflict unless there is an obligation on third parties to prosecute for acts of torture. Without an obligation, prosecution is discretionary and the core principles of diplomatic immunity and respect for sovereign nations would counsel a third party not to prosecute. Thus, the norms never come into conflict and the preemptory norms hierarchy is inapplicable. However, this argument is flawed in the context of the CIA abductions given the existence of the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment (CAT). Article 7 of the CAT creates an obligation upon signatory states to prosecute violations of the CAT.¹⁵

This rule was affirmed and clarified in the recent case of *Belgium v. Senegal*.¹⁶ The Belgian government brought suit in the International Court of Justice against Senegal for not either prosecuting or extraditing the former president of Chad, Hissène Habré. Habré stands accused of torture and crimes against humanity committed during his presidency. He fled to Senegal after the fall of his government and lived there ever since. The Belgian government

¹⁵ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 26 April 2013].

¹⁶ Judgment, Questions Concerning the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment (Jul. 20, 2012)], available at <http://www.icj-cij.org/docket/files/144/17064.pdf>.

alleged that “all states parties to the CAT have an obligation to prevent and punish torture,” and that Senegal must either prosecute Habré or extradite him for trial in another signatory state capable of prosecuting.¹⁷

The ICJ agreed with Belgium’s position, confirming that under Article 7 of the CAT, states with jurisdiction over the area that an accused violator of the treaty is located in have a duty to prosecute. This applies whether the accused is a national, foreigner, or where the alleged crimes took place.¹⁸ Though in *Belgium v. Senegal* the Belgian government sought only to force Senegal to act in compliance with CAT Article 7’s requirement to prosecute, it can easily be inferred from this case that prosecuting acts of torture is in fact an obligation on all signatories and an international norm to be followed, perhaps even calling for universal jurisdiction when these rights are violated. The norms of diplomatic immunity and freedom from torture can thus fall into conflict and be balanced under the peremptory norms hierarchy.

The peremptory norms balancing approach receives a fair bit of criticism. Firstly, its detractors argue that this point of view is overly simplistic for what in reality is a difficult judgment, and its proponents ignore more difficult scenarios. In the case of the CIA kidnapping of Abu Omar, the situation could be narrowed to the question of whether one should be able to avoid penalties for causing another to be tortured. The truth is that there are many other considerations to be made in weighing the agents’ actions. The agents believed that they were justified in acting by self-defense motives. There was fear that Omar was a terrorist working against the United States, and the hope in capturing him was that Omar would be able to provide

¹⁷ Cindy Galway Buys, *Belgium v. Senegal: The International Court of Justice Affirms the Obligation to Prosecute or Extradite Hissène Habré Under the Convention Against Torture*, 16 AM.J.INT’L L. 29 (2012).

¹⁸ Judgment, *supra* note 16, ¶68.

information during interrogation that may prevent future harm. There have also been allegations that the Italian government was complicit in the kidnapping.

This balancing test does not address how the factors mentioned above, only a few of the ones involved, affect the ultimate outcome. There is no guidance as to whether only the main substantive rights involved may be considered or whether minor factors, such as the intent for self-defense, may come into play. A decision could potentially depend upon a series of aggravating or mitigating factors, at which point this balancing test can hardly be distinguished from the subjective test for implicit waiver. The normative hierarchy works in simple situations, but does not adequately address more complicated scenarios presenting a variety of factors such as Omar's CIA abduction.

Another problem in attempting to use the peremptory norms approach comes in trying to determine which international norms are peremptory. This question seems clear in certain cases, such as those involving genocide, torture, and slavery, but so far no courts have attempted to work out which other norms may be peremptory. There exist many rights in the world today, but there is no definitive list of which ones rise to the level of peremptory. Should the normative hierarchy approach gain favor in the future, courts would need to determine which norms have achieved peremptory status, most likely resulting in even more confusing and difficult to apply balancing tests.

In his critique of the normative hierarchy theory, Lee M. Caplan not only ponders how courts would handle a question that has frustrated scholars but also wonders what courts would do in a case involving peremptory norms that are not also considered basic human rights.¹⁹ There

¹⁹ Lee M. Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM.J.INT'L L. 741, 772 (2003).

exists a valid question of whether peremptory norms not based in human rights would have any effect in a legal argument, and if so, just what effect in the case they would have. This is an important question that has not at all been addressed.

Some international courts, including the European Court of Human Rights (ECHR), have also displayed hostility towards the idea of a peremptory norms hierarchy. That court addressed this idea in the case of *Al-Adsani v. The United Kingdom*. Mr. Al-Adsani was the victim of vicious torture after publicly embarrassing a Kuwaiti Sheik.²⁰ When the Britain refused to serve a writ on the Kuwaiti government for civil damages on sovereign immunity grounds, Al-Adsani appealed to the ECHR claiming that his right not to be tortured had been violated. The Court, in a close 9-8 opinion, rejected Al-Adsani's claim. The majority opinion notes that whether one has an actionable claim is subject to procedural bars and other limits to the ability to bring a case. The majority went on to say that

“The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.”²¹

As of the *Al-Adsani* decision, the idea of flatly removing certain rights from alleged violators of international norms based on a hierarchy structure was very new, and the Court here displayed hesitancy to do so in the face of a traditional and well-established immunity defense, especially where only civil and not criminal penalties were called for.

Some criticisms applicable to the implied waiver theory work in the context of normative hierarchy theories, too. For example, affirming the rights of third party states to remove

²⁰ Al-Adsani came in possession of personal sexual videotapes while acting as a freedom fighter in the region. He was later kidnapped and tortured before escaping to the United Kingdom.

²¹ *Al-Adsani v. The United Kingdom*, 35763/97, Council of Europe: European Court of Human Rights, 21 November 2001, ¶66, available at: <http://www.refworld.org/docid/3fe6c7b54.html> [accessed 7 April 2013]

diplomatic immunity and prosecute individuals in absentia denies the right of prosecution from the nation that those individuals are residing in. An example of this problem could be seen in *Belgium v. Senegal*. While Belgium very much wanted to prosecute Habré for his crimes, the primary right and obligation under the Convention Against Torture laid with Senegal, where Habré was residing. While all nations have a strong, natural interest in prosecuting acts of torture, opening up the possibility of universal jurisdiction to prosecute via normative hierarchies could act to deny a nation of that right. Poorer nations with fewer resources to prosecute may still have that strong interest, and the current system affirmed in *Bel. v. Sen.* prevents richer nations from pressuring them to immediately turn over alleged violators. That does not mean that violators can hide out in these nations forever though. In Habré's case, the Court held that Senegal ultimately delayed prosecution and opined that it should either prosecute or extradite him in the near future.

The foregoing arguments and critiques place the peremptory norms balancing approach in a tumultuous place. Historically, cases such as *Al-Adsani* suggest that this approach to removing immunity is not favorable. However, more recent ones, including *Belgium v. Senegal*, seem to indicate increasing acceptance of the idea that denial of the right to freedom from torture must be prosecuted by members of the international community. In the future, normative hierarchy theories justifying universal jurisdiction may continue to gain acceptance, but for now courts still waiver on whether or not to accept them. A solution to the problem of how to remove immunity that is based in written law may be more helpful than a young theory that still needs to be expanded upon more by courts. To that end we look to the core of international diplomacy and law.

The Convention Against Torture and the Vienna Convention on Diplomatic Relations

Adopted in 1961, the Vienna Convention on Diplomatic Relations outlines the ways in which diplomats are to interact with their host countries and vice versa. It sets out the basic law of diplomatic immunity to both civil and criminal suit, how to deal with foreign ambassadors, and even how to properly declare one persona non grata. For over fifty years the VCDR and its protocols have regulated diplomatic relations among signatory countries. As an international treaty, signatories can be held accountable in court for violation of its provisions. In regards to the CIA abduction of Abu Omar and claims of diplomatic immunity, the VCDR may also provide a concrete argument for denying the agents' claimed defense.

Under Article 3 of the VCDR, the drafters attempted to define "diplomatic mission" for purposes of the treaty. That Article states in part

1. The functions of a diplomatic mission consist inter alia in:

...(b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law.²²

By its clear language, Article 3 implies that furthering a State's interest by means not permitted by international law cannot be considered a valid diplomatic mission. This raises the questions of whether one may qualify as a diplomat with the benefit of immunity when engaged in international crimes.

At this point it is helpful to look at Article 1 of the VCDR, which includes a few definitions for the purpose of understanding and interpreting the treaty as necessary. There, a diplomatic agent is defined as "the head of the mission or a member of the diplomatic staff of the mission"²³ Thus, anyone other than those involved in a valid diplomatic mission within the meaning of Article 3 does not qualify as a diplomatic agent and is not entitled to all of the

²² Supra, note 7, art. 3(1)(b)

²³ Vienna Convention on Diplomatic Relations, art. 1(e), 500 UNTS 95; 23 UST 3227; 55 AJIL 1064 (1961).

associated privileges. This poses two major questions regarding the CIA abduction: 1. Did the agents commit an international crime that would cause their actions to not be considered part of a valid diplomatic mission? 2. Could the agents still be immunized from prosecution by some other legal means?

Was an international crime committed by the CIA in abducting Abu Omar?

In asking whether an international crime occurred in abducting Abu Omar, one must turn to the traditional sources of international law. These sources include customary international law, such as laws against piracy, and international treaties. The current extradition treaty between the United States and Italy states that “An offense, however denominated, shall be an extraditable offense only if it is punishable under the laws of both Contracting Parties by deprivation of liberty for a period of more than one year or by a more severe penalty.”²⁴ As such, any felony offense in the United States that is similarly punishable in Italy qualifies as an international crime between the two countries. The crime of kidnapping is among those, although one might argue that the abduction of Omar does not qualify as kidnapping by the United States’ standards. The CIA was acting to capture a suspected terrorist for interrogation, and so there would be no violation of U.S. law. If Italian authorities in fact aided in Omar’s rendition there may not be a violation of Italian law either.

If the extradition treaty between Italy and the United States is unhelpful in defining abductions as an international crime, then customary international law is even less helpful to that end. While abduction is certainly a violation of human rights, it has rarely been considered an

²⁴ Extraditions Treaty with Italy, art. 2, Oct. 13, 1983, 1983 U.S.T. LEXIS 421.

international crime except in specific circumstances.²⁵ Those circumstances typically include abduction for the purposes of slavery, abduction amount to a war crime, or a crime against humanity. The rendition of an individual, in this case Abu Omar, is unlikely to reach the necessary level to be considered an international crime under customary law.

There is another argument that an international crime occurred which does not depend upon matching similar crimes together or looking to customs. That argument looks back to the Convention Against Torture. CAT Article 3 states that “No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²⁶ This means that a state cannot, under the CAT, force an individual to go to a nation that there is a reasonable belief he or she will be tortured in. The drafters of the CAT believed it important that not only they protect individuals from direct persecution, but also prevent nations from simply outsourcing torture to other countries.

Recall that after his initial abduction in Milan, Abu Omar was flown to Germany, and from there transported to Egypt. Omar had been living in Milan, Italy on political asylum from Egypt since 2001. Egypt believed him to be a member of the rebellious al-Gama'a al-Islamiyya organization. Because of this, Omar arguably faced the threat of torture simply by being sent back to Egypt. Even more important is the agents intent when they took Omar. If the intent was to bring Omar to Egypt for the purpose of interrogating him by torturous methods, then the question of whether there were substantial grounds for believing Omar would be tortured is

²⁵ Dapo Akande, The Conviction by an Italian Court of CIA Agents for Abduction – Some Issues Concerning Immunity, EJIL: Talk! (Nov. 7, 2009), <http://www.ejiltalk.org/the-conviction-by-an-italian-court-of-cia-agents-for-abduction-some-issues-concerning-immunity/>.

²⁶ Supra, note 15, art. 3.

answered affirmatively, and the agents violated the CAT's prohibition of refouler, an international crime.

The traditional use of CAT Article 3 has been to protect migrants to new countries from being deported back to states where they fear political reprisals. There has been a great deal of litigation and formulation of legal tests around this use. Both the traditional use and language of Article 3 regarding State Parties would seem to limit its application to holding the state that an individual is sent from responsible. One could argue that Italy was responsible for Abu Omar's rendition to Germany, where he had no fear of torture, but sending him to Egypt, where there was a well-founded fear, was the fault of the German government. This argument places the blame for Omar's refolement on a third party and absolves the CIA agents of responsibility. However, this theory ignores the intent of Article 3 and is little more than a smoke-and-mirrors cover for the actions of the United States and its agents.

Regardless of whether or not Italy was implicit in Abu Omar's rendition, the ultimate fact is that Omar was transported to Aviano air-force base, before being flown to Germany by agents of the United States.²⁷ In Germany he was held in secret such that not even the German government was aware of his temporary presence in the country.²⁸ From there, U.S. agents again moved Omar, this time to Egypt. To claim that the German government was responsible for this is simply a fallacy. Article 3's reference to "State Parties" should not be interpreted so strictly as to only apply to the nation that an individual is refoled from. In the abduction case, Omar was very clearly refoled through the actions of the United States only, with Germany only being involved as an innocent third party taken advantage of for that purpose. The United States should

²⁷ Italy Pardons U.S. Air Force Officer in CIA Case, USA Today (April 5, 2013, 5:21 PM), <http://www.usatoday.com/story/news/world/2013/04/05/italy-pardon-air-force-cia/2057679/>.

²⁸ Zagaris, U.S. Encounters Difficulties.

have to pay the price for refolement, and its agents held responsible for intentionally committing an international crime under the Convention Against Torture.

Could the agents still be protected from prosecution?

While there seems to be little doubt that an international crime took place when Mr. Omar was kidnapped, the agents involved may still be protected by other international agreements. In particular, Italy and the United States hold a Status of Forces Agreement through NATO, creating a number of treaty obligations to be followed. A SOFA instructs courts as to how the domestic laws of a receiving state may apply to foreign military personnel. Such agreements have a long history, and generally hold that the laws of a sending state follow its military. Receiving states generally do not have jurisdiction to act against foreign military personnel, even in criminal cases. As was discussed earlier, these agreements bring form to the idea that it is primarily a sending country's right to punish its own citizens under certain circumstances. Military members are often punished for their actions abroad in courts martial or are returned home to face other charges. The extent of this waiver is unclear, but we will now discuss the SOFA's history and theories under which it could or could not apply to rendition.

One tragic case that became an international incident can shed some light on how Italy and the United States interpret this agreement. In 1998, a Marine aircraft flying over Italy severed the cables holding a gondola, killing twenty passengers inside. Italian prosecutors immediately began a prosecution of the Marines at fault, but met stiff resistance from the United States, which claimed that under the SOFA it alone had jurisdiction to try the Marines in a military court. SOFA Article VII confirms that concurrent jurisdiction exists under the agreement, though the sending state retains jurisdiction for "offences arising out of any act or

omission done in the performance of official duty.”²⁹ Thus, the argument became whether the Marines were acting in the course of their official duties when the accident occurred. In drafting the agreement, Italy had requested a more precise definition of official duties, but the wording was eventually left vague anyway. Italy has never officially ceded its position that official duties should pertain only to orders given by officers. Meanwhile, the vague definition in the Status of Forces agreement has enabled the U.S. to take any position that it chooses.³⁰

The CIA agents who abducted Abu Omar may wish to take the position that they were simply military personnel acting within the scope of legal duties at the time. Thus, though jurisdiction is considered concurrent under the Status of Forces Agreement, the United States would retain primary jurisdiction over their case and would most likely choose not to press criminal charges. In the gondola incident, Italy eventually permitted the United States as a sending state to determine whether the flight crew was acting pursuant to official order. If history is on the CIA agents’ side, it will do the same again. However, Italian prosecutors have occasionally been upset by this waiver of jurisdiction, and may petition the government not to cede jurisdiction if they feel particularly strongly about the case. This could lead to tension, creating political upheaval and unpredictable legal results.

If the agents wished to claim that they were acting on legal duties, the United States would be hard pressed to make such an argument. If successful, that argument would allow a state to justify its agents’ actions in violation of international law on the grounds that they were

²⁹ Agreement, with Appendix, between the United States of America and Other Governments 1953 WL 44517, 4.

³⁰ Kimberly C. Priest-Hamilton, *Who Really Should Have Exercised Jurisdiction over the Military Pilots Implicated in the 1998 Italy Gondola Accident?*, 65 *J. Air L. & Com.* 605, 623-24 (2000). Chris Jenks & Eric Talbot Jensen, *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*, 1 *Harv. Nat'l Sec. J.* 171, 182 (2010).

simply “following orders.”³¹ This is not an acceptable defense in the modern age. It would be strange indeed if modern international law stemmed from the Nuremberg trials where this exact defense was found inexcusable, yet sixty years later it were considered acceptable. Chris Jenks and Eric Jensen attempt to justify this position by stating that “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.”³² However, this argument is fatally flawed in that the authors assume any order given is a lawful order. If this were the case, then international law would be ineffective except where military officers acted entirely independent of their superiors. There could be no accountability for actors who commit war crimes committed under an official order, which is certainly an untenable position.

There is a final, rather large hole to note in the argument that the CIA agents would be protected from Italian prosecution by the NATO SOFA. The agreement only refers to military personnel in the receiving state. In order for the agreement to apply, one must be able to characterize the CIA agents as such. It is possible to argue that the agents were acting in a military-like function, capturing a potential enemy for the safety and security of their country, but U.S. law, as well as the NATO SOFA, itself limit the definition of military personnel such that it cannot include the agents. Under the United States Code, “[t]he term ‘armed forces’ means the Army, Navy, Air Force, Marine Corps, and Coast Guard.”³³ Members of the CIA do not qualify. Meanwhile, Note 35 to Article I of the Status of Forces Agreement defines military personnel as belonging to the land, sea, or air armed services of a nation. This traditional

³¹ Chris Jenks & Eric Talbot Jensen, 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, 1 Harv. Nat'l Sec. J. 171, 186 (2010).

³² Id.

³³ 10 U.S.C.A. § 101 (West).

definition cannot be applied to the agents. The CIA agents do not qualify for protection under the NATO Status of Forces Agreement.

Using the foregoing information, one can see that the abducting agents who have declared diplomatic immunity are plainly liable for their actions in Milan. Under the Convention Against Torture, the agents committed refolement by sending Omar to Egypt, where it was certain that he would be a victim of torture whether it was at the hands of the CIA or government agents in his own country. Such a crime removes the agents' claim of diplomatic immunity under the Vienna Convention on Diplomatic Relations, as the commission of an international crime cannot be considered part of a diplomatic mission by VCDR Article Three and one must be on a diplomatic mission to be defined as a diplomat under that treaty. Finally, the agents cannot be protected by the Status of Forces Agreement between Italy and the United States. The agents do not qualify as military personnel and modern international law does not recognize a "following orders" defense. The defense of diplomatic immunity for the abduction of Abu Omar necessarily fails so long as intentional refolement is considered a violation of international law.

Conclusion

The world of international law is a complicated one, and even more so when political beliefs and values are weighed against the laws and principles that people have designed for their selves. There is little doubt that the United States, in giving CIA agents Madero, Russomando, and Castelli their missions meant to safeguard itself from future attack and the horrors of September 11, 2001. This is an extremely relatable position, but the method chosen came with a complete disregard for the rules of international law that have been so carefully crafted over decades of work and debate. Those lessons cannot be discarded out of fear and justifying by self-

protection. The rules of international law apply to all people and in all situations. The challenge is to find a way to protect the future without erasing the past.

As has been shown, the CIA's actions in the abduction of Abu Omar are incompatible with case law and cannot be defended by hiding behind the shield of immunity. While the United States will likely refuse any request to extradite the accused agents to Italy, understanding how international law can adapt to new situations is an important scholastic exercise that may become relevant at some future date. In reacting to the war on terror and its international scope, courts will need to process theories such as implied waiver of right and potential preemptory norms hierarchies. These concepts may help to spur new ideas and new legislation worldwide to help the nations of the world cope with the realities of terrorism in a fashion that does not trample upon the rights and obligations that it has already established.

Alternatively, courts may instead choose to rely upon written law in the form of the Convention Against Torture and other international treaties. Such laws will need to be expanded upon to overcome new defenses and situations, but courts are capable of doing so. The law cannot be so narrowly read that it is incapable of reacting to changed circumstances. Courts must apply not only their knowledge of the law as it has been decided, but understand the spirit of those laws and be wary of the environment that they were created in. It defies rational thought to believe that sixty years after Nuremberg a defense of following orders would be permitted to stand in the face of serious violations of international law and human rights. Time will tell whether such issues can be successfully resolved by state actors out of court, or whether states will turn to international law to answer the pressing question of how to appropriately handle changing global circumstances.