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INTERNATIONAL LEGAL STANDARDS APPLICABLE TO ITALY REGARDING THE RIGHT TO A FAIR TRIAL

This report concerns the international legal standards for a fair trial by an impartial tribunal by which Italy is bound, related remedies for aggrieved persons, and contact information.

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**INTERNATIONAL LEGAL STANDARDS APPLICABLE TO ITALY REGARDING
THE RIGHT TO A FAIR TRIAL**

Executive Summary

The international legal standards for a fair trial by an impartial tribunal by which Italy is bound are contained in the European Convention on Human Rights and Fundamental Freedoms and its Protocol 7 and the International Covenant on Civil and Political Rights (ICCPR). An aggrieved person who claims that his/her rights to a fair trial have been violated by Italy has the right to bring legal action against Italy either at the European Court of Human Rights (ECHR), or to forward a communication to the Human Rights Committee (HRC), established by the Optional Protocol to the ICCPR. Italy has ratified the Optional Protocol with the reservation which precludes the Human Rights Committee from examining cases that have been the subject of previous international investigation; therefore an aggrieved individual has to select either the ECHR or the HRC. The report also contains information on persons to contact with the Council of Europe, or the European Union for the purpose of addressing human rights concerns.

I. Questions Presented

This report responds to three issues concerning the conduct of criminal trials in Italy, presented as follows:

- (a) The legal standards for a fair trial by an impartial tribunal by which Italy is bound based on international agreements;
- (b) The legal remedies available to a convicted individual; and,
- (c) Appropriate persons to contact in the Council of Europe and the European Union to address concerns pertaining to the manner in which the trial of a U.S. national has been conducted in Italy.

The report seeks to provide an objective discussion of the issues without reference to any particular set of facts.

II. Background

In a criminal trial, Italian judicial and investigative authorities are primarily bound by the national rules and principles enshrined in the Italian Constitution, and codes of criminal law and

criminal procedure.* As a general rule, by becoming a member of the European Union,¹ the Council of Europe,² and the Organization of Security and Cooperation in Europe (OSCE),³ Italy has committed itself to adhering to and respecting the human rights and freedoms of individuals within its jurisdiction. In addition, Italy is bound by bilateral and international agreements that it has signed and ratified and which regulate various aspects of criminal trials. Where the accused is a U.S. national, Italy has an additional legal duty to follow the rights and obligations spelled out in the Mutual Assistance Treaty signed with the United States on November 9, 1982, which entered into force on November 13, 1985.⁴ A 2003 agreement between the European Union and the United States on extradition and legal assistance in the context of criminal investigations supplements the bilateral agreement.

At the outset of criminal investigations, under Article 36(b) of the Vienna Convention on Consular Relations,⁵ Italy's primary responsibility is to notify promptly the consular authorities of the United States when a U.S. national is arrested or committed to prison or custody pending trial, and also to inform the person concerned of his or her rights to consular notification. U.S. consular authorities have the right to visit the national in prison and to communicate with and assist him or her with legal representation, provided that such rights are exercised in accordance with Italian law.

III. Right to a Fair and Impartial Tribunal

The fundamental right of an accused person to have a fair trial is a well established principle of national and international law enshrined in two notable international legal instruments, signed and ratified by Italy: (a) the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereafter the Convention for Human Rights)

* A separate report on applicable Italian law is also provided.

¹ Article 6 of the Lisbon Treaty, which entered into force on December 1, 2009, recognizes the rights, freedoms and principles enshrined in the 2000 Charter of Fundamental Rights of the European Union and grants it the same legal force as the Treaties amended by the Lisbon Treaty. The same Article also proclaims that the fundamental rights as guaranteed by the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms constitute general principles of the Union's law and requires that the Union accede to the European Convention. See Lisbon Treaty art. 6, Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union –Protocols, Annexes –Declarations Annexed to the Final Act of the Intergovernmental Conference, which adopted the Treaty of Lisbon, 2008 O.J. (C 115), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML> (last visited Dec. 29, 2009).

² Italy ratified the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe on October 25, 1966.

³ See The Copenhagen document of 1990, Part II, Specific Human Dimension Commitments, in OSCE OFFICE OF DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (ODIHR), OSCE HUMAN DIMENSION COMMITMENTS VOL. I: THEMATIC COMPILATION at 71 (2d ed. 2005), available at <http://www.osce.org/item/16237.html> (last visited Dec. 29, 2009).

⁴ U.S.-Italy Mutual Assistance Treaty, 98th Cong. 2d Sess., Ex. 98-25, Exec. Rpt. 98-36; 24 I.L.M. 1539, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003D0516:EN:NOT>. The Treaty will enter into force on February 1, 2010.

⁵ United Nations, Vienna Convention on Consular Relations, Apr. 24, 1963, available at <http://www.unhcr.org/refworld/docid/3ae6b3648.html> (last visited Dec. 18, 2009).

and Articles 2 , 3, and 4 of Protocol No. 7 to the Convention for Human Rights;⁶ and (b) the International Covenant on Civil and Political Rights (hereafter ICCPR)⁷ and its Optional Protocol.⁸ Italy signed the European Convention on Human Rights on November 4, 1950, and ratified it on October 26, 1955.⁹ Italy signed the ICCPR on January 18, 1967, and ratified it on September 15, 1978. Consequently, Italy is legally required to adhere to the fundamental rights of an accused as enshrined in Article 14 of the ICCPR. Italy signed the Optional Protocol to the ICCPR on April 30, 1976, and ratified it on September 15, 1978.¹⁰ As a State party to the Optional Protocol, Italy has recognized the competence of the Human Rights Committee to consider communications from individuals who have alleged violations of human rights by the State party.

Article 6 of the European Convention on Human Rights embodies the right to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹¹ Furthermore, the same paragraph of Article 6 permits the national authorities to exclude the press and the public from all or part of a trial for reasons of public order, morals, or other concerns, such as to protect the private life of the person accused or when publicity would prejudice the interests of justice.

The basic principle of presumption of innocence is also cited in Article 6 of the European Convention on Human Rights, as well as certain minimum guarantees, which in their totality encompass the right to a fair hearing. These are enumerated in Article 6, and include the following minimum rights:

- (a) to be informed promptly and in a language that the person understands regarding the charges;
- (b) to have adequate time to prepare for his defense and to communicate with a counsel of his choice;
- (c) to defend himself in person or through legal representation and to be given free legal assistance if destitute;

⁶ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), E.T.S. No. 4, *entered into force* Sept. 9, 1953, *available at* <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=14/12/2009&CL=ENG>.

⁷ ICCPR, 999 U.N.T.S. 171, *opened for signature* Dec. 16, 1966, *entered into force* Mar. 23, 1976, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

⁸ Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 302, *opened for signature* Dec. 16, 1966, *entered into force* Mar. 23, 1976, *available at* <http://www2.ohchr.org/english/law/ccpr-one.htm> (last visited Dec. 18, 2009).

⁹ For a list of signatures and ratifications by parties to the Convention, *see* <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=14/12/2009&CL=ENG> (last visited Dec. 18, 2009).

¹⁰ *See* signatures and ratifications list, *available at* <http://www2.ohchr.org/english/law/ccpr-one.htm> (click on “status of ratifications”) (last visited Dec. 18, 2009).

¹¹ Convention for Human Rights art. 6, *as amended* by subsequent Protocols.

- (d) to examine witnesses against him and on his behalf under equal terms; and,
- (e) to have free assistance of an interpreter if the accused does not understand the language of the court.

In addition, Italy, as a party to Protocol No. 7 to the 1950 European Convention on Human Rights,¹² is required to provide to the accused the right of appeal in criminal matters, compensation for wrongful conviction, and the right not to be tried or punished twice.¹³

Article 14 of the ICCPR contains similar language to that used in Article 6 of the European Convention on Human Rights regarding the right to a fair trial by an impartial tribunal. In addition, the right to a fair trial has been the subject of an in-depth interpretation by the Human Rights Committee, which appears in the form of a General Comment No. 32, *Right to Equality Before the Courts and Right to a Fair Trial*.¹⁴ The Human Rights Committee was established under the ICCPR to consider alleged violations of human rights by States parties to the Optional Protocol.

IV. International Legal Remedies Available for Aggrieved Persons

Before an individual convicted of a crime may resort to legal remedies available at the international level, he must fulfill the very basic principle of exhaustion of domestic remedies in order to give an opportunity to the state involved to remedy a wrong through the appeal process. Otherwise, the case will not be admissible before an international/regional tribunal. The avenues for redress at the international level after exhaustion of domestic remedies are discussed below.

A. Council of Europe: European Court of Human Rights

An aggrieved individual may file an application with the European Court of Human Rights (hereafter the ECHR) located in Strasbourg, France, on the ground that his or her rights under Article 6 of the European Convention on Human Rights have been violated. The ECHR has produced a substantial body of case law dealing with violations of Article 6 of the Convention. In the vast majority of these cases, the ECHR ruled in favor of applicants on grounds that their fundamental right to a fair trial by an impartial tribunal was violated in domestic judicial criminal proceedings. In a small number of cases, the ECHR did rule in favor of respondent states and held that the applicant's rights were not infringed upon under Article 6 of the Convention. For example, in the case of *Perna v. Italy* the Court found no violation of

¹² Protocol No. 7, E.T.S. 117, entered into force Nov. 1, 1988.

¹³ *Id.* The above rights are included in Protocol 7, arts. 2-4.

¹⁴ Human Rights Committee—General Comments, Comment No. 32, Right to Equality Before Courts and Tribunals and to a Fair Trial, available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm> (last visited Dec. 29, 2009).

Article 6(1) and 6(3) (d) for not calling a witness whose testimony consisted of a denial of the charges against the applicant.¹⁵

This memorandum is limited to highlighting three illustrative cases before the ECHR. The first two deal with the issue of the defendant being denied access to witnesses. In the third case, the ECHR examined the issue of impartiality of the jury. The European Convention on Human Rights does not require trial by jury. When a country employs the jury system, however, the ECHR subjects the jury to the same high standards of impartiality and independence required for tribunals.

In the case of *A.M. v. Italy*,¹⁶ decided in 2000, the applicant complained that during the criminal proceedings against him for sexual assault and gross indecency, he was treated unfairly as a defendant and deprived of the opportunity to examine witnesses, in violation of Article 6, paragraphs 1 and 3(d) of the Convention. The ECHR stated that the admissibility of evidence is primarily a matter governed by national law and that the domestic courts are free to assess the evidence before them.¹⁷ It further clarified that it is the court's function not to decide whether statements made by witnesses were properly admitted as evidence, but "rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken were fair." Furthermore, the ECHR noted that in the case under consideration, the Italian courts relied only on a witness' statements from a deposition in the United States before trial and that the applicant was denied an opportunity to confront his accusers. The ECHR held that Article 6, paragraphs 1 and 3(d) of the Convention for Human Rights had been violated and ordered Italy to pay the applicant 50,000,000 Italian lire as damages and 4,837,900 lire for costs and expenses.

In the case of *Luca v. Italy*,¹⁸ decided in 2001, the ECHR also examined whether the applicant's rights under Article 6, paragraphs 1 and 3 of the Convention were violated. The applicant complained that he was convicted on the basis of statements made before the public prosecutor, without having been given an opportunity to examine the witness who made those statements. The Italian government argued that the Italian legal system afforded the right to examine prosecution witness, but that in certain circumstances, the trial court was allowed to reach its decision based on evidence obtained during the preliminary investigation. The government also contended that the person who made the statement was not a witness but a "person accused in connected proceedings,"—i.e., a codefendant—who was entitled to remain silent. The Court stated that it had already recognized one's right to remain silent, and the right not to incriminate oneself is generally recognized by international standards. The Court,

¹⁵ Case of Perna v. Italy, Application no. 48898/1999 (May 6, 2003) (ECHR), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Perna%20%7C%20v.%20%7C%20Italy&sessionId=41761542&skin=hudoc-en> (last visited Dec. 30, 2009).

¹⁶ Case of A.M. v. Italy, Application no. 37019/97 (final Mar. 15, 2000) (ECHR), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=A.M.%20%7C%20v.%20%7C%20Italy&sessionId=41741521&skin=hudoc-en> (last visited Dec. 29, 2009).

¹⁷ See *id.* para. 24.

¹⁸ Case of Luca v. Italy, Application no. 33354/96 (final May 27, 2001) (ECHR), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Luca%20%7C%20v.%20%7C%20Italy&sessionId=41741521&skin=hudoc-en> (last visited Dec. 29, 2009).

however, dismissed the argument that the statements were made by a codefendant rather than a witness. The ECHR reiterated that the term “witness” had an “autonomous” meaning within the framework of the Convention; it held that when a deposition serves as the basis of a conviction, irrespective of whether it comes from a codefendant or a witness in the strict sense of the word, it “constitutes evidence for the prosecution to which the guarantees provided by Article 6, paragraphs 1 and 3(d) of the Convention apply.” The ECHR concluded that the applicant was denied a fair trial because neither he nor his lawyer was given an opportunity at any stage of the proceedings to challenge the statements made.¹⁹

In the case of *Sander v. United Kingdom*,²⁰ decided in 2000, the applicant complained before the ECHR that his case before the Birmingham Crown Court had not been heard by an impartial tribunal, because the jury was racially prejudiced. In the *Sander* case, a member of the jury forwarded a note to the judge alleging that the other jurors had made racially laced remarks and jokes, and that he felt that the jury would convict the defendants based not on evidence but on their Asian background. Subsequently, the entire jury wrote a letter stating that all allegations about a prejudiced jury were unfounded. The applicant thought that there was a subjective bias from some jurors. The ECHR applied the principle established by its case law that impartiality is subject to a two-prong test: (a) under the subjective test, the tribunal must be free of any personal bias or prejudice. The ECHR stated that personal impartiality is to be presumed unless proven to the contrary; and (b) under the objective test, the tribunal “must offer sufficient guarantees to exclude any legitimate doubts.”

Applying these tests, the ECHR found in *Sander* that at least one juror had made racist comments, but concluded that this fact in itself did not amount to evidence that the juror was biased. Consequently, the ECHR held that the applicant did not establish that the jury lacked impartiality based on the subjective test. The ECHR then proceeded to examine whether the court that tried the applicant was impartial from the objective point of view. The British government argued that guarantees establishing impartiality existed based on the fact that the trial judge had admonished the jury against being racially prejudiced and the fact that the jury had assured him of its impartiality. The ECHR, however, did not give any particular weight to the trial judge’s admonition and the assurances given by the jury, noting that such actions were not sufficient to ensure impartiality of the jury. The ECHR also noted that under the law of the United Kingdom, the judge was not authorized to ask the jury about the allegations contained in the letter. The ECHR concluded that allegations stated in the juror’s note were sufficient to create in the mind of the applicant and any other objective person “legitimate doubts as to the impartiality of the court,” and that the judge did not take strong measures to ensure impartiality of the jury, including discharging it. It therefore found that the trial court was not impartial from the objective point of view and that there had been a violation of Article 6, paragraph 1 of the Convention.

B. European Union: Court of Justice of the EU

¹⁹ *Id.* para. 45.

²⁰ Case of *Sander v. United Kingdom*, Application no. 34129/96 (final Aug. 9, 2009) (ECHR), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Sander%20%7C%20v.%20%7C%20United%20%7C%20Kingdom&sessionid=41741521&skin=hudoc-en> (last visited Dec. 29, 2009).

In a number of decisions and within the context of ensuring the correct interpretation and implementation of European Union law, the European Court of Justice of the EU has dealt with questions involving human rights. In such cases, the Court of Justice has referred to the European Convention on Human Rights and to decisions adopted by the ECHR. National courts in the exercise of the right to ask for a preliminary ruling based on Article 234 of the EC Treaty,²¹ may also request the European Court of Justice to give a ruling on issues regarding the validity and interpretation of the Treaty and acts of EU institutions which may also have a bearing on issues involving human rights. However, the legal standing *per se* of an individual before the Court is restricted, based on Article 230 of the EC Treaty.²² An individual may institute legal proceedings against a decision issued by institutions, bodies or agencies of the EU, provided that the decision, in the form of a regulation or a decision addressed to another person, is of “direct and individual concern.”²³

After the Lisbon Treaty entered into force on December 1, 2009, the criterion of “direct and individual concern” of an act addressed to an individual remains. However, the legal standing of an individual before the Court is less restricted where a legal action against a regulatory act of “direct concern” is instituted. In the absence of such a regulatory act, an individual has no legal standing to initiate legal proceedings before the Court.

The Lisbon Treaty rendered legally binding the Charter of Fundamental Rights of the European Union, which contains similar rights to the European Convention on Human Rights. However, it applies mainly to acts of the EU institutions and bodies; it also applies to the acts of the Member States, but only when they implement Union law.²⁴ Future accession by the EU to the ECHR, as required by the Lisbon Treaty, will subject the EU and its institutions to potential responsibility before the ECHR for human rights violations. Thus, following accession, an individual may be able to bring an action against the Union for an act undertaken by the Union that is of “direct concern” to the individual, and possibly against the Member States for acts undertaken when implementing European Union law. Again, the principle of exhaustion of domestic remedies would apply. In the context of the EU, domestic remedies would include an action before the Court of Justice of the EU before an applicant reaches the ECHR.

Based on this brief review of judicial recourse for an individual before the Court of Justice of the EU, an appropriate course of action for an individual whose right to a fair trial may have been infringed by actions of an EU Member would be to file an application with the ECHR, rather than with the Court of Justice of the EU.

C. United Nations: Human Rights Committee

²¹ See new Article 267 of the Lisbon Treaty, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML>.

²² See new Article 263 of the Lisbon Treaty, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML>.

²³ Art. 230 of the EC Treaty, as amended by the Lisbon Treaty, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML>.

²⁴ Charter of Fundamental Rights art. 51.

As stated above, under the Optional Protocol of the ICCPR, Italy recognized the competence of the Human Rights Committee established by Article 28 of the ICCPR to receive communications from individuals who claim to have been victims of violations of any rights established under the ICCPR by a State party.²⁵ Italy, among several other countries, made a reservation that precludes the Committee from considering communications from individuals who have sought adjudication of the same issue before another international court.²⁶ The Human Rights Committee found, in Communication No. 121/1982,²⁷ that such a reservation renders an application that was previously the subject of an international investigation inadmissible before the Committee.

The procedure for accepting and considering communications submitted by individuals under the Optional Protocol is contained in Chapter XVII of the Rules of Procedure of the Human Rights Committee.²⁸ The Secretary General of the United Nations is responsible for forwarding the communications to the Human Rights Committee and is authorized to request that the author of a communication provide any necessary additional information to substantiate his case.

D. Serving the Sentence in the United States

If not acquitted after exercising the right to appeal under Italian law, a U.S. national convicted of a crime in Italy has the right to request to serve the remainder of his or her sentence in the United States. Pursuant to Article 2 of the Council of Europe Convention on the Transfer of Sentenced Persons,²⁹ the request may be submitted either to the sentencing state or to the administering state (the United States). The United States, as a party to the Convention, to which Italy is also a party,³⁰ may then request the transfer of the prisoner to the United States, provided that Italy agrees to it and the procedural aspects of the Convention are respected.

²⁵ The procedure for submitting communications to the Human Rights Committee is regulated by the Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms, ECOSOC Resolution 1503 (XLVII) of May 27, 1970. U.N. ECOSOC Off. Rec., 48th Sess., Supp. 1A 8.

²⁶ See reservation made by Italy, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en#EndDec (last visited Dec. 18, 2009).

²⁷ In Communication No. 121.1982, the author alleged violation by Denmark of Articles 5, 7 and 10 of the Universal Declaration of Human Rights, which correspond to Articles 7, 14 and 26 of the International Covenant of Civil and Political Rights. The author had submitted the same complaint to the European Commission of Human Rights, which subsequently declared the complaint inadmissible as manifestly ill-founded. The Committee held that in light of the reservation made by Denmark, which precludes the Committee from considering communications if the same subject matter has been under investigation by an international body, the communication was inadmissible.

²⁸ Rules of Procedure of the Human Rights Committee, CCPR/C/3/Rev.8, Sept. 22, 2005, available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/5f55247f58c6a129c125709300479adb/\\$FILE/G0544089.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/5f55247f58c6a129c125709300479adb/$FILE/G0544089.pdf) (last visited Dec. 29, 2009).

²⁹ Convention on the Transfer of Sentenced Persons, ETS No. 112, entered into force July 1, 1985, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=112&CM=8&CL=ENG> (last visited Dec. 28, 2009).

³⁰ *Id.*, ratifications as of Dec. 14, 2009, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=8&DF=&CL=ENG> (last visited Dec. 18, 2009).

V. Persons to Contact

At the Council of Europe, one may contact the European Commissioner for Human Rights, Mr. Thomas Hammemberg, to discuss human rights concerns. His personal information is accessible via this Council of Europe link: http://www.coe.int/t/commissioner/Office/contact_en.asp (last visited Dec. 29, 2009).

At the European Union, one may contact the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, which is responsible for human rights issues within the EU. Contact information is available at <http://www.europarl.europa.eu/activities/committees/contactsCom.do?language=EN&body=LIB> (last visited Dec. 29, 2009). Alternatively, one may fill out a petition with the Committee on Petitions of the European Parliament, available at <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?language=EN&id=49> (last visited Dec. 29, 2009).

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