

# State Secrets, Impunity and Human Rights Violations: Restriction of Evidence in the Abu Omar Case

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## Abstract

On 17 February 2011, political refugee Abu Omar was abducted from Italian territory and transferred to Egypt where he remained in detention until 2007. During Abu Omar's trial, the Italian Government invoked the State secrets privilege to suppress information regarding Abu Omar's abduction and rendition. The Abu Omar case demonstrates the risks inherent in the potential for abuse of the invocation of State secrets and underscores the need to impose limitations on the scope of its application. 'There is reason to think that, as a general matter in times of crisis, we will overestimate our security needs and discount the value of liberty'.<sup>1</sup> The State secrets privilege must not be used as a mechanism for escaping accountability for failing to meet international human rights standards in relation to accused persons. This article explores how this principle is reflected in a judgment regarding the US extraordinary rendition programme issued by an Italian judge who prosecuted several of the liable agents and provides recommendations on improving accountability and transparency when State secrets are at issue in future cases.

Keywords: Abu Omar, impunity, rendition, State secrets

## 1. Introduction

Osama Nasr Moustafa, also known as Abu Omar, obtained status as a political refugee in Italy in 2001, because he was at risk of being persecuted on political grounds in his country of nationality. Following 9/11, the United States suspected him of being a member of an operative unit of 'Al-Qaida and belonging to a secret Islamic fundamentalist organisation. He was consequently investigated while residing in Italy.<sup>2</sup> He was an imam at a Milanese mosque until

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<sup>1</sup> David Cole, 'Enemy Aliens', (2002) *Stanford Law Review* 54, p. 953.

<sup>2</sup> He was thought to have played a leading role in investigating offences under Article 270 *bis* of the Italian Criminal Code (i.e. violent acts aimed at international terrorism). His phone was tapped in order to identify his contacts and reveal his plan before being forcibly transferred from the custody of the Italian judicial authorities and rendered to another country. For a more detailed account of the facts, see Amnesty International (AI), 'Italy: The Abu Omar case', AI doc. EUR 30/012/2009, 4 November 2009; 'Convictions in Abu Omar rendition case a step toward

his abduction by the CIA and Italian Secret Service (hereinafter SISMI).<sup>3</sup> He was later transferred to Egypt, where he was arbitrarily detained until 2007 where he claims to have endured extensive torture.<sup>4</sup> Sadly, Abu Omar's abduction is not the only case implicating Italian authorities in extraordinary rendition. According to a report prepared by the European Parliament, Italy's involvement was confirmed in at least two other cases, including Maher Arar, who was transported from Syria to Amman via the Ciampino airport on a CIA flight and Abou El Kassim Britel, an Italian citizen arrested in Pakistan in 2002 and detained in Morocco.<sup>5</sup> The aforementioned report states that 46 CIA-related flights stopped in 15 Italian airports between 2001 and 2005.<sup>6</sup> These victims of rendition have been systematically denied their right to resolution and reparation for the human rights violations committed they have endured.

Apart from failing to protect individuals in its territory from the violation of fundamental rights (such as the right to life and prohibition of torture), the State has also failed to meet its obligation to investigate and prosecute those involved in extraordinary rendition practices.<sup>7</sup> Despite the international obligations bestowed upon Italy through its ratification of a number of human rights treaties,<sup>8</sup> the State secrets privilege hindered investigations at the institutional level and refused to cooperate with European bodies attempting to shed light on the extraordinary rendition programme.<sup>9</sup>

Citing examples from the Abu Omar case, this article illustrates the need for oversight and safeguards to prevent State secrets from being used as a mechanism to conceal information

accountability', AI press release, 5 November 2009; 'Italy – Abu Omar: Italian authorities must cooperate fully with all investigations', AI doc. EUR 30/006/2006, 16 November 2006.

<sup>3</sup> Italian Secret Service (SISMI) is the Italian intelligence service. In the following parts of the article, the latter will also be referred to as SISMI.

<sup>4</sup> 'This is how they kidnapped me from Italy', *Chicago Tribune*, 8 January 2007. Available at <http://www.chicagotribune.com/news/nationworld/chi-cialetter-story,0,1548045.story>. Last accessed 26 June 2009.

<sup>5</sup> European Union Parliament (EUP), 'Report on Presumed Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners', 30 January 2007, EUP doc. P6\_TA(2005)0529.

<sup>6</sup> Similar conclusions are advanced in the reports issued by the Council of Europe Parliamentary Assembly (PACE), 'Alleged secret detentions and unlawful inter-State transfers of detainees involving Council of Europe Member States', related by Mr. Dick Marty. First report, PACE doc. 10957, 12 June 2006; Second Report PACE doc. 11302 rev., 8 June 2007.

<sup>7</sup> 'Extraordinary rendition' refers to the extra-judicial transfer of persons from one jurisdiction or State to another for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment. See European Court of Human Rights, 6 July 2010, *Babar Ahmad, Haroon Rashid Aswat, Syed Tahla Ahsan and Mustafa Kamal Mustafa (Abu Hamza) v. the United Kingdom*, application nos. 24027/07, 11949/08 and 36742/08, at para. 113. The European reports mention several countries that facilitated or, in the worst case, cooperated with the US authorities in order to enact the rendition and 'extraordinary' rendition programme. Along with Italy, the involvement of the United Kingdom, Poland, Spain, Germany and Sweden can be recalled. See fn. 5 and 6.

<sup>8</sup> Of these, apart from the rights proclaimed by Articles 1, 3, 5 and 6 of the European Convention on Human Rights (ECHR), the United Nations Convention Against Torture acquires a special importance, since it defines an obligation to prosecute all agents present in its territory who are suspected of involvement in torture or complicity in torture. Violence suffered by Abu Omar in Egypt amounts to torture as defined in Article 1 of the Convention. See also Francesco. Messineo, 'The Abu Omar Case in Italy: 'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture under the UN Torture Convention', (2009) *Journal of International Criminal Justice* 7.

<sup>9</sup> It is worth noticing that Nicolò Pollari was heard by the European Parliament Commission and he concealed the truth. EUP, 'Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners', 14 February 2007 and 19 February 2009. EUP doc. P6\_TA(2007)0032, p. 53, paras. 50-67.

regarding renditions.<sup>10</sup> As the first trial involving individual criminal accountability for renditions; the Abu Omar case demonstrates the difficulties associated with prosecuting those responsible. Transparency and accountability must be brought to the forefront, especially in cases of rendition involving long-established democracies, such as Italy, whose main duties are to prevent, protect and prosecute.<sup>11</sup>

As affirmed within resolutions of the Parliamentary Assembly of the Council of Europe, invoking State secrets in an effort to maintain solidarity with allies by concealing relevant information before the courts hinders the judiciary's role in prosecuting violations of fundamental human rights and freedoms. The Italian Constitutional Court's ruling on this matter raises important issues regarding the protecting of human rights<sup>12</sup> by holding accountable those responsible for the abduction and illegal transfer of suspects as part of the CIA's extraordinary rendition programme.<sup>13</sup>

## 2. The State Secret Privilege in Practice

The question of State secrets during the criminal proceedings that began on 9 January 2007 in Milan against US and Italian agents accused of involvement in Abu Omar's abduction after formal investigations had taken place.<sup>14</sup> At first, Italian authorities denied their participation, but investigations which began in Milan in 2003 proved that rendition had occurred and that Italian agents had played an active role<sup>15</sup>. During his interrogation, the chief of the SISMI, Nicolò

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<sup>10</sup> For a general condemnation of extraordinary renditions, see Parliamentary Assembly of the Council of Europe, 'Resolution no 1507/2006' and 'Recommendation 1754'. For specific reference on State secrets, Rec. 1507, para. 12, and Rec. 1792/2007, at para. 1. Among others, Louis Fisher, 'Extraordinary Rendition: The Price of Secrecy', (2008) *American University Law Review* 57; Matteo. Winkler, 'When Extraordinary Means Illegal: International Law and European Reaction to the United States Rendition Program', (2008) *Loyola of Los Angeles International & Comparative Law Review*, 30(33), pp. 33-76; Alan. W. Clarke, 'Rendition to Torture: A Critical Legal History', (Fall 2009) *The State University of New Jersey Rutgers Law Review*; N. Napolitano, 'Extraordinary Rendition e Detenzioni Segrete Alla Luce Degli Strumenti di Tutela dei Diritti Umani in Europa', (2007) *Diritti Umani e Diritto Internazionale* 2.

<sup>11</sup> The Eminent Jurists Panel of the International Commission of Jurists, published a report dated 4 May 2009 entitled 'Assessing Damage, Urging Action' on terrorism, counter-terrorism and human rights. In it, the Panel expressed its 'deep concern' at the extent to which responses to the events of 11 September 2001 had 'changed the legal landscape in countries around the world'. It found that 'the international legal order based on respect for human rights, built up painstakingly during the second half of the last century, is in jeopardy'. The report also drew attention to 'the cloak of secrecy that surrounds detention and interrogation to gather intelligence and to the impunity allowed to those who engage in torture and cruel, inhuman or degrading treatment'. Available at <http://ejp.icj.org>. Last accessed 5 July 2011.

<sup>12</sup> Constitutional Court, 'Conflitto di Attribuzione Tra Poteri dello Stato (processo Abu Omar e Segreto di Stato)', (2009) *Official Journal of Italian Republic* 106, 8 April 2009. See also Vittorio. Fanchiotti, 'Stato di Diritto e Ragion di Stato: Il Caso Abu Omar e la Consulta', (2009) *Questione Giustizia* 3, pp. 7-22; Tommaso. Giupponi, 'Il Conflitto tra Governo e Procura di Milano nel caso Abu Omar', (2007) *Quaderni Costituzionali*, p. 384.

<sup>13</sup> 'Italian Court Finds CIA Agents Guilty of Kidnapping Terrorism Suspect', *The Guardian*, 4 November 2009.

<sup>14</sup> Even if the public prosecutor invited subsequent Italian Governments to forward to the USA requests in order to question and extradite them, due also to the existence of a treaty signed by the two countries in 1982 in cooperation over criminal proceedings, they ignored the request or refused to comply. However at that time, the US had also already declared its opposition to extradition. Craig Whitlock 'U.S. Won't Send CIA Defendants to Italy', *Washington Post*, 1 March 2007.

<sup>15</sup> For further details on the investigation activity, see A. Spataro, 'Ne valeva la pena', (2010) Bari, Ed. Laterza, ch. IV, VI, VIII, X; more generally, M. Nino, 'Extraordinary Renditions: The Role of European Security Services in the

Pollari (a suspect along with the vice director of the same institution), claimed he was unable to prove his non-involvement in the rendition without referring to documents protected by State secrets.<sup>16</sup> Article 202 of the Italian Code of Criminal Procedure establishes that when State secrets are invoked by a witness, the judge is required to inform the President of the Council of Ministers (hereinafter PCoMs) to request confirmation. Should secrecy be confirmed and should the evidence be critical for the decision of the trial, the judge is obliged to stop the proceedings. Nevertheless, the judge in Milan failed to ask for confirmation from the PCoMs after Pollari's interrogation, which led to an appeal to the Constitutional Court, alleging a conflict of power between judiciary and executive bodies. The claimant declared that the Milan Public Prosecutor's Office was interfering with the powers attributed to the PCoMs by violating legislation applicable to State secrets through the use of confidential documents for investigative purposes and obtaining authorisation for tapping SISMI lines.

All documents, reports or acts relating to anti-terrorism measures were covered by State secrets following resolutions by presidents Berlusconi and Prodi, who had retroactively extended the resolutions to include all acts concerning relationships with allied countries after 9/11, as well as all facts relating to the abduction and all previous events.<sup>17</sup> Due to the scope of the privilege in June 2007, the Public Prosecutor Office also initiated proceedings before the Constitutional Court against the Italian President on the grounds of conflict of powers, alleging that State secrets were invoked in order to conceal evidence of conduct in contravention of the Italian Constitution.<sup>18</sup>

Despite the Milanese judge's decision to strike all uncensored documents from the proceedings, which at first precluded a Court ruling, the PCoMs initiated further proceedings before the Constitutional Court because the judge decided to continue the trial. However, the State secret privilege was once again advanced by the witnesses to avoid disclosure of confidential information—a request that was later confirmed by the PCoMs.<sup>19</sup> Notwithstanding the government's declaration that only certain issues concerning the relationships between the US and Italian intelligence services were secret, the trial judge chose to lodge further proceedings against the chief executive before the Constitutional Court, because the State secret privilege was invoked to such an extent that it was difficult for the Court to prosecute the crimes alleged in Abu Omar's abduction. Whilst the government overlooked the importance of respecting

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Fight Against International Terrorism', (2008) *Revue Internationale de Droit Pénal* 78; V. Fanchiotti, 'Sequestri, Servizi, Segreti. Il Caso Abu Omar e le Sue Anomalie', (2008) *Questione Giustizia* 2; T. Giupponi, 'Stato di Diritto e Attività di Intelligence: Gli Interrogativi del Caso Abu Omar', (2006) *Quaderni Costituzionali*, p. 810.

<sup>16</sup> As a matter of fact, state officials have a general duty not to disseminate secret information, not even if called as witnesses during a criminal trial. See in particular, Article 261 of the Criminal Code and Article 202 of the Italian Code of Criminal Procedure.

<sup>17</sup> President of the Council of Ministers, letter dated 26 July 2006, no USG/2.SP/813/50/347. See also claim no 6/2007 against the President of the Council before the Constitutional Court.

<sup>18</sup> In contrast with Article 12(2) of Law no 801/1977, establishing SISMI. For further references, see Alessandro Pace, 'L'apposizione del segreto di Stato nei principi costituzionali e nella legge no 124 del 2007', (2008) *Giurisprudenza Costituzionale*, p. 4041; Alessandro Pace, 'I 'Fatti Eversivi dell'Ordine Costituzionale' Nella Legge n. 801 del 1977 e Nella Legge n. 124 del 2007', Available at [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it). Last accessed 17 June 2011 and (2009) *Studi in onore di Lorenza Carlassare*.

<sup>19</sup> Letters of the President of the Council of Ministers dated 15 November 2008, no USG/2.SP/556/50/347 and no USG/2.SP/557/50/347; 6 October 2008, no 6000.1/42025/GAB.

human rights and fundamental freedoms, the Milanese judicial authorities deemed it a decisive point. The constitutional judges came to a decision on 11 March 2009.<sup>20</sup>

### 3. Constitutional Order and National Security

The Italian constitutional order is characterised by the inviolability of human rights as stated in the first part of its Constitution. Impairing the judiciary's ability to deliver a sound judgment by withholding relevant information based on the State secret privilege and failing to take legal action under Article 112 of the Italian Constitution represents a violation of the rights contained therein. The Abu Omar case provides a platform for evaluating whether Italian authorities were able to balance seemingly opposite constitutional principles, such as the defence of the Country (as per Article 52 of the Constitution) and the protection of human rights.

Article 3 of the Italian Constitution grants equality to all citizens before the law. Under Article 112 of the Constitution, the Italian Constituent Assembly introduced the obligation to pursue criminal action against every individual who commits an offence, irrespective of their occupation, political affiliation or income. At present, this principle is in force only in Italy; however, the impossibility of prosecuting all crimes has led to its practical ineffectiveness. The public prosecutor bears the obligation to pursue criminal action against individuals who commit an offence and is granted 'institutional independency' in order to protect him or her from political lobbying or specific interests.<sup>21</sup> At the end of the investigation, the public prosecutor has an obligation to commence legal proceedings against the accused if there is sufficient evidence to suggest the accused have committed one or more offences.

A new law regulating intelligence activities and the use of State secrets was adopted in 2007.<sup>22</sup> Once the law had come into force, the PCoMs' competences became more extensive, whereas public prosecutors and judges were explicitly prevented from acquiring and using information (directly or indirectly) contained within State secrets.<sup>23</sup> In this way, State secrets seem to supersede the obligation to prosecute and the right of full disclosure to the defendant regarding the charges against him.

SISMI agents can be called to act outside the scope of the law when gathering intelligence when such action has been authorised by the PCoMs as necessary and proportional to the achievement

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<sup>20</sup> Constitutional Court, judgment no 106/2009, Official Journal of Italian Republic, 8 April 2009. On the Court's decision, see Giovanni Salvi, 'La Corte e il Segreto di Stato', (October 2009) *Cassazione penale*; Adele. Anzon Demmig, 'Il segreto di Stato ancora una volta tra Presidente del Consiglio, autorità giudiziaria e Corte Costituzionale', (2009) *Giurisprudenza Costituzionale*, p. 1020; F. Ramacci, 'Segreto di Stato, *salus rei publicae* e 'sbarramento ai giudici' ai p.m.', (2009) *Giurisprudenza Costituzionale*, p. 1015.

<sup>21</sup> On the characteristics of the Italian public prosecutor in a comparative approach see Giuseppe. Di Federico, 'Promoting Prosecutorial Accountability, Independence and Effectiveness', (2008) *Open Society Institute*, Sofia, pp. 301-338.

<sup>22</sup> Law 124/2007. On the connections between the reform adopted in 2007 and the events surrounding Abu Omar's abduction. See Armando Spataro at fn. 15, ch. XVIII.

<sup>23</sup> On the new law reforming secret services and State secrets see C. Mosca, S. Gambacurta, G. Scandone, M. Valentini, 'I Servizi di Informazione e il Segreto di Stato', (2008) Milano; P.L. Vigna, 'La Nuova Disciplina dei Servizi di Sicurezza', (2007) *Legislazione Penale*, p. 693; T. F. Giupponi, 'Servizi di Informazione e Segreto di Stato Nella Legge 124/2007', (2009) *Scritti in onore di Luigi Arcidiacono*.

of SISMI's legitimate aims.<sup>24</sup> Although operations detrimental to life and physical integrity are not allowed in any case, a problem arises when SISMI's agents are authorised to participate in actions similar to those perpetrated in Abu Omar's abduction; the legislation in force is unclear on this point and it seems to allow such practices in some situations. The control exercised by the PCoMs is thus fundamental in protecting human rights and fundamental freedoms. PCoMs is a political authority and therefore influenced by the country's alliances, which draws the independence of this investigation into question. Following adoption of the new legislation, SISMI agents are now able to appeal to the State secret privilege as witnesses and when under investigation by the judicial authorities (Article 41). If this norm, whose legitimacy was confirmed by the Constitutional Court in the judgment analysed below,<sup>25</sup> was justified by political reason (e.g. to avoid prosecuting SISMI's agents in the Abu Omar case), the prohibition from revealing information contained within State secrets by the defendant does not take into account the fact that it restricts the right to defence granted by Article 24 of the Italian Constitution.<sup>26</sup>

The political use of the State secret, confirming its preeminence on the obligation of criminal prosecution, is clear also in reference to the moment when it can be raised. For instance, SISMI's agents and the Italian Government did not raise the issue of State secrecy at the beginning of the proceedings on Abu Omar's abduction; the issue was raised only when it was clear that the ensuing investigations would have revealed compromising information about the government's conduct. Nevertheless, in such cases, the judicial authority is obliged to respect confidentiality and avoid further dissemination of information deemed to be a State secret. Judges can request the PCoMs to confirm of the existence of a State secret; if so confirmed, the collected evidence can no longer be used in court. The consequences of confirming information as secret when the investigation of crimes is already underway seem to open the door for the PCoMs to stop any judicial action for political reasons. The scope and limitations of State secrets must be clearly defined<sup>27</sup> in order for public prosecutors and judges to identify when the law is being abused. Italian legislation states that 'State secret covers all acts, documents, news, activities and other aspects whose dissemination would damage the territorial and political integrity of the Republic in the framework of its international agreements, the institutions established by the Italian Constitution, the independence of Italy from foreign States, and military defence'.<sup>28</sup> However, Decisions to categorise information as a State secret based on political influence may not benefit its populace.

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<sup>24</sup> See Article 17 of the law 124/2007.

<sup>25</sup> Constitutional Court, judgment no 106/2009, at para. D11.

<sup>26</sup> It is no accident that at the end of the proceedings of appeal the lawyer of the accused SISMI director, although in an instrumental manner, affirmed that "his client would have been able to demonstrate his innocence if the whole situation was not under State secret", see 'Abu Omar, prosciolti Pollari e Mancini', *Corriere della Sera*, 15 December 2010. Available at [http://www.corriere.it/cronache/10\\_dicembre\\_15/pollari-mancini\\_fd8c198e-0866-11e0-b759-00144f02aabc.shtml](http://www.corriere.it/cronache/10_dicembre_15/pollari-mancini_fd8c198e-0866-11e0-b759-00144f02aabc.shtml). Last accessed 16 December 2010.

<sup>27</sup> A regulation adopted by decree of the PCoMs dated 8 April 2008 establishes the criteria for the selection of information, acts, places and things that may be covered by State secrets in order to avoid any grave prejudices to the primary interests of the State. The first items in the list are economic, financial, industrial, scientific, technological and environmental interests. This is a very broad statement that was excluded by parliament during the discussion on the laws on the State secret in 2007 but was later re-adopted at SISMI's insistence.

<sup>28</sup> Article 12(l) of Law no 801/77, transposed in the first para. of Article 39 of Law no 124/07 'Sistema di Informazione per la Sicurezza della Repubblica e Nuova Disciplina del Segreto'; see also Constitutional Court, judgments no 82 (1976), no 86 (1977), no 110 (1998) and Article 39 of the Law no 124 (2007).

If the foundation of democracy rests on the protection of human dignity, there is nothing more harmful to the constitutional order than facilitating torture and forced disappearances. In light of recent case-law before the European Court of Human Rights' (hereinafter ECtHR),<sup>29</sup> assuming a role in, or permitting the commission of, torture and inhuman or degrading treatment constitutes a violation of Articles 2 and 3 of the Convention. According to the ECtHR, 'extraordinary rendition, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention.'<sup>30</sup> Italy, a State party to the European Convention on Human Rights (ECHR) since 1955, is not only obliged to respect the right to life and the prohibition of torture as per Article 3, but it is also duty bound to properly prosecute those who are thought to be liable for the violation of these principles. Government efforts to restrain judicial discretion over prosecuting crimes are in breach of the ECHR as interpreted by the ECtHR, which maintains that the secrecy of information must be balanced against a right to truth.

Law 124/2007, entitled 'System of information for the Republic security and new secret regulation', contains provisions governing conflicts between the PCoMs and the judiciary regarding the use of State secrets before the Constitutional Court.<sup>31</sup> In order to make an informed ruling, Constitutional judges require access to all relevant evidence to assess whether these institutions acted in accordance with the law. However, the evaluation on the necessity to employ State secrecy does not fall within the Court's jurisdiction. According to constitutional judges in the Abu Omar case, such evaluation is assigned to the PCoMs and to the Parliament. For this reason, the Court's assessment cannot avoid the danger that national security prevails over the protection of individual rights.<sup>32</sup> The Constitutional Court's decision has clarified other limits to the applicability of the State secret privilege, but failed to avoid imposing restrictions on criminal proceedings against those implicated in the unconstitutional practice of rendition.

#### 4. The Italian Constitutional Court's Jurisprudence on State Secrets

The Constitutional Court ruling stated that while the State secret is a fundamental tool for protecting national security, no form of juridical control is envisaged for its application. A judge has to try crimes without being able to use evidence included in the State secret. The Constitutional Court further explained that: 'State security is a fundamental and insuppressible public aspect and prevails over any other';<sup>33</sup> in other words, State secrets can help preserve

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<sup>29</sup> *Sellem v. Italy*, European Court of Human Rights, no 12584/08, 5 May 2009; *Ben Khemais v. Italia*, case no 246/07, 24 February 2009; *Saadi v. Italia*, case no 37201/0628, 28 February 2008.

<sup>30</sup> *Babar Ahmad, Haroon Rashid Aswat, Syed Tahla Ahsan and Mustafa Kamal Mustafa (Abu Hamza) v. the United Kingdom*, European Court of Human Rights, 6 July 2010, at para. 114. See fn. 7.

<sup>31</sup> Official Journal of the Italian Republic no 187, 13 August 2007. Also of interest is the view analysing the victim's lack of representation, as well as of the other persons involved in the judgment at the proceedings before the Constitutional Court. It seems to be a court judging powers instead of a court granting fundamental rights. See Giulia Pili, 'Il Caso Abu Omar: il Contra Ditorio Mancato a Palazzo della Consulta', (2010) *Quaderni Costituzionali*, p. 117.

<sup>32</sup> See for example David Cole and James X. Dempsey, 'Terrorism and the Constitution: Sacrificing Civil Liberties in the name of National Security', (New York: New Press 2006); Alan Dershowitz, 'Why Terrorism Works. Understanding the Threat, Responding to the Challenge', (New Haven: Yale University Press, 2002); Bruce Ackerman, 'Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism', (New Haven: Yale University Press; 2006); P. Bonetti, *Terrorismo, emergenza e costituzioni democratiche*, (2006) Bologna.

<sup>33</sup> Constitutional Court, judgment no 106/2009, at para. D3; see also para. D12.4.

national security and as such only parliament can limit the head of the government's powers in this respect. In this specific situation, SISMI documents and testimonies containing information about the relationship between SISMI and the CIA must remain secret. As a consequence, the reasons underpinning the recollections of the PCoMs were largely accepted, while the instances lodged by the Milanese judges were declared inadmissible. In the opinion of the Constitutional Court, 'the investigations would not suffer from the application of the State secret privilege, also because no relevant evidence was produced'.<sup>34</sup>

Two points are particularly important. Firstly, according to the ruling, the Milanese judicial bodies had breached the secrecy of confidential documents when it was decided, in retrospect, to keep them secret. This ruling was quite controversial since the declaration of State secrecy for some of the documents occurred after the investigations had already commenced and as unfavourable evidence began to emerge. The Constitutional Court approved the government's decision, as the latter's power in this sphere cannot be subject to limitation.

The second relevant issue was in ascertaining the nature of Abu Omar's abduction. According to the Milanese judges, it constituted an attack on the constitutional legal order and, for this reason, the related events could not be covered by State secrets. By contrast, the PCoMs has consistently claimed that State secrets were unconcerned with the actual crime of abduction, and instead focused on the relationship between the Italian and the foreign intelligence services. The Constitutional Court's conclusion, that the Abu Omar abduction is 'a specific case of abduction, which alone is not able of subverting the overall structure of democratic institutions',<sup>35</sup> is unsatisfying for human rights defenders. Therefore, in accepting a very narrow definition of the subversive fact, the court decided that the dissenting Milanese judges had exceeded their authority. By using secret documents in its efforts to prosecute what was claimed to be an unlawful abduction of a suspected terrorist, the Milanese court violated national security laws and the relevant pleadings had to be annulled. The trial could have continued, but the Milanese judge in charge of the final sentence, Oscar Magi, was bound to strike from the proceedings all sources making direct or indirect reference to the relationships between the Italian and the foreign intelligence services.

The decision led to a clear contradiction: the abduction was to be prosecuted and was clearly defined as related to the illegal programme of renditions; however, since this kind of extraordinary operation dealt with the relationship between allied intelligence services, all evidence allowing the sentencing of the culprits could not be used.<sup>36</sup> In short, Italy's Constitutional Court dealt the prosecution a heavy blow, preventing the judge from using much of the evidence gathered during investigations.

Judge Oscar Magi did not abandon the prospect of seeing the trial through. After attempting to continue proceedings without making reference to the relationship between SISMI and the CIA, on 4 November 2009, he decided that State secrets made it impossible to proceed against the

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<sup>34</sup> Constitutional Court, judgment no 106/2009, at para. D6.

<sup>35</sup> Constitutional Court, judgment no 106/2009, at para. D8.5.

<sup>36</sup> This was clearly stated by the judge in his case before the Constitutional Court, no 20/2008, but the latter later declared it 'unfounded' (*non fondato*). See ruling 106/2009 at para. D12.1 and D9.1. Judge Magi later called the contradictory character of the ruling 'An absolutely worrying logical and legal paradox'; he added 'The importance of this decision/interpretation (...) has led to an abnormal extension of the secrecy field of application, risking changing it into a 'possible absolute and incontrollable exception to the rule of Law''.

director of the Italian intelligence service, Nicolò Pollari, for whom the public prosecutor had requested a 13-year prison sentence. Two other Italian intelligence officers were each given three-year prison terms as a result of their participation. Of the 26 US intelligence agents, 23 were convicted<sup>37</sup>, including Robert Seldon Lady, who was allegedly the chief of the CIA activities in Milan at the time of the abduction and was given an eight-year sentence – the harshest punishment inflicted by the court, while others were sentenced to five years. On the other hand, three other people (Jeff Castelli, former CIA chief in Italy and two members of his staff) were acquitted due to diplomatic immunity. Some bitterness was felt towards the heads of the Italian Secret Service, as illustrated in the Milanese judge’s explanation of the motivations behind his sentence: ‘The existence of an authorisation at national level coming from the highest authorities of the US Secret Services suggests that this activity was accomplished at least with the knowledge (or possibly the approval) of the Italian Secret Services, but evidence existing of these circumstances could not be investigated further due to the Italian Government invoking State secrets’.<sup>38</sup> It is worth considering what the public prosecutor told the Milanese court: ‘This was not an easy trial and the mere fact of its having been held is a significant event.’<sup>39</sup>

## 5. ‘It Was Worth It’:<sup>40</sup> Consequences Stemming from the Abu Omar Trial

Notwithstanding the limitations of the judgment, it has some positive elements. Of major significance is the Italian court’s confirmation that CIA abductions of persons from a foreign territory is an illegal, unacceptable and unjustifiable action and the ‘war on terrorism’ cannot be used to validate the violation of fundamental human rights.<sup>41</sup> The ruling issued by the Constitutional Court also condemned extraordinary renditions as crimes contrary to the constitutional traditions and legal principles of European States. Unfortunately, the Constitutional Court missed the opportunity to apply this condemnation to a specific case.<sup>42</sup>

In his final ruling, Judge Magi attempted to improve the balance of the political and security requirements; human rights protection lies at the heart of the problem, but unfortunately the Constitutional Court, was unable to meet the standard required by international human rights instruments, above all the ECtHR (Articles 1, 2, 3, 5, 6). On closer inspection, the judge questioned the actual relevance of the means to the end, where the end is about protecting the life of the nation, whilst the means would be represented by a divergence from the assurance of rights; the events of Abu Omar’s abduction do not appear proportionate or reasonable for fighting international terrorism. If democracy is about governing with visible power, all forms of

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<sup>37</sup> The judge also awarded damages to Abu Omar of one million Euros and to his wife of 500,000 Euros. ‘Rapimento Abu Omar, Pollari e Mancini non giudicabili per il segreto di Stato’, *Corriere della Sera*, 4 November 2009.

<sup>38</sup> ‘Abu Omar, i servizi italiani sapevano’, *Corriere della Sera*, 1 February 2010; ‘Abu Omar, il giudice: ‘Il SISMI sapeva tutto’’, *Il Giornale*, 1st February 2010.

<sup>39</sup> Armando Spataro, see fn. 15.

<sup>40</sup> Armando Spataro, the prosecutor, underscores the importance of prosecuting any known crime; those who commit an offence must be held accountable. See fn. 15.

<sup>41</sup> See among others, Human Rights Watch (HRW), ‘Italia/Usa: Corte Italiana Censura le Pratiche di ‘Rendition’ della Cia’, 4 November 2009; Amnesty International, ‘Report 2010: Human Rights Gains in 2009/10’, 27 May 2010. AI doc. POL 10/009/2010.

<sup>42</sup> Constitutional Court no 106/2009, at para. D8.5.

secrecy should be seen as extraordinary and strictly bound to comply with and protect State values.

As far as the US agents are concerned, the Italian decision appears to be quite courageous, even if it appears discriminatory in comparison to the treatment reserved for the Italian agents. In the United States, the dangers related to the disclosure of secret information have been used to hinder rendition trials,<sup>43</sup> as had occurred when the US Government issued a formal decision to grant three US agents with immunity, thus preventing the Milanese court from weighing the relevant evidence and possibly convicting those agents. Other military agents were sentenced in their absence, pursuant to the Italian Criminal Code; the arrest warrant issued by the Milanese judge is valid throughout the entire European Union.<sup>44</sup> The Court of Appeal has recently confirmed the above-mentioned judgment.<sup>45</sup>

The aforementioned facts clearly show that government officials in Italy were relying on State secrets to prevent their illegal actions from being tried by the judicial authorities. The Constitutional Court's decision actually prevented them from being convicted for the support they offered the US agents. As the judge in Milan stated following the Constitutional Court ruling: 'The fact that those accused of a serious crime are allowed to escape a correct assessment of their accountabilities because their relationships with the secret services in other countries, although connected to the aforementioned crime, are covered by the State secret privilege, is simply tantamount to admitting that they can benefit from absolute immunity that is not explicitly included in any law of this Republic'.<sup>46</sup> The Italian intelligence service has been damaged by this ruling, since SISMI's confidentiality was compromised and some agents, following the disclosure of their names, cannot be used in future secret operations. Above all, the heads of the whole structure were finally forced to resign and illegal activities not necessary in pursuing SISMI's aims were revealed.<sup>47</sup>

It is even more serious that foreign agents arrested someone in Italy (whether the Italian Government allowed it or not), who was under investigation by Italian prosecutors at the time, thus thwarting all efforts made against Abu Omar's organisation.<sup>48</sup> How can an act that unnecessarily interferes with the Italian Government's investigation of Abu Omar amount to international cooperation in countering terrorism?

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<sup>43</sup> For example, New York's Federal Appeal Court refused the legal action promoted by M. Arar against arrest and arbitrary detention in Egypt. See fn. 39; L. Fisher, see fn. 10, para. IV.A.

<sup>44</sup> Armando Spataro (Public Prosecutor for the Abu Omar case), 'L'Unione Europea e le politiche di contrasto del terrorismo internazionale', available at [www.europeanrights.eu](http://www.europeanrights.eu). Last accessed 28 June 2010.

<sup>45</sup> 'Caso Abu Omar, chiesti 12 anni per Pollari', 28 October 2010, *Corriere della Sera*, available at [http://www.corriere.it/cronache/10\\_ottobre\\_28/abu-omar-pollari-pg\\_2f3529ea-e273-11df-8440-00144f02aabc.shtml?fr=correlati](http://www.corriere.it/cronache/10_ottobre_28/abu-omar-pollari-pg_2f3529ea-e273-11df-8440-00144f02aabc.shtml?fr=correlati). Last accessed 10 December 2010; 'Abu Omar, Prosciolti Pollari e Mancini', 15 December 2010, *Corriere della Sera*, available at [http://www.corriere.it/cronache/10\\_dicembre\\_15/pollari-mancini\\_fd8c198e-0866-11e0-b759-00144f02aabc.shtml](http://www.corriere.it/cronache/10_dicembre_15/pollari-mancini_fd8c198e-0866-11e0-b759-00144f02aabc.shtml). Last accessed 16 December 2010.

<sup>46</sup> See fn. 35. For further references, see Paola Gaeta, 'Extraordinary Renditions and Immunity of State Agents from Criminal Jurisdiction: the Abu Omar Case', (2006) *Rivista di Diritto Internazionale* no 89.

<sup>47</sup> The Constitutional Court has been called to decide on another case of State secret abuse following investigations aimed at prosecuting SISMI activity in collecting personal information on Italian political and economic leaders. See the decision of the Constitutional Court no 376, 27 December 2010.

<sup>48</sup> A similar orientation is shown by Judge Salvini in the Order Establishing the Temporary Imprisonment Provisional, nos. 5236/02 R.G.N.R and 1511/02 R.G.GIP, Tribunale di Milano, 24 June 2005. Available at <http://www.statewatch.org/cia/documents/milan-tribunal-abu-omar.pdf>. Last accessed 6 July 2010.

It remains to be seen whether the landmark Abu Omar case will set a precedent for future domestic and regional cases involving the exclusion of evidence on the grounds that it constitutes a State secret. As claimed by an Italian Government, such actions have taken place on a number of previous occasions, although only a few are known to the public.<sup>49</sup> Moving forward, the lack of transparency and accountability surrounding such practices must be addressed.

In Italy, this role is facilitated by an independent public prosecutor, who is required to pursue legal action when there is sufficient evidence to suggest that an offence has occurred. The judicial authority shoulders enormous responsibilities in ensuring that State secrets are not used as a mechanism for concealing unlawful operations and escaping accountability;<sup>50</sup> additional safeguards on the use of State secrets are necessary to ensure respect for and protection of human rights and fundamental freedoms<sup>51</sup>.

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<sup>49</sup> During a conference on terrorism and Human Rights Protection held in Genoa, at the Faculty of Political Sciences. The opinion is shared by R. S. Lady in an interview published in *Il Giornale*, 30 June 2009, in which he also describes himself as a soldier fighting a war against terrorism in which superior orders could not be discussed. This thesis was harshly attacked by public prosecutor, A. Spataro, during the trial.

<sup>50</sup> The important role of the judiciary in affirming the respect of human rights while fighting international terrorism has also been clearly demonstrated at the European level in relation to the *blacklist* system, with the European Court of Justice's well-known *Kadi* judgment. The same thing can be said in reference to the US experience with the Supreme Court's judgments on Guantanamo detainees in 2008.

<sup>51</sup> See the Council of Europe Parliamentary Assembly Recommendation 1713 on the Democratic Oversight of the Security Sector in Member States, 23 June 2005. In relation to the Italian case, see Article 30.2 Law no 124 of 3 August 2007, which defines the functions of the Parliamentary Commission for the Republic's security as having to regularly and effectively ensure that SISMI acts in compliance with the Italian Constitution.