European Convention on Human Rights—extraordinary renditions—state secrets privilege—right to the truth—attribution of conduct and responsibility

NASR v. ITALY. App. No. 44883/09. *At* http://hudoc.echr.coe.int.
European Court of Human Rights, February 23, 2016.

On February 23, 2016, a chamber of the European Court of Human Rights (Court) unanimously found Italy in violation of the European Convention on Human Rights (Convention)[1] by virtue of its involvement in the extrajudicial transfer of a Muslim cleric from Italy to Egypt by agents of the United States Central Intelligence Agency (CIA).[2] Specifically, the Court held that Italy had violated the prohibition against torture and inhuman or degrading treatment (Art. 3), the prohibition against arbitrary detention (Art. 5), the right to respect one's private and family life (Art. 8), and the right to an effective remedy (Art. 13). The judgment builds upon several prior decisions by the Court in cases brought by victims of the CIA's extraordinary rendition program.[3] Although the judgment consolidates the conclusions reached in those prior decisions, it is notable for dealing inadequately with attribution in the context of state responsibility and for omitting any reference to the "right to the truth." In that respect, the Court seems to have backtracked from its (already timid) embrace of this right in its previous case law.

As determined by the Court, Osama Mustafa Nasr (also known as Abu Omar) was an Egyptian Muslim cleric who had been granted political refugee status in Italy but had come under investigation by the Italian authorities for terrorist activities.[4] On February 17, 2003, he was abducted in Milan in the middle of the day by CIA operatives with the acquiescence or connivance of the Italian military intelligence service (SISMi). He was transferred to the U.S. air base in Aviano, Italy, and flown first to Ramstein, Germany, and then to Egypt, where the authorities held him incommunicado and without charges until February 2007 (except for an interlude in 2004 when he was released for approximately a month). While detained, he was apparently subjected to ill-treatment; a medical certificate of May 2007 indicated that he suffered from post-traumatic stress disorder and showed visible signs of previously inflicted injuries (paras. 10–27).

Meanwhile, the details of Nasr's abduction started to unfold in Italy after his wife filed a complaint about his disappearance to the police and a witness confirmed the abduction (para. 29). The Office of the Public Prosecutor in Milan conducted a thorough investigation that led in December 2006 to the indictment of twenty-six U.S. citizens (including CIA agents and diplomatic personnel) and six Italian citizens (para. 72). According to the Court, both U.S. and Italian intelligence authorities sought to obstruct the investigation by providing misleading information (para. 224).

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 221, *as amended by* Protocol No. 14, May 13, 2004, CETS No. 194.

[2] Nasr and Ghali v. Italy, App. No 44883/09 (Eur. Ct. H.R. Feb. 23, 2016) [hereinafter Judgment] (in French). Translations of the Judgment are by the author. Judgments of the Court cited herein are available at its website, http://hudoc.echr.coe.int.

[3] El-Masri v. Former Yugoslav Republic of Maced., 2012-VI Eur. Ct. H.R. 263; Al-Nashiri v. Poland, App. No. 28761/11 (Eur. Ct. H.R. July 24, 2014).

[4] In fact, in December 2013 Nasr was convicted of membership in a terrorist organization by the Milan District Court. Judgment, para. 9.

Moreover, the Italian government and its secret services, while initially responsive to the prosecutor's requests, changed course as soon as the investigation revealed the involvement of Italian authorities in the abduction; they invoked the state secrets privilege[5] regarding all parts of the investigation that touched on the relationship between the CIA and SISMi (paras. 52–71). After protracted and complex judicial proceedings before the Italian Constitutional Court (initiated by the Italian prime minister against the public prosecutor of Milan for violating the state secrets privilege and thus usurping the power of the executive), the Constitutional Court confirmed that the state secrets privilege took precedence over any other interest. As a result, no evidence covered by the privilege could be used in the ongoing proceedings in Milan,[6] which rendered it virtually impossible to indict and convict any Italian agents. In the event, the Tribunal of Milan dismissed the case against the Italian agents but condemned twenty-three U.S. agents in absentia (para. 116).[7]

Finally, the U.S. agents were ordered to pay pecuniary damages to Nasr and his wife, Nabila Ghali, in an amount to be specified in subsequent civil proceedings. Judging that they had no chance of actually receiving compensation since the condemned U.S. agents lacked assets in Italy, the two victims did not file the requisite civil suit and the damages remained unpaid (para. 144). In 2009, while the proceedings were still pending, Nasr and his wife took their case to the European Court of Human Rights.

After summarily rejecting Italy's admissibility objections concerning nonexhaustion of domestic remedies (paras. 195–214), the Court made some preliminary observations regarding the admissibility of evidence, the burden of proof, and the effect of the state secrets privilege in the proceedings at hand. This approach was a response to Italy's strategy of not contesting the occurrence of an extraordinary rendition but only the involvement of Italian authorities in that action, owing to the absence of sufficient proof (since the inculpatory evidence was covered by the state secrets privilege) (para. 218).

The Court rejected the Italian government's position on the grounds that, as established by previous decisions, "in the proceedings before the Court, there are no procedural barriers to the admissibility of evidence" (para. 219). After clearing the way for the admission of all evidence, the Court elaborated on the standard for assessing it. In this respect, it observed that when the knowledge about what happened comes exclusively from state authorities, the Court cannot strictly apply the principle of *affirmanti incumbit probatio*. To the contrary, indicia of injuries or death create a strong presumption that the government must rebut so that the Court does not draw negative inferences about that state's responsibility (para. 220). In the case at hand, the Court noted, it had been sufficiently demonstrated that the Italian authorities knew or ought to have known that the operation took place in the framework of an extraordinary rendition (para. 235). Hence, a presumption of knowledge could be attributed to the Italian

[5] In the original French version of the decision, the Court used the term "state secret privilege," with "secret" in the singular.

[6] *See* Corte cost., 10 febbraio 2014, n. 24; Corte cost., 11 marzo 2009, n. 106 [hereinafter No. 106/2009]. Both decisions are available at http://www.cortecostituzionale.it (in Italian and unofficial English translations).

[7] None has been extradited so far to Italy from the United States. European arrest warrants against them have been circulated but to date none has been enforced. An international arrest warrant, which has not been enforced, was issued against Robert Lady, the CIA chief in Milan at that time. The president of Italy pardoned three of the convicted U.S. citizens. Judgment, paras. 146–50.

authorities for each and every violation of Convention Articles 3 and 5 treated under the Court's consistent case law as intrinsic to an extrajudicial transfer operation (paras. 243–44).

On that basis, the Court concluded that Italy had violated Article 3's prohibition against torture both in its procedural and in its substantive dimensions. As for the former, the Court repeatedly commended the public prosecutor and the Italian courts for conducting a thorough investigation and establishing the truth. Nevertheless, it observed that, ultimately, the judicial proceedings had not resulted in the actual punishment of the perpetrators or effective redress for the victims. Specifically, the executive's manipulation of the state secrets privilege regarding material that had already been publicly divulged had led to the annulment of the condemnations of the Italian agents (paras. 265–72). Moreover, the government not only had failed to request the extradition of the indicted CIA agents, but also had actually pardoned three of them, among whom was Robert Seldon Lady, the mastermind of the operation (paras. 270–71). Consequently, the Court concluded, the national procedure had rendered inadequate results, and thus Article 3 had been violated in its procedural dimension (para. 274).

As far as the substantive dimension of Article 3 was concerned, the Court did not assess the gravity of each and every act occurring during the rendition but concluded that the cumulative effects of Nasr's treatment throughout the operation attained the requisite degree of gravity under Article 3 (para. 287). On that basis, the Court then found Italy *directly* responsible for the violation of this article, because the Italian authorities knew or ought to have known that through their facilitation of the abduction and through their failure to prevent the violation (or to seek diplomatic assurances to this end), they had exposed Nasr to a foreseeable and considerable risk of torture (paras. 288–89). For this purpose, the Court said, it was not necessary to demonstrate that Italy actually knew that the abduction was meant to hand Nasr over to Egypt (para. 288).

The same rationale underpinned the Court's analysis of arbitrary detention under Article 5 of the Convention. Specifically, the Court concluded that Italy had failed to take effective measures to prevent the risk of arbitrary detention and to conduct a rapid and effective investigation; therefore, since it knew that an extraordinary rendition was taking place, its responsibility was engaged for the abduction and the whole detention "after Mr. Nasr's transfer [*sic*] to the U.S. agents" (para. 302).[8]

The Court also found Italy responsible for violating Article 8 of the Convention concerning the right to family life, with respect to both Nasr and his wife (paras. 310, 326). The Court said that the acts and omissions of the Italian government had unlawfully deprived Nasr of his "right to personal development and the right to establish and develop relationships with other human beings and the outside world," and arbitrarily denied the couple "each other's company, a fundamental element of family life" (para. 308).

Finally, the Court took the view that by invoking the state secrets privilege in an abusive way, Italy had deprived the applicants of an effective remedy for both the criminal and the civil components of the case in violation of Article 13, because they had been unable to avail themselves "of effective and practical remedies capable of leading to the identification and punishment of those responsible . . . and to an award of compensation" (para. 334).

[8] The factual background of the case does not corroborate the Court's use of the term "transfer" in this context, since Italy never took the victim into custody during the operation. This formulation probably resulted from reproduction of the relevant phrasing from the Court's two previous cases on extraordinary renditions.

As a result, and according to Article 41 of the Convention, the Court awarded just satisfaction to both Nasr and Ghali in the amount of seventy thousand and fifteen thousand euros, respectively (para. 348).

* * * *

Apart from serious questions about its success as an antiterrorism technique, the CIA's program of extraordinary renditions radically challenged the fundamentals of the international legal system. Its implementation outside existing legal frameworks, the absence of any juridical guarantees, and the appalling treatment of the victims are well documented by now. Nonetheless, judicial redress for the victims remains erratic. The main challenges for the European Court of Human Rights in this respect have been, first, how to tackle the sensitive nature of the evidence in the context of the war on terror without compromising the states' national security interests, and, second, how to accommodate the composite and multinational character of the operations. These two challenges weighed heavily on the way the Court treated the state secrets privilege/right-to-the-truth conundrum and its approach to attribution in the context of state responsibility.

The state secrets defense has been the main impediment to effective judicial review of extraordinary rendition cases in domestic courts.[9] In the United States, for instance, the courts have sometimes upheld a broad state secrets doctrine, dismissing cases because the privileged information constituted the very essence of the litigation.[10] For its part, the Italian Constitutional Court has declared that the state secrets privilege serves the *salus rei publicae*, and that national security interests thus take absolute precedence over any other interests and rights that could be protected by declassifying the material.[11]

In prior judgments, the European Court of Human Rights has firmly rejected such an approach. It has consistently dismissed any "procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment," and hence has set aside the state secrets privilege.[12] In doing so, the Court has also, albeit unassertively, endorsed a right to the truth, in both its private and its public dimensions. As the Court observed in *El-Masri v. Former Yugoslav Republic of Macedonia*, the victims, their families, and the public in general have a right to know what happened, and state authorities must conduct an adequate and public investigation that will combat impunity "as a matter of justice for the victims, as a deterrent to prevent new violations, and to uphold the rule of law and public trust in the justice system."[13] This approach applies in particular to cases of extraordinary renditions and enforced disappearances, which are generally characterized by secrecy.

Yet in *Nasr and Ghali*, the Court adopted a paradoxical, and at times almost surreal, approach to evidence and skipped altogether any reference to the right to the truth. In considering the admissibility of evidence, the Court ruled out the applicability of the state secrets

[9] The state secrets privilege is a procedural objection raised by the executive to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security." Ellsberg v. Mitchell, 709 F.2d 51, 56 (D.C. Cir. 1983).

[10] *See, e.g.*, Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1087 (9th Cir. 2010); El-Masri v. United States, 479 F.3d 296, 307–08, 312 (4th Cir. 2007).

[11] No. 106/2009, *supra* note 6, *considerato in diritto* (legal considerations), para. 3.

[12] *El-Masri, supra* note 3, para. 151; *Al-Nashiri*, *supra* note 3, para. 394.

[13] *El-Masri,* para. 192; *see also id.*, para. 191; *Al-Nashiri*, para. 495.

privilege to the proceedings by declaring that it would use all available material (paras. 219, 227). But it then went to great lengths to minimize the importance of sealed material to its findings. For instance, the Court mentioned the intercepted phone calls between SISMi agents and the documents seized in the SISMi headquarters in its preliminary discussion of admissible evidence despite their being covered by the state secrets privilege in the domestic proceedings. Nevertheless, it did not invoke them to establish the presumption that Italy knew the CIA operation was an extraordinary rendition, even though that evidence was the most relevant to proving Italy's implication in the operation. Instead, the Court emphasized that an Italian agent, whose testimony was coincidentally not covered by the state secrets privilege (para. 223), was present at the moment of the abduction, which took place on Italian soil (para. 232). This evidence, however, was rather thin for establishing such a crucial presumption about Italy's knowledge, and hence the country's responsibility in the case. In the end, the Court seems to have abstained altogether from relying on the sealed material to hold Italy in violation of its obligations under the Convention.

With regard to the right to the truth, the absence of any reference to it in the Court's reasoning might be explained by the fact that the Italian judicial authorities had conducted a thorough investigation that shed light on the sequence of events and identified the perpetrators. On that basis, one could argue that the truth about this incident had already been established domestically and had been made public before the state secrets privilege was invoked. All the same, one might wonder to what extent justice is served and how far the rule of law and public trust in the justice system are upheld when governmental acts impede the successful completion of judicial proceedings and the punishment of all perpetrators. Moreover, the omission by the Court of any reference to the right to the truth does not help to solidify or clarify the scope and content of its tentative jurisprudence on this right, which stands in contrast to the much more refined case law on the subject developed by the Inter-American Court of Human Rights.

The Court also remained ambivalent about attribution. It did not clarify how Italy's responsibility was engaged vis-à-vis the various violations committed during the extraordinary rendition. The Court's difficulty in this regard can be explained by the multiplicity of states that are implicated in varying degrees and at different stages in such operations. Under the circumstances, it is not always clear which state committed the wrongful act and whether other states were complicit and should also be held responsible.

The articles on state responsibility of the International Law Commission (ILC Articles) make a basic distinction between direct responsibility for acts attributed to the state and indirect or derivative responsibility in connection with the act of another state, when, for instance, a state aids or assists another state in the commission of a wrongful act.[14] The Court, however, has not strictly observed this subtle distinction in its case law on extraordinary renditions.

In considering Article 3 violations, the Court in *El-Masri* distinguished between acts committed on Macedonian territory and the victim's transfer from the Macedonian authorities to U.S. agents. For acts committed in Macedonia, it imputed the relevant treatment to the Former Yugoslav Republic of Macedonia, which it found directly responsible for the acts of U.S.

[14] *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries Thereto, Arts. 4–11, 16–19, *in* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, [2001] 2 Y.B. Int'l L. Comm'n 30, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ILC Articles].

agents,[15] whereas for the transfer, the Court spoke of attribution of responsibility (not of conduct) to Macedonia.[16] In the *Al-Nashiri* case, the Court changed course. It examined whether the alleged treatment (and not only the responsibility) could be imputed to Poland for both the acts committed on its territory and the transfer,[17] but then recognized Poland's responsibility for the former "on account of its 'acquiescence and [*sic*] connivance' " in the U.S. program, a reason falling squarely under the attribution-of-responsibility paradigm.[18]

In the *Nasr and Ghali* case, the Court adopted a more succinct approach: under the rubric of attribution of conduct (para. 284), it held Italy *directly* responsible for the violation of Article 3[19] because the Italian agents had abstained from taking all necessary measures to prevent exposing the applicant to a considerable risk of torture, which was intrinsic to his transfer (para. 289). By not distinguishing between the acts committed on Italian territory (by Italian or U.S. agents) and the subsequent acts, the Court avoided the conceptual confusion of the preceding case law, but at the expense of a more systematic approach to the question of state responsibility for participation in extraordinary renditions.

In its case law on Article 5, prohibiting arbitrary detention, the Court had previously oscillated between recognizing the responsibility of the respondent state for the detention on its territory, the transfer, *and the subsequent detention in other countries*,[20] and recognizing its responsibility only for the detention on its territory and the transfer.[21] In the instant case, the Court returned to the first formulation and concluded that Italy's responsibility was engaged with regard to the abduction *and the whole detention of Abu Omar in Egypt* (para. 302).

This approach is problematic on three different accounts. First, holding Italy responsible for Nasr's detention in Egypt departs from the approach in *Othman (Abu Qatada) v. United Kingdom*,[22] where the Court extended its rationale in *Soering v. United Kingdom*[23] on Article 3 of the Convention to Article 5. In those two cases, the Court held the United Kingdom responsible not for the acts to which the applicants were subjected after the extradition/expulsion, but only for its own conduct, namely, the extradition or expulsion itself, as it exposed them to the risk of breaching Articles 3 and/or 5. Additionally, the treatment of Italy's responsibility under Article 3 (where it was not explicitly found responsible for acts subsequent to the removal from Italy) and Article 5 (where it was found responsible for acts subsequent to the transfer to Egypt) seems incongruous.

Second, the Court did not clarify whether the acts themselves were attributed to Italy or only the responsibility, although the reference to Article 16 of the ILC Articles, on aid or assistance in the commission of an internationally wrongful act (para. 185), and the Court's insistence on holding Italy responsible for the applicant's detention in Egypt make the attribution-of-responsibility scenario more plausible.

[15] *El-Masri*, *supra* note 3, para. 211.

[16] *Id.*, para. 215.

[17] *Al-Nashiri*, *supra* note 3, para. 510.

[18] *Id.*, para. 517 (quoting *El-Masri*, para. 206, and citing *id.*, para. 211).

[19] But among the juridical documents relevant to the case quoted in the Judgment, para. 185, the only remotely pertinent provision of those cited from the ILC Articles, *supra* note 14, is Article 16, which deals with indirect responsibility.

[20] *El-Masri, supra* note 3, para. 241.

[21] *Al-Nashiri*, *supra* note 3, para. 531.

[22] Nevertheless, it makes reference to this case in its reasoning. Judgment, para. 244 (citing Othman (Abu Qatada) v. United Kingdom, App. No. 8139/09, para. 233 (Eur. Ct. H.R. May 9, 2012)).

[23] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A), para. 91 (1989).

Third, if Article 16 does apply here, the knowledge threshold required by the Court for engaging Italy's responsibility is much lower than the one actually required by Article 16. This provision requires the complicit state to have had knowledge of the circumstances (or even to have shared the intentions of the aided or assisted state),[24] but the Court satisfied itself with a standard of constructed knowledge. According to this standard, responsibility arose from Italy's knowledge that an extraordinary rendition, in which the risk of violating Article 5 is inherent, was taking place.

The Court's somewhat paradoxical approach to issues of responsibility deserves further reflection and should not be cursorily dismissed because of its internal inconsistency and its divergence from the conceptual constraints of the ILC Articles. One may hope that in the next set of judgments on extraordinary renditions the Court will clarify its views on attribution as well as on the right to the truth.

VASSILIS PERGANTIS
Aristotle University of Thessaloniki
American College of Thessaloniki

UN Charter—authority of Security Council under Chapter VII—imposition of sanctions— interpretation of Security Council resolutions—right to fair and public hearing—conflicting treaty obligations

AL-DULIMI v. SWITZERLAND. Application No. 5809/08. *At* http://hudoc.echr.coe.int. European Court of Human Rights, June 21, 2016.

On June 21, 2016, the Grand Chamber of the European Court of Human Rights (Court) determined that the Swiss courts had not provided a sufficient opportunity for individuals affected by the United Nations Iraqi sanctions program to challenge the imposition of those sanctions on them and their assets.[1] In consequence, the Court concluded, the Swiss courts had violated the rights of those individuals to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law," as guaranteed by Article 6(1) of the European Convention on Human Rights (Convention).[2] This judgment builds on the Court's previous rulings regarding the relationship between the obligations imposed by the Convention and those required by the UN enforcement action.[3]

Specifically, the case concerned the impact of UN Security Council Resolution 1483 (2003) on the financial assets of Khalaf M. Al-Dulimi, an Iraqi citizen living in Jordan who had served

[24] ILC Articles, *supra* note 14, Art. 16(a) & Art. 16 cmt. (5).

[1] Al-Dulimi and Montana Management Inc. v. Switzerland, App. No. 5809/08 (Eur. Ct. H.R. June 21, 2016). Judgments of the Court cited herein are available at its website, http://www.hudoc.echr.coe.int.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 221. The case had been referred to the Grand Chamber following the judgment of the Second Chamber, which also found a violation of Article 6. Al-Dulimi v. Switzerland, App. No. 5809/08 (Eur. Ct. H.R. Nov. 26, 2013) [hereinafter *Al-Dulimi I*].

[3] Al-Jedda v. United Kingdom, 2011-IV Eur. Ct. H.R. 305, 50 ILM 950 (2011) (reported by Miša Zgonec-Rožej at 106 AJIL 830 (2012)); Nada v. Switzerland, 2012-V Eur. Ct. H.R. 115. The Court also referred to the European Court of Justice's decisions in Joined Cases C-402/05 P & C-415/05 P, Kadi v. Council, 2008 ECR I-6351 [hereinafter *Kadi I*] (reported by Miša Zgonec-Rožej at 103 AJIL 305 (2009)); and Joined Cases C-584/10 P, C-59310 P, & C-595/10 P, Commission v. Kadi (Eur. Ct. Justice July 18, 2013) (reported by Clemens A. Feinäugle at 107 AJIL 878 (2013)).