

## State Secret Privilege versus Human Rights: Lessons from the European Court of Human Rights Ruling on the *Abu Omar* Case

European Court of Human Rights, Judgment of 23 February 2016,  
*Nasr and Ghali v Italy*

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### INTRODUCTION

On 23 February 2016, the European Court of Human Rights, IV Section, unanimously convicted Italy in the *Nasr and Ghali* case<sup>1</sup> (also known as the *Abu Omar* case). According to the Court, the cooperation offered by Member States of the Council of Europe in the Extraordinary Renditions Programme – enacted by the United States<sup>2</sup> with the aim of fighting jihadist terrorism – overtly contradicted the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention' or 'the ECHR') from several points of view. In particular, as the Court had already pointed out in its landmark judgment

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<sup>1</sup> ECtHR 23 February 2016, Case No. 44883/09, *Nasr and Ghali v Italy*.

<sup>2</sup> Senate Select Committee on Intelligence, 'Committee Study of the Central Intelligence Agency's Detention and Interrogation Program', Executive Summary, 3 December 2014 (approved on 13 December 2012; updated for release on 3 April 2014), <[www.fas.org/irp/congress/2014\\_rpt/sci-rdi.pdf](http://www.fas.org/irp/congress/2014_rpt/sci-rdi.pdf)>, visited 22 December 2016. See Central Intelligence Agency, Memo to the Department of Justice Command Centre, 'Background Paper on CIA's Combined Use of Interrogation Techniques', 30 December 2004, <[www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf](http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf)>, visited 22 December 2016. Upon taking office, President Obama ordered a thorough review of interrogation techniques used by US federal officials against suspected terrorists: see Executive Order No. 13491 (74 Fed. Reg. 4893), 22 January 2009, <[www.whitehouse.gov](http://www.whitehouse.gov)>, visited 22 December 2016.

in the *El Masri* case,<sup>3</sup> it violated the ban on torture and other cruel, inhuman or degrading treatment as well as the prohibition on unlawful detention.<sup>4</sup>

However, the ruling is remarkable not only for having clearly settled the case law of the Court on extraordinary renditions, but also for having taken an important step in calling to account Member States when they fail to provide an effective judicial remedy to victims of serious violations of human rights, even when they are committed outside their territory. In so doing, the Court had to deal with the thorny issue of the use of state secrets, often invoked by governments in the struggle against terrorism. The Strasbourg Court ruled that resort to the state secret privilege is unlawful both when it is claimed in relation to evidence already in the public domain and when it is used to help national and foreign officials who have committed gross violations of human rights avoid prosecution. Moreover, according to the Court, the Convention is also breached when punishments imposed by domestic courts are not actually served due to the reluctance of national governments to enforce them.

This recent judgment raises important questions about the rules of the so-called war on terror and implies that limits exist as to what governments and their agents can do in the name of national security. Measures adopted by Member States to combat international terrorism may not infringe upon human rights that are considered inviolable (i.e. Articles 3 and 5 ECHR). Nor may the protection of other fundamental freedoms (i.e. Article 8 ECHR) be allowed to sink below the minimum standard embodied in the Convention. Sanctions exist to safeguard those limits, hence ensuring accountability for human rights violations.

Therefore, Member States are duty bound to provide prompt and effective investigation of all violations, ensure that convictions are handed down when appropriate, and that those sentences are served. After *El Masri*, the ruling here commented upon represents a further step by the Court towards the practical protection and substantial promotion of human rights and fundamental freedoms which must always be guaranteed, especially in challenging times.<sup>5</sup>

<sup>3</sup> ECtHR 13 December 2012, Case No. 39630/09, *El-Masri v Macedonia* [Grand Chamber].

<sup>4</sup> In general, on extraordinary renditions and related judicial outcomes, see A. Vedaschi, 'Extraordinary Renditions: esiste una giustizia transnazionale?' [*Extraordinary Renditions: Does a Transnational Justice Exist?*], 4 *Diritto Pubblico Comparato ed Europeo* (2013) p. 1255 at p. 1292 and doctrine cited therein; L. Fisher, 'Extraordinary Rendition: The Price of Secrecy', 57 *American University Law Review* (2008) p. 1405 at 1421; M.L. Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', 75 *George Washington Law Review* (2007) p. 1333 at p. 1355; D. Weissbrodt and A. Bergquist, 'Extraordinary Rendition and the Torture Convention', 46 *Virginia Journal of International Law* (2006) p. 585 at p. 593; D. Weissbrodt and A. Bergquist, 'Extraordinary Rendition: A Human Rights Analysis', 19 *Harvard Human Rights Journal* (2006) p. 123 at p. 128.

<sup>5</sup> D. Jenkins, 'The Long Decade', and M. Scheinin, 'Human Rights and Counter-Terrorism: Lessons from a Long Decade', both in D. Jenkins et al. (eds.), *The Long Decade* (Oxford University

## FACTS OF THE CASE

The *Nasr and Ghali* case (henceforth: *Abu Omar*) stemmed from complaints lodged by Nasr Osama Mustafa Hassan (alias Abu Omar), an Egyptian imam with refugee status in Italy – the first applicant – and his wife Nabila Ghali – the second applicant. The two complained of serious violations of their fundamental rights, given Abu Omar's extraordinary rendition by US agents with the cooperation of Italian military intelligence (*Servizio Informazioni e Sicurezza Militare*, 'SISMI'). Abu Omar was stopped by an Italian agent for a routine document check in Milan, forced into a truck, and handed over to agents of the Central Intelligence Agency ('CIA'). He was subsequently transferred to the NATO air-base at Aviano and, after a rapid refuelling stop in Ramstein, Germany, was flown to Cairo, Egypt, where he was detained in a secret prison and, under local laws, tortured and questioned on his (alleged) affiliation to jihadist terror cells. Therefore, following the usual pattern,<sup>6</sup> the extraordinary rendition of Abu Omar, like others carried out by CIA agents with the help of several European countries as part of the war on terror, was in effect nothing but a kidnapping aimed at the extrajudicial transfer of the target to a third state allowing torture as a legitimate means of questioning.

## CRIMINAL PROCEEDINGS BEFORE THE ITALIAN COURTS

The aforementioned crimes (i.e. kidnapping with the intent to engage in torture and other forms of cruel, inhuman and degrading treatment) were brought before the Tribunal of Milan.<sup>7</sup> In 2009, the Tribunal, a court of first instance in the Italian criminal judicial system, had convicted *in absentia* 22 CIA agents and one US military official involved in Abu Omar's kidnapping, but also acquitted three US citizens who enjoyed diplomatic immunity and, most remarkably, was forced

Press 2014) p. 3 and p. 289 respectively; A. Vidaschi, 'Has the Balancing of Rights Given Way to a Hierarchy of Values?', 1 *Comparative Law Review* (2010) p. 1 at p. 34; T. Groppi (ed.), *Democrazia e terrorismo. Diritti fondamentali e sicurezza dopo l'11 settembre 2001* [*Democracy and Terrorism. Fundamental Rights and Security Post-9/11*] (Editoriale Scientifica 2006).

<sup>6</sup>Open Society, 'Globalizing Torture. CIA Secret Detention and Extraordinary Rendition', New York, Open Society Foundation, 2013, <[www.opensocietyfoundations.org](http://www.opensocietyfoundations.org)>, visited 22 December 2016; Amnesty International, 'Open Secret. Mounting Evidence of Europe's Complicity in Rendition and Secret Detention', London, Amnesty International Publications, 2010; Amnesty International, 'Torture and Secret Detention: Testimony of the "Disappeared" in the "War on Terror"', August 2005, AI Index: AMR 51/108/2005, <[www.amnesty.ie](http://www.amnesty.ie)>, visited 22 December 2016.

<sup>7</sup>Tribunal of Milan, criminal section IV, decision 4 November 2009, No. 12428. In the Italian framework, prosecution is compulsory, so that, when crimes exist, public prosecutors – who are independent from the government – have the duty to initiate criminal proceedings (Art. 112 of the Italian Constitution).

to dismiss the charges against five Italian SISMi officers due to the invocation of the state secret privilege, which was promptly confirmed by the Prime Minister in office. By Italian law, the Prime Minister is the only authority vested with this prerogative power.<sup>8</sup> Therefore, when state secrecy is invoked regarding sensitive information during a criminal proceeding, and the Prime Minister confirms that such material has been classified a state secret, neither public prosecutors nor judges can, directly or indirectly, use the information and the material shielded by the privilege. Thus, the case had to be dismissed due to use of the state secret privilege. In *Abu Omar*, confirmation of the state secret privilege provoked a clash between the judicial authority and the executive branch, resulting in a dispute ('conflict of powers') settled by the Constitutional Court<sup>9</sup> in favour of the latter with the ruling No. 106/2009.<sup>10</sup>

In the meantime, both the defendants and the public prosecutor in charge of the case appealed the Tribunal's judgment. Reaffirming the judgment handed down at first instance, the Court of Appeal of Milan upheld the convictions and sentences handed down to the CIA agents, and even increased their punishment. However, in light of the Constitutional Court decision on the use of the state secret privilege, the Court of Appeal declared that it was not possible to proceed with the action filed against the Italian SISMi agents. The invocation of secrecy for the crucial evidence prevented the Court of Appeal from convicting the Italian intelligence officers. To explain its decision, the Court of Appeal employed the striking metaphor of a 'black curtain' drawn across the crucial evidence by the Constitutional Court in such a manner that every alleged charge remained 'undecidable'.<sup>11</sup>

Regarding the matter of the use of secrecy and, more precisely, of the sealed evidence, the General Prosecutor of the Court of Appeal filed a complaint with the Supreme Court of Cassation. The latter confirmed the convictions of the US agents. However, by means of a different interpretation of the use of secrecy, the Supreme Court struck down the acquittal of the Italian SISMi agents and instructed the Court of Appeal to rule again on the charges against them.

<sup>8</sup> Law 3 August 2007, No. 124 on Intelligence System for the Security of the Republic and New Provisions Governing State Secret Privilege, in Official Journal, 13 August 2007, No. 187. The Act in force was amended by Law No. 133/2012. See Art. 40(2-5) of Law No. 124/2007 and Art. 202 of the Italian Criminal Procedure Code. If the Prime Minister denies the existence of any state secret (or lets the 30-day deadline lapse without responding to a request made by judicial authorities), material useful to the case can be used as evidence at the criminal trial. See Art. 41(3 and 5) of Law No. 124/2007.

<sup>9</sup> See Art. 134 of the Italian Constitution, which calls upon the Constitutional Court to resolve disputes concerning the allocation of powers between the branches of government. See *infra* n. 18.

<sup>10</sup> Italian Constitutional Court, decision 11 March 2009, No. 106.

<sup>11</sup> Court of Appeal of Milan, criminal section III, decision 15 December 2010, No. 3688.

The Court of Cassation argued that state secret privilege could not shield evidence substantiating the unauthorised activities of members of the Italian intelligence services, i.e. those outside the exercise of their official functions.<sup>12</sup> Therefore, since both the Prime Minister and the Head of the SISMi had consistently declared that neither the Italian government nor Italian intelligence had had any part in Abu Omar's extraordinary rendition, there was no reason to prevent the Court of Appeal from judging the actions of intelligence agents who had acted on their own initiative (co-operating with the CIA).<sup>13</sup>

According to the Court of Cassation, the Court of Appeal convicted the Italian SISMi agents<sup>14</sup> in its second decision without waiting for the second ruling of the Constitutional Court, which had again been called upon to settle a further dispute between the executive branch and the judicial authorities (particularly the Court of Cassation) on the secrecy issue. The Constitutional Court once more ruled in favour of the Prime Minister in decision No. 24/2014.<sup>15</sup> Following the Constitutional Court decision, and with a show of some embarrassment and dismay, the Court of Cassation quashed the convictions of the Italian SISMi agents.<sup>16</sup>

#### THE THORNY ISSUE OF STATE SECRET PRIVILEGE IN THE CASE LAW OF THE CONSTITUTIONAL COURT

At every stage of the criminal proceedings the matter of state secrecy remained contentious.<sup>17</sup> The assertion of state secret privilege (i.e. its invocation and subsequent confirmation by the Prime Minister) constrained the actions of

<sup>12</sup>Nonetheless, per Art. 17(2) of Law No. 24/2007, actions committed by intelligence services that involve 'endangering or injuring the life, physical integrity, personal dignity, personal freedom, moral freedom, health or safety of one or more persons' are never included in any special reasons of exoneration of responsibility.

<sup>13</sup>Court of Cassation, criminal section V, decision 19 September 2012, No. 46340. See A. Vidaschi, 'La Cassazione solleva il "sipario nero" calato dalla Consulta: il caso Abu Omar si riapre' [*The Court of Cassation Lifts the Curtain Placed by the Constitutional Court: the Abu Omar Case Reopens*], 1 *Percorsi costituzionali* (2013) p. 163 at p. 194.

<sup>14</sup>Court of Appeal of Milan, criminal section IV, decision 3 April 2013, No. 985.

<sup>15</sup>Italian Constitutional Court, decision 19 February 2014, No. 24. A. Vidaschi, 'Il segreto di Stato resta senza giudice' [*The State Secret Privilege Remains Without a Judge*], 1 *Giurisprudenza costituzionale* (2014) p. 394 at p. 400. See also decision 21 November 2011, No. 40.

<sup>16</sup>A. Pace, 'Le due Corti e il caso Abu Omar' [*The Two Courts and the Abu Omar Case*], 1 *Giurisprudenza costituzionale* (2014) p. 389 at p. 394.

<sup>17</sup>A. Spataro, 'Abuse of State Secrecy and National Security', Tbilisi Report, 16 September 2010, <[www.assembly.coe.int](http://www.assembly.coe.int)>, visited 22 December 2016; T. Scovazzi, 'Considerazioni in tema di segreto di Stato e gravi violazioni dei diritti umani' [*Considerations on State Secret Privilege and Gross Violations of Human Rights*], in G. Venturini and S. Bariatti (eds.), *Individuals Rights and International Justice* (Giuffrè 2009) p. 885.

the judiciary against Italian intelligence agents and provoked a lengthy and bitter dispute between the executive branch (i.e. the Prime Minister) and the judicial authorities (i.e. the prosecutors responsible for the criminal investigation and judges who were presiding over the trial). The Constitutional Court was called upon to settle these ‘conflicts of powers’<sup>18</sup> and consistently ruled in favour of the Prime Minister. In other words, by supporting the position of the government, the Court considered use of the state secret privilege lawful.

In *Abu Omar*, the state secret privilege was, arguably, extended beyond the terms explicitly provided by Italian law, and under controversial circumstances. First, while Article 202 of the Italian Code of Criminal Procedure expressly provides that witnesses may invoke the privilege, in *Abu Omar* it was invoked by the defendants, a rather unusual circumstance in light of Italian judicial history on the same subject matter.<sup>19</sup> Second, and more critically, state secrecy was claimed in relation to facts, documents and information that were already known to the public prosecutor in charge of the case (the intelligence agents themselves had provided them at an earlier stage of the investigation) and in the public domain (due to the Fava and Marty Reports, whose content was widely circulated in the media).<sup>20</sup> The charged agents subsequently asserted that this material, already disclosed, was in fact classified. Consequently, the secrecy claim no longer served to protect national security but rather had the effect of shielding the defendants from their culpability. Third, the defendants (officers of the Italian military intelligence) claimed state secret privilege – and this is perhaps the most egregious element – in relation to serious criminal offences.<sup>21</sup>

Despite these controversial aspects, the Constitutional Court reaffirmed that the decision to assert state secret privilege falls within the discretionary powers of

<sup>18</sup> Pursuant to Art. 134 of the Italian Constitution, the Constitutional Court has jurisdiction to settle those conflicts that may arise – *inter alia* – between different ‘powers’ within the constitutional structure of the state (e.g. the executive branch and the judiciary). Where one of these ‘powers’ considers that another one did, in fact, violate or interfere with its own competences under the Constitution, it may ask the Court for a ruling intended to cause such violation or interference to cease. Disputes between the executive power and judicial authorities are generally rare and – in any case – they usually appear once within a sole judicial proceeding. By contrast, within the *Abu Omar* case, ‘conflicts of powers’ were raised (by the judiciary against the executive branch and vice versa) seven times within a sole criminal proceeding. This circumstance underlines the sensitive nature of the issues at stake. See *supra* n. 9.

<sup>19</sup> In general, defendants may easily resort to their constitutional right ‘to remain silent’ pursuant to Art. 208 of the Italian Code of Criminal Procedure, and the Judgment of the Constitutional Court No. 361/1998.

<sup>20</sup> See *infra* n. 29.

<sup>21</sup> See *supra* n. 12. By Italian law, when agents of intelligence services endanger or injure ‘life, physical integrity, personal dignity, personal freedom ...’ they are never exonerated from their responsibility, since such actions can, under no circumstance, be authorised legitimately.

the Prime Minister, as it implies an evaluation of the most appropriate means to ensure national security. Hence, the Court stressed the essentially political nature of such a decision.<sup>22</sup> In doing so, the Court underlined, correctly, that use of state secrecy must be functional regarding the fundamental interests of national security. Since the 1970s,<sup>23</sup> the Court has consistently highlighted the link between state secrecy and the *salus rei publicae*, which includes the state's international personality, territorial integrity, independence and, ultimately, its survival.<sup>24</sup> According to the Court, the constitutional grounds of such a preeminent interest are Articles 1, 5 and 52 of the Italian Constitution which, respectively, aim to protect the democratic framework and independence of the Nation and to impose a sacred duty to defend the homeland.<sup>25</sup>

In its reasoning the Court stressed that state secrecy does not protect the interests of the political majority, but rather safeguards fundamental general interests which have a constitutional dimension. Given the constitutional dimension, the Court excluded any scrutiny of state secrecy by ordinary judges (i.e. judges of first and second instance) and even by the Court of Cassation: only the Constitutional Court has the power to perform judicial review of state secret privilege.<sup>26</sup> While the scope of such review is not specified, the law clearly provides for the Constitutional Court to rule on the legitimacy of state secrecy by virtue of its authority to settle disputes between the executive and the judiciary on this issue, pursuant to Article 134 of the Italian Constitution. Consequently, the law forbids the state secret privilege to be invoked before the Constitutional Court itself; hence, the Court has the power to gain access to classified documents and information. These normative assumptions lead to the conclusion that the Court enjoys the prerogative to review the Prime Minister's decision to confirm the existence of a secrecy bond (and to evaluate whether the same bond could actually be established) *vis à vis* the conditions set forth by Law No. 124/2007. However, instead of playing the role of ultimate judge on issues of state secrecy (including its legitimacy), the Court in *Abu Omar* circumscribed its decision-making capacity by

<sup>22</sup> Italian Constitutional Court, decision 11 March 2009, No. 106, 'Considerato in diritto' para. 3.

<sup>23</sup> Law No. 124/2007 replaced Law No. 801/1977, which was adopted following the Italian Constitutional Court, decisions No. 82/1976 and No. 86/1977.

<sup>24</sup> *Supra* n. 23.

<sup>25</sup> Constitutional case law of the 1970s insists on Art. 52 of the Italian Constitution (marginally Arts. 87 and 126), then touches on Arts. 1 and 5 of the Italian Constitution, before explicitly referring to a set of articles and not only on one article. Italian constitutional scholars are divided on the issue of the constitutional basis of the state secret privilege. For a general overview, see A. Vedaschi, 'Arcana Imperii and Salus Rei Publicae: State Secrets Privilege and the Italian Legal Framework', in D. Cole et al., *Secrecy, National Security and the Vindication of Constitutional Law* (Elgar 2013) p. 95 at p. 97.

<sup>26</sup> Art. 40 of Law No. 124/2007 and Art. 202(8) of the Italian Criminal Procedure Code.

restricting itself to ascertaining formal and procedural aspects. More precisely, it simply asserted that the Prime Minister has the authority to confirm state secret privilege, and that its invocation, in the case at hand, was in accordance with the temporal and formal rules stated by law, without verifying the existence of a link between the use of secrecy and the reasons listed by the law.<sup>27</sup>

In addition – and this is another controversial point the decision makes – the Court clearly gave a narrow interpretation to the limits provided by Law No. 124/2007 on the resort to state secrecy. According to that Law, the shield of secrecy cannot be used to conceal acts against the constitutional *order*,<sup>28</sup> which itself embodies human rights and fundamental values such as human dignity. The abduction of Abu Omar, designed to facilitate a secret detention whose outcome was the torture of the victim, is commonly regarded<sup>29</sup> as an infringement of several human rights and as a violation of human dignity. Therefore, it amounts to a breach of the constitutional *order*. Conversely, the Constitutional Court stated that a single offence, albeit one as serious as extraordinary rendition, cannot constitute an act against the constitutional *system*, insofar as it is not aimed at overthrowing the government.<sup>30</sup> The Court thus conflated two different concepts, i.e. constitutional order, which rests upon human rights and fundamental values,

<sup>27</sup> Italian Constitutional Court, decision 11 March 2009, No. 106, ‘Considerato in diritto’ paras. 8.1-8.4, 12.5. See Art. 39(1) of Law No. 124/2007: ‘The records, documents, information, activities and every other thing the disclosure of which may be used to damage the integrity of the Republic (including in relation to international agreements, the defence of its underlying institutions as established by the Constitution, the State’s independence vis à vis other states and its relations with them, as well as its military preparation and defence), shall have State-secret status’.

<sup>28</sup> Art. 39(11) of Law No. 124/2007, which expressly forbids placing the seal of state secrecy on documents, information or matters relating to acts of terrorism or acts that may endanger the constitutional order: ‘In no circumstances shall information, documents or matters relating to acts of terrorism, acts subverting the constitutional order or acts constituting the criminal offences referred to under articles 285, 416-bis, 416-ter and 422 of the Criminal Code, have State-secret status’.

<sup>29</sup> A number of supranational bodies, such as the ECtHR (*see infra* n. 33), the European Parliament (*see* Temporary Committee on the ‘alleged use of European countries by the CIA for the transportation and illegal detention of prisoners’, Fava Report, <[www.europarl.europa.eu](http://www.europarl.europa.eu)>, visited 22 December 2016) and the Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights, ‘Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States’, AS/Jur (2006) 16 Part II, 12 June 2006, PACE Doc. 10957-Marty Report I; and ‘Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States’, AS/Jur (2007) 36, 11 June 2007, PACE Doc. 11302-Marty Report II, <[www.assembly.coe.int](http://www.assembly.coe.int)>, visited 22 December 2016) have repeatedly classified such practice as a serious violation of fundamental human rights and human dignity in particular.

<sup>30</sup> A. Pace, ‘I “fatti eversivi dell’ordine costituzionale” nella legge n. 801 del 1977 e nella legge n. 124 del 2007’ [*The Facts Contrary to the Constitutional Order in the Law No. 801 of 1977 and in the Law No. 124 of 2007*], 2 *Costituzionalismo.it* (2009), <[www.costituzionalismo.it](http://www.costituzionalismo.it)>, visited 22 December 2016. *Contra* A. Anzon, ‘Il segreto di Stato ancora una volta tra Presidente del Consiglio, autorità giudiziaria e Corte Costituzionale’ [*The Return of the State Secret Privilege Between Prime*



and the constitutional system, which refers to the democratic life of institutions. The former is wider than the latter. Indeed, the constitutional system is contained within the constitutional order, but due to the Court's narrow interpretation, the constitutional order and the constitutional system overlap. Following from the Court's argument, basic human rights and the fundamental value of human dignity (inconsistent with torture and other cruel treatment) are not an integral part of Italian constitutional order, which, under a narrow interpretation, amounts to a simple constitutional system of government. As a result, in the Court's view, the state secret privilege should not have been lifted in *Abu Omar*.

In conclusion, by refusing effective judicial review of the use of state secrecy, the Constitutional Court has in its most recent decisions abdicated its role as sole reviewer of state secret privilege, leaving it under the wide and entirely discretionary purview of the Prime Minister (which presents a risk of arbitrary use).<sup>31</sup> This refusal by the Constitutional Court is particularly disturbing due to a lack of other effective forms of oversight. In fact, while the Italian legal framework does provide for the political oversight of state secrecy, this political oversight is not automatically exercised<sup>32</sup> by Parliament. Moreover, parliamentary review does not necessarily lead to any modification of decisions taken by the Prime Minister, even when Parliament disagrees with the reasons grounding the assertion of state secret privilege. Consequently, parliamentary review, when it even takes place, remains relatively weak. In any case, in *Abu Omar* no political oversight was initiated.

## THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

In the present ruling, the European Court of Human Rights once again unmistakably condemns the practice of extraordinary rendition.<sup>33</sup> It also poses strict limits on the invocation of the state secret privilege when it comes to

*Minister, Judicial Authority and Constitutional Court*], 2 *Giurisprudenza costituzionale* (2009) p. 1020 at p. 1031.

<sup>31</sup> See A. Vidaschi, 'Il segreto di Stato tra tradizione e innovazione: novità normative e recenti evoluzioni giurisprudenziali' [*The State Secret Privilege Between Tradition and Innovation: Developments in Legislative News and Recent Case Laws*], 3 *Diritto Pubblico Comparato ed Europeo* (2012) p. 978 at p. 995. See also ECtHR 9 September 2009, Case No. 72094/01, *Kavasanica v Slovakia*, § 79 and ECtHR 22 October 2009, Case No. 69519/01, *Pasko v Russia*.

<sup>32</sup> The Parliamentary Committee for the Intelligence and Security Services – a political body made up of five deputies and five senators and presided over by a member of the opposition – submits a report to the plenary Assembly of Parliament in order to call for its oversight on state secrecy: Arts. 30 and 31, Law No. 124/2007 as modified by Law No. 133/2012.

<sup>33</sup> *El-Masri v Macedonia* [Grand Chamber] *supra* n. 3; see also ECtHR 27 April 2014, Case No. 28761/11, *Al-Nashiri v Poland*; ECtHR 24 July 2014, Case No. 7511/13, *Husayn (Abu Zubaydah) v Poland*. Those decisions embrace the stance of the Council of Europe and its Parliamentary Assembly on this controversial counter-terrorism measure, see *supra* n. 29.

ascertaining responsibility for serious violations of fundamental rights, and stresses the need for convictions to be imposed and sentences to in fact be served in order to ensure that victims may enjoy an ‘effective remedy’ as dictated by the ECHR. Having clarified the facts of the case,<sup>34</sup> the Court recognised, among others, breaches of Article 3 ECHR, which prohibits torture and inhuman treatment, and Article 5, which safeguards the right to liberty and security.

Regarding the substantial violation of Article 3 ECHR, the Court noted that, during his abduction followed by his forced disappearance, Abu Omar suffered physical and psychological trauma amounting to a severe degree of ill-treatment and even torture. The Court emphasised that his extraordinary rendition not only put the applicant in a situation of complete vulnerability to physical injury, but also left him in a state of continuous anxiety due to the uncertainty of his fate.<sup>35</sup> Thus the violation of the substantial dimension of Article 3 clearly emerges.

However, following upon the Court’s reasoning (which confirmed its settled case law),<sup>36</sup> Italian authorities were aware of the ‘real risk’ of the perpetration of cruel and inhuman treatment on victims of extraordinary rendition and, hence, on Abu Omar himself.<sup>37</sup> Nevertheless, Italian officers did nothing to prevent Abu Omar from being flown to a third country notorious for its use of torture. On the contrary, in order to comply with the Convention, the Italian authorities should

<sup>34</sup> As the Court has already done in other cases of extraordinary renditions, it derogated from the rule by which the burden of proof is on the claimant (*affirmanti incumbit probatio*) since in such circumstances it should be easier for national authorities to defend themselves against the alleged violations of the Convention. When there is substantial, precise and consistent evidence in favour of the version of the claimant and in the lack of a convincing explanation provided by national authorities, the Court shall embrace the victim’s version.

<sup>35</sup> See *Nasr and Ghali v Italy*, *supra* n. 1, § 286.

<sup>36</sup> See ECtHR 17 January 2012, Case No. 8139/09, *Othman v the United Kingdom*, § 233.

<sup>37</sup> See *Nasr and Ghali v Italy*, *supra* n. 1, § 242-243 and 288. In the Court’s words: 242 ‘Selon la jurisprudence constante de la Cour, la décision d’un État contractant de renvoyer un fugitif – et a fortiori le renvoi lui-même – peut soulever un problème au regard de l’article 3, et donc engager la responsabilité de l’État en cause au titre de la Convention, lorsqu’il y a des motifs sérieux et avérés de croire que l’intéressé, si on le renvoie vers le pays de destination, y courra un risque réel d’être soumis à un traitement contraire à cette disposition [...]. 243. Dans le contexte des affaires similaires relatives à des opérations de “remise extraordinaire” [...] la Cour a aussi souligné que, lorsqu’il est établi que l’État qui renvoie savait, ou aurait dû savoir, à l’époque des faits que la personne renvoyée du territoire faisait l’objet d’une “remise extraordinaire” [...], la possibilité d’une violation de l’article 3 est sérieuse et doit être considérée comme un élément intrinsèque du transfert’. Similarly, in *El Masri v Macedonia* (*supra* n. 3, § 218), the Court held that ‘[...] there were serious reasons to believe that, if the applicant was to be transferred into US custody under the “rendition” programme, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Consequently, it must be concluded that the Macedonian authorities knew or ought to have known, at the relevant time, that there was a real risk that the applicant would be subjected to treatment contrary to Article 3 of the Convention.’

have adopted every measure necessary to prevent an individual subject to Italian jurisdiction from being exposed to a 'real risk' of torture or inhuman and degrading treatment.<sup>38</sup> In the present case, the obligation falling upon the Italian authorities was even greater given that the applicant enjoyed refugee status. Italy was eventually held accountable both for the direct actions of the SISMI agents and for failing to prevent the abduction and subsequent torture of Abu Omar.

As regards Article 5 ECHR, the arguments are consistent with those set forth regarding Article 3 and rest upon the principle that a Member State should be held accountable for events resulting from its own lapse. According to the Court, Italy had violated the prohibition on arbitrary arrest and unlawful detention since Italian agents not only stopped the applicant at the first stage of the extraordinary rendition, but also cooperated, at least passively, in the forced deportation of Abu Omar to a third country where he was unlawfully detained. As Italian authorities did nothing to prevent his *incommunicado* detention, Italy is also jointly responsible for the secret detention of Abu Omar in Egypt. Moreover, a detention of this nature deprived the applicant of access to his family; hence, the Court also held Italy responsible for a violation of Article 8 ECHR, which protects private and family life.

From a more general perspective, I would like to point out the Court's emphasis on the issue of accountability. Consistent with its previous case law, the Court established that Member States of the Council of Europe may not only be held accountable for actions committed directly by their national governments and their intelligence services, but may also be held accountable for the conduct of any third countries where such actions have been made possible by a state's own negligence, including its failure to prevent kidnapping, irregular detention and torture. It is irrelevant, in terms of accountability, whether the forced deportation, interrogation by torture and *incommunicado* detention were carried out by third countries (in the present case, the US and Egypt).<sup>39</sup> Therefore, in affirming the violation of Articles 3 and 5 of the Convention, the Court extended Italy's accountability to the cruel and inhuman treatment perpetrated by the Egyptian police and to all of the stages of the extraordinary rendition carried out by US agents, since the Italian authorities knew or should have known about them.

The accountability issue emerges clearly in another point made by the Court: Italy also frustrated the applicant's right to seek effective remedy as guaranteed by Article 13 ECHR, read in conjunction with Article 3, in its procedural dimension, and with Article 5 and Article 8. This passage is particularly significant. Unlike previous cases in which national authorities frequently failed to investigate violations (e.g. Macedonia: in *El Masri* the trial did not even start due to the

<sup>38</sup> See *Nasr and Ghali v Italy*, *supra* n. 1, § 289-290.

<sup>39</sup> See *Nasr and Ghali v Italy*, *supra* n. 1, § 288.

alleged absence of minimum requirements), in this instance the Court acknowledged the high quality of the investigation carried out by Italian law enforcement authorities, the judiciary, and prosecutors. Indeed, the Court praised the prosecuting authorities for their successful identification of those who physically kidnapped Abu Omar and who participated in his extraordinary rendition.<sup>40</sup> Nevertheless, the Court also considered that Italy was unable to comply with the obligation both to effectively punish the guilty CIA agents (due to the inertia of the Italian government), and to convict the indicted Italian intelligence officers (because of the systematic use of the state secret privilege). In fact, while the convicted CIA agents were able to avoid serving their sentences since the Italian government did not promptly request extradition,<sup>41</sup> the invocation of state secrecy barred the prosecution of Italian intelligence officers at the first two stages of the trial. Even after the Court of Appeal's second ruling, the assertion of secrecy led the Court of Cassation to overturn the convictions of the SISMI agents due to the Constitutional Court's further decision in favour of the Prime Minister, who had confirmed the state secret privilege shielding evidence essential to the prosecution's case.

Focusing on the issue of state secrecy, the Strasbourg Court noted that the state secret privilege, although considered lawful by the Italian Constitutional Court, could not be invoked against the European Court of Human Rights itself. Therefore, the Strasbourg judges were entitled to examine the closed material. On these grounds, the Court itself grasped the opportunity to set limits on the lawful use of secrecy.

In the *El Masri* ruling, the Court had already had a chance to criticise the US Administration (which is, however, not subject to its jurisdiction) for the systematic use of the state secret privilege. Indeed, in criticising the improper use of secrecy, the Court clearly stated that secrecy shall remain an exception<sup>42</sup> and made explicit reference to the right to the truth.<sup>43</sup> However, in *Abu Omar*, while

<sup>40</sup> See *Nasr and Ghali v Italy*, *supra* n. 1, §§ 265 and 267.

<sup>41</sup> Despite the existence of a dedicated agreement between the US and Italy itself: on 13 October 1983 Italy and the US signed a bilateral agreement on mutual extradition, which on 3 May 2006 was modified and subsequently ratified. However, on 5 October 2015 the CIA agent, Sabrina De Sousa, was arrested in Portugal on the grounds of a European arrest warrant forwarded by the Public Prosecutor of Milan. On 12 January 2016, the Court of Appeal of Lisbon ruled in favour of her extradition to Italy and the decision was upheld by the Portuguese Supreme Court on 11 April 2016. De Sousa's final appeal to the Constitutional Court of Portugal was rejected on 8 June 2016.

<sup>42</sup> See ECtHR 9 February 1995, Case No. 16616/90, *Vereniging Weekblad Bluf v the Netherlands*; ECtHR 24 July 2008, Case No. 1365/07, *C.G. v Bulgaria*, § 40. Cf. ECtHR 10 December 2007, Case No. 69698/01, *Stoll v Switzerland* [Grand Chamber], §§ 107 and 111.

<sup>43</sup> A. Vedaschi, 'Globalization of Human Rights and Mutual Influence between Courts: the Innovative Reverse Path of the Right to the Truth', in S. Shetreet (ed.), *Culture of Judicial Independence: Rule of Law and World Peace* (Nijhoff-Brill 2014) p. 107 at p. 114; F. Fabbrini,

the Court addressed the aforementioned rebuke to a Member State (Italy), it also established that invoking the state secret privilege for previously disclosed facts and information (i.e. material in the public domain) is nonsense, both logically as well as legally.<sup>44</sup> In addition, the Court stressed that in *Abu Omar* the assertion of state secret privilege was the reason why the Italian intelligence agents could not be held accountable for their crimes and were able to avoid punishment.<sup>45</sup> That is a crucial point in its reasoning: the Court held that secrecy is unlawful when it grants impunity to the perpetrators of crimes.<sup>46</sup>

Despite praising the overall criminal investigation and the prompt move to action by domestic courts,<sup>47</sup> the Court highlighted the substantial ineffectiveness of the proceedings and punishments, as Italy had both failed to obtain the conviction of several of the indicted agents as well as failed to enforce the sentences handed down to US citizens. This point typifies the Court's pragmatic approach: carrying out a prompt and an independent investigation is not enough if it does not result in the appropriate convictions and sentences served. In brief, not only did the Italian government use secrecy to seal essential evidence already in the public domain, thereby granting *de facto* immunity to the indicted agents, it also remained inactive by failing to forward extradition requests to ensure that sentences lawfully handed out to those found guilty were indeed served. In addition, the Italian President of the Republic pardoned three of the convicted US citizens.<sup>48</sup> In the Court's view, the ineffectiveness of the national proceedings amounted to a breach of the rights granted to Abu Omar by the Convention. From this perspective, it is worth noting that the European Court of Human

'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism', 14 *Human Rights Law Review* (2014) p. 85 at p. 99.

<sup>44</sup> See *Nasr and Ghali v Italy supra* n. 1, § 268. A. Vidaschi, 'Cronaca di una condanna annunciata: Abu Omar a Strasburgo, l'ultimo atto' [*Chronicle of a Conviction Foretold: Abu Omar at Strasbourg, the Ultimate Ruling*], in 1 *DPCE online* (2016), <[www.dpce.it/dpceonline12016/](http://www.dpce.it/dpceonline12016/)>, visited 22 December 2016; T. Scovazzi, 'Segreto di Stato e diritti umani: il sipario nero sul caso "Abu Omar"' [*State Secret Privilege and Human Rights: the Black Curtain over the Abu Omar Case*], 1 *Diritti Umani e Diritto Internazionale* (2016) p. 157.

<sup>45</sup> *Nasr and Ghali v Italy supra* n. 1, § 269.

<sup>46</sup> It is worth noting that the Guidelines adopted by the Committee of Ministers of the Council of Europe stressed that 'impunity must be fought for 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': Directorate General of Human Rights and Rule of Law, 'Eradicating Impunity for Serious Human Rights Violations', H/Inf(2011)7', <[www.coe.int/justice](http://www.coe.int/justice)>, visited 3 September 2016.

<sup>47</sup> See *Nasr and Ghali v Italy supra* n. 1, § 272.

<sup>48</sup> More precisely, on 5 April 2013 the President of the Republic pardoned one of the convicted American officers (Colonel Joseph L. Romano). On 23 December 2015, the other convicted US citizens were pardoned (Betnie Medero for the entire sanction and Robert S. Lady for two years, so that his punishment was reduced from nine to seven years' imprisonment).

Rights considers itself entitled to scrutinise the adequacy of the outcomes of domestic criminal proceedings and to judge whether they comply with the duty to effectively apply the ECHR.

With regard to Nabila Ghali, although there is no automatically recognised victim status for relatives of the applicant, the Court, considering the specific and prolonged condition of anxiety caused by the forced disappearance, also found that a violation of Articles 3 and 8 in conjunction with Article 13 ECHR had occurred with respect to Abu Omar's wife.

To sum up, since the Italian Constitutional Court forced both the Court of Appeal and the Court of Cassation to acquit several officers of Italian military intelligence by fostering the misuse of the privilege of state secrecy, and since the Italian government had not taken measures to enforce the sentences imposed on US citizens, accountability had not been ensured for gross violations of human rights. This lamentable situation is not consistent with the rule of law. On these grounds, the Court ordered Italy to pay compensation of €70,000 to Abu Omar and €15,000 to Mrs Ghali, plus a further €30,000 in legal expenses.

## CONCLUSION

The ruling of the European Court of Human Rights in the *Abu Omar* case is remarkable from several perspectives.

First, settling and reinforcing its previous case law, the Strasbourg Court unequivocally condemned the Extraordinary Renditions Programme enacted by the US with the cooperation of several European countries as part of the war on terror. This controversial counter-terrorism measure, designed to facilitate forced disappearances, secret detentions and the torture of targeted individuals, represents an overt breach of the most basic principles of the Convention. According to the Court, such principles are indissolubly linked to the essence of democracy and, consequently, not subject to derogation. In its reasoning, the Court constantly refers to the foundations of democratic communities, which have to be preserved, especially in times of emergency. Therefore, democratic states bear a duty to act consistently with the rule of law, even when faced with an insidious threat such as the one posed by jihadist terrorism. Indeed, the so-called war on terror needs to be fought in compliance with minimum standards prohibiting torture while requiring that any detention be accompanied by legally binding safeguards. To this extent, by firmly condemning criminal actions perpetrated in the name of national security by domestic authorities, the supranational system of protection of human rights embodied by the European Court of Human Rights has provided a noteworthy lesson to the national one, which will hopefully not go unnoticed.

The second remarkable point the decision makes relates to the issue of accountability, which depends on an 'effective remedy' being granted to victims of abuses committed by public powers. In this regard, the judgment clearly reveals the pragmatic attitude of the Strasbourg judges: the Court found an infringement of the Convention both because certain perpetrators of gross violations of human rights were not actually convicted (e.g. the Italian intelligence agents) and because even those who were convicted (e.g. CIA agents) were not effectively punished (i.e. they never served the sentences handed down), even though a complete and prompt investigation had been conducted by domestic prosecuting authorities. Indeed, the very essence of human rights lies in their effective protection, and this entails: first, the need for prompt and effective investigation regarding any violations; second, that convictions be handed down; and third, that sentences actually be served. In this regard, it is important to point out that the Court strongly insists on the effective prosecution and firm enforcement of any conviction as crucial to full compliance with the ECHR: a serious investigation, which nonetheless yields no relevant outcome in terms of punishment, will not suffice, and the state secret privilege cannot be used as an alibi to avoid such convictions. In other words, enforcement of the Convention relies on an effective and full vindication of the rights it enshrines. Such vindication stands in stark contrast to the lack of responsibility emanating from the national proceedings, which granted *de facto* immunity to certain intelligence agents, placing them beyond the reach of justice.

The *de facto* immunity issue was a consequence of both the (ab-)use of secrecy and the inertia of the national authorities. According to the Court, state secrecy must remain an exception and needs to be balanced with specific guarantees. Hence, scrutiny must be strict, particularly when fundamental rights are at stake. The Court clarified that use of the state secret privilege regarding facts and information in the public domain, especially when the privilege is invoked in order to grant immunity to the perpetrators of serious violations of human rights, entails a violation of the Convention. This innovative stance strengthens and explicates the Court's previous case law which always insisted on the necessity of judicial review aimed at assessing the existence of reasonable justifications for the invocation of state secret privilege.

The decision offers a severe rebuke to the Italian Constitutional Court for its position in the *Abu Omar* case. The Constitutional Court relied on the Prime Minister's decision on state secrets, and skewed the balance between security and freedom heavily in favour of the former. It refused to perform any substantial scrutiny of state secret privilege, and resorted to concealing evidence of gross violations of human rights even though this violation, from my perspective, amounted to a breach of the constitutional order. Therefore, by neglecting its duty to assess the lawfulness of the use of secrecy, the Italian Constitutional Court, in my opinion, showed an excessively deferential attitude towards the Prime Minister.

At the same time, the European Court of Human Rights emphasised that a breach of the Convention may also occur due to the behaviour of domestic authorities in enforcing sentences. In *Abu Omar*, while the President of the Republic pardoned three of the convicted US officers, the Italian government took no steps to seek extradition. In censuring these behaviours, the Court regards itself as entitled to scrutinise the adequacy of convictions imposed by domestic courts and, most remarkably, their actual enforcement. In doing so, the Court reveals its concern for the effectiveness of remedies, which can be detrimental in terms of deterrence. In fact, human rights only exist to the extent that their violation can be effectively and adequately punished. Rightful and proportionate punishments for human rights violations imply the very existence of such rights, and exercise a deterrent and dissuasive pressure on potential offenders. Ultimately, the effectiveness of the legal action and its outcomes are essential to maintaining public trust in the judicial system.

In *Abu Omar*, the Court has taken significant steps aimed at increasing accountability for gross violations of human rights – rights whose protection needs to be guaranteed, especially in challenging times – and at re-establishing the balance between freedom and security in favour of the former. Although one must recognise that full vindication of these rights should properly take place in domestic fora (since the Court cannot punish the perpetrators of crimes directly), the rationale of this ruling provides relevant redress to the victims in relation to the intolerable situation in which justice is denied. Furthermore, its moral suasion will probably have remarkable effect.

