



**DIPARTIMENTO DI GIURISPRUDENZA**

**Cattedra di Tutela Internazionale dei Diritti Umani**

**STATE SECRETS AND HUMAN RIGHTS:  
AN ANALYSIS OF THE PRE AND POST-9/11**

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**ANNO ACCADEMICO 2016-2017**

*The Age of Terrorism cannot, should not, be allowed to  
supersede the Age of Rights*

Louis Henkin

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## Introduction

Secrecy is a powerful instrument and it has a twofold nature.

On one hand, secrecy is necessary for the State to survive, for the legal order to be maintained: this is the concept of *arcana imperii*, which finds new stamina in the democratic State.<sup>1</sup> Indeed, for the general interests of the State as community to be pursued, some information must remain in the domain of few.<sup>2</sup>

In this light, the concept of state secrets is not irreconcilable with the one of democracy and transparency: secrecy is an exception to the latter, and it is unavoidable for the existence of the very concept of State and governance. Some 'invisible' powers must live with the 'visible' ones.<sup>3</sup>

Therefore, the institute of State Secrets Privilege is innate within the good governance and both the Italian and the U.S. courts have found its origin in the dawning of the modern State.<sup>4</sup>

On the other hand, secrecy is dangerous. The idea of hiding and withholding information from the public domain is ambiguous and arguable.

Indeed, if the democracy entails that sovereign powers reside and are exercised by the whole group of free citizens, how can the latter govern when they do not even know?<sup>5</sup>

Hannah Arendt, addressing the origin of Totalitarianism, affirmed that "Real power begins where secrecy begins."<sup>6</sup> As a consequence, limits, safeguards and controls must bridle the concept of secret. Otherwise, secrecy would turn into an instrument for the authorities to avoid any scrutiny from their citizens and into a complete 'black check' for the Governments' decisions.<sup>7</sup>

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<sup>1</sup> Arianna Vidaschi, *Arcanii Imperii and Salus Rei Publicae: State Secrets Privilege and the Italian Legal Framework* in *SECURITY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW 95* (David Cole, Federico Fabbrini & Arianna Vidaschi eds., 2013).

<sup>2</sup> Corte Cost., 24 Maggio 1977, n. 86, (It.).

<sup>3</sup> Andrea Morrone, *Il nomos del segreto di Stato* in *NUOVI PROFILI DEL SEGRETO DI STATO E DELL'ATTIVITÀ DI INTELLIGENCE 7* (Giulio Illuminati & G. Giappichelli eds., 2010).

<sup>4</sup> Corte Cost., 14 Aprile 1976, n. 82, (It.); *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>5</sup> *democracy* in *BLACK'S LAW DICTIONARY* (10<sup>th</sup> ed., West Group 2014).

<sup>6</sup> HANNA ARENDT, *THE ORIGIN OF TOTALITARISM* (1951).

<sup>7</sup> *U.S. Invokes State Secrets to Bar Cleric Lawsuit*, CBS NEWS, Sept. 25, 2010, <http://www.cbsnews.com/news/us-invokes-state-secrets-to-bar-cleric-lawsuit/>.

Such an ambivalent concept creates concern when the pillars of the rule of law and of the separation of powers' system start tottering, as it is happening in the post 9/11 world.

The terroristic attacks against New York and Washington constitute a figurative turning point of the existent legal order.<sup>8</sup> As a watershed, it changed the direction of things and it provoked a consistent revolution in the way Governments interpret civil rights, fundamental principles and existing safeguards.<sup>9</sup>

Indeed, while fighting against terrorism, Governments are willing to derogate from the principles of the rule of law and from fundamental human rights in favor of national security.<sup>10</sup> The 'War on Terror' that began that tragic 9/11 does not fit any existent legal paradigm.<sup>11</sup>

Cofer Black, director of the CIA Counter-Terrorism Department affirmed: "All you need to know is that there was a 'before 9/11' and an 'after 9/11.' After 9/11, the gloves came off."<sup>12</sup>

The aftermath of the terroristic attacks opens the path to a reality where the exception becomes the rule, where the torture is a means to gather information, where the arbitrary detention is not a ban, where kidnapping a person and making him or her fly to other part of the world is not impossible, but it is rather a well-established practice.<sup>13</sup>

In this new unprecedented reality the recourse to the concept of 'State Secrets' and to the institute of the 'State secrets privilege' assumes a new role. Governments avoid any scrutiny from the judicial and the parliamentary branches asserting an alleged need for secrecy in the name of the national security.

In this way, State officials feel more confident when violating worldwide-accepted human rights standard because they will not respond for them.

At the same time, they recall the concept of 'State Secrets' to pretend they do

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<sup>8</sup> Richard W. Bulliet, *9/11: Landmark or Watershed*, 10 YEARS AFTER SEPTEMBER 11 FORUM, <http://essays.ssrc.org/10yearsafter911/911-landmark-or-watershed/>.

<sup>9</sup> Michael Ignatieff, *Human Rights, the Laws of War, and Terrorism*, 69 INT'L Q., 1143, 1150 (2002).

<sup>10</sup> Joan Fitzpatrick, *Speaking Law to Power: The War against Terrorism and Human Rights*, 13 EUR. J. INT'L L. 241, 244 (2002).

<sup>11</sup> *Id.* at 245.

<sup>12</sup> TESTIMONY OF COFER BLACK, [https://fas.org/irp/congress/2002\\_hr/092602black.html](https://fas.org/irp/congress/2002_hr/092602black.html)

<sup>13</sup> *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, HUMAN RIGHTS WATCH 3 (Mar. 25, 2003), <https://www.hrw.org/legacy/un/chr59/counter-terrorism-bck.pdf>.

fit into a legal framework and they are acting in compliance with the law.

On the contrary, the abuse of the institute leads to a denial of vital postulates of a rule of law-oriented system as accountability and justiciability.

Indeed, the State secrets privilege precludes the disclosure of sensitive information during a trial and thus, it prevents the judges from accessing it.

Governments are abusing of the privilege and they are invoking it even when its prerequisites are not satisfied; courts are unconditionally accepting the over-invocation and even loosening the limits of the legal institute in order for the Governments' claims to seem legitimate. The general and current trend among judicial branches consists in an unfettered reliance on the executive branches' claims. Courts abandon their role as oversight bodies in liberal democracies, where instead the commitment to individual liberties should be the main focus.<sup>14</sup>

Consequently, contestable decisions and actions of State officials stay unpunished and nobody is held accountable for gross violations of human rights and fundamental freedoms at the national level.

As a reaction to the 'legal vacuum' of accountability that the abuse of the State Secrets Privilege is provoking, international bodies and courts are strengthening the concept of 'Right to Truth' and re-affirming the idea that both the victims of human rights violations and the social community must know what Governments are doing and why, even in the context of the 'War on Terror.'

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<sup>14</sup> Hitoshi Nasu, *State Secrets Law and National Security*, 64 INT'L & COMP. L. Q. 365, 402 (2015).

# **Chapter**

## **The Age of the ‘War on Terror.’ Security v. Liberty.**

**1**

### **1.1 Foreword**

The airstrikes hitting over the Twin Towers and over the Pentagon on September 11, 2001, was a watershed event. Since that moment on, Governments had profoundly changed and have resorted to restrictive and emergency measures in order to fulfill an alleged duty towards the security of their own citizens against the threat of terrorism.

The invocation of the State secrets privilege in order to hide decisions taken as counter-terrorism strategies and as to avoid Government officials’ accountability for violations of fundamental human rights is meaningful.

This long-standing and traditional evidentiary privilege has been abused and manipulated in very recent times in order to assist the needs of the executive power in tackling terrorism.

Governments have been reported to resort to the state secret even when the prerequisites for the privilege to apply are not satisfied. On the other hand, courts, which should check on the executive branch and be the guardians of the constitutional order, make largely use of the self-restraint when national security is at stake.

Therefore, State secrets privilege looks like today as a completely reformed institute and this thesis will address the transformation of the institute both in the Italian and in the U.S. legal system.

The first chapter of this thesis will address the concept of exceptionalism and the evocation of the former in the post 9/11 world. It will also address some countries’ decisions limiting fundamental rights and allegedly aimed at ensuring more protection. It will then focus on the trend of extraordinary renditions and the Governments’ necessity of secrecy once engaging in this practice.

In this light, the second chapter will analyze the development and the understanding of the State secrets privilege before 9/11. The chapter is divided in two sub-parts. Part A refers to the U.S. most relevant caselaw, which has contributed to the development of the State secrets privilege concept in the American common



law tradition. Part B addresses the Italian most salient caselaw of the Constitutional Court and the legislative Act of October 24, 1977 n. 801, concerning the organization of the secret services and the discipline of the State secret.

The third chapter will thus focus on the use and abuse of the State secrets privilege after the 9/11 watersheds. It will aim to show how the institute has been used to avoid national accountability in counter-terrorism operations. Again, the chapter will be divided in part A and B. Part A will address the American cases which contributed the most to the transformation of the concept of State secrets privilege. Part B will concern the Italian recent *Abu Omar* case and in particular the way in which the Italian Constitutional Court's case law has been ground for a new legislative measure governing the institute: *Legge* August 3, 2007, n. 124.

The fourth and final chapter of the thesis will then recall the European Court of Human Rights jurisprudence on the use of 'State secrets' in the framework of counter terrorism measures. It will analyze the recent *Abu Omar* decision against the Italian Government and also other similar judgments. All of the formers rejected the evocation of the State secrets privilege in case of these terrific violations of human rights and stood against the lack of national accountability due to this practice. Moreover, the European Court of Human Rights re-established and developed the concept of Right to the Truth, which is endangered by the abuse of the privilege.

In this chapter the differences between the European Court of Human Rights and the Inter-American System of Human Rights will be addressed too. Due to important dissimilarities, the latter has not been able to tackle the lack of accountability triggered by the resort to the State secrets privilege, while the European Court of Human Rights have made it possible for the victims and the families to receive some form of relief for the secreted extraordinary renditions experienced.

## **1.2 The Era of Exceptionalism**

An overview of the remarkable events, which occurred after the 9/11 attacks directly points to the long standing debate on the relationship between liberty and security. This is the age of the War on Terror and the rule of law is frighteningly changing, while the pillars of democracy are swaying.

In the immediate aftermath of the September 11 attack to the Twin Towers, the U.S. President George Bush affirmed that the world was entering in the era of the ‘War on Terror.’<sup>15</sup> He kept on repeating, “The freedom is under attack.”<sup>16</sup>

That slogan has been repeated at large as a mantra, to the extent that since that tragic day on, Governments have resorted to the profound values of liberty and freedom as justifications for the enactment of counter terrorism measures, which do deeply limit liberty itself.<sup>17</sup>

In the post 09/11 world civil liberties are challenged and the existence of a shadow of freedom is acknowledged as long as limits are drawn.<sup>18</sup>

Citizens of the world are now persuaded by high figures’ speeches and media campaigns that certain rights must be surrendered to ensure safety and national security and that some limitations of liberty are admissible when security is at stake.

For instance, in 2007, the British National Center for Social Research conducted a survey on over 3, 000 adults: the outcome of the former was that a huge majority of the British audience is willing to renounce to civil liberties in order to tackle the threat of terrorism.<sup>19</sup> Compulsory ID Cards, phone tapping, electronic tagging and home curfews are few of the less invasive measures, which are considered acceptable when the final price is the national security.<sup>20</sup>

The destruction of the World Trade Center has triggered a process of transformation in both the political theory and in the executive practice. Some argue that exceptional times require exceptional measures and thus, the rules of the game must change.<sup>21</sup> The terroristic attacks make the era of “Exceptionalism” arise, as several commentators have defined the current time.<sup>22</sup>

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<sup>15</sup> MIRIAM GANI & PENELOPE MATHEW, *FRESH PERSPECTIVES ON THE ‘WAR ON TERROR’* 1 (Miriam Gani & Penelope Mathew eds., 2008).

<sup>16</sup> *Text of George Bush's speech*, THE GUARDIAN, Sept, 21, 2001, <https://www.theguardian.com/world/2001/sep/21/september11.usa13>.

<sup>17</sup> Claudia Aradau, *Forget Equality? Security and Liberty in the ‘War on Terror’* 33 ALTERNATIVES 293, 295 (2008).

<sup>18</sup> *Id.* at 296.

<sup>19</sup> John Carvel & Lucy Ward, *Huge majority say civil liberty curbs a 'price worth paying' to fight terror*,

THE GUARDIAN, Jan. 24, 2007, <https://www.theguardian.com/uk/2007/jan/24/terrorism.idcards>.

<sup>20</sup> *Id.*

<sup>21</sup> ANDREW W. NEAL, *EXCEPTIONALISM AND THE POLITIC OF COUNTER-TERRORISM. LIBERTY, SECURITY AND THE WAR ON TERROR* 1 (Bigo et al. eds., 2010).

<sup>22</sup> Sophia A. McClennen, *Neoliberalism as Terrorism; or State of Disaster Exceptionalism* in *TERROR, THEORY AND THE HUMANITIES* 178 (Jeffrey Di Leo & Uppinder Mehan eds., 2012).

Some historical events are able to impact a whole generation and to redefine the meaning of specific terms: after 9/11 ‘exception’ becomes the normality, ‘liberty’ cannot exist unfettered, ‘security’ is the aim of every political decision, ‘terror’ is not anymore just a state of mind but something to fight against.<sup>23</sup>

The roots of the political exceptionalism go back to Carl Schmitt’s political thought. He was one of the most important articulators of the ‘state of exception’ and argued: “the rule proves nothing; the exception proves everything: it confirms not only the rule but also its existence, which derives only from the exception.”<sup>24</sup>

In its 1922 *Political Theology*, Schmitt dealt with situations of threat to the life of the state.<sup>25</sup> His approach was that when a situation goes beyond the predictability and beyond what is codified by law, thus the exceptionality of the situation demands an authoritarian response beyond the law and beyond any limit.<sup>26</sup> The norms are made for normal situations and they cease to apply as soon as the normality is superseded by an emergency. Rules are situational and they do not fit exceptions.<sup>27</sup>

The exception is inevitable and it cannot be subject to laws. The sovereign will decide on the exception and this is the highest foreseeable power.<sup>28</sup> The decision of the sovereign will replace the rule of law in a new legal order taking place outside the framework of the norms.

State of emergency is unpredictable and total: the sovereign has the duty to recognize when a real peril for the very existence of the State is taking place and which the measures to apply are as normal rules do not apply.<sup>29</sup> According to Schmitt, it is not possible to foresee or to rule on the exercise of emergency powers, as other authors tried to argue.<sup>30</sup> On the other side, John Ferejohn and Pasquale

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<sup>23</sup> Jeffrey Di Leo & Uppinder Mehan, *Theory Ground Zero: Terror, Theory and the Humanities after 9/11* in *TERROR, THEORY AND THE HUMANITIES* 11 (Jeffrey Di Leo & Uppinder Mehan eds., 2012).

<sup>24</sup> CARL SCHMITT, *POLITICAL THEOLOGY. FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 15 (George Schwab ed., 2005).

<sup>25</sup> *Id.* at 6.

<sup>26</sup> Nomi Claire Lazar, *Must Exceptionalism Prove the Rule? An Angle on Emergency Government in the History of Political Thought*, 34 *POL. & SOC’Y* 245, 259 (2008).

<sup>27</sup> SCHMITT, *supra* note 24, at 13.

<sup>28</sup> SCHMITT, *supra* note 24, at 6.

<sup>29</sup> *Id.*

<sup>30</sup> John Ferejohn & Pasquale Pasquino, *The law of the exception: A typology of emergency powers*, 2 *INT’L J. OF CONST L.* 210.

Pasquino believe that emergency legislation can exist within the constitutional framework and emergency powers may be divided in models.<sup>31</sup>

The contemporary author Giorgio Agamben refers to the paradigm of the state of exception as featured by Carl Schmitt.<sup>32</sup> The former highlighted the fact that as of today jurists and scholars have never agreed on a definition of state of exception yet.<sup>33</sup> In 2016 Agamben, as a witness and reporter of contemporary events, described the world's development as a progression of a 'global civil war.'<sup>34</sup> The state of exception is becoming the paradigm of every contemporary Government, whereas the constitutional provisions and safeguards get weakened.<sup>35</sup>

Indeed, the terroristic attacks of September 11 opened the door to broad and consistent emergency powers and scholars struggled to find a legal basis for the 'War on Terror.'<sup>36</sup> Surprisingly Schmitt's theories were used as bedrock for extensive emergency powers by modern Governments and as a justification for violations of the liberal democracy's values.<sup>37</sup>

Under this discourse and under the label of 'exceptional,' Governments have engaged in a wide array of measures, most of which have been reported to violate fundamental civil liberties and rights.<sup>38</sup> Some changes have been made through antiterrorism laws, while most of the decisions took place through Governmental decisions and acts.<sup>39</sup>

This trend is spreading worldwide.<sup>40</sup>

In 2005, the Centre de Cultura Contemporània de Barcelona hosted a symposium entitled *Archipelago of exception*, which counted Giorgio Agamben and

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<sup>31</sup> *Id.* at 215.

<sup>32</sup> GIORGIO AGAMBEN, STATE OF EXCEPTION 1 (2016).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.*

<sup>36</sup> William E. Scheuerman, *Survey Article: Emergency Powers and the Rule of Law After 9/11*, 14 THE J. OF POL. PHIL. 62 (2006).

<sup>37</sup> *Id.* at 63

<sup>38</sup> NEAL, *supra* note 21, at 7.

<sup>39</sup> *Id.*

<sup>40</sup> Lindsay Gorman, *The Terrorist Threat: Its Impact on American Civil Liberties and Democracy*, ATLANTIC INTERNATIONAL STUDIES ORGANIZATION, <https://atlismta.org/online-journals/0607-journal-development-challenges/the-terrorist-threat/>.

Thomas Keenan as speakers.<sup>41</sup> The publication coming from this philosophical, legal, and architectural gathering presented a new image of the world, made up of several areas that seem to be governed by a permanent state of exception.<sup>42</sup>

This pattern of exceptionalism swings between two poles: on one side there is the authority, the leaders and the officials, claiming that some liberty has to be sacrificed to fight the renewed enemy of terrorism. On the other side there are the liberties and the rights enshrined in the Constitutions, in the national fundamental documents and in the international treaties.<sup>43</sup> The general trend consists in sacrificing and treading upon the values contained in those papers in the name of national security.<sup>44</sup> Paradoxically, those countries in which liberal and democratic values are regarded as inherent to the State itself find themselves on the front line when waiving rights and liberties in the name of the urgency and the national security.

As a matter of fact, many argue that there is not a real compromise between liberty and security when anti-terrorism measures are implemented and that the balance is all in favor of authoritarian decisions.<sup>45</sup>

On the contrary, they argue, in the fight against terrorism Governments must also fulfill international and national obligations and make sure that counter-terrorist measures respect and do not violate international human rights, humanitarian, and refugee law.<sup>46</sup>

Since September 11, the then U.N. Secretary-General Kofi Annan has consistently affirmed that there must be no tradeoff between human rights and fighting terrorism and that the democratic space cannot be shut down.<sup>47</sup>

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<sup>41</sup> CENTRE DE CULTURA CONTEMPORÀNIA DE BARCELONA, ARCHIPELAGO OF EXCEPTIONS- SOVEREIGNTIES OF EXTRATERRITORIALITY (Nov. 10-11, 2005), <http://www.cccb.org/en/activities/file/archipelago-of-exception/218418>.

<sup>42</sup> JOSÉ LUIS PARD & AL., ARCHIPELAGO OF EXCEPTIONS- SOVEREIGNTIES OF EXTRATERRITORIALITY (Ubanitas collection 2007).

<sup>43</sup> Hon. Frank J. Williams, *Still a Frightening Unknown: Achieving a Constitutional Balance between Civil Liberties and National Security during the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675, 677 (2007).

<sup>44</sup> *Id.* at 678.

<sup>45</sup> NEAL, *supra* note 21, at 9.

<sup>46</sup> HUMAN RIGHTS WATCH, *supra* note 13.

<sup>47</sup> Thalif Deen, *POLITICS: No Trade-Off on Terrorism, Human Rights – U.N. Chief*, IPS NEWS, Jan. 19, 2002, <http://www.ipsnews.net/2002/01/politics-no-trade-off-on-terrorism-human-rights-un-chief/>.

However, the examples of Governments limiting fundamental rights, both to their citizens and to foreigners, evoking an allegedly compelling need of safety are several and varied.

### 1.3 Governments' reactions

The 'War on Terror' has reconfirmed the relevance of the theory of exception and has prompted several countries to take policies and measures impairing on fundamental liberties. Guantanamo Bay, Abu Ghraib, extraordinary renditions, total surveillance, are few of the names we sometime hear.<sup>48</sup>

However, a new understanding of the world is perhaps emerging as a consequence of daily warnings targeting people who have begun to feel unsafe in their own premises. Therefore, most of them do not even pay attention on what Governments do in the name of security and accept everything without distinguishing between legality and violations of the rule of law.

For instance, in 2006 the ABC News and the Washington Post conducted a telephone poll and interviewed 1,000 adults on the U.S. military prison in Guantanamo Bay, Cuba.<sup>49</sup> The 57% of the poll supported the federal Government's decision to hold the detainees over there.<sup>50</sup> Americans were willing to accept encroachments of human rights in exchange of a stronger likelihood to prevent a new terroristic attack.<sup>51</sup>

Looking back at what Governments have done since the tumult of September 11, it stands clear that public deliberation has been rare and has been lacking proper public awareness.<sup>52</sup>

Certain measures adopted by States to face the terrorism threat have themselves often posed serious challenges to human rights and the rule of law which would have a corrosive effect on democracy.<sup>53</sup> Hereinafter some of them are listed.

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<sup>48</sup> Claudia Aradau & Rens Van Munster, *Exceptionalism And The 'War On Terror': Criminology Meets International Relations*, 49 THE BRITISH J. OF CRIMINOLOGY 686, 688 (2009).

<sup>49</sup> *Seven in 10 Oppose Holding Detainees Indefinitely Without Charges*, ABC NEWS, Jun. 26, 2006, <http://abcnews.go.com/images/Politics/1015a2Gitmo.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> See *foreword* in THE WAR ON OUR FREEDOMS – CIVIL LIBERTIES IN AN AGE OF TERRORISM (Leone and Anrig eds. 2003).

<sup>52</sup> Richard C. Leone, *The Quiet Republic: The Missing Debate About Civil Liberties After 9/11* in THE WAR ON OUR FREEDOMS – CIVIL LIBERTIES IN AN AGE OF TERRORISM 99 (Leone and Anrig eds. 2003).

## a) The United States

The first country to be analyzed is the United States of America.

As addressed before, three days after the destruction of the World Trade Center and the Pentagon strike, President Bush declared a state of emergency. Then, on September 23, 2001, he defined the threat of terrorism for the U.S. as unusual and extraordinary.<sup>54</sup> The emergency has been renewed every year with the effect to render the emergency the normality and to transform exceptional measures into everyday techniques of Government.<sup>55</sup>

Few days after the tragic fall of the Twin Towers, the Supreme Court Justice Sandra Day O'Connor affirmed during an interview for the New York Times: "We're likely to experience more restrictions on our personal freedom than has ever been the case in our country."<sup>56</sup>

Abstractly, American citizens would protect civil liberties rather than bolster national security. On the other hand, when they are asked to decide in specific situation, the support for civil liberties breaks down.<sup>57</sup>

The U.S.A. Patriot Act is one of the legislative measures undertaken to eliminate any obstacle to efficient investigations which would be caused by individual privacy rights.<sup>58</sup>

The name is an acronym for *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism*.<sup>59</sup> The act provides for enhanced secret surveillance measures, as secret searches, increased powers to

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<sup>53</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS, TERRORISM AND COUNTER-TERRORISM- FACT SHEET N. 32, <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

<sup>54</sup> Derek Gregory, *The Black Flag: Guantánamo Bay And The Space Of Exception*, 88 *Geografiska Annaler* 405, 407 (2006).

<sup>55</sup> *Id.*

<sup>56</sup> Linda Greenhouse, *A Nation Challenged: The Supreme Court; In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001.

<sup>57</sup> Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. OF POL. SCI. 28, 33 (2004).

<sup>58</sup> James Hamilton, *The Delicate Balance Between Civil Liberties And National Security* 5, SOUTH AFRICAN JUDGES COMMISSION (Aug. 2006), [http://venice.coe.int/SACJF/2006\\_08\\_MOZ%20Maputo/Hamilton\\_delicate\\_balance.htm](http://venice.coe.int/SACJF/2006_08_MOZ%20Maputo/Hamilton_delicate_balance.htm).

<sup>59</sup> *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56.

wiretap communications devices, intercept communications, to employ pen registers and trap and trace devices and to access previously confidential records.<sup>60</sup>

Furthermore, the Act re- defines the checks and balances between branches of the Governments as it allows investigators to act in several situations without no prior judicial warrant or probable cause to be alleged.<sup>61</sup> This measure weakened the control mechanisms and the supervision system. Thus, it impairs accountability of either the executive branch or of its investigators.<sup>62</sup>

However, The Department of Justice claims that the U.S. Patriot Act has had a key role in defending innocent lives against terrorism and that the Government could not have prevented and avoided other attacks without it.<sup>63</sup>

It sounds like Americans had to accept a ‘bad compromise,’ renouncing to their privacy in exchange of a non-particularly significant anti-terrorism gain.<sup>64</sup> Indeed, some authors talk about ‘September 11 opportunism’ to describe the tendency to enact new investigative and enforcement powers which render the Government unfettered using the label of ‘anti-terrorism’ and taking advantage of the common sense of emergency around the nation.<sup>65</sup> The best way for the sovereign to exercise fully discretionary authority, free from any check is creating a ‘normless space.’ This is the case of Guantanamo.<sup>66</sup>

Guantanamo is a an area of Cuba, whose length consists of 45 square miles and which is controlled by the United States pursuant to a 1903 lease agreement.<sup>67</sup>

The text of the lease provides that the U.S. exercises complete control and jurisdiction over the area, but Cuba remains the ultimate sovereign.<sup>68</sup>

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<sup>60</sup> *Id.* at §§ 201, 202, 213, 216.

<sup>61</sup> Stephen J. Schulhofer, *No Checks, No Balances: Discarding Bedrock Constitutional Principles in THE WAR ON OUR FREEDOMS – CIVIL LIBERTIES IN AN AGE OF TERRORISM* 1052 (Leone and Anrig eds. 2003).

<sup>62</sup> *Id.* at 1166.

<sup>63</sup> DEPARTMENT OF JUSTICE, *THE USA PATRIOT ACT: PRESERVING LIFE AND LIBERTY*, [https://www.justice.gov/archive/ll/what\\_is\\_the\\_patriot\\_act.pdf](https://www.justice.gov/archive/ll/what_is_the_patriot_act.pdf)

<sup>64</sup> STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11*, 65 (1st ed., 2002).

<sup>65</sup> NEAL, *supra* note 21, at 12 (quoting Schulhofer, *supra* note 64, at 65).

<sup>66</sup> William E. Scheuerman, *Schmitt and the Road to Abu Ghraib*, 13 *Constellations* 1,118 (2006).

<sup>67</sup> Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 23 1903, US-Cuba T.S. No. 418.

<sup>68</sup> *Id.*



Since September 11, the U.S. has transferred several prisoners captured during the Afghan War or suspected of being connected to Al-Qaeda or to the Taliban armed forces, to the military base of Guantanamo Bay.<sup>69</sup>

The purpose of a prison in Cuba was to release the U.S. Government from any national and international obligation: the Justice Department contends that the prison is in the foreign territory and therefore does not fall within the jurisdiction of any U.S. court.<sup>70</sup>

The geographical and legal characteristic of Guantanamo fits the U.S. long-standing position that human rights treaties do not apply extraterritorially; therefore the U.S. officials in Guantanamo are not bound by them.<sup>71</sup> The U.S. has refused to apply the Geneva Conventions to the detainees and to abide principles deriving from international human rights law in Guantanamo.<sup>72</sup> Moreover, the detainees of Guantanamo do not have the status of Prisoners of War; they do not have any legal status.<sup>73</sup> The U.S. uses the label ‘unlawful enemy combatants’ for these detainees in order to deny their rights to challenge the detention and to refuse to provide them with human treatments and with the Geneva Convention and the Human Rights Law safeguards.<sup>74</sup>

Giorgio Agamben analyzed Guantanamo camp as a space inhabited by ‘bare life,’ developing beyond the boundaries of the rule of law.<sup>75</sup> The camp is the most meaningful example of the state of exception, an area where the line between law and violence becomes blurred.<sup>76</sup>

Guantanamo is an example of contemporary Western exceptionalism and cannot be explained by the ‘nomos’: it is a new and *sui generis* juridical system.<sup>77</sup> Specifically, the regime applicable to the base was shaped through presidential

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<sup>69</sup> HUMAN RIGHTS WATCH, *supra* note 32, at 23.

<sup>70</sup> Joseph Lelyveld, *The Least Worst Place* in THE WAR ON OUR FREEDOMS – CIVIL LIBERTIES IN AN AGE OF TERRORISM 1382 (Leone and Anrig eds. 2003).

<sup>71</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 21 (2nd ed., 2009).

<sup>72</sup> THE TORTURE PAPERS. THE ROAD TO ABU GHRAIB 23 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

<sup>73</sup> Claudia Aradau, *Law Transformed: Guantanamo and the ‘other’ exception*, 28 THIRD WORLD Q. 489 (2007).

<sup>74</sup> Gabor Rona, *An Appraisal of U.S. practice relating to ‘Enemy Combatants,’* 10 YEARBOOK OF INT’L HUMANITARIAN L. 232, 248 (2007).

<sup>75</sup> *Id.* at 489.

<sup>76</sup> GIORGIO AGAMBEN, HOMO SACER. SOVEREIGN POWER AND BARE LIFE 170 (1998).

<sup>77</sup> Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT’L L. 613, 621 (2005). INT’L & COMP. L. Q.

orders and it provides for the complete control of the military.<sup>78</sup> The prisoners were to be tried by U.S. military tribunals and not to access writ of habeas corpus before the U.S. courts. The trials would be held in secret and none of the basic guarantees of fair trial would be respected.<sup>79</sup>

The issue of the detention of Guantanamo detainees finally found its way to the U.S. Federal Courts. *Rasul v. Bush* was a landmark decision of the United States Supreme Court in which the Court held that foreign nationals held in the Guantanamo Bay detention camp could petition federal courts for writs of *habeas corpus* to review the legality of their detention.<sup>80</sup> In *Hamdi v. Rumsfeld* the question was whether the executive might have the authority to detain American citizens who are qualified as enemy combatants. The Court did not take a decision on the merit, but at least it stated that the Government could not interfere with the role of court in maintaining a balance between rights and security and that U.S. citizens must be granted the right to due process.<sup>81</sup> I

In light of this twofold assumption, in another case, *Hamdan v. Rumsfeld*, the Court declared that the military commissions set up to try the Guantanamo detainees did violate the Uniform Code of Military Justice and the Four Geneva Conventions.<sup>82</sup>

The aforementioned decisions should have been a turning point to take Guantanamo back to the legality. However, the Court victory was short-lived and the situation remained ambiguous and contested.<sup>83</sup> For example, the *Hamdan* decision did not answer several questions regarding which procedure would be in compliance with detainees' rights: it just left another issue unresolved.<sup>84</sup>

Efforts to change Guantanamo have proved useless: the military bay is a 'legal black hole,' where international and national standards are suspended.<sup>85</sup>

Guantanamo detainees were tortured, subject to enhanced interrogation techniques and mistreated without any redress.<sup>86</sup> Dreadfully, many of those detainees

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<sup>78</sup> Johan Steyen, *Guantanamo Bay: the Legal Black Hole*, 53 INT'L & COMP. L. Q. 1, 9 (2005).

<sup>79</sup> *Id.*

<sup>80</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>81</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>82</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>83</sup> KAREN J. GREENBERG, ROGUE JUSTICE. THE MAKING OF THE SECURITY STATE 97 (1st ed., 2016).

<sup>84</sup> Sandra Day O'Connor, *Guantanamo: Legal Black Hole?* 14 Canterbury L. Rev. 207, 214 (2008).

<sup>85</sup> Steyen, *supra* note 78, at 1.

<sup>86</sup> NEAL, *supra* note 21, at 81.

did not even fall into any of the categories to be recognized as enemy combatants, but remained incarcerated anyway.<sup>87</sup>

Giorgio Agamben describes these imprisoned enemies as *homines sacri*, who have been taken away from the normal legal procedure that may end up in a death penalty decision.<sup>88</sup> They are ‘bare life,’ taken to the most dangerous physical and mental breaking down point. They are nothing, but just alive.<sup>89</sup>

In conclusion, being the perfect example of the transformation the law and the societies are experiencing, Guantanamo is it will exist as long as the ‘War on Terror’ and ‘exceptionalism’ mentality will exist.<sup>90</sup> The U.S. Government has pushed itself too further and now it stands at point where no return is feasible. Barack Obama’s promises and efforts to close the prison have come across being worthless.<sup>91</sup> The State of Exception persists.

## **b) The United Kingdom**

A state facing a national emergency may probably feel the pressure of defending its own citizens and adopting emergency measures.<sup>92</sup> Therefore, the drafters of Human Rights Treaties as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (also known as the Pact of San José), all provided for an escape clause to human rights obligations in case of emergency.

Article 15(1) of the ECHR provides that “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not

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<sup>87</sup> Mark Denbeaux et al., *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data*, 41 SETON HALL L. REV. 1211, 1229 (2011).

<sup>88</sup> AGAMBEN, *supra* note 76, at 18.

<sup>89</sup> NEAL, *supra* note 21, at 91.

<sup>90</sup> Claudia Aradau, *supra* note 73, at 499.

<sup>91</sup> Connie Bruck, *Why Obama has failed to close Guantanamo*, THE NEW YORKER, Aug. 1, 2016.

<sup>92</sup> Emilie M. Hafner-Burton et al., *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 675 INT’L ORG. 673 (2011).

inconsistent with its other obligations under international law.”<sup>93</sup> Paragraph 3 provides for the procedure to follow in order to invoke the derogating clause.<sup>94</sup>

On one hand, providing for a derogatory regime within the same treaty to be derogated would ensure the public proclamation of the emergency and the judicial review of the measures undertaken.<sup>95</sup> Some scholars believe that states have the duty and the right to proclaim a state of emergency in order to protect their own citizens.<sup>96</sup>

On the other hand, the escape clause can be abused to invoke a state of emergency threatening the life of the nation even when the requisites are not satisfied and before even trying to strike a fair balance between human rights and security. In these situations a strong judicial review mechanism is necessary.<sup>97</sup>

The United Kingdom and the experience with the European Court of Human Rights is an example of the second scenario.

As of 2011, the British Government was the one with the highest number of derogations from the ECHR.<sup>98</sup> In response to the 9/11 events, the U.K. has derogated to the ECHR on the basis of article 15 for counter-terrorism purposes. It was the sole member of the Council of Europe to invoke it.<sup>99</sup>

In December 2001, the British Parliament adopted *the Anti-Terrorism, Crime and Security Act (ATCSA)*.<sup>100</sup> Section 23 of the latter provides for the indefinite detention without charge or trial of non-U.K. nationals who are suspected of terrorism-related activity and cannot be returned to their country of origin or to another country.<sup>101</sup> It consisted in a derogation of article 5(1)(f) of the Convention, which endorses the right to liberty and security.<sup>102</sup>

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<sup>93</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights as amended) (ECHR) art. 15(1).

<sup>94</sup> *Id.* at art.15(3).

<sup>95</sup> Hafner-Burton, *supra* note 92, at 677.

<sup>96</sup> MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (N.P. Engel eds. 2005).

<sup>97</sup> Stefan Kirchner, *Human Rights Guarantees During States Of Emergency: The European Convention On Human Rights*, 3 BALTIC J. OF L. AND POL. 1, 18 (2010).

<sup>98</sup> Hafner-Burton, *supra* note 92, at 679.

<sup>99</sup> HUMAN RIGHTS WATCH, *supra* note 13, at 20.

<sup>100</sup> Anti- Terrorism, Crime and Security Act (2001) c.24 (U.K.).

<sup>101</sup> Christopher Michaelsen, *Derogating from International Human Rights Obligations in the ‘War Against Terrorism’? — A British–Australian Perspective*, 17 TERRORISM AND POLITICAL VIOLENCE 131, 136 (2005).

<sup>102</sup> ECHR, *supra* note 93, at art. 5.

The validity of the act was challenged in *A and Others v. Secretary of State for the Home Department*, also known as Belmarsh case.<sup>103</sup>

The appellants were 9 non-UK nationals, all detained without any charge or any criminal trial in prospect, in accordance with the ATCSA.<sup>104</sup> The appellants challenged a decision of the Court of Appeal. The latter sided with the executive branch in opposing a 2002 decision of the Special Immigration Appeals Commission.<sup>105</sup> Indeed, the Commission found section 23 of the ATCSA to be discriminatory on nationality grounds as British citizens suspects would be indefinitely detained.<sup>106</sup>

The foreign nationals were challenging the lawfulness of their detention under the U.K. Human Rights Act, which should implement the European Convention at the domestic level. They also opposed the Government's decision to derogate from Article 5 obligations as inconsistent with the ECHR.<sup>107</sup>

Therefore, the House of Lords found itself to address two issues: whether the threshold test of the public emergency under art. 15 ECHR had been fulfilled;<sup>108</sup> whether the legislation enacted was 'strictly required' for the urgency of the situation.<sup>109</sup>

The House answered positively to the first question.<sup>110</sup> Taking into consideration the nature of the 9 /11 terrorist attacks and even if there was not a threat of an immediate attack towards the U.K., the assessment of a risk was correct. The opinion of the Government and Parliament on whether there is a public emergency threatening the life of the nation should always hold a great value.<sup>111</sup>

Instead, the Lords did not recognize the detention measures endorsed as valid. Indeed, even if the threat to the U.K. national security derived from Al-Qaeda members, who are predominantly foreigners, the formers did not exhaust the

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<sup>103</sup> *A and Others v. Secretary of State for the Home Department*, UKHL 56 [2004].

<sup>104</sup> *Id.* at para. 3.

<sup>105</sup> *Id.* at para 1.

<sup>106</sup> Hamilton, *supra* note 58, at 10.

<sup>107</sup> Amrita Mukherjee, *Detention of Foreign National Terrorist Suspects: Compatibility with the European Convention on Human Rights: A and Others v Secretary of State for the Home Department*, 69 J. CRIM. L. 215 (2005).

<sup>108</sup> *A and Others*, at para. 16.

<sup>109</sup> *Id.* at para. 30.

<sup>110</sup> *Id.* at para. 29

<sup>111</sup> Hamilton, *supra* note 58, at 10.

category.<sup>112</sup> Section 23 ATCSA did not address the threat caused by U.K. nationals.<sup>113</sup>

The Court also held that the response was disproportionate and not strictly necessary according to the features of the situation.<sup>114</sup> Moreover, Section 23, which provides for the detention of suspected international terrorists who are not UK nationals, but not for the detention of suspected of international terrorists who are UK nationals, is discriminatory and violates Article 14 of the European Convention (which the Government did not derogate from).<sup>115</sup>

Later in time the issue reached the European Court of Human Rights. In 2006, 11 applicants filed a complaint arguing that their indefinite detention consisted in inhuman and degrading treatment; that the conditions of the detention were unlawful and discriminatory; that the derogation was disproportionate.<sup>116</sup>

The Grand Chamber held that the U.K. did not respect its obligations under art. 5(1) and 5(4) of the ECHR.<sup>117</sup>

The European Court confirmed that considerations of national security cannot justify the existence of ‘black holes’ that allow Governments to detain individuals indefinitely and to exercise unfettered powers.<sup>118</sup>

The U.K.’s political conflict between compliance with international human rights and the primacy of national security is evident. In 2006, the leader of the Conservative Party David Cameron gave a speech to the Centre for Political Studies and argued “The Human Rights Act has a similarly damaging impact on our ability to protect our society against terrorism.”<sup>119</sup> He was elected as Prime Minister in 2010 and served till 2016.

Following the very recent terror attacks on London Bridge, Manchester and Westminster, the debate has reawakened. Theresa May affirmed she would be ready

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<sup>112</sup> *A and Others*, at para. 31(3).

<sup>113</sup> *Id.* at para. 31(4).

<sup>114</sup> Hamilton, *supra* note 58, at 11.

<sup>115</sup> Mukherjee, *supra* note 107, at 218.

<sup>116</sup> ECtHR, *A. And Others v. The United Kingdom*, App. No. 3455/05 (2009), at 3.

<sup>117</sup> *Terrorism and the European Convention on Human Rights*, EUROPEAN COURT OF HUMAN RIGHTS PRESS UNIT (May 2017), [http://www.echr.coe.int/Documents/FS\\_Terrorism\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf).

<sup>118</sup> *See Concluding Remarks in ECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW 95* (David Cole, Federico Fabbrini & Arianna Vidaschi eds., 2013).

<sup>119</sup> *Balancing freedom and security - a modern British Bill of Rights*, THE GUARDIAN, June 26, 2006, <https://www.theguardian.com/politics/2006/jun/26/conservatives.constitution>.

to rip up human rights law in order to impose more restrictions on terrorist suspects and ensure higher security to her citizens.<sup>120</sup>

**c) France**

France is experiencing a perpetual state of emergency.<sup>121</sup>

As a response to the multiple terroristic attacks in January and in November 2015, President Hollande declared the State of Emergency.<sup>122</sup>

The French state of Emergency is regulated both by arts. 16 and 36 of the Constitution<sup>123</sup> and by the law N. 55-385 of 3 April 1955.<sup>124</sup>

The expanded emergency powers allow the Government to impose house arrest, searches and computer seizures without a judicial warrant or a judge's authorization. Also website can be blocked by officials without any prior judicial authorization.<sup>125</sup>

These powers interfere with the rights to liberty, security, freedom of movement, privacy, and freedoms of association and expression.<sup>126</sup>

French law enforcement officials have executed abusive and discriminatory raids and house arrests, especially against people following the Islam religion.<sup>127</sup>

Later, on February 21, 2016, the French National Assembly and the Senate approved a three-month extension of the state of emergency and therefore renewed the exceptional powers of the executive.<sup>128</sup>

“The state of emergency cannot be permanent,” declared the new French Prime

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<sup>120</sup> *Election 2017: May prepared to change human rights law to tackle terrorism – as it happened*, THE GUARDIAN, June 6, 2017, <https://www.theguardian.com/politics/live/2017/jun/06/general-election-2017-security-farron-knee-jerk-response-politics-live>.

<sup>121</sup> Robert Zaretsky, *France's Perpetual State of Emergency*, FOREIGN POLICY, July 16, 2016, <http://foreignpolicy.com/2016/07/16/frances-perpetual-state-of-emergency/>.

<sup>122</sup> *Paris attacks: François Hollande declares state of emergency*, THE GUARDIAN, Nov. 14, 2015, <https://www.theguardian.com/world/video/2015/nov/14/paris-attacks-francois-hollande-declares-state-emergency-france-video>.

<sup>123</sup> 1956 CONST., artt. 16 & 36 (France).

<sup>124</sup> Loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence est anticonstitutionnel.

<sup>125</sup> *France: New Emergency Powers Threaten Rights*, HUMAN RIGHTS WATCH (Nov. 24, 2015), <https://www.hrw.org/news/2015/11/24/france-new-emergency-powers-threaten-rights>.

<sup>126</sup> *Id.*

<sup>127</sup> *France: Abuses Under State of Emergency*, HUMAN RIGHTS WATCH (Feb. 3, 2016), <https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency><https://www.hrw.org/news/2016/02/03/france-abuses-under-state-emergency>.

<sup>128</sup> Benedict Jeannerod, *Dispatches: France's Renewed Emergency Law a Recipe for Abuse*, HUMAN RIGHTS WATCH, Feb. 22 2016, <https://www.hrw.org/news/2016/02/22/dispatches-frances-renewed-emergency-law-recipe-abuse>.

Minister Manuel Valls in the April of the same year. However, he also announced he was going to request an additional two-month extension of the state of emergency. This was necessary in the light of the European Football championship and of the Tour de France.<sup>129</sup> It was the first time the state of emergency was renewed since Hollande first declared it.

Then, in July 2016, the attack in Nice took place and the President Hollande made clear that the state of emergency, which was supposed to elapse in two weeks, was going to last. The extraordinary situation was turning into normality.<sup>130</sup>

One week later, the Parliament approved some amendments to the 1955 law. The new provisions expanded the French state of emergency for a significant period and also strengthened the already wide executive powers.<sup>131</sup> This new, six-month extension of the emergency consists in the France's longest state of exception since the 1950s Algerian War. The status beyond the rules became the normality.<sup>132</sup>

Finally, on December 15, 2016, the French Parliament adopted legislation, which extend the state of emergency till July 2017.<sup>133</sup> The process of normalization of the state of emergency has reached its peak.

According to the report of the French Parliamentary Commission in charge of overseeing the application of the state of emergency, the latter was useful at the beginning, but it turned into abusive. Since November 2015, French officials have conducted 4,292 warrantless raids, 612 house arrests and 1,657 identity and vehicle control stops. The outcomes consisted in only 61 terrorism-related criminal investigations: 20 for the offense of “criminal association in relation to a terrorist undertaking,” while the majority was related to less serious charges of glorifying terrorism.<sup>134</sup>

France seems to be ‘addicted’ to its state of emergency and not know how to

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<sup>129</sup> *Dispatches: Will France's State of Emergency Ever End?*, HUMAN RIGHTS WATCH (Apr. 20, 2016), <https://www.hrw.org/news/2016/04/20/dispatches-will-frances-state-emergency-ever-end>.

<sup>130</sup> Zaretsky, *supra* note 121.

<sup>131</sup> *Projet De Loi prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence et portant mesures de renforcement de la lutte antiterroriste*.

<sup>132</sup> Letta Tayler, *France's Emergency Powers: The New Normal*, HUMAN RIGHTS WATCH, Aug. 2, 2016, <https://www.hrw.org/news/2016/08/02/frances-emergency-powers-new-normal>.

<sup>133</sup> *Loi n° 2016-1767 du 19 décembre 2016 prorogeant l'application de la loi n° 55-385 du 3 avril 1955 relative à l'état d'urgence (France)*.

<sup>134</sup> Dominique Raimbourg & Jean Jean-Frédéric Poisson, *Communication d'étape sur le contrôle de l'état d'urgence Réunion de la commission des Lois du mercredi 22 février 2017*, [http://www2.assemblee-nationale.fr/static/14/lois/communication\\_2017\\_02\\_22.pdf](http://www2.assemblee-nationale.fr/static/14/lois/communication_2017_02_22.pdf)



quit it. The weakening of Human Rights and of the Rule of Law is not worth it because does not lead to such a greater level of security.<sup>135</sup>

Nadim Houry, director of Terrorism and Counter Terrorism Program at Human Rights Watch, affirmed: “Given that terrorism will arguably remain a threat for the foreseeable future, the authorities should seriously reevaluate their reliance on exceptional measures and return to existing legal measures.”<sup>136</sup>

#### **d) The United Nations’ position**

The actions of the United Nations in the post September 11 have had two different approaches.

First, the Security Council has adopted several resolutions condemning terrorism and calling for Member States to fight together against the new threat.<sup>137</sup>

For instance, on September 28, 2011, it adopted Resolution 1373 under Chapter VII of the UN Charter.<sup>138</sup> That decision established new international obligations and standards that UN Member States had to respect. Among them, there was the duty to freeze terrorists assets, the prohibition to support persons and entities involved in terrorist acts and the obligation to exchange information on terrorism.<sup>139</sup>

The same resolution established the Counter-Terrorism Committee to which Member States had to report the status of implementation of the resolution.<sup>140</sup>

However, the Security Council’s focus was on the legal framework necessary to fight terrorism, but it did not refer to its operation and consequences. Indeed, some legal measures had a negative impact on the enjoyment of fundamental human rights.<sup>141</sup>

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<sup>135</sup> Nadim Houry, *Breaking France’s addiction to its state of emergency*, OPEN DEMOCRACY (Mar. 13, 2017), <https://www.opendemocracy.net/can-europe-make-it/nadim-houry/breaking-france-s-addiction-to-its-state-of-emergency>.

<sup>136</sup> *France: Emergency Renewal Risks Normalizing Extraordinary Powers*, HUMAN RIGHTS WATCH (Dec. 15, 2016), <https://www.hrw.org/news/2016/12/15/france-emergency-renewal-risks-normalizing-extraordinary-powers>.

<sup>137</sup> UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, DIGEST OF JURISPRUDENCE OF THE UN AND REGIONAL ORGANIZATIONS ON THE PROTECTION OF HUMAN RIGHTS WHILE COUNTERING TERRORISM (July 2003), [www.unodc.org/unodc/terrorism.html](http://www.unodc.org/unodc/terrorism.html).

<sup>138</sup> U.N. S.C., Resolution 1373, S/RES/1373 (Sept. 28, 2011).

<sup>139</sup> *Id.* at 1-2.

<sup>140</sup> *Id.* at 6.

<sup>141</sup> UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 137, at 7.

Therefore, the Office of the High Commissioner for Human Rights drafted and presented to the Counter-Terrorism Committee a ‘*Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures.*’<sup>142</sup>

The aim of the document was reminding the Committee to keep some fundamental principles alive while tackling the terrorism threat: among them, the High Commissioner affirmed that any counter- terrorism measure must be prescribed by law in order not to be arbitrary or discriminatory.<sup>143</sup>

Moreover, there are some human rights that are not even derogable during the ‘War on Terror,’ as the right to life and the prohibition against torture and cruel, inhuman or degrading treatment or punishment.

Within the United Nations, the fear that Member States could derogate from any HR obligation, even the most compelling, and they could take any measures they wanted in the name of counter-terrorism without being punishable was arising.

Then, the General Assembly intervened: on December 18, 2002, it adopted a resolution specifically addressing the need of protecting human rights and fundamental freedoms while countering terrorism.<sup>144</sup> States must keep in mind their obligations under international law, in particular human rights law, humanitarian law and the norms on refugees, when they choose the measures to take to combat terrorism.<sup>145</sup>

Also the Commission on Human Rights affirmed the same principles and called for all the special procedures and mechanism within the Office of the High Commissioner for Human Rights and the other UN Human Rights bodies, to include the protecting of human rights in the fight against terrorism as part of their mandate.<sup>146</sup>

Furthermore, the UN Committee Against Torture issued a statement reminding all the States Parties to the UN Convention against Torture, Other Cruel, Inhuman or

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<sup>142</sup> UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures*, [http://www.un.org/en/sc/ctc/docs/rights/2002\\_09\\_23\\_ctcchair\\_note.pdf](http://www.un.org/en/sc/ctc/docs/rights/2002_09_23_ctcchair_note.pdf)

<sup>143</sup> *Id.*

<sup>144</sup> U.N. G.A. Res. 57/219, UN Doc. A/RES/57/219 (Feb. 27, 2003).

<sup>145</sup> *Id.* at 1.

<sup>146</sup> U.N. Commission on Human Rights Res. 2003/68, UN Doc. E/CN.4/RES/2003/68 (Apr. 25, 2003).

Degrading Treatment or Punishment, that most of the obligations within the treaty are not derogable, as the prohibition against ill treatment.

While the Committee expressed its pain for the death of so many victims in the 9/11 attacks, it also praised member States to respect the provisions in any circumstance, also in that moment of terror.<sup>147</sup>

From the analysis of the UN body system's decisions following the 9/11 attacks, it is noteworthy that the need to balance liberty and security and the risk that counter- terrorism measures could turn into consistent violations of fundamental human rights obligations had been foreseen since the very beginning. Indeed, some of the measures taken by UN Member States are outside the legal framework and do violate obligations undertaken through UN treaties.

#### 1.4 Extraordinary Renditions

Among the counter-terrorism measures threatening the rule of the law and the pillars of democracy, the extraordinary renditions' phenomenon deserves particular attention for the purpose of this thesis.

The term 'extraordinary renditions' refers to American programs led by CIA (Central Intelligence Agency), through which terrorist suspects are abducted and transferred to other countries to be detained and interrogated.<sup>148</sup> The American executive finds allies in foreign Governments that are beyond the reach of federal and international law.<sup>149</sup>

Therefore, the aim of their removal is to detain them in countries where these rules do not apply.<sup>150</sup>

The detentions essentially consist in an outsourcing of torture.<sup>151</sup> U.S. and foreign personnel interrogates them employing coercive interrogation techniques.<sup>152</sup>

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<sup>147</sup> U.N. COMMITTEE AGAINST TORTURE, STATEMENT OF THE COMMITTEE IN CONNECTION WITH THE EVENTS OF 11 SEPTEMBER 2001, <http://www2.ohchr.org/English/bodies/cat/docs/statements/A.57.44.pdf>.

<sup>148</sup> PETER JAN HONIGSBERG, *OUR NATION UNHINGED, THE HUMAN CONSEQUENCES OF THE WAR ON TERROR* 179 (University of California Press, 2009).

<sup>149</sup> See *Fact Sheet: Extraordinary Rendition*, AMERICAN CIVIL LIBERTIES UNION (Dec. 6, 2005) <https://www.aclu.org/other/fact-sheet-extraordinary-rendition>.

<sup>150</sup> Victor Hansen, *Extraordinary Renditions and the State Secret Privilege: Keeping Focus on the Task at Hand*, 23 N.C.J. INT'L & COM. REG. 629 (2008).

<sup>151</sup> Timothy Bazzle, *Shutting the Courthouse Doors: Invoking the State Secret Privilege to Thwart Judicial Review in the Age of Terror*, 23 CIVIL RIGHTS L.J. 29, 46 (2012).

<sup>152</sup> LOUIS HENKIN ET AL., *HUMAN RIGHTS* 3 (2nd ed., 2009).

The practice needs the cooperation of other states to capture the targets and detain them.<sup>153</sup> The *Abu Omar* case, involving both Italian and U.S. secret services, is a meaningful example.<sup>154</sup> The case will be addressed in chapter III of this thesis.<sup>155</sup>

According to one official, who has been directly involved in rendering captives into foreign hands, the understanding is, “We don’t kick the (expletive) out of them. We send them to other countries so they can kick the (expletive) out of them.”<sup>156</sup>

‘Extraordinary rendition’ is not a proper term used in international law.<sup>157</sup> The word has a merely descriptive value inasmuch as it refers to “the process by which a country seizes a person assumed to be involved in terrorist activity and then transports him or her for interrogation to a country where due process of law is unlikely to be respected.”<sup>158</sup> What renders the transfer ‘extraordinary’ is its execution outside a legal framework.<sup>159</sup>

The practice originated with the Reagan administration to bring terrorists to the United States. Then, President Bush administration took the concept to its extreme meaning. Under his tenure, the number of kidnappings increased sharply and suspects were transported to several different countries.<sup>160</sup>

Every time the procedure is almost the same. So-called ‘black men,’ CIA agents wearing civilian black plain-clothes, seize the targets, cut off their clothes, immobilize them and take them on board of an aircraft. The destination is a ‘black-site.’<sup>161</sup> Their goal is making them disappear: indeed they are called ‘ghost detainees.’<sup>162</sup>

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<sup>153</sup> Fiona Lau, *The Treatment of High Value Detainees under the United States’ Extraordinary Rendition Program: a Case of Crimes against Humanity for the International Criminal Court*, 39 UNSW L. J., 1261.

<sup>154</sup> *Id.*

<sup>155</sup> See chapter III.

<sup>156</sup> HONIGSBERG, *supra* note 148, at 179 (quoting Dana Priest and Barton Gellman, *US Decries Abuse but Defends Interrogations*, WASH. POST, December 23, 2002 at A01).

<sup>157</sup> Eur. Comm’n for Democracy through Law (Venice Comm’n), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of State Secret Detention Facilities and Inter-State Transport of Prisoners*, CDL-AD(2006)009 (Mar.17, 2006) at §30.

<sup>158</sup> *Extraordinary rendition*, COLLINS DICTIONARY (14<sup>th</sup> ed., 2014).

<sup>159</sup> Francesco Messineo, *The Abu Omar Case in Italy: ‘Extraordinary Renditions’ and State Obligations to Criminalize and Prosecute Torture under the UN Torture Convention*, 7 JOURNAL OF INT’L CRIM. JUST. 1023, 1023 (2009).

<sup>160</sup> *Id.*

<sup>161</sup> Jane Mayer, *Outsourcing Torture, the Secret History of America’s Extraordinary Rendition Program*, THE NEW YORKER, Feb. 14, 2005, at 106.

<sup>162</sup> HONIGSBERG, *supra* note 148, at 180.

After 9/11 over 100 hundred people were subject to this kind of treatment.<sup>163</sup>

The U.S. domestic legal basis for this practice is the *Memorandum of Notification*, a classified directive signed by Bush on September 17, 2001. It entrusts the CIA with the power to render terrorists and to conduct these renditions abroad.<sup>164</sup>

Administration officials and the President used to state that they ensure the receiving country will not torture the detainees before sending them.<sup>165</sup> On the contrary, every time a prisoner was released or had a chance to talk about the detention, alleged to have been tortured.<sup>166</sup>

Three categories of renditions can be identified according to the destination. The person abducted can be forcibly repatriated to the national country; the person can be transferred to a detention under U.S. control outside the territory, such as Guantanamo; and the person can be moved to a third country.<sup>167</sup>

Extraordinary renditions in the context of the ‘War on Terror’ display peculiar human rights violation of new emergece. Indeed, they combine elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, and denial of impartial tribunals and of other due process rights.<sup>168</sup>

The key obstacle to onward progress with respect to holding Governments accountable for the violations, to prosecuting the perpetrators of these atrocities and to granting some relief to the victim is the ‘need of secrecy.’ Governments claim they cannot release information, as they have to protect their citizens

First, a State sponsors the abduction of a person in one country and then transfers that person to another country for the detention and the interrogation. Later state officials try to avoid legal constraints and not be held accountable alleging the need for secrecy.<sup>169</sup>

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<sup>163</sup> Mayer, *supra* note 161, at 106.

<sup>164</sup> Matteo M. Winkler, *When ‘Extraordinary’ means illegal: International Law and European Reaction to the United States Rendition Programs*, 34 LOY. L.A. INT’L & COMP. L. REV. 30, 42 (2008).

<sup>165</sup> WHITE HOUSE, PRESIDENT’S PRESS CONFERENCE (Mar. 16, 2005 and Apr. 28, 2005).

<sup>166</sup> Katherine Hawkins, *The Promises of Torturers: Diplomatic Assurances and the Legality of ‘Rendition’*, 20 GEO. IMMIGR. L. J. 213, 264 (2006).

<sup>167</sup> Messineo, *supra* note 159, at 1025.

<sup>168</sup> David Weissbrodt and Amy Berquist, *Extraordinary Renditions: a Human Rights Analysis*, 19 HARV. HUMAN RIGHTS J. 123, 127 (2006).

<sup>169</sup> *Id.*

Indeed, the best way to avoid accountability is to eliminate and hiding any evidence linking the extraordinary rendition and the human rights violation to a Government.<sup>170</sup>

## 1.5 The need of Secrecy and the State secrets privilege

Secrecy in the governance has a twofold nature.

Secrecy is a necessary tool for the Governments in their efforts to keep citizens safe, in particular from the terrorism threat.<sup>171</sup> If the executive could not rely on the secrecy, most of its operations in the counter- terrorism frameworks, as investigations, phone tapping and searches, would be meaningless.

On the other hand, secrecy undermines democracies: citizens are not aware of what their Government is doing and cannot assess whether the goals and the policies pursued are consistent with their needs and ideals.<sup>172</sup>

After the attacks of September 11, 2001, the demand of secrecy has become highly intense. The focus on terrorism has changed the nature of the interests at stake: as addressed above, national security is completely overcoming civil liberties.<sup>173</sup> In parallel, the secret label is overcoming disclosure.<sup>174</sup>

Governments resort to various techniques in order to keep their actions secret: one of them consists in the recourse to the State secrets privilege. In particular, the U.S. Government has invoked the privilege to dismiss cases of plaintiffs alleging to be innocent victims of extraordinary rendition.<sup>175</sup>

The Bush and the Obama administrations have invoked the State secrets privilege to stop judicial review on the controversial extraordinary renditions programs.<sup>176</sup>

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<sup>170</sup> *Open Secret: Mounting Evidence Of Europe's Complicity In Rendition And Secret Detention*, AMNESTY INTERNATIONAL, at 6 (2010).

<sup>171</sup> *Introduction*, in *SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW 2* (David Cole, Federico Fabbrini & Arianna Vidaschi eds., 2013)

<sup>172</sup> *Id.*

<sup>173</sup> Kent Roach, *Managing secrecy and its migration in the post 9/11 world* in *SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW 115* (David Cole, Federico Fabbrini & Arianna Vidaschi eds., 2013)

<sup>174</sup> GABRIEL SCHOENFELD, *NECESSARY SECRETS, NATIONAL SECURITY, THE MEDIA AND THE RULE OF LAW* (Norton ed., 2010).

<sup>175</sup> Alex Turner, *Extraordinary Results in Extraordinary Renditions*, 69 *SUM. L. REV.* 559, 560 (2016).

<sup>176</sup> Bazzle, *supra* note 151, at 45.

This has been the central legal doctrine applied by the executive to keep away the judges in national security cases.<sup>177</sup>

The state secrets privilege is an evidentiary privilege that can be granted to Governments. The latter, by invoking it, object courts' orders to disclose information in litigation if there is a reasonable danger that the disclosure would harm the national security of the State.<sup>178</sup> This instrument has been part of several judicial systems, in particular Italian and American ones, since early times, in the pre September 11 era.<sup>179</sup>

However, the assertion of the need for secrecy has increased sharply after 9/11 in the light of the ongoing terrorism's threat.<sup>180</sup> The U.S. is witnessing two phenomena.

First, the Government is routinely and broadly requesting to keep the evidence secret. These claims lead an over classification of documents.<sup>181</sup> Second, an indiscriminate judicial deference to such claims takes place. Some scholars believe that courts are "shutting the courthouse doors" and not addressing public and private rights' violations.<sup>182</sup> 9/11 cases are ambiguous and "so infused with state secrets that the risk of disclosing is both apparent and inevitable."<sup>183</sup>

Well-crafted legal doctrines have been recalled in order to expand even more the scope of state secret. For instance, the mosaic theory provides that information that do not specifically concern national security, but it is linked with the sensitive information should remain covered as well.<sup>184</sup> The trend moves towards a huge 'black hole' under the label 'state secrets.'

When released, victims of extraordinary renditions filled federal lawsuits claiming constitutional violations.<sup>185</sup> The United States, either as original party or

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<sup>177</sup> DAVID RUDENSTINE, *THE AGE OF DEFERENCE* 84 (2016).

<sup>178</sup> Todd Garvey & Edward C. Liu, *Preventing the Disclosure of Sensitive National Security Information during Civil Litigation* Congressional Research Service, C.R.S., 1 (2011).

<sup>179</sup> Hansen, *supra* note 150, at 631.

<sup>180</sup> William Weaver & Robert Pallito, *State Secrets and Executive Powers*, 120 *Pol. Sci. Q.* 85 (2005).

<sup>181</sup> *Id.* at 87.

<sup>182</sup> Bazzle, *supra* note 151, at 30.

<sup>183</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9<sup>th</sup> Cir. 2010)(*en banc*).

<sup>184</sup> Bazzle, *supra* note 151, at 38.

<sup>185</sup> Hansen, *supra* note 150, at 630.

after having intervened, has asked the courts to dismiss the case on the basis of a reasonable danger that the disclosure of sensitive information would create.<sup>186</sup>

An examination of the validity of the Government's allegation would require a Court-carried balance-test between a private party's need to bring evidence and to have the merit of the case addressed and the Government's necessity to keep the national security information untouched.<sup>187</sup>

However, U.S. courts have self-restrained themselves from deciding in cases involving national security issues, leaving the room to the executive.<sup>188</sup>

This Era characterized by a flawed system of check and balances due to the anomalous and exaggerate recourse to State secrets privilege has been named 'The Age of Deference.'<sup>189</sup> The trend, which finds its roots in the U.S. political maturation, has recently being endorsed by the Italian Executive and Judicial branches.

As far as 2014, the Italian Constitutional Court has come to declare appropriate the application of the State secrets privilege in the case concerning the extraordinary rendition of Abu Omar.<sup>190</sup>

In the following two chapters of this thesis, it will be clear that the State secrets privilege has been turned upside down after 9/11 due to the need of secrecy in the framework of the extraordinary renditions both in Italy and in the United States.

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<sup>186</sup> See *El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007).

<sup>187</sup> Jason Crook, *From the Civil War to the War on Terror: The revolution and Application of the State Secret Privilege*, 72 ALBANY L. REV. 57, 64 (2009).

<sup>188</sup> STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 135 (Wolters Kluwer eds., 6th ed., 2016).

<sup>189</sup> David Rudenstine, *The Courts and National Security: The Ordeal of the State Secret Privilege*, 44 U. OF BALTIMORE L. REV. 37, 38 (2014-2015).

<sup>190</sup> Federico Fabbrini, *Extraordinary Renditions and the State Secret Privilege: Italy and the United States Compared*, 3 IT. J. OF PUB. L. 255, 256 (2011).



# Chapter II The State secrets privilege in the Pre-September 11 World

## Part A Italy

### A.1 Foreword

To begin with, it is necessary to underline that the interpretation of the State secrets privilege by the Italian Constitutional Court has been fundamental for the development of the institute in the Italian legal framework.<sup>191</sup> The two decisions occurred in the 1977 and 1978 have been a turning point of the entire discipline<sup>192</sup> and have been prompted through legislative reforms.<sup>193</sup>

The major reason behind the discipline of the State secrets privilege is that the executive branch classifies as ‘secret’ the information that may be dangerous either for the defense of the country (military secret) or for the fulfillment of other fundamental functions of the State (political secret).<sup>194</sup>

Before Law n. 801/1977 entered into force, the legislative regulation of the institute was contained in both the substantive and procedural criminal law, as two independent through interconnected fields. Those who revealed the information covered by State secrets privilege were condemned under substantive criminal law. In parallel, it was also necessary to strengthen the procedural regulation of the evidentiary privilege.<sup>195</sup>

Therefore, as early as 1913, the Code of Criminal Procedural Law contained dispositions on the State secrets privilege as well.<sup>196</sup> The procedural protection of the State secrets privilege corresponds to a barrier created by the executive branch towards the judicial one.<sup>197</sup>

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<sup>191</sup> Giuseppe Scandone, *Il Stato. Storia, essenza e la nuova definizione nella legge di riforma. I profili Storici* in I SERVIZI DI INFORMAZIONE E IL SEGRETO DI STATO 399 (Carlo Mosco et al. eds., 2008).

<sup>192</sup> Corte Cost. nn. 82/1976 & 86/1977, *supra* note 2 & 4.

<sup>193</sup> Legge 24 ottobre 1977, n. 801, G.U. Nov. 7, 1977, n.303 (It.).

<sup>194</sup> Silvano Labriola, *Il Segreto di Stato* in ENCICLOPEDIA DEL DIRITTO, vol. XLI (Giuffrè, 1980)

<sup>195</sup> Scandone, *supra* note 191, at 399.

<sup>196</sup> *Id.*

<sup>197</sup> Giorgio Spangher, *Il segreto di Stato come Limite Probatori* in IL SEGRETO DI STATO. EVOLUZIONI NORMATIVE E GIURISPRUDENZIALI 28 (Presidenza del Consiglio dei Ministri, 2011).

This evidentiary privilege becomes a fundamental element to keep the three-branched democratic system together: the law protects the state secret and at the same time prevent its use and abuse by the means of limits and guarantees.

## A.2 Arcana Imperii

The existence of secrets of the sovereign, of so called *arcana imperii*, is inherent in the existence of the same democratic state and has been object of problems and discussions since ancient times.<sup>198</sup>

The term *arcana imperii* was first used by Tacito to refer to that information that must be hidden from the normal population in the transitional period between the Res Publica to the Principality.<sup>199</sup>

The *arcana imperii* are the legal devices employed to ensure the continuity and robustness of a new Government.<sup>200</sup>

The link between the *arcana imperii* and the ‘reason of the state’ becomes a *leitmotiv* in the XVII century. ‘Reason of State’ is a political way of thinking according to which the action of the Government must be based on the alleged needs or requirements of a political state regardless of potential violation of individual rights or of moral codes.<sup>201</sup>

The authors who embrace this tendency believe that the sovereign must hide the aims and purposes of the powers, the *arcana imperii*, to his subjects when necessary.<sup>202</sup>

The development of the institute of State secrets privilege depends on the understanding and interpretation of the concept of *arcana imperii*. In particular, the former was deemed to be conceivable and legitimate within the framework the democratic State as long as it is aimed at protecting the *salus rei publicae*.<sup>203</sup>

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<sup>198</sup> Massimo Luciani, *Il segreto di Stato nell’ordinamento nazionale* in IL SEGRETO DI STATO. EVOLUZIONI NORMATIVE E GIURISPRUDENZIALI 9 (Presidenza del Consiglio dei Ministri, 2011)

<sup>199</sup> TACITO, ANNALES, LIBER II, 36; Hist., I, 4.

<sup>200</sup> ELEONORA RINALDI, ARCANIA IMPERII. IL SEGRETO DI STATO NELLA FORMA DI GOVERNO ITALIANA 2 (Jovene ed., 2016).

<sup>201</sup> *Reason of State* in Merriam-Webster dictionary.

<sup>202</sup> ELEONORA RINALDI, *supra* note 200, at 5 (quoting ARNOLD CLAPMAR, DE ARCANIS RERUMPUBLICARUM LIBRI VI, 1605).

<sup>203</sup> CARLO BONZANO, IL SEGRETO DI STATO NEL PROCESSO PENALE 4 (Antonio Milani ed., 2010).

Indeed, the State secrets privilege concerns two opposing interests of a democratic State, in this specific case the Italian Republic.

On one hand, the democratic power has been defined as the “governance of the public power in public.”<sup>204</sup> The publicity is the rule; the secrecy is just an exception. Therefore, the latter should be always limited in time and restricted in scope.<sup>205</sup>

Contrarily, in the authoritarian State the exercise of power is characterized by secrecy. The sovereign keeps the power through secret techniques, relying on the idea that “*salus rei publicae suprema lex esto.*” It means that the safeguard of the republic should be the supreme law and therefore certain means are acceptable for a great final goal.<sup>206</sup>

The difference between a democratic State and an authoritarian one stands in the different balance between secrecy and publicity that the two models of governance carry out.<sup>207</sup> The democracy bedrock is the visible power, while the authoritarian State survives because of invisible powers.<sup>208</sup>

However, on the other hand, the nature of the governance powers is a way more complex and hard to manage than it looks like. The reality is made of both visible and invisible powers and the publicity cannot be upgraded as absolute principle.<sup>209</sup>

Sometime fundamental information must remain unknown to the community for the very concept of community to survive.<sup>210</sup>

Some scholars believe that the secret is necessary also in the democratic State, probably even more than in the authoritarian one.<sup>211</sup>

For instance, Gianfranco Miglio affirms that secrecy is the premise to dominate over a population.<sup>212</sup> To believe that every decision of the sovereign will be formally legal and public is just a utopia.<sup>213</sup>

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<sup>204</sup> NORBERTO BOBBIO, *IL FUTURO DELLA DEMOCRAZIA* 86 (2005).

<sup>205</sup> *Id.* at 87.

<sup>206</sup> FRANZ NEUMANN, *LO STATO DEMOCRATICO E LO STATO AUTORITARIO* 19 (1973).

<sup>207</sup> Valentina Pupo, *Prime note sul segreto di Stato nella dimensione della democrazia rappresentativa*, 1 *ConsultaOnline* 152 (2015).

<sup>208</sup> *Id.* at 153

<sup>209</sup> Morrone, *supra* note 3, at 7.

<sup>210</sup> Pupo, *supra* note 207, at 159.

<sup>211</sup> *Id.* at 9.

<sup>212</sup> Gianfranco Miglio, *Il segreto politico* in *IL SEGRETO NELLA REALTÀ GIURIDICA ITALIANA* (Antonio Milani ed., 1983).

<sup>213</sup> *Id.* at 177.

Gianfranco Miglio recalls the principle of Tacito's *arcana imperii* and also the understanding of the ancient author by Arnold Clapmar. The latter stated that the secrecy is strictly interconnected to governance and that this is the bedrock of the 'reason of the State' philosophical movement.<sup>214</sup> The real 'reason of the State' must be kept secret in order to preserve the State itself.<sup>215</sup>

The publicity approach and the secrecy one are anyway reconcilable: the secret has a room in any political structure. The dichotomy publicity v. secrecy corresponds with the one counterpoising the rule to the exception.

The secrecy must be the exception to evoke in order to pursue the 'the reason of the State,' the *salus rei publicae*.<sup>216</sup>

In the light of this compromise, the State secrets privilege must be regulated in details; it must be based on specific fundamental values and it must maintain the division of powers among the three branches effective.<sup>217</sup>

Once the Italian Constitution entered into force, it was not the secret per se to be protected, but its function as to preserve some fundamental constitutional principles.<sup>218</sup>

To conclude, the State secrets privilege, in its initial shape and understanding, was a tool to pursue higher and undeniable values and goals.

As the existence of secrets, *arcana*, was necessary to keep the imperium safe, the end justified the means.<sup>219</sup>

The next paragraph will briefly address the development and the understanding of the State secrets privilege in Italy before the 1948

### **A.3 Brief History of the State secrets privilege before the Constitution**

For the purpose of this thesis, the excursus to previous regulations of the State secrets privilege will start from the 1889 Zanardelli Code.<sup>220</sup>

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<sup>214</sup> *Id.* at 172.

<sup>215</sup> Giuseppe Aronzo & Irene Pellizone, *Il segreto di Stato nella giurisprudenza della Corte costituzionale e della Corte europea dei diritti dell'uomo*, 1 AIC 1, 4 (2012).

<sup>216</sup> Morrone, *supra* note 3, at 11.

<sup>217</sup> *Id.* at 12.

<sup>218</sup> Aronzo & Pellizone, *supra* note 215, at 4.

<sup>219</sup> Pupo, *supra* note 207, at 159.

<sup>220</sup> The Zanardelli Code contained the project of reform on 1859 code of the sardo-piemontese Kingdom, carried out from the Justice Minister Tajani.

Art. 107 of the Zanardelli Code punished anyone revealing political or military secrets concerning the security of the State.<sup>221</sup>

For the first time, the Zanardelli Code did not distinguish between wartime and time of peace and did not mention the referee of the secret communication.

On the contrary, the Criminal Code in force during the Napoleonic regime in the north of Italy addressed the issue differently. The *Livre III*, concerning the crimes and offences against the security of the State contained provisions on the Secrets at articles 80, 81, 82.<sup>222</sup>

These articles provided for a punishment for those who revealed sensible information as the construction of fortifications and harbors, strategies, negotiations or missions to officials of another country or to the enemy.<sup>223</sup>

Indeed, the French Napoleonic model code used to indict the communication of military and political secrets to enemies or to officials of foreign countries during the warfare.<sup>224</sup> Instead, the opposite Tuscany model was broader.<sup>225</sup>

The Zanardelli code looks like a synthesis of the two models as it considers the crimes of revealing information as common felonies that everybody, not only State officials, can commit at any time.<sup>226</sup>

As a consequence, the criminal procedural law changed too: the 1913 code of criminal procedure provided for a ban to question State officials on political or military secrets concerning the State's security (art. 248).<sup>227</sup> Moreover, the judicial branch was prevented from requesting any act, document or other thing connected to political or military secrets concerning the State's security to officials (art. 240).<sup>228</sup>

Later in time, during the fascist regime important legislative reforms were approved. The 1930 Rocco Criminal law Code expanded the State secrets privilege's purpose. Articles 256 and 261 of the latter provided together that the information, which must remain secret in the interest of State's security or anyway in the international or national political interest of the State itself, can be protected through

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<sup>221</sup> R.D. 30 Giugno 1889, n. 6133.

<sup>222</sup> CODICE DEI DELITTI E DELLE PENE PEL REGNO DI ITALIA (1810).

<sup>223</sup> *Id.*

<sup>224</sup> MARINA CAPORALE, SEGRETO DI STATO, SEGRETO AMMINISTRATIVO E SISTEMA DI CLASSIFICAZIONE DELLE INFORMAZIONI 15 (Libreria Bonomo ed., 2015).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Scandone, *supra* note 191, at 408.

<sup>228</sup> *Id.*

the privilege.<sup>229</sup> Moreover, as in the Zanardelli Code, secrets' disclosure was punished as a common felony.

Therefore, the State secrets privilege found itself to be protected in a consistent and wider way.<sup>230</sup>

At the same time, the Rocco Criminal Procedural law Code expanded the range of people protected by the privilege. The judiciary was now prevented from interrogating State officials, as well as State employees and those conducting public services.<sup>231</sup>

Article 352 excluded these categories from being questioned on political or military secrets and all the other information, which may damage the State's security or the State's internal or international political interests.<sup>232</sup> If the information covered by the secret were fundamental for the proceedings to continue, the Judiciary had no other choice but to dismiss them for failure of the prosecution to produce a case.<sup>233</sup>

It is noteworthy that article 352, in setting the object of the State secrets privilege, recalled the definition given by the criminal substantive norms.

Vittorio Grevi argued that article 352 clearly showed how the new procedural system rested on the idea that State's interests always prevail on other needs.<sup>234</sup>

He also recalled the explanatory report of Alfredo Rocco, who Stated that the State secrets privilege might cover a broad range of information, from political security to financial robustness.<sup>235</sup>

Few years later, the institute had to face the Constitution's entry into force.

#### **A.4 The State secrets privilege within the Constitutional Framework**

The adoption of the Italian Constitution called the institute of the State secrets privilege into question again. The latter needed a legal basis to survive.

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<sup>229</sup> CAPORALE, *supra* note 224, at 18.

<sup>230</sup> *Id.* at 19.

<sup>231</sup> Scandone, *supra* note 191, at 410.

<sup>232</sup> CAPORALE, *supra* note 224, at 20.

<sup>233</sup> *Id.*

<sup>234</sup> Vittorio Grevi, *Segreto di Stato e Processo Penale*, in *IL SEGRETO NELLA REALTÀ GIURIDICA ITALIANA* 225 (Antonio Milani ed. 1983).

<sup>235</sup> *Id.*

Indeed, some problems of constitutional relevance arose with regard to the compliance of the State secrets privilege with the new Italian legal system's fundamental principles.<sup>236</sup>

In particular, as addressed before, democratic constitutions seems it odds with the concept of secrets and rely on the fundamental principles of transparency and accountability of State officials for the acts committed while in office.<sup>237</sup>

Since the adoption of the Constitution on, a general trend of citizens' access to every source of information has developed.<sup>238</sup>

The State secrets privilege is a derogation of the principle of transparency: the executive power invokes it to forbid the transmission of information and records to the judicial power and therefore also to the audience of citizens.<sup>239</sup>

In particular, State secrets encroach upon articles 21 and 97 of the Constitution.

Article 21 enshrines the right to inform and to be informed.<sup>240</sup> The latter can be limited once it may harm other fundamental values protected by the Constitution, and the balancing between the two values is shaped as a strict scrutiny.<sup>241</sup>

Article 97 provides that "Public offices are organized according to the provisions of law, so as to ensure the efficiency and impartiality of administration [...]"<sup>242</sup> In order for the citizens to check on the efficiency and impartiality of the officials, information must be public. Indeed, scholars consider the administrative transparency doctrine to come from art. 97.<sup>243</sup>

Also article 1, at paragraph 2, in affirming that the sovereignty belongs to the people, implicitly corroborates the theory of publicity: citizens need to be informed in order to govern.<sup>244</sup>

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<sup>236</sup> Tommaso F. Giupponi & Federico Fabbrini, *Intelligence Agencies and State Secret Privilege: the Italian Experience*, 4 INT'L CRIM. L. J. 443, 446 (2010).

<sup>237</sup> *Id.*; See *supra* part A.2.

<sup>238</sup> Giovanni Pitruzzella, *Segreto, Profili Costituzionali*, in ENCICLOPEDIA GIURIDICA TRECCANI, vol. XXVII 2 (1992).

<sup>239</sup> Irene Pellizzone, *Transparency versus National Security: the method of constitutional law 2*, <https://air.unimi.it/retrieve/handle/2434/213739/259497/Pellizzone.pdf>.

<sup>240</sup> Art. 21 Costituzione [Cost.][It.].

<sup>241</sup> CAPORALE, *supra* note 224, at 29.

<sup>242</sup> Costituzione, *supra* note 240, at art. 97.

<sup>243</sup> Alessandro Pace, *L'apposizione del Segreto di Stato nei principi costituzionali e nella legge n.124 del 2007*, ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI, Feb. 3, 2009, <http://archivio.rivistaaic.it/dottrina/garanzie/pace5.html>.

<sup>244</sup> Costituzione, *supra* note 240, at art. 1.

Right to access to the court, right to a counsel and right to independence of judiciary are all under attack when the State secret is invoked before the courts.<sup>245</sup>

Nonetheless, State secret can be compatible with the constitutional framework when compelling interests as national security are at stake and striking a balance between security and other interests leads the Government to opt for the State secret.<sup>246</sup>

Finally, transparency and publicity still stand as a rule in the constitutional framework, but special exigencies may arise for the rule to be derogated and the secret to be invoked.<sup>247</sup>

However, they are not values per se, but they are legitimate when they do protect other interests.<sup>248</sup>

#### **a) The Constitutional basis of the Secret**

Scholars have argued that the State secrets privilege protects constitutional interests as the internal and external security of the State.<sup>249</sup>

As for the external security, the Constitutional provision referring to it is 52. Indeed, the latter recognizes the duty of every citizen to defend the country.<sup>250</sup> However, the scope of such duty, and the implications on the width of the State secret notion are still questioned

One of the first judgments delivered by the Constitutional Court on the State secret affirmed that the institute was aimed at protecting the supreme interest of security, integrity and international personality of the State, which are contained in art. 52 of the Constitution.<sup>251</sup>

Yet, on the contrary, most legal scholars believe that article 52 may be a legal basis only for the military State secret, not for the political one.<sup>252</sup>

Therefore, some recall art. 54 as a constitutional premise.<sup>253</sup>

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<sup>245</sup> Tommaso F. Giupponi & Federico Fabbrini, *supra* note 236, at 446.

<sup>246</sup> Vidaschi, *supra* note 1, at 96.

<sup>247</sup> Giulio M. Salerno, *Il segreto di Stato tra conferme e novità* in *PERCORSI COSTITUZIONALI* 61 (Giuseppe de Vergottini & Tommaso Edoardo Frosini eds., 2008).

<sup>248</sup> CAPORALE, *supra* note 224, at 29.

<sup>249</sup> Vidaschi, *supra* note 1, at 446.

<sup>250</sup> Costituzione, *supra* note 240, at art. 52; Adele Anzon, *Segreto di Stato e Costituzione*, 1 *Giurisprudenza Costituzionale*, 1755, 1784 (1976).

<sup>251</sup> Corte Cost. n.82/1976, *supra* note 4

<sup>252</sup> Labriola, *supra* note 194, at 1031.

<sup>253</sup> *Id.*



Specifically, art. 54 states that “All citizens have the duty to be loyal to the Republic and to uphold its Constitution and laws.”<sup>254</sup>

This provision has been deemed to embody the State’s internal security interest, but the debate is still open. Indeed, there is uncertainty on whether a political State secret based on article 54 can live with the principle of people’s sovereignty laid down in article 1 of the Constitution.<sup>255</sup>

In addition, also article 117, paragraph 2(d) has been used as foundation for the State Secret.<sup>256</sup> The the constitutional law 3/2001, which has reformed Title V and has included the security of the State among the State’s exclusive legislative expertise, has inserted the provision.<sup>257</sup>

Finally, some invoke article 11, which governs the international action’s sphere.<sup>258</sup>

Each disposition recalled can be helpful in defining the interest protected by the State secrets privilege and the several aspects of the institute.<sup>259</sup>

In particular, articles 52 and 54 of the Constitution stress the duties of the citizens: each individual has to protect the State secret and not to reveal it as long as the behavior is consistent with the obligation to defend the homeland and to be loyal to the Republic.<sup>260</sup>

Instead, article 117, paragraph 2(d), and article 11 focus on the division of powers and competencies. They confirm that everything related to the military, to the national security and to the secrecy is entrusted to the management of the State, not of local authorities or regions.<sup>261</sup> Moreover, foreign policy and international relations’ issues are up to the national sovereign too and cannot be fragmented.<sup>262</sup>

### **b) Balancing Secrecy with Transparency**

Besides finding a constitutional basis for the institute, questions still remained on how to offset the articles siding with transparency and those justifying secrecy.

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<sup>254</sup> Costituzione, *supra* note 240, at art. 54.

<sup>255</sup> CAPORALE, *supra* note 224, at 36.

<sup>256</sup> VEDASCHI, *supra* note 1, at 97.

<sup>257</sup> Legge costituzionale 18 ottobre 2001, n. 3, G.U. 24 Ottobre 2001, n. 248.

<sup>258</sup> Costituzione, *supra* note 240, at art. 11.

<sup>259</sup> Giulio M. Salerno, *Il segreto di Stato tra conferme e novità* in *PERCORSI COSTITUZIONALI* 60 (Giuseppe de Vergottini & Tommaso Edoardo Frosini eds., 2008).

<sup>260</sup> *Id.* at 61.

<sup>261</sup> *Id.*

<sup>262</sup> Costituzione, *supra* note 240, at art. 11.

The intervention of the Constitutional Court was fundamental to strike a fair balance between secrecy and other constitutional values and to smooth potential incompatibilities.<sup>263</sup>

The right approach to endorse consisted in accepting the existence the State secrets privilege, without refusing it, but keeping in mind that it may become a very dangerous instrument of Government.

Therefore, it must be specifically ruled by addressing any detail as the premises, the exercise, the checks and the balances.

This awareness led the legislature to the drafting of Law October 24, 1977, n. 801.<sup>264</sup>

Strict control of the State secrets privilege is necessary in order to avoid that the institute leads to arbitrariness and to lack of accountability for political action of officials recurring to it.<sup>265</sup>

#### **A.5 The Constitutional Court and the State secrets privilege**

The institute of the State secrets privilege needed a solid basis from which to arise and develop. The intervention of the Constitutional Court was fundamental to balance the various compelling interests and to establish the nature of the State secret as an instrument to safeguard the legal order, rather than an element of unfettered sovereignty.<sup>266</sup>

Since the 70s, the Court has progressively integrated the institute within the constitutional framework. Its judges have depicted State secrets as means to affirm the *salus rei publicae* and thus worthy of prevailing over the judicial branch and sometime of blocking the judicial discovery.<sup>267</sup>

The relationship between the national legislator and the Court in the field of State secrets privilege has been peculiar: constitutional judges have been intervening very often and have been deeply impacting the legal role of the institute, while the national legislator have seemed uncertain and almost worried of ruling on it.

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<sup>263</sup> Vidaschi, *supra* note 1, at 97.

<sup>264</sup> See *supra* note 193.

<sup>265</sup> Salerno, *supra* note 247, at 62.

<sup>266</sup> BONZANO, *supra* note 203, at 10.

<sup>267</sup> *Id.*

Therefore, legislative amendments on the State secrets privilege have followed and adapted themselves to the decisions of the Supreme Court and not the other way around, as it should work in a civil law system.<sup>268</sup>

The Constitutional Court has provided decisions on the State secrets privilege in two occasions: when it has been called upon for an incidental opinion on the constitutional legitimacy of law provisions or when conflicts of attributions have been arising between the executive and the judicial branch.<sup>269</sup> In both the occasions the Court has found itself to strike a balance between competing interests.<sup>270</sup>

The difference is that, while in addressing the first category the Court has to abstractly compare constitutional values, the second category requests a concrete and specific analysis.<sup>271</sup>

Anyway, since its very first decision on the matter, the Court has tried to set a clear system of principles through which to deal with the State secret.

#### **i. The Decision No. 82/1976**

The Constitutional Court's decision that used to represent the bedrock of the State secrets privilege's understanding is the judgment April 14 1976, n. 82.

In that occasion, the Court had to decide whether articles 342 and 352 of the criminal procedural law code were in compliance with the Constitution.<sup>272</sup>

Article 342 concerned State's officials, employees and people carrying out public services' duty to deliver any document, act or thing to the judicial authority unless they invoke the military or political secret.<sup>273</sup>

Instead, article 352 prevented the same category of people from being questioned on State secrets' matters.<sup>274</sup>

In particular, a judge from Verona raised the constitutional issue arguing that articles 342 and 352 hinder articles 101 and 104 of the Constitution.<sup>275</sup> Art. 101

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<sup>268</sup> CAPORALE, *supra* note 224, at 39.

<sup>269</sup> The decisions 82/1976 and 24/1977 fall within the first category; the decision 110/1998 in the second one.

<sup>270</sup> Gino Scaccia, *Il bilanciamento degli interessi come tecnica di controllo costituzionale*, *Giurisprudenza Costituzionale* 3961 (1998).

<sup>271</sup> BONZANO, *supra* note 203, at 15.

<sup>272</sup> Corte Cost. n.82/1976, *supra* note 4, at 1-2.

<sup>273</sup> See CAPORALE, *supra* note 224, at 20 (quoting art. 342 of Codice Di Procedura Penale Rocco.)

<sup>274</sup> *Id.*

<sup>275</sup> Corte Cost. n.82/1976, *supra* note 4,, at 1 (facts).

provides that judges are subjected only to law, while article 104 States that the judiciary branch is autonomous and independent.<sup>276</sup>

The judge *a quo* alleged that precluding the judiciary from receiving information due to the State secret invoked by the executive would obstruct the functions of the former and subordinate it to the will of the latter.<sup>277</sup>

Also a judge from Ravenna challenged the constitutionality of the same two provisions, claiming a violation of articles 3, 24, 28, 52, 101, 102, 103, 111, 112 and 113 of the Constitution.<sup>278</sup>

Briefly, the second judge alleged that the regulation of the State secret violates the right to defense and hinders the very jurisdictional function because it creates an obstacle to the achievement of justice.<sup>279</sup> In addition, given that article 342 does not request any motivation for the allegation of the secret to be valid, judges cannot even check on its validity.<sup>280</sup>

The Constitutional Court rejected all the allegation of invalidity for inadmissibility, but the one based on article 3 of the Constitution.<sup>281</sup> In particular, the question was whether the different treatment of the military State secret compared to the professional secrecy is constitutionally acceptable.

Indeed, according to the articles at stake, the State secret needed an authorization from the Minister of Justice for the judiciary to criminally proceed once the military secret has been invoked.<sup>282</sup>

The Court affirmed that a different treatment is rational and it would be linked to the different interests protected. Indeed, the State secret protects the highest goal, which is security of the State.<sup>283</sup>

The integrity of the homeland, its, independence, its international personality and its very survival prevails on any other need, in every legal system. In the Italian

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<sup>276</sup> Costituzione, *supra* note 240, at arts. 101 & 104.

<sup>277</sup> Corte Cost. n.82/1976, *supra* note 4,, at 1 (facts).

<sup>278</sup> *Id.* at 2 (facts).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 6 (reasoning).

<sup>282</sup> *Id.* at 5 (reasoning).

<sup>283</sup> *Id.*

Constitution, the legal basis of this long- standing concern is embodied in article 52 of the charter.<sup>284</sup>

The Court pushed itself to differentiate the State secrets privilege from any other fact-finding obstacle to criminal proceedings.

Indeed, since the very beginning the Constitutional Court has linked the institute to the *salus rei publicae*, which is not an indescribable entity, but it covers specific and objective needs as the integrity and survival of the State.<sup>285</sup>

**ii. The Decision No. 86/1977**

One year later, two judges challenged the constitutionality of articles 342 and 352 of the Criminal Procedural law code again.<sup>286</sup>

This time, the issue before the Court was not the legitimacy of the State secret per se as much as the relationship between the executive power and the judiciary one.<sup>287</sup> The latter's power get obstructed when the former invokes the secret.

The judge *a quo* recalled the decision from the year before and its dictum according to which it is important to strike a balance between the judiciary branch's need to acquire evidence and the executive branch's need to keep some information, connected to the security of the State, secret.<sup>288</sup>

Instead, the State secrets privilege is seen by the Executive as an obstacle to the judiciary activity and it is not acceptable that it is up to the same executive branch to decide whether to proceed or not.<sup>289</sup> The legal protection of the State secret does not reflect the division of powers as set in the Constitution and thus, it is not legitimate.

The Constitutional Court affirmed that every time there is the secrecy at stake it has to be balanced with other constitutional interests.<sup>290</sup>

The decision n.82/1976 did link the institute to fundamental constitutional values as the security and the defense of the homeland.

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<sup>284</sup> *Id.*

<sup>285</sup> BONZANO, *supra* note 203, at 17.

<sup>286</sup> Corte Cost. n.86/1977, *supra* note 2.

<sup>287</sup> Morrone, *supra* note 3, at 28.

<sup>288</sup> Corte Cost. n.86/1977, *supra* note 2.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 5 (reasoning).

However, the Court in this occasion also recognized that the concept of defense might be interpreted in a broad way and therefore, it has to be understood in the light of article 5 and article 1 of the Italian Constitution.<sup>291</sup>

Article 1 defines Italy as a ‘Democratic Republic,’ while art. 5 sets out the principles of indivisibility and unity.<sup>292</sup>

In addition, the Court found the constitutional basis for the security predominance not only in article 52, but also in article 126, which provides that the Regional Council may be dissolved for reasons of national security.<sup>293</sup>

The norms evoked contribute to strengthen the external and internal security of the State.<sup>294</sup> The need to protect the homeland against violent actions that contrast the democratic spirit, which stands beyond the constitutional framework, is a supreme interest.<sup>295</sup>

Then, the Court distinguished between the State conceived as a community from the State made of the Government and the political parties. The interests protected by the State secrets privilege must be those of the State community and they cannot overlap with those of the political parties.<sup>296</sup> The secret is conceivable and acceptable when it works as means to reach the supreme goal of the State-community’s interests.<sup>297</sup>

The task of deciding which the information and the events that may endanger the security are belongs to the Prime Minister.<sup>298</sup> Indeed, according to article 95 of the Constitution the latter “conducts and holds responsibility for the general policy of the Government.”<sup>299</sup>

The Constitutional Court, through this decision, put the judgments on the external and internal security of the State and the discretionary choice on the *salus rei publicae* within the Prime Minister’s range of power.<sup>300</sup>

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<sup>291</sup> *Id.*

<sup>292</sup> Costituzione, *supra* note 240, at arts. 1&5.

<sup>293</sup> *Id.* at art. 126.

<sup>294</sup> Corte Cost. n.86/1977, *supra* note 2, at 5 (reasoning).

<sup>295</sup> Tommaso F. Giupponi & Federico Fabbrini, *supra* note 236, at 447.

<sup>296</sup> *Id.*

<sup>297</sup> Corte Cost. n.86/1977, *supra* note 2, at 5 (reasoning).

<sup>298</sup> *Id.* at 6-7 (reasoning).

<sup>299</sup> Costituzione, *supra* note 240, at art. 95.

<sup>300</sup> Corte Cost. n.86/1977, *supra* note 2, at 6-7 (reasoning).

In particular, the President has room to act and decide within the objective limits established in the decision n. 82/1076 and here re-affirmed: the integrity, independence, international personality and the very survival of the homeland.

Thus, the Constitutional Court recognized the invalidity of articles 342 and 352 to the extent they granted the power to confirm or not the State secret to the Minister of Justice, rather than to the Prime Minister.<sup>301</sup>

The Court resolved the conflict between the judicial branch and the executive one at the advantage of the latter: choices on the means to employ for the supreme interests of the security are totally political. Judges do not have the skills to rule on that.<sup>302</sup>

Anyway, the executive power does not exercise this power unfettered: the President has the duty to confirm or not the secret within a certain time and the judges can control whether the correct authority has invoked the privilege.

Moreover, State secrets must not be used to avoid inspections on facts that are subversive of the constitutional legal order.<sup>303</sup> The latter consists of civil liberties and rights, rather than of the division of powers.<sup>304</sup>

To conclude, the Executive branch, through the State secrets privilege, may partially escape accountability towards the judicial branch, but it is still accountable towards its citizens through the dialogue with the Parliament, which is the representative of the sovereign community.<sup>305</sup>

It is noteworthy that, with this decision the Constitutional Court with this decision set the basic guidelines and principles that the legislator will follow in drafting the law October 24, 1977 n. 801.<sup>306</sup> In particular, it highlighted the Prime Minister's power to invoke the State secrets privilege, the duty of the former to balance the compelling interest and to act in the light of the State-community's

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<sup>301</sup> *Id.* at 7 (reasoning).

<sup>302</sup> *Id.* at 8.

<sup>303</sup> *Id.*

<sup>304</sup> Alessandro Russo, *La Corte Dei Conflitti E Le Recenti Interpretazioni Sul Segreto Di Stato*, Quaderni Costituzionali, at 2

[http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti\\_forum/paper/0304\\_russo.pdf](http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0304_russo.pdf).

<sup>305</sup> Costituzione, *supra* note 240, at art. 8.

<sup>306</sup> Russo, *supra* note 304, at 3.

values; the need to motivate the recourse to the institute; the check on behalf of the Parliament.<sup>307</sup>

The duty to motivate is strictly linked to very nature of the State secret: if the latter is aimed at preserving the legal order and at strengthening the national security, the Executive must show the necessity to invoke the secret to reach these goals. The previous regulation was unconstitutional in the part that it did not provide for a motivation.<sup>308</sup>

As for other institutes, motivating the use of the State secret is the best way to prevent its abuse.

This decision addressed the issue and its regulation in a more comprehensive and structured way. Therefore, it is still considered a leading case on the matter and a key judgment to interpret the State secret in a democratic and constitutional way.<sup>309</sup>

### **iii. Final remarks**

The two decisions addressed above confirmed the principle that the State secrets privilege is legitimate only if it pursues ‘paramount interests’ of the State-community, of the citizenry and it stands as necessary to guarantee the national security.<sup>310</sup>

The seal is legitimate only when it is aimed at reaching the territorial integrity, the independence, and the very survival of the State.

Thus, the courts carried out the identification of what is coverable by the State secret through an objective parameter.<sup>311</sup>

However, the lack of a specific formulation of the interests protectable with the State secret and the discretionary character of the Prime Minister’s choice on whether to invoke it or not needed a further specification. Not only the State secrets privilege must be aimed at protecting the paramount interests addressed, but it should also represent the means to reach those goals.<sup>312</sup>

The judgment on which means are necessary and adequate is up to the Executive. The Parliament checks on the activity of the former and ensures the

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<sup>307</sup> *Id.*

<sup>308</sup> Arconzo & Pellizone, *supra* note 215, at 8.

<sup>309</sup> RINALDI, *supra* note 200, at 81

<sup>310</sup> Vedaschi, *supra* note 1, at 104.

<sup>311</sup> BONZANO, *supra* note 203, at 20.

<sup>312</sup> RINALDI, *supra* note 200, at 85.



equilibrium among the three branches. The sphere of the State secret is completely political and left to the will of the political bodies.<sup>313</sup>

The State secret differentiates itself from any other kind of secrecy: it is completely uncontestable by the judicial branch because it protects interests prevailing on the exercise of the judicial function.<sup>314</sup> Indeed, it defends the *salus rei publicae*.

To conclude, the two decisions of the Constitutional Court attempted to resolve the long-standing conflict between democracy's transparency and *arcana imperii*.

Secrets serve the purposes of safeguarding constitutional values and thus, they lose their authoritarian character. The light of the Constitution embraces these secrets and turns them into instruments of the democratic framework.<sup>315</sup>

#### **A.6 The Legislator and the State secrets privilege: the Law No. 801/1977**

The Constitutional Court inspired the legislator.

The definitions provided by the Supreme Court were embedded in the law 801/1977, entitled 'Foundation and set of rules for the services of information and security and regulation of the State secrets privilege.'<sup>316</sup>

Indeed, art. 12 of that law provided that "the acts, the documents, the information, the activities and any other thing, whose spread may damage the State's integrity, also in relation to international treaties, the defense of the institutions traced by the Constitution, the free exercise of the constitutional bodies' functions, the independence of the State towards the other States, the relations with the latter and the State's military defense, these can be covered by the State secret."<sup>317</sup>

The identification of the State secrets privilege's reach recalls the words of the decisions n. 82/1976 and 86/1977.

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<sup>313</sup> BONZANO, *supra* note 203, at 21.

<sup>314</sup> Arconzo & Pellizone, *supra* note 215, at 5.

<sup>315</sup> BONZANO, *supra* note 203, at 21.

<sup>316</sup> Giusi Sapienza, *La nuova disciplina del Segreto di Stato: profili sostanziali* in NUOVI PROFILI DEL SEGRETO DI STATO E DELL'ATTIVITÀ DI INTELLIGENCE 135 (Giulio Illuminati & G. Giappichelli eds., 2010).

<sup>317</sup> Legge 801/1977, *supra* note 193, at art. 12.

Moreover, the following paragraph of the same article embraced the dictum of the Constitutional Court according to which the institute must not prevent inspections on facts subversive of the constitutional legal order.<sup>318</sup>

On one hand, the definition of the values protected by the State secret is linked to the *salus rei publicae*: on the other one, the ban to hide any eversion of the constitutional legal order affirms the immutability of the democratic Republic as form of Government.<sup>319</sup>

Subsequently, articles 13-15 face the relation between judicial branch and executive one's issue. Indeed, these norms modify the criminal procedural law code and amended the articles 342, 351, 352 and 372.<sup>320</sup>

First, the amendments superseded the distinction between military secret and political secret contained in the 1930 code.<sup>321</sup> The State secret is not anymore about the information per se, but about the threat that the information may create to the paramount interests.

Second, the new article 352 of the Criminal procedural law code provides that State officials, the State employees and those carrying out a public service must abstain from and cannot be request to depose on what is covered by the State secrets privilege.

If the acting judicial authority does not trust the invocation of the State secret, it may request the Prime Minister to confirm it within 60 days.

In the event the President does confirm it and the information covered is fundamental to proceed, the judicial authority must dismiss the proceedings.<sup>322</sup>

Third, the legislative reform identified the Prime Minister as *dominus* of the State secrets privilege.<sup>323</sup>

Art. 1 of the law grants the President the power to control the implementation of the criteria to invoke the State secrets privilege; to identify the competent bodies; to ensure the protection of the privilege.<sup>324</sup>

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<sup>318</sup> Corte Cost. n.86/1977, *supra* note 2, at 8 (reasoning).

<sup>319</sup> Sapienza, *supra* note 316, at 134.

<sup>320</sup> Legge 801/1977, *supra* note 193, at arts. 13-15.

<sup>321</sup> RINALDI, *supra* note 200, at 92.

<sup>322</sup> Legge 801/1977, *supra* note 193, at art. 15.

<sup>323</sup> Tommaso F. Giupponi, *La riforma del sistema di informazione per la sicurezza della Repubblica* in NUOVI PROFILI DEL SEGRETO DI STATO E DELL'ATTIVITÀ DI INTELLIGENCE 65 (Giulio Illuminati & G. Giappichelli eds., 2010).

The President found itself to be entrusted with a wide discretionary power. Indeed, the definition provided by article 12 of the law did not specifically set the limits of the State secret.

In particular, the reference to “any other thing that may damage” leads to a very broad explanation of State secret, which pretends to consist in an objective criterion, but it clearly needs the intervention of the authority to be understood and implemented.<sup>325</sup>

The President is not the one invoking the secret in the first instance, but he has the authority to intervene any time the judicial authority does not agree with the apposition of the privilege.<sup>326</sup>

Fourth, the legislative reform begins setting the political control exercised by the Parliament over the Executive.<sup>327</sup>

Indeed, article 11 of the law entrusts a Parliamentary Committee with the task of supervising the correct application of the principles established by the law itself (and therefore, by the two above mentioned opinions of the Constitutional Court).<sup>328</sup>

Moreover, in the event the Prime Minister confirms the State secrets privilege under art. 352, he must communicate it to the Committee, attaching a brief motivation. If the majority of the Committee deems the confirmation not to be legitimate, it can inform the chambers of the Parliament.<sup>329</sup>

Anyway, the Prime Minister has to inform the Committee of every apposition of the State secrets privilege.<sup>330</sup>

Moreover, the Constitutional Court might have a say on the executive action according to the conflict of powers’ discipline.<sup>331</sup> Indeed, article 134 allows the Constitutional Court to pass judgments on conflicts arising from allocation of powers of the State.<sup>332</sup>

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<sup>324</sup> Legge 801/1977, *supra* note 193, at art. 1.

<sup>325</sup> CAPORALE, *supra* note 224, at 47.

<sup>326</sup> Scandone, *supra* note 191, at 419.

<sup>327</sup> *Id.*

<sup>328</sup> Legge 801/1977, *supra* note 193, at art. 11.

<sup>329</sup> *Id.* at art. 16.

<sup>330</sup> *Id.* at art. 17.

<sup>331</sup> Scandone, *supra* note 191, at 419.

<sup>332</sup> Costituzione, *supra* note 240, at art. 134

Thus, the Constitutional Tribunal may intervene in case of disagreement between the executive branch and the judiciary one concerning the apposition of the State secrets privilege.

While the Constitution Court with the opinion 86/1977 claimed that the judiciary does not have the suitable task to check on the invocation of the State secrets privilege, it maintains a say on the matter through its role as judge over the three branches.

Its role under article 134 of the Constitution will strongly develop and will become fundamental in the post September 11 World, as it will be addressed in the third chapter of this thesis.

To conclude, it is noteworthy that the intervention of the Legislator in 1977 was supposed to be temporary, due to the emergence of the situation and to the two recent decisions of the Constitutional Court.<sup>333</sup>

Indeed, article 18 of the 1977 Legislative Act anticipates the oncoming of a new systematic regulation of the State secrets privilege and it affirms that the definition of State secret contained herein will be valid as long as the new rules do not enter into force.<sup>334</sup>

## **A.7 Final remarks**

The 1977 Legislative intervention was expected to be substituted soon by a comprehensive discipline. However, it will be to wait for ten years for the Parliament to legislate again on the State secrets privilege.<sup>335</sup>

Till that moment, the discipline of the State secrets privilege continues to evolve from the verdicts of the Constitutional Court, as the law 801/1977 was not analytic enough.

In the decision 110/1998, the Court was called again to rule on the State secrets privilege.<sup>336</sup> This time, it had jurisdiction on the basis of the allocation of powers' discipline.

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<sup>333</sup> BONZANO, *supra* note 203, at 22.

<sup>334</sup> Legge 801/1977, *supra* note 193, at art. 18.

<sup>335</sup> See chapter 3.

<sup>336</sup> Corte Cost., 10 Aprile 1998, n. 110.

In that occasion, the judges explicitly relied on the decisions antecedent to the law 801/1977 rather than on the words of the law itself.<sup>337</sup>

They recalled the link that must exist between the State secret and the survival, integrity, and democratic order of the State, the so called ‘paramount interests.’<sup>338</sup> Moreover the privilege and values must be in a means- goal relation.

After having re-affirmed the guidelines of the institute, the Constitutional Court talked about the effects of it towards the judicial authority.

In particular, it affirmed that the apposition of the State secret does not inhibit the judiciary from investigating the facts, but only from using specific evidence.<sup>339</sup>

Some information and documents can be covered with the label ‘secret,’ not the *notitia criminis* per se.<sup>340</sup>

These developments will be fundamental for an understanding of the issue in the post September 11 World.

## **Part B      The United States of America**

### **B.1      Foreword**

The State secrets privilege in the United States is a common law evidentiary privilege, which derives from the President’s authority over national security and therefore it is considered to have strong links with constitutional values.<sup>341</sup>

Under this institute, a court may allow the Government not to reveal specific evidence to the public because it could lead to a threat of the national security.<sup>342</sup>

Specifically, it is aimed at sealing that information whose spread would lead to “impairment of the nation’s defense capabilities, disclosure of intelligence gathering methods or capabilities, and disruption of diplomatic relations with foreign Governments.”<sup>343</sup>

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<sup>337</sup> *Id.* at 5 (reasoning).

<sup>338</sup> *Id.*

<sup>339</sup> Ciro Santariello, *La sentenza costituzionale n. 110 del 1998 in tema opposizione del segreto di Stato e poteri dell'autorità giudiziaria: una pronuncia con molte luci e qualche ombra*, 4 *Giur. It.* 1, 29 (1999).

<sup>340</sup> *Id.*

<sup>341</sup> Amanda Frost, *The State Secret Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1935 (2007).

<sup>342</sup> Louis Fisher, *The State Secret Privilege: From Bush II to Obama*, 46 *PRES. STUD. Q.* 173 (2016).

<sup>343</sup> *Ellsberg v. Mitchell*, 709 F. 2d 51, 57 (D.C. Cir. 1983).

Therefore, the roots of the U.S. State secrets privilege fall within two different groups: the common law evidentiary privileges and the set of principles coming from the constitutional separation of powers.<sup>344</sup>

The Constitution refers rarely to secrecy and does not provide a comprehensive framework for it.<sup>345</sup>

In particular, article 1, section 5, clause 3 confers “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy.”<sup>346</sup>

In the debate surrounding the drafting of the Constitution, some supported the idea that in certain occasions secret Government action is necessary and the President is the most suitable to control it.<sup>347</sup>

Instead, others could not trust a Government that accepted shadows and uncertainty.<sup>348</sup>

The conflict between transparency and secrecy smoothed and the courts overcame the opposition to the recourse to secrets.<sup>349</sup>

Indeed, through consistent case law, the judiciary developed several theories to hide some Governmental actions from the public, among which the State secrets privilege.

The State Secret is one of the evidentiary privileges established in the English and American common law systems.

In particular, it derives from the so called ‘crown privilege,’ as developed in England and Scotland, which included the duty for the officials to keep the King’s secrets.<sup>350</sup>

In the XIX century, the English jurist Thomas Starkie affirmed that there exists some information whose disclosure would create more inconvenience than its exclusion.<sup>351</sup>

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<sup>344</sup> Bazzle, *supra* note 151, at 31.

<sup>345</sup> *Id.*

<sup>346</sup> U.S. CONST. art.1 §5.

<sup>347</sup> JOHN JAY, THE FEDERALIST NO. 64 390- 391 (Clinton Rossiter ed., 1961).

<sup>348</sup> James Madison, Notes of Debates in the Federal Convention of 1787 433-34 (Norton ed., 1987).

<sup>349</sup> Bazzle, *supra* note 151, at 31.

<sup>350</sup> BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 62 (J.W. Ehrlich ed., 1959).

<sup>351</sup> THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE AND DIGEST OF IN CIVIL AND CRIMINAL PROCEEDINGS (Wells & Lilly eds. 1826).

The State secrets privilege showed itself in an opaque way really early in time. For instance, in the leading case *Marbury v. Madison*, the Secretary of State Levy Lincoln refused to testify on information communicated to him in confidence.<sup>352</sup> Justice Marshall recognized that the former could not be obliged to.<sup>353</sup>

The same Justice Marshall addressed better the issue in the Burr's case.<sup>354</sup>

Aaron Burr was charged with treason and he sought the production of a letter from one of the President Jefferson's officials in order to defend himself.<sup>355</sup>

The clash between the Government's desire not to disclose the letter and Aaron's right to defense was evident. Thus, Justice Marshall highlighted the fact that the administration did not oppose the production of the document on the ground that the disclosure would have 'endangered the public safety.'<sup>356</sup>

Implicitly, the court was saying that withholding of information would have been legitimate in case the Government had invoked the public safety.

The dictum of the decision implies that the President can overcome the duty of transparency when he has to safeguard the public safety and the latter prevails on the former exigency.

As for its connection to the very existence of the State, sometimes the State secrets privilege is deemed to belong to a pre- constitutional era and to be due to a natural instinct of auto-preservation.<sup>357</sup>

The power to ensure and preserve the sovereignty comes with sovereignty itself.<sup>358</sup> This is why some do not even struggle to find a legal basis for the institute.

Anyway, the Supreme Court explicitly recognized the State secrets privilege after the roots of the institute have already grown through previous case law and doctrinal discussions.

While it is usually the Supreme Court that rules and initiates a new doctrine, this was not the case in the development of the State secrets privilege.<sup>359</sup>

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<sup>352</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 143-144 (1803).

<sup>353</sup> *Id.* at 144-145.

<sup>354</sup> *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807).

<sup>355</sup> *Id.* at 32.

<sup>356</sup> *Id.* at 37.

<sup>357</sup> Brian Z. Tamanaha, *A Critical Review of the Classified Information Procedures Act*, 13 AM. J. OF CRIM. L 318 (1986).

<sup>358</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

<sup>359</sup> ARTHUR SELWYN MILLER, *THE SUPREME COURT: MYTH AND REALITY* 6 (1978).

The highest court became aware of the privilege as it was an already existing trend and decided to embrace it after a few circuit courts had chartered its course.<sup>360</sup>

The *Reynolds* case marked out the first explicit recognition of the evidentiary privilege by the Supreme Court.<sup>361</sup> However, in that occasion the Court affirmed that the State secrets privilege was already ‘well established in the law of evidence’.<sup>362</sup>

The judges cited several precedents, among which an important input for its developments stands in the case *Totten v. U.S.*<sup>363</sup>

Now, these rules have been in place for a long time and the SC has sporadically affirmed and reinvigorated them.<sup>364</sup>

Therefore, the Supreme Court is considered to be the only one having the authority to modify the State secrets privilege and its premises.<sup>365</sup>

However, the chapter III will show a different understanding of the courts in the post September 11 World.

## **B.2 Totten v. United States**

The event from which the *Totten* case arose was a secret espionage agreement entered into between a Union Spy, William Lloyd, and President Lincoln during the Civil War.<sup>366</sup>

Under the contract made in July 1861, William Lloyd was expected to reach the south, to control the number of troops owned by the insurrectionary States, to get plans of fortifications and similar useful information.<sup>367</sup> Then, he had to report to the President. He was to be paid \$200 a month for these services.<sup>368</sup>

The Spy did carry out his duties and did respect the agreement: he proceeded to the enemy’s territory, he stayed there for all the duration of the war and he gained and transmitted secret information to the President. However, he was only reimbursed for the expenses, but never paid for his services.<sup>369</sup>

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<sup>360</sup> Frost, *supra* note 341, at 75.

<sup>361</sup> *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>362</sup> *Id.* at 6-7, n.11.

<sup>363</sup> *Totten v. United States*, 92 U.S. 105 (1875).

<sup>364</sup> *See Tenet v. Doe*, 544 U.S. 1, 8-10 (2005); *Webster v. Doe*, 486 U.S. 592, 604 (1988).

<sup>365</sup> Rudenstine, *supra* note 189, at 43

<sup>366</sup> Crook, *supra* note 187, at 58 (2009).

<sup>367</sup> *Totten*, 92 U.S. at 105- 106.

<sup>368</sup> *Id.* at 106.

<sup>369</sup> *Id.*



Lloyd later died and Mr. Totten brought the case before the Court of Claims on the former's behalf to recover the compensation owed under the contract.<sup>370</sup>

The Court of Claims dismissed the action being uncertain on whether the President has the authority to make the United States enter this kind of contract.<sup>371</sup>

The case reached the Supreme Court: the latter affirmed the lower court's decision.<sup>372</sup> However, the reasoning was very different.

Indeed, the Supreme Court recognized the President's power to enter a secret contract with a spy to gain information on the enemies. As a commander-in-chief and due to the current state of war, his actions were legitimate and lawful.<sup>373</sup>

Instead, there was concern about entering litigation on the matter. The services at issue were secret; the contract was to be sealed; the information gathered was to be communicated privately.<sup>374</sup> These conditions of the agreement did not match with proceedings on the agreement itself.

If the litigation were admissible, secret services would never be possible, as they would suffer a huge detriment of the public. On the contrary, these services are often necessary for the survival of the State in time of war.<sup>375</sup>

The SC held that "It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."<sup>376</sup>

Therefore, the dictum arising from the decision is that a lawsuit can be dismissed not only because it discloses confidential information, but also if it just threaten to do so. The mere possibility of disclosure is enough for the judicial system not to proceed.<sup>377</sup>

As addressed before, this was not the first time that a U.S. court faced the issue of secret information.<sup>378</sup>

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<sup>370</sup> Crook, *supra* note 187, at 58.

<sup>371</sup> *Totten*, 92 U.S. at 106.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 107.

<sup>376</sup> *Id.*

<sup>377</sup> Crook, *supra* note 187, at 59.

<sup>378</sup> See *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807).

However, *Totten* was later cited as a milestone for the establishment of the State secrets privilege.<sup>379</sup>

Paradoxically, in that case either the Government did not invoke the privilege or any obstacle for the judicial branch's impossibility to set the case or the Court did mention any secret.<sup>380</sup>

However, *Totten's* ruling had a broad scope and was able to set down some general guidelines and principles from which the doctrine of the state secret was to develop.<sup>381</sup>

To conclude, even if the general idea of privileged information that should not be disclosed has historical roots, the proper concept and the comprehensive discipline of the State secrets privilege will have to wait for the *Reynolds* decision.

### **B.3 United States v. Reynolds**

*Reynolds* facts involved the crash of a Governmental B-29 aircraft. Three civilians were killed in the incident and their widows claimed for damages against the federal Government.<sup>382</sup>

In the pretrial stage, the three widows asked for the AirForce's official accident investigation report and the statements of three surviving crewmembers.

The Government refused to disclose the material necessary to investigate, as the aircraft involved and the personnel were carrying out a secret mission at the time of the incident.<sup>383</sup>

The information requested could not be disclosed, "*without seriously hampering national security.*"<sup>384</sup>

The District Court ordered the Government to produce the documents in order to allow the judges to determine whether the content was privileged.

Both the decisions of the District Court and the Court of Appeals were in favor of the plaintiffs and sided with the production of the documents. Thus, the Government appealed again.<sup>385</sup>

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<sup>379</sup> *Reynolds*, 345 U.S., at 6-7, n. 11.

<sup>380</sup> Rudenstine, *supra* note 189, at 49.

<sup>381</sup> Erin M. Stilpt, *The Military and the State Secret Privilege: the Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 834 (2006).

<sup>382</sup> Frost, *supra* note 341, at 4.

<sup>383</sup> *Reynolds*, 345 U.S., at 5.

<sup>384</sup> *Id.*

The Supreme Court decided to grant certiorari because the Government's privilege to resist discovery was at issue.<sup>386</sup>

The previous judicial experience on the protection of secrets had been limited, however the principles on the application of the privilege were already clear and the latter belonged without any doubt to the sovereign sphere of the Government.<sup>387</sup>

However, the Court recognized that there must be a formal claim of the privilege and that the court itself must determine whether the premises to claim the privilege are appropriate.<sup>388</sup> The difficult part for the judges consists in doing it without forcing a disclosure of the information protected.

The SC recognized that a judicial inquiry might find a balance between a too strict control over the privilege and a total deference, which would lead to abuses.<sup>389</sup>

The correct compromise stands with the court checking the evidence and circumstances and deciding whether forcing the disclosure of evidence would divulgate information, which threatens the national security.<sup>390</sup>

The case at stake fell within that hypothesis: there was a high likelihood that the incident report would have contained references to secret data of the mission.<sup>391</sup>

As a conclusion, the SC reversed and remanded the Court of Appeals' decision and recognized the Governmental claim's likelihood of success.<sup>392</sup>

The Court concluded that the privilege only limited the evidence that could be used and remanded the case to the district court in order to allow the plaintiff to gather more information and litigate the case without the privileged documents.<sup>393</sup>

Indeed, it is now settled that, in a lawsuit counting the Government as defendant, the invocation of the privilege should not have any other consequence, but the deprivation for the plaintiff of some evidence.<sup>394</sup>

However, it may also be possible that the apposition of the privilege completely bar the entire litigation. If the defendant (usually the Government) needs

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<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 3.

<sup>387</sup> *Id.* at 8.

<sup>388</sup> *Id.*

<sup>389</sup> *Id.* at 9.

<sup>390</sup> *Id.* at 10.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.* at 12.

<sup>393</sup> Frost, *supra* note 341, at 1937.

<sup>394</sup> Crook, *supra* note 187, at 64.

privileged information to defend itself, the court may opt for the summary judgment<sup>395</sup>.

This scenario will take place more often in the post September 11 world.<sup>396</sup>

Taking the stock of the decision, it is evident that the Supreme Court provided a definition of State secrets privilege. The latter is an evidentiary bonus and some requisites must be satisfied to invoke it.<sup>397</sup>

On one hand, the formal requirement is a claim by the Executive;<sup>398</sup> on the other hand, the substantial existence of a ‘reasonable danger’ for the national security is requested.<sup>399</sup>

Moreover, the Court did not hold that the bare invocation of the State secrets privilege by the executive would be sufficient for the latter to have it: the judiciary branch has to balance the interests of the discovery-seeking party who needs the privileged information and those of the Government arguing that the disclosure would potentially endanger the national security.<sup>400</sup>

However, some commentators believe that the implicit message coming from the *Reynolds* case was that courts rely on the assertion of state secret’s necessity by the executive and do not carry out a comprehensive and complete control.<sup>401</sup>

In particular, Louis Fisher affirmed that *Reynolds* sent a strong signal that when it is about national security, the judicial branch will follow the label given by the executive and will give up opposing it.<sup>402</sup>

Moreover, through the *Reynolds* decision, the State secrets privilege crystalized as an absolute ban: when the court decides that the documents at issue should be covered by the privilege, the latter prevails in a total way. It does not matter whether the defense of a party in the lawsuit gets injured or whether there are other interests involved.<sup>403</sup>

With *Reynolds*, the basic framework to decide states secrets cases was set.

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<sup>395</sup> See *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

<sup>396</sup> See Chapter III.

<sup>397</sup> *Bazze*, *supra* note 151 at 36.

<sup>398</sup> *Reynolds*, 345 U.S. at 7-8.

<sup>399</sup> *Id.* at 10.

<sup>400</sup> *Frost*, *supra* note 341, at 1937.

<sup>401</sup> *Weaver & Pallito*, *supra* note 180, at 98.

<sup>402</sup> LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE 257 (2006).

<sup>403</sup> *Rudenstine*, *supra* note 189, at 50.

#### B.4 State Secrets in the Post-Reynolds Era

In the years following the *Reynolds* decision, the Government rarely invoked the privilege. Later, since 1977 state secrets had been asserted more often.

Between 1953- 1976 the privilege was invoked in only 11 case, while there were 59 reported cases between 1977-2001.<sup>404</sup>

Five years after *Reynolds*, the Second Circuit delivered its opinion on *Halpern v. United States*.<sup>405</sup>

In that case, the inventor Halpern brought a lawsuit against the U.S. after the Government refused to compensate him for the decision to issue an order of secrecy under the Invention Secrecy Act, according to which Halpern could not commercially use certain military patents.<sup>406</sup>

The Government tried to stop the lawsuit claiming the State secrets privilege.<sup>407</sup>

The court did not accept the Government's claim, as the plaintiff, Halpern, was not trying to have access to secret information because he already possessed them.<sup>408</sup>

Therefore, the state secrets were not going to be shared with somebody who did not already know them except for the judge. The claim was not legitimate.<sup>409</sup>

Another case that suggested important limitations on the State secrets privilege was *Elson v. Bowen*, addressed by the Supreme Court of Nevada.<sup>410</sup>

The Court had to decide whether it had the power to prevent a trial judge from compelling federal agents to testify and produce documents concerning their alleged participating in wiretaps activities without warrant.<sup>411</sup>

It is noteworthy that the Court held that the privilege does not work anymore once the information becomes public and that the secret category is not anyway applicable when the Government's conduct is unconstitutional.<sup>412</sup>

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<sup>404</sup> Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV 1249, appendix (2007).

<sup>405</sup> *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958).

<sup>406</sup> *Id.* at 37-38.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 44.

<sup>409</sup> Chesney, *supra* note 404, at 1290.

<sup>410</sup> *Elson v. Bowen*, 436 P.2d 12 (Nev. 1967).

<sup>411</sup> *Id.* at 13-14.

<sup>412</sup> Chesney, *supra* note 404, at 1292.

As already mention, after the 1977 the use of the State secrets privilege deeply increased. This was due to a parallel increase of lawsuit against the Government for several alleged violations conducted by U.S. intelligence agencies acting in the name of national security.<sup>413</sup>

The Government tried to use the State secrets privilege to dismiss the cases on the surveillance activities. However, some of the alleged privileged information was already in the public domain due to leaks and investigations.

Oddly, the Courts again used a looser approach than in the immediate aftermath of *Reynolds* and sided with the Government, as in *Halkin v. Helms*.<sup>414</sup>

Indeed, in this case the judges sided with the Government and secret services agencies against 27 plaintiffs opposing unconstitutional warrantless surveillance activities.<sup>415</sup>

The reasoning was that disclosing the information in a lawsuit, even if some of it was already in the public domain, would have endangered the very intelligence activity and its organization. As the communications are all connected, this disclosure would have interfered with other missions.<sup>416</sup>

The following rulings in the pre September 11 era did not differ from *Halkin* and continued to refer to *Reynolds* as the basis for the privilege.<sup>417</sup>

## **B.5 Final Remarks**

*Reynolds* was the leading case on the State secrets privilege.

All the subsequent decisions concerning the need of secrecy had to refer to it.

However, in *Reynolds* the SC did not specifically and clearly sets the limits of the evidentiary privilege.

Instead, as some scholars argued, the case established a strong basis for the courts' trend to completely defer to the executive in cases involving national security.<sup>418</sup>

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<sup>413</sup> Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 806-07 (1989).

<sup>414</sup> *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978).

<sup>415</sup> *Id.* at 3.

<sup>416</sup> *Id.* at 8-9.

<sup>417</sup> Chesney, *supra* note 404, at 1298.

<sup>418</sup> *See supra* part B.3.

The lack of an invasive and comprehensive regulation on the matter by the highest court led to uncertainty in the next future.

On one hand, the immediate post- *Reynolds* cases did try to draw boundaries and to define rules on the use and abuse of the privilege; on the other hand, the same rules were overcome when necessary because they were not specifically based on the SC leading case *Reynolds*.

A recent episode regarding the *Reynolds* case is meaningful in the conclusion of the pre- September 11 U.S. Part.

This fundamental case always recalled by courts to expand the scope of the State secrets privilege counted a new chapter in the XXI century.

In 2000, Judith Palya Loether, the daughter of one of the victims in the *Reynolds* aircraft incident, found recently declassified documents on the Internet. Among them, there was a report on the B-29 that crashed in 1948, which was declassified in 1995. It regarded the death of her father.

Anything inside not even resembled a ‘military secret’: Loether could see that the Air Force did fail to install heat shield to prevent fires.<sup>419</sup>

Loether and the other two families involved in the historical litigation decided to file a motion for a writ of *coram nobis*. The latter consist of a claim that the executive misled the SC.<sup>420</sup>

The case arrived to the SC, but it denied certiorari.<sup>421</sup>

It was too late to correct the mistake. The development of the evidentiary privilege went so further that it was impossible to admit that the institute was based just on a fake national emergency.

## Conclusion

Analyzing the State secrets privilege in Italy and in the United States in a comparative perspective, there are some issues to highlight.

First, in both the legal systems the role of the jurisprudence was fundamental for the development of the privilege. While this character is normal and expectable

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<sup>419</sup> Fisher, *supra* note 342, at 184.

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* at 185.

for the United States, which is a common law system, it may instead sounds peculiar for Italy.

Indeed, the Italian judiciary usually develops a concept building on the norms and the rule of law, not the other way around.

The State secrets privilege arose and expanded in the light of its alleged purpose: the national security. Therefore, it is understandable that judges, when they found themselves to interpret the concept of national security, they also defined the width and the characteristics of the privilege.

Second, while in Italy the jurisprudential definition of state secrets was followed by a legislative intervention, the same hasn't happened yet in the United States. Some believes that time has come for the U.S. Congress to codify the privilege: it is necessary to have a new formulation in order to balance the various interests at stake and provide principles the courts can follow.<sup>422</sup>

An early draft of the evidentiary rules of procedure included art. 509, titled *Secrets of State and Other Official Information*.<sup>423</sup> The Congress at that time rejected it because there was not a compelling federal interest in regulating it.

Third, usually courts' evaluation of a privilege claim comprises a balancing of the interests at stake.<sup>424</sup> While the Italian Constitutional Court did strike this balance between the need of secrecy for national security's purposes and other constitutional interests, the U.S. tradition of *Reynolds* has not required it. If the court finds that the material at issue is reasonably linked to national security issues, no other interest can overcome the state secret.

Fourth, the object and the boundaries of the State Secret are different in the Italian and in the American tradition.

The former has provided a narrow definition of the privilege, as the information covered must be in a means-goal relation with the safety of the country. Instead, the latter accepted claim of secret on a whole matter and in that event the case would be dismissed as the complete action is affected.<sup>425</sup>

The differences just addressed will smooth in the Post September 11 World.

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<sup>422</sup> Hansen, *supra* note 150, at 640.

<sup>423</sup> STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 161 (Wolters Kluwer eds., 6th ed., 2016).

<sup>424</sup> Frank Corrado, *The Problem of the 'State Secrets' privilege*, 260-OCT N.J. L. 9, 11 (2009).

<sup>425</sup> *Id.*



As it will be explained, during the ‘War on Terror,’ Italy will embrace a broader definition of state secret and supersede the boundaries set in past, following the American cases.

The emergency created by international terrorism and the recourse to secret measures to tackle the threat will push together two opposite legal systems.

## Chapter III

### The State Secrets Privilege in the Post-September 11 World

#### Foreword

The State Secrets Privilege was born as instrument to protect the very existence of the State, its survival.<sup>426</sup>

It consists of a bar for the judicial authority to get aware of certain evidence during proceedings for the purpose of achieving higher interests.<sup>427</sup>

The institute could match with western contemporary democracies as long as it is aimed at protecting the democracy itself and the rule of law. The principle of transparency has to accept some boundaries and live with a small room of secrets as a compromise.<sup>428</sup>

Since the terrorist attacks of September 11, 2001, the use of the State secrets privilege has expanded dramatically.<sup>429</sup>

Data and statistics show that the increase is undeniable.<sup>430</sup> Moreover, the number of cases in which courts do not uphold the privilege has decreased from 20% to 14%. Since September 11, the courts have recognized the state secret the 86% of the times it has been invoked.<sup>431</sup>

This phenomenon is due to two factors.

First, the Executive branches invoke it more often to dismiss legal challenges concerning very debated and controversial actions taken by Governments in the effort to fight the terrorism threat.<sup>432</sup>

In particular, in the light of the several challenges to ambiguous programs as the Governments' warrantless surveillance or the extraordinary renditions, the label

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<sup>426</sup> See Corte Cost. n. 86/1977; See *Reynolds* case.

<sup>427</sup> Marco Malerba, *Segreto di stato: tra salus rei publicae, «nero sipario» e strisciante impunità*, 1 *Diritto Penale Contemporaneo* 1, 69 (2017).

<sup>428</sup> Stéphane Lefebvre, *A Brief Genealogy of State Secrecy*, 31 *WINDSOR YEARBOOK ACCESS TO JUST.* 95, 111 (2013).

<sup>429</sup> Daniel R. Cassman, *Keep It Secret, Keep It Safe: An Empirical Analysis Of The State Secrets Doctrine*, *STANFORD L. REV.* 1173, 1184 (2015).

<sup>430</sup> *Id.* at 1189 (See figure 1).

<sup>431</sup> *Id.* at 1192 (See figure 2).

<sup>432</sup> Bazzle, *supra* note 151, at 29.

‘state secret’ becomes a very powerful tool for the Government to avoid lawsuits on its behest.<sup>433</sup>

Second, Courts have accepted and relied on the assertion of the privilege by the Executive without carrying out a meaningful review.<sup>434</sup>

In order to uphold state secrets when the premises would not be satisfied, the judiciary implements a range of techniques and it simulates to act legally.

In Italy, the Constitutional Court has recently expanded the meaning of State Secret arguing that a broader concept falls within the traditional definition.<sup>435</sup>

In the United States courts overturn the dicta of famous precedents in order to legitimize the recent use of secrets.<sup>436</sup>

The contemporary age has been nicknamed the ‘Age of Deference’ in order to describe the judiciary trend to completely defer to the executive branch and to indiscriminately accept and affirm the actions of the Government allegedly taken in the name of national security.<sup>437</sup>

A successful and unfettered invocation of the privilege leads to some flaws experienced by the litigants facing the Government.

In particular, it may turn into the dismissal of the entire case and thus, it allows the Government to escape troublesome litigation.<sup>438</sup>

The consequences consist in lack of accountability and violations of fundamental rights and values at the alleged advantage of national security.<sup>439</sup>

Therefore, State Secrets have been employed as a ‘litigation tactic’ to thwart judicial review, criticism and public debate around the covered information.<sup>440</sup>

The nowadays use of the privilege prevents courts and common people to engage in the debate on the post-September 11 decisions and governmental missions.<sup>441</sup>

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<sup>433</sup> Stephanie A. Fichera, *Compromising Liberty for Security: The Need To Rein in the Executive's Use of the State-Secrets Privilege in Post-September 11 Litigation*, 62 U. MIAMI L. REV. 625 (2007).

<sup>434</sup> Rudenstine, *supra* note 189, at 39.

<sup>435</sup> Arianna Vidaschi, *State Secret Privilege versus Human Rights: lessons from the European Court of Human Rights Ruling on the Abu Omar Case*, 13 EUR. CRIM. L. REV. 166, 173 (2017).

<sup>436</sup> Bazzle, *supra* note 151, at 47.

<sup>437</sup> DAVID RUDENSTINE, *THE AGE OF DEFERENCE* (2016).

<sup>438</sup> Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 134 (2006).

<sup>439</sup> Fichera, *supra* note 433, at 39.

<sup>440</sup> Fuchs, *supra* note 438, at 133.

<sup>441</sup> Robert M. Chesney, *supra* note 404, at 1269.

State secrets and judicial deference are strongly intertwined and together they do contribute to the collapse of the constitutional order.<sup>442</sup>

Indeed, executive officials who may have committed unlawful acts and violated constitutionally granted rights and liberties do avoid judicial accountability.<sup>443</sup>

They do not have to worry about being held accountable and thus, they do underestimate their duties under the law and the norms they must comply with.<sup>444</sup>

On the other hand, courts should respond to the violations and be the guardian of the system. Instead, they do accept the Government's request for secrecy and dismiss 'hot' cases.<sup>445</sup>

This tendency weakens the confidence in the judicial system and makes the courts look like they are at the service of the Government rather than of the truth and of the justice.<sup>446</sup>

Therefore, the constitutional order based on a three equal branched system is under attack.

Indeed, the legal order stands on the ideal of a complicated system of check and balances and, in the event one of the pillars does not fulfill its purpose as it was supposed to, then the machinery does not work anymore.<sup>447</sup>

The overuse of State Secret by the Executive and the indifference of the Judiciary both lead to the betrayal of the very purpose of a democratic Government: supervising and enhancing the rule of law.<sup>448</sup>

Democracies, as Italy and the United States, are based on the rule of law: the Governments must comply with the law and thus, respond of their actions before the judicial bodies in case their actions do not respect the norms.<sup>449</sup>

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<sup>442</sup> Rudenstine, *supra* note 189, at 39.

<sup>443</sup> Jeremy Telman, *Intolerable Abuses: Rendition For Torture And The State Secrets Privilege*, 63 ALA. L. REV. 429, 446 (2012).

<sup>444</sup> PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 2 (2009).

<sup>445</sup> Rudenstine, *supra* note 189, at 39.

<sup>446</sup> *Id.*

<sup>447</sup> David Rudenstine, *The Irony of a Faustian Bargain: A Reconsideration of the Supreme Court's 1953 United States v. Reynolds Decision*, 34 CARDOZO L. REV. 1283, 1370 (2013).

<sup>448</sup> Rudenstine, *supra* note 189, at 39.

<sup>449</sup> AMERICAN BAR ASSOCIATION DIVISION OF PUBLIC EDUCATION, WHAT IS RULE OF LAW, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf>.

The Secretary General of the United Nations as described the rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws.”<sup>450</sup>

The current use of the State secrets privilege is undermining the legal order and violating the fundamental principles of accountability and rule of law.

Executive officials violate human rights standards and fundamental values and they do need secrecy in order not for constitutional framework to completely fall out.

Thus, the recourse to the State Secret is the way Governments have found to make the most debatable counter terrorism measures get back into legality.<sup>451</sup> Indeed, State secrets privilege has really ancient roots, as it was addressed before.<sup>452</sup>

Courts are scared of hindering missions carried out in the name of national security. They tend to understand the privilege as a total and absolute national security’s need and do not balance it with other constitutional values.<sup>453</sup>

Secrecy turns into a danger for the same value it was aimed at protecting: the democracy, the life in a community, and the existence of the State.<sup>454</sup>

An institute of the legal order can become an enemy of the fundamental pillars of order itself. It happens when the institute gets abused.<sup>455</sup>

The only way for the State secrets privilege to get back to normality would consist in the Courts adopting a stricter approach and reining the invocation of the former.

However, as it will be shown in the following paragraphs, the today trend is the other way around. Courts are more and more mild with Governments and do not take a strong position against the over-invocation of the privilege.

The post September 11 cases that will be analyzed all concern challenges to the extraordinary renditions programs during which state secrets were appended.

I decided to focus only on these governmental measures for two reasons.

First, to better compare the judiciary approaches both in Italy and in the United States and to address the international world’s reaction;

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<sup>450</sup> REPORT OF THE U.N. SECRETARY GENERAL, THE RULE OF LAW AND TRANSITIONAL JUSTICE IN CONFLICT AND POST-CONFLICT SOCIETIES, Aug. 23, 2004, S/2004/616.

<sup>451</sup> KENT ROACH, THE 9/11 EFFECT: COMPARATIVE COUNTER TERRORISM 23 (2011).

<sup>452</sup> See *supra* chapter II.

<sup>453</sup> Fichera, *supra* note 433, at 650.

<sup>454</sup> Fuchs, *supra* note 438, at 176.

<sup>455</sup> GIANNI FLAMINI & CLAUDIO NUNZIATA, SEGRETO DI STATO. USO E ABUSO (2002).

Second, to show that the abuse of the State secrets privilege in scenarios as the extraordinary renditions programs in black sites, where human rights are likely to be violated, leads to a total lack of accountability which undermines the rule of law and provokes reactions at the international level.

## Part A The United States

### A.1 Introduction

In the United States, since the Bush Administration on, the institute of the State secrets privilege has radically changed.<sup>456</sup>

Nowadays, claims for secrecy are the default rule and most of the time the executive officials invoking the State secrets privilege do not even know what the alleged secret documents contain.<sup>457</sup>

Over-classification is thus a significant problem: too much information is covered and often for worthless reasons.

U.S. Presidents and legal advisors advocate for a broad power to hide information. They also claim that judges do not have the skills to evaluate the level of danger that releasing information would provoke to national security.

Indeed, evaluations on national security are still considered expertise of specific agencies.<sup>458</sup>

Courts do accept the allegations of secrecy and do not fight to have a say in national security cases. On the contrary, they do defer to the Government.<sup>459</sup>

Moreover, the nowadays effect of the State Secrets is often the dismissal of the whole case, not only the refusal of the evidence covered by the evidentiary privilege.<sup>460</sup>

Indeed, the Supreme Court has recognized that some matters are so linked to secrecy that the judicial resolution of the cases is not foreseeable once the state secrets have been invoked.<sup>461</sup>

The final result is a sweeping understanding and application of State secrets privilege.<sup>462</sup>

The feeling is that the today invocation of it and the subsequent exception to the principle of transparency do not go along with the necessity but with the convenience of the Governments.<sup>463</sup>

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<sup>456</sup> Weaver & Pallito, *supra* note 180, at 85.

<sup>457</sup> Neely Tucker, *Judge Orders White House Papers' Release*, WASHINGTON POST., Oct. 18, 2002.

<sup>458</sup> Weaver & Pallito, *supra* note 180, at 89.

<sup>459</sup> Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1378 (2009).

<sup>460</sup> STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 166 (Wolters Kluwer eds., 6th ed., 2016).

<sup>461</sup> *Id.* at 167.

<sup>462</sup> Hansen, *supra* note 150, at 637.

## A.2 El-Masri v. United States

### i. The Story

Khaled El-Masri is a German citizen of Lebanese descent.<sup>464</sup> He was originally from Kuwait, but rose in Lebanon. He then moved to Germany and gained the citizenship in 1995.<sup>465</sup>

In 2003, he took a bus in Ulm, Germany, heading to Macedonia. Ulm has always been recognized by American and German surveillance services as an Islamic district.

When he reached Macedonian territory, local forces abducted him and questioned him. He was never informed of the reasons of his detention. He was then moved to a hotel in Skopje, Macedonia, where he remained for more than twenty days.<sup>466</sup> He did not ever have access to a lawyer or translator even if the questions were in English and his language skills were poor.

One of the interrogators suggested him to admit to support Al Qaeda and to collaborate in order to be released.<sup>467</sup> He denied any kind of involvement.

On January 23, 2004, a video of El-Masri saying that everything was fine was recorded. His detainers then drove him handcuffed and blindfolded to an airport.

After being undressed and beaten, ill-treated and mortified, he was loaded on a plane deemed to belong to a CIA- controlled corporation.<sup>468</sup>

He landed in Afghanistan, where he was interrogated and tortured again. The questions regarded an alleged trip to Jalalabad and his ties with 9/11 conspirators.

On May 28 of the same year another airplane transferred him to Albania. Albania officials later at night arranged a flight for him to go back to Germany.

Once he was back in Germany, he told the terrifying story and the American Civil Liberties Union (hereinafter ACLU) decided to file a suit on his behalf.

Therefore, on December 6, 2005, El-Masri filed a suit in the United States District Court for the Eastern District of Virginia.

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<sup>463</sup> Lefebvre, *supra* note 428, at 113.

<sup>464</sup> *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 533 (E.D. Va. 2006).

<sup>465</sup> HONIGSBERG, *supra* note 148, at 184.

<sup>466</sup> James Meek, *They beat me from all the sides*, THE GUARDIAN, January 13, 2005.

<sup>467</sup> HONIGSBERG, *supra* note 148, at 185.

<sup>468</sup> Scott Shane, *CIA Expanding Terror Battle under Guise of Charter Flights*, NY TIMES, May 31, 2005, at I.



The defendants were Tenet, director of the CIA, ten unknown CIA agents, three private corporations that allegedly provided CIA with means of transportation, and ten unknown private employees.<sup>469</sup>

There were three causes of action: a claim under the *Bivens* case,<sup>470</sup> a claim under the Alien Tort Statute (ATS) for violations of international principles banning arbitrary detention,<sup>471</sup> and another claim under the ATS for violating international legal standards on cruel, inhuman, or degrading treatment.

The United States moved to invoke the State secrets privilege.<sup>472</sup> The district court found the privilege to be validly asserted.<sup>473</sup>

Once the validity of the invocation was determined, the second question to the court was whether to dismiss the case in the light of the threat provoked by the potential disclosure of information.<sup>474</sup>

Justices sided the Government in holding that El-Masri would have revealed specific details about the extraordinary renditions program if he had to prove his detention and that he suffered degrading an inhuman treatment.<sup>475</sup>

The U.S. motion to dismiss the case was granted.<sup>476</sup> The Eastern District of Virginia embraced a strongly deferential and absolutist approach when the executive invoked the State secrets privilege.

El-Masri decided to appeal. He stated that, although state secret may have had some role in the case, the latter could have continued anyway without revealing sensible information.<sup>477</sup>

The appellant's argument did not convince the Fourth Circuit Court of Appeal, which confirmed the dismissal of the case by the district court.<sup>478</sup>

The Supreme Court did not grant the writ of certiorari.<sup>479</sup>

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<sup>469</sup> Crook, *supra* note 187, at 67.

<sup>470</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (in that case the Court held that the Fourth Amendment gives rise to a right of action against federal law enforcement officials for damages from an unlawful search and seizure),

<sup>471</sup> Alien Tort Statute, 28 U.S.C. § 1350.

<sup>472</sup> *El Masri v. Tenet*, 437 F.Supp.2 at 535.

<sup>473</sup> *Id.* at 537.

<sup>474</sup> *Id.* at 538.

<sup>475</sup> *Id.* at 539.

<sup>476</sup> *Id.* at 541.

<sup>477</sup> Reply Brief for Plaintiff- Appellant at 10, *El Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (No. 06-1667), 2007 WL 2571681 at \*10.

<sup>478</sup> *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007).

<sup>479</sup> *El-Masri v. United States*, 552 U.S. 947 (2007).

Therefore, the reasoning and the decision of the Court of Appeal are still standing. The *ratio decidendi* of the Fourth Circuit on matter of secrecy sets a standard that other circuit courts are following.<sup>480</sup>

**ii. The Great Expansion of the State secrets privilege**

It is noteworthy that the standard at issue consists of a sharp expansion of the evidentiary privilege, due to a rethinking of the precedent leading cases.

Indeed, the outcome of the case provides a ‘no-checks’ version of state secret and any type of judicial review is deemed as prohibited.<sup>481</sup>

To reach this extreme decision, the Fourth Circuit converged the bar established in *Totten*<sup>482</sup> with the reasoning in *Reynolds*.<sup>483</sup>

The former identifies the origins of the evidentiary privilege in the constitutional separation of powers, while the latter considers it a common law principle.

The merging of the two cases leads the *El-Masri* courts to hold that the State secrets privilege “performs a function of constitutional significance, because it allows the executive branch to protect information the secrecy of which is necessary to its military and foreign-affairs responsibilities.”<sup>484</sup>

The decision also recalls *United States v. Nixon*<sup>485</sup> judgment, in which the roots of the privilege were deduced from the American Constitution, at article II.<sup>486</sup>

On one hand, as already addressed before, the *Totten* case concerned a contract between a Union Spy and the President Abraham Lincoln.<sup>487</sup>

It is fundamental to remember that, once questioned on the issue, the Supreme Court not only did not grant the enforcement, but it also stated that public policy principles prevent anyone from bringing to in court suits which litigation would disclose confidential materials.<sup>488</sup>

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<sup>480</sup> Federico Fabbrini, *Extraordinary Renditions and the State Secret Privilege: Italy and the United States Compared*, 3 *Ir. J. of Pub. L.* 255, 275 (2011)(quoting *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070 (9th Cir. 2010)).

<sup>481</sup> *El Masri v. United States*, 479 F.3d at 307-308.

<sup>482</sup> *Totten v. United States*, 92 U.S. 105 (1876).

<sup>483</sup> *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>484</sup> *El-Masri v. United States*, 479 F.3d at 303.

<sup>485</sup> *United States v. Nixon*, 94 S.Ct. 3090 (1974).

<sup>486</sup> U.S. CONST. art II, §2.

<sup>487</sup> Frost, *supra* note 341, at 1940.

<sup>488</sup> *Totten*, 92 U.S. at 107.

Some scholars consider this decision as being aimed at creating an absolute “bar” to litigation when secret information is involved.<sup>489</sup>

Following *Totten*, it would not even be necessary for the Executive to formally invoke any evidentiary privilege: when secret actions are at stake, the same art. II of the Constitution forecloses any dispute.<sup>490</sup>

On the other hand, in *Reynolds*, the Supreme Court looked at the State secrets privilege as an evidentiary institute that the Government could enjoy.<sup>491</sup>

It also established the requisites to invoke it: one hand, the formal requirement is a claim by the Executive;<sup>492</sup> on the other hand, the substantial existence of a ‘reasonable danger’ for the national security is requested.<sup>493</sup>

Therefore, Justice King’s opinion in *El- Masri* established the three-step to follow when facing this privilege.

- 1) The procedural and formal requirements established in *Reynolds* to invoke the State secrets privilege have to be followed.
- 2) It has to be established whether there is ground to consider the information at stake evidentiary privilege.
- 3) If the second answer is affirmative, the court is then asked to decide whether to continue the trial in the light of the need of secrecy.<sup>494</sup>

Once the procedural requirements have been satisfied, the courts have to engage in a deeper inquiry.

Indeed, moving to the analysis of the second step, which is about the valid interposition of the State secrets privilege, the Court provided another double standard.

First, recalling *Reynolds*, it has to be decided whether there is a reasonable danger for State’s security.

Second, it is necessary to dismiss the case if, according to the circumstances, the sensitive matter is central to the litigation.<sup>495</sup>

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<sup>489</sup> Bazzle, *supra* note 151, at 34.

<sup>490</sup> *Id.*

<sup>491</sup> Bazzle, *supra* note 151, at 36.

<sup>492</sup> *Reynolds*, 345 U.S. at 7-8.

<sup>493</sup> *Id.* at 10.

<sup>494</sup> *El-Masri*, 479 F.3d at 304.

<sup>495</sup> *Id.* at 308.

This part of the test resembles the *Totten*'s bar, which prevents any kind of litigation.

Therefore, *El-Masri* decision borrowed parts of the reasoning both from *Reynolds* and *Totten*.

The outcome was nothing but completely neutralizing the role of the Judiciary branch once the State secrets privilege is invoked.<sup>496</sup>

The Reynolds 'reasonable danger' balancing test was already weak, but under *El-Masri* it turned into the principle that "no attempt is made to balance the need for secrecy of the privileged information against a party's need for the information's disclosure."<sup>497</sup>

*El-Masri* turned the courts' role into a blank check and raises concern about accountability.<sup>498</sup>

U.S. courts never held anybody accountable for *El-Masri* torture.

The fourth Circuit weakened its judicial role and denied to have any responsibility on the case. However, it left an individual who already experienced torture without any relief or any access to the judicial branch.<sup>499</sup>

Only in January 2007, German prosecutors issued arrest warrants for 13 CIA agents involved.<sup>500</sup>

However, due to the pressure from the U.S. administration, the German Government refused to seek the extradition of the suspects from the US.<sup>501</sup>

### **A.3 Binyam Mohamed v. Jeppesen Dataplan, Inc.**

#### **i. The facts**

Mohamed is originally from Ethiopia and he was legally residing in U.K. after being granted political asylum.

In June 2001, he travelled to Afghanistan.

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<sup>496</sup> Bazzle, *supra* note 151, at 49.

<sup>497</sup> *El-Masri*, 479 F.3d at 306.

<sup>498</sup> VICTOR HANSEN & LAWRENCE FRIEDMAN, *THE CASE FOR CONGRESS, SEPARATION OF POWERS AND THE WAR ON TERROR* 98 (Ashgate eds., 2009).

<sup>499</sup> Fichera, *supra* note 433, at 636.

<sup>500</sup> Craig Whitlock, *Germans charge 13 CIA operatives*, WASH. POST., Feb. 1, 2007, at A1.

<sup>501</sup> *The Khaled El-Masri Case*, OPEN SOCIETY JUSTICE INITIATIVE (Dec. 2012), <https://www.opensocietyfoundations.org/sites/default/files/timeline-khaledelmasri-20140411.pdf>.

In April 2002 he tried to enter U.K. with a fake passport. He was arrested at Pakistan's airport and delivered to U.S. forces. He was subsequently rendered to Afghanistan, Pakistan and Morocco and he claimed Moroccan officials tortured him.<sup>502</sup>

He was then transferred to Guantanamo.<sup>503</sup> He was initially charged with conspiracy in Joe Padilla's plans before a military commission.

In 2006 the Supreme Court in *Hamdan v. Rumsfeld* held that those proceedings were illegal.<sup>504</sup>

The ACLU, on behalf of Mohamed, brought a suit in 2007 against Jeppesen, the company that provided flights for his extraordinary renditions.<sup>505</sup>

The U.S. Government claimed the existence of state secrets privilege and the district court dismissed the case.<sup>506</sup>

The applicant appealed and a three-judges panel of the Ninth Circuit reversed the District Court decision on April 28, 2009.<sup>507</sup>

The panel delivered a reasoning regarding the standard of review applicable in case of a State secrets privilege claim. It addressed the *Reynolds* standard and the *Totten* bar, both recalled in *El-Masri* decision.<sup>508</sup>

The court noticed that both Jeppesen, and, to a lesser degree, the Government believed that the *Totten* rule prevented the case from being litigated.<sup>509</sup>

The judgment held that "Totten has no bearing here, where third-party plaintiffs (not Jeppesen) seek compensation from Jeppesen (not the Government) for tortious detention and torture (not unpaid espionage services)."<sup>510</sup>

The Court rejected the broad application of *Totten* ruling to other contexts.

Moreover, the Court of Appeals did not accept the Government's motion to dismiss grounded on *Reynolds* either. It recalled the Supreme Court words, which stated that state secret is an evidentiary privilege. This means that a state secrets'

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<sup>502</sup> ROBERT H. WAGSTAFF, TERROR DETENTIONS AND THE RULE OF LAW 258 (2014).

<sup>503</sup> *Binyam Mohamed: the torture allegations*, THE TELEGRAPH (January 12, 2012), <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/9010123/Binyam-Mohamed-the-torture-allegations.html>.

<sup>504</sup> *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

<sup>505</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D.C. 2008)

<sup>506</sup> *Id.* at 1134.

<sup>507</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 961 (9th Cir. 2009).

<sup>508</sup> *Id.* at 952.

<sup>509</sup> *Id.* at 953.

<sup>510</sup> *Id.* at 954.

valid claim just prevents some evidence from being disclosed, it does not actually prevent the parties from litigating.<sup>511</sup>

The final judgment was then against Bush administration and the suit continued.<sup>512</sup>

**ii. Obama administration and En banc rehearing**

Before the Obama administration came in power, the candidate Obama stated that he was against Government's extreme application of secrecy.<sup>513</sup>

However, later, his Department of Justice requested the Court of Appeal for the Ninth Circuit to rehear the case *en banc*.<sup>514</sup>

This time, the court rejected the plaintiff's claim that the *Totten* bar applied only to case where the very subject matter is a state secret.<sup>515</sup>

The court upheld the district court decision anyway, and reversed the three panel previous judgment, on the ground of *Reynolds*.<sup>516</sup>

Indeed, it was not necessary to determine which litigations can be barred according to the *Totten* rule, because *Reynolds* one allowed the dismissal anyway.<sup>517</sup>

Once recognized the existence of the privilege, the judge had to decide whether to dismiss the case.

In *Mohamed*, the Ninth Circuit resembled the reasoning adopted in *El-Masri*.<sup>518</sup>

It held that even assuming that the case can be completely discussed only using non- privilege evidence; any effort by Jeppesen to defend itself would endanger the national security.<sup>519</sup>

The dissent highlighted that Mohamed never had even a chance to present non-secret evidence. "Plaintiffs' attempt to prove their case in court is simply cut off.

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<sup>511</sup> *Id.* at 955.

<sup>512</sup> WAGSTAFF, *supra* note 134, at 502.

<sup>513</sup> *Id.*

<sup>514</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010).

<sup>515</sup> *Id.* at 1078.

<sup>516</sup> *Id.* at 1084.

<sup>517</sup> *Id.* at 1085.

<sup>518</sup> *El-Masri*, 479 F.3d at 309.

<sup>519</sup> *Mohamed*, 614 F. 3d at 1090.

They are not even allowed to attempt to prove their case by use of non secret evidence in their own hands.”<sup>520</sup>

The Supreme Court did not grant certiorari.<sup>521</sup>

It is interesting to note that even if *Mohamed* case reached the same outcome as *El-Masri*, the Ninth circuit took same distance from the Fourth Circuit’s reasoning.<sup>522</sup>

Indeed, the former decided to maintain the distinction between *Reynolds* and *Totten* and not to combine them to expand the scope of the State secrets privilege as the latter did. This is ambiguous because, as highlighted before, the *Mohamed* decision recalls *El-Masri* in some parts.

In *Jeppesen*, Judge Bea voted for the dismissal, relying on the *Totten* doctrine.<sup>523</sup> Instead, the majority did not base its decision on *Totten*, but they disposed the case according to *Reynolds*.<sup>524</sup>

However, the circuit Judges left open the possibility that some claims similar to the one of *Mohamed* could fall within the *Totten* bar rule.

The fact that a federal circuit could consider applying *Totten* rule, a doctrine developed around a contract, in a torts case show the Governments’ efforts to conflate the two doctrines, besides the fact they are related only by analogy.<sup>525</sup>

Again, the Supreme Court, by not granting certiorari, missed a chance to provide necessary principles on how to apply State secrets privilege in the context of the War on Terror.<sup>526</sup>

None a state official was held accountable by any U.S. court for the torture and the mistreatment of *Mohamed*.

### iii. Binyam Mohamed in the U.K.

The tragic story of *Mohamed* has a chapter in U.K. too.

Indeed, a civil action was commenced in UK in May 2008 to compel the English Government’s disclosure of documents.<sup>527</sup>

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<sup>520</sup> *Id.* at 1094.

<sup>521</sup> *Mohamed v. Jeppesen Dataplan, Inc.*, 563 U.S. 1002 (2011).

<sup>522</sup> *Bazzle*, *supra* note 151, at 53.

<sup>523</sup> *Jeppesen Dataplan*, 614 F.3d at 1093 (Bea, J., concurring).

<sup>524</sup> *Id.* at 1084.

<sup>525</sup> *Telman*, *supra* note 443, at 440.

<sup>526</sup> *Bazzle*, *supra* note 151, at 54.

Mohamed was seeking 42 documents, including the some notes from 2002 that a security agent took during an interview, and all other documents in the Government possession that could be relevant to Mohamed's allegation that Americans had tortured him.

In response, the Government argued that disclosing the requested material would cause a grave threat to the national security.<sup>528</sup>

Indeed, the Foreign Secretary let the documents to be reviewed by the court, but he did not agree with releasing them without the U.S. consent.<sup>529</sup>

On August 21, 2008, the UK trial court decided to disclose the material because it was essential the defense of Mohamed in the U.S.

The documents were disclosed solely for the purpose of the proceedings, but they were not released to the public.<sup>530</sup>

The same Foreign Secretary issued a public interest immunity certificate, claiming that the documents could not be accepted in any proceedings for national security reasons.<sup>531</sup>

Specifically, there was a threat that the U.S. could call into question its intelligence relation with the U.K. and it would lead to a serious damage for the English operations.<sup>532</sup>

The Trial Court still held that the disclosure of documents was necessary and the Foreign Secretary stressed the fact the U.S. Government delivered to U.K sensitive information that the latter should control.<sup>533</sup>

In 2009, the trial court decided not to publish documents regarding the Mohamed's treatment, because it was concerned that the U.S. could decide not to share information anymore.

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<sup>527</sup> Jasminka Kalajdzic, *Litigating State Secrets: A Comparative Study of National Security Privilege in Canadian, US and English Civil Cases*, 41 OTTAWA L. REV. 289, 305 (2009).

<sup>528</sup> *R. (on the application of Mohamed) v, Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2519, at para. 46.

<sup>529</sup> Laura K. Mehalko, *Hooded: Binyam Mohamed And The State Secrets Privilege*, 34 BOSTON COLLEGE INT'L & COMP. L. REV 81, 84 (2011).

<sup>530</sup> *R. (on the application of Mohamed) v, Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048.

<sup>531</sup> Kalajdzic, *supra* note 527, at 305.

<sup>532</sup> *Id.*

<sup>533</sup> *Id.* at 306.



Thus, the court redacted seven paragraphs in its previous judgment that described the information the United Kingdom received from the United States regarding Mohamed's torture during his interrogation.<sup>534</sup>

Later in time, in 2010, the Court of Appeals decided to release the 7 paragraphs. The basis for this decision was the fact that the information contained there was already public. Indeed, the language that the U.S. used in a *habeas corpus* decision already reflected that the former admitted to have tortured Mohamed.<sup>535</sup>

Moreover, the court recalled the concept of 'open justice.'<sup>536</sup>

The final decision was that the information contained in the seven paragraphs at issue was not endangering the national security.<sup>537</sup>

The English judges, striking a out fair balance between the two Governments' interest to secrecy and Mohamed's need to defend himself, did not find any necessity to keep the information confidential.

The parallel proceedings in the U.S. and in U.K. offer an insight on the abuse of the State secrets privilege.

English judges realized that the interest of security/secrecy did not request a complete shield, but few edits were enough.<sup>538</sup>

The conclusion was that the U.S. claim for state secrets was unnecessary and the Government was recurring to it in an abusive way just to avoid any liability for the degrading and inhuman treatments its officials inferred to Mohamed.<sup>539</sup>

To conclude, in November 2010 the U.K. Government decided to compensate 16 Guantanamo detainees, including Binyamen Mohamed.<sup>540</sup>

Again, nobody was held accountable for the torture and there was not a convictions or a public statement by the U.K. or the U.S. Government on the actions committed.

At least, the compensations to the Guantanamo victims originally from U.K. demonstrate a feeling of guiltiness.

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<sup>534</sup> Ashley Deeks, *Xvi Litigating How We Fight*, 87 INT'L L. STUD. 427, 440 (2011).

<sup>535</sup> *R v. Sec'y of State for Foreign & Commw. Affairs* [2010] 3 W.L.R. 554, para. 64.

<sup>536</sup> *Id.* at 11.

<sup>537</sup> *Id.* at 52.

<sup>538</sup> Kalajdzic, *supra* note 527

<sup>539</sup> *Id.*

<sup>540</sup> *Binyam Mohamed: the torture allegations*, The Telegraph, Jan, 12, 2012, <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/9010123/Binyam-Mohamed-the-torture-allegations.html>

## A.4 Maher Arar

### i. The Facts

Mohamed Arar is a Canadian Citizen who immigrated to Canada from Syria when he was teenager. He was born in Syria and he has double citizenship.<sup>541</sup>

On September 26, 2002, while he was travelling from Tunisia back to Canada, the Immigration and Naturalization Service stopped him in the JFK airport of New York City.<sup>542</sup> They detained him as suspected member of a terrorist organization.<sup>543</sup>

He denied being in contact with anyone. FBI officials interrogated him. One immigration officer suggested him to volunteer to go to Syria and he did not accept.<sup>544</sup>

On the 6<sup>th</sup> of October U.S. officials decided to have a night session with Amar and did not inform his lawyer. The next Monday the INS Regional Director issued a final notice of inadmissibility in which it was determined they were going to send him to Syria according to unclosed documents.<sup>545</sup>

Unlike other cases of extraordinary renditions, domestic law officials through immigration law, not CIA officials, rendered Arar to Syria.<sup>546</sup>

They served him with his final removal order while they were taking him to the airport. His lawyer was never informed about that.<sup>547</sup>

Arar spent one year in a Syrian jail being interrogated and tortured by Syrian security officers.<sup>548</sup> In October 2003 Syria Government released him because he had no connection with terrorism. He went back to Canada and was never charged with any crime by any country.<sup>549</sup>

Therefore, Barbara Olshanki, who worked for the Center of Constitutional Rights, filed a suit on his behalf against the US Attorney General Ashcroft for violations of federal and international law.<sup>550</sup>

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<sup>541</sup> Jules Lobel, *Extraordinary Renditions and the Constitution: The Case of Maher Arar*, 28 THE REVIEW OF LITIGATION 479, 482 (2008).

<sup>542</sup> *Id.*

<sup>543</sup> *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 253 (E.D.N.Y. 2006).

<sup>544</sup> *Id.*

<sup>545</sup> *Arar*, 414 F. Supp. at 254.

<sup>546</sup> Lobel, *supra* note 156, at 481.

<sup>547</sup> *Id.* at 484.

<sup>548</sup> *Arar*, 414 F. Supp. at 255.

<sup>549</sup> Lobel, *supra* note 541, at 485.

<sup>550</sup> HONIGSBERG, *supra* note 148, at 189.

The district court granted defendant's motion to dismiss the case: the ground for the dismissal was special security reasons.<sup>551</sup>

The Court of Appeal of the Second Circuit affirmed the dismissal, but not on State secrets privilege ground. The court held that the applicant did not have a federal claim or a cause of action.<sup>552</sup>

Then, the Second Circuit Court of Appeal en banc decided to review the decision sua sponte and dismissed again the applicant's claim.<sup>553</sup>

## ii. The State secrets privilege issue

The Court of Appeal en banc dismissed Amar's claim again on different grounds from the state secrets privilege, but this issue was addressed by dissenting opinions.

In particular, the dissenting Justice Sack, highlighted that the majority followed the same reasoning used in *El-Masri* but then it wrongfully dismissed the case on a different ground.<sup>554</sup>

Moreover, the dissenting opinion of Justice Calabresi recalled the recent criticism against State secrets privilege doctrine.<sup>555</sup> According to him, this explained why in *Amar* the Second Circuit decided not to dismiss the case on that ground.<sup>556</sup>

However, the Justice provided three reasons why a dismissal for need of secrecy would have been better and fairer.

First, a dismissal based on the fact that a party cannot provide evidence at least does not enter into the merit and does not damage the legal standard to which other applicants' claims are subject.

Second, it avoids Government 'gamesmanship.' In this case the Government claimed a State secrets privilege in the district court but then it did not recall it during the Second Circuit en banc review because it won the case in merit.

Third, a holding that Arar did not suffer a remediable harm legitimates the Government more than a State secrets privilege decision would.<sup>557</sup>

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<sup>551</sup> *Arar v. Ashcroft*, 414 F. Supp. at 287-288.

<sup>552</sup> *Arar v. Ashcroft*, 532 F.3d 157, 193 (2d Cir. 2008).

<sup>553</sup> *Arar v. Ashcroft*, 585 F.3d 559, 582 (2d Cir. 2009).

<sup>554</sup> *Id.* at 607.

<sup>555</sup> *Arar v. Ashcroft*, 585 F.3d at 637 (quoting *Mohamed v. Jeppesen Dataplan* 563 F.3d at 1006).

<sup>556</sup> *Arar v. Ashcroft*, 532 F.3d at 193.

<sup>557</sup> *Arar v. Ashcroft*, 585 F.3d at 637-639.

The judge's conclusion is that probably a correct use of the state secret doctrine would better balance the need to compensate victims with the necessity to keep some information secret.<sup>558</sup>

Indeed, Justice Calabresi was courageous in explicitly addressing the issue of the extraordinary renditions.

He affirmed that regardless of the constitutionality of the operations, mistakes would be made during them and thus, it was necessary to ensure compensation to innocent victims.<sup>559</sup>

However, the disclosure of some specific information could endanger the security of the State.

In his opinion, the only solution would be the application of a sophisticated states secret doctrine, which does not correspond with the totally unfettered and uncontrolled tool recently claimed by the Government in order to dismiss cases and avoid state officials' accountability.

Arar did not enjoy any form of redress in the U.S., but he did receive apologies from the Canada Government.

### **iii. The Canadian Commission**

Canada decided to establish a commission chaired by Judge O'Connor to investigate the case.<sup>560</sup>

In 2006 the Commission found Arar not guilty and Canada apologized and compensated him.

Thus, the model of an independent commission to investigate the involvement of the Canadian security forces in the *Arar* case did work out.<sup>561</sup>

This *ad hoc* commission was elected by the legislature and presided by a Judge.<sup>562</sup>

The body investigated the factual circumstances of the case and also recommended reforms for the Canadian security services.<sup>563</sup>

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<sup>558</sup> *Id.* at 639.

<sup>559</sup> *Id.*

<sup>560</sup> COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR (2006).

<sup>561</sup> Erin Craddock, *Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions "Cure" the Due Process Deficiencies in the US Removal Proceedings?* 93 CORNELL L. REV. 621, 636 (2008).

<sup>562</sup> Winkler, *supra* note 164, at 59.

The creation of a system implying the control of both the legislative branch and of an independent judicial branch was a winning solution to make the executive, legislative and judicial branches share responsibilities in national security cases.<sup>564</sup>

## A.5 Final Remarks

The criticism against the State Secrets Privilege recalled by Judge Calabresi is real and still alive.

Several scholars believe that the institute has experienced a metamorphosis. From being an evidentiary privilege aimed at avoiding the disclosure of information threatening the life of the nation, it has turned into a dangerous and powerful device for the U.S. federal Government to keep its actions secret.<sup>565</sup>

This trend is preventing a public scrutiny of what the Government is doing and it is deeply damaging the system of separated powers.<sup>566</sup>

Indeed, the real price of the abuse of the institute is accountability.

Also the Obama Administration's Attorney General Eric Holder affirmed that it is necessary to "provide greater accountability and reliability in the invocation of the state secrets privilege."<sup>567</sup>

The concept of accountability, which is vanishing, is the so-called explanatory or deliberative accountability, not the political one.<sup>568</sup>

On one hand, the political accountability of state officials regards the process of selection of the actors and the possibility for them to be removed by the same voters.<sup>569</sup>

On the other hand, the explanatory accountability refers to the possibility to doubt the officials' actions and to request them to justify their decisions, to motivate them and to face the consequences of wrong choices.<sup>570</sup>

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<sup>563</sup> *Id.*

<sup>564</sup> Frost, *supra* note 341, at 1964.

<sup>565</sup> Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENTARY 625 (2009).

<sup>566</sup> Richard Abel, *Forecasting Civil Litigation*, 58 DEPAUL L. REV. 425, 436 (2009).

<sup>567</sup> MEMORANDUM FROM ATTORNEY GEN. ERIC HOLDER TO HEADS OF EXECUTIVE DEP'TS AND AGENCIES AND HEADS OF DEP'T COMPONENTS 1, Sept. 23, 2009, <http://www.justice.gov/opa/documents/state-secret-privileges.pdf>.

<sup>568</sup> Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1256 (2009).

<sup>569</sup> Wells, *supra* note 565, at 629.

The current situation does not permit the courts to check the accountability.

Indeed, if the officials do just invoke the State secrets privilege, without explaining the reasons in details, the courts do not have the skill to discern whether there is a national security concern at issue or not. They do not have the tools to strike a balancing test between values.<sup>571</sup>

Moreover, as already stressed, courts have been very deferential and they have rarely rejected the invocation of the privilege.<sup>572</sup>

The blank check of the judiciary towards the executive is provoking several consequences: it is turning upside-down the parameters created for the legitimacy of the State secrets privilege and the cases get dismissed without any analysis into the merits; it is interfering with both private rights, concerning the single citizen or applicant and the public rights, concerning the whole community who should be checking on the executive.<sup>573</sup>

Stories of the post September 11 as the ones of El-Masri, Mohamed Binyam or Maher Arar, fall into the so-called ‘preventive paradigm’ of the United States.<sup>574</sup>

The paradigm consists in combating not past or current wrongdoing, but in preventing future harm by employing extreme measures as extraordinary renditions are.<sup>575</sup>

This very paradigm urges the intervention of the judiciary power.

Indeed, in a system where the state punishes people without having indisputable evidence that those people are guilty, rule of law, transparency and fair process are in danger.<sup>576</sup>

Therefore, the courts must check on the executive and make the system of separation of powers be effective.

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<sup>570</sup> Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 256 (1999).

<sup>571</sup> Wells, *supra* note 565, at 630.

<sup>572</sup> Carrie Newton Lyons, *The State Secrets Privilege: Expanding Its Scope Through Government Misuse*, 11 LEWIS & CLARK L. REV. 99, 111 (2009).

<sup>573</sup> *Id.* at 112.

<sup>574</sup> David Cole, *Less Safe, Less Free: A Progress Report on the War on Terror*, 2008 J. INST. JUST. INT'L STUD. 1, 2 (2008).

<sup>575</sup> *Id.*

<sup>576</sup> *Id.* at 3.

On the contrary, the cases addressed above demonstrate that the judicial branch is adopting a very weak and deferential approach in the U.S. and the next part will show that the same trend is now manifesting in Italy

## **Part B Italy**

### **B.1 Introduction**

The century of the September 11 events triggered a process of transformation in Italy as well.

Indeed, the legislator finally decided to intervene and to repeal the law on the State secrets privilege, while the Constitutional Court through recent decisions undertook a process, which ended up in the complete dismissal of any significant control on the invocation of the State secrets privilege.

The role of judiciary branch is definitely inhibited due to both a first legislative intervention and to a later jurisprudential one.

The case that took place in the framework of the just approved the Legislative Act n. 204/2007 ruling on the privilege, is the one on the extraordinary rendition of the Milan Imam generally referred to as Abu Omar.<sup>577</sup>

This incident is a prime example of the expansion of the State secrets privilege and of the weakening of the limits and the controls set to avoid an abuse of the institute during the period of transformation of western democracies in the global war against international terrorism.<sup>578</sup>

Besides the sensitive matter of the extraordinary renditions and of their existence within the constitutional framework, Abu Omar has finally brought to the attention of the Constitutional Court the hard issue of the relationship between the executive and the judiciary branches concerning the State secrets privilege.<sup>579</sup>

The judges entrusted with the conservation of the constitutional order did conform themselves to the U.S. courts' trend and completely defer to the Government.

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<sup>577</sup> MARIAVITTORIA CATANZARITI, SEGRETO E POTERE. I LIMITI DELLA DEMOCRAZIA 184 (Giappichelli ed., 2014).

<sup>578</sup> *Id.*

<sup>579</sup> Giupponi, *supra* note 323, at 127.

To do that, they had to overturn the previous jurisprudence and to put aside the fundamental principles concerning the State secrets privilege.

## **B.2 The Law No. 124/2007**

The Legislator finally intervened in 2007 to modify the Legislative Act n. 801/1977.<sup>580</sup>

In the 30 years separating the two bodies of rules, the judicial branch had not been particularly innovative: there were not very original principles to be crystalized.<sup>581</sup>

Again, the discipline distinguishes norms on the Services of Information and Security and norms on the State secrets privilege.

Thus, even if the 1977 provisions were supposed to be temporary, the structure keeps the same shape.<sup>582</sup>

It is noteworthy that the Law n. 124/ 2007 was approved after the constitutional reform 3/2001, which included the security of the State among the exclusive competencies of the central Government.<sup>583</sup>

This change allowed overcoming any doubt concerning the constitutional basis for the State secrets privilege.<sup>584</sup>

The new discipline innovated the previous one, but it kept the fundamental principles identical.<sup>585</sup>

First, the law No. 124/2007 has partially innovated the previous definition of interests that can be covered by the State Secrets Privilege.<sup>586</sup>

Article 39(1) provides that: “The acts, the documents, the news, the activities and any other thing whose diffusion could damage the integrity of the Italian Republic, also relating to international agreements, the defense of the institutions which are placed at the foundation of the Republic by the Constitution, the

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<sup>580</sup> Legge 3 Agosto 2007, n. 124, *Sistema di informazione per la sicurezza della Repubblica e nuova disciplina del segreto*, G.U. n. 187, 13 Agosto 2007.

<sup>581</sup> CAPORALE, *supra* note 224, at 98.

<sup>582</sup> *Id.* at 49.

<sup>583</sup> Legge costituzionale 18 ottobre 2001, n. 3, G.U. n. 248, 24 Ottobre 2001 (It.)

<sup>584</sup> Salerno, *supra* note 247, at 61.

<sup>585</sup> *Id.* at 62.

<sup>586</sup> *Id.* at 67.



independence of the State from the other ones, the military defense, are covered by the State secrets privilege”.<sup>587</sup>

Moreover, paragraph 3 of the same article affirms that also the information, the documents, the acts, the activities, the things and the places, whose knowledge outside the authorized locations, could damage the same finalities provided for in paragraph 1, are suitable to be covered.<sup>588</sup>

It is noteworthy that the legislator refers and distinguishes the ‘diffusion’ from the ‘knowledge.’

While the first has to be interpreted as the proper access, possession and the management of privileged information, the second concerns the more limited acquisition of what is covered by the secret. Even if the former may be more dangerous, both can be equally protected.<sup>589</sup>

Moreover, one more element of originality is the reference to the ‘places’ and this addition sounds like the list is now more specific and complete. Before the edits, some tried to make the places fall within ‘any other thing’ in order to keep them secret.<sup>590</sup>

Among the finalities, the law mentions the integrity of the Italian Republic, instead of the Democratic State as in the previous version.<sup>591</sup> Moreover, it refers to the institutions that are placed at the foundation of the Republic by the Constitution.<sup>592</sup>

This was interpreted as a signal that the most important goal for the legislator is the very survival of the Republic and thus, the secret should be circumscribed and aimed at primary values.<sup>593</sup>

However, paragraph 5 of article 39 allows the Prime Minister to issue a regulation in order to set the criteria for the identification of what can be covered by the secret.<sup>594</sup> This was approved on April 8, 2008.<sup>595</sup>

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<sup>587</sup> Legge 124/2007, *supra* note 580, at art. 39(1).

<sup>588</sup> *Id.* at 39(3).

<sup>589</sup> CAPORALE, *supra* note 224, at 52.

<sup>590</sup> Sapienza, *supra* note 316, at 141.

<sup>591</sup> Salerno, *supra* note 247, at 68.

<sup>592</sup> Legge 124/2007, *supra* note 580, at art. 39(1).

<sup>593</sup> BONZANO, *supra* note 203, at 71.

<sup>594</sup> Legge 124/2007, *supra* note 580, at art. 39(5).

<sup>595</sup> D.P.R 8 Aprile 2008, entrato in vigore il 2 Maggio 2008.

Besides the fact that it was uncertain how the judge could control secondary norms, the executive regulation seems not to follow the legislator path directed at limiting the information to be covered.

Indeed, the President did not limit itself to the set of the criteria, but he listed as an example a broad range of matters that are suitable for secrecy.<sup>596</sup>

Among them, the annex to the regulation referred to ‘economic, financial and environmental interests.’<sup>597</sup>

The consequence is twofold: the scope of the State secrets privilege dramatically expanded and the legislator, again, left a wide room of interpretation to the executive.<sup>598</sup>

Second, the great role of the Prime Minister is confirmed and glorified. He is the one entrusted to confirm the apposition of the State secrets privilege against the judge.<sup>599</sup>

Third, article 41(7) of the new law provides that the only way for the ordinary judge to criticize the apposition of the State secrets privilege is by making a conflict of powers arise before the Constitutional Court.<sup>600</sup> Thus, the State secrets privilege cannot be opposed against the Constitutional judges.<sup>601</sup>

Fourth, paragraph 6 of the article crystalizes a principle developed through the jurisprudence: the invocation of the secret does not prevent the judge from keeping on investigating on the *notitia criminis* according to other elements.<sup>602</sup>

Therefore, the long standing principle that the ordinary judge does not have a say on the legitimacy of the privilege is confirmed: the invocation is a proper political discretionary decision.<sup>603</sup>

Fifth, the role of the Parliament is better established.

The bicameral parliamentary committee entrusted with the control on the State secrets privilege is named COPASIR.<sup>604</sup>

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<sup>596</sup> Paolo Pisa, *Segreto di Stato in evoluzione. Riforma 2007 e Regolamento 2008*, 2 GNOSIS, RIVISTA ITALIANA DI INTELLIGENCE, <http://gnosis.aisi.gov.it/gnosis/Rivista15.nsf/ServNavig/5>.

<sup>597</sup> D.P.R., *supra* note 595, at art. 5.

<sup>598</sup> CAPORALE, *supra* note 224, at 55.

<sup>599</sup> Legge 124/2007, *supra* note 580, at art. 40.

<sup>600</sup> Salerno, *supra* note 247, at 63.

<sup>601</sup> Legge 124/2007, *supra* note 580, at art. 41(8).

<sup>602</sup> *Id.* at art. 41(6).

<sup>603</sup> Grevi, *supra* note 234, at 87.

The COPASIR receives specific communications on the apposition of the State secrets privilege from the Prime Minister.<sup>605</sup>

Moreover, the Committee can ask information and documents and can access locations and archives, even if the State secrets privilege can be opposed to it most of the time.<sup>606</sup>

To conclude, article 40 of the Law n. 207/2004 modifies article 202 of the Code of Criminal Procedure Law and provides that the state officials, the state employees and those carrying out public services are the only allowed to invoke the privilege during a trial. Thus, the amendments decide to maintain the traditional structure regarding the legitimacy of the invocation.<sup>607</sup>

Briefly, this constitutes the legal framework where the Abu Omar case took place.

### **B.3 The Abu Omar Case**

#### **i. The facts**

Mr. Osama Mustafa Hassan Nasr, hereinafter called Abu Omar, is an Egyptian-born Muslim cleric who used to live in Milan.<sup>608</sup>

He arrived in Italy in 1998 and started working as Imam in Milan in 2000.<sup>609</sup> He was granted political refugee status in 2001 because he was at risk of prosecution on political grounds in his national country.<sup>610</sup>

However, the Italian police was investigating on his possible ties with radical Islamist groups.<sup>611</sup>

On February 12, 2003 he was stopped on the street by plain-clothes officers, immobilized and forced into a van. The individuals who abducted him were

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<sup>604</sup> The appellation stands for bicameral committee for the security of the Republic; Legge 124/2007, *supra* note 580, at art. 30.

<sup>605</sup> Catanzariti, *supra* note 153, at 165.

<sup>606</sup> *Id.*

<sup>607</sup> Michele Panzavolta, *Vecchio e nuovo nella disciplina processuale del segreto di Stato* in NUOVI PROFILI DEL SEGRETO DI STATO E DELL'ATTIVITÀ DI INTELLIGENCE 178 (Giulio Illuminati & G. Giappichelli eds., 2010).

<sup>608</sup> Fabbrini, *supra* note 480, at 259.

<sup>609</sup> Irene Wiczorek, *Italian Court of Cassation delivers its ruling on the Abu Omar case. What to expect from the decision?* 3 NEW J. OF EUR. CRIM. L., 412, 413 (2012).

<sup>610</sup> Carmelo Danisi, *State secrets, Impunity and Human Rights Violations: Restrictions of Evidence in the Abu Omar Case* 188, <http://projects.essex.ac.uk/ehrr/V8N1/Danisi.pdf>.

<sup>611</sup> Fabbrini, *supra* note 480, at 259.

identified as members of CIA and officers of SISMI, the Italian Military Intelligence and Security Service.<sup>612</sup>

He was brought to the NATO Airbase in Aviano, and then transferred to the NATO airbase in Raimsten, Germany.

From there he was put into a flight to Egypt.<sup>613</sup> He was maintained in custody at the Cairo's intelligence headquarters and then moved to the Egyptian Torah prison.

He was arbitrarily detained until 2007 and he claims to have suffered continuous torture.<sup>614</sup> He confessed that, during his Egyptian custody he was beaten, subjected to electric shocks, hung upside down, prohibited from making contact with his family or lawyer, and held in a rat-infested cell with inadequate food. He was neither charged with a crime nor brought before a court.<sup>615</sup>

On April 20, 2004, he was released with the condition he will not tell anybody about what happened to him. However, once free, he called his wife.

Because of the phone call, he was re-arrested on May 12, 2004.

Abu Omar was taken to the State Security Investigation Services office in Nasr City, then transferred to Istiqlal Tora Prison and finally moved to Damanhur Prison. The Minister of Interior ordered to maintain him in administrative detention

In February 2005 he was transferred back to Tora Prison. He was released in February 2007.<sup>616</sup>

In the meanwhile, in February 2003, Abu Omar's wife, Nabila Ghali, reported her husband's disappearance soon after his abduction.

The investigation started properly after Abu Omar called his family in 2004 to inform about his kidnapping and detention.<sup>617</sup>

Between 2005 and 2006, Milan prosecutors opened a criminal investigation to ascertain who was accountable for the abduction.<sup>618</sup>

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<sup>612</sup> Legge 124/2007, *supra* note 580 (replacing SISMI, Servizio per le Informazioni e la Sicurezza Militare, with AISE, Agenzia Informazioni e Sicurezza Esterna).

<sup>613</sup> Wiczoreck, *supra* note 609, at 413.

<sup>614</sup> *This is how they kidnapped me from Italy*, CHICAGO TRIBUNE (Jan. 8, 2007), <http://www.chicagotribune.com/news/nationworld/chi-cialetter-story-story.html>.

<sup>615</sup> *Italy: the Abu Omar Case*, AMNESTY INTERNATIONAL 2 (Nov. 4, 2009), <https://www.amnesty.org/en/documents/EUR30/012/2009/en/>.

<sup>616</sup> *Id.*

<sup>617</sup> *Id.*

They collected a large amount of evidence demonstrating the involvement of CIA and SISMI by means of phone tapping, computer records and seizure of documents from the intelligence services.<sup>619</sup>

In particular, on July 5, 2006, the Milan Prosecutors conducted a search in the SISMI office in Rome and none of the SISMI officials presiding opposed it. Some documents and information material were seized.<sup>620</sup>

Later in time, in October, all the documents were filed according to art 415-bis of the Criminal Procedure Law Code.<sup>621</sup>

During this phase, the Italian Government did not formally oppose any State secrets privilege to stop the researches.

The Government, headed from 2001 to 2006 by the Prime Minister Silvio Berlusconi, only made reference to national security concerns regarding the relationship between CIA and SISMI in a letter to the prosecutors.<sup>622</sup>

The Prodi Governments later interpreted this letter as an apposition of the State secrets privilege.

On October 31, 2006 the SISMI fulfilled its duty to deposit and delivered evidence to the prosecutors, including some previously seized documents, this time presenting several *omissis*.<sup>623</sup> The note attached to the documents provided that the information contained referred to the matters drawn by state secrets.

At then end of the investigations, the Italian Prosecutor formulated the official indictment of 26 U.S. citizens and 9 Italians.<sup>624</sup>

Among them there were Robert Seldon Lady, chief of Milan CIA office and Jeff Castelli, the responsible for the American secret services in Italy.

Also Marco Pollari, ex SISMI chief and the vice- chief Nicolò Mancini were in the 'black list.'<sup>625</sup>

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<sup>618</sup> Codice Penale Italiano, art. 605 (criminalizing abduction) and art. 289-bis (criminalizing abduction for terrorist purposes), <http://www.altalex.com/documents/codici-altalex/2014/10/30/codice-penale>.

<sup>619</sup> Chris Jenks & Eric T. Jensen, *All Human Rights are Equal, But Some are More Equal than Others: the Extraordinary Rendition of a Terror Suspect in Italy, the NATO SOFA, and Human Rights*, 1 HARV. NAT. SEC. J. 171, 174 (2010).

<sup>620</sup> Corte Cost., 11 Marzo 2009, n. 106, G.U. Marzo 3, 2010, n. 12, § 8.1.

<sup>621</sup> Codice di Procedura Penale, Decreto del presidente della Repubblica 22 settembre 1988, n. 447, art. 415-bis.

<sup>622</sup> Fabbrini, *supra* note 480, at 260.

<sup>623</sup> Corte Cost., 11 Marzo 2009, *supra* note 620, at 8.1.

<sup>624</sup> Fabbrini, *supra* note 480, at 260.

According to art. 405 of the Italian Code of Criminal Procedure, the prosecutor requested the Milan independent magistrate (GUP, *giudice udienza preliminare*) to open the trial and the latter consented on February 16, 2007.<sup>626</sup>

Although the prosecutors issued arrest warrants, the U.S. defendants were not present at the proceedings.<sup>627</sup>

The Italian Government did not agree with the prosecutors to deliver extradition requests to the U.S. Government.<sup>628</sup> American citizens were therefore tried *in absentia*.<sup>629</sup>

While the preliminary hearing was pending, the Italian Prime Minister (since 2006, Romano Prodi) raised a claim in front of the Italian Constitutional Court complaining that the investigations had violated the State secrets privilege regarding the relationship between CIA and SISMI.<sup>630</sup>

Moreover, later in time, he argued that the decision to open the trial was based on evidence collected in violation of the alleged state secret and the proceedings had to be suspended.<sup>631</sup>

On the other side, the Office of the public prosecutor claimed that the Government jeopardized its prerogatives and that the privilege had never been raised before.<sup>632</sup> The Judge also lamented that the secret was aimed at impeding any decision on the accountability.<sup>633</sup>

While the disagreements were increasing, the Criminal Trial in Milan was proceeding. Thus, on May 30, 2008, the new Prime Minister Silvio Berlusconi resorted again to the Constitutional Court, arguing that continuing a trial while the

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<sup>625</sup> Yasha Maccanico, *State Secrets in the Abu Omar Case: the Transatlantic Relationship Undermines the Rule of Law in Cases Involving Human Rights Abuses by Intelligence Services*, STATE WATCH 1 (2014), <http://www.statewatch.org/analyses/no-254-abu-omar-yasha.pdf>.

<sup>626</sup> *Rapimento Abu Omar, a Giudizio l'ex Capo del Sismi Nicolò Pollari*. LA REPUBBLICA (February 16, 2007), <http://www.repubblica.it/2007/02/sezioni/cronaca/abu-omar-pollari/abu-omar-pollari/abu-omar-pollari.html>.

<sup>627</sup> John Hooper, *Italian Court finds CIA agents Guilty of Kidnapping Terrorism Suspect*, THE GUARDIAN, Nov. 4, 2009, at 3.

<sup>628</sup> *Convictions in the Abu Omar Case: a Step Toward Accountability*, AMNESTY INTERNATIONAL (Nov. 5, 2009), <https://www.amnesty.org/en/latest/news/2009/11/convictions-abu-omar-rendition-case-step-toward-accountability-20091105/>.

<sup>629</sup> Messineo, *supra* note 625, at 1023-24.

<sup>630</sup> Fabbrini, *supra* note 480, at 261.

<sup>631</sup> *Id.* at 262.

<sup>632</sup> Corte Cost., ordinanza 26 Settembre 2007, n. 337, G.U. Ott. 3, 2007, n. 38 (It.).

<sup>633</sup> Corte Cost., ordinanza 17 Dicembre 2008, n. 425, G.U. Dic. 24, 2008, n. 53 (It.).

decision on the existence of the state secrets privilege hadn't been taken yet, constituted a violation of the Executive constitutional rights.<sup>634</sup>

Finally, on March 11, 2009, the Italian Constitutional Court delivered its decision on five joined conflicts of allocation of powers, all arising from the same criminal case.<sup>635</sup>

## ii. The Decision No. 106/2009

The Court reasoning referred to both the Italian norms on the State secrets privilege and its own precedents.<sup>636</sup>

In particular, it reaffirmed that the institute is aimed at preserving the paramount interests of the State Community as its territorial integrity, its independence and its very survival.<sup>637</sup>

The Court went through the most important previous decisions on the matter; it highlighted the constitutional grounds of the institute and it recognized the necessity to strike a fair balance between contrasting constitutional interests, but it also reinstated the supremacy of the national security.<sup>638</sup>

Moreover, it explicitly recognized a broad power to the Prime Minister in deciding which information, acts or facts must be covered by the state secrets privilege.

Therefore, the Executive is granted a complete discretion of evaluation that is aimed at safeguarding the *salus rei publicae*.

The only limit consists in the need of motivating to the Parliament the reasons behind the invocation of the privilege and not to use it to cover facts reversing the constitutional order.<sup>639</sup>

Any kind of judicial review regarding *an* or *quomodo* this power can be exercised is banned. The only control that is admissible consists in the parliamentary one, while the courts have no skills to have a say into a political decision.<sup>640</sup>

The Court seems to recall a kind of faded political question doctrine.<sup>641</sup>

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<sup>634</sup> Corte Cost., ordinanza 25 Giugno 2008, n. 230, G.U. July 2, 2008, n. 28 (It.).

<sup>635</sup> Corte Cost., 11 Marzo 2009, n. 106, G.U. Marzo 3, 2010, n. 12 (It.).

<sup>636</sup> *Id.* at § 3 and § 4 (*quoting* C.Cost., 24 Maggio 1997, n. 86 (It.); C.Cost., n. 86/77; C. Cost., n. 110/98).

<sup>637</sup> *Id.*

<sup>638</sup> *Id.*

<sup>639</sup> *Id.* at §3.

<sup>640</sup> *Id.*

It is noteworthy that the Court affirms that principles established in previous decisions are still in vigor and not capable of being manipulated.<sup>642</sup> Indeed, the court is saying that, but contemporarily it is modifying the principles of the States Secret Privilege, as it will be addressed later.

First, the same judicial body that in its judgment No. 86/1977 recognized the necessity for the Government to motivate when claiming the need for secrecy shifted to a new position, arguing that only the same Executive branch can decide whether the request is valid.<sup>643</sup>

The choice on the necessary and appropriate means to ensure national security is a political one and the Constitutional Court cannot review the reasons leading the executive to hide some evidence.<sup>644</sup>

Second, it held that the state secret classification applied only to the relations between the Italian secret service and the foreign ones and also to the SISMI structure.<sup>645</sup>

Therefore, there was room for the prosecutor to continue the investigations on the proper kidnapping. Indeed, the existence of a specific crime to be investigated is not in contradiction with the necessity to keep some evidence secret.<sup>646</sup>

Moreover, the object of the secret was too limited for falling within facts reversing the constitutional order not coverable.<sup>647</sup> Indeed, it could not be aimed at undermining the democratic legal order.<sup>648</sup>

The extraordinary renditions do contrast the constitutional principles of European States and they are opposed by the Council of Europe, but this is not enough for the Court to hold that they overturn the legal order.<sup>649</sup>

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<sup>641</sup> The political question doctrine is a U.S. doctrine according to which federal courts will not review a case if the latter contains a political question that would be better addressed by the executive. This doctrine evolved from the case *Baker v Carr*, 369 U.S. 186 (1962).

<sup>642</sup> Corte Cost., n.106/2009, *supra* note 635, at §4.

<sup>643</sup> Arconzo & Pellizone, *supra* note 215, at 8.

<sup>644</sup> Giupponi & Fabbrini, *supra* note 236, at 464.

<sup>645</sup> Maccanico, *supra* note 625, at 4; Corte Cost., n.106/2009, *supra* note 635, at §12.3.

<sup>646</sup> *See supra* Corte Cost. 110//1998.

<sup>647</sup> Corte Cost., n.106/2009, *supra* note 635, at 8.5.

<sup>648</sup> *Id.*

<sup>649</sup> COUNCIL OF EUROPE, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, RAPPORTEUR DICK MARTY, SECRET DETENTIONS AND ILLEGAL TRANSFERS OF DETAINEES INVOLVING COUNCIL OF EUROPE MEMBER STATES: SECOND REPORT 52 (Jun. 7, 2007), [http://assembly.coe.int/CommitteeDocs/2007/EMarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf).



Third, the Court recognized as valid a retroactive application of the privilege. The claim indeed was invoked after the opening of the investigations and after the seizure of documents.<sup>650</sup>

The constitutional judges held that, notwithstanding the fact that state secrets are generally asserted before the acquisition of evidence, anyway the judges in that situation had to either dismiss the documents without the *omissis* or to ask for the confirmation of the privilege to the Prime Minister.<sup>651</sup>

While, on one hand, the Court is trying to limit the object of the state secret to specific relations between secret agencies, on the other hand it is allowing a tardive application of the same secret.

Indeed, a late invocation of privilege does not have different effects from a prompt one.<sup>652</sup>

The reasoning of the Constitutional judges does provoke some doubts because the information getting covered was already in the domain of the judicial branch.<sup>653</sup>

How can the need of secrecy emerge once the documents have already been disclosed? It seems like the aim behind its invocation was only to guarantee immunity to Italian officers.

This is precisely what the Italian Court of Cassation has subsequently held.

Moreover, the Constitution Court with this decision drastically weakened any judicial control on the invocation of the State secrets privilege.

Indeed, while on one hand ordinary judges do not have power to check on it, the Constitutional Court has been granted this authority by the law and the Constitution.<sup>654</sup>

On the contrary, in the Abu Omar case, the highest judicial body restrained itself to controlling the formal and procedural requirements of the State secrets privilege, without entering into the merit or checking the existence of a national security need.<sup>655</sup>

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<sup>650</sup> Corte Cost., n.106/2009, *supra* note 635, at §8.4.

<sup>651</sup> *Id.*

<sup>652</sup> Arconzo & Pellizone, *supra* note 215, at 12.

<sup>653</sup> *Id.*

<sup>654</sup> Legge n. 124/2007, art. 40; Codice di Procedura Penale, Art. 202(8); Costituzione, art. 134.

<sup>655</sup> Arianna Vendaschi, *State Secret Privilege versus Human Rights: lessons from the European Court of Human Rights ruling on the Abu Omar Case*, EUR. CRIM. L. REV. 166, 173 (2017).

It is noteworthy that the Court also gave a very narrow interpretation of the limits provided by the Law 124/2007 on the legitimacy of the State Secret.<sup>656</sup>

Indeed, the reformed law, as the previous one stated and the jurisprudence already provided in the 70s, rules that the institute cannot be used to conceal acts against the constitutional order.<sup>657</sup>

The Constitution does protect human rights and fundamental values and the extraordinary rendition of Abu Omar does constitute, without any doubt, a violation of those rights and principles that Italy, as well as the other States part of the Council of Europe, is aimed at protecting.<sup>658</sup>

However, the Constitutional Court affirmed that a single violation, even if so serious as an extraordinary rendition, could not overturn the constitutional legal system.<sup>659</sup>

In order to argue that, the Court distinguished the concept of constitutional order from the one of constitutional system. The first relies on human rights, while the second concerns the democratic legal order, whose protection do not allow the invocation of the State Secret.<sup>660</sup>

The former is wider than the latter, they do sometimes overlap but they do not coincide. Human rights are not part of the constitutional system and thus, extraordinary renditions can be covered by the secret.<sup>661</sup>

In conclusion, due on one hand to the narrow interpretation of the limits of the state secret and on the other hand to broad power left to the Prime Minister, the Constitutional Court with this decision abdicated its role as guardian and arbitrator among the branches once the state secret is invoked.<sup>662</sup>

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<sup>656</sup> *Id.* at 172.

<sup>657</sup> Legge n. 124/2007, art. 39(11).

<sup>658</sup> COUNCIL OF EUROPE, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, RAPPORTEUR DICK MARTY, *supra* note 649.

<sup>659</sup> Corte Cost., n.106/2009, *supra* note 635, at 8.5.

<sup>660</sup> Vidaschi, *supra* note 655, at 174.

<sup>661</sup> *Id.*

<sup>662</sup> Giupponi & Fabbrini, *supra* note 236, at 465.

### iii. Afterwards

On November 4, 2009, The Milan court convicted 22 CIA members, one U.S. force member and two Italian officers. Instead, 3 U.S. intelligence agents were acquitted according to diplomatic immunity rules.<sup>663</sup>

However, in order to comply with the Constitutional Court decision on the state secret status of the evidence, charges against high-level Italian intelligence officers were set aside.<sup>664</sup>

The conviction of the U.S. agents seems quite courageous. On the contrary, they haven't served their sentences yet and it will never happen, as the Italian Government is not willing to ask for their extradition.<sup>665</sup>

In July 2013, only one of them, Robert Seldon Lady, was arrested in Panama. Italy did not have an extradition agreement with Panama and therefore the agent was able to fly back to the U.S.<sup>666</sup>

In September, he sought a pardon from the Italy President Giorgio Napolitano, arguing that he was just carrying out his duties in the war against terrorism.<sup>667</sup> Robert Lady wrote: "After the September 11 attacks, my Government took extraordinary steps and extraordinary risks for those extraordinary times, in order to protect lives."<sup>668</sup> Two years later, in 2015, the new established President, Sergio Mattarella, decided to grant the pardon to Robert Seldon Lady and Betnie Medero. Together with Joseph L. Romano, already pardoned in April 2013, the two agents had their punishments for the rendition of the Milan Imam removed or reduced.<sup>669</sup>

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<sup>663</sup> Danisi, *supra* note 610, at 196.

<sup>664</sup> Maccanico, *supra* note 625, at 1.

<sup>665</sup> *Id.* at 3.

<sup>666</sup> *Id.* at 2.

<sup>667</sup> Jim Yardley, *Italy: Former C.I.A. Chief Requests Pardon for 2009 Rendition Conviction*, NY TIMES, Sept. 13, 2013.

<sup>668</sup> Nick Squires, *Ex-CIA Milan chief writes to Italy president seeking pardon*, THE TELEGRAPH, Sept. 12, 2013, <http://www.telegraph.co.uk/news/worldnews/europe/italy/10303865/US-spy-writes-to-Italy-president-seeking-pardon.html>.

<sup>669</sup> Christopher Emsden, *Italy to pardon U.S. Officer in Rendition Case*, THE WALL STREET JOURNAL, Apr. 5, 2013; *Abu Omar: Mattarella grazia Medero e Seldon Lady*, LA REPUBBLICA, Dec. 23, 2015; Gino Scaccia, *IL RE DELLA REPUBBLICA. CRONACA COSTITUZIONALE DELLA PRESIDENZA DI GIORGIO NAPOLITANO* (Mucchi ed., 2015) (for an analysis of the Italian President to grant pardon).

In the meanwhile, the Italian Court of Cassation rejected the decision to exclude some evidence because of the State secrets privilege and re-opened the proceedings against the two SISMI agents Pollari and Mancini.<sup>670</sup>

It asserted that the State secrets privilege had been used as a ‘black curtain’ to grant the Italian officers absolute immunity.<sup>671</sup>

On the contrary, the material regarding the kidnapping was not subject to the state secret status and thus, proves should have been distinguished.<sup>672</sup>

The Court of Cassation highlighted some anomalies in the behavior of the Government. First, in a letter dated November 11, 2005 the Prime Minister Berlusconi alleged some national security concerns around the relationship between the Italian and the U.S. services and the organization of the SISMI.

Second, later in time, the new President Prodi interpreted that letter as a proper invocation of the State secrets privilege.<sup>673</sup>

Therefore, the apposition of the secret was not only tardive, but also vaguely made *per relationem* to imprecise documents.<sup>674</sup>

The Milano Court of Appeal complied with the Court of Cassation decision and convicted Pollari, Mancini and three more Italian officers.<sup>675</sup>

The Government presented appeals for conflicts of attribution again and the Constitutional Court found itself to deliver a new decision.

#### **iv. The Decision No. 24/2014**

The Italian Constitutional Court recognized again the legitimacy of the State secrets privilege and sided with the Government.

The decision of the Court of Cassation to undo the acquittal of the Italian officers did undermine the rights of the Prime Minister concerning state secrets.<sup>676</sup>

Indeed, it was arbitrary and over invasive for an ordinary judge to set the limits of the privilege.<sup>677</sup>

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<sup>670</sup> Corte di Appello di Milano, III sezione penale, 15 Dicembre 2010, n. 3688 (It.); Corte di Cassazione, V sezione penale, 19 Settembre 2012, n. 46340 (It.).

<sup>671</sup> Corte di Cassazione, *supra* note 670, at 120.

<sup>672</sup> *Id.* at 122.

<sup>673</sup> Alessandro Pace, *Le due Corti e il Caso Abu Omar*, Consulta Online 3, <http://www.giurcost.org/studi/pace6.pdf>.

<sup>674</sup> *Id.*

<sup>675</sup> Corte di Appello di Milano, IV sezione penale, 12 Febbraio 2013, n. 985 (It.).

<sup>676</sup> Corte Cost., 10 Febbraio 2014, n. 24, G.U. Febbraio 19, 2014, n. 9, §2 (It.).

The decision highlighted the exclusive duty of the Prime Minister to review and confirm the legitimacy of the state secret and its boundaries in the light of the *salus rei publicae*.<sup>678</sup>

Addressing the consequences of the need for secrecy on the right to defense of an individual, as Abu Omar in the present case, the Court carried out a rough test to balance the interests.<sup>679</sup>

The unavailability of evidence and dismissal of the proceedings was due to the prominence of the national security protection over the need of judicial review.<sup>680</sup>

Once again the Court stressed the fact that a crime had been committed and the Prosecutor did not lose the power to investigate and exercise criminal action.

However, the Judiciary branch could not act as to remove the boundaries traced by the Executive.<sup>681</sup>

Inside the boundaries, the very object of the State secrets privilege cannot in anyway be subject to judicial review.

It is the duty of the Prime Minister to define the object and no other voice is then allowed. The Court of Cassation did not have any power to decide what part of evidence was under the state secret status, even if the Government invocation only regarded the relations between the Italian and the foreign secret services.<sup>682</sup>

The Court once again wasted its chance to rule about the State secrets privilege and clarify its limits and purposes. It Court appeared scared and overly cautious.<sup>683</sup>

Therefore, this last chapter in the Abu Omar's Italian sequence of events did confirm the struggle the constitutional judges experience in dealing with the State secrets privilege. They refuse to carry out their role as guardian of the existent legal order on this matter.<sup>684</sup>

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<sup>677</sup> *Id.*

<sup>678</sup> Corte Cost., 10 Febbraio 2014, n. 24, G.U. Febbraio 19, 2014, n. 9, §5 (It.).

<sup>679</sup> *Id.*

<sup>680</sup> *Id.*

<sup>681</sup> *Id.*

<sup>682</sup> Corte Cost., n. 24/2014, *supra* note 678, at 6.

<sup>683</sup> Arconzo & Pellizzone, *supra* note 215, at 17.

<sup>684</sup> Tommaso Francesco Giupponi, *Il Segreto Di Stato Ancora Davanti Alla Corte (Ovvero Del Bilanciamento Impossibile)*, 9 *Studium Iuris* 1005, 1010 (2014).

In particular, even if it is up to the Prime Minister to establish the boundaries of the state secret and its object, anyway the Constitutional Court should retain the authority to check the legitimacy.<sup>685</sup>

Indeed, the Constitutional Court's precedents provided that any opinion on the *an* or *quomodo* of the secrecy by ordinary judges was excluded, but its authority in conflict of powers cases was always standing.<sup>686</sup>

On the contrary, the Court has always refused to give any opinion either on the means to be adopted for the security of the nation or on their proportionality and suitability in the light of the final goal arguing it fell within the political power.<sup>687</sup>

Gradually, judgment-by-judgment, the Supreme Italian Judicial Body has limited itself once the state secrets privilege was at stake and finally, with the decision No. 24/2014, it has reached the peak of reliance on the Government's will.<sup>688</sup>

The Court cannot even inspect the reason behind the invocation of the secret and should limit itself to a purely formal control.<sup>689</sup>

However, the very qualification of the secret and the existence of legislative limits for its invocation call for an inspection that do enter into the merit and do not restrain itself to the formal ground.<sup>690</sup>

To conclude, as of today, the Constitutional Court has never approved any request to annul the state secret claim, but it has always granted the executive claims for secrecy.<sup>691</sup>

#### **B.4 Final remarks**

The outcome of the Abu Omar case had a devastating effect on any kind of regulation and control over the State secrets privilege.

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<sup>685</sup> *Id.* at 1009.

<sup>686</sup> *See* Corte Cost., No 106/2009; Corte Cost., No. 40/2012.

<sup>687</sup> Giupponi, *supra* note 684, at 1010.

<sup>688</sup> Marco Malerba, *La resistibile ascesa del segreto di stato: tra salus rei publicae, «nero sipario» e strisciante impunità*, 1 *Diritto Penale Contemporaneo* 69, 74 (2017).

<sup>689</sup> Giupponi, *supra* note 684, at 1111.

<sup>690</sup> Malerba, *supra* note 230, at 74.

<sup>691</sup> *Id.*

As stated by the Court of Cassation, “it appears to uproot the very possibility of a verification of legitimacy, moderation and reasonableness of the exercise of the executive power to impose a secret.”<sup>692</sup>

Indeed, the former adapted itself to the decision of the Constitutional Court and undid the decision of the Milan Court of Appeal convicting Pollari, Mancini and three more Italian officials.

However, the Court of Cassation did take the chance to re-affirm that the new trend has a lacerating effect on any previous rule.<sup>693</sup>

Going through the procedural history of the case, the will of the Constitutional Court to completely rely on the Executive classification of privileged material is evident.

Since the 1976, the qualification of the State secrets privilege has been linked to its very finality: the necessity to keep the state and its legal order safe.<sup>694</sup>

However, the Abu Omar case shows a complete different trend: the boundaries of the secret get blurry and any judgment is left to the discretion of the Government.

Noting the huge area of information allegedly shield in the Milan Imam case, the Court of Cassation has tried to intervene and to claim that a broad ‘black curtain’ was not necessary for the purpose of national security interests.<sup>695</sup>

Indeed, there must be a distinction between the proper crime, the abduction, on one side, which was not covered by the privilege, and the relationship between the U.S. and the Italian intelligence services, the *interna corporis* of the SISMI on the other side, which instead was to be secreted.<sup>696</sup>

However, the Constitutional Court ruled that the ordinary judge could not reinterpret or narrow the limits of the state secret as traced by the Government.

Therefore, the boundaries could be decided in a categorical, almost retroactive, way by a political authority, which just have to provide a vague motivation.<sup>697</sup>

In this way the abuse of the institute becomes legitimate. The relationship between rule, transparency, and exception, secrecy is overturned.<sup>698</sup>

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<sup>692</sup> Corte di Cassazione, I sezione penale, 24 Febbraio 2014, n. 249.

<sup>693</sup> Pace, *supra* note 673, at 6.

<sup>694</sup> See Corte Cost. 86/1977.

<sup>695</sup> Malerba, *supra* note 688, at 77.

<sup>696</sup> See Corte cost. 106/2009.

<sup>697</sup> Malerba, *supra* note 688.

The Government invokes the state secrets privilege anytime it is useful for purpose of avoiding Italian officials' accountability.

This is also the opinion of the European Court of Human Rights that will find itself to address the Abu Omar's issue.

The holding of the international tribunal and generally, the reaction of the international community to the use of the State secrets privilege in extraordinary renditions' cases will be addressed in the following chapter.

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<sup>698</sup> Arianna Vidaschi, *Il segreto di Stato resta senza giudice*, 1 Giur. Cost. 394, 397 (2014).



# CHAPTER

## The International Law Response

# IV

### 4.1 Foreword. A Human Rights Assessment

The extraordinary renditions of suspect terrorists are one of the major challenges of international human rights law.<sup>699</sup>

Even if these practices already existed before 9/11, their implementation has dramatically and scarily increased in the framework of the War on Terror.

‘Extraordinary’ are transfers carried out without complying with the procedures and safeguards provided by law.

People alleged to be involved in terrorist activities are forcibly transported from one country to another, notwithstanding the normal legal practices, as extradition and deportation.<sup>700</sup>

Indeed, the officials responsible for them are willing not to be slowed down by legal processes or hindered and stopped by countries’ investigations.<sup>701</sup> The removal from the country of origin and the carriage to a new one happens outside of the due process and of the rule of law.

Victims do not have access to any tribunal and they just see themselves uprooted from their lives. Thus, Lord Steyn referred to the term ‘extraordinary renditions’ as a ‘fancy phrase for kidnapping.’<sup>702</sup>

Moreover, the real aim of the terrible journey is to subject them to the so called enhanced interrogation techniques, which are nothing but torture and other cruel and degrading treatments. These are employed by U.S. and foreign officials in order to gather information from the detainees.<sup>703</sup>

Both the elements, the forcible transportation and the invasive interrogation practices, raise several issues under international law.<sup>704</sup>

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<sup>699</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS (2nd ed., 2009).

<sup>700</sup> Philippe Sands, *The international rule of law: extraordinary renditions, complicity and its consequences*, 4 EUR. HUMAN RIGHTS L. REV., 408 (2006).

<sup>701</sup> William G. Weaver & Robert M. Pallito, *The Law: ‘Extraordinary Rendition’ and Presidential Fiat*, 36 PRESID. STUD. Q. 102, 102-103 (2006).

<sup>702</sup> Lord Steyn, *Democracy, the Rule of Law and the Role of Judges*, 1 EUR. HUMAN RIGHTS L. REV. 243, 244 (2006).

<sup>703</sup> John Wadham, *Rendition, detention and torture in Europe: territorial responsibility and the right to truth*, 5 EUR. HUMAN RIGHTS L. REV. 519, 521 (2014).

<sup>704</sup> Sands, *supra* note 700, a 408.

The violation of international treaties and customary law are multiple.

As for the first element, the forcible removal and transportation of an individual outside the rule of law, it violates several provisions contained in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (ICCPR) and in regional human rights treaties as the European Convention of Human Rights and the American Convention on Human Rights.<sup>705</sup>

In particular, article 9 of ICCPR provides that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”<sup>706</sup>

Detention is arbitrary when the deprivation of liberty, although provided by the law, is “manifestly disproportional, unjust or unpredictable.”<sup>707</sup>

Extraordinary renditions consist in e deprivations of liberty outside any predictability and any rule of law and thus, they are in violation of article 9 ICCPR. Similar provisions are contained in the European and American Convention.<sup>708</sup>

Moreover, the ‘right to life,’ enshrined in all the above mentioned human rights treaties, has been long interpreted as a positive obligation for States to prevent situations where the life of people is threatened.<sup>709</sup>

In particular, the Human Rights Committee has affirmed that state parties should implement positive and effective measures to prevent and combat the disappearance of individuals, which most of the times lead to the death of the victims.<sup>710</sup>

On this point, extraordinary renditions may be defined as a peculiar type of forced disappearances.<sup>711</sup>

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<sup>705</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 175 (ICCPR); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

<sup>706</sup> ICCPR art.9.

<sup>707</sup> MANFRED NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 22 (2<sup>nd</sup> rev edn., NP Engel Publisher 2005).

<sup>708</sup> art. 5 ECHR; art. 7 American Convention.

<sup>709</sup> Art.6 ICCPR; art. 2 ECHR;

<sup>710</sup> Human Rights Committee, *General Comment 6, Article 6*, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

<sup>711</sup> David Weissbrodt and Amy Berquist, *Extraordinary Renditions: a Human Rights Analysis*, 19 HARV. HUMAN RIGHTS J. 123, 127 (2006).

Moreover, article 17 ICCPR provides for the right to be free from any interference with one's private and family life.<sup>712</sup> Again, similar norms are included in regional treaties.<sup>713</sup>

The removal of a person from his or her ordinary life, without following any of the foreseeable legal procedures, consists in a gross interference.

Indeed, the Covenant charges unlawful and arbitrary interferences, which are States' impediments not in compliance with the law or anyway not in accordance with the aims and the objectives of the Covenant.<sup>714</sup>

The real aim of the extraordinary renditions is to inflict torture and other degrading treatments to the victims in order to obtain information and thus, the removals are an evident violation of the purposes to be achieved through the Covenant.<sup>715</sup>

As for the second element, which is the invasive interrogation, it does violate the 1948 Convention against Torture or other Cruel, Inhumane or Degrading Treatment or Punishment (CAT).<sup>716</sup> Indeed, the latter outlaws any form of torture.

Three elements must be satisfied for the torture to subsist: the intentional causation of severe mental or physical pain; the satisfaction of one of the specific purposes listed in the Convention as punishment, intimidation and the obtaining of information;<sup>717</sup> the fact that the acts are carried out by officials, at their instigations or with their acquiescence, but they do not constitute a lawful sanction.<sup>718</sup>

Also the ICCPR, ECHR and the American Convention ban the torture.<sup>719</sup>

The extraordinary renditions do fit the definition of torture: the interrogators and the public officials in the black sites intentionally mistreat the detainees with the purpose of obtaining any kind of confession about their affiliation with terrorist groups.

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<sup>712</sup> art. 17 ICCPR.

<sup>713</sup> art. 8 ECHR.

<sup>714</sup> Human Rights Committee, *General Comment 16*, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994).

<sup>715</sup> *Fact Sheet: Extraordinary Renditions*, AMERICAN CIVIL LIBERTIES UNION (Jun. 1, 2011), <https://www.aclu.org/other/fact-sheet-extraordinary-rendition>.

<sup>716</sup> Sands, *supra* note 700, at 408.

<sup>717</sup> HERMAN BURGERS AND HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 129-130 (Dordrecht; London: Martinus Nijhoff, 1988).

<sup>718</sup>, art.1.

<sup>719</sup> art. 7 ICCPR; art.5 American Convention; art. 3 ECHR.

Moreover, the U.S. and foreign officials at the headquarters acquiesce on what is happening, even if they pretend not to know. These accidents happen outside any legal framework, in remote areas where the rule of law does not apply.<sup>720</sup>

Furthermore, the extraordinary renditions also infringe art. 3 of the CAT, which crystallizes the *principle of non-refoulement*. The latter provides for state parties' duty not to render, transfer, send or return a person where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or ill-treatment.<sup>721</sup>

Therefore, State officials' do have the duty not to commit and to prevent torture in their territory, as well as the obligation not to send a person to a territory where he/she can experience the same treatment.<sup>722</sup>

The extraordinary renditions all present common features: U.S. officials, with the participation of foreign State actors, do seek to transfer terrorist suspects to 'black sites,' where they will likely be tortured in order to gain information through these invasive interrogation techniques.<sup>723</sup>

They do violate the prohibition of torture and other cruel, inhumane or degrading treatment or anyway, they infringe the principle of non-refoulement. Indeed, these practices have been defined as 'outsourcing torture.'<sup>724</sup>

The only counter-argument standing against the allegation of Human Rights violations in the extraordinary renditions program consists in the scope of the treaties themselves.

Indeed, the United States has long argued that the International Covenant on Civil and Political Rights do not apply extraterritorially.

Specifically, the U.S. Government interprets the duty to ensure the rights in the Covenant "to all the individuals within its territory and subject to its jurisdiction," provided in article 2, as requiring the two elements to be simultaneously satisfied.<sup>725</sup>

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<sup>720</sup> See *supra* chapter III.

<sup>721</sup> Christopher Michaelsen, *The renaissance of non-refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights*, 61 INT'L CRIM. L. Q. 752 (2012).

<sup>722</sup> CAT, art.3,

<sup>723</sup> NEW YORK UNIVERSITY SCHOOL OF LAW, THE CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL LAW APPLICABLE TO 'EXTRAORDINARY RENDITIONS 6 (Dec. 2005), [http://www.statewatch.org/news/2005/dec/CHRGJ\\_rendition.pdf](http://www.statewatch.org/news/2005/dec/CHRGJ_rendition.pdf).

<sup>724</sup> Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14, 2005.

<sup>725</sup> *United States Responses to Selected Recommendations of the Human Rights Committee*, UN Doc. CCPR/C/USA/CO/3/Rev.1/Add.1 (2007).

Therefore, U.S. officials should not be held accountable for violations of the Covenant taking place outside the U.S. territory.

This is the real aim behind the practice of sending suspect terrorists to locations as Guantanamo, Afghanistan and other remote places where the rules do not apply and the U.S. officials do not respond to their actions: to escape accountability.<sup>726</sup>

On the contrary, the Human Rights Committee has interpreted the elements of territory and jurisdictions, contained in article 2, as to be alternative: States have to ensure the respect of the Covenant within their boundaries and in every territory where people are under their jurisdictions, which in international law means 'under power or their effective control.'<sup>727</sup> The International Court of Justice does agree with this interpretation.<sup>728</sup>

Also the CAT is deemed to have an extra- territorial scope. Indeed, the Committee against Torture requests every State Party to take effective measures to prevent torture not only in its territory, but also in any territory 'under its jurisdiction.'<sup>729</sup>

Therefore, given the ambiguous nature of the extraordinary renditions, the numerous violations of Human Rights connected to them and the common interpretation of the main international treaties as to have an extraterritorial scope, states' rely on the recourse to the state secrets in order to avoid accountability for the violation of human rights connected to the practices at issue.<sup>730</sup>

Indeed, the invocation of the State Secrets Privilege provokes a vacuum of Governmental accountability and it constitutes a great obstacle to get any relief for the violations suffered by the victims and their families.<sup>731</sup>

The real aim of the institute is not the national security concern anymore, but it constitutes a 'shield' from prosecution for gross human rights abuses.<sup>732</sup>

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<sup>726</sup> *Extraordinary rendition: suspected Al Qaeda member - extraordinary rendition - "black sites,"* 6 EUR. HUMAN RIGHTS L. REV. 671, 672 (2014).

<sup>727</sup> Human Rights Committee, *General Comment No. 31*, UN Doc. CCPR/C/21/Rev.1/Add. 1326 (March 29, 2004).

<sup>728</sup> ICJ, *Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory* 136 (2004).

<sup>729</sup> Committee against Torture, *Concluding observations on the third to fifth periodic reports of United States of America*, UN Doc. CAT/C/USA/CO/3-5 (Nov. 20, 2014), para. 15.

<sup>730</sup> Matthew Windsor, *(Pro)Motion to Dismiss? Constitutional Tort Litigation and Threshold Failure in the War on Terror*, 1 BRIT. J. AM. LEGAL STUD. 241, 254 (2012).

<sup>731</sup> *Id.* at 241.

The match between counter- terrorism measures and state secrecy has become so common and typical that international bodies, courts and scholars have long been debating about it.<sup>733</sup>

The discussion on the matter and the concerns arising from this practice led to the better development and advancement of the concept of ‘Right to the Truth.’<sup>734</sup> Victims have the right to know which is the reason behind the violations of the fundamental rights they suffered and who is responsible for them.

Thus, the apposition of the State Secrets Privilege not only constitutes a tool for the Governments to avoid any investigation on the ambiguous measures carried out in the context of the ‘War on Terror,’ but it becomes a violation of the ‘Right to Truth’ per se.<sup>735</sup> Both the victims and their loved ones have a legal right to be informed about the circumstances surrounding the extraordinary renditions.

The concept of ‘Right To Truth’ has been developing since earlier times and recently, due to the challenge provoked by the dichotomy extraordinary renditions- invocation of State secrets privilege, it has experienced a moment of reawakening and progression.

Indeed, International Human Rights Law is characterized by the ability to evolve as a response to new scenarios and hurdles.<sup>736</sup>

The reaffirmation of the ‘Right To Truth’ is the response to the lack of accountability in the post September 11 world caused by the abusive invocation of the concept of secrecy.

## 4.2 The Right to the Truth

The Right to the Truth is central to gross violations of human rights as forced disappearances, targeted and extra- judicial killings and torture.<sup>737</sup>

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<sup>732</sup> COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, ABUSE OF STATE SECRECY AND NATIONAL SECURITY: OBSTACLES TO PARLIAMENTARY AND JUDICIAL SCRUTINY OF HUMAN RIGHTS VIOLATIONS, [http://www.assembly.coe.int/CommitteeDocs/2011/State%20secrecy\\_MartyE.pdf](http://www.assembly.coe.int/CommitteeDocs/2011/State%20secrecy_MartyE.pdf).

<sup>733</sup> *Id.*

<sup>734</sup> Federico Fabbrini, *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*, HUMAN RIGHTS L. REV. 1, 18 (2013).

<sup>735</sup> Thomas M. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, 23 MICHIGAN J. OF INT’L L. 977 (2002).

<sup>736</sup> Nancy Flowers, *From Concept to Convention: How Human Rights Law Evolves*, HUMAN RIGHTS RESOURCE CENTER UNIVERSITY OF MINNESOTA, <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/from-concept.htm>.

Nevertheless, the right does concern both the right for the victim, the family and the community in general to access information, and also States' obligation to take all the necessary positive measures to protect the entitlement to know, in particular through effective investigations.<sup>738</sup>

First, the victims and their families have the imprescriptible right to know the truth about the circumstances where the human rights violations took place.<sup>739</sup>

Second, also the entire community of human beings has the right to be informed about past heinous abuses.<sup>740</sup> Indeed, the full exercise of the right provides a vital safeguard to avoid the recurrence of the violations.<sup>741</sup>

Third, the Right to the Truth is also linked to the right to a remedy. The latter includes the right to an effective investigation of the facts, the right to have the facts publicly disclosed and the right to reparation.<sup>742</sup>

Indeed, the right to reparation is strongly affirmed in international law.<sup>743</sup> The obligation of a State violating human rights, humanitarian law and international criminal law's provisions to provide reparation is a vital part of the fight against impunity.<sup>744</sup>

The definition of reparation adopted at the international level is a broad one: the modality of reparation that may be appropriate is flexible and the status of the truth as reparation-seeking means is accepted.<sup>745</sup>

Specifically, in 2005, the UN General Assembly adopted the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for*

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<sup>737</sup> Juan Méndez, *Responsibility for Past Human Rights Violations: An Emerging "Right to the Truth,"* in TRUTH AND JUSTICE: IN SEARCH OF RECONCILIATION IN SURINAME 44 (Alfredo Forti & Georgine De Miranda eds., 1999).

<sup>738</sup> Anna Oriolo, *Right to the Truth and International Jurisprudence as the 'conscience' of humanity. Comparative insights from the European and Inter-American Courts of Human Rights,* 8 IURA & LEGAL SYSTEMS 66, 70 (2016).

<sup>739</sup> TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION (Eduardo González & Hodward Varney eds., 2015).

<sup>740</sup> Commission on Human Rights, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity,* UN Doc. E/CN.4/2005/102/Add.1 (Feb.8, 2005), at principle 2.

<sup>741</sup> *Id.* at principle 4.

<sup>742</sup> TRUTH SEEKING, *supra* note 739, at 3.

<sup>743</sup> U.N. G.A. Res. 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

<sup>744</sup> Commission on Human Rights, *supra* note 740.

<sup>745</sup> Merryl Lawry-White, *The reparative effect of truth seeking in transitional justice,* 61 INT'L & COMP. L. Q. 141, 146 (2015).

*Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.*<sup>746</sup> The latter consist in a ‘soft law’ instrument, thus not binding on Member States, but promoting a resystematization of the existent national principles governing the right to reparation.<sup>747</sup> These principles also confirm that the victims have a ‘right to seek the truth’ concerning the violations that they have suffered and their causes. They demonstrate an emerging interest in searching the verity.<sup>748</sup>

The ‘Right to the Truth’ has been a developing concept in international law over the last decade. The contribution of international bodies and courts has been fundamental for its affirmation.<sup>749</sup> Indeed, there is no binding legal instrument directly and specifically embodying this right, even if there is reference to it in several international instruments.<sup>750</sup> However, an emerging norm is rapidly developing in order to counterbalance situations where systematic and gross human rights violations stay unpunished and unresolved.

This concept encompasses a positive obligation for the States to undertake every sustainable effort in order to investigate the violations and to seek evidence.<sup>751</sup> Simplifying, the aims of the investigations should consist in discovering the three Ws: What really happened, Why it did happen, Who did commit it.

The very origin of this right and the linked obligations can be traced in the general and internationally accepted duty of the States to respect and ensure human rights.<sup>752</sup> Starting from there, the Right to the Truth has then reached an autonomous dimension through national, regional and international jurisprudence and by many international and regional interGovernmental organizations. The following pages address some of the most important decisions and statements aimed at advancing this right.

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<sup>746</sup> *supra* note 743.

<sup>747</sup> REDRESS TRUST, A HANDBOOK ON THE BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION (2006).

<sup>748</sup> Basis principles, *supra* note 743, at art. 24.

<sup>749</sup> Dermot Groome, The Right to the Truth in the Fight against Impunity, 29 BERKLEY J. OF INT’L L. 29, 175 (2011).

<sup>750</sup> Juan E. Méndez & Francisco J Bariffi, *Right to the Truth* in Max Planck Encyclopedia of Public International Law (2012).

<sup>751</sup> *Id.*

<sup>752</sup> ICCPR art. 2; ECHR art. 1; ACHR art. 1.



### 4.3 The Role of the Inter-American Commission and the Inter-American Court of Human Rights

The entry point of the ‘Right to the truth’ in international law is connected to the several episodes of *desaparecidos*, the forcibly disappeared.<sup>753</sup>

The enforced disappearances are practices typical of the XX century Latin American totalitarian regimes and they violated several human rights.

These authoritarian Governments used to target groups of their society that they believed to be a threat for the power and they made them disappear.<sup>754</sup>

Therefore, the Right to the Truth was born out of these gross and systematic human rights violations and of the subsequent perpetrators’ impunity. Due to the existent situation, the need for the Truth has been one of the most important issues in Latin American.<sup>755</sup>

The Inter- American Commission and the Inter-American Court had a fundamental role in addressing the issue of forced disappearances and in developing the basic principles of the Right to the Truth.

The Inter- American Court, in the *Velásquez Rodríguez* case, has affirmed at the very minimum a duty to investigate and thus, a basis for the further development of the Right to the Truth.<sup>756</sup>

The petition filed with the Inter-American Commission concerned Manfredo Velasquez, a student of the Honduras National Autonomous University, who was kept in detention without any arrest warrant by members of the Honduras National Office of Investigations and of the armed forces.<sup>757</sup>

Several eyewitnesses testified that the Manfredo and others were captured and transported to prison by the police and other security forces and there they were interrogated and tortured.<sup>758</sup>

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<sup>753</sup> Patricia Naftali, *Crafting a “Right to Truth” in International Law: Converging Mobilizations, Diverging Agendas?* 13 *Justice Penale internationale* 1, 3 (2016).

<sup>754</sup> Nikolas Kyriakou, *The International Convention for the Protection of All Persons from Enforced Disappearance and Its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Rendition*, 13 *MELB. J. INT’L L.* 424 (2012).

<sup>755</sup> Juan Mèendez & Javier Mariezcurrena, *Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection*, 26 *Soc. JUST.*, 84, 86 (1999).

<sup>756</sup> *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, par. 91 (1998).

<sup>757</sup> *Id.* at 3.

<sup>758</sup> *Id.*

However, public officials always denied to know the whereabouts of the people disappeared.<sup>759</sup> The Inter-American Commission did request the Government to investigate on the situation, but the researches were inappropriate.<sup>760</sup>

Finally, the Court found that a State has the duty to investigate any situation where a violation of the Convention is involved.<sup>761</sup> In the event that the violation goes unpunished and the victims do not receive any relief, the State apparatus is responsible for the failure of carrying out its duty to ensure the full and free exercise of fundamental rights to people within its jurisdiction.<sup>762</sup>

The Government is also accountable in the event it does not provide a proper and full investigation when private individuals commit the violations. As a consequence, the responsibility is greater when the violators are public officials.

The Court found the State of Honduras to be accountable for carrying out inadequate procedures to investigate the disappearance of Manfredo Velasquez and thus, to have violated its duties under art 1 of the Convention, which requests state parties to ensure the full and free exercise of the rights contained in the document.<sup>763</sup>

In this way, even in the remote hypothesis public officials had not had any responsibility, the Government is anyway responsible, among the other violations, for the arbitrary detention, the cruel and the inhumane treatment that the student has suffered.<sup>764</sup>

Moreover, the Inter-American Commission has addressed and contributed to the affirmation of the Right to the Truth in the *Manuel Stalin Bolaños Quiñones v. Ecuador* case.<sup>765</sup>

The application concerned the arrest and detention of Manuel by the Marines and the subsequent disappearance of the detainee. The petitioners were family members of the victim and the same day of the arrest they started asking questions to the Government regarding the whereabouts of Manuel.<sup>766</sup>

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<sup>759</sup> *Id.* at 5.

<sup>760</sup> *Id.*

<sup>761</sup> *Id.* at 176.

<sup>762</sup> *Id.*

<sup>763</sup> *Id.* 178.

<sup>764</sup> *Id.* at 194.

<sup>765</sup> *Manuel Stalin Bolaños Quiñones v. Ecuador*, Inter-Am.Comm. H.R., Case 10.580, Report No. 10/95, OEA/Ser.L/V/II.91 (1996).

<sup>766</sup> *Id.* at para. 2.

The Commission held that a State is obligated to investigate every situation where a human right protected by the Convention is violated. In the event the violation stays unpunished and the victim's rights are not restored, the State apparatus fails to comply with its duties to ensure the full and complete exercise of the rights enshrined in the Convention.<sup>767</sup>

It is noteworthy that the Court specifically addressed the issue of state secrets in a context different from the extraordinary renditions program. Indeed, in the case of *Myrna Mack Chang v. Guatemala*, it was held that the State secrets privilege cannot be invoked in order to obstruct the flow of information necessary to ascertain the truth and it could constitute an obstacle to the administration of justice.<sup>768</sup>

The case concerned the arbitrary murder of Myrna Mack Chang by the Guatemalan State, as a consequence of an intelligence military operation.<sup>769</sup> The Ministry of National Defense resorted to the official secret in order not to provide information on the event.<sup>770</sup>

The court held that “ in cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.”<sup>771</sup>

The reasoning also recalled a statement of the Inter-American Commission, according to which there may be a conflict between the national interest to safeguard State secret and the obligation of a State to protect individuals from officials' violations and to punish the perpetrators.<sup>772</sup> Therefore, it is incompatible with the Rule of Law that the secrets are outside any legal control. The conflict between human rights and state secrets was assessed.

A turning point in the inter-American Court's jurisprudence was the *Gomes Lund v. Brasil* Case.<sup>773</sup> In this judgement, the Court confirmed the jurisprudence on the 'Right to the Truth' and it found a legal basis for it in article 13 of the

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<sup>767</sup> *Id.* at para. 21.

<sup>768</sup> *Case of Myrna Mack Chang v. Guatemala*, Inter-Am. Ct. H.R. (Series C) No. 101 (Feb. 21, 2003).

<sup>769</sup> *Id.* at 4.

<sup>770</sup> *Id.* at 178.

<sup>771</sup> *Id.* at 182.

<sup>772</sup> *Id.*

<sup>773</sup> *Case of Gomes Lund v. Brasil*, Inter-Am. Ct. H.R. (Series C.) No. 219 (Nov. 24, 2010).

Convention, which attributes the right to be informed.<sup>774</sup> The roots of this right were not only traced back to a general obligation of the States to adopt all the necessary measures to protect human rights, enshrined in article 1 of the Convention, but they also stood within a specific right.

*Gomes Lund* was an opportunity to set down some guiding principles on the Right to the Truth, connected with the right to access information concerning gross violations of human rights. Moreover, it highlighted both the individual and societal nature of the right.<sup>775</sup>

The case originated from a petition by the Center for Justice and International Law and Human Rights Watch Americas, on behalf of the people disappeared in the context of the ‘Guerrilha do Araguaia’ and their relatives.<sup>776</sup> The Federal Republic of Brazil was deemed responsible for the arbitrary detention, the ill-treatment and the enforced disappearance of members of the communist party and peasants as a consequence to the army operations to stop the guerrillas.<sup>777</sup>

The applicants complained that the violators of fundamental human rights were still unpunished due to the lack of investigations and prosecution and to the unwillingness of the State to ensure the right to the truth and to information.<sup>778</sup> They also highlighted that the Court’s jurisdiction could not be limited *ratione temporis* in case of enforced disappearances, because it involved a violation of a permanent and continued nature.

Indeed, the respondent State argued that the Court did lack jurisdiction because Brazil accepted the latter “under a reservation of reciprocity and for facts subsequent to December 10, 1998,” while the case at issue regarded events that took place before.<sup>779</sup>

The Court rejected the objection and strongly affirmed that the enforced disappearances are violations of continuous and permanent nature: the act of

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<sup>774</sup> Oriolo, *supra* note 738, at 68.

<sup>775</sup> *Id.* at 69.

<sup>776</sup> *Case of Gomes Lund v. Brasil*, *supra* note 773, at 1.

<sup>777</sup> *Id.* at 2.

<sup>778</sup> *Id.* at 14.

<sup>779</sup> *Id.* at 12.

disappearance start with the deprivation of liberty of the victim and it lasts as long as the family does not know anything about the whereabouts of the victim.<sup>780</sup>

The permanent nature of the violation is a peculiar and fundamental characteristic of the enforced disappearances which also typifies the right to the truth: the lack of investigations and information on the victim's human rights abuses does injure the victim and the family as long as they do not get aware of the reasons behind the abuses and the people responsible for them.

In the merit, the Inter-American Court affirmed that the duty to positively investigate human rights violations and to punish the perpetrators must be adopted to ensure the fulfillment of human rights, as established in article 1 of the Convention.<sup>781</sup> The duty to investigate is an obligation of means and not of result: it is not a formality, but a legal duty.<sup>782</sup>

Moreover, the Court established that the right of expression and thought also enshrines the right of people to access information. Restrictions to it should just be exceptional.<sup>783</sup> In this light, the victims of gross human rights violations, their families and the whole society have the right to know the truth: they need to receive updated information on the abuses at issue.<sup>784</sup>

One year later, the Court has re-affirmed and developed these principle in the *Gelman v. Uruguay* case.<sup>785</sup> The initial petition to the Inter-American Commission concerned the forced disappearance of María Claudia García Iruretagoyena de Gelman, first detained in Buenos Aires while pregnant and then suddenly vanished.<sup>786</sup> She was likely transported to Uruguay, where she gave birth and her daughter was given to a Uruguayan family.<sup>787</sup>

The Court again highlighted the multiple and perpetual nature of the violations caused by the practice of enforced disappearances.<sup>788</sup> They place the victims and their kins in a status of complete 'defenselessness.'<sup>789</sup>

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<sup>780</sup> *Id.* at 17.

<sup>781</sup> *Id.* at 140.

<sup>782</sup> *Id.* at 138.

<sup>783</sup> *Id.* at 198.

<sup>784</sup> *Id.* at 200.

<sup>785</sup> *Case of Gelman v Uruguay*, Inter-Am. Ct. H.R. (Series C) No. 221 (24 February 2011).

<sup>786</sup> *Id.* at para. 2.

<sup>787</sup> *Id.*

<sup>788</sup> *Id.* at para. 73

<sup>789</sup> *Id.* at para. 74.

Thus, according to the Court, the prohibition of enforced disappearances and its corresponding obligation to investigate and punish those responsible for them has reached a *jus cogens* nature.<sup>790</sup>

In particular, the duty to investigate is an obligation that stands regardless the procedures initiated by the family or the next of kin: States must take all the necessary measures to fulfill it. Indeed, an investigation would start in similar circumstances even if nobody complained. The investigation must also start *ex officio*.<sup>791</sup>

The Court again recognizes both an individual dimension of the right to know and a societal one: the State should set an historical and adequate reconstruction of the facts in order for everyone to know who participated in the perpetration of violations.<sup>792</sup> The principle of effectiveness of investigations must prevail for the concept of justice to succeed.

Finally, the Inter-American Commission has recently released a report explicitly focusing on the Right to the Truth in the Americas. The report highlighted that the right is not included in the American Convention, but it has been developed by the Court and the Commission as a response to States' failure to investigate and punish gross human rights violations.<sup>793</sup> The Commission recognizes the strict relation between democracy, human rights and the truth and urges member states to undertake national law efforts and reforms in order to ensure the right to the truth.<sup>794</sup>

To conclude, the contribution of the Inter-American system has been fundamental in order to establish the characteristics of the right to the truth and of its violations.

#### **4.4 The Role of the United Nations**

The United Nations system has had a leading role in the affirmation of the right to the truth.

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<sup>790</sup> *Id.* at para. 183.

<sup>791</sup> *Id.* at para. 186.

<sup>792</sup> *Id.* at para. 192.

<sup>793</sup> *The Right to the Truth in the Americas*, Inter-Am.Comm. H.R., OEA/Ser.L/V/II.152 Doc. 2 (Aug. 13, 2014).

<sup>794</sup> *Id.* at 114.

First, it took part in the condemnation of enforced disappearances and, in that occasion, it made reference to the right to know the circumstances of the disappearance and the whereabouts of the victims. In 1981 the UN Commission of Human Rights' Working Group on Enforced Disappearance recognized that the families of the disappeared have an undeniable right to know the fate of their loved ones.<sup>795</sup>

Later in time, on December 20, 2006, the UN General assembly adopted the *International Convention for the Protection of All Persons from Enforced Disappearance*.<sup>796</sup> It entered into force in 2010. Contrarily to the 1992 *Declaration on the Protection of All Persons From Enforced Disappearance*, both the preamble and the text of the Convention refer explicitly to the Right to the Truth.<sup>797</sup>

In particular, article 24(2) provides that “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.”<sup>798</sup>

Moreover, paragraph 1 of the same article specifies that ‘victim’ means both the person disappeared and anyone else suffering harm due to the disappearance.

In addition, the UN system also highlighted the existence and the autonomy of the right to the Truth in every case of gross human rights violations, not only in the context of enforced disappearances.

In 2005, the Commission on Human Rights, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*.<sup>799</sup> Among them, principle 2 contains the ‘inalienable right to know the truth’ and principles 4 recalls the right to victims of human rights violations and their families’ right to know the circumstances surrounding the violations. Moreover, principle 5

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<sup>795</sup> UN Commission on Human Rights, *Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, In Particular: Question of Missing and Disappeared Persons*, Report of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1492 (Dec. 31, 1981), par. 5.

<sup>796</sup> U.N. G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Jan. 12, 2007).

<sup>797</sup> U.N. G.A. 47/133 U.N. Doc. A/RES/47/133 (December 18, 1992).

<sup>798</sup> Convention on Enforced Disappearances, *supra* note 796, at art. 24(2),

<sup>799</sup> *supra* note 740.

requests Member States to ensure that national judicial bodies give effects to the right to the truth.<sup>800</sup>

Later, in 2006, the High Commissioner for Human Rights specifically devoted a research to the Right to the Truth.<sup>801</sup> The Study recalled international and national courts' decisions, treaties' provisions, UN General Assembly and Security Council's resolutions and other international organizations' instruments, all referring to this right.

The document defined the scope of it, which applies to all the *gross* violation of human rights as well as violations of humanitarian law.<sup>802</sup> Moreover, for the entitlement of the right, all of the texts refer to the victims and their families. Yet, the term 'victim' can be interpreted in a collective way: everybody has the right to know about specific and grave violations.<sup>803</sup>

The report recognizes an expansion in the content and in the meaning of the right. While it had been created in the enforced disappearances context and thus, it provided for the legal entitlement to know the whereabouts of the disappeared, now the concept is developing and it broadens its focus to include the causes for the violations, the circumstances of the formers, the status of the investigations and the identity of the perpetrators.<sup>804</sup>

Several connections with other human rights had been found so far: the right to the truth is strictly connected to the right to an effective investigation, to the right to a remedy, to the right to life, to the right to information, to the right of legal and judicial protection and to the right not to be tortured, as not knowing the conditions of a loved one constitutes a psychological ill-treatment.<sup>805</sup> Anyway, as a final recommendation, the report defines the right to the truth as a 'stand-alone' right, which should not be subject to limitations.<sup>806</sup>

Finally, in 2008, the UN Human Rights Council adopted the *Resolution 9/11 on the Right to the Truth* and recognized the importance of respecting and ensuring

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<sup>800</sup> *Id.* at principles 2, 4, 5.

<sup>801</sup> Office of the High Commissioner for Human Rights, *Study on the Right to the Truth*, UN Doc. E/CN.4/2006/91 (Feb. 8, 2006).

<sup>802</sup> *Id.* at 33.

<sup>803</sup> *Id.*

<sup>804</sup> *Id.* at 38.

<sup>805</sup> *Id.* at 41-42.

<sup>806</sup> *Id.* at *Conclusions*.



this right in order to combat impunity.<sup>807</sup> Lack of accountability situations must always be avoided.

Moreover, it welcomed the establishment of judicial and non-judicial truth-seeking mechanisms at the national level as the truth commissions.<sup>808</sup>

#### **4.5 The establishment and the functioning of the Truth Commissions**

Parallel to the evolution of the right to the truth at the international level, civil societies and experts have developed various and peculiar truth-seeking mechanisms in violence-affected countries. Many initiatives have been implemented in order to discover the truth. Among them, more than 30 official truth commissions have been established since 1974.<sup>809</sup>

A Truth Commission is an *ad hoc*, autonomous, and victim-centered commission of inquiry aimed at investigating and reporting on the main causes behind gross and systematic human rights violations, at setting relief for the victims and at making recommendations in order to avoid the repetition of similar events.<sup>810</sup>

These commissions are typically established during a period of political transition, which follows a moment characterized by gross human rights violations.<sup>811</sup>

Truth Commissions have been emerging in several regions: Argentina, Guatemala, Chile, East Timor, Ecuador, Guatemala, Nigeria, Sierra Leone, South Africa and Former Federal Republic of Yugoslavia are few of them.<sup>812</sup>

These mechanisms were particularly appropriate in countries as Argentina and Chile. Indeed, the forced disappearance perpetrated in Chile under the regime of Pinochet and in Argentina during the military control led the United Nations to the creation of teams of inquiry.<sup>813</sup>

In the context where they are established, Truth Commissions research and report on specific violation or on specific periods of time. They adapt themselves to

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<sup>807</sup> Human Rights Council Res. 9/11, U.N. Doc. A/HRC/RES/15/1 (2008).

<sup>808</sup> *Id.* at 3.

<sup>809</sup> Antkowiak, *supra* note 735, at 996.

<sup>810</sup> MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 18 (2006).

<sup>811</sup> LOUIS HENKIN ET AL., HUMAN RIGHTS 743 (2nd ed., 2009).

<sup>812</sup> UNITED STATES INSTITUTE OF PEACE, TRUTH COMMISSION DIGITAL COLLECTION, <https://www.usip.org/publications/2011/03/truth-commission-digital-collection>.

<sup>813</sup> Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, impunity and the Inter-American Human Rights System*, 12 Boston U. L. J. 1, 321 (1994).

the needs of the societies where they act.<sup>814</sup> Indeed, these commissions are usually created with the acquiescence and the funds of national Governments.

They are not courts, but they are entrusted with the power to refer violations to national judicial bodies. Moreover, they have quasi-judicial powers as conducting searches and requesting statements under oath.<sup>815</sup>

In recent times, Truth Commissions do not only uncover and report the truth, but they do administer accountability, provide remedies for the victims and they suggest solutions in order for the violations not to happen again.<sup>816</sup>

#### **4.6 The Council of Europe's commitment**

The Council of Europe has always been committed in ensuring and protecting the right to the truth. Already in 1987, the Parliamentary Assembly affirmed the right of family members to know the truth about the destiny of disappeared people.<sup>817</sup>

In more recent times, it has been on the front line to discover the truth about the extraordinary renditions programs. The necessity to discover the 'unspoken truths' about the practices employed by the United States and other foreign allied countries to combat suspect terrorists was invoked very often by the Council of Europe, which was willing to bring some clarity on the treatments of the targeted people and on the connections existing between the U.S. and some CoE Member States.

In facing the issue, the Council did recognize and address the very widespread practice among the Governments of invoking the State Secrets Privilege in order to avoid any accountability. The Human Rights Organization strongly condemned it and called for more transparency and for the truth

The issue emerged in November 2005, when the Washington Post and the New York Times revealed the existence of secret prisons in Europe where CIA detained suspect terrorists.<sup>818</sup>

Hiding a global network was a central tool for the U.S. in the 'War on Terror'

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<sup>814</sup> *Id.*

<sup>815</sup> Alison Bisset, *The privilege against self-incrimination in truth commission-administered accountability initiatives*, 30 LEIDEN J. OF INT'L L. 155, 157 (2017).

<sup>816</sup> *Id.*

<sup>817</sup> COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY RESOLUTION 1056 (1987)

<sup>818</sup> Diana Priest, *CIA holds Terror Suspects in Secret Prisons*, THE WASHINGTON POST, NOV. 2, 2005.

and it did include the cooperation with foreign intelligence services and the guarantee that the information shared with the allied officials would be kept secret from the public and bodies charged with overseeing secret services.<sup>819</sup>

Also the civil society made it hear its voice: Amnesty International defined this patchwork as a ‘a global system of human rights violations.’<sup>820</sup> The victims of renditions were indeed transferred to U.S. custody from other countries and they were often held in so-called black sites around the world, also in unknown locations in Europe.

As a response to the allegations, on November 7, 2005, the CoE Parliamentary Assembly appointed Dick Marty, a former prosecutor originally from Switzerland, to conduct investigations on the existence of secret detentions and the inter-state transfer of detainees involving member states.<sup>821</sup>

Few weeks later, Terry Davis, Secretary General of the CoE, decided to invoke article 52 of the European Convention of Human Rights. The provision allowed him to conduct inquiries towards the Member States and to ask them further explanations on the implementation of the Convention.<sup>822</sup> Accordingly, he sent a questionnaire to the contracting parties of the Convention.<sup>823</sup>

On March 1, 2006, Mr. Davis released his report. Through his investigation, he became aware of the fact that in most Member States the existing legislative and administrative framework regulating secret services are not effective either adequate. In particular, there is a lack of control over foreign secret services. The Secretary General called for effective safeguards, as a democratic check by national parliaments and judicial control in the event of HR violations.

Moreover, he highlighted that the confidentiality of the information involved does not require the lack of any control.<sup>824</sup>

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<sup>819</sup> *Id.*

<sup>820</sup> "Rendition" And Secret Detention: A Global System Of Human Rights Violations, AMNESTY INTERNATIONAL (Jan. 1, 2006), <https://www.amnesty.org/en/documents/POL30/003/2006/en/>.

<sup>821</sup> Judit Toth, *EU Member States Complicity in Extraordinary Renditions* 7, <http://epa.oszk.hu/00400/00476/00007/pdf/005-026.pdf>.

<sup>822</sup> ECHR, *supra* note 7, at art. 52.

<sup>823</sup> COUNCIL OF EUROPE, ALLEGED SECRET DETENTIONS IN COUNCIL OF EUROPE MEMBER STATES <http://www.coe.int/T/E/Com/Files/Events/2006-cia/>.

<sup>824</sup> COUNCIL OF EUROPE, SECRETARY GENERAL'S REPORT UNDER ARTICLE 52 ECHR ON THE QUESTION OF SECRET DETENTION AND TRANSPORT OF DETAINEES SUSPECTED OF TERRORIST ACTS, NOTABLY BY OR AT THE INSTIGATION OF FOREIGN AGENCIES, SG/Inf (2006) 5, Feb. 28, 2006, para. 101.

He also affirmed the Member States duty to investigate the allegations about their involvement in running secret detention centres and controlling ‘extraordinary renditions flights.’ The Convention’s Contracting Parties bare the undeniable duty to make sure their territory is not used to capture and send people to countries where there is a high likelihood they will be tortured.<sup>825</sup>

Few weeks later, the European Commission for Democracy through law, better known as Venice Commission, adopted a legal opinion concerning the international obligations of Council of Europe Member States in respect of secret detention facilities an inter-state transport of prisoners.<sup>826</sup> Indeed, in December 2005, the Parliamentary Assembly requested it to address the duties of the parties in the light of the ECHR.<sup>827</sup>

The Commission went through the international human rights and humanitarian law existing framework.

Concerning the violations inflicted to the detainees, it focused on the scope of the ECHR and it held that, as for the ICCPR, the former retains an extraterritorial scope and contracting state parties must be held accountable for violations occurring outside their territories in certain situation, as in the case the victims are within the states’ power or under their control.<sup>828</sup>

On the other hand, referring to the removal of the terrorist suspects from one country to another, this is illegal when it does not fall within one of the four situations admitted in international law: deportation, extradition, transit or transfer of sentenced persons in order to serve the sentence in the receiving country.<sup>829</sup>

Thus, the ‘renditions,’ which involve obtaining custody over a person allegedly involved in terrorism and transferring the person to another country, are not set out in the law and they are to be defined ‘extraordinary’. Thus, the kidnapping of a person by state officials from one State to another is an international wrongful act without any doubt.

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<sup>825</sup> *Id.* at para. 102.

<sup>826</sup> COUNCIL OF EUROPE VENICE COMMISSION, OPINION ON THE INTERNATIONAL OBLIGATIONS OF COUNCIL OF EUROPE MEMBER STATES IN RESPECT OF SECRET DETENTION FACILITIES AN INTER-STATE TRANSPORT OF PRISONERS, CDL-AD(2006)009, March 17, 2006.

<sup>827</sup> Alleged Secret Detentions in Council of Europe Member States, *supra* note 823.

<sup>828</sup> Venice Commission, *supra* note 826, at 15.

<sup>829</sup> *Id.* at 4.

The Commission then focused on the fundamental principles governing State responsibility: a State is usually bound by the acts of its agents, even when they are acting *ultra vires*.<sup>830</sup>

Moreover, besides the fact that usually the consent to carry out internationally wrongful act makes them lawful, if a public official authorizes a foreign state's representative to take in custody and transfer a person from its territory without complying with any ordinary procedure, the authorization is a violation of international law and the consent does not cure the violaton.<sup>831</sup>

Once provided these general principles, the Commission was confident in affirming that CoE Members States' responsibility arise if they are aware or they get involved in the arrest and secret detention of suspect terrorists. The accountability stands even if their officials acted *ultra vires* or whether the Governments did not have knowledge about activities taking place on their territories but they did not conduct an effective investigation.<sup>832</sup>

Moreover, the prohibition to transfer a person to a location where there is a risk of torture always applies and Member States are bound by it, especially if they transfer prisoners without one of the procedures set by law.

They do even have a duty to act in the event they have the suspicion that an airplane crossing the airspace transport prisoners to locations where they will suffer ill treatment.<sup>833</sup>

The contribution of the Venice Commission had a huge impact to bring some clarity on the legal framework applicable to these murky and ambiguous practices.

The independent experts provided a throughout analysis of the member states' international law and human rights obligations and highlighted which the standards developed so far from the conventions were.

Therefore, the rapporteur Dick Marty welcomed the legal opinion and affirmed that the advisory body provided a tremendous help for his inquiry on extraordinary renditions and secret detentions.<sup>834</sup>

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<sup>830</sup> *Id.* at 10.

<sup>831</sup> *Id.* at 10.

<sup>832</sup> *Id.* at 35.

<sup>833</sup> *Id.* at 37.

<sup>834</sup> *Venice Commission lays down the law on secret detentions and extraordinary rendition in Europe*, CRAIG MURRAY BLOG

In June 2006, Mr. Marty presented to the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly his first report on alleged secret detentions and unlawful inter-state transfers involving Member States.<sup>835</sup>

Contrarily to the previous reports, this one is full of details and factual descriptions. However, the rapporteur affirms that, given the complexity and the dimension of the issue, the world is still far away from knowing the details of the extraordinary renditions and the treatments inflicted to the abducted persons.<sup>836</sup> The final goal must be consist in chasing the truth.

Dick Marty uses a very powerful and loquacious metaphor to describe the existing system as for what he understood during his investigations. The system of targeting, apprehending and detaining terrorist suspects looks like a ‘spider’s web.’<sup>837</sup>

His team members had the chance to contact several ‘insiders’ and to receive very specific details. The system looks so complex that could not have been created from scratch as a response to the 9/11 terroristic attacks, but it already existed before.

However, since that tragic day, the United States have transformed the renditions programme into an instrument completely deviated from any notion of justice in order to pursue its ‘War on Terror.’<sup>838</sup> Marty confirms that the attack to the Twin Towers was a watershed moment and since then, the rules of the games have changed.<sup>839</sup>

Operations have moved their focus and have transformed in the level of dangerousness: the renditions are now meant to imprison terrorists outside ‘the reach of any justice system and keep them there.’<sup>840</sup>

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(March 24, 2006), [https://www.craigmurray.org.uk/archives/2006/03/dick\\_marty\\_welc/](https://www.craigmurray.org.uk/archives/2006/03/dick_marty_welc/).

<sup>835</sup> COUNCIL OF EUROPE COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, RAPPORTEUR DICK MARTY ALLEGED SECRET DETENTIONS AND UNLAWFUL INTER-STATE TRANSFERS INVOLVING COUNCIL OF EUROPE MEMBER STATES EXPLANATORY MEMORANDUM, AS/Jur (2006) 16 Part II, June 7, 2006.

<sup>836</sup> *Id.* at para. 16.

<sup>837</sup> *Id.* at para. 25.

<sup>838</sup> *Id.* at para. 35.

<sup>839</sup> The report refers to the testimony of General Nicolò Pollari, Director of the Italian Intelligence and Security Services, in front of the European Parliament Temporary Committee on March 6, 2003.

<sup>840</sup> *Id.* at para. 36.

As of 2006, the spider's web counted CIA 'black sites,' detention facilities around the world run by U.S. Government and various categories of aircraft landing points where detainees are picked up and dropped off.<sup>841</sup>

The report then addresses the real stories of victims as Maher Arar, El-Masri and Abu Omar to show the effects of the renditions on individuals and their families. Arar affirmed he was willing to collaborate and talk about his torture to prevent the same treatment from happening to any other human being.<sup>842</sup>

Finally, the rapporteur urged the Member States to do everything in their power to comply with their positive duty to investigate and to ensure transparency in order to avoid the inception of 'black holes.'<sup>843</sup> The need for the truth was established.

One year later, the rapporteur was able to provide more evidence to the set of allegations discussed: on June 7, 2007, a second report was released.<sup>844</sup> The assertion that a huge amount of people was being kidnapped from various locations around the world and transferred to countries where the torture is a common practice has finally been corroborated.<sup>845</sup>

The truth is hardly emerging from the obscurity after all the efforts the U.S. Government and some European ones have taken in order to obstruct the search.

Indeed, this second report does recognize that the invocation of the concept of 'state secrets' is one of the main reasons why the world is still ignorant about what is happening at the headquarters' level.

Secrecy is called upon in order not to provide explanations or to prevent the human rights violators to be held accountable. Germany and Italy are specifically mentioned and criticized for having abused of the institute.<sup>846</sup>

In particular, what is very shocking is the general trend among the national bodies entrusted with overseeing the invocation of state secrets to redefine and overturn the concept and scope of the privilege in order to shrink accountability.

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<sup>841</sup> *Id.* at para. 43.

<sup>842</sup> *Id.* at paras. 88-91.

<sup>843</sup> *Id.* at paras. 291-92.

<sup>844</sup> COUNCIL OF EUROPE, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, RAPPOREUR DICK MARTY, SECRET DETENTIONS AND ILLEGAL TRANSFERS OF DETAINEES INVOLVING COUNCIL OF EUROPE MEMBER STATES: SECOND REPORT, AS/Jur (2007) 36, June 7, 2007.

<sup>845</sup> *Id.* at para. 1.

<sup>846</sup> *Id.* at para. 5.

The rapporteur explicitly refers to the ‘dynamics of the truth’ and he has now reached the awareness that understanding the truth about human rights and national security imperatives is fundamental for both getting over the past tragedies and for avoiding them to happen again. Knowing what happened and identifying who is accountable for that is both a right and a duty.<sup>847</sup>

The doctrine of State Secrecy is provoking a ‘legal vacuum’: victims of extraordinary renditions as El-Masri are not able to hold accountable any of those who made their ordeal happen, in any State. The core of the problem is the invocation of the State Secrets Privilege, which constitutes an absolute obstacle.<sup>848</sup>

The report defines the ruling the 4<sup>th</sup> Circuit U.S. Court of Appeals in *El-Masri* case as ‘disappointing and regrettable.’ Indeed, the judicial body did acknowledge its role as a guardian on the invocation of the privilege, but it decided anyway to accord unfettered deference to the executive branch.<sup>849</sup> This reasoning cannot be reconcilable with the principles of ‘rule of law.’

The report also refers to the Italian *Abu Omar* case and it harshly affirms that Italy would preserve its relations with the United States at the detriment of everything, including the rule of law and the respect of Human Rights.

The necessity of unpleasant truths not to become public has led the Italian Government to invoke secrecy in order to shield criminal conducts and to allow officials not to respond for their responsibilities.<sup>850</sup>

Swinging its inclination after the harsh words used to address the Italian situation, Marty mentions the positive example of Canada, which owns the status of observer within the Council of Europe.

Thus, the case of Maher Arar, which did not achieve any result through the U.S. judicial system, was instead treated in a more appropriate way on the Canadian soil. Indeed, the Canadian Minister of Public Security appointed a special and separated commission of inquiry in order to investigate into the facts and to reach a conclusion.<sup>851</sup>

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<sup>847</sup> *Id.* at para. 28.

<sup>848</sup> *Id.* at para. 299.

<sup>849</sup> See *supra* El-Masri case, chapter III.

<sup>850</sup> *Id.* at 323.

<sup>851</sup> Ronald-Franch Melchers, *The Maher Arar Case: Implications For Canada -- U.S. Law Enforcement Cooperation*, 1 J. OF THE INST. OF JUS. AND INT’L STUD. 37, 39 (2006).



The independent body released 1195 pages divided in three books containing the reconstructed and detailed factual background, the analysis and the following recommendations about the events relating to Maher Arar.<sup>852</sup>

Canada found a compromise to safeguard both accountability and national security. The commissioner was a judge with previous experience and he had access to all the information, including the secret one. Indeed, the sensitive documents were examined through a specific procedure that anyway allowed both the parties to be heard.<sup>853</sup>

The inquiry's result was that Canadian officials did collaborate with U.S. secret services in transporting and detaining Maher Arar and that the latter had no connection at all to terrorism.<sup>854</sup> At least, a little of accountability was uncovered.

It is surprising that Arar, after years of detention and torture, affirmed that "Accountability is not about seeking revenge; it is about making our institutions better and a model for the rest of the world. Accountability goes to the heart of our democracy. It is a fundamental pillar that distinguishes our society from police states."<sup>855</sup> This fundamental pillar is now under threat because of the continuous abuse of the State Secrets Privilege, which allows the troublesome truths to stay unspoken.

The necessity to limit and tackle the uncontrolled use of State Secrets by Governments involved in the extraordinary renditions became evident to Dick Marty, who committed a third report on this specific matter. Indeed, in 2011 he presented a document entitled *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*.<sup>856</sup>

The aim of the report is precisely to address the abuse of state secrecy as to prevent judicial or parliamentary inquiries necessary to strengthen the rule of law.

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<sup>852</sup> DENNIS O'CONNOR, REPORT OF THE EVENTS RELATING TO MAHER ARAR (2006).

<sup>853</sup> Second Report, *supra* note 844, at para. 329.

<sup>854</sup> Mark Tushnet, *The political constitution of emergency powers: parliamentary and separation-of-powers regulation*, 3 INT. J. L. C. 275, 284 (2007).

<sup>855</sup> *Maher Arar and Lapsed Media Ethics*, THE CANADIAN JOURNALISM FOUNDATION (Jan. 29, 2009), <http://cjf-fjc.ca/j-talks/maher-arar-and-lapsed-media-ethics>.

<sup>856</sup> COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY, RAPPORTEUR DICK MARTY, ABUSE OF STATE SECRECY AND NATIONAL SECURITY: OBSTACLES TO PARLIAMENTARY AND JUDICIAL SCRUTINY OF HUMAN RIGHTS VIOLATIONS, Sept. 7, 2011, <https://info.publicintelligence.net/CoE-StateSecrecy.pdf>.

There are several secrets ‘not worthy of protection’ that have been invoked in order to shield and hide violations committed by State officials.<sup>857</sup>

The report goes through the narration of several stories as the one of Abu Omar and of the El-Masri both in Macedonia and in the United States. The Italian prosecutor Armando Spataro described to Dick Marty the tremendous difficulties that the invocation of the State Secrets Privilege and the subsequent guidelines set by the Constitutional Court provoked to the investigation and incrimination of the violators.<sup>858</sup>

The conclusion of the analysis is that several European countries seem to conform themselves to the U.S. doctrine according to which terrorism and national security are matters for the executive and thus, the judiciary and the parliamentary branches cannot have a say. The balance between the powers has now shifted in favor of the Executive. The lack of any control over the invocation of State Secrets is an evident sign of this trend. Indeed, the arbitrary reliance on the privilege is endangering the already delicate balance of the democratic states. The impunity of public officials has to come to an end.<sup>859</sup>

In particular, the oversight by a national ad hoc parliamentary committee is a must. On the matter, the report also recalls the ‘good practices’ collected by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.<sup>860</sup>

Among them, the number 6 urges the secret services to be overseen not by one institution, but by a mix of executive, parliamentary and judicial powers. A fundamental condition is that at least one of the bodies checking on the officials is independent by the executive.<sup>861</sup> Also the CoE Venice Commission adopted similar conclusions.<sup>862</sup>

Among the principles set down by Dick Marty, the first one is that there must not be areas free from any kind of control. Civil and criminal courts and

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<sup>857</sup> *Id.* at para. 5.

<sup>858</sup> *Id.* at para. 6.

<sup>859</sup> *Id.* at para. 45.

<sup>860</sup> Human Rights Council, *Compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight*, U.N. Doc. A/HRC/14/46, May 17, 2010.

<sup>861</sup> *Id.* at 6.

<sup>862</sup> Venice Commission, *Report on the Democratic Oversight of the Security Services*, CDL-AD(2007)016, June 2, 2007.

parliamentary committees should be allowed to investigate crimes and human rights violations and not being prevented just by the invocation of national security.<sup>863</sup>

On the contrary, for instance in Italy, the State Secrets Privilege can be opposed to the same Parliamentary Committee entrusted with overseeing its invocation by the Prime Minister.<sup>864</sup>

National bodies have the right and the duty not to consider breaches of the law committed by state officials as not prosecutable: abuses of human rights by the Government must not be labeled as secrets.<sup>865</sup>

Countries have to put into place the national safeguards urged by the CoE and other international bodies in order to get over a situation of dangerous impunity and abuse of state secrecy. Furthermore, due to the internationalization of the issue, stricter measures should be also taken at the international level.<sup>866</sup>

To conclude, while the reports of Dick Marty for the Parliamentary Assembly led to a mature assessment of the issue of extraordinary renditions together with the abuse of state secrecy and allowed to set down some recommendations, the European Court of Human Rights had a fundamental role in finally holding some Governments accountable for the violations at issue and for the obstacles created to effective investigations.

#### **4.7 The Role of the European Court of Human Rights**

The analysis addressed in the third chapter has showed that both in the U.S. and in Italy domestic courts have been either unable or unwilling to review the invocation of the State secrets privilege by the Executive, even in compelling cases as the extraordinary renditions are.<sup>867</sup>

In this framework of courts' fear to check on the Governments on national security issues, a prominent role can be played by supranational courts which have

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<sup>863</sup> Abuse of state secrecy and national security, *supra* note 856, at 51.

<sup>864</sup> Catanzariti, *supra* note 153, at 165

<sup>865</sup> *Id.* at 53

<sup>866</sup> Abuse of state secrecy and national security, *supra* note 856, at 57.

<sup>867</sup> See *supra* chapter II.

the mandate to address human rights violations and to hold states accountable for those violations.<sup>868</sup>

The European Court of Human Rights has accepted the challenge and has finally succeeded in recognizing the responsibility of some Governments for the human rights violations victims of extraordinary renditions have suffered.

Indeed, the Court is a specialized Human Rights body, which undertakes a complementary role and ensures the realization of multilevel protection in the States parties to the Convention.<sup>869</sup>

The enhancement of mechanisms of judicial review and human rights' claims' adjudication at the international level is highly recommended whenever violations do not receive adequate investigation and relief at the national level and national officials hide themselves from accountability.<sup>870</sup>

As a matter of fact, the recourse to the European Court of Human Rights has several benefits.

First, given that it judges outside the national system, it enjoys a great independence and there is no risk it is biased or Government-oriented as it may happen with national courts.<sup>871</sup>

Second, the ECtHR can better embrace the need to protect human rights and strike a fair balance between Human Rights dicta and national security concerns leading, for instance, to the invocation of state secrets.<sup>872</sup>

Third, the ECtHR does not encounter procedural obstacle for the admissibility of evidence. On the contrary, national courts are often prevented from accessing information due to the State Secrets Privilege.<sup>873</sup>

The court does receive information from international bodies such as the International Commission of Jurists and the UN Commissioner for Human Rights

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<sup>868</sup> Federico Fabbrini, *Extraordinary Renditions and the State Secret Privilege: Italy and the United States Compared*, 3 *IT. J. OF PUB. L.* 255, 260 (2011).

<sup>869</sup> Ingolf Pernice & Ralf Kanitz, *Fundamental Rights and Multilevel Constitutionalism In Europe*, 7 *Walter Hallstein-Institute Paper* 1, 11 (2004).

<sup>870</sup> Giorgio Gaja, *New Instruments and Institutions for Enhancing the Protection of Fundamental Rights in Europe* 781 in *THE EU AND HUMAN RIGHTS* (Philip Alston et al. eds., 1999).

<sup>871</sup> Laurence Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 *YALE L. J.* 273 (1997).

<sup>872</sup> Susanna Mancini, *The Crucifix Rage: Supra-national Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, 6 *EU. CONST. L. REV.* 6, 10 (2010).

<sup>873</sup> Fabbrini, *supra* note 868, at 17.

and thus, it carries out a comprehensive and fair assessment of the core fundamental rights.<sup>874</sup>

Fourth, and specifically concerning the State Secrets Privilege, the ECtHR has long adopted a stricter approach than national courts.

Specifically, in *Tinnelley and Sons Ltd v. UK*, the Court found that the restriction of the right to a court due to the assertion of the State secrets privilege by the Government was disproportional and thus, in violation of art. 6 ECHR.<sup>875</sup>

More recently, the ECtHR reaffirmed the necessity to balance the protection of national security with the right to access the court. Indeed, in *Devenney v. UK*, the Court held that the protection of national security is a legitimate aim, which may need limitation of the right to access a court, including not disclosing information for security purposes. Anyway, there must be a reasonable relationship of proportionality between security concerns and the impact the means employed by the authorities have on the counterparts.<sup>876</sup> The invocation of the State Secrets Privilege cannot go unfettered.

#### **i. The Right to the Truth prior to the extraordinary renditions**

In parallel to the Inter-American system, States' duty to investigate was developed by the European Court of Human Rights.

First, the Court adopted an interesting approach in the *McCann and Others v. United Kingdom* case.<sup>877</sup> The latter concerned three members of the Irish Republican Army (IRA) by the British Security Forces. The victims were suspected of planning a terroristic attack on Gibraltar.<sup>878</sup>

The European judges found that besides some shortcomings, investigations around the deaths were adequate and there was not a breach of the procedural duty to inquire arising from art. 2 (right to life) in connection to art. 1 (obligation to respect human rights).<sup>879</sup>

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<sup>874</sup> Luzius Wildhaber, *The European Court of Human Rights in Action*, 21 RITSUMEIKAN L. REV 83 (2004).

<sup>875</sup> *Tinnelley & Sons Ltd. et al. v. UK*, ECtHR, Application No. 20390/92 (1998), para. 79.

<sup>876</sup> *Devenney v. UK*, ECtHR, Application No. 24265/94 (2002), para. 26.

<sup>877</sup> *McCann & Others v. United Kingdom*, ECtHR, Application No. 18984/91 (1995).

<sup>878</sup> *Id.* at 14.

<sup>879</sup> Antkowiak, *supra* note 735, at 982.

Later in time, in *Aksoy v. Turkey*, the Court interpreted article 13 enshrining the right to an effective remedy as to include States' duty to carry out a full and proper investigations when serious allegations are at issue.<sup>880</sup>

A throughout inquiry is necessary in order to identify the perpetrators.<sup>881</sup> Recently, through the *Cyprus v. Turkey* case, the Court addressed the issue of HR violations of missing Greek Cypriots and their relatives since the 1974 Turkish Invasion of Cyprus.<sup>882</sup> In this occasion, there was a development of the duty to investigate.

Indeed, the Court held that the lack of effective investigations on the whereabouts of the disappeared people constituted a violation of art. 2 'right to life' in its procedural dimension. Indeed, the authorities failed to discover the fate of the missing people who disappeared in life-threatening circumstances.<sup>883</sup>

On the other hand, the Government was responsible for a violation of article 3 of the Convention in respect of the relatives of the Greek-Cypriot missing persons.

Indeed, due to the lack of any information about their beloved one, the families were condemned to live in a prolonged state of anxiety, which we cannot be erased by the time.<sup>884</sup>

These precedents will be influential in the ECtHR breakthrough jurisprudence that has developed since the El-Masri case on concerning extraordinary renditions and state secrets.

Indeed, the programs target suspects of terrorism, as the victims in McCann case were. In addition, extraordinary renditions are reviewed and complex form of forced disappearances. The forcibly removal of a person is now a gateway for the commission of other violations as arbitrary detention and torture allegedly in the fight against terrorism.<sup>885</sup>

Cases dismissed at the national level due to the invocation of State Secrets reached the ECtHR and the international judicial body had a chance to express its opinion on the dangerous pair extraordinary renditions- state secrets privilege.

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<sup>880</sup> *Aksoy v. Turkey*, ECtHR, Application No. 21987/93 para. 95 (December 1996).

<sup>881</sup> *Id.* at para. 98.

<sup>882</sup> *Case of Cyprus v. Turkey*, ECtHR, Application No. 25781/94 (May 2010).

<sup>883</sup> *Id.* at para. 136.

<sup>884</sup> *Id.* at para. 158.

<sup>885</sup> Gabriella Citroni, *Enforced Disappearance: Challenges To Accountability Under International Law*, 12 JOURNAL OF INT'L CRIM. L. 731, 732 (2014).

The Court will focus on secret prisons, on operations starting on the European Soil and on the hunt for the truth.<sup>886</sup>

All these premises are necessary to understand the leading role the ECtHR has carried out in addressing the extraordinary renditions. With case of *El-Masri v. the Former Yugoslav Republic of Macedonia*, the Court has been the first judicial body officially recognizing the tragic events' fact pattern and holding a Government accountable for them.<sup>887</sup>

## **ii. El-Masri v. the Former Yugoslav Republic of Macedonia**

The tragic story of El-Masri and the events around its extraordinary rendition has already been narrated above.<sup>888</sup>

In 2006, El-Masri first tried to seek damages in the U.S. federal courts, but his complaint was dismissed on the ground of the State Secrets Privilege.<sup>889</sup>

Then, he presented criminal and civil complaints in Macedonia because the latter was involved in its capture and removal to Afghanistan. Indeed, Macedonian officials stopped him at the Serbian- Macedonian border and they held him in isolation because they suspected he was connected to terrorist groups.<sup>890</sup>

He was interrogated, beaten and tortured: he was handcuffed and blindfolded; a object was forced into his anus, while his feet were tied together.

Then, he was put on a flight and transported to Afghanistan where he suffered further degrading and inhumane treatment.

The complaints in Macedonia were meaningless: El-Masri asked the Macedonian prosecutors to investigate his case, but the inquiry was discontinued and not effective.<sup>891</sup>

Therefore, El-Masri decided to refer to international tribunal and first, it submitted the case to the Inter-American Commission on Human Rights.

The commission transmitted the petition to the U.S. Government for comments. No further information were provided and the Government decided not to cooperate and to block the procedural path.<sup>892</sup>

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<sup>886</sup> Oriolo, *supra* note 738, at 77.

<sup>887</sup> Fabbrini, *supra* note 868, at 13.

<sup>888</sup> See *supra* chapter III.

<sup>889</sup> See *El-Masri v. U.S.*

<sup>890</sup> Oriolo, *supra* note 738, at 77.

<sup>891</sup> Fabbrini, *supra* note 868, at 3.

The victim turned to the European Court of Human Rights and on July 20, 2009 he presented its claim against the Former Yugoslav Republic of Macedonia (hereinafter FYROM), according to art. 34 of the Convention.

He complained that the agents of the respondent State subjected him to a secret detention operation, interrogated and ill-treated him and did not allow him to know his charges or to meet a lawyer. Moreover, they brought him to the Skopje airport and they delivered him to CIA agents.

The case was first allocated to the first section, which decided to relinquish jurisdiction in favour of the Grand Chamber of the ECtHR. The latter addressed its decision on December 13, 2012.<sup>893</sup>

The position of the Government of the FYROM was that the Macedonian border police have some suspicions about El-Masri's passport and decided to detain him. They did interrogate him and when they established there was not Interpol warrant against him, they released the detainee. The Minister of Interior affirmed they did not have any information about what happened to him after being released.<sup>894</sup>

Contrarily, the rapporteur of the CoE Committee on Legal Affairs and Human Rights, Dick Marty, received confidential information demonstrating that the full description of El-Masri was transmitted to the CIA via the bureau in Skopje.<sup>895</sup>

The Court relied on the Dick Marty's reports and also on the European Parliament report, carried out by Claudio Fava.<sup>896</sup> The latter investigated on the alleged existence of CIA prisons in Europe.

The rapporteur Claudio Fava identified at least 1,243 flights that were controlled by CIA and flew in the European airspace.<sup>897</sup> Moreover, the report highlighted that many of the EU Member States and the Council of Europe parties

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<sup>892</sup> *El-Masri v. United States*, Inter-Am.Comm. H.R., Petition No. 419-08 (Apr. 9, 2008).

<sup>893</sup> *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, ECtHR, Application No. 39630/09 (2012).

<sup>894</sup> *Id.* at para. 37.

<sup>895</sup> Rapporteur Dick Marty, *supra* note 844, at para. 116.

<sup>896</sup> *El-Masri*, *supra* note 893, at 47.

<sup>897</sup> *CIA activities in Europe: European Parliament adopts final report, requests Council to press Member States for more information*, STATE WATCH, Feb. 14, 2007, <https://www.statewatch.org/news/2007/feb/ep-cia-report-prel.pdf>.



did not cooperate in the research of the truth and did not give explanations. The FYROM was listed among the countries to be condemned.<sup>898</sup>

Furthermore, the European Parliament adopted a Resolution on the issue and it deplored the reluctance of the Macedonian authorities to cooperate with the Rapporteur and confirm that El-Masri had been held in Macedonia before being rendered to the CIA.<sup>899</sup>

Indeed, the Department for Control and Professional Standards within the Ministry of the Interior allegedly inquired El-Masri's claims.

However, the applicant was never asked to produce any evidence neither was ever informed of any development in the investigations.<sup>900</sup>

Later in time, he lodged a criminal complaint with the Skopje public prosecutor's office against unknown public officials responsible for his detention and abduction. The prosecutor requested the Ministry of Interior to collaborate, but the latter just confirmed previous findings.<sup>901</sup> The Criminal Complaint was deemed as unsubstantiated.

As the last national venue, Mr. Medarski, on behalf of El-Masri, made a request for civil damages against the State and the Ministry of the Interior. He sought a relief for the non-pecuniary damage he suffered due to the torture and the fear to be killed. In addition, he experienced mental suffering because he knew his family was looking for him.

The Government affirmed that there were already almost 20 cases before the court of first instance: the case is still pending.<sup>902</sup>

It is noteworthy that the ECtHR rejected the Government's objection that the applicant did not comply with the six-month rule to present a complaint within article 35 of the Covenant. The Court affirmed that in certain situations the six months start to run from the day a person becomes aware of circumstances that rendered the domestic remedies ineffective. Thus, El-Masri did respect the time limit.<sup>903</sup>

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<sup>898</sup> *Id.*

<sup>899</sup> *Id.*

<sup>900</sup> *El-Masri, supra* note 893, at 64.

<sup>901</sup> *Id.* at 69.

<sup>902</sup> *Id.* at 72-73.

<sup>903</sup> *El-Masri, supra* note 893, at 137.

The Court found itself to behave as a court of first instance as none judicial body had never reconstructed the facts before and it held that there was a prima facie evidence in favour of the applicant's version of the story and thus, the burden of proof was to be bared by the Government.<sup>904</sup>

The applicant alleged a violation of article 3 of the Convention, on the prohibition to torture or to inhumane or degrading treatment or punishment, when he was detained in the hotel and because FYROM violated the principle of *non-refoulement* by means of rendering him to the CIA at the airport.<sup>905</sup>

Also Amnesty International and the International Commission of Jurists affirmed that the case at issue concerned the U.S. led secret detentions and rendition system. Moreover, they affirmed that victims of HR violations do have a right to an effective, which is enshrined, inter alia, in article 3 read in connection with article 13 about the effective remedies.<sup>906</sup>

The Court reiterate its dictum that when an individual alleges that he suffered a HR violation at the hands of public officials, article 1 of the Convention obliges the State involved to carry out an effective investigation and to identify and punish the violators. The inquiry must be serious and reasonable.<sup>907</sup>

Applying these principles to the case at issue, the Court found that the summary investigation in the case at issue were not effective and made the victim feel he was in a 'procedural limb.'<sup>908</sup>

Therefore, article 3 had been violated both on the procedural ground, due to the lack of investigations, and on the substantive ground, as the victim was under the control of Macedonian authorities when he was mistreated both in the hotel and at the airport.<sup>909</sup>

Moreover, there is likelihood to believe that the Macedonia authorities knew which the destination of the flight was when they delivered El-Masri to the CIA.<sup>910</sup>

Moving to article 5 of Convention, concerning the right to liberty and security, the applicant alleged again a violation of both the substantive and the procedural

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<sup>904</sup> *Id.* at 165.

<sup>905</sup> European Convention, *supra* note 93, at art. 3.

<sup>906</sup> *El-Masri*, *supra* note 893, at 179.

<sup>907</sup> *Id.* at 183.

<sup>908</sup> *Id.* at 193.

<sup>909</sup> *Id.* at 210.

<sup>910</sup> *Id.* at 218.

scope of the provision.<sup>911</sup> Indeed, the respondent State did not conduct an effective investigation on the means and the circumstances of the detention.

The Court found the detention in the hotel by the Macedonian authorities to be in violation of the safeguards enshrined in article 5 and also the fact they handed the detainee over the CIA custody, when there was a high suspicion of arbitrary interference, was a breach of the same provision.<sup>912</sup>

El-Masri also complained a violation of his right to respect for his private life, enshrined in article 8 of the Convention.

The Court affirmed that the provision has to be interpreted as preventing a person to be treated in a way that provokes a loss of dignity. Thus, it found a violation of article 8.<sup>913</sup>

Finally, it is fundamental to consider the alleged violation of article 13 of the Convention, prescribing for an effective remedy in case of violation.<sup>914</sup>

The Court held that, when there is a claim that an individual has been tortured by state agents, the notion of effective remedy also comprises the right to effective investigation leading to the identification of those responsible.<sup>915</sup> The obligations under article 13 expand those already addressed under article 3 and 5: the Former Yugoslav Republic of Macedonia failed to fulfil them.<sup>916</sup>

It is noteworthy that the Court not only recognized a procedural duty of investigation to be embedded in articles 5, but it also found a legal basis for it in article 13.

Through the reference to the duty to investigate, violation of the Right to the Truth has been established. In particular, when the applicant explicitly complained an article 10 violation of his right to be informed of the truth, the Court rejected the request affirming that issue has already been recognized in the precedents complaints.<sup>917</sup>

The power of the El-Masri decision is unquestionable.

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<sup>911</sup> *Id.* at 224.

<sup>912</sup> *Id.* at 238.

<sup>913</sup> *Id.* at 248.

<sup>914</sup> European Convention, *supra* note 93, at art. 13.

<sup>915</sup> *El-Masri*, *supra* note 893, at 255.

<sup>916</sup> *Id.* at 263.

<sup>917</sup> *Id.* at 264.

The decision of the ECtHR finally stopped the trend of secrecy and impunity that characterized the extraordinary renditions' cases at the national level. The victims' human rights were finally vindicated.<sup>918</sup>

In addition, the Court cautiously endorsed the concept of 'Right to the Truth.' This includes the right for the victim and the general public to get aware of the abuses committed by the Government when national security is at stake.

Indeed, the ECtHR addressed the impact of inadequate investigations on the Right to the Truth. Not only the applicant and his family, but the general public had the right to know what is happening. The extraordinary renditions are attracting worldwide attention.<sup>919</sup>

Even if the Macedonian authorities did not explicitly rely on the concept of 'State Secrets,' the Court made reference to it. Indeed, it reminded the El-Masri's episode before the U.S. courts and it affirmed that the very aim of the invocation of the privilege was to obstruct the truth. Moreover, the Marty report found that the Macedonian authorities endorsed the same approach as the Americans when they decided not to carry out effective investigations.<sup>920</sup>

Adequate responses from the involved Governments in case of gross abuses are essential to keep people confident in the adherence to the rule of law.<sup>921</sup> Thus, the knowledge of the truth as both a remedial and preventive role: remedial because victims' part of their relief is finally knowing who did violate their human rights and why; preventive because it is fundamental to strengthen the democratic State.<sup>922</sup>

The decision in *El-Masri* was a breath of fresh air after long years of secrets, lies and 'black holes.' Also the Council of Europe's Commissioner for Human Rights affirmed that the ECtHR 'shook this secret world.'<sup>923</sup>

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<sup>918</sup> Fabbrini, *supra* note 868, at 2.

<sup>919</sup> El-Masri, *supra* note 893, at 191.

<sup>920</sup> *Id.*

<sup>921</sup> Fabbrini, *supra* note 868, at 18.

<sup>922</sup> Oriolo, *supra* note 738, at 78.

<sup>923</sup> Nils Muiznieks, *Time for accountability in CIA torture case*, Council of Europe (Sept. 11, 2013), <https://www.coe.int/en/web/commissioner/-/time-for-accountability-in-cia-torture-cas-1>.

### iii. A confirmation of the ‘Right to the Truth’ approach

As a confirmation of the pursued innovation, the approach adopted by the Court in *El-Masri* was later confirmed in the *Al-Nashiri v. Poland* case,<sup>924</sup> examined simultaneously with the *Abu Zubaydah v. Poland* case.<sup>925</sup>

In both the cases, the Court found the Polish Government responsible for cooperating with CIA in transporting and detaining the two applicants suspected of terrorist activities.<sup>926</sup>

Already in 2005, the Human Rights Watch mentioned Poland as one of the central European Countries involved in the extraordinary renditions.<sup>927</sup>

Indeed the Polish military base in Stare Kiejkuty, was deemed to be part of the CIA worldwide network. Many terrorist suspects were interrogated and tortured there, kept incommunicado and then transferred to the Guantanamo, as in the case of Al-Nashiri and Abu Zubaydah.<sup>928</sup>

Dick Marty’s report on state secrecy referred to the struggles Al-Nashiri’s lawyers had go through. Due to the alleged state secrecy issues, everything their client was saying was classified. For instance, his military defense counsel admitted he was not even able to correctly spell the surname of Al-Nashiri because all the answers were top secret.<sup>929</sup>

The European Court of Human Rights reached the same outcome as in *El-Masri*. Indeed, in *Al-Nashiri* it held that there had been of the procedural scope of article 3 of the Convention due to respondent State inability to pursue an effective and throughout investigation on the applicant’s complaints of gross abuses as torture, ill-treatment and undisclosed detention.<sup>930</sup>

Moreover, it found also a violations of the duties embedded in article 13, which include the obligation to carry out effective investigations.<sup>931</sup>

Also the decision in *Abu Zubadaydah* presented the same outcome.<sup>932</sup>

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<sup>924</sup> *Case Of Al Nashiri V. Poland*, ECtHR, Application No. 28761/11 [judgement] [2015].

<sup>925</sup> *Case of Abu Zubaydah v. Poland*, ECtHR, Application No. 7511/13 [judgement] [2014].

<sup>926</sup> Oriolo, *supra* note 738, at 66.

<sup>927</sup> Adam Bodnar & Irmina Pacho, *Domestic Investigation into Participation of Polish Officials in the CIA Extraordinary Rendition Program and the State Responsibility under the European Convention on Human Rights*, POLISH Y.B. INT’L L. 233, 235 (2011).

<sup>928</sup> *Id.*

<sup>929</sup> Abuse of state secrecy and national security, *supra* note 856, at para.13.

<sup>930</sup> *Al-Nashiri*, *supra* note 924, at para. 599.

<sup>931</sup> *Id.* at para. 551.

To conclude, the ECtHR already have had previous experience in cases of extraordinary renditions and of state secrets' concerns once the Abu Omar's application was filed.

**iv. Nasr and Ghali v. Italy (The Abu Omar Case)**

Abu Omar and his wife, missing any kind of relief at the national level, decided to refer to the European Court of Justice and to bring a case against Italy.<sup>933</sup>

The fourth section of the Court unanimously condemned Italy on February 23, 2016.

The Court reconstructed the procedural hurdles Abu Omar and his wife went through in national courts: it mentioned both the criminal proceedings and the two decisions of the Constitutional Court concerning the State Secrets Privilege.<sup>934</sup>

The outcome of the procedural path was the lack of any compensation for the victims: the incriminated U.S. officials have been extradited and have never provided any relief to the applicants.<sup>935</sup>

The Court then entered into the merits and rejected the objection of the Government under article 35 of the Convention. Indeed, Italy alleged that the application to the ECtHR was presented while the Italian criminal proceedings were still pending and there had not been the exhaustion of the local remedies.<sup>936</sup>

The Court recognized that when the applicant presented their claims the criminal proceedings had already been pending for six years and an half and the Constitutional Court had already recognized the legitimacy of the State Secrets Privilege. Therefore, the promptness was acceptable.<sup>937</sup>

Shifting to the substantial violations, Abu Omar and his wife alleged the former had been victim of an extraordinary rendition. The Italian Government, although it recognized that the Imam had been kidnapped in Milan, moved to Aviano and then sent to Egypt, it denied any Italian officials' involvement.<sup>938</sup>

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<sup>932</sup> *Abu Zubaydah*, *supra* note 926.

<sup>933</sup> *Nasr and Ghali v. Italy*, ECtHR, Application No. 44883/09 [judgment] [2016].

<sup>934</sup> *Id.* at 128-40.

<sup>935</sup> *Id.* at 144.

<sup>936</sup> *Id.* at 195.

<sup>937</sup> *Id.* at 201.

<sup>938</sup> *Id.* at 218.

The Court observed that, contrarily to the cases of El-Masri and Al-Nashiri, national courts have recaptured the events of the Abu Omar abduction. The Italian Government never contested them. The only issue contested is whether Italian Officials knew Abu Omar was the target of an extraordinary rendition mission.<sup>939</sup>

According to all the information gathered, the ECtHR affirmed that the Italian authorities should have known the nature of the operations.

The Court moved to address the alleged violation of article 3 of the Convention, in both its substantial and procedural scope.

It is noteworthy that the judicial body distinguished this case from Al-Nashiri and El-Masri, affirming that the Italian national courts did carry out a proper investigation and indeed, both Italians and U.S. officials were initially condemned.<sup>940</sup>

However, the obstacle to the truth in the case at issue was not the lack of effective investigations by the Italian prosecutors but the invocation of the State Secrets privilege by the Government. This consisted in a 'black curtain' on the truth, as the Court of Cassation described it.<sup>941</sup>

The ECtHR even affirmed that the application of the privilege on information that were already in public domain had no other aim, but to hide the truth and to avoid the incrimination of Italian officers.<sup>942</sup>

Therefore, due to the abuse of the State Secrets Privilege following investigation that were instead adequate and effective, the Italian Government did violate article 3 of the Convention in its procedural aspect.

Moreover, the Italian authorities also violated the substantial provisions of article 3 because they allowed the U.S. officials to kidnap Abu Omar on the Italian soil, even if they knew this was part of an extraordinary rendition and that the victim was running a high risk to be tortured.<sup>943</sup>

The subsequent analysis and holding of the ECtHR resembles the one set in El-Masri case. Indeed, the Court also found violations of article 5, 8 and 13.

The Court does not refer explicitly again to the abuse of the State Secrets Privilege, but it does implicitly. Indeed, it affirmed that the Italian national

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<sup>939</sup> *Id.* at 228.

<sup>940</sup> *Id.* at 268.

<sup>941</sup> See *supra* chapter II.

<sup>942</sup> *Nasr and Ghali v. Italy*, *supra* note 933, at 268.

<sup>943</sup> *Id.* at 291.

authorities did recognize the illegality and arbitrariness of Abu Omar's detention.<sup>944</sup> The only reasons why any investigation or incrimination went through was just the invocation of the secrecy.

In conclusion, given that both Abu Omar and his wife experienced a moral damage due to the impossibility to entail any judicial venue in Italy after the invocation of the State Secrets Privilege, the ECtHR arranged a monetary compensation for both of them.

From a general perspective's analysis, the Court put a large emphasis on the issue of accountability. Indeed, consistently with the previous case law it established Council of Europe's Member States could be responsible for violations carried out by foreign countries.<sup>945</sup>

In particular, the Italian officials knew that Abu Omar was the target of an extraordinary rendition mission and they should have done anything in their power to prevent a person under their jurisdiction to experience it. On the contrary, Italy did collaborate with the CIA and other U.S. officials.

In terms of accountability, it does not matter who physically inflicts the torture: the negligence and the acquiescence of Italy make the latter responsible also for the ill treatment suffered in Egypt.<sup>946</sup>

Moreover and surprisingly, the Court also highlighted the use and abuse of State Secrecy as a tool to avoid national accountability and impunity. I

Indeed, the European judicial body is finally facing a country that has invoked the privilege in an extraordinary rendition case and it does not miss the chance to oppose such a practice.

While in *El-Masri's* case, the Court did criticise the U.S. administration's recourse to secrecy, it was anyway judging Macedonia at the end of the day.<sup>947</sup>

Here, the crucial point of the reasoning is not only that the State Secrets Privilege must be an exception and not a rule, but also that its invocation just in order

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<sup>944</sup> *Id.* at 301.

<sup>945</sup> Arianna Vidaschi, *State Secrets Privilege versus Human Rights: lessons from the European Court of Human Rights ruling on the Abu Omar Case*, 13 E.C.L. 166, 176 (2017).

<sup>946</sup> *Id.*

<sup>947</sup> *See supra El-Masri case.*



to grant impunity to perpetrators of gross human rights violations is unlawful and not admissible at all.<sup>948</sup>

Finally, it is noteworthy that the State's duty and the victims' right to effective investigation, already crystallized in *El-Masri* and in the Polish cases, it is here reinforced with a new stamina.

Indeed, the Court adopts a pragmatic approach: throughout investigations are not enough if at the end the perpetrators of the violations do escape accountability by means of legal 'ways out' as the State Secrets privilege is.

Every time the respondent State has the tools to pursue the truth, it must achieve it. Italy was therefore responsible for failing of making the truth arise.

Nevertheless, the *Abu Omar* decision, as the *El-Masri* one, presents several limits to the adjudication of the truth. Indeed, the European Court of Human Rights was not able to hold the U.S. officials accountable, who are the real 'mastermind' of the all plans.<sup>949</sup> Therefore these decisions left several questions on accountability unanswered.

Also the New York Times defined the decision in *El-Masri* as "a powerful condemnation of improper C.I.A. tactics and of the abject failure of any American court to provide redress for Mr. Masri or the other victims of Washington's discredited policy of secret detention and extraordinary rendition."<sup>950</sup>

There were hopes in the international community for the United States to reach to these very strong judgments as to make clarity on the situation and hold the responsible accountable.

This did not happen and, contrarily to the CoE Member States, the United States does not feel the pressure of the Inter-American Court of Human Rights.

The recent judgments of the European Court of Human Rights have demonstrated that a multi-level framework of human rights protection is the way to avoid impunity in all those cases where Governments are unwilling to incriminate the violators at the national level. However, the Inter-American system looks very different from the European Court of Human Rights and thus, it has not been able so far to incriminate CIA officials and the United States.

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<sup>948</sup> Vidaschi, *supra* note 945, at 177.

<sup>949</sup> Fabbrini, *supra* note 868, at 21.

<sup>950</sup> James A. Goldston, *Rendition Condemned*, NY TIMES, Dec. 12, 2012.

## 4.8 Comparative Insights from the European and the Inter-American Courts of Human Rights

As addressed above, El-Masri did try to lodge an application before the Inter-American Commission for the violations committed by U.S. officials.<sup>951</sup>

The United States did not collaborate and the case was dismissed.

The Inter-American system of Human Rights is peculiar. As of today, it is made of two main organ: the Commission and the Court.<sup>952</sup>

The Commission was created by the Organization of American State (OAS) in 1959, after the OAS endorsed the non-binding American Declaration of the Rights and Duties of Man.<sup>953</sup>

The aim of the Commission is to examine communications that report violations of the declaration by members of the organization; to ask member states' information and to release reports with its observations.<sup>954</sup>

The Inter-American Commission lacks the capacity to decide on individual applications and its work depends on the willingness of the respondent State to cooperate.

Later, in 1969, the OAS adopted the American Convention (also known as Pact of San José). The new instrument created legal binding obligations for member states to respect human rights and it established the Inter-American Court of Human Rights.<sup>955</sup>

In this new light, the Commission assumed the role to examine violation of the Convention by state parties to it. In addition, Article 61 of the Convention provides that the Court can receive cases either by the Commission or by a State against which the commission has already decided.<sup>956</sup>

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<sup>951</sup> *El-Masri v. United States*, IAComHR, Petition No. 419-08 (Apr. 9, 2008).

<sup>952</sup> Ricardo Mauricio Freire Soares, *Il Sistema Inter-Americano di protezione dei diritti umani* 3, democrazia e sicurezza, <http://www.democraziaesicurezza.it/Note/Il-sistema-inter-americano-di-protezione-dei-diritti-umani>.

<sup>953</sup> LOUIS HENKIN ET AL., *HUMAN RIGHTS* 568. (2nd ed., 2009)

<sup>954</sup> *Id.*

<sup>955</sup> American Convention, *supra* note 705.

<sup>956</sup> *Id.* at art. 61.

The jurisdiction of the Commission is not automatic, but it must be accepted through the ratification of the Convention or through a separate declaration, which can also be limited to a specific case.<sup>957</sup>

Also the mandate of the American Court is limited in its scope because States have to accept its jurisdiction through the ratification of the convention or through reciprocal agreements.<sup>958</sup>

The position of the United States within the Inter-American system is particular. On one hand, it has has a leading role in the drafting of both the Declaration and the Convention. It also provides financial support to the organs of the system.<sup>959</sup> The U.S. has signed the American Convention on Human Rights, also known as the Pact of San José, but they have never ratified it.<sup>960</sup> The failure to ratify it means that the State cannot be subject to individual petitions turning into a binding judgement by the Court.<sup>961</sup> The U.S. has never recognized the binding jurisdiction of these organs.

On one hand, the Inter-American Commission stands just as an international forum in which a State can be subject to public scrutiny.<sup>962</sup> No judicial decision with binding effect can be taken by the Commission. The United States recognizes the Commission's authority to review individual complaints, but it rejects the view that the Declaration has evolved from a soft law instrument to hard law.<sup>963</sup>

On the other hand, the Court can just review the U.S. practices, but it can never direct a judgment to the State.

On the contrary, the European Court of Human Rights is a *court of law*.<sup>964</sup> Since the adoption of the Protocol No. 11, the jurisdiction of the ECtHR is

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<sup>957</sup> ANGELA DEL VECCHIO, I TRIBUNALI INTERNAZIONALI TRA GLOBALIZZAZIONE E LOCALISMI 177 (II ed., Cacucci eds. 2015).

<sup>958</sup> *Id.*

<sup>959</sup> Richard J. Wilson, The United States' Position on the Death Penalty in the Inter-American Human Rights System, 42 SANTA CLARA L. REV. 1159, 1166 (2002).

<sup>960</sup> *Inter-American Human Rights System*, INTERNATIONAL JUSTICE RESOURCE CENTER, <http://www.ijrcenter.org/regional/inter-american-system/>.

<sup>961</sup> DOUGLASS CASSEL, THE INTER-AMERICAN HUMAN RIGHTS LAW, SOFT AND HARD, IN COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 393 ( Dinah Shelton ed., 2000).

<sup>962</sup> Fabbrini, *supra* note 868.

<sup>963</sup> HENKIN, *supra* note 953, at 618.

<sup>964</sup> GREER & WILDHABER, REVISITING THE DEBATE ABOUT CONSTITUTIONALISING HUMAN RIGHTS LAW (2000).

compulsory. Therefore, individual applicants, who satisfy the procedural requirements, can refer to the Court.<sup>965</sup>

Respondent States can decide not to participate in the proceedings, but the ruling of the Court is anyway binding and this is a huge difference from the Inter-American System of Human Rights.<sup>966</sup>

The different destiny of the application lodged before the Inter-American Commission and before the ECtHR shows the huge distance between the two international systems.

The flaws of the Inter-American System leads to the impossibility for either the Commission or the Court to impose the respect of the right to the truth to the U.S. or to avoid a abuse of the State Secrets Privilege by U.S. officials.

The Inter-American Court has developed flourish jurisprudence on the 'Right to the Truth' in case of forced disappearances<sup>967</sup> Its rulings have been the very starting point for the development of this right and for the understanding of its characteristics. Furthermore, as addressed above, it has also expressly ruled against the abuse of the State Secrets Privilege in the *Case of Myrna Mack Chang v. Guatemala* and it has anticipated the foreseeable conflict between state secrets and human rights.<sup>968</sup> Also the Commission has stood up in favor of the right to the truth.

However, the limited jurisdiction of the Court and the specific role of the Commission makes it really hard for the system to impose the respect of the right to the truth to the United States and to rule against the U.S. abuse of the State Secrets Privilege.

Nevertheless, the Inter-American System lacks the impetus and the strength of the European one in respect of U.S. officials and the accountability of latter for the extraordinary renditions programs is still far to be pursued. The autonomy of right to the Truth and its use against the abuse of the concept of State Secrets is developing and affirming itself. Yet, it will be partial as long as it will not be accepted worldwide.

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<sup>965</sup> Protocol 11 ECHR.

<sup>966</sup> DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (3d edn., 2015).

<sup>967</sup> *Velásquez Rodríguez*, supra note 756.

<sup>968</sup> *Case of Myrna Mack Chang v. Guatemala*, supra note 768.

The International community will struggle to undermine the recourse to secrecy hiding the abuses of human rights in the extraordinary renditions programs to the extent that the ‘masterminds’ of the programs are not held accountable.

## FINAL REMARKS

International bodies and courts become especially fundamental when national systems have come to a standstill. The reshape and abuse of the concept of State Secrecy in the context of the ‘War on Terror’ and of the ‘Extraordinary Renditions’ provoked one of those impasse situations where the intervention of an international entity has been the key.

A multilevel architecture for the protection of fundamental rights such as the European one has several advantages. Among them, it can step in when national courts have stepped out due to national security concerns.<sup>969</sup>

The main role of courts in liberal democracies is to control and to ensure the respect of fundamental liberties and rights. The degree to which they are able to do it in time of emergencies affects the degree of respect of those rights and principles.<sup>970</sup>

Once national judges refrain from scrutinizing the invocation of the State Secrets Privilege and do allow the Executive to rely on it without any kind of check, a well-established international framework is triggered and do intervene.

Indeed, the European Court of Human Rights has faced the national judiciary branches’ reluctance to exercise their role as guardians also when national security is invoked and it has finally held Governments accountable for the extraordinary renditions’ of terrorist suspects.

The strength and revolution of the ECtHR’s does not limit itself to the fact that the Court condemned European Countries for the torture, ill treatment, arbitrary detention and interferences with the private life of the CIA runned extraordinary renditions programs. Besides that and even more noteworthy is the adoption and the strengthening of the concept of ‘Right to the Truth.’

The respondent States not only violated the substantive provisions of the Covenant, but also its procedural obligations requesting effective and adequate investigations in the event of gross abuses of human rights.

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<sup>969</sup> Fabbrini, *supra* note 868, at 302.

<sup>970</sup> Federico Fabbrini, *The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice*, *YEARBOOK OF EUROPEAN LAW* 664, 667 (2010).

The duty to investigate becomes the main focus in the ECtHR's reasoning: the Court refers also to international bodies' reports aimed at pursuing the truth as the Council of Europe Parliamentary Commission's reports and the recommendations of the United Nations system and non-Governmental organizations.

This leads to the full recognition of the 'Right to the Truth' and to the achievement of its autonomy.

As a peak, the 2016 *Abu Omar* decision addresses the abuse of the State Secrets Privilege in the context of the 'War on Terror' and it has the courage to affirm that invoking the secrecy to shield information that are already in the public domain cannot be legitimate.

The balance of interests at issue when secrecy is invoked seems to be forgotten by the national courts that always sides with the national security. On the contrary, the European Court rules that striking a fair balance between compelling interests is always a priority for the judicial branches.

In particular, the right for the victims and for the other people affected by the harm to know the specifics of the events and the subsequent duty of the State to investigate and to achieve the Truth without setting obstacles stands against the national security's request for secrecy.

The aim of the State Secrets Privilege may consist in preventing State officials' accountability: indeed, on one hand, gross violations of human rights are very often committed by public authorities and, on other hand, the State Secrets Privilege covers documents and information accessible only by the same authorities. Therefore, the risk for the privilege to be a tool to avoid impunity is high.<sup>971</sup>

Also the Inter-American Court of Human Rights has fought for the Right to the Truth and has opposed the use of the State Secrets Privilege as a perpetuation of impunity.<sup>972</sup>

At the international level, the principle that international human rights law prevents Governments from invoking the State Secrets Privilege for the most inhumane violations of human rights which infringes human dignity.<sup>973</sup>

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<sup>971</sup> Tullio Scovazzi, *Considerazioni in Tema di Segreto di Stato e Gravi Violazioni dei Diritti Umani* 891 in LIBER FAUSTO POCAR (Gabriella Venturini & Stefania Baratti eds, Giuffrè ed., 2014).

<sup>972</sup> *Myrna Mack Chang c. Guatemala*, para. 181.

<sup>973</sup> Scovazzi, *supra* note 971, at 893.

However, the configuration and the characteristics of the Inter-American system do not succeed in compelling the United States not to use the concept of State Secrets just to avoid officials' accountability and to hinder the search for the truth. The 'masterminds' of the 'extraordinary renditions' and of the abuse of the State Secrets Privilege still remain unpunished.

Shifting to the national level, the analysis of both the Italian and the U.S. legal systems has revealed several flaws in the existing bodies entrusted with the control of the invocation of the State Secrets Privilege.

The U.S. federal courts are totally subject to the will of the Government and they do overturn their own precedents in order to please the Government requests.

Also the Italian Constitutional Court has adopted a deferential attitude and has revolutionized its precedent dicta and minimized its role in order to legitimize the Executive branch's invocation of secrecy in the *Abu Omar* events.

Moreover, the model of a parliamentary oversight independent body, as the COPASIR adopted in the Italian legal framework is, has proved not to work. Indeed, the latter still appear not to be completely independent from the Government and it is prevented from accessing certain information. The COPASIR still has a very limited role.

So far, the only national model, which has ensured a relief to victims of the extraordinary renditions' programs, is the Canadian Commission for Maher Arar. This inquiry body, chaired by Justice O'Connor, was runned by the principle of 'open justice': public scrutiny is fundamental to achieve accountability towards the judiciary and towards the general public, which has an interest in ensuring that the system works in a non-arbitrary way.<sup>974</sup>

To conclude, the national and international consequences of the Governmental abuse of the State Secrets Privilege in the context of the War on Terror are a brightline defense of the international human rights law system.

Indeed, some oppose the international human rights law system defining the latter as a not effective and not necessary model.<sup>975</sup>

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<sup>974</sup> Richard Dearden & Wendy Wagner, *The New Threat to Access to Information: National Security Allegations*, 1 J. PARLIAMENTARY & POL. L 457, 460 (2008).

<sup>975</sup> PAOLO DE STEFANI, IL DIRITTO INTERNAZIONALE DEI DIRITTI UMANI 3 (Antonio Milani ed., 1994).



On the contrary, international human rights law can arrive there where national systems are scared to act and it can hold national Governments accountable for violations that national courts would not recognize.

To conclude, several steps still need to be taken for the abuse of the State Secrets privilege to be downsized, for the lack of accountability at the national level to be filled and for the Right to the Truth to be strengthened.

International courts and bodies must keep on advocating for the Truth as a Right; national systems must go through a strong internal reform in order to comply with the international law dictum and the Rule of Law principles.

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