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State Secrets and Human Rights: Pre and Post-September 11

Anna Chiara Amato

Abstact

This paper is aimed at addressing the abuse of the State Secrets Privilege in the post- September 11 world. When emergency calls and fear advances, governments tend to resort to the label of "State Secrets" to avoid imputability for their actions and choices which are often arguable. Going through the recent Italian Abu Omar case and the American EL-Masri case, this paper will demostrate that an excessive overuse of the old institute of State Secrets and its upturning to pursue governmental interests has led to gross abuses of democrary, rules of law and fundamental human rights. When national States, terrified by international terrorism attacks, are unable and unwilling to respect the rights of the people while struggling to ensure security and control, international law steps in and fills the tremendous gaps left open by national law and jurisprudence. Specifically, to face governments abusing of the concept of State Secrets Privilege and resorting to it as a shield against the truth, international courts and UN-bodies have resorted to the concept of Right to the Truth and has strengthened it in order to break the fence down the and hold governments accountable for their own actions.

1. The need for Secrecy and the State Secret Privilege

Secrecy is a powerful instrument and it 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.[1] 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.[2]

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.[3] In parallel, the secret label is overcoming disclosure.[4]

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.[5]

The Bush and the Obama administrations have invoked the State secrets privilege to stop judicial review on the controversial extraordinary renditions programs.[6]

This has been the central legal doctrine applied by the executive to keep away the judges in national security cases.[7]

The state secrets privilege is an evidentiary privilege that can be granted to governments. The latters, 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.[8] This instrument has been part of several judicial systems, in particular Italian and American ones, since early times, in the pre September 11 era.[9]

However, the assertion of the need for secrecy has increased sharply after 9/11 in the light of the ongoing terrorism's threat.[10] 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.[11] 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.[12] 9/11 cases are ambiguous and "so infused with state secrets that the risk of disclosing is both apparent and inevitable."[13]

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.[14] 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.[15] The United States, either as original party or 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.[16]

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.[17]

However, U.S. courts have self-restrained themselves from deciding in cases involving national security issues, leaving the room to the executive.[18]

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".[19] 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.[20]

Throughout this paper, it will be shown 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.

2. The State Secrets Privilege in the Post-September 11 World

The State Secrets Privilege was born as instrument to protect the very existence of the State, its survival.[21]

It consists of a bar for the judicial authority to get aware of certain evidence during proceedings for the purpose of achieving higher interests.[22]

The institute could match with western contemporary democracies as long at 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.[23]

Since the terrorist attacks of September 11, 2001, the use of the State secrets privilege has expanded dramatically.[24]

Data and statistics show that the increase is undeniable.[25] 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.[26]

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.[27]

In particular, in the light of the several challenges to ambiguous programs as the governments' warrantless surveillance or the extraordinary renditions, the label "state secret" becomes a very powerful tool for the government to avoid lawsuits on its behest.[28]

Second, Courts have accepted and relied on the assertion of the privilege by the Executive without carrying out a meaningful review.[29]

In Italy, the Constitutional Court has recently expanded the meaning of State Secret arguing that a broader concept falls within the traditional definition.[30]

In the United States courts overturn the dicta of famous precedents in order to legitimize the recent use of secrets.[31]

A successful and unfettered invocation of the privilege leads to some flaws experienced by the litigants facing the government.

In particular, it may turns into the dismissal of the entire case and thus, it allows the government to escape troublesome litigation.[32] The consequences consist in lack of

accountability and violations of fundamental rights and values at the alleged advantage of national security.[33]Therefore, State Secrets have been employed as a 'litigation tactic' to thwart judicial review, criticism and public debate around the covered information.[34]

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.[35]

State secrets and judicial deference are strongly intertwined and together they do contribute to the collapse of the constitutional order.[36]

Indeed, executive officials who may have committed unlawful acts and violated constitutionally granted rights and liberties do avoid judicial accountability.[37] 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.[38]

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.[39]

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.[40]

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.[41]

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.[42]

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.[43]

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."[44]

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.

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.[45]

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.[46]

An institute of the legal order can become an enemy of the fundamental pillars of order itself. It happens when the institute gets abused.[47]

2.1 The United States: The *El-Masri* Case

Khaled El-Masri is a German citizen of Lebanese descent.[48] He was originally from Kuwait, but rose in Lebanon. He then moved to Germany and gained the citizenship in 1995.[49]

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.[50] 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.[51] 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.[52]

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. The United States moved to invoke the State secrets privilege.[53] The district court found the privilege to be validly asserted.[54]

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.[55]

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.[56]

The U.S. motion to dismiss the case was granted.[57] 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.[58]

The appellant's argument did not convince the Fourth Circuit Court of Appeal, which confirmed the dismissal of the case by the district court.[59]

The Supreme Court did not grant the writ of certiorari.[60]

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.[61]

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.[62]

El-Masri courts held 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."[63]

The outcome of El- Masri 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."[64] *El- Masri* turned the courts' role into a blank check and raises concern about accountability.[65] U.S. courts never held anybody accountable for El- Masri torture.

2.2 Italy: The Abu Omar Case

The century of the September 11 events triggered a process of transformation in Italy as well. The case that will be addressed and 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.

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.[66]

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.[67]

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.

To do that, they had to overturn the previous jurisprudence and to put aside the fundamental principles concerning the State secrets privilege.

Mr. Osama Mustafa Hassan Nasr, hereinafter called Abu Omar, is an Egyptian-born Muslim cleric who used to live in Milan.[68] He arrived in Italy in 1998 and started working as Imam in Milan in 2000.[69] He was granted political refugee status in 2001 because he was at risk of prosecution on political grounds in his national country.[70] However, the Italian police was investigating on his possible ties with radical Islamist groups.[71]

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 identified as members of CIA and officers of SISMI, the Italian Military Intelligence and Security Service.[72]

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. 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.[73] 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.[74]

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 Istiqbal 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.[75]

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.[76]

Between 2005 and 2006, Milan prosecutors opened a criminal investigation to ascertain who was accountable for the abduction.[77]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.[78]

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.[79] Later in time, in October, all the documents were filed according to art 415-bis of the Criminal Procedure Law Code.[80]

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.[81]

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.*[82] 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.[83]

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".[84]

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.[85]

Although the prosecutors issued arrest warrants, the U.S. defendants were not present at the proceedings.[86]

The Italian Government did not agree with the prosecutors to deliver extradition requests to the U.S. government.[87] American citizens were therefore tried *in absentia*.[88]

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.[89]

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.[90]

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.[91] The Judge also lamented that the secret was aimed at impeding any decision on the accountability.[92]

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 decision on the existence of the state secrets privilege hadn't been taken yet, constituted a violation of the Executive constitutional rights.[93]

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.[94]

The Court reasoning referred to both the Italian norms on the State secrets privilege and its own precedents.[95] 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.[96]

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.[97] 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.[98]

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.[99]

The Court seems to recall a kind of faded political question doctrine.[100]

It is noteworthy that the Court affirms that principles established in previous decisions are still in vigor and not capable of being manipulated.[101] 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 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.[102]

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.[103]

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.[104]

Moreover, the object of the secret was too limited for falling within facts reversing the constitutional order not coverable.[105] Indeed, it could not be aimed at undermining the democratic legal order.[106]

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. [107]

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.[108]

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.[109]

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.[110]

The reasoning of the Constitutional judges does provoke some doubts because the information getting covered was already in the domain of the judicial branch.[111]

How can the need of secrecy emerge once the documents have already been disclosed? It is 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.[112]

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.[113]

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.[114]

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.[115]

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.[116]

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.[117]

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.[118] 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."[119] 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. [120]

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.[121]

It asserted that the State secrets privilege had been used as a 'black curtain' to grant the Italian officers absolute immunity.[122]

On the contrary, the material regarding the kidnapping was not subject to the state secret status and thus, proves should have been distinguished.[123]

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.[124]

Therefore, the apposition of the secret was not only tardive, but also vaguely made *per relationem* to imprecise documents.[125]

The Milano Court of Appeal complied with the Court of Cassation decision and convicted Pollari, Mancini and three more Italian officers.[126]

The Government presented appeals for conflicts of attribution again and the Constitutional Court found itself to deliver a new decision.

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.[127]

Indeed, it was arbitrary and over invasive for an ordinary judge to set the limits of the privilege.[128]

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*.[129]

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.[130]

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.[131]

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.[132]

Inside the boundaries, the vey 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.[133]

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.[134]

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.[135]

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.[136]

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.[137]

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.[138]

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.[139]

The Court cannot even inspect the reason behind the invocation of the secret and should limit itself to a purely formal control.[140]

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. [141]

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.[142]

3. The International Law Assesment: The Right to the Truth

3.1 The Human Rights Violations Triggered by Extraordinary Renditions Programs

The extraordinary renditions of suspect terrorists are one of the major challenges of international human rights law.[143] 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.[144]

Indeed, the official responsible for them are willing not to be slowed down by legal processes or hindered and stopped by countries' investigations.[145] 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.'[146]

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.[147]

Both the elements, the forcible transportation and the invasive interrogation practices, raise several issues under international law.[148]

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.[149]

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."[150]

Detention is arbitrary when the deprivation of liberty, although provided by the law, is "manifestly disproportional, unjust or unpredictable."[151]

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.[152]

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.[153]

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.[154]

On this point, extraordinary renditions may be defined as a peculiar type of forced disappearances.[155]

Moreover, article 17 ICCPR provides for the right to be free from any interference with one's private and family life.[156] Again, similar norms are included in regional treaties.[157]

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.[158]

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.[159]

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).[160] 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;[161] 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.[162]

Also the ICCPR, ECHR and the American Convention ban the torture.[163]

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.

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.[164]

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.[165]

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.[166]

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.[167]

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.'[168]

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.

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.[169]

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 they do have jurisdiction, which in international law means effective control. The International Court of Justice does agree with this interpretation.

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."[170]

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.[171]

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.[172]

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.[173]

The match between counter- terrorism measures and state secrecy has become so common and typical that international bodies, courts and scholars have long being debating about it.[174]

The discussion on the matter and the concerns arising from this practice leaded to the better development and advancement of the concept of 'Right to the Truth.'[175] 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.[176] 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.[177]

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 concet of secrecy.

3.1.1 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.[178]

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.[179]

First, the victims and their families have the imprescritible right to know the truth about the circumstances where the human rights violations took place.[180]

Second, also the entire community of human beings has the right to be informed about past heinous abuse.[181] The full exercise of the right provides a vital safeguard to avoid the recourrence of the violations.[182]

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.[183]

Indeed, the right to reparation is strongly affirmed in international law.[184] The obligation of a State violating human rights, humanitarian law and international crimal law's provisions to provide reparation is a vital part of the fight against impunity.[185]

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.[186]

Specifically, in 2005, the UN General Assembly adopted the *United Nations 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.*[187] The latters consist in a 'soft law' instrument, thus not binding on Member States, but promoting a resistematization of the existent national principles governing the right to reparation.[188] These principles also confirm that the victims have a 'right to seek the truth' concerning the violations that they have suffered and their causes and they demonstrate an emerging interest in searching the verity.[189]

The 'Right to the Truth' has been a developing concept in international law over the last decade. The contribution of international bodies and court has been fundamental for its

affirmation.[190] Indeed, there is no binding legal instrument directly and specifically embodying this right, even if there is reference to it in several international instruments. [191] However, an emerging norm is rapidly developing in order to counterbalance situations where systematic and gross human rights violations stay unpunished and unresolved.

The 'Right to the Truth' encompasses a positive obligation for the States to undertake every sustainable effort in order to investigate the violations and to seek evidence.[192] Simplifying, the aims of the investigatios should consist of discovering the three Ws: What really happened, Why it did happen, Who did commit it and made it happen.

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.[193] 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.

3.1.2 The Role of the European Court of Human Rights

As addressed above, 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.[194]

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 the mandate to address human rights violations and to hold states accountable for those violations.[195]

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.[196]

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.[197]

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.[198]

Second, the ECtHR can better embrace the need to protect human rights and strike a fair balance between HR dicta and national security concerns leading, for instance, to the invocation of state secrets.[199]

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.[200]

The court does receive information from international bodies such as the International Commission of Jurists and the UN Commissioner for Human Rights and thus, it carries out a comprehensive and fair assessment of the core fundamental rights.[201]

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.[202]

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.[203] The invocation of the State Secrets Privilege cannot go unfettered.

3.1.3 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.[204]

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.[205]

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.[206]

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 were 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. [207]

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.[208]

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.[209]

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.[210]

Contrarily, the rapporteur of the CoE Commite 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.[211]

The Court relied on the Dick Marty's reports and also on the European Parliament report, carried out by Claudio Fava.[212] 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.[213] Moreover, the report highlighted that many of the EU Member States and the Council of Europe parties did not cooperate in the research of the truth and did not give explanations. The FYROM was listed among the countries to be condemned.[214]

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.

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.[215]

Later in time, he lodged a criminal complaint with the Skopje public prosecutor's office against unknown public officials responsible for hid detention and abduction. The prosecutor requested the Ministry of Interior to collaborate, but the latter just confirmed previous findings.[216] The Criminal Complaint was deemed as unsubstantiated.

As the last national venue, Mr. Medarski, on bealf of El-Masri, made a request for civil damages against the State and the Ministry of the Interior. He sought a relied 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.[217]

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.[218]

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.[219]

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.[220]

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.[221]

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.[222]

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.'[223]

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.[224]

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.[225]

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 scope of the provision.[226] 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.[227]

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.[228]

Finally, it is fundamental to consider the alleged violation of article 13 of the Convention, prescribing for an effective remedy in case of violation.[229]

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.[230] The obligations under article 13 expand those already addressed under article 3 and 5: the Former Yugoslav Republic of Macedonia failed to fulfil them.[231]

It is noteworthy that the Court not only recognized a procedural duty of investigation to be embedded in articles and 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.[232]

The power of the El-Masri decision is unquestionable.

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.[233]

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.[234]

Even if the Macedonian authorities did not explicitly rely onthe 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.[235]

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.[236] 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.[237]

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.'[238]

3.1.4 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.[239]

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.[240]

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 relied to the applicants.[241]

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.[242]

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.[243]

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.[244]

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.[245]

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 it 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.[246]

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.[247]

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.[248]

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.[249]

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 authorities did recognize the illegality and arbitrariness of Abu Omar's detention.[250] The only reasons why any investigation or incrimination went through was just the invocation of the secrecy.

In conclusion, given that both Abu 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.[251]

In particular, the Italian officials knew that Abu Omar was the target of an extraordinary rendition mission and they should 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.[252]

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.[253]

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 to grant impunity to perpetrators of gross human rights violations is unlawful and not admissible at all.[254]

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.[255] Therefore these decisions left several questions on accountability unanswered.

Also the New York Timed 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."[256]

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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