



Analysis

State secrets in the Abu Omar case: the transatlantic relationship undermines the rule of law in cases involving human rights abuses by intelligence services

Yasha Maccanico

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In the context of the relationship between the EU and its member states on one side, and the United States on the other, it is worth revisiting in the light of recent developments the notorious case of the abduction and torture of Egyptian refugee and Imam, Abu Omar (Hassan Mustafa Osama Nasr) in Milan on 17 February 2003. Court proceedings into Omar's rendition led to the conviction of 22 members of the CIA, one US military official and two Italian intelligence agents in November 2009, in spite of the "state secret" status that was imposed on fundamental parts of the evidence, resulting in charges against high-level Italian intelligence officials being temporarily dropped. On 12 February 2013, the Milan appeal court convicted former SISMI (*Servizio per le Informazioni e la Sicurezza Militare*, Military Intelligence and Security Service) director Nicolò Pollari and his deputy Marco Mancini, issuing ten and nine year prison sentences respectively. The convictions followed the Court of Cassation's ruling of 19 September 2012 rejecting appeals filed by the convicted US nationals. The Court of Cassation [Italy's highest appeal court] also rejected the decision to exclude some evidence from being considered at the trial and annulled the part of the Milan appeal court's ruling of 15 December 2010 which argued that the prosecution of Nicolò Pollari, Raffaele Di Troia, Ciorra Giuseppe, Marco Mancini and Luciano Di Gregorio should not proceed. Yet, as three governments (two led by Silvio Berlusconi and one by Romano Prodi) had done previously, resulting in state secret classification being imposed on some evidence by the Constitutional Court in sentence no. 106 on 11 March 2009, appeals were presented concerning conflicts of attribution on 11 February and 3 July 2013 by the governments led by Mario Monti and Enrico Letta respectively.

On 13 February 2014, the Constitutional Court upheld the appeals, ruling that the Court of Cassation did not have a right to annul the decision to stop the prosecutions of Nicolò Pollari, Raffaele Di Troia, Ciorra Giuseppe, Marco Mancini and Luciano Di Gregori. Moreover, it should not have annulled the Milan appeal court's ordinances of 22 and 26 October 2010 which established that material, including the defendants' interrogation transcripts during preliminary investigations, could not be used in the trial. The basis for the Court of Cassation's ruling was that the state secret classification only concerned relations between the Italian intelligence services and the CIA and the internal workings of the Italian intelligence services in the exercise of their functions authorised by the service, not the factual event of the kidnapping. The consequence of the annulment of substantial parts of the Court of Cassation's sentence of September 2012 was the invalidation of subsequent

Timeline

17 February 2003: Abu Omar is kidnapped in Milan.

11 March 2009: Constitutional Court sentence 106/2009 upholds the conflict of attributions and establishes the scope of the state secret.

4 November 2009: Milan court convicts 22 members of the CIA, one member of the US Air Force, and two Italian intelligence officers; it curtails proceedings against Pollari, Mancini, Di Troia, Di Gregori and Ciorra in compliance with the Constitutional Court's sentence 106/2009.

15 December 2010: Milan appeal court confirms the ruling by the court of first instance.

19 September 2012: Court of Cassation rejects appeals and orders proceedings against Pollari, Mancini, Di Troia, Di Gregori and Ciorra to resume.

12 February 2013: In application of the Court of Cassation's sentence, the Milan appeal court convicts Pollari (10 years), Mancini (9 years), Di Troia, Di Gregori and Ciorra (6 years).

13 February 2014: Constitutional Court upholds the conflict of attributions, annuls the Court of Cassation's decisions leading to a re-trial, and annuls the sentence reached by the Milan appeal court on 12 February 2013.

24 February 2014: Court of Cassation quashes the convictions of Pollari, Mancini, Di Troia, Di Gregori and Ciorra in compliance with the Constitutional Court's sentence, acknowledging that "penal action could not be continued due to the existence of the state secret" (see post-script).

of national security tied to a precise and tragic historical moment that found its concrete expression in practices that Italy and the European Union deem incompatible with the fundamental principles of the rule of law". Secondly, he noted that the legislative change introduced by presidential decree no. 27 of 11 March 2013 to extend the justice ministry's discretion to renounce Italian jurisdiction in relation to crimes committed by military personnel deployed abroad under the auspices of NATO to any phase in judicial proceedings. Such discretion may also be exercised on request from the foreign affairs ministry.

Describing this development as constituting a "new and relevant fact" which would have granted the defendant a "different, more favourable" judicial context, Napolitano explained that the pardon:

acts undertaken by the Milan appeal court that led to convictions in February 2013. These included the acquisition and use of interrogation transcripts in the proceedings, the failure to consult the prime minister's office about whether state secret status still applied to this material, the admission of evidence covered by state secret classification used by the general prosecutor, the establishment of the defendants' penal culpability and the sentence issued against them. The remaining parts of the Court of Cassation's ruling, which were not annulled, confirmed the convictions handed down by the Milan appeal court's sentence by rejecting the appeals lodged by the defendants.

Pardon requests and normative changes

A further development concerned the arrest on the basis of an international arrest warrant of Robert Seldon Lady, one of the CIA officers convicted for the abduction, in Panama on 18 July 2013. He was released the next day and flew to the United States, as Italy does not have an extradition agreement with Panama. Two months later, on 11 September 2013, Lady wrote to the Italian President, Giorgio Napolitano, to plead for a pardon. Among other concerns, Lady stressed that his objective was "to protect the Italian people from terrorist activity", that he was unable to defend himself adequately because he had "access to certain secret and confidential information of the Italian government in connection with my liaison activities" that it was unlawful for him to use, and that he was "advised that any policies were vetted and complied with Italian policy".

On 5 April 2013, the Italian President had granted a pardon to a member of the US air force who was convicted and sentenced for his involvement in the Abu Omar kidnapping, Colonel Joseph L. Romano III. Napolitano's statement announcing this decision gave two key justifications for the pardon. Firstly, he stressed that following his election President Barack Obama "put an end to an approach to the challenges

“intends to resolve an event that the United States considers unprecedented as regards the conviction of a [member of the] US military belonging to NATO for facts committed on Italian territory, deemed lawful on the basis of measures adopted after the New York Twin Towers’ attack by the then American President and Congress. Exercising the power to pardon has thus remedied a situation of evident sensitivity from the perspective of bilateral relations with a friendly Country, with which a relationship as allies exists, and hence of close cooperation for the purpose of the common goals of promoting democracy and the safeguard of security”.

Thus, attempts by the Italian judiciary to prosecute the Abu Omar rendition in which a key enabling role was played by a USAF officer (Romano was responsible for security at the Aviano airbase in northern Italy from which Abu Omar was flown to Ramstein in Germany en route to Cairo and for letting the convoy that had undertaken the rendition, including Abu Omar himself into the base, contravening Italian law) have resulted in greater latitude for Italy to renounce jurisdiction in cases involving criminal offences by military personnel from NATO forces.

Commenting on the Romano pardon, Professor Gino Scaccia noted that the first reason provided was explicitly political and ignored the fact that “forced disappearances” represent a crime against humanity for which immunity cannot be granted, according to the Statute of Rome that established the International Criminal Court (art. 7). The second reason is the legislative change that ostensibly alters the framework for renouncing jurisdiction when there are concurring jurisdictions concerning a case involving NATO personnel. But this was not relevant because the acts committed were not deemed illegal in the US, meaning that there were no concurring jurisdictions, as the Court of Cassation argued in dismissing one of the reasons for the appeals lodged by the US defendants in the Abu Omar case. Thus, rather than relinquishing jurisdiction, the legal changes introduced are described by Scaccia as “renouncing the execution of a sentence” or as “contesting the use that is made of jurisdiction” by the judiciary.

Much ado about nothing?

The Abu Omar case is regarded as significant because it is the only example of successful prosecutions being achieved by national judicial authorities concerning CIA renditions on European territory. Yet members of the CIA and other American defendants were all convicted *in absentia* as they had returned to the US by the time investigations got underway, and none will serve their sentences. Enacting the state secrets classification regime, albeit belatedly, enabled the protection of Italian intelligence service officials and personnel, excluding the issue of possible collusion in rendition by the Italian government or intelligence services from the scope of judicial proceedings. Over 11 years after the abduction, 23 US citizens have been convicted and sentenced to between seven and nine years imprisonment (three further defendants including the former head of the CIA in Italy, Jeff Castelli, enjoyed diplomatic immunity).

The only Italians who were involved and convicted were a *carabiniere*, Luciano Pironi; a journalist who acted unlawfully as an intelligence agent and was elected as an MP in 2008 after his resignation from the Order of Journalists, Renato Farina; and two SISMI officers, Pio Pompa and Luciano Seno. Pironi’s role in the abduction has been confirmed: he confessed to stopping Abu Omar in the street and asking for his identification documents before he was bundled into a van, at the behest of Robert Seldon Lady. He cooperated with magistrates and plea bargaining resulted in a suspended sentence of one year, nine months and a day. Also after plea bargaining, Farina received a six-month jail sentence that was converted into a fine for contravening legislation that prohibits journalists from acting on behalf of the intelligence services and for his active role in the cover-up by attempting to influence investigations using false information, at the behest of Pompa. Pompa and Seno

were also convicted with respective two-year and eight-month sentences for their role in the cover-up, which was discovered because they were under surveillance at the time for conducting unlawful surveillance activities targeting judges and NGOs.

The repercussions of the Abu Omar case go beyond its judicial outcome in terms of convictions and sentences, and may have significant implications for the future. Firstly, it played a role in the decision to reform the Italian intelligence services and state secret classification regime in August 2007, as it revealed abuses including the surveillance of judges and NGOs and the possible collusion of SISMI with the CIA in an illegal abduction. This led to the erstwhile military and civilian intelligence services (SISMI and SISDE, *Servizio per le Informazioni e la Sicurezza Democratica*, run by the defence and interior ministry respectively) being replaced by an internal and an external information and security service (AISI, *Agenzia Informazioni e Sicurezza Interna* and AISE, *Agenzia Informazioni e Sicurezza Esterna*) in 2007. Secondly, it proved a test case as to the reach and implications of the new state secret classification regime, which was bitterly fought out between successive Italian governments and the Milan courts from 11 November 2005 until the Constitutional Court's sentence no. 106 of 11 March 2009, and more recently between the Court of Cassation and the Monti and Letta governments, resolved by the Constitutional Court's sentence no. 24 of 13 February 2014. Thirdly, it concerned the limits imposed on judicial authorities for "reasons of state" in prosecuting criminal offences in cases that have a bearing on national security involving actions carried out by national intelligence services and/or those of allied countries in Italy that entail human rights abuses (in this case, the denial of personal freedom and torture). Finally, it is worth considering what implications this has for the future in terms of covert and/or criminal operations by intelligence services, and the likelihood of prosecution, punishment and, most importantly, of the truth coming out.

State secrets, intelligence services, human rights abuses and the judiciary

On 11 March 2009, the Constitutional Court resolved a series of five "conflicts of attribution" between the prime minister's office and judges concerning the "state secret" classification imposed on documents submitted by prosecutors in the Abu Omar trial, by upholding the state secret classification.

The resolution of these conflicts followed the adoption of law no. 124 of 3 August 2007 which reformed the intelligence services and constituted a test case on two levels. Firstly, concerning the prosecution of intelligence personnel for acts that are not exempted by the "special cause of justification" (for Italian intelligence service officers authorised to commit offences in specific instances) which cannot be applied to cases that involved "endangering or harming life, physical integrity, personal freedom, moral freedom, the health or well-being of one or more people" (art. 17.2). Secondly, it concerned the new regime governing state secrets that excluded "documents or things concerning matters of terrorism or subversive of the constitutional order" (art. 39.11), which was presented at the time as a human rights protection clause.

In its final ruling, the court argued that prime ministerial discretion as to the classification of material as a "state secret" prevailed over the judges' authority to acquire and use material in order to ascertain responsibilities in the commission of a crime. The balance was tipped towards secrecy by the public interest in protecting details about relations between Italian and foreign intelligence services and the possible consequences of disclosing information on relations with foreign intelligence services (including possible future ostracism or unwillingness to cooperate, which would be detrimental for Italy's security). However, the state secret classification was not applied to the proceedings as a whole, but only to specific aspects of them, namely "the relations between the Italian secret service and foreign ones" and "SISMI's organisational and operative structures, particularly the directives and orders imparted by its Director to members of this body, even if such relations, directives and orders

were to be in some way connected to the fact of the crime itself”, that is, the abduction of Abu Omar. In concrete terms, “the kidnapping itself is not the object of the state secret” classification.

In its ruling of 15 December 2010, the Milan appeal court ratified the interpretation of the Constitutional Court’s sentence by the first instance court on 4 November 2009 as precluding the possibility of convicting Pollari and four other SISMI officers for their role in the kidnapping due to the limitations imposed on the use of evidence classified as a state secret. In fact, while the court was not prevented from investigating the kidnapping itself, it could not proceed against defendants if the evidence that was classified as “secret” was “essential” for their prosecution, citing point 3 of art. 202 of the penal procedure code: “in case the secret is confirmed and knowledge of what is covered by the state secret would be essential for the definition of the trial, the judge declares that prosecution should not proceed due to the existence of the state secret”.

Nonetheless, the ruling noted that the appeal court could not grant the defendant’s request for an acquittal using any other formula, as well as stressing that several elements suggested possible acquiescence or cooperation by SISMI officers and/or officials in the kidnapping. Its review of the first judgement revoked the mitigating circumstances that were applied to the convicted US nationals, resulting in longer sentences: nine years for Lady (up from eight years) and seven years for the remaining defendants (up from five years), whereas it reduced the length of sentences imposed against Pompa and Seno, from three years to two years and eight months.

The Court of Cassation brings Italian intelligence officers back into play

The conclusions in the Court of Cassation’s sentence no. 46340 of 19 September 2012 annulled parts of the December 2010 Milan appeal court’s ruling, accepting some of the arguments put forward by the general prosecutor and the civil parties in the proceedings (Abu Omar and his wife Nabila Ghali). Most importantly, it annulled the decision that proceedings be curtailed concerning the five members of SISMI (its then director Nicolò Pollari, Raffaele Di Troia, Giuseppe Ciorra, Marco Mancini and Luciano Di Gregori), calling on the Milan appeal court to re-examine their cases. It also annulled two ordinances issued by the appeal court on 22 and 26 October 2010 forbidding the use of material including the evidence provided by Ciorra, Di Troia, Di Gregori and Mancini when they were questioned. It claimed that the state secret classification had been interpreted as a “black curtain” that gave rise to an extensive area on which it was impossible to reach a decision, enabling the SISMI officers to “enjoy an absolute kind of immunity” (p. 120) in the trial, whereas the material should have been carefully sifted to ascertain what parts of it could be considered.

The rationale for doing so was that the definition of the material subjected to state secret status did not include acts committed by officers as individuals acting “outside of [the exercise of] their functions” (p. 122), and both the government and SISMI had stated unequivocally that they were not involved in the kidnapping. The government did so in a note dated 11 November 2005, whereas SISMI director Pollari had done so when questioned by the European Parliament inquiry investigating renditions. In the absence of information to dispute the truthfulness of these claims contained in official documents sent to judicial authorities, the court concluded that any involvement in the rendition was carried out by SISMI officers on a personal basis. This placed their acts beyond the bounds of the state secret classification, even if specific criminal acts were carried out in agreement with members of foreign intelligence services, because they were acting outside of their official functions and without authorisation from the upper echelons of the intelligence service. Thus, evidence concerning the individual conduct of officers was not covered by the state secret classification, whereas evidence likely to suggest that the rendition may have been a “joint CIA/SISMI operation” was to remain secret (p. 122).

Moreover, the issue of special justification applicable to intelligence service officers could not apply to such acts in view of the denial of personal freedom, all the more so considering that the operation was aimed at transferring the victim abroad, where he could be interrogated by being subjected to torture (p. 123). The Court of Cassation sentence also remarked on issues including the delay with which the state secret classification was originally imposed and on whether it could be applied to material concerning human rights violations, arguing against an interpretation that excludes such acts unless they are directed against the state. A further issue mentioned in defence of this decision was drawn from the European Parliament's resolution of 11 September 2012 on the "Alleged transportation and illegal detention of prisoners in European countries by the CIA" which noted that: "abuses of state secrecy and national security constitute a serious obstacle to democratic scrutiny", and "in no circumstance does state secrecy take priority over inalienable fundamental rights".

In sum, the Court of Cassation rejected the appeals filed by the convicted US nationals, confirmed their sentences, and those against Pompa and Seno, while adjusting the ancillary measures imposed on them. It also annulled the decision to suspend proceedings against Pollari, Di Troia, Ciorra, Mancini and Di Gregori, calling for their position to be re-examined by another section of the Milan appeal court.

Re-examination of the SISMI officers' positions

Sentence no. 985 was issued by the fourth section of the Milan appeal court on 12 February 2013 and convicted the five SISMI defendants, sentencing Pollari to ten years, Mancini to nine years, and Ciorra, Di Gregori and Di Troia to six years. The convictions were reached following three stages:

1) Firstly, the careful sifting of evidence to separate material that could not be considered as a result of its state secret classification and evaluation as to whether the remaining material might suffice to establish the defendants' criminal culpability.

With regards to the transcripts of the interrogations of Ciorra, Di Gregori, Di Troia and Mancini, the court decided to include them in evidence while excluding the parts involving questions and/or answers that were effectively covered by the state secret classification. The testimonies of witnesses who did not claim state secret exemption, including some who knew of its existence but chose not to invoke it, was also considered. The testimony of Stefano D'Ambrosio was considered particularly important in this context because he did not mention CIA/SISMI relations and ruled out that it was a "joint operation", claiming that he received information from Lady due to a "friendly" rather than an "institutional" relationship with him. The same applies to Luciano Pironi's testimony, as he received information from Lady "confidentially" and as a *carabiniere* would not have had any knowledge or involvement in institutional activity involving SISMI. Telephone intercept material obtained in the course of investigations was also allowed insofar as it did not consist of communications involving the exercise of their official activities. Transcripts of General Pignero's testimony were also used, bearing in mind that, as for all the material, information concerning the relationship between Italian and foreign intelligence services and the internal workings of SISMI are subject to state secret classification.

2) Secondly, given that the state secret classification "does not and cannot cover" the event for which the defendants are charged (as established by the Court of Cassation), the court sought to establish their "material and moral participation in the kidnapping materially executed by the CIA agents".

The court considered material from interceptions, interrogations and testimonies acquired by the investigating judicial authorities. This evidence included General Gustavo Pignero and Marco Mancini discussing strategies they could adopt to cover-up and protect the service

and its director Pollari (including mention of a list of subjects to be abducted that was handed to Pignero by Pollari, who had probably received it from Jeff Castelli). Mention of a meeting in Bologna in early 2002 at which members of SISMI discussed the rendition emerges from different sources. This information included disagreements between SISMI members concerning their attitude to the proposed operation (D'Ambrosio was transferred), an official boasting about SISMI's role in the operation, and Lady's meetings in a personal capacity with both D'Ambrosio and Pironi, the *carabiniere* whom he convinced to participate in the operation. It also emerged that the US requested SISMI assist in the preliminary targeting of Abu Omar for rendition and that this was specifically ordered by Mancini and carried out by Ciorra, Di Gregori and Di Troia.

Thus the sentence notes that the evidence contained "unequivocal elements" to "affirm the defendants' responsibility" in the crime through "agreements struck and activities undertaken for the purpose of enacting an operation that was clearly outside of the Service's institutional purposes". While SISMI originally denied any involvement, efforts to place the operation within the realm of state secrecy covering intelligence activities followed General Pignero's testimony. Although he admitted certain acts Pignero denied any awareness that it was an illegal operation. Yet, the material also includes reference to "rendition" and to communications between individuals that demonstrated knowledge of the illegal nature of these activities. The sentence concludes that:

"There were never any distinct and autonomous criminal projects directed at the kidnapping of 'Abu Omar', but a single project, with a single direction, that began with Castelli's request to Pollari, advanced with Lady's operative organisation and culminated with the kidnapping in Milan of the offended party, who was taken to Aviano and finally to Egypt." (p. 116)

Preparatory activities were conducted for some time, including preliminary checks of the victim's habits and movements, and Pironi made himself available to stop Abu Omar in the street on various occasions. The importance of the SISMI officers' involvement stems not only from their participation but from the fact that they were in a position and had a duty to prevent the commission of criminal acts in Italian territory. This was particularly the case for its director, Pollari. This contribution was also significant in facilitating the commission of a criminal act and in reinforcing the intention to commit such an act by those intending to do so. Thus, the sentence concludes that: "The aforementioned elements are fully adequate and sufficient to demonstrate the responsibility, from both an objective and a subjective perspective, of those here accused regarding the offence attributed to them". (p. 125)

3) Thirdly, sentences were issued considering the seriousness of this form of kidnapping and the defendants' awareness of the intention to transfer the victim to Egypt where he would be tortured.

The sentence notes that kidnapping, per se, is a serious crime. This case has specific features that make it even more so, such as the awareness that Abu Omar would be handed over to the Egyptian authorities and tortured. It is worsened by the fact that Abu Omar was under judicial investigation in Italy and yet was removed from the justice system's jurisdiction, and that he was recognised by Italy as a political refugee. This cooperation also facilitated a violation of Italian national sovereignty. Aggravating circumstances included the fact that those involved held public office and abused their powers and that the offence was committed by more than five people; a further aggravating factor for Pollari, who received a ten-year sentence, resulted from his rank and authority over the other participants. Mancini's rank and direction of subordinates also resulted in a longer sentence (nine years) than the remaining three defendants, who were given six-year sentences. Moreover, both Pollari and Mancini were deemed to have participated in attempts to mislead investigations involving

Pompa, Farina and Pignero, who have been convicted (apart from the latter, who died during the proceedings).

Conflict of attributions reloaded - acquittals confirmed by the Constitutional Court

On 24 April and 24 October 2013, conflicts of attribution submitted by prime ministers Monti and Letta were admitted to contest the Court of Cassation and the Milan appeal court's rulings that material previously excluded should be made available to the court without first informing the prime minister's office and asking whether the state secret classification applied. In sentence no. 24/2014 of 13 February 2014, the Constitutional Court upheld the two conflicts of attribution. The Court of Cassation's rationale for annulling the curtailing of prosecutions against SISMI officers was described as "arbitrary" by the appellant prime ministers and as impinging on their discretion (acknowledged as "ample" by the court) to impose the state secret classification on matters involving "an interest that is prevalent over any other", as it concerns "the very existence of the State". Such an interpretation on the basis of a statement by the government, and SISMI's non-involvement in the rendition from 2005, was deemed by the Constitutional Court to represent an alteration of the scope and content of the "object" of state secret classification, particularly as such a statement may have resulted from involvement being a "state secret" itself. Thus, the Court of Cassation was not in a position to annul the ending of prosecutions against the SISMI officers, nor to annul the orders whereby material was not made available for consideration by the court. Consequently, the acts undertaken by the fourth section of the Milan appeal court on the basis of the Court of Cassation's sentence were invalidated: these included ordinances allowing the use of information that was previously excluded, the failure to consult the prime minister's office, the attribution of responsibility to SISMI officers and the issuing of the sentence.

Justice and politics: implications for the future

The implications of the Abu Omar case are wide-ranging. A delicate balancing act by different political and jurisdictional authorities sought to enable prosecutions to be undertaken concerning his rendition, which would otherwise have to be acknowledged as lawful in view of the compulsory nature of prosecution by judicial authorities in the presence of a crime. Yet there was a parallel need to exclude evidence that may have revealed collusion between Italian and US intelligence services for reasons of national security. The solution found by the Constitutional Court in the conflicts of attribution between successive governments and judges in Milan was that the state secret classification applied to the inner workings of SISMI and to relations between Italian and foreign intelligence services, but not to the kidnapping itself because it represented a human rights violation. This strategy worked in the first instance and at the appeal trials where judges interpreted the decision to exclude vast amounts of documentation from consideration, resulting in the non-prosecution of the SISMI officers involved. After the Court of Cassation failed to ratify this interpretation, calling for the prosecutions to be resumed and for further material to be admitted, convictions that shed further light on the events leading up to the rendition were inevitable. This also showed the distinction the Constitutional Court sought to impose - between the kidnapping on the one hand, and relations between Italian and US intelligence services and the inner workings of SISMI on the other - to be untenable. Thus, the political authority intervened anew to enforce its authority on the matter of state secret classification, which was recognised by the Constitutional Court.

A failure to prosecute and convict would have signalled acceptance of foreign intelligence officers conducting criminal acts on Italian territory, with obvious implications bearing in mind Italy's history of intelligence service and CIA collusion in criminal acts during the so-called "years of lead" (from the late 1960s to the early 1980s). Yet a successful prosecution that revealed collusion between intelligence services or at the governmental level would have

been damaging for Italy in terms of its own standing and constitutional order. Thus, the conviction of US personnel who would be unlikely to serve their sentences provided a practicable escape route. The possibility of pleading for pardons may be the ultimate way of ensuring that this remains the case. The most troubling conclusion that emerges from this case is that information on future unlawful operations conducted by foreign intelligence services (particularly the CIA) with the participation of host country services that involve human rights abuses may perpetually fall within the scope of state secret classification.

Post script:

Court of Cassation obeys Constitutional Court, but defends its rationale and warns of consequences

On 24 February 2014, the first penal section of the Court of Cassation reached its sentence (no. 249/2014) concerning the appeals filed by five members of the former Italian military intelligence service against their convictions in the Abu Omar case by the Milan appeal court on 12 February 2013. The reasoning behind the decision to quash the convictions of former SISMI director Nicolò Pollari, Marco Mancini, Raffaele Di Troia, Luciano Di Gregori and Giuseppe Ciorra was released on 16 May 2014. The sentence reads like a justification of previous actions by the Court of Cassation that led to the resumption of proceedings against the five members of SISMI. The case against them had been shelved in the first instance and appeal trials in application of the Constitutional Court's sentence (no. 106/2009) that confirmed that some evidence in the case was subject to state secret classification, upholding the conflicts of attribution raised by successive governments against the Milan prosecuting magistrates. The case was reopened on 19 September 2012, after the Court of Cassation's failure to ratify the interpretation of the scope of the state secret classification as requiring the prosecutions against SISMI personnel to be curtailed. The sentence ends by quashing the convictions, noting that the Court of Cassation has been left no choice but to do so by the Constitutional Court's sentence no. 24/2014 issued on 10 February 2014, and warning of the implications of the governments' and Constitutional Court's interventions in this case.

The sentence expresses dismay for the shift in the Constitutional Court's position, which it views as an expansion of the scope of the state secret classification as it was originally established. It links this shift to two documents submitted to the court by the former head of AISE (the foreign intelligence service, *Agenzia Informazioni e Sicurezza Esterna*), General Santini, on 25 January and 4 February 2013. The first note confirmed the continued existence and validity of the state secret classification as was indicated in notes from the prime minister's office that raised the new conflicts of attribution. The second one stated that:

"the activities by the SISMI personnel covered by the defendants' interrogation transcripts should be deemed to be covered by the state secret insofar as they are framed within the context of institutional activities to counter international terrorism of an Islamic origin." [emphasis in the original]

The Court of Cassation argued that the notes should not have affected the Constitutional Court's decision, because they were not issued by the prime minister, who has an exclusive prerogative over state secret classification. Moreover, the second note contradicted previous official statements excluding conduct that may be connected to the abduction from the context of SISMI's institutional activities.

In its analysis of the legal context for its decision, the Court of Cassation stressed that it was inevitably "deeply etched and radically marked" by the Constitutional Court's sentence no. 24/2014, which it must accept "institutionally", including its direct and "constitutionally unavoidable" consequences. The appellants' claims are deemed to be founded "today",

purely on the basis of the “devastating force” of the latest instruction by the judge ruling on the conflict between institutional powers. In fact, the Constitutional Court’s previous sentence had clearly established the limits of the state secret classification that had been imposed to the relations between Italian and foreign intelligence services and to the inner workings of the Italian military intelligence service. The competent authorities had not imposed what the Court calls a “black curtain” on the relevant events for years, as successive prime ministers had denied any involvement by the government or SISMI in the rendition. The right to jurisdiction could only give way to concerns over the “very survival of the State”.

Thus, in its previous ruling, it was coherent from a logical-juridical perspective to conclude that:

- the kidnapping itself was not covered by the state secret;
- SISMI was not involved;
- there was not and could not be a secret concerning the individual criminal conduct enacted outside of the purposes of the intelligence service;
- the state secret was imposed belatedly; and
- as a corollary of this last issue, evidence that had already been acquired could not be affected by the state secret.

Moreover, it was “nonsensical” to impose a state secret on information that was already publicly available, resulting in the interference leading to the “*retrospective demolition* of the acquired material that would have translated into subjective impunity”, a notion that is inconceivable in the legal system.

Sentence no. 24/2014 altered the situation and was described as “definitely innovative” as it

*“appears to uproot the very possibility of a verification of the legitimacy, moderation and reasonableness of the exercise of the power to impose a secret by the competent administrative authority, compressing the duty to ascertain criminal offences by the judicial authority which inevitably ends up being referred to the discretion of the political authority – **which must necessarily lead to wide-ranging and deep reflections that go beyond the present case** – as well as due to its concrete effects in these proceedings, as it had moved, until now, precisely and loyally along the route that was drawn by the previous rulings, of a different kind, issued specifically by the Constitutional Court itself.”* [emphasis added]

The Constitutional Court’s use of the notes from the director of AISE is viewed as the key development, alongside the silence in sentence 24/2014 about the impossibility of applying state secret classification to material that is in the public domain. Thus, the sentence is summarised as establishing:

- the prime minister’s wide discretionary power as beyond the reach of common judges, due to the political nature of decisions on the suitable means to guarantee the state’s security;
- the interest in safeguarding national security is prevalent over the need for jurisdictional verification;
- jurisdictional and court bodies may not act in ways which affect the perimeter drawn by the prime minister regarding the scope of the state secret;
- in reference to the Court of Cassation’s argument that the secret could not apply to behaviour enacted outside of their official functions, limits to the state secret could not result from the existence or otherwise of formal decisions issued by the government or high-level intelligence officials;

- charges brought concerning the aggravating circumstance of a public officer misusing the powers resulting from their functions refer to links with both the CIA network in Italy and the use of SISMI structures;
- the prime minister raising a conflict of attributions makes it implausible to consider the events as resulting from personal initiatives by the accused;
- the jurisdictional power is barred from conducting further inquiries because any directives or orders issued by the SISMI director in connection with the case are covered by the state secret classification.

The Court of Cassation describes such findings as “demolishing”, “totalising” and as “imposing an outcome” whereby proceedings must be curtailed, “overpowering” the possibility of any other outcome. All the appellants were thus acquitted “because penal action could not be undertaken due to the existence of the state secret”.

Sources

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