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REPUBBLICA ITALIANA
TRIBUNALE ORDINARIO DI MILANO
Section XI criminal court
as Review Judge

The Review Court met in its chambers; the bench being constituted by the following magistrates:

Dr. Enrico Tranfa President

Dr. Paola Corbetta Judge

Dr. Tomaso E. Epidendio Judge and speaker

In proceedings *ex art. 310 criminal procedure code (c.p.p.)* brought by the Public Prosecutor at the Milan Courthouse against:

- 1) **CASTALDO Eliana**, born in Florida (USA) on 11/14/1969, *untraceable*;
- 2) **CASTELLANO Victor**, born in Texas (USA) on 05/01/1968, *untraceable*;
- 3) **GURLEY John Thomas**, born in Los Angeles (USA) on 07/10/1969, *untraceable*;
- 4) **KIRKLAND James Robert**, born in Tennessee (USA) on 07.13.42, *untraceable*;
- 5) **JENKINS Anne Lidia**, born in Florida on 09/24/1946, *untraceable*;
- 6) **IBANEZ Brenda Liliana**, born in New York (USA) on 01.07.60, *untraceable*;

All assisted and defended publicly by Counsel Guido Meroni, Milan Bar Association;

Through an application submitted on 07.01.2005, appealing against the ruling passed by the Judge for preliminary investigations at the Milan Court-house on 06.22.2005, and specifically the section in which the Judge rejected the request of custodial measures for the abovementioned suspects, indicted for the crime below:

Felony ex Arts. 110, 112 n° 1, 605 criminal code, whereby among themselves and together with others (also Egyptian nationals), including ROMANO Joseph L. III - with the consequent aggravating circumstance of the offence being committed by over five persons - for having kidnapped, depriving him of personal freedom, Nasr Osama Mustafa Hassan alias Abu Omar, apprehending him by force and forcibly making him enter a van, thereafter taking him first to the US military airbase at Aviano, where the United States of America Air Force 31st FW (Fighter Wing) is stationed, and thence to Egypt; parties to the crime being Jenkins Anne Lidia, Kirkland James Robert, Castaldo Eliana Isabella, Ibanez Brenda Liliana, Castellano Victor and Gurley John Thomas in participating to the preparatory stages of the abduction (preliminary scouting and assessment of the location where it would take place, scrutiny of Abu Omar's habits, research into neighboring areas to that of the planned abduction, as well evaluation of the most suitable route for a safe and hasty access to the freeway bound for Aviano); parties to the crime being Asherleigh Gregory, Purvis George, Carrera Lorenzo, Harty Benamar, Harbaugh Raymond, Rueda Pilar, Sofin Joseph, Adler Monica Courtney, Logan Cynthia Dame, Duffin John Kevin, Channing Drew Carlyle, and Vasiliou Michalis in participating to the abovementioned preparatory stages, and to the actual execution of the kidnapping together with the victim's transfer to Aviano; party to the crime being Romano Joseph, US head officer in charge of security at Aviano base, for receiving the abductors and the victim at the said base, ensuring the formers benefited from a safe access to the base, and were able to put the victim on a plane taking him

outside Italy; party to the crime being Lady Robert Seldon, for coordinating the action, as well as for ensuring connections and assistance to other parties to the crime, also as a consequence of his earlier presence and working activity in Milan.

Abduction carried out in Milan, on 02\17\2003

The facts are wholly outlined in the ruling object of this appeal; its contents is recalled here in full

- having examined the documentation submitted on 07.06.2005;
- on completing the hearing and having cleared any reservations, it issues the following

Court order

On 03.23.2005 the Public Prosecutor at the Milan Courthouse requested that custodial measures be applied to several US citizens for the 02.17.2003 kidnapping in Milan of Nasr Osama Mustafa Hassan *alias Abu Omar*, an Egyptian citizen and then political refugee, such status being granted by the Italian Government; he was also under investigation for terrorist-related offences ex art. 270 *bis* c.p. (and for offences in conjunction thereof), for which a request of custodial measures would later be issued in separate proceedings by the Judge for Preliminary Investigations (GIP) in Milan on 06.24.2005.

On 06.22.2005 the GIP in Milan upheld the request of custodial measures for several suspects, while rejecting it for those indicated above, on the grounds that no serious evidence as to their involvement in the relevant abduction was presented.

Indeed the GIP did not believe the prosecution's accusatory reasoning "as regards those subjects who were not present (at least, insofar as a probative evaluation would allow) in Milan on the day of Omar's kidnapping, yet had taken part in the preparation of the crime, namely Jenkins Anne Lidia, Kirkland James Robert, Castaldo Eliana Isabella, Ibanez Brenda Liliana, Castellano Victor and Gurley John Thomas. It emerged, in fact, that their telephones had been in contact with those issued to the individuals present in Milan on the day of the abduction; it also emerged they had resided in Milan throughout the months prior to the abduction, and their telephone appliances had often been traced in the various telecom cells adjacent the abduction scene, most likely demonstrating that they had carried out inspections to assess the surroundings of the places frequented by Omar and record his movements from his home in Via Conte Verde to the Mosque in Viale Jenner. These elements, specifically if viewed within the overall investigative framework as outlined above, undoubtedly possess a strong circumstantial value, though not enough to warrant the implementation of custodial measures. The same conclusion is reached with regard the condition of Ibanez Brenda Liliana, who was indeed in Milan on the day of the kidnapping (in fact she was in town from 13th to 19th 2003) but seems not to have been at the crime scene on 02.17.2003".

Therefore, while the GIP upheld the custodial sentence for the crime of kidnapping being applied to the remaining suspects, he also rejected the Public Prosecutor's application against those individuals subject of the present appeal, as the evidence against them on their involvement in the said crime was deemed not to satisfy the requirements of Art.273 c.p.p. .

With the application for appeal, the Public Prosecutor requested that the Court in Milan "canceled" the ruling (as per Art.310 c.p.p.) issued by the

GIP on 06.22.2005 “with regard the section on the refusal of the custodial measures” and “proceeded to issue” a consequent custodial sentence against the abovementioned individuals on the grounds of complicity in aggravated kidnapping.

The Public Prosecutor specifically pointed out that the contested ruling was to be endorsed and fully evoked with regard the reconstruction of events, carefully conducted by means of witness statements, telephone interceptions, and an examination of any traces the abductors’ cellphones left behind, and which the previous judge had aptly weighed and considered.

The articulate conclusions of the contested ruling are espoused unquestionably, with specific reference to Omar’s kidnapping in Milan, his transportation in a white van to Aviano airport, not to mention his deportation by means of executive jets to Cairo, Egypt via Ramstein, Germany.

Instead, the Public Prosecutor did not share the GIP’s distinction between the actions of those who had actually carried out the abduction on 02.17.2003, and those who had taken part in the preparatory stages of the abduction, as the Prosecution believed that all the above individuals belonged to a single group of US citizens, who had come to Milan with the sole intention of conducting the said kidnapping.

The Public Prosecutor pointed out the that the GIP, for his part, had indeed regarded the 19 defendants as an individual group, acting closely in pursuance of a single objective, namely Abu Omar’s kidnapping.

In particular, the Public Prosecutor stated that, after faultlessly reconstructing the presence in the area (thereafter, the crime scene) of those defendants object of the appeal, the first judge had noted at pgs 15 and 16 of his ruling that these people had been present in the streets normally frequented

by Omar almost one hundred times in the month leading up to the abduction. Said US citizens were never known to have visited such areas. This condition lead the same judge to rule that *“the highlighted telephone numbers belong to individuals who first planned and then carried out the kidnapping”*.

The appellant further stressed how the GIP himself had actually emphasized those elements that pointed at the concurrence and coordination of the group’s activities; inferable specifically:

- from the near-complete identification of the ID numbers of the credit cards used by the defendants for hotel bills and car rentals (hinting that the cards had been issued in a same context);
- since the defendants lodged at the same hotels in Milan, La Spezia and Florence, sometimes in the same period and sometimes consecutively;
- since different individuals often supplied hotel staff with a same foreign address as residency.

The Public Prosecutor then submitted detailed grids (summarizing the findings of inspections carried out by judicial police and attached to the recorded documentation), which proved the presence of several defendants in different hotels, the length of their stay, as also the frequency and duration of their presence in places where the crime would then be committed; on the one hand, this enabled investigators to prove the simultaneous presence of today’s defendants with those that would later actually perform the kidnapping, and, on the other, it exposed the arrival and departure of today’s defendants just before and straight after the preparatory activities towards the kidnapping, except for Ibanez, who is believed to have awaited the ab-

duction to be complete before heading to Venice from Milan, and thence leaving the country with one of the material perpetrators of the actual abduction (Asherleigh).

The Public Prosecutor then pointed out how studying the telephone records had exposed the frequency of contacts between those involved in the scouting and those who had carried out the abduction, while it transpired that Castaldo, Ibanez and Kirkland had actually used the very same telephone appliances as three material perpetrators of the kidnapping; this being an unequivocal sign that such telephone appliances belonged to a same supply available to all those involved in the operation.

Lastly, in proof of the group's consistency, the Public Prosecutor cited the outcome of a search made at the fugitive defendant Robert Seldon Lady's house at Penango (Asti), Italy. The man is a retired diplomat known to law enforcement agencies as the Milan CIA contact: all hotels used by the defendants were included in a list found in his home and confiscated.

As a result of the group's operative consistency and the proven participation in scouting activities of those defendants against whom the present appeal is held, the Public Prosecutor believed they could not be treated as exempt from blame simply for not having partaken in the material abduction for the very reason that, through such activities, they had favored the acquisition of cognitive elements re the abduction scene and the victim's habits, which were accessory to the deed and which its material executors were capable of exploiting; by so doing, they had also bolstered the kidnappers' resolve, a fact which the Public Prosecutor believed was sufficient to contemplate the above defendants' complicity in the said kidnapping.

The Public Prosecutor supported the said conclusion by quoting Supreme Court rulings believed to support the reasoning put forward in the appeal.

The Prosecution therefore insisted that the request for extending custodial measures also to the abovementioned defendants should be allowed.

Throughout the hearing the Public Prosecutor illustrated the grounds for appeal, insiting that the aforesaid conclusions should be accepted. The defence drew attention to the problems relating to the identification of today's defendants and, as for the rest, requested that the GIP's ruling, in which the Public Prosecutor's request was rejected, be upheld.

The defendants did not appear in person.

This Court believes the appeal is founded within the limitations detailed below and that, consequently, the application for custodial measures should be extended to the abovementioned persons in partial overturning of the ruling object of this appeal.

On a preliminary note, it is hereby stated how, based on the investigations made, all the defendants in these proceedings have been declared untraceable through specific court orders issued by the GIP at the Milan Court-house on 07.05.2005 as per Art.159 c.p.p., and the notifications thereof were submitted to the counsel for the defence, nominated by the GIP pursuant to Art.97 c.p.p. and abovementioned Art.159 subsection 1 c.p.p..

Once the untraceability (as is here the case) has been declared, Art.159 ss2 c.p.p. provides that "notifications made in this way [namely, the copy being presented to the defence] are valid to every effect" and that "untraceable

defendants are represented by the defence counsel”. The following Art.160 c.p.p. then provides (at section 1) that “the decree of untraceability issued by the judge or by the Public Prosecutor at some point in the preliminary investigations”, as is here the case, “ceases to be effective once the warrant closing the preliminary hearing is issued or, in want of this, once the preliminary investigations are complete” (the preliminary investigation is not complete in this specific case, so neither is the preliminary hearing).

For the purposes of the above provisions, it is found that the decree of untraceability issued by the GIP remains effective also in this appeal trial and that, consequently, any notifications to the defendants as to the definition of the hearing have been aptly executed by means of their presentation to the defence.

To this effect it is stressed that the proceedings *ex art. 310 c.p.p.* spark an incidental proceeding that remains pertinent to the preliminary investigations phase and that, in the light of the provisions in Art.160 c.p.p. (curbing the effectiveness of the decree of untraceability subject to the phase in which it was issued, and not based on the principal or incidental nature of the actual proceedings), also remains effective in the parallel incidental proceedings, providing it is started in the same phase (specifically, that of preliminary investigations): indeed, the very accessory and subaltern nature of the incidental appeal proceeding *ex Art.310 c.p.p.* vis-à-vis the principal proceeding commands that, in the absence of express legal provisions supporting such principle, any actions performed in the principal proceeding are also effective in the incidental proceedings (see Cass. sez. I 7.7.1994 n.3409 Ardino RV 199587, where it was held that the decree of untraceability issued during the phase of preliminary investigations in the principal

proceeding is also “de libertate” effective in the incidental proceeding started in the same phase, consequently ensuring that the notification submitted to the untraceable defendant’s counsel is valid).

The same Supreme Court has also on occasions pointed out that “*in terms of notification to defendants abroad, in the event of conflict between the general prescriptions of Art.169 c.p.p. and the specific provisions for appeals in “de libertate” proceedings as per Art.310 c.p.p. (allowing notification in the short time provided by Art.127 of the said code, thereby ensuring a decision is possible within twenty days from receipt of the documents), the latter cannot but be overriding, in consideration of the requirements of rapidity inherent to the relevant proceedings; a different interpretation would not rest harmoniously with the principles laid down by the code that, anyhow, sets very short deadlines in the relevant proceedings. It follows that **the notification of the hearing to a defendant abroad must necessarily take place through notification to the defence counselor, as the code provides in case of untraceable defendants (Art.159), fugitives (165 c.p.p.) or defendants without abode in Italy (Art.169 c.p.p.). The same applies for the notification of the court order in appeal trials**” (Cass. sez. VI 26.1.1999 n.257 Cammarata RV 214132; *conf.* Cass. sez. I 14.10.1999 n.5611 Piscopo RV 214700; Cass. sez. VI 18.12.1990 n.3778 Carbone RV 186525; likewise, even in a case when the defendant was detained abroad, and therefore in a known place, v. Cass. sez. II 26.6.2003 n.31693 Urbanovic RV 226683).*

Moreover, the suspects’ blatant untraceability and the researches prior to its announcement cannot but warrant the belief that a foreign abode for the suspects object of the present appeal is also unknown.

After all, suspects had provided P.O. Box addresses (not amounting to accommodation addresses as they neither dwelt or resided there) that have yielded nothing despite the inspections carried out hitherto, as can be inferred from the documentation submitted to this Court.

Consequently, this removes the only prerequisite on which an appeal against the notification could be allowed as per Art.169 c.p.p. (see Cass. sez. V 13.11.2002 n.4083 Lombardo RV 224699), and is therefore irrevocably ruled out.

On the contrary, it must be pointed out that in the principal proceedings (whose findings possess an absorbent value vis-à-vis those in the incidental proceeding on which it is founded, as is, in fact, the present appeal ex Art.310 c.p.p.) an action commanding the search of the aforesaid defendants was initiated and then concluded with a declaration of untraceability, so that the only notification permitted in the present case is the one adopted, namely notification to the defence as provided by Art.159 c.p.p. in the case of untraceability, not by virtue of an interpretational *fictio* (equating the foreigner lacking appropriate abode in Italy to an untraceable person) but on the basis of the condition of untraceability conferred upon the suspects upon termination of the procedure contemplated by law for a declaration to this effect, this procedure having already been completed in the principal proceeding during the preliminary investigations phase.

It should then be pointed out that notification through presentation to the defence counsel has already been held as consistent with the 11.04.1950 Convention on the upholding of human rights and basic freedoms, ratified with L. 4.8.1955 n.848, reflecting manifold Supreme Court rulings (see Cass. sez. VI 18.12.1990 n.3778 Carbone RV 186526; Cass. sez. I

14.10.1999 n.5611 Piscopo RV 214700 as quoted); moreover, on a different tone, it would grant an unfair privilege to foreigners that had absconded after committing the crime (such privilege would indeed be unconstitutional in that it would benefit whoever is untraceable, to the detriment of those individuals who had made themselves available to the authorities, and whose conduct would be equally blameworthy as those who had absconded) thereby preventing the prosecuting authority from proceeding against the absconding foreigner with custodial measures, ensuing from the Prosecutor's appeal, due to the fact that no valid notification could theoretically be made.

Therefore, the notification procedure re the definition of the hearing is not only compatible in the specific case with the legislator's intent (and in keeping with the Supreme Court's abovementioned guidelines), but neither can any constitutional unlawfulness be traced in the specific matter.

After all, it should be noted how no objections, either on constitutional or procedural grounds, have been raised by the defense; consequently, for the abovementioned reasons (in conformity with the Supreme Court rulings), this Court does not believe any *ex officio* criticism arising from questions on constitutionality is warranted.

It therefore finds that the argumentation throughout the present incidental proceeding was lawfully conducted, along with the presentation to the defence of the notification re the definition of the hearing.

Moving on to examine the merit of the appeal, the Court thoroughly agrees with the timely factual reconstruction made in the contested ruling, based

on a careful analysis of the elements acquired in the investigation, which reaches back to the Public Prosecutor's detailed request, though enhancing it with remarks and observations such as e.g. those relating to the numerical succession of credit cards used by the suspects, thereby allowing to substantiate further the well-founded factual conclusions that may be drawn from the abovementioned request for custodial measures.

Indeed, the reality of Abu Omar's abduction can no longer be justifiably doubted, despite unsubstantiated information from March 2003 was received by Police Headquarters in Rome and supplied to the Public Prosecutor's office at the Milan Courthouse as late as 04.24.2004, claiming that Omar had relocated to an unknown Balkan location.

It is worth mentioning that, straight after the abduction, a Milan lawyer appointed by Omar's family made inquiries with DIGOS on his client's possible arrest, as his wife had reported his disappearance on 02.20.2003 and she had neither seen nor heard him since noon 02.17.2003. The argument for the abduction is then supported by statements provided by an eyewitness (Rezk Merfat), who had coincidentally been present at the scene, and had confided in a friend; under pressure for information (on the abduction) from the *imam*, the latter had recounted her friend's tale, namely that the man had been forcibly abducted by strangers who had approached him with the excuse of checking his papers, loading him then into a white van despite his efforts to break free.

The said elements would be enough in themselves to support the theory of the abduction, also because the said Abu Omar turned out to be under investigation by the police, and DIGOS had already stated on 02.12.2003 that

unspecified “trusted sources” had also confirmed the circumstances of Omar’s forcible abduction with a white van.

In fact there was no reason why Abu Omar shouldn’t inform his closest family of a possible temporary flight, thereby sparing his wife such despair, and whose desperate pleas to both law enforcement agencies and the Islamic community focused the latter’s attention on the gathering the relevant information.

Even the conversations wiretapped at the time attested the widespread shock experienced by those individuals who were under investigation for crimes linked with international terrorism, supporting the belief that they too were unaware of the victim’s fate, despite their involvement in Omar’s same activities, and which could have theoretically warranted his voluntary flight from Milan.

Had the above events been the product of a false declaration made by those involved in illegal actions, aimed at justifying Abu Omar’s disappearance, it would be hard to explain why Salem Shawki Bakry, husband of the eye-witness (Rezk Merfat), had been threatened not to reveal what his wife has seen: indeed, he told investigators who had later questioned him that he had been pressurized not to disclose any information, and had decided to send his wife abroad; he had shared his fears with Abu Imad (the Imam who had urged the faithful to step forward if they possessed any information on Abu Omar’s disappearance). Questioned on this point, the same Abu Imad confirmed that the man did not want to “slam open the doors of hell”.

Still, any residual doubts on the reality of the abduction were swept away by Abu Omar himself, who also provided useful points for a resumption of

investigations (that had by then reached a standstill); in fact he contacted his wife (whose phone was still tapped) on 04.20.2004, roughly a year after his kidnapping, and told her what had happened.

Throughout the time from 04.20.2004 until 05.10.2004, investigators were able to intercept several conversations with Abu Omar who, after having contacted his wife, exchanged calls with other individuals subject to wire-tapping in conjunction with investigations into crimes as per Art.270 bis c.p., and notably with Elbadry Mohamed Reda, with whom he mentioned the outcome of the interrogations he was put through during his captivity.

The same Reda specified to investigators that Omar had endured tough questioning, and had been exposed to huge temperature jumps throughout (from extremely hot to extremely cold, causing him awful pain to his bones, as if fractured). Abu Omar had also suffered electric shocks to his genitals and was forced to listen to dreadfully loud noise, resulting in damage to his hearing. Said torture and the physical consequences of mistreatment (i.e. locomotion and walking troubles, as also incontinence) were then confirmed in the medical reports of tests that Abu Omar had undergone, and the translation from Arabic into Italian had been received by DIGOS on 03.23.2005.

Then again, Abu Omar informed Reda of the above circumstances during a conversation in which the former also gave details of other information he had been forced to provide on other associates during a conversation in which Abu Omar spoke of activities and listed names that he never would have uttered, had he known the call was being intercepted; this rules out any manipulation of events surrounding the abduction, and strengthens the

worthiness of the information passed on to Reda, so that I expressly reject the idea they may have been spread with malicious intent.

It was thanks to the details on the means of transferring Abu Omar from Italy to Egypt that investigators were able to intensify the inquiry, and to single out Aviano as the airport that was involved in the victim's rendition, the only one roughly five hours' drive from Milan (being the stated time required for the road trip).

At the same time, investigators were able to trace the telephone numbers that were active on the abduction scene, and ascertained that several had been in contact with the then commander of the 31st Security Force Squadron, and head of airport security at Aviano airbase, whilst the Aviano CC Aeronautics Station confirmed details of flights departing from Aviano (aside from two-seater F16 aircraft), thus allowing to identify the DC9 flight that took off at a time compatible with the arrival in Ramstein, Germany, and subsequent departure of another US aircraft bound for Cairo, Egypt, where the presence and activity of another telephone number was established: that of Robert Seldon Lady, known to DIGOS as the main CIA contact in Milan, and who had also been contacted by one of the cell phones operating at the crime scene whilst the abduction was underway.

By matching the data on the whereabouts of telephone SIM card holders by tracing their movements within GSM cells to the results of inquiries into hotel bookings by US citizens whose names had arisen in conjunction with investigations on mobile GSM numbers and car rentals, it was possible to identify the holders and users of said SIM cards throughout the crucial stages of the operation, ascertaining that said cards were present and in use

in the different hotels, in line with a chronological succession that perfectly matched the suspects' overnight stays at hotels in Milan and throughout Italy, where they had moreover been identified by means of their identity papers.

In this way it was possible to identify the persons who had actively performed the abduction and those that had surely been present for the duration of the subsequent transfer from Milan to Aviano, whence Abu Omar was deported to Egypt.

Faced with a GIP injunction that is particularly detailed and wholly consistent with the reconstruction of the events, and in order to avoid futile repetitions of its findings and argumentations, this Court cannot but fully recall and refer to the reconstruction stated therein, so as to integrate in such way the motivation of the present proceeding: indeed, it consists of references to specifications issued in this very proceeding, concerning the same facts and known to the parties, as it is clear from the documents submitted to this Court.

It should then be noted that the reconstruction of events in the court order has by no means been contested by the appellant, who, instead, refutes the correctness of the GIP's judicial findings with regard the suspects, resulting in the present appeal.

On this point the Court must note that the motivation of the judge's warrant appears inconsistent and defective: inconsistent because, having outlined a series of factual circumstances (such as running scouting activities directed at Abu Omar's abduction, the occurrence of frequent and otherwise inexplicable contacts between the present suspects and the material perpetrators

of the abduction), that support the argument of the defendants' involvement in the relevant crime, the trial judge then settles for the opposite finding, negating the existence of the serious evidence above; defective because the trial judge fails to explain from which perspective the circumstantial picture is found wanting (either due to the absence of relevant behavior imputable as accessory to the crime, or since the material conduct is not deemed sufficient to establish the complicity in the crimes, or because the will to contribute to the perpetration of the abduction is not sufficiently established); such analytical indication of the reasoning at the root of the rejection was all the more necessary given that factual circumstances and arguments in support of the existence of said serious evidence had been acknowledged before the negative finding.

This Court indeed believes that the gap in the reasoning at the heart of the refusal cannot be filled, on the very grounds that no suitable motivation supporting it exists, whereas the abovementioned inconsistency (on the relevant aspect) of the contested order manifestly points at well-founded and recurring reasons affirming that, with regard to the above defendants, the evidence garnered amply satisfies the requirements of severity set by Art.273 c.p.p. in support of custodial measures as requested by the D.A.

As regards the causal effectiveness of the single accomplices' behavior, it must be emphasized that the Supreme Court has already pointed out that "for the purposes of ascertaining individuals' factual participation in a crime, the connivance not only becomes relevant when it is causally effective, being the precondition for the detrimental act, but also when it takes the shape of a facilitation; this being when the crime would still have been committed but, in absence of the facilitation, against significantly greater

odds or uncertainty. It follows that the accessory conduct need only manifest itself in an outward performance bestowing a significant contribution to the offence being committed, either by intensifying the mens rea or by facilitating the other participants' actions, and that the abettor has increased the chances of the offence being committed by means of his conduct" (Cass. sez. V 13.4.2004 n.21082 Terreno RV 229200).

To a great degree, the scouting activities have emerged as an irreplaceable element in establishing a sound knowledge of the crime scene whereabouts, especially since the abduction would be performed in utter secrecy by foreign citizens, without the assistance of individuals familiar with the surroundings or based in Italy, as this would have made it easier to link them to the victim's disappearance, or to trace their identities.

After all, the rationale in question maintains that crimes may be committed in greater security if the perpetrators are individuals that do not belong to the same territorial context to which their offences are ascribable, since, as in this case, executing a planned crime implies operating in a public place or any location where the presence of eyewitnesses cannot be a priori ruled out.

For the purpose of establishing complicity, the conduct of those who materially carried out the scouting must be acknowledged as directly instrumental in the preparation of the abduction.

Specifically, one must point out that **Castaldo**:

- recurs as present in the area where the abduction took place and along the escape route followed by the perpetrators 18 times between 01.18.2003 and 01.31.2003
- has used the same cellphone number, marked with the same IMEI

code, as the one used by an unidentified person, who was nevertheless present at the crime scene on the relevant day

- has had frequent contacts with co-defendants Castellano (also repeatedly present in the area where the abduction took place and along the escape route taken by the perpetrators, though after Castaldo), Adler (appearing to have participated in the actual kidnapping), Carrera (recurring in the whereabouts of the crime scene on the day it was committed, then heading for Aviano on the same day and returning to Milan), with co-defendants Sofin, Harty, Harbaugh and Rueda (material executors of the abduction), and with an unidentified individual whose cellphone number was active on the day of the abduction throughout the Milan – Aviano route
- stays in the same Milan hotel (the Westin) as Adler, Harbaugh, Harty, Rueda and Sofin, namely the individuals who allegedly carried out the actual kidnapping
- is present on 2.2.2003 at La Spezia, where Adler, Duffin, Purvis, Carrera, Harbaugh, Harty (the actual perpetrators of the abduction) and co-defendants Castellano and Gurley
- to have the first nine digits on her credit card in common with Rueda's.

As regards **Kirkland**, the same appears:

- present in the area where the abduction took place and along the escape route followed by the perpetrators 11 times between 01.16.2003 and 02.09.2003
- to have had frequent contacts in that same timeframe with Jenkins, Castellano (individuals involved in the scouting activities), Logan, Duffin (individuals in charge of conveying Abu Omar from Milan to

Aviano) Adler, Carrera, Rueda, Sofin, Purvis and Harbaugh (individuals appearing as material executors of the abduction)

- to have stayed in the same Milan hotel (the Marriott) as Carrera and Purvis (later emerging as material executors of the abduction), and Channing and Vasiliou (later emerging as individuals in charge of conveying Abu Omar from Milan to Aviano), only then to team up with Carrera and move on to the Hotel Ata Executive, from which he checks out after the last scouting inspection
- to have the first seven digits on his credit card in common with Adler's.

As regards **Jenkins**, the same appears:

- present in the area where the abduction took place and along the escape route followed by the perpetrators 17 times between 01.22.2003 and 02.08.2003
- to have had frequent contacts in that same timeframe with Kirkland, Castellano (individuals involved in the scouting activities), Logan, Duffin (individuals in charge of conveying Abu Omar from Milan to Aviano) Adler, Rueda, Sofin, and Harbaugh (individuals appearing as material executors of the abduction)
- to have stayed in the same Milan hotel (Hotel Principe di Savoia) as Adler and Purvis (material executors of the abduction) Duffin and Logan (individuals in charge of conveying Abu Omar from Milan to Aviano), and Castellano (involved in the scouting activities), and to have then moved to Hotel Gallia in Milan, where Duffin and Logan (as said before, individuals in charge of conveying Abu Omar from Milan to Aviano) are also present, from which he checks out two days after the last scouting inspection.

As regards **Ibanez**, she appears:

- present in the area where the abduction took place twice between 02.13.2003 and 02.15.2003
- to have used the same cellphone appliance, marked with the same IMEI code, as the one used (with a different number) by an unidentified person, who nevertheless partook in the scouting activities and the material abduction
- to have been in contact with co-defendant Sofin (appearing as material executor of the abduction)
- to have stayed at the Hotel Hilton in Milan along with Asherleigh, Purvis (material executors of the abduction), Duffin and Logan (in charge of conveying Abu Omar from Milan to Aviano), and co-defendants Castellano and Gurley (on 02.03.2003), from which she will check out two days after the actual abduction, along with one of the material perpetrators, Asherleigh, with whom she travels to Venice, only to leave a few days later
- to have all but the last two digits on her credit card in common with Logan's.

As regards **Castellano**, in addition to details on his involvement when assessing Gurley's position, the same appears:

- present in the area where the abduction took place 8 times between 01.25.2003 and 02.07.2003
- to have had frequent telephone contacts in that same timeframe with Kirkland, Jenkins, Castaldo (individuals involved in the scouting activities at the crime scene) Duffin (in charge of conveying Abu Omar from Milan to Aviano) Adler, Carrera, Rueda, Purvis, Harty and

Harbaugh (material executors of the abduction)

- to have stayed at the same hotel in Milan as material executors of the abduction (Purvis and Asherleigh), individuals who conveyed Abu Omar from Milan to Aviano (Logan and Duffin), as well as co-defendants Gurley and Ibanez.

At this point, it is highly unlikely that

- the above US citizens had repeatedly found themselves in the very areas that Abu Omar habitually traveled along from his abode to the mosque, and along the route to Aviano, out of sheer chance and in such a short timeframe.
- the same US citizens had established manifold telephone contact with an unusually high number of individuals, who later emerged as involved at varying lengths in the execution of Abu Omar's kidnapping and transportation from Milan to Aviano, given that their presence in such humdrum places could neither be ascribed to tourism nor shuttling from one hotel or resort to another, but was solely motivated by the intent to stake out the future abduction victim's habits and movements.

Similarly, it is also highly unlikely that an incredible series of coincidences caused today's defendants to spend overnight stays in the same hotels as the material executors of the abduction, and in those same hotels appearing in a list seized during a home search at Robert Seldon Lady's house; not only is he known to Digos as the CIA contact in Milan, but is also the recipient of a telephone call on the day of the kidnapping from one of the individuals (Purvis) who carried it through, while the latter was still on the crime scene. In addition to this, the now untraceable Robert Seldon Lady

was also holder of the telephone number that was active in Egypt during the same time when Abu Omar had been taken there and was being questioned for any information on terrorist group members, and had ultimately been offered to return as a spy.

As said before, surmising that all this is merely the outcome of an array of articulated (and uncannily interconnected) yet wholly coincidental circumstances is an utterly unacceptable operation from a logical and evaluative standpoint, in that it negates the objective evidence gleaned from the copious elements pointing at demonstrating how the scouting activity was finalized towards the abduction, in which the various individuals would mutually interact and exchange data progressively garnered in such a manner as to ensure the abduction was carried out in the smoothest possible way; this required the opportunity to liaise directly with the material perpetrators so as to concur with them on the sort of information they required for the purposes of the abduction, therefore defining a joint plan of action.

After all, the above elements are not the only ones supporting the belief that the actions perpetrated by today's defendants were wholly finalized towards carrying out the abduction, if one considers that the above individuals arrive in Italy and leave the country in adherence to a tight chronological schedule that covers the inspections to be carried out and, in one case (that of Ibanez, who arrived shortly before the events), even until straight after the actual abduction.

Indeed there are numerous elements that belie the collectiveness of the action and the comprehensive coordination put into effect by the single contributions that would lead to the completion of the offence.

Examples range from the abovementioned correlation between the credit card numbers (arousing the suspicion that they have all been issued within a same context), to the shared use of cellphones on the part of several suspects (those operated by Castaldo, Ibanez, and Kirkland, especially, also appear to have been used by individuals who actively partook in the material abduction), or that several suspects in the present proceeding have often submitted a same US address when checking into hotels for overnight stays.

If such *modus operandi* seems somewhat convoluted and drawn-out, let us nonetheless not overlook the sensitive nature of the unlawful deed that had to be accomplished.

Neither can one underestimate how this kind of undercover operation not only proved a remarkable hindrance in reconstructing the criminal act, namely the very reality of the completed abduction, but also in establishing any complicity therein, a still incomplete venture.

The quest for secrecy and the need to ensure contacts and organizational feedback for the purpose of planning the operative measures for the abduction shed light on the movements of individuals, which would otherwise be devoid of any explanation or logic, permitting a full appreciation of **Gurley**'s involvement in the affair and his complicity in the kidnapping.

Indeed, it should be noted how the same travels in close contact with co-defendant Castellano, who not only is active in the scouting activities at the crime scene (where he is present 18 times between 01.25.2003 and 02.05.2003), but also occasionally makes hotel bookings for himself and his accomplices, and especially for Adler (present at the crime scene during the actual abduction) at the Hilton Hotel in Milan at the time when the kid-

napping was being carried out.

It should then be noted that on 02.02.2003 Gurley was present with Castellano at the Jolly Hotel in La Spezia, together with another individual who (like Castellano) had carried out scouting activities in view of the abduction, namely Castaldo (present at the crime scene 18 times between 01.18.2003 and 01.31.2003). In addition to this, on the above day the same hotel was housing other individuals recurring as material executors of the abduction (Adler, Purvis, Carrera, Harbaugh, Harty and Rueda), and also one of those who reportedly drove Abu Omar from Milan to Aviano (Duffin). On that same day, together with two of the material executors of the abduction (Adler and Purvis) and the individual who partook in Omar's transportation (Duffin), Castellano and Gurley move to the Hotel Baglioni in Florence, which they leave immediately on 02.03.2003 and on the same day check into the Hotel Hilton in Milan, where they meet up with Ibanez, Asherleigh, and Logan (in charge of scouting activities, the former will stay in Milan until the day after the abduction, leaving on 02.19.2003 with Logan, who reportedly contributed to transporting Omar to Aviano, and Asherleigh, another individual who partakes in the material abduction, with whom she stops over in Venice, and thence travels to Germany).

As it has become clear, the operation involves a range of frenzied transfers from one hotel to another, where they stay for a very short time, considering the distances covered between Northern Italian cities (Milan - La Spezia - Florence - Milan), and utterly nonsensical in themselves (be it for tourist motives, or any other reason), the sole objective of which is to arrange meetings in places far-removed from the actual crime scene between persons who carried out scouting activities, persons who will later transpire

to be members of the “commando unit” partaking directly in the abduction, and those charged with transporting Omar to Aviano; the group will thereafter reunite, having lost some of its components who had completed their mission (notably, those who had made the most transfers), joining up in Milan with new persons charged with scouting activities and with further individuals who will take part in the execution of the material abduction, namely those in charge of conveying the victim to Aviano base.

The complexity of the organization, and the wariness displayed in meetings (as when different accomplices grouped up or scattered), causing their connection to the planned abduction to be far from manifest, can be straightforwardly motivated by the particularity of the endeavored objective: indeed the individual targeted for abduction was touted as a member of an international terrorist organization with ample resources (even reactive warheads), supported by complex international relations, and whose affiliates are known to operate with stealth and circumspection, and furthermore special care would be required to avoid detection by the victim or by persons close to him. After all, this operation was being conducted against a person who, due to his manifest links with extremism and international terrorism, was supposedly subject to close scrutiny on behalf of the Italian authorities (as was indeed the case), and consequently it would have to be accomplished in such a manner as to ensure, also from this standpoint, the uttermost confidentiality and, especially, in such a way that it would be nigh impossible to ascribe *a posteriori* the parties’ presence and mutual contacts to the act of kidnapping, which, insofar as possible, was not even meant to become manifest as such.

After all, if such requirements of caution and wariness go a long way in

vindicating an organization nothing less of Machiavellian – which, otherwise, would in itself seem altogether illogical and groundless – one can safely rule out that persons who had demonstrated such a degree of functional vigilance and could liaise so skillfully with one another would accept the participation to such operational meetings of an unwitting national, residing in the same hotels where the contacts were being established and the working groups were being assembled in view of the actual abduction: on the other hand, nobody has even tried to allege that, due to a constant and unfortunate array of coincidences, the abovementioned Gurley had not only undergone strenuous transfers from one city to the next, but, due to an even more extraordinarily unfortunate coincidence, was staying in the same hotels where out of sheer chance other fellow countrymen (some of whom later turned out to be material executors of Abu Omar's kidnapping, while others had performed thorough scouting activities around the scene of the abduction) were also resident. In turn, they also underwent an equally bizarre, and otherwise inexplicable, series of transfers from city to city, only to end up in the same hotel in Milan as other fellow nationals who also turned out to be material executors of the abduction, or persons who scouted its whereabouts. Due to a truly unbelievable stack of misfortunate coincidences, the same Gurley would then leave Milan along with co-defendant Castellano (as said before, the one who had not only performed scouting activities but had also booked one of the material executor's hotel room).

Between 02 and 03.02.2003, Gurley would then shuttle from La Spezia to Florence, then on to Milan, and from there on to an unknown destination immediately before the abduction was performed, always traveling with Castellano and accompanied by a group that, despite having reunited in

varying forms, always featured individuals in its midst who had carried out scouting activities, individuals who had performed the abduction, and individuals who had transported Omar to Aviano.

Though established at a logical level, the assumption that Gurley took part in operative meetings aimed at planning the abduction must be regarded as extremely well-founded, all the more so because his arrival and departure from Italy have appeared to be in strong and sole connection with such gatherings (otherwise unfathomable) and that the actual abduction would take place shortly after his involvement.

Gurley's behavior, if only his bolstering the resolve of the others, must be held to be criminally relevant for the purposes of confirming his complicity in the abduction in question.

It then follows, on the basis of the reflections outlined above, that each of the defendants has contributed to the performance of the crime through an outward behavior that aimed at strengthening or facilitating the perpetration of the offence, and therefore turned into criminally relevant for the purposes of substantiating their complicity in the said offence.

It should furthermore be stressed how, based on the elements detailed above, all today's defendants appear to have acted with an identical objective, in full awareness of the actions performed by others, and with the intent to operate together: this fulfills the requirements for establishing criminal complicity in the crime (see Cass. sez. VI 21.3.2003 n.25705 Salamone RV 225935; Cass. sez. VI 10.7.2003 n.37337 D'Amico RV 227321).

Indeed, it is not a question of the defendants' mere presence alongside others, which would surely not suffice *per se* to establish the complicity (see Cass. sez. V 29.3.1996 n.4759 Capozzi RV 204842), but rather an array of coordinated scouting activities of the areas where the abduction would take place, telephone contacts with the material executors and several coordinators of the operation, participation in meetings to be held in other cities so as not to arouse suspicion and to avoid the joint presence of those members of the group charged with forcibly seizing the victim and those charged with transferring the man to the airbase (from which he would be flown to Egypt against his will and undergo the questioning as mentioned above).

It therefore amounts to a series of actions that, to be efficiently performed and geared at the successful completion of the operation (as was the actual case), must have necessitated a shared knowledge and coordination along the lines of a joint criminal plan, which would not feature a specific coordinator – thus being the sole responsible (together with the material abductors) of fully grasping the extent of the unlawful conduct which every other participant's preparatory actions had facilitated – but a plethora of contacts between each defendant and another, aimed at exchanging garnered information, to the level that each participant was educated in the contributions of others and aware of the joint criminal project.

This is sufficient to establish criminal complicity, since proving the existence of prior agreement or that every single participant was aware of every single contribution by the participants (see Cass. sez. un. 22.11.2000 n.31 Sormani RV 218525) is not a prerequisite; what is required, instead, is the mere understanding on everybody's part (as is the case here) of the need for coordination in view of the ultimate criminal goal, which, in turn, would necessarily have to be known to everyone, so that each conspirator could

fulfill his/her tasks: the scouting and the data obtained from tracking the victim's movements were all aimed at the latter's forcible apprehension, with the consequential notification of the route details (permitting to establish the most fitting locations, times and means to be employed in Omar's abduction and transportation), at effectively ensuring the contacts and meetings with the other parties, at guaranteeing, especially, the victim's complete surprise and the utter secrecy of the operations the foreign agents had to perform in Italian territory, in such a way that, insofar as possible, it would have been impossible to uncover the deed or to track down its culprits; such secrecy and care in arranging the meetings - with the material abductors and those in charge of transportation and with those who had performed the scouting activities - also denotes that persons unrelated with the criminal scheme being planned at the time, through the data exchanged by the above parties, would not have been admitted to such gatherings, which were also held far from Milan and in such a way that, insofar as possible, it would have been impossible to uncover *a posteriori* the group's joint effort, thereby linking it to the abduction.

From this point of view, then, Gurley's presence at such operative meetings – conducted in the highly convoluted way as described before, where units formed and regrouped to ensure the data obtained from the scouting was first adequately discussed between the scouts and the material abductors, then between those responsible for staking out the area in the final days and all the units in charge of Omar's abduction and transport from Milan - indeed appears significant in that his accessory involvement in the deed can be established, as also his will to contribute to the execution of the said kidnapping.

Insofar as the identification of the suspects, it must be stated that this has not proven overly difficult as with those parties against whom the appeal was lodged, since they have turned out to be the subscribers of the cell-phone numbers in use (discovered thanks to the identification of 17 numbers that were present at the crime scene on the day of the abduction and had reportedly engaged in prior contact with today's defendants) and their identities have been derived from the ID papers submitted to the hotels where they resided and, to this day, have not shown any sign of forgery.

In any case, one must stress that caution should be exercised so as not to mistake uncertainty as to the suspects' physical identities (i.e. where the party subject to the proceeding matches the one designated as the perpetrator of the crime) with uncertainty as to the suspects' exact personal particulars (i.e. the truthfulness of a name, surname, and other elements necessary to identify the person subject to the proceeding, moreover, matching physically the one designated as the perpetrator of the crime).

In fact, in the first instance, any misgiving on the correlation between the party subject to the proceeding and the one designated as the perpetrator of the crime thwarts the ascription of the crime, with the substantive result that the defendant is cleared for not committing the deed, which, insofar as the provisional measures, equally lessens the chances of later ascribing the crime to the accused upon sentencing, with the consequent lack of the requisite of circumstantial gravity.

If, instead, the uncertainty concerns the suspect's identity, aside from the exact physical identification, Art.66 s.2 c.p.p. expressly provides that "the impossibility to ascribe the exact personal particulars to the accused does not preclude any action on the prosecuting authority's part, when the person's physical identity is certain" and specifying further at s.3 that "any in-

correct personal particulars assigned to a defendant are amended as provided by Art.130”, namely according to the procedure laid out for correcting material mistakes.

In this case, the physical identity of the persons against whom the appeal was lodged is beyond doubt, in that it was established in the manner described above.

Moreover, neither do the suspects’ personal particulars arouse any doubts, since the same have been derived from the passports presented at the hotels where the parties stayed. On the balance of submitted evidence, no difference or discrepancy has been registered to this day between the particulars presented repeatedly at the different hotels, nor has any element arisen that plausibly suggests the said ID papers are a forgery.

At this stage, it follows that the personal particulars ascribed to the defendants are genuine, although if for any reason they turned out to be incorrect, due to still unknown and therefore truly unforeseeable elements, no flaw in the procedure or in ascribing the responsibility for the crime would ensue (and even less so with regard the chance of ascribing the crime to the accused upon sentencing, for the purpose of substantiating the serious evidence warranting custodial measures) but the material error regarding the incorrect personal particulars assigned would have to be amended.

One must therefore consider fully satisfied the requisite provided in Art.273 c.p.p. with regard the attribution (as per complicity ex Art.110 c.p.p.) of the abovementioned offence also to the other above defendants.

It should also be noted that, delegated by the State Attorney's office on 03.10.2005, the Carabinieri High Command for Foreign Affairs activated the State Department protocol to establish whether the suspects (including those object of the present appeal proceeding ex Art.310 c.p.p.) were employed in any way in US consular or embassy delegations or in other international organizations. In response to the said query (delivered to the State Attorney's office on 04.21.2005), none of the parties against whom the present appeal is lodged have turned out to possess diplomatic qualifications, thus excluding them from the category of individuals protected by the guarantees laid down in the 04.18.1961 Vienna Convention on diplomatic relations, implemented with act of Parliament n.804 dated 08.09.1967.

By the same measure, they do not appear to be listed in any State-recognized institutional bodies, assuming they had acted in compliance with a duty or exercising a right acknowledged under its regulations; accordingly, at the present state of inquiries, no justifiable reason can be alleged and, as said above, none has been claimed by the defense, nor noted ex officio.

It should then be stressed that the said crime is punishable with a minimum 4-year sentence and the principle set out in Art.280 s.2 is therefore upheld.

As said before, no grounds for precluding punishment or for extinguishing the sentence have arisen in this case, and neither have they been prospected by the defense.

This Court also finds that a suspended sentence cannot accompany the judgment, not only due to the seriousness of the incident and the *infliggenda pena* (since the sentence that may be executed against the defendants will not foreseeably be contained within the limits that warrant its suspension) but also due to the unfeasibility of a positive outcome to the question

of abstaining from committing similar crimes in the future, as highlighted by the following considerations on the custodial measures.

On the point of custodial measures, this Court believes these are immediately called for, given the exceptional threat of such occurrences as in Art.274 b) c.p.p..

It has already been pointed out how the relevant offence presents intrinsically serious aspects to such a degree that a prison sentence in excess of two years should immediately be handed out upon passing judgment: in consideration of the extraordinary wealth of men and resources employed in the abduction, the suspects' ability to gain access to military bases, and to avail themselves of aircraft protected by such concessions that their own flight details have been hard to establish.

The assumption quoted in Art.274 b) must thus be considered as fully met, regarding the prognostication of imposing a sentence in excess of two years.

As for the risk that the accused may flee, the Court cannot but underline how, right from the default in the proceeding against them for the application of custodial measures, the defendants have been deemed untraceable, and have already materially absconded after committing the crime. It should also be pointed out that the all the parties appeared to possess great financial means, which enabled them to dwell in expensive luxury hotels throughout Italy, so as to warrant the belief that the parties enjoyed sufficient pecuniary means to steer clear of the Italian authorities' claims; indeed the parties' links with this country are all but tenuous (as they are foreign nationals employed in the above criminal activities by virtue of their

lack of permanence in the Country, and in view of the greater efforts faced by investigators to keep them in check and establish their identity).

After all, one cannot fail to see how, since the only party to be affected by the indictment (the abovementioned Robert Seldon Lady, a foreign national maintaining stable links with Italy) has made himself untraceable, it must all the more follow that those parties strongly linked to him, and with whom the activities were planned, endeavor to evade Italian justice, seeing that they enjoy an even more favorable position (being in want of family ties or uninterrupted domicile in Italy), yet share a fundamentally analogous status with regard to deceptive skills, organizational capabilities, and contacts to exploit in planning their movements.

It is worth mentioning that these persons are all outstandingly proficient in carrying out their tasks in utter secrecy and are fully capable of being constantly on the move so as to conceal their actual destinations; they have proven to be capable of this in concrete, and with such mastery as befits anyone who is professionally accustomed to such behavior.

An array of sound elements, specifically ascribable to today's defendants, are indeed very real, and suggest that the likelihood of the said persons avoiding every kind of pursuit is extremely high (if not downright certain); this conclusion is further supported by the previously mentioned tangible fact, namely that, after committing the deed, throughout the investigations and for the duration of the procedure for applying custodial measures against them, the parties had already absconded and are now untraceable.

Hence, there is certainly a very clear danger of the parties' escaping, and it

is of such exceptional gravity that it would alone warrant the implemented measure.

Furthermore, it looks as if another likely danger in the present case is that of recidivism. It has already been pointed out how all the defendants have manifested outstanding skills in completing their assigned duties with speed, stealth, and utter efficiency, to the extent that preliminary investigations into the offences committed (and the suspects' identification as accomplices) were only made possible several years later. Such skills cannot be the product of extemporary or occasional resolutions, rather, they stand for a degree of professionalism that can only be attained through commitment to such conducts that reflect a dedicated and deep-rooted choice of lifestyle, seeing the sacrifices and risks to which they are exposed. It should not be overlooked, in fact, that the suspects carried out the above abduction with the intent to subject the victim to harsh questioning and to glean information on the worldwide terrorist activities of organizations that can benefit from international support as well as military hardware (this can be inferred in the likewise recorded warrant for custodial measures against Abu Omar).

The criminal activity carried out by the defendants indeed carries serious hazards for the actual perpetrators, and implies that extreme risks must be accepted; this acceptance is only compatible with a dedicated and deep-rooted determination, and one's complete submission to the pursuit of the assigned goals.

It therefore cannot be held that such conducts are occasional and, conversely, in view of the professionalism, the determination and the willingness tangibly manifested (as the emblematic availability to repeat such tasks if the need arose), one presupposes that the danger of recidivism is

extremely high and present, seeing that the context underlying the current abduction has remained unchanged.

After all, acting in secrecy and the ability to resort to fictitious superscriptions (such as to telephone companies) demonstrates how the essentials arising from the present inquiries on no account can be construed as being a hindrance in the reiteration of wrongdoings on the part of today's defendants. On the contrary, the defendants' proven recourse to effective dissimulating strategies, and their disregard towards acts of physical coercion in the pursuit of the said goals (both in planning the crime and in seeking to draw information from the abducted) suggests that there is a truly genuine and great danger of evidence tampering in this case, especially if one considers how difficult and sensitive the present investigations and inquiries have been, and how any findings must be preserved until they can be submitted and debated in court, also in view of the need to corroborate them against the claimants, who already appear to have been tangibly and effectively intimidated (see the statement given by Salem Shawki Bakri regarding the threats endured, the perceived need to send his wife into hiding – being an eyewitness to the incident, and the man's fears as expressed to Abu Imad re his desire not to “slam open the doors of hell” – this being an icastic expression that well renders the state of terror in which these people in the know were living).

Therefore, since the danger of escape is enough on its own to warrant the implemented measure, it is nonetheless the belief of this court that threats such as evidence tampering and recidivism are very real indeed, and that custodial measures in prison are called for also to ensure that said requirements are adequately guaranteed.

The defendants' previously mentioned abilities to threaten and dissimulate, the established absence of parties whose escape was stacked against greater

odds than today's defendants, their concrete and manifest will to eschew justice and to remove all traces of their presence, indeed, goes to show that the parties present a thoroughly unreliable nature (when it comes to assessing the profile of defendants who are taken into account for lighter custodial measures than prison custody) that firmly rules out any possible contemplation of alternative measures to a prison custody; this is all the more utterly impracticable given the certified status of the defendants, who are all untraceable.

Therefore the only adequate and proportional measure applicable in this case to all the above defendants is that of a custodial term in prison.

In view of all previous considerations, this court therefore overturns the contested injunction, and specifically where the Prosecutor's request was rejected, and orders that custodial measures in prison are applied to:

CASTALDO Eliana, born in Florida (USA) on 11/14/1969, currently *untraceable*;

CASTELLANO Victor, born in Texas (USA) on 05/01/1968, currently *untraceable*;

GURLEY John Thomas, born in Los Angeles (USA) on 07/10/1969, currently *untraceable*;

KIRKLAND James Robert, born in Tennessee (USA) on 07/13/42, currently *untraceable*;

JENKINS Anne Lidia, born in Florida on 09/24/1946, currently *untraceable*;

IBANEZ Brenda Liliana born in New York (USA) on 01/07/60, currently *untraceable*.

On consideration that this ruling prescribes the application of custodial measures in prison, having allowed the Prosecutor's appeal, the enforcement of the said measures is to be suspended until the ruling becomes final, pursuant to Art.310 s.3 c.p.p.

For these reasons

This court overturns the contested injunction issued by the GIP from the Milan Courthouse on 06.22.2005, specifically where the Prosecutor's request was rejected, and orders that custodial measures in prison are applied to:

CASTALDO Eliana, born in Florida (USA) on 11/14/1969, currently *untraceable*;

CASTELLANO Victor, born in Texas (USA) on 05/01/1968, currently *untraceable*;

GURLEY John Thomas, born in Los Angeles (USA) on 07/10/1969, currently *untraceable*;

KIRKLAND James Robert, born in Tennessee (USA) on 07/13/42, currently *untraceable*;

JENKINS Anne Lidia, born in Florida on 09/24/1946, currently *untraceable*;

IBANEZ Brenda Liliana born in New York (USA) on 01/07/60, currently *untraceable*.

This court declares that the enforcement of the present measures is *ex lege* suspended until the ruling becomes final.

This court delegates to the registrar the administering of all necessary duties and communications with immediate effect, and, once this injunction

has become executable, entrusts the Milan Prosecutor with ordering its execution, namely the arrest of the six abovementioned suspects¹.

Milan, 20th July 2005

The Judge responsible for summing up

Dr. Tommaso Epidendio

The President

Dr. Enrico Tranfa

The present warrant, consisting in 41 pages, was translated into English by Alessandro Bygate, language consultant and Interpreter, acting on assignment as appointed by the undersigned Deputy Public Prosecutor, dr. Armando Spataro Milano, November,5 2005

¹ The present warrant became executable on October2005 and the Public Prosecutor has therefore ordered its execution.