

EXTRAORDINARY RENDITIONS AND THE STATE SECRET PRIVILEGE:  
ITALY AND THE UNITED STATES COMPARED

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*Abstract*

The purpose of this article is to analyze the application of the State secret privilege in litigations concerning cases of extraordinary renditions in Italy and the United States (US). The article addresses the decision of the Italian Constitutional Court in the *Abu Omar* case and compares it with the case law of US federal courts in the *El-Masri* case. It is argued, with several caveats, that a common pattern emerges in both Italy and the US, whenever a case of extraordinary rendition is either investigated in a criminal proceeding or claimed in a civil suit for the purpose of civil liability: if the government invokes the existence of a State secret privilege, the judiciary shows utmost deference to the determination of the executive branch, making it impossible for the individuals allegedly subjected to extraordinary renditions to obtain justice before domestic courts. The article therefore examines what role legislatures and supranational human rights institutions could play to reverse this

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troubling trend, by assessing the differences and the similarities existing between Italy and the US. Even though legislatures, both in parliamentary and separation of powers systems, have proved either unwilling or unable to check the invocation of the privilege by the executive branch, the article suggests that the existence of judicial fora beyond the States, where individuals can bring their human rights claims, can be a valuable mechanism to ensure that allegations of extraordinary renditions are effectively adjudicated and redressed.

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### 1. Introduction

The purpose of this article is to analyze the application of the State secret privilege in litigations concerning cases of extraordinary renditions in Italy and the United States (US). Specifically, the article addresses the decision of the *Corte Costituzionale* (CCost), Italy's Constitutional Court, in the *Abu Omar* case<sup>1</sup> and places it in a broader constitutional perspective, by comparing it with the case law of US federal courts.<sup>2</sup> On the basis of the comparative assessment, the article argues that a common pattern emerges both in Italy and the US, whenever a case of extraordinary rendition is either investigated in a criminal proceeding or claimed in a civil suit for the purpose of civil liability: if the government

<sup>1</sup> C.Cost., sent. 106/2009, March 11, 2009 (published April 8, 2009).

<sup>2</sup> *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006); *aff'd by El-Masri v. US*, 479 F.3d 296 (4th Cir. 2007); *cert. denied El-Masri v. US*, 552 US 947 (2007). Cfr. also *Mohamed v. Jeppesen Dataplan Inc.*, 539 F. Supp. 2d 1128 (N.D. Ca. 2008); *rev'd by Mohamed v. Jeppesen Dataplan Inc.*, 536 F.3d 992 (9th Cir. 2009); *aff'd by, En banc Mohamed v. Jeppesen Dataplan Inc.*, 2010 US App. LEXIS 18746 (9th Cir. 2010); *cert. denied Mohamed v. Jeppesen Dataplan Inc.*, 2011 U.S. LEXIS 3575.

invokes the existence of a State secret privilege, the judiciary shows utmost deference to the determination of the executive branch and proceeds either to a dismissal of the civil action or to an acquittal of the accused persons. The consequence of the application of the State secret privilege is, therefore, the impossibility for the individuals allegedly subjected to extraordinary renditions to obtain justice through redress before domestic courts.

This troubling trend could be counteracted in a number of ways. The article will first investigate the role of legislatures in the oversight of the executive power and how the differences between a parliamentary and a separation of powers system may affect the capacity of the political branches to check and balance each other and prevent potential abuses in the use of the State secret privilege. As will be shown, however, the willingness and the ability of Parliament or Congress to counteract the increasing recourse by the executive to the State secret privilege seems weak in both the Italian and the US contexts. The article will therefore examine a second means of redress against the abuse of the State secret privilege: the role of supranational judicial institutions. Here, the divergence between the US and Italy appears significant: indeed, contrary to the US, Italy – as the other European countries – is subject to an external human rights scrutiny exercised by the European Court of Human Rights (ECtHR). Despite a number of caveats, it is argued that the existence of a multilevel system of human rights protection in Europe might prove effective and make the individuals adversely affected by human rights violations better off.

The structure of the article is as follows. Section 2 examines in some detail the *Abu Omar* trial as an example of the post-9/11 practice of extraordinary renditions and addresses the complex litigation on the applicability of the State secret privilege that has occurred before the Italian CCost. Section 3 takes into account the *El-Masri* case before the US courts and, by emphasizing the similar way in which Italian and US courts handle the questions raised by the executive's assertion of a State secret privilege in cases of extraordinary renditions, develops an analytical framework on the role of the domestic judiciary. Section 4 evaluates the role of the legislatures in the US and Italy and compares their capacity to oversee the executive branch's abuse of the State secret privilege. Finally, section 5 considers the role of supranational judicial institutions and looks at some recent developments in the case law of the ECtHR that highlight the potentials of a multilevel system of human rights protection to remedy

human rights violations produced by the practice of extraordinary renditions: the application lodged by Mr. El-Masri before the ECtHR will be reported as an example and compared with the less effective international mechanisms binding the US in the framework of the Inter-American human rights system. A brief conclusion follows.

## 2. The *Abu Omar* case

One of the most contentious counter-terrorism policies utilized by the US administration in the post-9/11 era is a program known as ‘extraordinary rendition.’<sup>3</sup> This program essentially consisted in the abduction of individuals suspected of being involved in terrorist plots or being part of terrorist networks and their secret transfer to detention facilities in third countries, in which constitutional and international standards of human rights protection do not apply, for the purpose of being interrogated.<sup>4</sup> One such individual was Mr. Osama Mustafa Hassan

<sup>3</sup> Cfr. Louis Fisher, *Extraordinary Rendition: the Price of Secrecy*, 57 Am. U.L. Rev. (2008) 1405, 1418 now reprinted in *The Constitution and 9/11* (2008) ch. 10, who explains that the ‘extraordinary rendition’ program was inaugurated in 1995 – cfr. Presidential Decision Directive 39 (June 21, 1995) – but reached its apex in the post-9/11 epoch. Departing from the approach of the previous US Administration, the new US President has established a Special Inter-Agency Task Force “to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.” (Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009) ‘Ensuring Lawful Interrogations’ Sec. 5 (e)(ii)). The Special Task Force then issued its recommendations to the US President advising that transfer practices comply with applicable legal requirements and do not result in the transfer of persons to face torture. The Task Force supported the continued use of assurances from a receiving country that an individual would not face torture if transferred there but requested strengthened mechanism to obtain, evaluate and monitor these assurances. (Dept. of Just., Press release 09-835, Aug. 24, 2009 available at: <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html> (last accessed June 10, 2011)).

<sup>4</sup> For a strong criticism of the use of ‘extraordinary renditions’ in the war on terror on human rights grounds cfr. Margaret Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo. Wash. L. Rev. (2006) 1333 and the report of the Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (2004). The practice of extraordinary rendition has come under fire also by

Nasr (alias Abu Omar), an Egyptian-born Muslim cleric living in Milan (Italy). The Italian police was already investigating the possible involvement of Mr. Abu Omar with radical Islamist groups, when, on 12 February 2003 Mr. Abu Omar was secretly kidnapped by a group of Central Intelligence Agency (CIA) operatives with the support of Italian security and intelligence officers and transferred to Egypt where he was detained for several month for interrogation purposes and allegedly subjected to torture and inhuman and degrading treatments.<sup>5</sup>

Soon afterwards, the Office of the public prosecutor in Milan opened a criminal investigation for the crime of abduction of Mr. Abu Omar and began an inquiry to identify the persons responsible for the crime.<sup>6</sup> It ought to be highlighted that in the Italian constitutional system, contrary to what occurs in the US, public prosecutors do not depend on the executive branch but enjoy the same wide autonomy and independence of ordinary judges. Indeed, both prosecutors and judges are civil servants, hired through public examinations, and are subject only to the disciplinary rules adopted by the *Consiglio Superiore della Magistratura* (Supreme Council of the Judiciary), i.e. the body representing the judiciary as an autonomous and independent branch of government.<sup>7</sup> In

multiple international institutions. Cfr. the Concluding Observations of the Human Rights Committee established under the International Covenant on Civil and Political Rights, *Report on the USA*, CCPR/C/USA/CO/3/Rev.1 Dec. 18, 2006; the Final Report of the European Parliament, *Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, Eur. Parl. Doc. A6-0020/2007, Jan. 30, 2007; and the two Reports written by Dick Marty for the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, *Alleged Secret Detentions in Council of Europe Member States*, AS/Jur (2006) 03, Jan. 22, 2006 and *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States*, AS/Jur (2007) 36, June 7, 2007.

<sup>5</sup> For an account of the facts involving Mr. Abu Omar and for an overview of the judicial proceedings that followed cfr. Tommaso F. Giupponi, *Stato di diritto e attività di intelligence: gli interrogativi del caso Abu Omar*, Quaderni Costituzionali (2006) 810; Francesco Messineo, "Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy, 7 J. Int'l Crim. J. (2009), 1023.

<sup>6</sup> Cfr. Penal code It., Art. 605 (criminalizing abduction) and Art. 289-bis (criminalizing abduction for terrorist purposes).

<sup>7</sup> For a comparison of the organization of the judicial branch in Italy and the US and for an assessment of the role and functions of the Supreme Council of the Judiciary in Italy cfr. Alessandro Pizzorusso, *Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies*, 38 Am. J. Comp. L. (1990), 373

addition, in reaction to the practice of the Fascist period, the 1948 Constitution decided to remove from the executive's discretion any decision regarding crimes to investigated and codified instead an opposing rule:<sup>8</sup> Art. 112 of the Constitution affirms that “the public prosecutor has the duty to initiate criminal proceedings” whenever he has been informed that a crime has been committed.<sup>9</sup>

During its investigations between 2005 and 2006, the Office of the public prosecutor gathered a large amount of evidence concerning the involvement of CIA operatives and Italian intelligence and security officers in the abduction of Mr. Abu Omar. At that time, moreover, the government neither attempted to prevent the inquiry nor formally invoked any State secret privilege.<sup>10</sup> This eventually led, on 5 December 2006, to the official indictment of 26 US and 9 Italian citizens. According to the adversarial system introduced in Italy by the 1988 Code of criminal procedure,<sup>11</sup> it is the duty of the public prosecutor to carry out criminal investigations and afterwards to formulate an indictment of the allegedly responsible persons, requesting that they be subjected to criminal trial.<sup>12</sup> The decision whether to open the criminal trial is, how-

and Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (2002).

<sup>8</sup> Cfr. Mario Chiavario, *Diritto Processuale Penale. Profilo Istituzionale* (2005). For a comparison between the European legal systems establishing a principle of prosecutorial discretion and those with a constitutionalized duty to prosecute any *notitia criminis* cfr. Luca Luparia, *Obbligatorietà e discrezionalità dell'azione penale nel quadro comparativo europeo*, *Giurisprudenza Italiana* (2002), 1751.

<sup>9</sup> Const. It., Art. 112. (A translation of the Italian Constitution by Carlo Fusaro is available in English at the International Constitutional Law web site: [http://www.servat.unibe.ch/icl/it\\_\\_indx.html](http://www.servat.unibe.ch/icl/it__indx.html) (last accessed June 10, 2011)).

<sup>10</sup> At the time of the investigations the government (headed from 2001 to 2006 by Prime Minister Berlusconi) did not formally invoke the State secret privilege. Nevertheless, in a confidential letter to the prosecutors it cautioned about the existence of reasons of national security concerning the relationship between the SISMI and the CIA. This was later interpreted by the new government (headed from 2006 to 2008 by Prime Minister Prodi) as implying the assertion of a State secret privilege. Cfr. *infra* text accompanying nt. 14 & 22.

<sup>11</sup> For an introduction to the Italian Code of criminal procedure in English cfr. William Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 *Yale J. Int'l L.* (1992), 2; Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 *Am. J. Comp. L.* (2000), 227.

<sup>12</sup> Cfr. Code of criminal procedure It., Art. 405 (request of the indictment by the Office of the public prosecutors).

ever, made in a public hearing, in the presence of the indicted persons, by a third independent magistrate, the *giudice dell'udienza preliminare* (gup) – i.e. the judge of the preliminary hearing, who evaluates the request of the public prosecutor on the basis of the evidence the latter collected during his investigations.<sup>13</sup> The gup of Milan decided to open the criminal trial at the preliminary hearing of 16 February 2007.

When the preliminary hearing was still pending in Milan, however, on 14 February 2007, the *Presidente del Consiglio*, Italy's Prime Minister (from Spring 2006, Mr. Prodi) commenced legal proceedings before the CCost against the Office of the public prosecutor of Milan, complaining that the investigations in the *Abu Omar* case had violated a State secret privilege regarding the relationship between the Italian military intelligence (SISMI)<sup>14</sup> and its foreign counterparts, and requesting the CCost to declare invalid all evidence gathered by the prosecutors.<sup>15</sup> Indeed, the Italian Constitution, instead of introducing a decentralized US-style system of judicial review, created a specialized judicial body, the CCost, on the Kelsenian model, to review the constitutionality of legislation.<sup>16</sup> The CCost, however, was granted also additional functions,<sup>17</sup> among which, especially, the power to umpire “conflicts of allocation of powers” between the branches of government.<sup>18</sup> Accordingly, any institution which alleges that one of its prerogatives has been unlawfully

<sup>13</sup> Cfr. Code of criminal procedure It., Art. 424 *juncto* Art. 429 (decision of the gup whether to open the criminal trial).

<sup>14</sup> The SISMI, established under Law 801/1977, was the Italian military intelligence agency involved in counter-proliferation activities and in all counter-intelligence operations taking place outside the national territory. Since the enactment of Law 124/2007 the SISMI has been replaced by the AISE. For an introduction to the organization and the functions of the Italian intelligence apparatus cfr. Tommaso F. Giupponi & Federico Fabbrini, *Intelligence Agencies and the State Secret Privilege: the Italian Experience*, 4 Int'l J. Const. Law 3 (2010), 443.

<sup>15</sup> Reg. C. 2/2007.

<sup>16</sup> Cfr. in general Mauro Cappelletti, *Il controllo giudiziario di costituzionalità delle leggi nel diritto comparato* (1972) and Norman Dorsen, Michel Rosenfeld, Andras Sajó & Susan Baer, *Comparative Constitutionalism. Cases and Materials* (2003), ch. 2. On the kelsenian model of constitutional review cfr. specifically Theo Öhlinger, *The Genesis of the Austrian Model of Constitutional Review of Legislation*, 16 Ratio Juris 2 (2003), 206.

<sup>17</sup> For an introduction to Italian CCost cfr. Gustavo Zagrebelsky, *La giurisdizione costituzionale*, in *Manuale di diritto pubblico* (Giuliano Amato & Augusto Barbera eds. 1991, 3<sup>rd</sup> ed.), 657; and Tania Groppi, *The Constitutional Court of Italy: Towards a Multilevel System of Constitutional Review?*, 3 J. Comp. L. (2008), 100.

<sup>18</sup> Cfr. Const. It., Art. 134 (functions of the CCost).

abridged by another branch, or that another branch has wrongly exercised the competences with which it was rightly endowed, can recur to the CCost to vindicate its powers.<sup>19</sup>

After the gup's decision on 16 February 2007 to open a criminal trial against the CIA and SISMI agents, the Prime Minister brought, on 14 March 2007, a new action for the allocation of powers before the CCost against the gup, claiming that its decision to open the criminal trial was based on evidence collected in violation of the State secret privilege and was, as such, void.<sup>20</sup> Both 'conflicts of allocations of powers' were declared *prima facie* admissible by the CCost on 18 April 2007.<sup>21</sup> In June, then, reacting to the initiative of the government, the Office of the public prosecutor of Milan also commenced proceedings before the CCost against the Prime Minister, complaining about the violation of its constitutional prerogatives and claiming that the position of the government had been inconsistent, since the State secret privilege had not been formally invoked by the executive during the investigations and had only been asserted lately.<sup>22</sup> The CCost also admitted *prima facie* this case and proceeded to a joint assessment of it with the previous two.<sup>23</sup>

In the meanwhile, however, the criminal trial in Milan had been moving on and the judge of the IV Criminal Division of the Tribunal of Milan in charge of the case had proceeded to the cross-examination

<sup>19</sup> On the role of the Italian CCost in umpiring conflicts of allocation of powers cfr. Augusto Cerri, *Poteri dello Stato (Conflitto tra i)*, in Enciclopedia Giuridica Treccani, vol. XXIII (1991) *ad vocem*. When the CCost is called upon to decide on a conflict of allocation of powers it shall first decide whether the action is *prima facie* admissible. A conflict of allocation is admissible if: a) the *subjects* of the proceedings, i.e. both parties, can be considered as 'powers of the State'; b) the *object* of the controversy has to do with a delimitation of constitutionally attributed powers. The CCost, in its case law, has been willing to interpret quite widely both criteria. Cfr. e.g. C.Cost. sent. 48/1998, Feb. 25, 1998 (published March 11, 1998) (holding that a conflict raised by the Parliamentary Committee for the control of the public broadcast channel is admissible), C.Cost. sent. 457/1999, Dec. 14, 1999 (published Dec. 29, 1999) (holding that the conflict of allocation is admissible to protect the constitutionally determined sphere of attribution of each branch from any legal measure that can be adopted by other branches). If a conflict is declared admissible the CCost will then, with a separate decision, rule on the merit. Cfr. also Antonio Ruggeri & Antonio Spadaro, *Lineamenti di Giustizia Costituzionale* (2005).

<sup>20</sup> Reg. C. 3/2007.

<sup>21</sup> C.Cost., ord. 124/2007, April 18, 2007 (published April 26, 2007); C.Cost., ord. 125/2007, April 18, 2007 (published April 26, 2007).

<sup>22</sup> Reg. C. 6/2007.

<sup>23</sup> C.Cost., ord. 337/2007, Sept. 26, 2007 (published Oct. 3, 2007).

phase, summoning witnesses and acquiring other evidence. Because of this, the new Prime Minister (from Spring 2008, Mr. Berlusconi) on 30 May 2008 commenced proceedings before the CCost against the Tribunal of Milan, claiming that the advancement of the trial while a decision on the State secrecy privilege was still pending before the CCost infringed the constitutional prerogatives of the executive branch.<sup>24</sup> On 13 December 2008, then, the Tribunal of Milan suspended the ongoing trial and brought proceeding against the Prime Minister before the CCost.<sup>25</sup> In his brief, the judge of Milan recalled that the officers of the SISMI who were accused in the trial had expressed their impossibility of presenting relevant evidence in their defence because of the existence of a State secret privilege and underlined how the Chief executive had confirmed the assertion of such a privilege. He therefore complained that the State secret privilege *de facto* made impossible for the court to issue a decision on the criminal liability of the accused persons.<sup>26</sup>

Eventually, after joining the unprecedented number of five ‘conflicts of allocation of powers’, all raised in the context of the same criminal case, the CCost on 11 March 2009 delivered its decision. The CCost began its opinion stating that the purpose of its ruling was – as typical of a ruling umpiring ‘conflicts of allocation of powers’ between branches of government – to clarify “the respective ambits of constitutional attributions that may be legitimately exercised, on the one hand, by the Prime

<sup>24</sup> Reg. C. 14/2008. The CCost declared the conflict for allocation of powers *prima facie* admissible on June 25, 2008: Cfr. C.Cost., ord. 230/2008, June 25, 2008 (published July 2, 2008).

<sup>25</sup> Reg. C. 20/2008. The CCost declared the conflict for allocation of powers *prima facie* admissible on Dec. 17, 2008: Cfr. C.Cost., ord. 425/2008, Dec. 17, 2008 (published Dec. 24, 2008).

<sup>26</sup> The situation that took place in the *Abu Omar* trial should not be confused with the rules in force in the US under the Classified Information Procedure Act (CIPA) – P.L. 96-456 codified at 18 U.S.C. App. III. – i.e. the Congressional act regulating the operation of the State secret privilege in the criminal context. CIPA, indeed, operates when the executive branch wants to prosecute an individual and, *at the same time*, wants to preserve the secrecy of several information, thus limiting the defendant’s rights to confront witnesses and present evidence in his defence. In the case at hand, instead, the problem was different. It has already been highlighted in text accompanying supra nt. 7 that in the Italian legal system prosecutors are independent from the executive branch: in the case at hand, therefore, the State secret privilege was not invoked by the Office of the public prosecutors but rather by the defendants (shielded by the government) in order to avoid the disclosure in court of the evidence collected by the prosecutors.

Minister and, on the other, by the several judicial authorities involved in the investigation and the trial<sup>27</sup> of Mr. Abu Omar (i.e. separately, the Office of the public prosecutor, the judge and the trial judge of Milan). Specifically, the focus of the decision was whether the Chief executive could invoke a State secret privilege (concealing all the relationships between the SISMI and the CIA) and thus prevent the judiciary from investigating and prosecuting the individuals allegedly involved in the abduction and extraordinary rendition of Mr. Abu Omar.

In the Italian legal system, the discipline of the State secret privilege is provided by statute.<sup>28</sup> A recent act of Parliament, Law 124/2007 – whose principles, however, are in continuity with those of the previous legislation dating to the 1970s<sup>29</sup> – affirms that a State secret privilege can be asserted to protect “the acts, the documents, the information, the activities, and all other things, whose knowledge or circulation can damage the integrity of the Republic, even in relation with international agreements, the defence of the institutions established by the Constitution, the independence of the State *vis-à-vis* other States and in its relationship with them and the preparation and military defence of the State.”<sup>30</sup> The Chief executive is the only authority entitled to assert the State secret privilege<sup>31</sup> and classification cannot last for more than 30 years.<sup>32</sup> The invocation of the privilege “inhibits judicial inquiry.”<sup>33</sup> However, to balance the need of national security with the rule of law, Law 124/2007 provides that when a judge is dissatisfied with the executive’s assertion of the privilege it can raise a ‘formal appeal’ to the Prime Minister, asking for the removal of the privilege and can, subsequently, bring an action for allocation of powers before the CCost.<sup>34</sup>

<sup>27</sup> C.Cost., sent. 106/2009, March 11, 2009 (published April 8, 2009), *cons. dir.*, § 3.

<sup>28</sup> For a detailed account of the Law 124/2007 cfr. Giupponi & Fabbrini (supra note 14). For a more general overview of the role of the State secret privilege in Italian constitutional politics cfr. instead Andrea Morrone, *Il nosmo del segreto di Stato, tra politica e Costituzione*, Forum Quaderni Costituzionali (2008).

<sup>29</sup> C.Cost. sent. 106/2009, *cons. dir.*, §4. The previous discipline of the State secret privilege was provided by Law 801/1977. For an overview of the continuities and discontinuities between the two regimes cfr. Giulio M. Salerno, *Il segreto di Stato tra conferme e novità*, Percorsi costituzionali (2008), 66.

<sup>30</sup> Law 124/2007, Art. 39(1).

<sup>31</sup> Law 124/2007, Art. 39(4) (power of the Prime Minister to assert the privilege).

<sup>32</sup> Law 124/2007, Art. 39(8) (expiration of the privilege after 30 years).

<sup>33</sup> Law 124/2007, Art. 41(5).

<sup>34</sup> Cfr. Law 124/2007, Art.s 41(1) and 41(7) (possibility for the judiciary to ask the

The judgment of the CCost began with a detailed explanation of the facts of the case and with a long reassessment of the precedents of the CCost regarding the State secret privilege.<sup>35</sup> The CCost restated its view that the State secret privilege “represents a preeminent interest in any legal system, whatever its political regime”<sup>36</sup> and that the executive branch enjoys a “wide discretion”<sup>37</sup> in deciding whether to classify a piece of information as a State secret. The CCost consequently affirmed that the judiciary “cannot scrutinize the ‘*an*’ [if] or the ‘*quomodo*’ [how] of the decision of the executive to seal an information as a State secret, because the choice on the necessary and appropriate means to ensure national security is a political one – belonging as such to the executive branch and not to the ordinary judiciary.”<sup>38</sup> At the same time, however, the CCost reaffirmed its role “in the case of a conflict of allocation between branches of government.”<sup>39</sup> From this statement it seemed therefore to follow that the CCost enjoyed a full and unrestrained power to scrutinize the decision of the executive branch to assert the existence of a privilege.

In the holding, the CCost mainly upheld the requests of the Prime Minister, affirming that the Office of the public prosecutor and, subsequently, the *gup* and the Tribunal of Milan had infringed upon the prerogative of the executive branch.<sup>40</sup> Although at the start of the investigations the Prime Minister had not asserted reasons of national security, once the State secret privilege was sealed on the documents concerning the relationship between the Italian intelligence agencies and the CIA, the public prosecutors were prevented from using this evidence to formalize the indictment; the *gup* could not ground on them in its decision to open a criminal trial; and the judge should not have admitted the examination of witnesses on this account. The CCost, instead,

government whether it has formally asserted the privilege and to contest this decision by raising a ‘conflict of attribution’ before the CCost).

<sup>35</sup> For an introduction to the precedents of the CCost in the field of the State secret privilege cfr. Carlo Bonzano, *Il segreto di Stato nel processo penale* (2010), ch. 1 and Alessandro Pace, *L'apposizione del segreto di Stato nei principi costituzionali e nella legge 124/2007*, *Giurisprudenza Costituzionale* (2008), 4047.

<sup>36</sup> C.Cost. sent. 106/2009, *cons. dir.*, §3 quoting C.Cost. sent. 86/1977, May 24, 1977 (published June 1, 1977).

<sup>37</sup> C.Cost. sent. 106/2009, *cons. dir.*, §3 quoting C.Cost. sent. 86/1977.

<sup>38</sup> C.Cost. sent. 106/2009, *cons. dir.*, §3 quoting C.Cost. sent. 86/1977.

<sup>39</sup> C.Cost. sent. 106/2009, *cons. dir.*, §3.

<sup>40</sup> *Id.*, §8.

affirmed that the Tribunal of Milan could not be criticized by the Prime Minister for the advancement of the trial.<sup>41</sup> And it also rejected the action brought by the prosecutors, affirming that, in fact, no violations of their constitutional prerogatives had occurred, since the Prime Minister had not obstructed their investigation concerning the crime of abduction of Mr. Abu Omar.<sup>42</sup>

Equally, in the *ratio decidendi* of its ruling, the CCost rejected the conflict of allocation of powers raised by the Tribunal of Milan, who complained that the Prime Minister's assertion of a State secret privilege was over-broad and prevented the judiciary from undertaking its constitutional duty to investigate crimes and provide justice.<sup>43</sup> After clarifying that the State secret "does not concern the crime of abduction 'ex se' [in itself] – which can therefore be investigated by the judicial authority – but rather, on the one hand, the relationship between the Italian intelligence services and the foreign agencies and, on the other, the organizational structure and the operative functions of the [Italian intelligence]"<sup>44</sup>, the CCost forcefully affirmed that "any judicial review on the decision to invoke a State secret privilege has to be excluded."<sup>45</sup> According to the CCost, the precedents and the legislation made it clear that the Prime Minister was entitled to a wide discretion in this field, and could not be subject to the scrutiny of ordinary courts.

With a deferential move, however, the CCost also abdicated its constitutional role in reviewing the action of the executive branch even in the context of a conflict of 'allocation of powers'.<sup>46</sup> In the words of the CCost, in fact, "the judgment on what means are considered as most appropriate or simply useful to ensure the security of the State belongs to the Prime Minister under the control of Parliament."<sup>47</sup> According to the CCost, its only task was that of checking "the existence or inexistence of the conditions that justify the invocation of the State secret privilege, but

<sup>41</sup> Id., §11.

<sup>42</sup> Id., §6.1.

<sup>43</sup> Id., §12.

<sup>44</sup> Id., §12.3.

<sup>45</sup> Id., §12.4.

<sup>46</sup> Cfr. Tommaso F. Giupponi, *Servizi di informazione e segreto di Stato nella legge n. 124/2007*, Forum Quaderni Costituzionali (2009), 46; Adele Anzon, *Il segreto di Stato ancora una volta tra Presidente del Consiglio, autorità giudiziaria e Corte costituzionale*, Giurisprudenza costituzionale (2009), 1020.

<sup>47</sup> C.Cost. sent. 106/2009, *cons. dir.*, §12.4.

not to judge on the merits of the reasons that prompted its invocation.”<sup>48</sup> By bowing to the autonomous evaluation of the government, under the control of Parliament, and by restricting its review to an external oversight of the respect of the procedures provided by the law, the CCost embraced a “kind of political question doctrine.”<sup>49</sup> As a consequence of its decision indeed, once the executive branch invokes the State secret privilege in court, this “effectively bars the judiciary”<sup>50</sup> from continuing its investigation and prosecutions and no scrutiny on the decision of the Prime Minister can be exercised even by the CCost.<sup>51</sup>

After the decision of the CCost, in April 2009 the criminal trial restarted in Milan: on the basis of the ruling of the CCost, however, the prosecutors and the judge were not allowed to use the evidence concerning the relationship between the SISMI and the CIA, regarded by the executive branch as a State secret. *De facto*, the existence of a State privilege represented an insurmountable hurdle that significantly shaped the outcome of the trial.<sup>52</sup> When on 4 November 2009 the judge read his decision,<sup>53</sup> he condemned 23 CIA agents of US nationality for the crime of abduction of Mr. Abu Omar, sanctioning them from three to five years imprisonment; he acquitted three US citizens for reasons of diplomatic immunity; and was forced to dismiss the indictment against all the Italian defendants (agents of the SISMI) since the existence of a State secret privilege prevented the assessment of their co-responsibility in the crime. As the US had already made clear that it would not extradite its officers to Italy,<sup>54</sup> however, not a single individual

<sup>48</sup> Id.

<sup>49</sup> Giupponi (cit. at 46), 47.

<sup>50</sup> C. Cost., sent. 106/2009, *cons. dir.* §4.

<sup>51</sup> Cfr. the critical remarks of Fabrizio Ramacci, *Segreto di Stato, salus rei publicae e “sbarramento” ai p.m.*, *Giurisprudenza costituzionale* (2009), 1015 and Giovanni Salvi, *La Corte e il segreto di Stato*, *Cassazione Penale* (2009) 3729.

<sup>52</sup> Messineo (supra note 5), 1043. Cfr. also Giovanni Bianconi, *Il processo dimezzato dalla mannaia del segreto di Stato*, *Il Corriere della Sera*, Oct. 1, 2009, at 27; Antonio Tarasco, *Il Caso Abu Omar e l'eccesso di motivazione dell'atto giudiziario: dei diversi modi di straripamento del potere*, *Corriere Giuridico* 6 (2010), 827.

<sup>53</sup> Trib. Milano, IV sez. pen., Nov. 4, 2009 (published Feb. 1, 2010).

<sup>54</sup> At this day, the Italian Ministry of Justice has not forwarded any official request of extradition of the accused and convicted persons to the US. The US Dept. of State, however, had already made clear on Feb. 28, 2007 that, if requested, it would not extradite its citizens to Italy for trial or punishment. Cfr. Craig Whitlock, *US Won't Send CIA Defendants to Italy: Abduction Probes Hurt Anti-Terrorism Efforts*, *State Dept. Official*

will be subject to criminal sanctions for the extraordinary rendition of Mr. Abu Omar.<sup>55</sup>

The decision of the Tribunal of Milan has been appealed both by the defendant and by the Office of the public prosecutor,<sup>56</sup> and is now pending before the Criminal Division of the Appeal Court of Milan. In light of the broad recognition of the State secret privilege offered in a final and binding decision by the CCost, however, it is unlikely that overhauls will take place on appeal.<sup>57</sup> Indeed, the decision of the CCost to acknowledge a wide discretion to the executive branch in invoking the State secret privilege to prevent the disclosure of information regarding the organization of the Italian intelligence agencies and its relationship with foreign agencies (namely, the CIA) – without any possibility of judicial review on the legitimacy of the Prime Minister’s decision to classify a piece of information as a State secret – jeopardizes the ability of the judiciary to perform its task and forecloses the possibility for the individuals subjected to extraordinary renditions to obtain a remedy before domestic courts.<sup>58</sup>

*Says*, The Washington Post, March 1, 2007. On the problem of judicial immunity for foreign intelligence agents cfr. Paola Gaeta, *Extraordinary renditions e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar*, *Rivista di Diritto Internazionale* (2006) 126.

<sup>55</sup> Of course, the fact that, in any case, the *Abu Omar* prosecution has eventually led to the condemnation of 23 CIA agents for their involvement in the unlawful abduction and secret rendition of Mr. Abu Omar, can be regarded as a positive step in the re-establishment of the rule of law in the post-9/11 era. Cfr. David Cole, *Getting Away With Torture*, *N.Y. Rev. of Books* 1 (2010), 39. The fact that nobody will be really punished for the wrongdoing, however, is problematic and unsatisfactory from a human rights perspective.

<sup>56</sup> Cfr. Biagio Marsiglia, *Abu Omar, appello della Procura: “Il segreto di Stato? Ambiguo”*, *Il Corriere della Sera*, March 20, 2010.

<sup>57</sup> Messineo (cit. at 5), 1043.

<sup>58</sup> According to the Code of criminal procedure It., Art. 74, natural persons who have suffered a damage from a crime, can bring a civil action in tort against the responsible person or, alternatively, can join the criminal proceedings activated by the Office of the public prosecutor against the indicted persons. In this case, the trial judge, beside being responsible of ascertaining the criminal liabilities, can also award pecuniary damages to the victim of a crime. The decision of the trial judge on the issue of civil liability is however determined by its ruling on the question of criminal responsibility. Mr. Abu Omar had joined the criminal proceedings activated by the Office of the public prosecutor of Milan. Because of the application of the State secret privilege, he will be unable to claim damages from the Italian intelligence officers who allegedly cooperated in its abduction and extraordinary rendition.

The position of the Italian judiciary, however, is not unique on the international scene.

### 3. The *El-Masri* case

In the past years, a number of cases concerning the policy of extraordinary renditions have been litigated in several jurisdictions around the world.<sup>59</sup> This confirms a trend by which counter-terrorism strategies adopted in the aftermath of 9/11 have been increasingly subjected to judicial scrutiny to ensure compatibility with principles of fundamental rights.<sup>60</sup> Nevertheless, while the judiciary, both in the US and Europe, has reaffirmed its role in reviewing the action of the political branches e.g. on the issues of indefinite detention and economic sanctions against suspected terrorists,<sup>61</sup> its involvement in the field of extraordinary renditions and State secrecy has been much less spectacular so far. Limiting the assessment to only those cases that took place before US federal courts in which litigation about extraordinary renditions was interwoven with the executive branch claim of a State

<sup>59</sup> For a general and updated overview of litigation of cases of extraordinary renditions in the US cfr. Louis Fisher, *The American Constitution at the End of the Bush Presidency*, in *Developments in American Politics* (Bruce Cain et al. eds., 2010), 238, 249 ff who also highlights how criminal investigations of cases of extraordinary renditions had been activated in a number of European States (beside Italy cfr.: Denmark, Germany, Ireland, Norway, Sweden) and are currently pending in Spain. Civil proceedings have advanced, unsuccessfully, also in the United Kingdom. Cfr: *Mohamed v. Secretary of State* [2008] EWHC 2048 (Admin.); *aff'd by Mohamed v. Secretary of State* [2009] EWHC 152 (Admin.) on which see Sudha Setty, *Litigating Secrets: Comparative Perspective on the State Secret Privilege*, 75 *Brooklyn L. Rev.* (2009) 201, 240.

<sup>60</sup> Cfr. Federico Fabbrini, *The Role of the Judiciary in Times of Emergency: Judicial Review of Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice*, 28 *Yearbook Eur. L.* (2009), 664.

<sup>61</sup> Cfr. e.g. *Lakhdar Boumediene et al. v. George W. Bush et al.* 553 US 723 (2008) (on the constitutional rights to *habeas corpus* for aliens detained as enemy combatants in Guantanamo); European Court of Justice, *Joined Cases C-402/05 P & C-415/05 P Yassin A. Kadi & Al Barakaat International Foundation v. EU Council and Commission* judgment of 3 September 2008, nyr (on the fundamental right to due process and fair proceeding for the individuals and entities targeted by United Nations counter-terrorism sanctions aiming at freezing their financial properties) – on which see David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, *Cato Supreme Court Rev.* (2008), 47 and Giacinto della Cananea, *Global Security and Procedural Due Process of Law Between the United Nations and the European Union: Kadi & Al Barakaat*, 15 *Columbia J. Eur. L.* (2009), 519.

secret privilege,<sup>62</sup> I will consider in particular the *El-Masri* case,<sup>63</sup> as a meaningful comparative example of a trans-Atlantic pattern of judicial retreat in the face of the invocation by the government of the State secret privilege for reasons of national security.

Mr. Khaled El-Masri, a German citizen of Lebanese descent, was seized, under suspicion of being a terrorist, by the Macedonian authorities on the 31 December 2003 and rendered to the US intelligence, who secretly transferred him to Afghanistan. There, he was detained incommunicado for several months and allegedly tortured and subjected to inhumane and degrading treatment. In May 2004, however, the CIA apparently came to the conclusion that there had been a mistake of identity and that it was detaining an innocent man. Mr. El-Masri was therefore flown back to Europe and allegedly abandoned on the side of an Albanian road.<sup>64</sup> On 6 December 2005, Mr. El-Masri filed a civil case in the US federal District Court for the Eastern District of Virginia, suing the former director of the CIA, certain unknown agents of the CIA and the corporations owning the private jets with which the CIA had operated his extraordinary rendition to and from Afghanistan as well as their personnel.<sup>65</sup> As already underlined, since in the US prosecutors are embedded in the executive branch, it is mainly through actions in tort

<sup>62</sup> Other cases in which plaintiffs brought civil proceedings claiming damages for their subjection to extraordinary rendition and in which the US government sought dismissal of the suit by invocation of the State secret privilege have been resolved in favour of the government on other grounds. Cfr. *Arar v. Ashcroft* 414 F. Supp. 2d 250 (E.D.N.Y. 2006); *aff'd by Arar v. Ashcroft* 532 F. 3d 157 (2d Cir. 2008); *aff'd by, En banc Arar v. Ashcroft* US App. LEXIS 23988 (2d Cir. 2009); *cert. denied by Arar v. Ashcroft* 130 S. Ct. 3409 (2009).

<sup>63</sup> *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006); *aff'd by El-Masri v. US* 479 F.3d 296 (4th Cir. 2007); *cert. denied El-Masri v. US* 552 US 947 (2007). But cfr. also *Mohamed v. Jeppesen Dataplan Inc.*, 539 F. Supp. 2d 1128 (N.D. Ca. 2008); *rev'd by Mohamed v. Jeppesen Dataplan Inc.*, 536 F.3d 992 (9th Cir. 2009); *aff'd by, En banc Mohamed v. Jeppesen Dataplan Inc.*, 2010 US App. LEXIS 18746 (9th Cir. 2010); *cert. denied Mohamed v. Jeppesen Dataplan Inc.*, 2011 U.S. LEXIS 3575.

<sup>64</sup> For an account of the facts involving Mr. El-Masri and for an overview of the judicial proceedings that followed cfr. Fisher (supra note 3), 1442; Daniel Huyck, *Fade to Black: El-Masri v. United States Validates the Use of the State Secret Privilege to Dismiss "Extraordinary Renditions" Claims*, 17 Minn. J. Int'l L. (2005), 435.

<sup>65</sup> Cfr. Complaint, *El-Masri v. Tenet*, No. 05-cv-1417 (E.D. Va) (available at: [http://www.aclu.org/files/safefree/rendition/asset\\_upload\\_file829\\_22211.pdf](http://www.aclu.org/files/safefree/rendition/asset_upload_file829_22211.pdf) (last accessed June 10, 2011)).

like the one brought by Mr. El-Masri that practices such as the CIA extraordinary renditions program can be subject to judicial scrutiny.<sup>66</sup>

Mr. El-Masri asserted three separate causes of action. To begin with, he claimed violations of his constitutional rights of due process as recognized in the V Amendment to the US Constitution.<sup>67</sup> In addition, he asserted a violation of the international legal norms prohibiting prolonged arbitrary detention as well as those prohibiting cruel, inhuman and degrading treatment – as incorporated in US law through the Alien Tort Statute (ATS). The ATS – a provision originally codified in the 1789 Judiciary Act<sup>68</sup> – has been interpreted as granting federal courts jurisdiction over lawsuits brought by aliens seeking damages for violations of norms of customary international law,<sup>69</sup> since the decision of the US Court of Appeal for the Second Circuit in *Filartiga v. Peña-Irala*.<sup>70</sup> The Supreme Court, despite clarifying that only a limited set of international norms can be justiciable under the ATS, has substantially confirmed this construction in *Sosa v. Alvarez-Machain*<sup>71</sup> – hence making the ATS an effective mechanism to review violations of peremptory norms of international human rights law,<sup>72</sup> such as the one alleged by Mr. El-Masri.

While the case was still at the pleading stage, however, in March 2006,

<sup>66</sup> Cfr. text accompanying supra nt. 7.

<sup>67</sup> Cfr. US Const., V Am (due process clause). On the due process clause cfr. also John Orth, *Due Process of Law* (2003). Cfr. also *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971) (recognizing an implied cause of action for an individual whose constitutional rights have been violated by federal agents).

<sup>68</sup> 1 Stat. 73-93; now codified as 28 USC § 1350: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

<sup>69</sup> Cfr. Louis Henkin, *International Law as Law in the US*, 82 Mich. L. Rev. 1560 (1984) and Harold H. Koh, *Filartiga v. Peña-Irala: Judicial Internalization of the Customary International Law Norm Against Torture*, in *International Law Stories* (John Noyes et al. eds., 2007). As it is well known, however, this interpretation of the ATS is criticized by the revisionist school of foreign relations law: cfr. Curtis Bradley & Jack Goldsmith, *Foreign Relations Law* (2006), ch. 7.

<sup>70</sup> *Filartiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

<sup>71</sup> *Sosa v. Alvarez-Machain* 542 US 692 (2004).

<sup>72</sup> For a more general reflection on the role that international human rights law can play in domestic adjudication cfr., in a comparative perspective, also Theodor Orlin & Martin Scheinin, *Introduction*, in *The Jurisprudence of Human Rights: A Comparative Interpretive Approach* (Martin Scheinin et al. eds., 2000), 3 and Henry Steiner, Philip Alston & Ryan Goodman, *International Human Rights in Context: Law Politics Morals* (2007, 3<sup>rd</sup> ed.) 1177.

the US administration (then headed by President Bush) filed a statement of interest in the case and moved to intervene in the suit, requesting that the District Court dismiss the case on claim of the existence of a State secret privilege.<sup>73</sup> In the US, the State secret privilege is not based on a Congressional act but rather derives from the common law jurisprudence of US federal courts.<sup>74</sup> Since the 1953 decision of the US Supreme Court (USSCt) in *US v. Reynolds*,<sup>75</sup> the government has been granted the privilege to resist court-ordered disclosure of information during litigation if “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”<sup>76</sup> According to the USSCt, to be valid, the assertion of the privilege has to be formally claimed by the executive branch. The court must, on a case by case basis, “satisfy[] itself that the occasion for invoking the privilege is appropriate.”<sup>77</sup> As essentially an evidentiary privilege, the State secret forecloses the disclosure in court of the information it protects, but does not automatically compel the dismissal of an entire case.<sup>78</sup>

On 12 May 2006, the judge of the District Court heard arguments by the parties and ordered that the government’s claim of the State secret privilege was valid. As a consequence, it granted motion to dismiss the case, bringing Mr. El-Masri’s action to an abrupt end before the case could even move to discovery.<sup>79</sup> In the opinion of the District Court, “a two step analysis”<sup>80</sup> was necessary in order to decide on the question at stake. First, the court had to determine as a threshold matter whether the

<sup>73</sup> Cfr. Federal Rules of Civil Procedure, Rule 24(a) (right of intervention in a pending procedure).

<sup>74</sup> Cfr. Edward Liu, *The State Secret Privilege and Other Limits on Litigation Involving Classified Information*, Congressional Research Service, R40603, May 28, 2009. Cfr. also Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* (2006) and Robert Pallito & William Weaver, *Presidential Secrecy and the Law* (2007).

<sup>75</sup> *US v. Reynolds*, 345 US 1 (1953).

<sup>76</sup> *Id.*, at 10.

<sup>77</sup> *Id.*, at 11.

<sup>78</sup> From this point of view the State secret privilege as framed in *Reynolds* differs from the absolute bar to judicial inquiry established by the USSCt in *Totten v. US* 92 US 105 (1876) (declaring *tout court* nonjusticiable a case brought against the federal government to enforce a contract of espionage). Cfr. Liu (supra note 74), 5.

<sup>79</sup> Fisher (supra note 3), 1444; Setty (supra note 59), 215.

<sup>80</sup> *El-Masri v. Tenet (El-Masri I)*, 437 F. Supp. 2d 530 (E.D. Va. 2006), at 10.

assertion of the State secret privilege by the government was valid in the case at hand. Second, if the assertion of the privilege was valid, the court had to consider whether dismissal of the suit was required or whether the case could nonetheless proceed in some fashion that would adequately safeguard the State secrets.

On the first issue, the court began by stating that in its view “the privilege derived from the President’s constitutional authority over the conduct of [the US] diplomatic and military affairs.”<sup>81</sup> Following the litmus test established by the US Supreme Court in *Reynolds*, then, the District Court affirmed that the executive had the duty to formally invoke the privilege and that the judiciary ought to “carefully scrutinize”<sup>82</sup> its assertion. However, deferring to the greater expertise in national security matters of the government, the court declared itself to be satisfied in the case at hand that the executive had demonstrated “a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”<sup>83</sup> On the basis of these governing principles, the court held that the executive’s claim was valid. In the court’s view, Mr. El-Masri’s complaint alleged “a clandestine intelligence program, and the means and method the foreign intelligence services of this and other countries used to carry [it] out [...]. And [...] any admission or denial of this allegations by the defendant in this case would [...] present a grave risk of injury to national security.”<sup>84</sup>

Having acknowledged that the executive’s assertion of the State secret privilege was valid, the District Court moved to the second issue, considering whether the case could nonetheless be tried without compromising sensitive information. According to the court, “in the instant case, this question [could be] easily answered in the negative. To succeed on his claim, Mr. El Masri would have to prove that he was abducted, detained and subjected to cruel and degrading treatment, all as part of the US’ extraordinary rendition program [and...] any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument.”<sup>85</sup> In the end, despite regretting that “the dismissal of the complaint [would] deprive[] Mr. El-Masri of an

<sup>81</sup> *Id.*, at 11.

<sup>82</sup> *Id.*, at 14.

<sup>83</sup> *Id.*, at 14 quoting *Reynolds*, at 10.

<sup>84</sup> *El-Masri I*, at 17-18.

<sup>85</sup> *Id.*, at 22.

American judicial forum for vindicating his claim,”<sup>86</sup> the District Court concluded that “controlling legal principles require[d] that in the present circumstances, Mr. El-Masri’s private interest must give way to the national interest in preserving State secrets.”<sup>87</sup>

The decision of the District Court was appealed by Mr. El-Masri to the US Court of Appeal for the Fourth Circuit, which on November 2006 reviewed the case *de novo*. On 2 March 2007, however, an unanimous three-judge panel of the Circuit Court affirmed the decision of the lower court. Just like the District Court, the judges began their opinion holding that the State secret, despite being an evidentiary common law privilege, “performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign affairs responsibility.”<sup>88</sup> The court also reasserted the *Reynolds* test – stating that the balanced decision of the USSCt required the judiciary to remain “firmly in control of deciding whether an executive assertion of the State secret privilege is valid, but subject to a standard mandating restraint in the exercise of its authority.”<sup>89</sup> It finally confirmed that dismissal of a case was appropriate when “the circumstances make clear that sensitive military information will be so central to the subject matter of the litigation.”<sup>90</sup>

Testing the case of Mr. El-Masri on these controlling principles, the Circuit Court argued that the litigation at hand could not but threaten the disclosure of relevant State secrets. Although Mr. El-Masri had contended that most of the evidence sealed by the government as State secrets had already been made public, the court held that “advancing a case in the court of public opinion, against the US at large, is an undertaking quite different from prevailing against specific defendants in a court of law.”<sup>91</sup> In the judges’ view, “to establish a *prima facie* case, [Mr. El-Masri] would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them personally liable to him. Such a showing could be made only with evidence that exposes how the

<sup>86</sup> *Id.*, at 24.

<sup>87</sup> *Id.*, at 24.

<sup>88</sup> *El-Masri v. US (El-Masri II)*, 479 F.3d 296 (4th Cir. 2007), at 14.

<sup>89</sup> *Id.*, at 18.

<sup>90</sup> *Id.*, at 22 quoting *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005), at 348.

<sup>91</sup> *El-Masri II*, at 31.

CIA organizes, staffs and supervises its most sensitive intelligence operations.”<sup>92</sup> In addition, the court emphasized that, because of the State secret privilege, the defendants could not properly defend themselves. In light of all this, thus, the lower court had not erred in dismissing the claim.<sup>93</sup>

In the final section of its opinion, the Circuit Court dwelled on what role the judiciary should have when reviewing the assertion of the State secret privilege by the executive branch. Despite remarking that “the State secret doctrine does not represent a surrender of judicial control over access to the courts,”<sup>94</sup> the judges openly admitted that their function had to be “modest”<sup>95</sup> and that they would exceed their power if they could “disregard settled legal principles in order to reach the merit of an executive action [...] on the ground that the President’s foreign policy has gotten out of line.”<sup>96</sup> Echoing the District Court, finally, the judges of the Fourth Circuit “recognize[d] the gravity of [the] conclusion that Mr. El-Masri must be denied a judicial forum for his complaint”<sup>97</sup> but pleaded that in the present circumstances the fundamental principle of access to court had to bow to reasons of national security.<sup>98</sup> Mr. El-Masri appealed the decision of the Circuit Court to the USSCt. As is well known, however, review of a case by the highest US federal court is not automatic. On 9 October 2007, the USSCt denied the *writ of certiorari*, effectively terminating Mr. El-Masri’s suit.<sup>99</sup>

Meanwhile, the *ratio decidendi* of the Fourth Circuit in the matter of State secret privilege is setting a standard toward which other federal courts in the US are converging. Hence, on 8 September 2010, the US Court of Appeal for the Ninth Circuit, reviewing *en banc* a previous decision in the *Mohamed* case – another civil suit brought by an individual

<sup>92</sup> *Id.*, at 31.

<sup>93</sup> As the critics of the decision have noticed, *de facto* the Fourth Circuit in its decision conflates the *Reynolds* and the *Totten* doctrines ensuring that whenever the government asserts a State secret privilege, the suit will be unable to move forward. Cfr. Huyck (supra note 64), 456.

<sup>94</sup> *El-Masri II*, at 41.

<sup>95</sup> *Id.*, at 43.

<sup>96</sup> *Id.*, at 43.

<sup>97</sup> *Id.*, at 45.

<sup>98</sup> Cfr. Fisher (supra note 3), 1447; Huyck (supra note 64), 454.

<sup>99</sup> *El-Masri v. US*, 552 US 947 (2007). Cfr. Aziz Huq, *Supreme Court El-Masri Rejection Undermines Accountability for Renditions*, *Jurist*, Oct. 12, 2007.

allegedly subjected to extraordinary rendition against an airline corporation, Jeppesen Dataplan, accused of arranging secret flights for the CIA – granted motion to dismiss the case at the pre-trial phase, as requested by the new Obama administration for reasons of State secrecy.<sup>100</sup> Despite a forceful dissent by five judges, and notwithstanding the majority’s awareness that the case presented “a painful conflict between human rights and national security,”<sup>101</sup> the Circuit Court – drawing largely on the *El-Masri* decision of the Fourth Circuit<sup>102</sup> – in the end “reluctantly”<sup>103</sup> concluded that the State secret privilege was asserted validly and barred the suit from continuing.<sup>104</sup> On 16 May 2011, then, the USSCt again denied *certiorari* to review the Ninth Circuit decision, bringing to a close also the *Mohamed* litigation.<sup>105</sup>

In conclusion, as the previous analysis highlights, a consistent feature characterizes the case law of the US federal courts in litigation involving cases of extraordinary rendition: whenever the government asserts the existence of a State secret privilege, courts step back and, by granting

<sup>100</sup> See the critical Editorial, *Torture is a Crime, Not a Secret*, The New York Times, Sept. 9, 2010, A30, NY ed. The new Administration has established a new policy and procedures for the assertion of the State secret privilege in court in order to ensure greater accountability. In particular, the Dept. of Justice has committed itself to heightened the standard under which it will recur to the privilege, affirming that it will recur to it only to the extent necessary to protect national security against the risk of significant harm. Moreover, it has tailored the effects of its invocation, affirming that whenever possible it will allow cases to move forward in the event that the sensitive information at issue is not critical to the case - hence facilitating court review. The final decision on the assertion of the State secret privilege, then, is centralized in the Attorney General (Dept. of Just., Press release 09-1013, Sept. 23, 2009 available at <http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html> (last accessed June 10, 2011)). These new policies however have been criticize for being insufficient: cfr. e.g. Fisher (supra note 59), 254. See also Editorial, *Shady Secrets*, The International Herald Tribune, Oct. 1, 2010, at 6.

<sup>101</sup> *Mohamed v. Jeppesen Dataplan Inc.*, 2010 US App. LEXIS 18746 (9th Cir. 2010), at 65.

<sup>102</sup> The Ninth Circuit rejected the conflation between the *Reynolds* and the *Totten* test that the Fourth Circuit had reached in *El-Masri II*. This difference, however, did not affect the conclusion of the case which was identical in both suits. Moreover, the dissenters contested that the majority had really avoided the conflation between the two tests made also by the Fourth Circuit, arguing (contrary to the opinion of the majority) that in no way could the *Totten* bar be relevant in the present case. Cfr. *Mohamed* (Hawkins J. dissenting), at 86.

<sup>103</sup> *Mohamed*, at 4.

<sup>104</sup> *Id.*, at 47 quoting *El-Masri II*, at 312.

<sup>105</sup> *Mohamed v. Jeppesen Dataplan Inc.*, 2011 U.S. LEXIS 3575. See also Editorial, *Malign Neglect*, The International Herald Tribune, May 24, 2011, at 8.

motion to dismiss the actions for civil liability, ensure *de facto* immunity from judicial scrutiny to the executive branch and its intelligence agencies.<sup>106</sup> From this point of view, the jurisprudence of the US federal courts – as developed in particular in *El-Masri* (and recently confirmed in *Mohamed*) – shows striking similarities with the position of the Italian CCost in *Abu Omar*. As seen in the previous Section, indeed, the highest Italian court ensured a wide discretion to the Chief executive in invoking the State secret privilege and renounced any meaningful role for either the ordinary judges or for itself in scrutinizing whether the assertion of the privilege by the Prime Minister was warranted or not.<sup>107</sup> A common pattern of judicial deference therefore emerges from the comparative assessment of courts' decisions concerning extraordinary renditions and the State secret privilege both in Italy and the US.<sup>108</sup>

Of course, any such interim conclusion shall be qualified by a number of caveats. Several differences between the Italian and US cases have already been highlighted. To begin with, US courts were facing actions for damages, whereas the *Abu Omar* case was a decision of a Constitutional Court umpiring conflicts between branches of government. The diversities of these proceedings as well as the specificities of the cases considered may have had some bearing on the decisions. In addition, while the outcome of *El-Masri* (and *Mohamed*) was the absolute impossibility for the plaintiffs to continue their claims, in Italy – notwithstanding the decision of the CConst in *Abu Omar* – the trial before the Tribunal of Milan was able to continue and a first judgment (now appealed) was delivered in November 2009. I have already underlined, however, how this ruling was largely shaped by the application of the State secret privilege:<sup>109</sup> none of the Italian intelligence agents who

<sup>106</sup> Cfr. Fisher (supra note 3), 1447-1448; Huyck (supra note 64), 437. Cfr. also *Mohamed* (Hawkins J. dissenting), at 83 criticizing that the majority of the Court for “transform[ing] an evidentiary privilege into an immunity doctrine.”

<sup>107</sup> Cfr. Giupponi (supra note 46), 46; Messineo (supra note 5), 1040.

<sup>108</sup> As well demonstrated by Laura Donohue, *The Shadow of the State Secret*, 159 U. Pa. L. Rev. (2010), 77 with regard to the US, because of the deference demonstrated by the judiciary, the use of the State secret privilege is increasing also in litigation which is not related to national security. A spill-over effects, in other words, is taking place and transforming the privilege from an evidentiary rule to a powerful litigation tools in the hands of the government and of private actors. Similar concerns have also been voiced in Italy by Giupponi (supra note 46).

<sup>109</sup> See supra text accompanying nt. 52.

were indicted for the crime of abduction could be tried, given the impossibility of using evidence which the government had sealed as secret against them, and only CIA officers of US nationality (for whom the State secret privilege was not asserted) were eventually condemned. In any case, they will not be subject to punishment, since the US refuses extradition.

More generally, then, differences in constitutional structure between a parliamentary system with a centralized Constitutional Court, like Italy, and a system of separated institutions sharing power as in the US, should not be ignored. However – to follow the methodological insights of Ran Hirshl – analyzing “cases that are different on all variables that are not central to the study but match in terms that are, thereby emphasizing the significance of consistency on the key independent variable in explaining the similar readings on the dependent variable”<sup>110</sup> is a sound exercise of comparison. The purpose of this work is to demonstrate that the State secret privilege trumps domestic litigation concerning cases of extraordinary renditions. The *Abu Omar* case in Italy was taken as a starting point and compared with case law from the US federal courts. Despite the differences in constitutional structure, mechanisms of litigation and technical outcomes in the specific cases, a consistent pattern of judicial retreat before the assertion of the State secret privilege has emerged in both countries. Since this state of affairs is troubling from the perspective of the protection of fundamental rights, possible avenues for redress need to be investigated.

#### **4. The role of legislatures: constitutional checks and balances**

Whereas both in Italy and the US courts at the domestic level have surrendered judicial control over the executive’s assertion of the State secret privilege to trump litigation concerning cases of extraordinary rendition,<sup>111</sup> both the Italian CCost and the US federal courts have invoked in a remarkably converging mode the intervention of the legislative branch as a check against possible abuses of the State secret privilege by the government and as a preferential source of redress for

<sup>110</sup> Ran Hirshl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am J. Comp. L. (2005), 125, 139 who defines this kind of comparative exercise as “the most different cases logic” of comparison.

<sup>111</sup> Fisher (supra note 3), 1447.

the individuals allegedly subjected to extraordinary renditions. I have already remarked<sup>112</sup> how in the *Abu Omar* case the C.Cost refused to exercise any review on the merits of the executive's claim, arguing instead that "it belongs to Parliament to scrutinize the way in which the Prime Minister exercises his power of asserting the State secret privilege, since it is Parliament, as the locus of popular sovereignty [...], which represents the institutions which can better oversee the highest and more pressing decisions of the executive."<sup>113</sup> Equally, in *El-Masri*, the District Court, while acknowledging that if Mr. El-Masri had suffered a wrong he "deserves a remedy,"<sup>114</sup> clarified "that the only source of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch."<sup>115</sup> The same reasoning was echoed by the Circuit Court in *Mohamed*.<sup>116</sup>

It has already been contested whether the judiciary can abdicate its role while calling for greater legislative oversight and remedial action.<sup>117</sup> As Amanda Frost has argued with regard to the US, for example, the jurisdiction of federal courts has been assigned in wide terms by Congress itself,<sup>118</sup> which may have deliberately used the judicial branch as a check on the abuse of the executive power.<sup>119</sup> "By declining to hear cases [because of the executive's assertion of the State secret privilege], courts are not just diminishing their own role in the constitutional structure, they are eliminating a constitutionally prescribed method through which Congress can curb the executive."<sup>120</sup> In similar terms, Tommaso Giup-

<sup>112</sup> Cfr. supra text accompanying nt. 47.

<sup>113</sup> C.Cost. sent. 106/2009, *cons. dir.*, §12.4.

<sup>114</sup> *El-Masri I*, at 29.

<sup>115</sup> *Id.*, at 29.

<sup>116</sup> *Mohamed*, at 59.

<sup>117</sup> For a general discussion whether political mechanisms or judicial ones should be preferred in the oversight of the executive branch in times of emergency cfr. Fiona de Londras & Fergal Davis, *Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms*, 30 Oxford J.L.S (2010), 19. For an overview of political oversight mechanisms in parliamentary and separation of powers systems cfr. also Mark Tushnet, *The Political Constitution of Emergency Powers: Parliamentary and Separation of Powers Regulation*, Int'l J. L. in Context (2008), 275.

<sup>118</sup> Cfr. US Const, Art. III, sec. 2, cl. 2 (jurisdiction of federal courts as Congress shall make).

<sup>119</sup> Amanda Frost, *The State Secret Privilege and Separation of Powers*, 75 Fordham L. Rev. (2007), 1931.

<sup>120</sup> *Id.*, 1957. Cfr. also Victor Hansen, *Extraordinary Renditions and the State Secret*

poni has criticized the decision of the Italian CCost to reject a review on the merits of the existence of the reasons that, in the *Abu Omar* case, justified the invocation of the State secret privilege by the Prime Minister:<sup>121</sup> as he highlighted, Law 124/2007 – the statute enacted by Parliament to regulate the State secret privilege – provides that no “State secret privilege can be invoked [by the government] before the Constitutional Court.”<sup>122</sup> It is hence reasonable to think that this provision proved the intent of Parliament to have the CCost oversee the action of the executive branch in State secrecy matters.<sup>123</sup>

Beyond the question of whether the judicial abdication of a supervisory role once the executive asserts a the State secret privilege is consistent with the function that the Constitution, or the legislature itself, has entrusted to courts, in this Section I examine two other interrelated issues arising from the judicial call for greater involvement of the legislature. First, I assess whether – *in constitutional terms* – legislatures may meaningfully contribute to overseeing the action of the executive branch in matters of State secrecy. To this end, I highlight the differences that exist between parliamentary systems and separation of powers systems. Second, I evaluate whether – *in factual terms* – Parliament and Congress have played any role in the cases at stake, by considering whether the *Abu Omar* and the *El-Masri* sagas have prompted significant domestic reactions from the Italian and US legislative branches. As I will try to demonstrate, the answer to the first question (can the legislatures do something?) already highlights several fallacies in the judicial call for greater legislative involvement. It is, however, the answer to the second question (did the legislatures do something?) that proves how constitutional checks and balances can sometimes be insufficient to curb the executive branch and provide redress to individuals who have suffered human rights violations.

The capacity of the legislature to check and balance the executive branch depends, among others, on the constitutional structure of the

*Privilege: Keeping Focus on the Task at Hand*, 33 N.C.J. Int'l L. & Com. Reg. (2008), 629, 652 who argues that “there is a role for both Congress and the courts in th[e] process” of executive oversight.

<sup>121</sup> Giupponi (supra note 46), 47.

<sup>122</sup> Law 124/2007, Art. 41(8).

<sup>123</sup> On the basis of this provision, in other words, the CCost should be entitled to access all information which the government has sealed as secrets. Cfr. also Giovanni Salvi, *Alla Consulta il ruolo di ultimo garante*, 40 Guida al diritto (2007), 85.

government and the political and electoral system.<sup>124</sup> Historically, in a parliamentary democracy, the executive derives its authority from Parliament – which is the only branch of government directly elected by the people. As such, any misguided decision by the Prime Minister and his government could be, in the abstract, rectified by the intervention of Parliament, through a vote of no-confidence or other measures provided by parliamentary procedures.<sup>125</sup> This scheme, however, largely fails to account for the contemporary reality of parliamentary systems. In a centuries-long development, the balance of powers between the executives and the legislatures has shifted, substantially increasing the power of the former over the latter.<sup>126</sup> A number of political and constitutional developments have favoured this transformation, including the rise of political parties, the personalization of electoral politics as well as the codification in a number of basic laws – in the attempt to rationalize the ‘virtues and vices’ of a parliamentary regime – of special powers for the executive government.<sup>127</sup>

<sup>124</sup> A vast literature on comparative government is available both in political science and constitutional law scholarship. Cfr. in general Giovanni Sartori, *Comparative Constitutional Engineering* (1997); Mark Tushnet & Vicki Jackson, *Comparative Constitutional Law* (2003, 2<sup>nd</sup> ed.), ch. VII(A) but see also Leopoldo Elia, *Governo (Forme di)*, in *Enciclopedia del diritto*, XIX (1970), *ad vocem* 634; Maurice Duverger, *Institutions politiques et droit constitutionnel*. Vol 1. *Les Grands Systèmes Politiques* (1970); Juan Linz, *Presidential or Parliamentary Democracy: Does it Make a Difference?*, in *The Failure of Presidential Democracy*. Vol. 1. *Comparative Perspectives* (Juan Linz & Arturo Valenzuela eds., 1994), 3.

<sup>125</sup> This traditional understanding of a parliamentary system was famously codified in the 1789 French Declaration of the Rights of Men and Citizens, Art. 6, which famously proclaimed that “la loi est l’expression de la volonté générale.” On this understanding, not only the executive was simply requested to *execute* the will of Parliament but also courts, were prevented from interpreting the law and, of course, from reviewing its compatibility with the Constitution. Cfr. Michel Troper, *Justice constitutionnelle et démocratie*, *Revue française de droit constitutionnel* (1990), 31.

<sup>126</sup> For an historical account of the transformations of parliamentary regimes in Europe cfr. Augusto Barbera, *I parlamenti. Un’Analisi comparativa* (1999) and Giuliano Amato, *Forme di Stato e forme di governo* (2006). An impressive reconstruction of the developments of government in human history is provided by the three volumes of Samuel Finer, *The History of Government from the Earliest Time* (1997).

<sup>127</sup> Cfr. Stefano Ceccanti, *La forma di governo parlamentare in trasformazione* (1997). The attempt to ‘rationalize’ the parliamentary regime has been more remarkable in France with the enactment of the 1958 Constitution. Cfr. e.g. Const. Fr. Art. 44(3) (power of government to ask Parliament to express a single vote on bill proposed by the Prime Minister), Art. 48(2) (power of government to decide the agenda of the bills on which

In Europe, England pioneered these transformations through its conventions on the law of the Constitution, largely because of its simple-plurality electoral system.<sup>128</sup> Despite some delays, however, also in continental Europe – at least since the post-war period – the executives have ceased to be the mere administrative agents of Parliament and have become the real masters of the political process.<sup>129</sup> Leaders of political parties now compete in popular elections and in the case of victory enjoy a parliamentary majority through which they can pursue their political agenda.<sup>130</sup> True enough, in many European countries, among which Italy,<sup>131</sup> the existence of a proportional electoral system – as well as

Parliament shall vote for two weeks a month), Art. 49(3) (power of government to enact a bill *as if* it was approved by Parliament by engaging its political responsibility). Since the 1962 constitutional amendment and the introduction of a direct election of the President of the Republic, however, the French parliamentary regime is generally described as a semi-presidential system. Cfr. Maurice Duverger, *A New Political System Model: Semi-Presidential Government*, 8 European J. Pol. R. (1980), 165. On the rationalization of parliamentary regimes in other European countries cfr. also Arnaud Martin, *Stabilité gouvernementale et rationalisation du régime parlementaire espagnol*, *Revue française de droit constitutionnel* (2000), 27 (on Spain); Eugeni Tanchev, *Parliamentarism Rationalized*, 2 E. Eu. Const. Rev. (1993), 33 (on Central and Eastern European countries) and the literature quote *infra* in nt. 133.

<sup>128</sup> The classical account of these transformations is provided by Walter Bagheot, *The English Constitution* (1867). On the English model of ‘cabinet government’ the contemporary literature is infinite: cfr. *inter alia*, the recent works of Anthony King, *The British Constitution* (2007) and Richard Heffernan & Paul Webb, *The British Prime Minister: Much More Than “First Among Equals”*, in *The Presidentialization of Politics. A Comparative Study of Modern Democracies* (Thomas Poguntke & Paul Webb eds., 2007), 26.

<sup>129</sup> Cfr. in a comparative perspective Anthony King, *Modes of Executive-Legislative Relations: Great Britain, France and West Germany*, 1 *Legislative Studies Quarterly* 1 (1976), 11; Sabino Cassese, *Il potere esecutivo nei sistemi parlamentari di governo*, *Quaderni Costituzionali* (1993), 141; Augusto Barbera & Carlo Fusaro, *Il governo delle democrazie* (2001).

<sup>130</sup> Cfr. in a comparative constitutional law perspective Giuseppe Morbidelli, Lucio Pegoraro, Antonio Reposo & Mauro Volpi, *Diritto pubblico comparato* (2005), ch. V and, from a political science perspective Lieven de Winter, *The Role of Parliament in Government Formation and Resignation*, in *Parliaments and Majority Rule in Western Europe* (Herbert Döring ed., 1995), 115.

<sup>131</sup> Italy has had a proportional electoral system from 1948 to 1993 but a mixed electoral system (with a prevailing majoritarian component) between 1993 and 2005. In 2005, a bill reintroduced a proportional system: nevertheless, the consolidation of a bipolar political competition seems (despite several steps backwards and numerous uncertainties) under way. For an introduction to the current electoral legislation cfr. Carlo Fusaro, *Party System Developments and Electoral Legislation in Italy (1948-2009)*, 1 *Bulletin of Italian Politics*

practices of ‘consociational democracy’ – have favoured the formations of coalition governments with a plurality of parties in which the Prime Minister has a weaker position.<sup>132</sup> Precisely to counter this role, however, many European Constitutions have assigned to the executive branch a special status in Parliament, strengthening its capacity to set the agenda and making a vote of no-confidence by the legislature unlikely or extremely difficult.<sup>133</sup>

In a system of separation of powers as in the US (often – inappropriately – called a presidential system),<sup>134</sup> instead, the executive branch is endowed with an autonomous popular legitimacy from that of Congress.<sup>135</sup> Hence, the latter cannot (save through the impeachment procedure)<sup>136</sup> challenge the actions, no matter how misguided, of the former by terminating his office.<sup>137</sup> The reverse, however, is also true: the President cannot affect the operations of Congress and force it to follow his lead, e.g. by threatening a new anticipated election.<sup>138</sup> In the US constitutional system, the political branches of government are separate and enjoy an independent electoral legitimacy.<sup>139</sup> In the intent of the Founding fathers, this institutional arrangement was adopted to ensure a reciprocal balance between the legislature and the executive, on the

(2009), 49. On the most recent developments cfr. also Andrea Morrone, *Governo, opposizione, democrazia maggioritaria*, Il Mulino 4 (2003), 637 and Vincenzo Lippolis, *Riforma della legge elettorale e forma di governo*, Quaderni Costituzionali (2007), 342.

<sup>132</sup> For a classical distinction between ‘majoritarian’ and ‘consociational’ democracy cfr. Arend Lijphart, *Patterns of Democracy* (1999).

<sup>133</sup> Cfr. e.g. Basic Law FRG, Art. 67 (constructive no-confidence vote) – on which see Karl-Rudolf Korte & Manuel Fröhlich, *Politik und Regieren in Deutschland* (2004); Const. Sp., Art. 113 (constructive no-confidence vote) – on which see Eduardo Virgala Foruria, *La moción de censura en la Constitución de 1978* (1988).

<sup>134</sup> For the celebrated definition of the US system of government as “separated institutions sharing power” cfr. Richard Neustadt, *Presidential Power and the Modern President* (1990, rev. ed.), 29.

<sup>135</sup> Cfr. US Const. Art. II, sec. 1, cl. 3 (election of the President).

<sup>136</sup> Cfr. US Const. Art. II, sec. 4 (removal from office of the President).

<sup>137</sup> Cfr. US Const. Art. II, sec. 1, cl. 1 *juncto* Am. XXII (term of President office four years renewable once).

<sup>138</sup> Cfr. US Const. Art. I, sec. 2, cl. 1 (term of Representatives two years) and Art. I, sec. 3, cl. 1 (term of Senators six years).

<sup>139</sup> Theodor Lowi & Benjamin Ginsberg, *American Government: Freedom and Power* (1990); Louis Fisher, *American Constitutional Law. Vol 1. Constitutional Structures: Separated Powers and Federalism* (1995, 2<sup>nd</sup> ed.); Laurence Tribe, *American Constitutional Law*, Vol. 1 (2000, 3<sup>rd</sup> ed.), ch. 2.

assumption that mutual controls would avoid the establishment of an arbitrary government.<sup>140</sup> The structure of the US constitutional system, otherwise, requires the branches to share power:<sup>141</sup> and since the President must obtain the consent of Congress to implement his agenda, the legislature plays a role in shaping the policies of the executive and in controlling its implementation.

Also in the US, however, the “constitutional dialogues”<sup>142</sup> between the political branches of government have largely evolved over time, significantly departing from what the framers had in mind when the US Constitution was enacted in 1787.<sup>143</sup> In particular, two developments have affected the US institutional arrangement: i.e. the consolidation of a two-party system and the transition from a Congressional to a Presidential government. Party politics and interests representation have made the activity of both branches subject to electoral competition based on alternative political agendas<sup>144</sup> and have increased the possibility of a ‘divided government’ – the Presidency and Congress being controlled by different political parties.<sup>145</sup> The rise of the modern Presidency,<sup>146</sup> in the New Deal era and especially during the Cold War,

<sup>140</sup> Cfr. *Federalist Papers*, LI (Madison) stating that the US Constitution is crafted to ensure that “ambition must be made to counteract ambition”. As it is well known a lively debate is taking place in the US about the virtues and vices of the US separation of powers system. Compare Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. (2000), 633 and Steven Calabresi, *The Virtues of Presidential Government*, 18 Const. Comm. (2001), 51.

<sup>141</sup> Cfr. Neustadt (supra note 134), 29.

<sup>142</sup> I draw the expression from Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (1988).

<sup>143</sup> Cfr. e.g. Lowi – Ginsberg (supra note 139); Fisher (supra note 139) and especially the paramount work of Bruce Ackerman, *We the People: Vol. 2. Transformations* (1998). For an historical account of the ‘constitutional vision’ of the founding period cfr. also Gordon Wood, *The Creation of the American Republic 1776-1787* (1998, 2<sup>nd</sup> ed.); Akhil Reed Amar, *America’s Constitution. A Biography* (2006).

<sup>144</sup> On the rise of party politics in the US cfr. the classic works of Walter Burnham, *Party System and the Political Process*, in *The American Party Systems* (William Chambers & Walter Burnham eds., 1967), 292 and Leon Epstein, *Political Parties in the American Mold* (1986).

<sup>145</sup> On ‘divided government’ cfr. David Mayhew, *Divided We Govern: Party Control, Lawmaking and Investigations 1946-2002* (2005, 2<sup>nd</sup> ed.) and Morris Fiorina, *Divided Government* (1996).

<sup>146</sup> Cfr. the classical Arthur Schlesinger Jr., *The Imperial Presidency* (1973) but see also Thomas Cronin, *The Invention of the American Presidency* (1989).

has produced an extraordinary expansion of the administrative apparatus<sup>147</sup> and, in reaction to this, the establishment of new Congressional mechanisms of review, e.g. through oversight committees and the practice of holding public hearings.<sup>148</sup>

These phenomena have affected the capacity of the legislatures, both in Europe and the US, to oversee the executive's action. In parliamentary systems, because of the *continuum* between parliamentary majorities and executive governments, the role of Parliament in the oversight of the executive branch has sharply diminished. Nowadays, rather, the 'opposition in Parliament' – i.e. the political parties which do not share the platform on which the government was elected – has the role to check the actions of the Prime Minister and to bring to the attention of the public at large the inadequacies of the executive.<sup>149</sup> Following the British practice of the 'shadow cabinet', a number of Continental European countries have found it convenient to formalize this model, but not always successfully.<sup>150</sup> In the US system of separation of powers, the ability of the political branches to check each other has, for structural reasons, traditionally been greater: nevertheless, Congress's role in controlling the action of the executive increasingly depends on political contingency – with greater scrutiny in times of 'divided government' and a more constrained stand in the periods in which both Congress and the Presidency are dominated by the same political majority.<sup>151</sup>

<sup>147</sup> Cfr. Cass Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. (1987), 415 and Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Columbia L. Rev. (1984) 574.

<sup>148</sup> On the role of Congress *vis-à-vis* the Presidency cfr. Nelson Polsby, *Congress and the Presidency* (1986) and more recently Nelson Polsby, *How Congress Evolves* (2004).

<sup>149</sup> Cfr. Robert Dahl, *Patterns of Opposition*, in *Political Opposition in Western Democracies* (Robert Dahl ed., 1966), 332.

<sup>150</sup> On the shadow cabinet in Britain cfr. David R. Turner, *The Shadow Cabinet in British Politics* (1969) and Giuseppe de Vergottini, *Lo Shadow Cabinet. Saggio sul rilievo costituzionale dell'opposizione nel regime parlamentare britannico* (1973). For the institutionalization of a 'statute of the opposition' in other European countries cfr. Ignacio Fernandez Sarasola, *El control parlamentario y su regulación en el Ordenamiento español*, *Revista Española de Derecho Constitucional* (2000) (on Spain); Giovanni Guzzetta, *La fine della centralità parlamentare e lo statuto dell'opposizione*, in *Come chiudere la transizione?* (Stefano Ceccanti & Salvatore Vassallo eds., 2004), 301 (on Italy); Pierre Avril, *Le statut de l'opposition: un feuilleton inachevé (Les articles 4 et 51-1 de la Constitution)*, *Les Petits Affiches*, Dec. 19, 2008, at 9 (on France).

<sup>151</sup> Cfr. Daryl Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. (2006), 2311.

The difficulties faced by legislatures in overseeing executive action seem even greater in the field of counter-terrorism, where the executive can either claim a constitutional role in ensuring national security or greater expertise and ability to act swiftly.<sup>152</sup> A burgeoning literature has accounted for the tremendous, and largely unchecked, expansion of Presidential powers in the US after 9/11.<sup>153</sup> It should be emphasized, however, that the strengthening of the executive branch has also been remarkable in parliamentary systems “which are formally adhering to the legislative model”<sup>154</sup> – that is, those systems which require anti-terrorism initiatives, with an impact on human rights, to be based on special legislation establishing concrete rules and specific powers for the executive government.<sup>155</sup> These general considerations on the role of legislatures are well reflected in the institutional mechanisms and political practices existing both in Italy and the US with regard to parliamentary or congressional oversight of the actions of the executive branch in matters of State secrecy.

In Italy, Law 124/2007 established a Parliamentary Committee on the Security of the Republic (COPASIR) to ensure a legislative oversight of executive action in matters of intelligence agencies and the State secret privilege.<sup>156</sup> COPASIR is composed of five members of the *Camera dei*

<sup>152</sup> Cfr. *inter alia* Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 Harv. L. Rev. (2005), 2637; Bruce Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism* (2006); Paolo Bonetti, *Terrorismo, emergenza e costituzioni democratiche* (2006); Andreas Paulus & Mindia Vashakmadze, *Parliamentary Control Over the Use of Armed Forces Against Terrorism: in Defence of the Separation of Powers*, 38 Netherland Yearbook Eur. L. (2007), 113.

<sup>153</sup> Cfr. e.g. Fisher (supra note 3); Frederick Schwarz & Aziz Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (2007); Scott Matheson Jr., *Presidential Constitutionalism in Perilous Times* (2009).

<sup>154</sup> Daphne Barak-Erez, *Terrorism Law Between the Executive and Legislative Models*, 57 Am. J. Comp. L. (2009), 877, 891.

<sup>155</sup> On the difficulties of Parliaments (and the opposition in it) to check the executive branch in times of national crises cfr. Yigal Mersel, *How Patriotic Can the Opposition Be? The Constitutional Role of the Minority Party in Times of Peace and During National Crises*, NYU Global Law Working Paper 2 (2004); Dirk Haubrich, *September 11, Anti-Terrorism Laws and Civil Liberties: Britain, France and Germany Compared*, in *Government and Opposition* (2003), 3. For a more general discussion about the presidentialization of constitutional systems in the post-9/11 era cfr. also Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: the Post-9/11 Globalization of Public Law and the International State of Emergency*, in *The Migration of Constitutional Ideas* (Sujit Choudhry ed., 2007) 347.

<sup>156</sup> The COPASIR has replaced the Parliamentary Committee established under Law

*Deputati* – i.e. the lower Chamber of Parliament – and five members of the *Senato* – i.e. the higher Chamber of Parliament – nominated by the Presidents of the two branches of the legislature, and it ensures the equal representation of both the members of the majority party (or coalition parties) in Parliament and of the opposition. To guarantee a meaningful involvement of the minority parties and an effective check on the activity of the government, the law requires that the President of COPASIR be chosen among the members of the opposition.<sup>157</sup> COPASIR has oversight, advisory and investigative functions<sup>158</sup> and shall be regularly informed by the executive of all his decisions.<sup>159</sup> COPASIR can access, under a duty of confidentiality, security files<sup>160</sup> and shall report to Parliament every year on the advancement of its activities.<sup>161</sup>

Nevertheless, as a matter of fact, the powers of COPASIR to review the decisions of the executive branch in issues of State secrecy may be quite limited.<sup>162</sup> Indeed, the Prime Minister – when the sharing of information with COPASIR may jeopardize “the security of the Republic, the relationship with foreign States, the course of ongoing operation or the security of sources of information and agents of the secret services”<sup>163</sup> – can assert a State secret privilege and refuse the disclosure of documents even to COPASIR. Law 124/2007 requires that the executive not invoke a State secret privilege when COPASIR is investigating institutional misconducts by intelligence officers:<sup>164</sup> however, in fact, this would seem to be only a minor hurdle, as it is up to the executive itself to decide whether the COPASIR’s request can be rejected. Against the decision of the Prime Minister, the only weapon in the hands of COPASIR is to refer

801/1977 named COPACO. Cfr. Paolo Bonetti, *Aspetti costituzionali del nuovo sistema di informazione per la sicurezza della Repubblica*, *Diritto e società* (2008), 251 and Francesco Sidoti, *The Italian Intelligence Service*, in *Gebaimdienste in Europa* (Thomas Jäger & Anna Daun eds., 2009), 78.

<sup>157</sup> Law 124/2007, Art. 31 (structure and composition of COPASIR).

<sup>158</sup> Law 124/2007, Art.s 31, 32 and 34 (functions of COPASIR).

<sup>159</sup> Law 124/2007, Art. 33 (duty of government to inform COPASIR).

<sup>160</sup> Law 124/2007, Art. 36 (duty of COPASIR not to disclose secrets).

<sup>161</sup> Law 124/2007, Art. 35 (duty of COPASIR to report yearly its activities to Parliament).

<sup>162</sup> Cfr. Giupponi & Fabbrini (supra note 14), 458.

<sup>163</sup> Law 124/2007, Art. 31(8).

<sup>164</sup> Law 124/2007, Art. 31(9) (prohibition for government to refuse disclosure of information to COPASIR when the latter is investigating misconducts by intelligence agencies).

the matter to Parliament, “for consequential evaluations,”<sup>165</sup> following the traditional logic of parliamentary control of executive action. For the reasons mentioned above, however, this hardly seems satisfactory.

In the US, both houses of Congress have established intelligence oversight Committees.<sup>166</sup> No legal framework, however, regulates the assertion of the State secret privilege by the executive and its control by the legislature.<sup>167</sup> During the 111<sup>th</sup> Congress (in times of ‘divided government’), bills were advanced either in the House of Representative or in the Senate, attempting to impose more stringent conditions on the invocation of the privilege by the President and requiring the Attorney General to report to the Congressional intelligence Committees on cases in which the executive had asserted the State secret privilege in court.<sup>168</sup> Nevertheless, none of the proposed measures has yet been enacted (and the arrival of a new administration, of the same political party of the congressional majority has slowed reform efforts during the 112<sup>th</sup> Congress). In addition, the previous US President strongly opposed any reform of the State secret privilege, claiming that any regulation of the matter by the legislature would be inconsistent with his constitutional role of ensuring national security, and warning that it could “refuse to comply with the legislated state secrets framework based on the theory of constitutional avoidance.”<sup>169</sup>

<sup>165</sup> Law 124/2007, Art. 31(10).

<sup>166</sup> Cfr. 50 USC § 413 (reports to Congressional Committees of intelligence activities and anticipated activities). On the role of the intelligence oversight Committees in controlling the executive branch in counter-terrorism policies and its difficulties cfr. Anne O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal. L. Rev. (2006), 1655. Note that just before the electoral recess of fall 2010 Congress approved the Intelligence Authorization bill – H.R. 2701 – the first piece of legislation in the field of intelligence oversight of the last six years, to ensure greater disclosure to the Congressional Committee of secret CIA activity by the President. The bill is now waiting Presidential signature to enter into force. Critics, however, have voiced concern about the effectiveness of the act. Cfr. Greg Miller, *With Bill, Congress Reasserts Oversight of Secret CIA Activities*, The Washington Post, Oct. 1, 2010, at A22.

<sup>167</sup> Cfr. also Heidi Kitrosser, *Congressional Oversight of National Security Activity: Improving Information Funnels*, 29 Cardozo L. Rev. (2008), 1049.

<sup>168</sup> Cfr. H.R. 984 (State Secret Protection bill); S. 417 (State Secret Protection bill) on which see Liu (supra note 74), 12 and Setty (supra note 59), 218.

<sup>169</sup> Setty (supra note 59), 223-224. For an explanation of the theory of ‘constitutional avoidance’ and for its criticism cfr. Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 Columbia L. Rev. (2006) 1189. Departing from the stand of the previous Administration, however, the new policies and procedures elaborated by the

In this context, it should come as no surprise that the Italian Parliament and the US Congress did not take steps in reaction to the *Abu Omar* and *El-Masri* cases. Despite the decision of the Italian Prime Ministers to raise three different conflicts of allocation of powers before the CCost on the claim that the judicial investigation in the *Abu Omar* case had threatened the disclosure of allegedly secret information concerning the relationship between the CIA and the SISMI, the COPASIR (both at the time of the centre-left government of Mr. Prodi and during the conservative government of Mr. Berlusconi) neither requested explanations from the executive branch concerning the alleged abduction of Mr. Abu Omar nor activated autonomous investigations to verify whether the action of the Prime Minister in barring criminal prosecutions of SISMI agents was justified. By the same token, the US Congress failed to react to the broad assertion of State secret privilege in litigation concerning cases of extraordinary renditions.<sup>170</sup> Even though these events were among the motivating factors in pushing the US legislator (but only once the Democratic Party gained majority in 2007) to advance reforms regarding the State secret privilege,<sup>171</sup> Congress neither ordered any independent investigation on the alleged wrongdoing nor took any other effective remedial actions.<sup>172</sup>

From this point of view, an often cited model<sup>173</sup> is the independent Commission established by the Canadian government to investigate the involvement of the Canadian security forces in the extraordinary rendition of Mr. Maher Arar – a Canadian national born in Syria who was rendered by the US to Syria under suspicion of being a terrorist suspect and allegedly subjected to torture and other inhumane and degrading treatments.<sup>174</sup> It is remarkable, however, that although the

Dept. of Justice on the assertion of the State secret privilege require the Attorney General to provide periodic reports on all cases in which the privilege is asserted to the appropriate oversight Committees in Congress (Dept. of Just., Press release 09-1013, Sept. 23, 2009 available at <http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html> (last accessed June 10, 2011)). See also *supra* nt. 100.

<sup>170</sup> Cfr. Jared Perkins, *The State Secrets Privilege and the Abdication of Oversight*, 21 *BYU J. Pub. L.* (2007), 235, 259 who highlights how “Congress is unlikely to be the champion of the cause of suspected terrorists (even though it is now clear that label is not applicable to Mr. Arar, nor, most likely, to Mr. El-Masri).”

<sup>171</sup> Setty (*supra* note 59), 213.

<sup>172</sup> Cfr. Cole (*supra* note 55), 39.

<sup>173</sup> Cfr. Tushnet (*supra* note 117), 284; Cole (*supra* note 55), 39.

<sup>174</sup> For an account of the facts involving Mr. Arar and for an overview of the judicial

Canadian authorities had only the (albeit relevant) role of sharing inaccurate and unreliable intelligence with the CIA, while US authorities bore the (almost entire) responsibility for the unlawful decision to detain Mr. Arar and secretly remove him to Syria, it was Canada – and not the US – that set up a special inquiry to report on the case and eventually decided to award Mr. Arar a significant payment in compensatory damages.<sup>175</sup> Hence, not only was Mr. Arar unable to obtain judicial redress in the US:<sup>176</sup> The US executive and Congress consistently refused to provide an alternative remedy, among others by declining any invitation by the Arar Commission to participate in the inquiry.<sup>177</sup>

In conclusion, as the analysis above highlights, there are serious concerns about the role of the legislative branch in ensuring a meaningful constitutional check on possible abuses by the executive branch in the assertion of a State secret privilege. Although both in the US and in Italy courts have stepped back and invoked “*nonjudicial* relief,”<sup>178</sup> institutional design and political dynamics in both parliamentary and separation of powers systems make legislative oversight of executive action difficult. It goes without saying that any such conclusion is tentative and should not be over-generalized. Professor Mark Tushnet has rightly argued that, “even in settings quite unfavourable to the development of constraints on the flow of power to executive government during emergencies, political control *can* work, and sometimes might work in real time more effectively than judicial controls.”<sup>179</sup> In the specific case under review here,

proceedings that followed cfr. Fisher (supra note 3), 1436; Erin Craddock, *Torturous Consequences and the Case of Maher Arar: Can Canadian Solutions “Cure” The Due Process Deficiencies in the US Removal Proceedings?*, 93 Cornell L. Rev. (2008), 621

<sup>175</sup> Cfr. the two reports of the *ad hoc* Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006); *A New Review Mechanism for the RCMP’s National Security Activity* (2006). Cfr. also Cornel Marian, *Learning from Others: The Scalia-Breyer Debate and the Benefit of Foreign Sources of Law to US Constitutional Interpretation of Counter-Terrorism Initiatives*, 4 Int’l J. Const. L. 1 (2010), 5, 11 who contrasts the Arar case with *El-Masri*.

<sup>176</sup> Cfr. supra nt. 62.

<sup>177</sup> Cfr. Kent Roach, *Review and Oversight of National Security Activities and Some Reflection on Canada’s Arar Inquiry*, 29 Cardozo L. Rev. (2007), 53, 82 who highlights that “the Canadian inquiry might have been even more effective had the US and Syrian governments not declined the inquiry’s invitation to participate.”

<sup>178</sup> *Mohamed*, at 58-59 (emphasis in the original).

<sup>179</sup> Tushnet (supra note 117), 287 (emphasis in the original).

however, both the Italian Parliament and the US Congress have proved too weak in counteracting the recourse by the executive to the State secret privilege. Additional means of redress need therefore to be considered.

### **5. The role of supranational courts: multilevel protection of fundamental rights**

The previous analysis has demonstrated that both in the US and in Italy, domestic courts have been unwilling or unable to review the assertion of the State secret privilege by the executive, even when the cases pending in their dockets concern allegations of extraordinary renditions and severe infringements of human rights. The capacity of domestic legislatures to oversee and curb the action of the executive branch, otherwise, has turned out to be limited both in the Italian parliamentary system and in the US system of separation of powers. If this is so, what can be an alternative venue of redress for individuals like Mr. Abu Omar and Mr. El-Masri, who have suffered severe infringements of their most basic rights – being abducted and secretly renditioned to be interrogated and detained in countries which are widely known to practice torture and other inhumane and degrading treatments?

In this section I examine the role that could be played by institutions who have jurisdiction to hear individual human rights claim *beyond the State*.<sup>180</sup> To this end, I first outline – *in constitutional terms* – the main institutional and jurisprudential features of the supranational systems for the protection of fundamental rights which operate in the European and the American contexts. Secondly, I analyze – *in factual terms* – whether these human rights arrangements can provide an effective mechanism to

<sup>180</sup> On the concept of multilevel protection of fundamental rights cfr. Ingolf Pernice & Ralf Kanitz, *Fundamental Rights and Multilevel Constitutionalism in Europe*, Walter Hallstein-Institute paper 7 (2004) now reprinted in *The Emerging Constitution of the European Union* (Deidre Curtin et al. eds., 2004); Giovanni Guzzetta, *Garanzia multilivello dei diritti e dialogo tra le Corti nella prospettiva di un Bill of Rights europeo*, in *Tutela dei diritti fondamentali e costituzionalismo multilivello. Tra Europa e Stati nazionali* (Antonio d'Atena & Pierfrancesco Grossi eds., 2004), 155. On the idea of constitutionalism beyond the State more generally cfr. instead *European Constitutionalism Beyond the State* (Joseph H.H. Weiler & Marlene Wind eds., 2004); Matthias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism In and Beyond the State*, in *Ruling the World: Constitutionalism, International Law and Global Governance* (Jeffrey Dunoff & Joel Trachtman eds., 2009), 258.

relief the human rights violations here at stake. As I will try to demonstrate, the assessment of the first issue reveals a major difference between Italy and the US: contrary to the latter, indeed, Italy – as the other European countries – is subject to a stringent supervision by supranational human rights bodies which can hold it liable for its illicit conduct. These structural differences affect the second issue, concerning the practical ability of supranational courts to offer an additional forum in which cases of extraordinary renditions and State secrecy, such as the one alleged by Mr. Abu Omar and Mr. El-Masri, can be effectively adjudicated and redressed.

The capacity of supranational institutions to ensure an additional forum in which human rights claim can be heard depends, among others, by institutional as well as jurisprudential factors.<sup>181</sup> In the European context, Italy is bound by the European Convention on Human Rights (ECHR) – an international treaty adopted under the aegis of the Council of Europe in the aftermath of World War II (WWII) and later integrated by several additional protocols<sup>182</sup> which has been now ratified by 47 European States (including all the 27 Member States of the European Union)<sup>183</sup>. The ECHR codifies a bill of basic civil and political rights that

<sup>181</sup> The article will focus here only on the role ‘regional’ human rights institutions. Both the US and European countries are then parties to global human rights treaties, including the 1966 UN International Covenant on Civil and Political Rights (ICCPR) and are therefore subject to the universal periodic review of the UN Human Rights Council. Cfr. e.g. *Report of the USA submitted to the UN High Commissioner for Human Rights* (2010). Equally, the US and European countries are parties to the UN Convention Against Torture (CAT). However, the oversight and adjudicatory mechanisms established by these UN human rights regimes are not comparable with those operating in the framework of regional organizations such as the ECHR. The US, in addition, is not a party to the Optional Protocol of the ICCPR, on the basis of which a supervisory international body may hear petitions submitted by private individuals alleging violation by State Parties of the rights recognized in the ICCPR. Specifically on the CAT obligations binding the US and its impact in the field of extraordinary renditions cfr. instead Michael J. Garcia, *Renditions: Constraints Imposed by the Laws on Torture*, Congressional Research Service, RL32890, Sept. 8, 2009.

<sup>182</sup> On the historical reasons that explain the creation of a human rights architecture beyond the States in post-WW II Europe cfr. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *Int'l Org.* (2000), 217; Stephen Gardbaum, *Human Rights and International Constitutionalism*, in *Ruling the World: Constitutionalism, International Law and Global Governance* (Jeffrey Dunoff & Joel Trachtman eds., 2009), 233.

<sup>183</sup> The European Union (EU) is endowed of its own human rights catalogue – the Charter

Contracting Parties are obliged to respect *vis-à-vis* all individuals falling under their jurisdiction. Furthermore, to ensure the effectiveness of these provisions, the ECHR has also established a powerful institutional machinery.<sup>184</sup> The heart of this institutional system is represented by the ECtHR, an independent judicial body empowered to hear and adjudicate individual human rights applications against the Signatory States. The ECtHR is assisted by a Council of Ministers (in which the representatives of the governments of the Contracting Parties sit), which oversees the enforcement of the ECtHR's decisions; it also used to be flanked by a Human Rights Commission (ECommHR) – which evaluated the admissibility of the individual applications and proposed a friendly settlement of the disputes.

As membership of the ECHR steadily expanded to the countries of Central and Eastern Europe in the late 1990s, however, the institutional devices for the protection of fundamental rights have been refined and the role of the ECtHR has been strongly enhanced.<sup>185</sup> In particular, since

of Fundamental Rights (CFR) – and has established an extremely effective judicial body: the European Court of Justice. The CFR however (still) applies just to the EU institutions and to the EU Member States only when their acts fall under the scope of application of EU law. Compare Joseph H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: on the Conflict of Standard and Values in the Protection of Human Rights in the European Legal Space*, in *The European Union and Human Rights* (Nanette Neuwahl & Allan Rosas eds., 1995) now reprinted in *The Constitution of Europe* (1999), ch. 3 and Martin Shapiro, *Rights in the European Union: Convergent with the USA?*, in *The State of the EU. Vol. 7: With US or Against US? European Trends in American Perspective* (Nicolas Jabko & Craig Parsons eds., 2005) 378. As such, the role of EU is still limited in the field under review in this paper. However on the most recent trends in the use of the State secret privilege at the EU level cfr.: Emilio de Capitani, *Unione Europea e segreto di Stato: un quadro normativo ancora in piena evoluzione*, Astrid Rassegne, Sep. 6, 2010.

<sup>184</sup> On the institutional machinery of the ECHR cfr. Antonio Bultrini, *Il meccanismo di protezione dei diritti fondamentali istituito dalla Convenzione europea dei diritti dell'uomo. Cenni introduttivi*, in *La Convenzione europea dei diritti dell'uomo. Profili ed effetti nell'ordinamento italiano* (Bruno Nascimbene ed., 2002), 20. Cfr. also Alec Stone Sweet, *Sur la constitutionnalisation de la Convention européenne des droits de l'homme*, 80 *Revue trimestrielle des droits de l'homme* (2009), 923 who argues that the ECHR, despite its Treaty-like nature, has undergone tremendous transformations in recent years and may be today accounted as a trans-European Constitution. Cfr. also *Loizidou v. Turkey* (Application No. 15318/89) [ECtHR] judgment on the preliminary objections March 23, 1995, at §75 (defining the ECHR as the constitutional instrument of the European public order).

<sup>185</sup> Robert Harmsen, *The Transformation of the ECHR Legal Order and the Post-Enlargement Challenges Facing the European Court of Human Rights*, in *The National*

the enactment of the 11<sup>th</sup> additional Protocol to the ECHR in 1998, the ECtHR and the ECommHR have been merged and the jurisdiction of the former over individual petitions has been made compulsory and automatic for all Contracting Parties. As a consequence, “any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the ECHR or the protocols thereto”<sup>186</sup> may bring an individual action in front of the ECtHR.<sup>187</sup> To be able to commence legal proceedings before the ECtHR, the *ressortissants* must have exhausted all national remedies unsuccessfully.<sup>188</sup> If the ECtHR finds that there has been a violation of the ECHR and its protocols it can afford just satisfaction to the injured party,<sup>189</sup> essentially by compelling a State found guilty of breaching ECHR rights to pay pecuniary damages.<sup>190</sup>

The human rights machinery constraining the US at the supranational level, on the contrary, is much weaker.<sup>191</sup> Indeed, despite having been among the promoter of the creation, on the ashes of WWII, of new international institutions and of the adoption of a universal Bill of rights (i.e. the Universal Declaration of Human Rights),<sup>192</sup> for several reasons

Judicial Treatment of ECHR and EU Laws. A Comparative Constitutional Perspective (Giuseppe Martinico & Oreste Pollicino eds., 2010), 27.

<sup>186</sup> ECHR, Art. 34 (allegation of victim status).

<sup>187</sup> These phenomena have *de facto* transformed the ECtHR in a supra-national Constitutional court: Compare Jean François Flauss, *La Cour européenne des droit de l'homme est-elle une Cour constitutionnelle?*, *Revue Française Droit Constitutionnel* (1998), 711 and Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 *H.R.L.Rev.* (2002), 161.

<sup>188</sup> ECHR, Art. 35 (exhaustion of prior domestic remedies).

<sup>189</sup> ECHR, Art. 41 (just satisfaction).

<sup>190</sup> Cfr. Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, in *A Europe of Rights* (Helen Keller & Alec Stone Sweet eds., 2008), 3; Giuseppe Franco Ferrari, *National Judges and Supranational Laws. On the Effective Application of EU Law and ECHR*, in *The National Judicial Treatment of ECHR and EU Laws. A Comparative Constitutional Perspective* (Giuseppe Martinico & Oreste Pollicino eds., 2010), 21.

<sup>191</sup> Note that the Inter-American human rights system is not, in itself, structurally weaker than the European one. Simply, the US is not subject to the adjudicatory and enforcement mechanisms set up under the ACHR (which are instead quite similar to the one of the ECHR). Cfr. text accompanying *infra* nt. 194.

<sup>192</sup> On the leading role of the US in establishing international human rights institutions cfr. Mery Anne Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) and Philippe Sands, *Lawless World. America and the Making and Breaking of Global Rule* (2005).

the US still systematically refuses to subject itself to the external scrutiny of a human rights institution akin to the ECtHR.<sup>193</sup> At the regional level, the American Human Rights Convention (ACHR) has been signed but not yet ratified by the US, with the consequence that the Inter-American Court of Human Rights (IACtHR) has no jurisdiction over individual human rights claims raised against the US.<sup>194</sup> The US has only approved the 1948 American Declaration of the Rights and Duties of Men (ADRDM) and is a Party to the Organization of the American States (OAS), whose Charter institutes an Inter-American Commission on Human Rights (IACommHR).<sup>195</sup> Nevertheless, the Statute of the IACommHR – adopted by the OAS General Assembly in 1979 – specifies that the powers of the IACommHR are extremely limited in relation to those States which have not signed the ACHR.<sup>196</sup>

In fact, with respect to these countries, the IACommHR has only a general function to monitor the human rights situation, to promote respect for fundamental rights and to raise human rights awareness, but it has no power to adjudicate individual applications.<sup>197</sup> Specifically, after the exhaustion of national remedies, private parties may file a complaint to the IACommHR alleging a violation of the ADRDM.<sup>198</sup> The

<sup>193</sup> On the position of the US *vis-à-vis* international human rights institutions compare Harold H. Koh, *Restoring America's Human Rights Reputation*, 40 *Cornell Int'l L. J.* (2007), 635 with Jed Rubenfeld, *The Two World Orders*, in *European and US Constitutionalism* (Georg Nolte ed., 2005), 280.

<sup>194</sup> On the Inter-American human rights system generally cfr. Scott Davidson, *The Inter-American Human Rights System* (1997) and on the IACtHR specificall cfr. Juan Antonio Trevieso, *La Corte Interamericana de Derechos Humanos opiniones consultivas y fallos: la jurisprudencia de la Corte Interamericana de Derechos Humanos* (1996).

<sup>195</sup> On the IACommHR cfr. Robert Goldman, *History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 *H.R. Quarterly* (2009), 856 and Maria B. Galli & Ariel Dulitzky, *A Comissão Interamericana de Direitos Humanos e o seu papel central no Sistema Interamericano de Proteção dos Direitos Humanos*, in *O Sistema Interamericano de Direitos Humanos e o direito brasileiro* (Luiz Flávio Gomes & Flávia Piovesan eds., 2000), 56.

<sup>196</sup> Compare IACommHR Statute, Art. 19 (powers of IACommHR *vis-à-vis* States which are Parties to the ACHR) with Art. 20 (powers of IACommHR *vis-à-vis* States which are not Parties to the ACHR).

<sup>197</sup> Cfr. Thomas Burgententhal & Douglass Cassel, *The Future of the Inter-American Human Rights System*, in *El Futuro del Sistema Interamericano de Protección de los derechos humanos* (Juan Mendez & Francisco Cox eds., 1998), 539.

<sup>198</sup> Cfr. IACommHR Statute, Art. 24 *juncto* IACommHR Regulation, Art. 51 (procedure

IACommHR, nevertheless, can only “examine [the] communications submitted to it and any other available information, [...] address the government of any member state not a Party to the [ACHR] for information deemed pertinent by this Commission, and [...] make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights.”<sup>199</sup> No judicial decision with binding effect on the Signatory State can therefore be adopted by the IACommHR, even when it finds a violation of the fundamental rights enshrined in the ADRDM. Rather, the role of the IACommHR is that of providing an international forum in which the action of the States can be subject to public scrutiny – with the hope that ‘naming and shaming’ might put some political pressure on the State under review to change its policies.<sup>200</sup>

The differences in the institutional structure between the supranational human rights system binding Italy and the one binding the US directly affect the possibility for the individuals who allege that they have been subject to extraordinary renditions and who were not able to make their case in Italian or US fora – because of the assertion of a State secret privilege by the government trumping the possibility of domestic litigation – to obtain redress before a supranational body. Indeed, the catalogue of rights codified in the European and American human rights systems include a number of largely overlapping provisions which are of relevance for individuals who have been subject to extraordinary renditions – *inter alia*, by protecting a procedural right of access to court,<sup>201</sup> prohibiting torture and inhumane treatment,<sup>202</sup> and safeguarding to the right to liberty and respect for private life.<sup>203</sup> Nevertheless, the pervasive

for petitioning the IACommHR claiming a human rights violations by a State which is not a Party to the ACHR).

<sup>199</sup> IACommHR Statute, Art. 20(b).

<sup>200</sup> Steiner, Alston & Goodman (supra note 72), 1033; Goldman (supra note 195), 887.

<sup>201</sup> Compare ECHR, Art. 6 (right to a fair trial) and Art. 13 (right to an effective remedy at the domestic level) with ADRDM Art. XVIII (right to a fair trial) and Art. XXVI (right to due process).

<sup>202</sup> Compare ECHR, Art. 2 (right to life) and Art. 3 (prohibition of torture and inhumane and degrading treatment) with ADRDM Art. I (right to life) and Art. XXV (right to humane treatment).

<sup>203</sup> Compare ECHR Art. 5 (prohibition of detention without trial) and Art. 8 (protection of private life) with ADRDM Art. XXV (protection against arbitrary arrest) and Art. V (protection of private life).

mechanisms of adjudication operating in the framework of the ECHR appear to be more effective *vis-à-vis* the regional system binding the US. Yet, other dynamics beyond institutional design needs to be taken into account when evaluating the greater capacity of the European human rights architecture in filling possible gaps in the protection of individual rights at the domestic level.

Also the role of a supranational court such as the ECtHR, in fact, is constrained by several substantive and procedural factors. To begin with, most rights protected under the ECHR are not absolute, and rather can be restricted by the Contracting Parties in the interest of national security, subject to respect for the principle of proportionality.<sup>204</sup> In addition, Art. 15 ECHR affirms that “in times of war or public emergency threatening the life of the nation,”<sup>205</sup> Signatory States may formally derogate from their ECHR obligations (save for the respect of the right to life, the prohibition of torture and of slavery) to the extent strictly required by the exigencies of the situation.<sup>206</sup> Finally, the ECtHR has, over time, developed in its case law a specific doctrine – known as the margin of appreciation – which allows Contracting Parties to enjoy a certain discretion when their measures are subject to review.<sup>207</sup> Although not applied systematically, this doctrine commands judicial restraint and *de*

<sup>204</sup> On the rise of proportionality analysis (also) in the jurisprudence of the ECtHR see Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 Columbia J. Transnat'l L. 1 (2008), 73, 75 and Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, in *Studies on European Public Law* (Luis Ortega Alvarez ed., 2005), 68.

<sup>205</sup> ECHR Art. 15.

<sup>206</sup> Cfr. e.g. ECtHR, *Brannigan and McBride v. United Kingdom* (Applications No. 14553/89 & 14554/89) [ECtHR], judgment of May 26, 1993 (holding that national authorities are in a better position than the ECtHR to decide on the existence of an emergency) but see also See *Aksoy v. Turkey* (Application No. 21987/93) [ECtHR], judgment of July 3, 1996 (holding that the measures adopted under Art. 15 ECHR exceeded what was strictly required by the exigencies of the situation). In the literature cfr. then Eva Brems, *The Margin of Appreciation in the Case-Law of the European Court of Human Rights*, 56 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1996), 240 and Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 H. R. Quarterly (2001), 625.

<sup>207</sup> On the doctrine of the margin of appreciation more generally cfr. Howard Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (1996); Palmira Tanzarella, *Il margine di apprezzamento*, in *I diritti in Azione* (Marta Cartabia ed., 2007), 143.

*facto* may leave to the Contracting Parties wide room for manoeuvre in national security matters beyond any oversight by the ECtHR.<sup>208</sup>

Despite these constraints, however, the analysis of the case law demonstrates that the ECtHR has attempted to limit recourse by national governments to the State secret privilege, even in the field of counter-terrorism.<sup>209</sup> Starting with *Tinnelley & Sons Ltd v. UK*,<sup>210</sup> in a series of cases (mainly relating to Northern Ireland anti-terrorism legislation) the ECtHR has made clear that the assertion of the State secret privilege (there, to prevent litigation in cases of discrimination in employment and public procurements) was not compatible with the right of access to court enshrined in Art. 6 ECHR.<sup>211</sup> Recently, in *Devenney v. UK* the ECtHR has formulated once again the proportionality test that it adopts in these cases. The ECtHR in fact, “accepts that the protection of national security is a legitimate aim which may entail limitations on the right of access to a court, including withholding information for the purposes of security”<sup>212</sup>, but preserves for itself the power “to consider whether there is a reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicant’s right of access to a court or tribunal.”<sup>213</sup>

In balancing the competing interests in the case at hand, the ECtHR

<sup>208</sup> Whether the margin of appreciation doctrine should be considered as a positive feature of the ECHR system has been the object of debate: compare Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 NYU J. Int’l L. & P. (1999), 843 and Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 Am. J. Int’l L. 1 (2003), 38.

<sup>209</sup> In other fields cfr. *Kenedi v Hungary* (Application No. 31475/05) [ECtHR] judgment of May 26, 2009 (finding a violation of Art. 6 ECHR because of the refusal of Hungary to disclose State secret documents to plaintiff despite court order); *Matyjek v. Poland* (Application No. 38184/03) [ECtHR] judgment of Sept. 24, 2007 (finding violation of Art. 6 ECHR because of the refusal of Poland to disclose State secret documents in lustration proceedings).

<sup>210</sup> *Tinnelley & Sons Ltd. et al. v. UK* (Application No. 20390/92) [ECtHR] judgment of July 10, 1998.

<sup>211</sup> Cfr. *Golder v. United Kingdom* (Application No. 4451/70) [ECtHR] judgment of Feb. 21, 1975 (interpreting Art. 6 ECHR as including a right to access to court) – on which see Carol Harlow, *Access to Justice as a Human Right: the European Convention and the European Union*, in *The EU and Human Rights* (Philip Alston ed., 1999), 190.

<sup>212</sup> *Devenney v. UK* (Application No. 24265/94) [ECtHR] judgment of June 19, 2002, at §26.

<sup>213</sup> *Id.*, at §26.

considered as relevant the fact that, because of the assertion of the State secret privilege in the domestic proceedings, “there could be no independent scrutiny whatsoever”<sup>214</sup> of the plaintiff’s claim (of discrimination on the basis of political or religious belief) and thus the applicant was “unable to challenge the dismissal or pursue any potential claim for pecuniary loss.”<sup>215</sup> The ECtHR therefore concluded that the severity of the restriction imposed on the right to access a court – unmitigated by any other available mechanisms of complaint – “was tantamount to removal of the court’s jurisdiction by executive *ipse dixit*”<sup>216</sup> and was in violation of the ECHR and it thus awarded pecuniary damages to the applicant. By reviewing the action of a Contracting Party through the prism of the procedural right of access to justice, these decisions of the ECtHR, in the end, suggest a confident role by the European supranational judiciary when national executives bar domestic litigation through the invocation of a State secret privilege.<sup>217</sup>

In light of the general institutional and jurisprudential capacity of supranational institutions in Europe and, conversely, in the US to ensure an additional forum to redress human rights violations shielded at the domestic level by the application of the State secret privilege, it is now possible to draw some cautionary remarks on the role of supranational courts in the cases of Mr. Abu Omar and Mr. El-Masri under review here. Individuals who were subject to extraordinary renditions can lodge an application before the ECtHR or the IACommHR, after the exhaustion of domestic remedies, alleging a violation of their fundamental rights.<sup>218</sup> Whereas the review of the IACommHR would be extremely limited, however, it seems plausible to argue that applicants would obtain a fair chance of advancing their claims before the ECtHR. In the case of Mr. El-Masri, since his action was dismissed entirely at the domestic level, an application to the ECtHR could well directly claim a violation of the procedural right of access to justice and of the right to a fair trial – like in the *Tinnelly* and *Devenney* cases – and (only) indirectly allege a limitation *inter alia* of the

<sup>214</sup> *Id.*, at §25.

<sup>215</sup> *Id.*, at §28.

<sup>216</sup> *Id.* Cfr. also *Tinnelly*, at §77.

<sup>217</sup> Cfr. also Iain Cameron, *National Security and the European Convention on Human Rights* (2000).

<sup>218</sup> Cfr. text accompanying *supra* nt. 189 & 198.

substantive provisions prohibiting torture and inhumane and degrading treatments.<sup>219</sup>

In the case of Mr. Abu Omar, on the contrary, since the criminal trial was not entirely trumped by the acknowledgment of a State secret privilege by the CCost, any possible recourse to the ECtHR would likely have to follow a different path. First of all, domestic venues of appeal would have to be exhausted with a final decision on the case by the Criminal division of the *Corte di Cassazione* – Italy’s Supreme Court.<sup>220</sup> Secondly, whereas the public prosecutors would be unqualified to petition the ECtHR, Mr. Abu Omar would have to lodge a formal complaint<sup>221</sup> and either claim (and demonstrate) that his request for compensatory damages had not been adequately satisfied at the domestic level<sup>222</sup> or assert, as an alternative, that his allegations of torture and inhumane treatment were not fully investigated and prosecuted at the domestic level and that Italy had therefore failed to comply with its ECHR obligations.<sup>223</sup> In the first case, Mr. Abu Omar’s action (provided it is admissible) could be based on the procedural right of access to court, whereas in the second case it would have to be based on the substantive provision of the ECHR prohibiting torture, inhumane treatment and detention without trial.

Be that as it may, although, at the moment, the possibility for Mr. Abu Omar to bring an action before the ECtHR seems mere speculation, it is remarkable that, instead, the scenario concerning Mr. El-Masri is coming into being. On 21 September 2009, in fact, Mr. El-Masri filed an application before the ECtHR against Macedonia (who is a party to the ECHR) asking the ECtHR to find that Macedonia, by unlawfully abducting him and transferring to CIA custody, had violated the prohibition of torture and inhumane treatment, his right to life, his right not to be detained without trial, his right of access to court and to a fair trial and his right to respect for private life.<sup>224</sup> Mr. El-Masri alleged that

<sup>219</sup> Of course, the US are not a party to the ECHR, so the hypothesis presented here is advance in the abstract. But cfr. *infra* text accompanying nt. 224.

<sup>220</sup> Cfr. *supra* text accompanying nt. 56.

<sup>221</sup> Cfr. *supra* text accompanying nt. 186.

<sup>222</sup> Cfr. *supra* nt. 58.

<sup>223</sup> Cfr. also Messineo (*supra* note 5), 1033 who explains that the investigations of the public prosecutors has only focused on the crime of abduction and not on the crime of (complicity in) torture and inhumane treatments that Mr. Abu Omar has suffered as a consequence of his extraordinary rendition to Egypt.

<sup>224</sup> Cfr. Application to the ECtHR, No. 39630/09, *El-Masri v. Macedonia* (available at:

Macedonia had failed to respond to his requests to open a criminal investigation to inquiry about his allegation and that the statute of limitations prevented any such initiative in the future. He also stated that a civil action for damages was pending before the Macedonian courts but that this process was not capable of providing an effective remedy for the violation of his ECHR rights<sup>225</sup> and asked the ECtHR to award him pecuniary and non-pecuniary damages. On 14 June 2010, with a noteworthy decision,<sup>226</sup> the ECtHR declared El-Masri's application as admissible and scheduled hearings to decide the case on the merits.<sup>227</sup>

A final pronouncement by the ECtHR reviewing the compatibility with the ECHR principles of the extraordinary rendition of Mr. El-Masri is therefore to be expected in the near future. This state of affairs starkly contrasts with what is going on, instead, within the Inter-American

[www.soros.org/initiatives/justice/litigation/macedonia/Application-Public-Version-20090921.pdf](http://www.soros.org/initiatives/justice/litigation/macedonia/Application-Public-Version-20090921.pdf) (last accessed June 10, 2011)).

<sup>225</sup> Cfr. e.g. *Assenov v. Bulgaria* (Application No. 24760/94) [ECtHR] judgment Oct. 28, 1998 (holding that victim who has exhausted remedies within the domestic criminal system should not pursue remedies before the domestic civil system before being able to sue the ECtHR); *Dzeladinov et al. v. Macedonia* (Application No. 1325202) [ECtHR] decision of admissibility March 6, 2007 (idem).

<sup>226</sup> To appreciate the importance of the admissibility decision of the ECHR it may be noticed that only a very limited number of applications lodged before the ECtHR are actually declared admissible and considered in the merit. The *Annual Report of for the Year 2009* (2010), 146 (available at: [www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/Annual\\_Report\\_2009\\_Final.pdf](http://www.echr.coe.int/NR/rdonlyres/C25277F5-BCAE-4401-BC9B-F58D015E4D54/0/Annual_Report_2009_Final.pdf) (last accessed June 10, 2011)) states that of the 35,460 applications received by the ECtHR in 2009, only 2,395 were considered admissible for a judgment of the merit (this means that less than 7% of the case are declared admissible). Note further that with the entrance into force of the 14<sup>th</sup> additional Protocol to the ECHR on June 1, 2010 conditions for admissibility of the applications have been tightened with the expectation to reduce even further the amount of cases to be decided on the merit by the ECtHR and henceforth to address the ever growing backlog of cases that is threatening the effective functioning of the ECtHR. Cfr. Palma Tanzarella, *Il futuro della Corte europea dei diritti dopo il Protocollo XIV*, Quaderni Costituzionali (2010), 423.

<sup>227</sup> *El-Masri v. Macedonia* (Application No. 39630/09) [ECtHR] decision of admissibility June 14, 2010. Cfr. Open Society Justice Initiative, Press release June 14, 2010 (available at <http://www.soros.org/initiatives/justice/focus/national-security/news/el-masri-rendition-20100614> (last accessed June 10, 2011)). On Oct. 8, 2010, the ECtHR communicated the decision to the Macedonian government asking it to reply to specific questions. Cfr. Open Society Justice Initiative, Press release Oct. 14, 2010 (available at <http://www.soros.org/initiatives/justice/focus/national-security/news/el-masri-european-court-20101014> (last accessed June 10, 2011)).

human rights system. After the exhaustion of his US venues of redress, on 9 April 2008 Mr. El-Masri petitioned the IACommHR alleging that the US had violated *inter alia* his right to life, to personality and to protection against arbitrary arrest, as recognized in the ADRDM.<sup>228</sup> Because of the limited powers of the IACommHR *vis-à-vis* the US, however, Mr. El-Masri could only plea the IACommHR to investigate the facts, declare that the US is responsible for the violation of the ADRDM, and ask it to recommend adequate and effective remedies for addressing the violation of his rights, including requesting that the US government and those directly responsible for Mr. El-Masri's extraordinary rendition publicly acknowledge such involvement and publicly apologize. More than two years later, however, despite the decision of the IACommHR to accept the petition,<sup>229</sup> the proceedings have not moved forward since the US has refused to cooperate.<sup>230</sup>

In conclusion, as this Section suggests, a multilevel architecture for the protection of fundamental rights such as that existing in Europe today can have several advantages.<sup>231</sup> A supranational court such as the ECtHR can play a role in ensuring effective protection of fundamental rights, even where for reasons of national security – as invoked by national governments through the State secret privilege – municipal courts have been forced to step back from litigation involving cases of extraordinary rendition, leaving gaps at the domestic level. On this ground, there seems to be a remarkable difference between the regional human rights institutions supervising the action of Italy and the US: the Inter-American human rights systems binding the US is very weak compared to the substantive

<sup>228</sup> Cfr. Petition to the IACommHR, No. 419-08, *El-Masri v. US*, April 9, 2008 (available at: [http://www.aclu.org/files/pdfs/safefree/elmasri\\_iachr\\_20080409.pdf](http://www.aclu.org/files/pdfs/safefree/elmasri_iachr_20080409.pdf) (last accessed June 10, 2011)).

<sup>229</sup> *El-Masri v. US* (Petition No. 419-08) [IACommHR] decision of admissibility Aug. 27, 2009. Cfr. American Civil Liberties Union, Press release Aug. 27, 2009 (available at [http://www.aclu.org/human-rights\\_national-security/international-tribunal-takes-case-innocent-victim-cia-extraordinary-r](http://www.aclu.org/human-rights_national-security/international-tribunal-takes-case-innocent-victim-cia-extraordinary-r) (last accessed June 10, 2011)).

<sup>230</sup> Cfr. Additional Information from Petitioner, No. 419-08, *El-Masri v. US*, July 27, 2010 (available at: [http://www.aclu.org/files/assets/P-419-08\\_Petitioners\\_Additional\\_Information.pdf](http://www.aclu.org/files/assets/P-419-08_Petitioners_Additional_Information.pdf) (last accessed June 10, 2011)).

<sup>231</sup> Cfr. Marta Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 Eu. Const. L. Rev. (2009), 5 and Aida Torres Pérez, *Conflict of Rights in the European Union* (2009). For further reference to the literature cfr. then Federico Fabbrini, *The European Multilevel System for the Protection of Fundamental Rights: A 'Neo-Federalist' Perspective*, Jean Monnet Working Paper 14 (2010).

obligations and the adjudicatory and enforcement mechanisms established by the ECHR. On the other hand, as remarked above, the capacity of the ECtHR to review the action of national executives should not be overestimated, not least because the ECtHR can only award pecuniary damages when it finds a violation of the ECHR. Nevertheless, the precedents of the ECtHR in cases of States' abuse of the secrecy privilege, as well as the recent decision of the ECtHR to admit the application of Mr. El-Masri shed some cautionary optimism about the forthcoming litigation at the supranational level of claims of extraordinary renditions.

## 6. Conclusion

The purpose of this article was to analyze the application of the State secret privilege in litigations concerning cases of extraordinary renditions. With several caveats, the article has argued that, despite the gravity of the allegations of human rights violations made by the individuals who were subjected to extraordinary renditions, a common pattern of judicial retreat emerges both in Italy and in the US whenever the government invokes a State secret. In the *Abu Omar* case, in Italy, the CCost ruled that the government had legitimately asserted a State secret privilege barring public prosecutors and ordinary judges from utilizing the evidence on the relationship between the CIA and the Italian intelligence which was essential in proving the criminal liability of the Italian officers involved in the abduction of Mr. Abu Omar. In the *El-Masri* case (and, more recently, in *Mohamed*), US federal courts blocked the action for civil liability that Mr. El-Masri had commenced, recognizing that the State secrecy privilege invoked by the executive branch was valid and commanded *tout court* dismissal of the case.

The comparative constitutional analysis highlights that a similar approach of judicial deference *vis-à-vis* the executive branch in matters of State secret privilege prevails in both countries. The consequence of such a broad operation of the State privilege, however, is the impossibility for individuals allegedly subjected to extraordinary renditions to obtain justice through redress before domestic courts. How can this troubling trend be counteracted? This article has offered a nuanced answer. In a remarkably convergent mode, both the US and Italian courts have invited legislatures to exercise greater scrutiny over the action of the executive branch and to provide redress against human rights violations. The analysis has demonstrated, however, that both in parliamentary and in separation of

powers systems the willingness and the ability of Parliament or Congress to check the executive might be limited for political and institutional reasons. In fact, the cases of Mr. Abu Omar and Mr. El-Masri themselves prove how ill-fated the judicial call for legislative intervention might sometimes be.

As an alternative venue of redress, the article has examined the function of supranational courts. The existence of a multilevel system for the protection of fundamental rights, in fact, may help fill the lacunae of the domestic legal systems and ensure that individuals who have suffered infringements of their rights (e.g. by being subject to extraordinary rendition) have an additional forum in which to advance their claims. From this point of view, however, a major difference exists between Italy and the US: whereas Italy, as all other European countries, is subject to an external and compelling review exercised by the ECtHR, the US is not yet party to the ACHR and cannot be sued before the IACtHR. Petitions can still be brought by private persons before the IACommHR, but, as the case of Mr. El-Masri clearly proves, this process is hardly as effective as the one provided by the ECHR. Nevertheless, the role of a supranational court such as the ECtHR should not be overestimated. A number of substantive and jurisprudential factors constrain its action and might diminish its capacity to cope alone with the function of overseeing State actions and adjudicating human rights violations.

In the end, it is reasonable to argue that stronger constitutional checks and balances and more effective review by supranational institutions are not mutually exclusive. Rather they can, and should, complement each other to ensure that fundamental rights are not unduly sacrificed for reasons of national security. The examples addressed in this article, on the unsuccessful attempt of Mr. Abu Omar and Mr. El-Masri to obtain a domestic remedy for the extraordinary rendition they have suffered, show how problematic the executive's assertion of a State secret privilege can be when it is left unchecked and unreviewed. Domestic courts, domestic legislatures and supranational institutions have all a role to play in order to ensure that individuals who allege that they have experienced outrageous violations of their rights by the hand of our governments are not left without a remedy, simply because of the executive say so. The fight against terrorism surely requires the handling of confidential information. But the rule of law demands that fundamental rights be safeguarded before the "*arcana imperii*."<sup>232</sup>

<sup>232</sup> Tacitus, *Annales*, Liber II – 36.