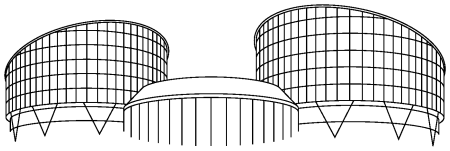

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECTION FOUR

CASE OF NASR AND GHALI v. ITALY

(Application No. 44883/09)

JUDGMENT

STRASBOURG

February 23, 2016

FINAL

05/23/2016

This judgment has become final by virtue of Article 44 § 2 of the Convention. It may undergo shape alterations.

Contents

In Nasr and Ghali v. Italy,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

George Nicolaou,*president,*
Guido Raimondi,
Päivi Hirvelä,
Ledi Bianku,
Nona Tsotsoria,
Paul Mahoney,
Krzysztof Wojtyczek,*judges*, and Françoise Elens-Passos, Section Registrar,

After deliberating in private on January 21, 2016,

Delivers the following judgment, adopted on this date:

PROCEDURE

1. The case originated in an application (no. 44883/09) brought against the Italian Republic by two Egyptian nationals, Mr Osama Mustafa Nasr and Ms Nabila Ghali ("the applicants"), who applied to the Court on August 6, 2009 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

2. The applicants were represented by Me L. Bauccio, a lawyer in Milan. The Italian Government ("the Government") were represented by their Agent, Ms E. Spatafora.

3. The applicants complain of various violations based on Articles 3, 5, 6, 8 and 13 of the Convention, in the context of the secret surrender operation to which the applicant was allegedly subjected. The person concerned alleges that he was abducted in Italy by Italian agents and foreign agents, having been transported to the American military base of Aviano in Italy and then to the American military base of Ramstein in Germany, to be handed over there to agents from the Central Intelligence Agency (hereafter "the CIA") who then allegedly put him on a special flight to Egypt, where he was held incommunicado and subjected to torture and ill-treatment.

4. On November 22, 2011, the application was communicated to the Government. On March 3, 2015, the Court put additional questions to the parties.

5. A hearing took place in public at the Human Rights Building in Strasbourg on 23 June 2015 (Rule 59 § 3).

Appeared:
– for the Government
Mrs. P. Accardo, co-agent;
Mr. G. Mauro Pellegrini, *co-agent*;
Ms R. Incutti, Ministry of Justice,
MM. Mr. Giannuzzi, Advocate General,
A. Di Taranto, Ministry of Justice *advisers.*

– for applicants
MM. I.BAUCCIO, attorney, *advice*,
vs.SCAMBIA, attorney,
I.FAVERO, attorney, *advisers*.

The Court heard statements by Mrs Incutti, Mr Giannuzzi and Mr Bauccio.

ACTUALLY

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, born in 1963, and the applicant, born in 1968, are a married couple.

7. The facts of the case, as presented by the parties, may be summarized as follows.

A. Context

8. The applicant, also known as “Abou Omar”, had lived in Italy since 1998 and had become an imam of a mosque in Latina. A member of the Jama'a al-Islamiya group, an Islamist movement considered terrorist by the Egyptian government, he applied for political refugee status. On 22 February 2001 the Italian authorities granted his request.

In July 2000 the applicant moved to Milan, and on 6 October 2001 he married the applicant at the mosque in Calle Quaranta, according to the Islamic rite.

9. Suspected in particular of criminal association for the purpose of committing violent acts of international terrorism, an offense provided for in article 270 bis of the penal code (hereinafter "the CP"), he was the subject of preliminary investigations carried out by the Milan public prosecutor's office on its relations with fundamentalist networks.

These investigations led to the issuance of an order for provisional detention, issued on 26 June 2005 by the judge for the preliminary investigations ("the GIP") of Milan.

It appears from the case file that the applicant was convicted on 6 December 2013 by the Milan court of belonging to a terrorist organisation. The applicant appealed against his conviction.

B. The applicant's abduction, his transfer to Egypt, his incommunicado detention in Egypt and the conditions of his detention

1. The applicant's abduction and his transfer to Egypt

10. According to his own statements – sent in writing to the Milan public prosecutor's office in 2004 – the applicant was intercepted on 17 February 2003 around noon by an unknown person dressed in civilian clothes (later identified as Mr Pironi; paragraphs 29, 58, 69, 72 and -74 below) as he walked down Guerzoni Street in Milan to the mosque on Jenner Boulevard. Passing himself off as a policeman, the stranger asked him for his identity document and his residence permit and pretended to check his identity by mobile phone. Suddenly, the applicant was assaulted by unidentified people, who grabbed him and pushed him violently into a white van parked nearby. He was then said to have been severely kicked and punched, immobilized, tied at the hands and feet and covered with a balaclava by two men in their thirties. The vehicle would then have started at high speed. During the journey, the applicant allegedly became extremely ill, fainted and was revived.

11. Approximately four hours later, the vehicle allegedly stopped at a location (later identified as the United States Air Forces in Europe, United States Air Forces in Europe, USAFE base in Aviano where the claimant was allegedly boarded a plane After a journey of approximately one hour, the plane was said to have landed at an airport later identified as the US military base at Ramstein in Germany (paragraphs 38-39 and 112-113 below) The applicant was said to have been transported Hands and feet tied in a room at this airport, where he was undressed and then dressed again with other clothes, and the blindfold covering his eyes was removed for a few moments to take a picture of him.

12. He was then taken on a military plane bound for Cairo's civilian airport. During the transfer, he was reportedly tied to a chair. He is said to have had headphones playing classical music placed over his ears, so as to prevent him from hearing what was going on around him. He was said to have been mistreated on several occasions and only received medical attention after a severe respiratory attack caused by the treatments he had undergone.

2. Incommunicado detention and interrogations in Egypt

a) The first period of detention (February 17-18, 2003 to April 19, 2004)

13. The applicant recounts in his statements that, once he arrived at Cairo airport, he was tied up with adhesive tape tightened around his feet and hands. Two people allegedly helped him off the plane and a person speaking Arabic with an Egyptian accent told him to get into a van.

14. The applicant was allegedly taken to the headquarters of the national intelligence services and interrogated by three Egyptian officers about his activities in Italy, his family and his trips abroad. Subsequently, a high-ranking Egyptian person allegedly interrogated him and offered him an immediate return to Italy in exchange for his collaboration with the intelligence services. The applicant declined that offer.

15. On the morning of 18 February 2003, the applicant was allegedly put in a cell of approximately two square meters with no window, no toilet, no water, no light and insufficiently ventilated, extremely cold in winter and very hot in summer. For the entire duration of his detention in this cell, he was allegedly prohibited from all contact with the outside world.

16. During this period, the applicant was regularly taken to an interrogation room where he was subjected to physical and psychological violence intended to extort information from him, in particular on his alleged relations with Islamist terrorist networks in Italy. During his first interrogation, he was allegedly stripped naked and forced to stand on one foot – with his other foot and hands bound together – so that he fell to the ground several times, to the mockery of the men in uniform who were present. Subsequently, he was allegedly beaten, subjected to electric shocks and threatened with sexual violence if he did not answer the questions put to him.

17. On 14 September 2003, he was reportedly transferred to another place of detention after being forced to sign declarations attesting that he had no objects on him when he arrived and that he had not been subjected to any ill-treatment during his detention.

18. He would then have been detained in a cell in the basement of about three square meters, without light, without opening, without sanitary facilities and without running water, in which he only had a very dirty and smelly blanket. He would have been fed exclusively with stale bread and water. He would not have had access to a toilet and would therefore have had to defecate and urinate in the cell. He could only take a shower every four months and never had his beard trimmed or his hair cut during his entire detention. He could have had no contact with the outside world. They reportedly refused to give him a Koran and to show him the direction of Mecca, towards which Muslims must turn to pray. He had to stand facing the wall when a guard opened the cell – which he said could happen at any time – or he would be beaten, sometimes with an electric baton. When

addressing him, the guards called him either by his cell number or by the names of women or genitals. From time to time, he was reportedly taken near the interrogation rooms to make him hear the cries of pain from other detainees.

19. The applicant explains that, twice a day, a guard came to fetch him to take him to the interrogation room, tied up and blindfolded by a blindfold. At each interrogation, an officer allegedly undressed him and then invited the other officers to touch his private parts to humiliate him. The applicant says that he was often suspended by his feet or tied to an iron door or a wooden fence, in different positions. Regularly, the agents allegedly beat him for hours and inflicted electroshocks on him using wet electrodes affixed to his head, chest and genitals. Other times, he was allegedly subjected to the torture called “martaba” (mattress), which consists of immobilizing the victim on a wet mattress and then sending electric shocks into the mattress. Finally,

20. From March 2004, instead of asking him questions, the Egyptian agents allegedly made the applicant repeat a false version of the events, which he should have confirmed before the prosecutor. In particular, he should have stated that he left Italy on his own initiative and reached Egypt by his own means, that he surrendered his Italian passport to the Egyptian authorities because he did not wish to return to Italy and that he suffered no no ill-treatment from them.

21. The applicant was reportedly held incommunicado until 19 April 2004. On that date he was released, according to him because he had made statements in accordance with the instructions he had received and on the condition that he not leave Alexandria and not to tell anyone about the treatment he had been subjected to while in detention.

22. Despite having been told not to speak to anyone about the treatment he had undergone, the applicant telephoned his wife as soon as he was released to reassure her of his fate. He also contacted other people to whom he described his abduction and detention (see also paragraphs 33 and 35 below).

b) The second period (date not specified in May 2004 – February 12, 2007)

23. On an unspecified date, some twenty days after his release, the applicant was arrested by the Egyptian police. He was detained in various establishments, including Istiqbal and Tora prisons, and placed in solitary confinement for long periods. His detention, of an administrative nature, was based on Egyptian anti-terrorist legislation. He was released on 12 February 2007 (see also paragraphs 34-35 below), without being charged.

24. In the meantime, on 5 November 2006, the applicant's detention in Egypt had been confirmed by General Ahmed Omar, assistant to the Egyptian Minister of the Interior, during an interview conducted by the newspaper "Al Ahram Weekly": General stated on that occasion that the

applicant was detained for security reasons and that he had gone to Egypt spontaneously.

25. During this period, the Egyptian authorities did not reply to the Italian magistrates who, in the context of the investigation carried out by the Milan public prosecutor's office into the applicant's abduction (see also paragraphs 30-72 below), asked to be able question him and obtain details of his arrival in Egypt and the reasons for his detention. They refused the applicant the possibility of traveling to Italy.

Banned from leaving Egyptian territory, the applicant, since his release, has lived in Alexandria.

3. Physical and psychological consequences of treatment suffered by the applicant

26. The treatments undergone by the applicant had left him with serious physical consequences, in particular a loss of hearing, difficulty moving around, rheumatism, incontinence problems and significant weight loss. The person concerned also reports significant psychological sequelae, in particular a state of depression and acute post-traumatic stress.

27. A medical certificate dated 9 June 2007, drawn up by a psychiatrist, attests that the applicant suffered from post-traumatic stress disorder. This doctor also recommended a consultation with a forensic doctor in order to have the marks of lesions still visible on the body of the person concerned noted.

C. The investigation carried out by the Milan public prosecutor's office

1. The first phase of the investigation: the identification of the American agents suspected of having taken part in the abduction and the remand orders concerning them.

28. On 20 February 2003 the applicant notified a Milan police station of the disappearance of her husband.

29. Following a call for witnesses, a certain Mrs. R., a member of the Egyptian community, made herself known.

On February 26, 2003, she was interviewed by the police. She stated that on February 17, 2003, shortly before noon, as she was passing with her children in rue Guerzoni on her way home, she had seen a white van parked on the left side of the road and, on the other side , leaning against a wall, a man with a long beard and traditional Arab clothes next to whom were two other men, with Western appearance, one of whom (ndr: Mr. Pironi, rifleman) was talking in a mobile phone. They had put the applicant on board the van. After speaking for a few moments with the volunteers of an

association with whom her children were playing, Mrs. R. reportedly set off again.

30. On an unspecified date, probably towards the end of February 2003, the Milan public prosecutor's office opened an investigation against X for kidnapping within the meaning of Article 605 of the Criminal Code. The police department in charge of special operations and terrorism (Divisione Investigazioni Generali e Operazioni Speciali - Digos) of Milan was seized of the investigation. Investigating authorities ordered wiretapping and controls on the use of mobile phones in the area where the incident allegedly took place.

31. On March 3, 2003, the American authorities (through RH Russomando, a CIA agent in Rome), communicated to Digos agents that Abu Omar was in the Balkans. The news would later turn out to be false and misleading (see also paragraph 114 below).

32. On March 4, 2003, Ms R. was heard by the prosecution and confirmed her statement of February 26, 2003.

Later, during the investigation, R's husband stated that his wife had refrained from saying that she had seen the people who put the applicant into the van using violence and heard cries for help.

Subsequently, several other witnesses were heard.

33. More than a year later, between 20 April 2004 and 7 May 2004, the investigators listened to telephone conversations between the applicant and his wife. During this period, telephone conversations between the applicant, the applicant and their Egyptian friend, a certain MMR, were intercepted. The applicant recounted his abduction, his deportation to Egypt, the torture suffered and said that he had been in Alexandria since 19 April 2004, the date of his release.

In particular, on 20 April 2004 the investigators recorded a telephone conversation between the applicant and the applicant. The latter was calling from Alexandria. After reassuring his wife about his state of health, he explained to her that he had been kidnapped and that he could not leave Egypt. He asked her to send him two hundred euros (EUR), to warn his Muslim friends and not to contact the press.

34. On 13 May 2004 a telephone conversation between the applicant and members of her family revealed that the applicant had just been arrested again by the Egyptian police. He remained in detention until February 12, 2007.

After his release in April 2004 the applicant had sent a memorandum to the Milan public prosecutor's office in which he described his abduction and the torture suffered (see also paragraph 10 above).

35. On 15 June 2004 MEMR, an Egyptian national residing in Milan, was heard as a witness because he had had telephone conversations with the applicant. The latter had related to him the circumstances of his abduction and his transfer to Egypt on board American military planes and had told

him that he had refused an offer from the Egyptian Minister of the Interior to collaborate with the intelligence services.

36. On 24 February 2005 Digos submitted a report to the public prosecutor's office on the investigations it had carried out. Thanks in particular to a verification of telephone communications made in the relevant areas, the investigators had identified a certain number of potentially suspicious telephone SIM cards. These cards had been connected several times for short periods despite the proximity between the respective users; they had been activated in the months preceding the abduction and had ceased to function in the following days; and they had been registered under false names. In addition, the users of some of them had subsequently traveled to Aviano Air Base and, during the journey, these cards had been used to call the head of the CIA in Milan (Mr. Robert Seldon Lady), the head of US security for the Aviano base (Lt. Col. Joseph Romano), as well as numbers for the state of Virginia, USA, where the CIA is headquartered. Finally, one of these cards had been spotted in the Cairo area during the following two weeks.

37. The cross-checking of the numbers called and calling on these SIM cards, of the movements of their users in the periods preceding and following the abduction, of the use of credit cards, of hotel stays and of journeys by plane or rental car had enabled the investigators to confirm certain hypotheses formed from the testimonies collected and to identify the real users of the telephone cards.

38. All of the information gathered by the police investigation confirmed the applicant's version of his abduction and his transfer to the American base at Aviano and then to Cairo. On February 17, 2003, around 4.30 p.m., the vehicle arrived at the USAFE base in Aviano where the applicant was taken on a plane. After a journey of about an hour, the plane landed at the USAFE base in Ramstein (Germany).

It was also established that nineteen American nationals were implicated in the facts, including members of the diplomatic and consular personnel of the United States in Italy. The investigators indicated in particular in their report that the head of the CIA in Milan at the time, Mr. Lady, had played a key role in the case.

39. Furthermore, air traffic checks carried out from four different sources had confirmed that, on 17 February 2003, a plane had taken off at 6.30 p.m. from Aviano bound for Ramstein and another plane had taken off at 8.30 p.m. from Ramstein to Cairo. The plane that made the Ramstein-Cairo trip belonged to the American company Richmore Aviation and had already been rented several times by the CIA before.

40. On 23 March 2005 the public prosecutor's office asked the GIP to order the provisional detention of nineteen American nationals suspected of having participated in the planning or execution of the kidnapping, including Mr Lady.

41. By order of June 22, 2005, the GIP accepted the request for thirteen of the suspects and rejected it for the remainder.

42. On 23 June 2005, during a search carried out at Mr Lady's home, the investigators found photos of the applicant taken in rue Guerzoni. They also seized the electronic traces of an Internet search for a car journey from Guerzoni Street to the Aviano base, as well as plane tickets and hotel reservations for a stay in Cairo from February 24 to March 4, 2003. .

43. On 26 June 2005 the applicant, who had returned from Egypt, was heard again by the public prosecutor's office.

44. By a decree of July 5, 2005, the GIP declared that the defendants affected by the provisional detention order could not be found (irreperibili) and ordered the notification of the acts of the procedure to the officially appointed lawyer.

45. The public prosecutor's office having challenged the order of 22 June 2005 (see paragraph 41 above), a division of the Milan court responsible for reviewing the precautionary measures reversed it and, by order of 20 July 2005, ordered the detention on remand of all of the defendants.

46. On 27 September 2005, following a further request from the public prosecutor's office, the Milan GIP ordered the remand in custody of three other American nationals.

47. On an unspecified date, the twenty-two American defendants were declared "at large" (latitanti).

48. On November 7 and December 22, 2005, the public prosecutor in charge of the investigation requested the General Prosecutor of Milan to ask the Ministry of Justice, on the one hand, to request from the American authorities the extradition of the defendants on the basis of a bilateral agreement with the United States and, on the other hand, to invite Interpol to issue a wanted notice against them.

49. On January 5 and 9, 2006 respectively, the Chamber responsible for reviewing the precautionary measures and the GIP issued European arrest warrants for the twenty-two accused.

50. On April 12, 2006, the Minister of Justice told the prosecution that he had decided not to request the extradition or the publication of an international search warrant for the twenty-two American defendants.

51. Subsequently, four other Americans were implicated by the statements of an Italian intelligence agent (see also paragraph 59 below).

2. Information from Italian intelligence services

52. In the meantime, by letter dated 1 July 2005, the public prosecutor's office had asked the directors of the civil intelligence service (Servizio per le informazioni e la sicurezza democratica - SISDe) and of the military intelligence service (Servizio per le informazioni e la sicurezza militare – SISMi) to indicate whether, under the existing agreements, the CIA was required to communicate to the Italian authorities the names of its agents

operating on national territory and, if so, whether the presence of the accused had been reported to this title.

53. On an unknown date, General Nicolò Pollari, director of the SISMi, sent a letter to the public prosecutor's office in which he assured them of the full cooperation of his service, while emphasizing that some of the questions asked could relate to information covered by the secret of State. By a second letter of 26 July 2005, the SISMi replied in the negative to the first question but confirmed the presence in Italy of Mr Lady and Ms Medero. The director of SISDe, General Mario Mori, communicated the same answer in a letter of July 22, 2005.

54. By letter dated November 5, 2005, the prosecution asked SISMi and SISDe whether any of the American nationals in question were members of the diplomatic or consular staff of the United States, whether there had been verbal or written exchanges between SISMi and the CIA about the applicant's abduction and, if so, what was the content of it.

55. By a confidential note of November 11, 2005, the President of the Council of Ministers (hereafter "the PdCM"), the competent authority in matters of State secrets, indicated that he had authorized the transmission of the information requested on condition that their disclosure would not prejudice the constitutional order. He added that the authorization had been given "in view of the full conviction (...) that the government and the SISMi are absolutely foreign to any aspect relating to the abduction of Mr. Osama Mustafa Nasr alias Abou Omar" and that "neither the government nor the service [had] ever received any information relating to anyone's involvement in the facts denounced, with the exception of those received by the judicial authority or by the press".

56. In a letter of 19 December 2005 the director of SISMi stated that his service had not maintained any relationship with the CIA or exchanged any document with it concerning the applicant's abduction. He also specified that two of the persons under investigation had been accredited as members of the American diplomatic personnel in Italy.

3. The second phase of the investigation: the involvement of Italian nationals, including State agents

57. The second phase of the investigation focused on the possible responsibility of SISMi agents in the operation as well as on the role of the four other American nationals (see also paragraph 51 above).

58. Examination of the telephone call records led to the conclusion that Mr. Pironi, at the time Marshal of the Special Operational Group (Raggruppamento Operativo Speciale) of carabinieri, had been present at the scene of the kidnapping and that he had had frequent contact with Mr. Lady. On 14 April 2006 Mr Pironi, questioned by the Milan public prosecutor's office, admitted to being the person who, on the day of the abduction, had intercepted the applicant to ask him to identify himself. He

stated that he acted on the initiative of Mr. Lady, who had presented the kidnapping to him as a joint action by the CIA and the SISMi.

59. Between May and July 2006, investigators questioned several SISMi agents. They stated that they had been instructed to cooperate with the judicial authorities, as the facts to which the investigation related were not covered by State secrecy.

Two former members of the service were interrogated on several occasions as witnesses. Colonel S. D'Ambrosio, former director of SISMi in Milan, said that in the fall of 2002, Mr. Lady confided to him that the CIA and SISMi were preparing to "sample" Mr. Nasr. Mr. D'Ambrosio had contacted his direct superior, Mr. Marco Mancini, on this subject. A few days later, Mr. D'Ambrosio was relieved of his duties. Following these statements, other American agents were implicated (see paragraph 51 above).

Colonel Sergio Fedrico, former head of SISMi in Trieste, territorially competent for the region in which the Aviano base is located, declared that in February 2002 he had refused a proposal from Mr. Mancini to take part in activities " non-Orthodox" of the SISMi. He added that, according to the statements of other agents of the Trieste structure, his successor, ML Pillini had boasted of having played an operational role in the kidnapping of the applicant. These remarks were successively confirmed by two agents of the SISMi of Trieste who had been direct witnesses. Mr Fedrico was also relieved of his duties in December 2002.

60. The telephone lines of several people – including Mr. Mancini and Mr. Pillini – having been tapped, the investigators had access to the conversations held in particular between Mr. Mancini and Colonel G. Pignero, his former superior, the content of which suggested that the two men were aware of the CIA's intention to abduct the applicant and of the possible participation of SISMi in the planning of the operation. This last hypothesis was corroborated by the simultaneous presence in two hotels in Milan, in the weeks preceding the abduction, of SISMi and CIA agents. The tapping also revealed that Mr. Mancini in particular had tried to induce the officials involved in the case to provide the prosecution with a consistent version of the facts excluding any role of the Italian intelligence services in the operation.

61. Moreover, telephone tapping of another member of SISMi, Mr. Pio Pompa, revealed that he spoke daily with a journalist, Mr. Renato Farina, who informed him of the progress of the investigation which he had knowledge through his role as a court reporter. At the request of SISMi agents, Mr. Farina would also have tried to lead the investigators on false leads.

62. By an order of 3 July 2006, the Milan GIP, at the request of the public prosecutor's office, revoked the orders adopted on 22 June and 20 July 2005 (see paragraph 45 above) and ordered the detention on remand of

twenty-eight defendants , including the two senior SISMi officials, MM Mancini and Pignero.

In the order, the GIP stated in particular that:

> "[I]t is obvious that an operation such as that carried out by the CIA agents in Milan, according to a plan "endorsed" by the American [intelligence] service, could not take place without the corresponding service of the the [territorial] State is at least informed".

63. On 5 July 2006 the headquarters of SISMi in Rome was searched on the orders of the public prosecutor's office. Several documents relating to the applicant's abduction were seized.

Thus, the prosecution seized a document from SISMi dated 15 May 2003, from which it emerged that the CIA had informed SISMi that Abu Omar was being held in Egypt and that he was being questioned by the Egyptian intelligence services.

In addition, a large number of documents testifying to the attention and concern with which the SISMi followed the progress of the investigations, in particular with regard to its involvement, and the receipts for the sums paid to Mr. Farina for his activity information were also seized (see also paragraph 61 above).

64. The recording of a conversation between Mr. Mancini and Mr. Pignero, made by the first without the knowledge of the second, and then given to the investigators, revealed that Mr. Pignero had received from the director of SISMi, Mr. Pollari, the order to organize the applicant's abduction. Questioned on July 11 and 13, 2006, Mr Pignero recognized his own voice.

65. This information was widely disseminated in the press.

For example, the daily La Repubblica published on July 21, 2006, an article titled “Pollari ordered the kidnapping: here is the recording that overwhelms him”. This article related the content of the conversation recorded by Mr. Mancini, quoted above. In particular, he recounted the passage where Mr Mancini asked Mr Pignero if he remembered that the order relating to the applicant's abduction came from the director of SISMi himself, and where Mr Pignero replied in the affirmative. . The article also stated that, according to the contested recording, Mr Pignero had met twice with the director of SISMi, Mr Pollari, regarding the applicant's abduction. He did not consider it appropriate to reveal everything to the Milanese public prosecutor's office in order to protect the director of SISMi. Because if Mr. Pollari “jumped”,

Another article published on July 23, 2006 in the daily La Repubblica, was entitled “Abou Omar, all the 007s knew”. It reported that after ten days of questioning by investigators, the first admissions of responsibility had been received. The agents of the Italian services had raided the scene, spinning and had prepared two secret files containing photos, names and plans to help the CIA. They were aware of the agreement with the

Americans for the extraordinary surrender of Abu Omar. Above all, everyone was aware that in Italy this was illegal. The Italians had played a determining role, and not only in the preparation of the operation. Mr. Mancini had admitted having organized, on the orders of Colonel Pignero, the preliminary studies of the places frequented by Abou Omar, for its removal. The project was presented at a meeting in Bologna at the regional headquarters of SISMi, in November 2002. This meeting was attended by SISMi agents S. Fedrico, L. Pillini, M. Iodice, M. Regondi, R. Di Troia. According to a witness, there were also two other officers. During his interrogation, Mr. Di Troia confirmed that Mr. Mancini had told him that the Americans wanted to capture Abu Omar. Several witnesses had reported that Mr. Pillini had boasted on several occasions of having participated in the kidnapping of Abou Omar: he had stayed in a hotel in Milan the days preceding the kidnapping of the person concerned (...), while six CIA agents tasked with carrying out the kidnapping were staying at a different hotel. in November 2002. This meeting was attended by SISMi agents S. Fedrico, L. Pillini, M. Iodice, M. Regondi, R. Di Troia. According to a witness, there were also two other officers. During his interrogation, Mr. Di Troia confirmed that Mr. Mancini had told him that the Americans wanted to capture Abu Omar. Several witnesses had reported that Mr. Pillini had boasted on several occasions of having participated in the kidnapping of Abou Omar: he had stayed in a hotel in Milan the days preceding the kidnapping of the person concerned (...), while six CIA agents tasked with carrying out the kidnapping were staying at a different hotel. in November 2002. This meeting was attended by SISMi agents S. Fedrico, L. Pillini, M. Iodice, M. Regondi, R. Di Troia. According to a witness, there were also two other officers. During his interrogation, Mr. Di Troia confirmed that Mr. Mancini had told him that the Americans wanted to capture Abu Omar. Several witnesses had reported that Mr. Pillini had boasted on several occasions of having participated in the kidnapping of Abou Omar: he had stayed in a hotel in Milan the days preceding the kidnapping of the person concerned (...), while six CIA agents tasked with carrying out the kidnapping were staying at a different hotel. Di Troia confirmed that Mr. Mancini had told him that the Americans wanted to capture Abu Omar. Several witnesses had reported that Mr. Pillini had boasted on several occasions of having participated in the kidnapping of Abou Omar: he had stayed in a hotel in Milan the days preceding the kidnapping of the person concerned (...), while six CIA agents tasked with carrying out the kidnapping were staying at a different hotel. Di Troia confirmed that Mr. Mancini had told him that the Americans wanted to capture Abu Omar. Several witnesses had reported that Mr. Pillini had boasted on several occasions of having participated in the kidnapping of Abou Omar: he had stayed in a hotel in Milan the days preceding the kidnapping of the person

concerned (...), while six CIA agents tasked with carrying out the kidnapping were staying at a different hotel.

66. On July 15, 2006, Mr. Pollari refused to answer questions from the prosecution, arguing that the facts on which he was questioned were covered by state secrecy, and that in any event, he was unaware of the kidnapping. litigious.

67. On 18 July 2006 the public prosecutor's office contacted the PdCM and the Ministry of Defense asking them to produce any information and any document in their possession concerning the applicant's abduction and the practice of "extrajudicial transfers" (see also paragraphs 172-173 below). He asked the PdCM if this information and documents were covered by State secrecy, and asked him, if so, to examine the advisability of lifting the secrecy.

68. In a note dated July 26, 2006, the PdCM indicated that the information and documents requested were covered by state secrecy and that the conditions for lifting secrecy were not met.

69. On 30 September 2006, when questioned during an ad hoc hearing held in chambers before the GIP for the purpose of producing evidence (incidente probatorio), Mr Pironi confirmed the statements already collected by the investigators.

70. On October 31, 2006, the Ministry of Defense confirmed that certain documents had been declared state secrets by the PdCM and therefore could not be produced. In the remaining documents, the parts subject to State secrets had been erased.

71. In November 2006, Mr Pollari was relieved of his duties as director of SISMi.

4. Closing of the investigation and committing the defendants to trial

72. On 5 December 2006 the public prosecutor's office requested the committal for trial of thirty-five people. Among them were twenty-six U.S. nationals (including former CIA officials stationed in Milan and Italy, some U.S. diplomatic and consular staff, and the former military chief of Aviano base security, Mr. . Romano) and six Italian nationals (M. Pironi, and five SISMi agents, namely N. Pollari, M. Mancini, R. Di Troia, L. Di Gregori, G. Ciorra) accused of having participated in the planning and to accomplish the abduction. Mr. Pignero had meanwhile died. Three other defendants, R. Farina, P. Pompa and L. Seno, had to answer for harboring criminals (favoreggiamento personale) for having helped the perpetrators of the crime after the kidnapping,

73. On an unspecified date in January 2007, at the request of the public prosecutor's office, a Milan court judge ordered the seizure of half of a house in Piedmont belonging to Mr Lady (the other half belonging to his wife) to cover court costs and any damages that may be awarded to claimants in the event of a conviction.

74. On February 16, 2007, the case ended for two of the defendants (MM. Pironi and Farina) by the special procedure for the application of the sentence agreed between the parties concerned and the public prosecutor (applicazione della pena su richiesta delle parti, article 444 of the Code of Criminal Procedure), namely one year and nine months' imprisonment for Mr Pironi and six months' imprisonment, converted into a fine of EUR 6,800, for Mr Farina. This judgment became final.

75. By a decision of the same day, filed on February 20, 2007, the GIP referred the thirty-three other defendants to the Milan court. Twenty-six of them (all US agents) failed to appear for trial and were tried in absentia.

5. Remedies concerning the conflict of jurisdiction between the powers of the State in the investigation phase

a) Appeals by the President of the Council of Ministers

76. On February 14 and March 14, 2007, the PdCM seized the Constitutional Court of two appeals, respectively against the public prosecutor's office and against the GIP of Milan, for conflict of competence between the powers of the State.

In the first appeal (no. 2/2007), he complained about the use and dissemination by the public prosecutor's office of documents and information covered by state secrets, the tapping of SISMi telephone lines and the having asked, during the hearing of September 30, 2006, questions concerning facts relating to State secrecy. For these reasons, he asked the Constitutional Court to annul the acts of the investigation concerned as well as the request for a referral to trial.

77. In the second appeal (no. 3/2007), he complained about the filing in the file and the use by the GIP of acts, documents and evidence covered by State secrecy. He specified that the GIP had taken cognizance of it and that, on the basis of these elements, it had decided to commit the defendants to trial and to begin the proceedings, which would have had the effect of further increasing the publicity of the information relating to secrecy. The PdCM asked the Constitutional Court to set aside the decision to commit for trial on 16 February 2007 (see paragraph 75 above) and to order the return of the documents containing the secret information.

78. The Milan court intervened in the proceedings by filing an incidental appeal. He maintained that the PdCM had disregarded the constitutional powers of the GIP by refusing to collaborate with it and to provide it with the documents relating to the abduction of Abou Omar and the practice of "extrajudicial transfers" and necessary for the conduct of the investigation. .

79. By two orders of 18 April 2007 (nos. 124/2007 and 125/2007), the Constitutional Court declared admissible the two appeals lodged by the PdCM (see also paragraphs 99 and 101-107 below).

b) Appeals by the Public Prosecutor's Office and the GIP of Milan

80. On 12 and 15 June 2007 respectively the Milan public prosecutor's office and GIP lodged appeals for conflict of jurisdiction against the PdCM (no. 6/2007 and 7/2007).

In its appeal, the Milan public prosecutor's office requested the Constitutional Court to conclude that the PdCM had exceeded its powers when, by the note of 26 July 2006 (see paragraph 68 above), it had declared the documents and information relating to the organizing and carrying out the removal. He first argued that state secrecy could not apply to the abduction, which constituted a "disorder of the constitutional order" given that the principles of the constitutional state were opposed to individuals were abducted from the territory of the Republic to be forcibly transferred to third countries so that they could be interrogated there under the threat or the use of physical and moral violence. He pointed out in this regard that secrecy had been applied generally, retroactively and without adequate reasoning.

81. In two orders of 26 September 2007 the Constitutional Court declared the prosecution's appeal admissible and that of the GIP inadmissible (see also paragraph 99 below).

D. Trials before the Milan court

1. Suspension, resumption of the trial and opening of the hearings

82. In the meantime, at the first hearing, on 8 June 2007, the applicants had instituted civil proceedings and had requested damages for interference with personal freedom, physical and mental integrity and privacy and family. The defendants had asked for the trial to be suspended on the grounds that the procedure for conflict of jurisdiction was still pending before the Constitutional Court. At the second hearing, on June 18, 2007, the court decided to suspend the trial.

83. On 12 October 2007 Law no. 124 of 3 August 2007 (“Law no. 124/2007”) on the reform of the intelligence and state secret services entered into force (see paragraphs 153 et seq. below).

84. By an order of March 19, 2008, the court revoked the order suspending the trial. He expressed himself thus:

> “Questions likely to arise as to the invalidity of procedural acts already performed or to be performed or the prohibition on using them can only be examined after the decision of the Constitutional Court on the invalidity of these acts or on the prohibition to use them;
>
> No attack on the superior interests protected by the secrecy of a document or an act may arise from the course of the debates concerning acts and documents now known and on a large part of which no secrecy has been imposed;

> Any questions relating to the requirements of secrecy may be resolved on a case-by-case basis, by assessing the need, where applicable, to maintain confidentiality on the conduct of the investigation (...) or by resorting to the procedure provided for by Article 202 of the Code of Criminal Procedure [State secret] ...”

85. At the request of the prosecution, the judge ordered the replacement of the partially secret documents in the file by the redacted versions communicated by the Ministry of Defence.

86. On April 16, 2008, the decree of the PdCM no. 90 of April 8, 2008, specifying what could fall under State secrecy, was published in the Official Journal.

87. At the hearing on 14 May 2008, the court granted by order the prosecution's request that members of SISMi be questioned on a certain number of elements, in particular on the relationship between the CIA and SISMi, insofar as where this information was necessary to establish individual responsibility for the disputed facts. He nevertheless specified that he reserved the right to exclude, during the hearing of these people, any question relating to a general examination of the relations between the SISMi and the CIA.

2. The conflict of jurisdiction denounced by the President of the Council of Ministers in relation to the orders issued by the Milan court on March 19 and May 14, 2008

88. On May 30, 2008, the PdCM again seized the Constitutional Court (appeal no. 14/2008), alleging that the Milan court had exceeded its jurisdiction and requesting the annulment of the two orders of March 19 and May 14, 2008 (paragraphs 84 and 87 above).

He maintained that, in view of the fact that the procedure intended to resolve the conflict of jurisdiction was pending before the Constitutional Court, the principle of sincere cooperation required the court not to admit, acquire or use, in particular during the proceedings, deeds, documents or other evidence that may be subject to State secrets, in order to avoid increasing the publicity of these elements.

He also asked the Court to declare that the court could not, in any event, use the information necessary to establish individual criminal responsibility, even that relating to the relationship between the CIA and the SISMi, because such use was, in his view, such as to affirm the primacy of the judiciary to punish the perpetrators of offenses over that of the PdCM to declare certain pieces of evidence secret.

By order of 25 June 2008 (no. 230/2008), the Constitutional Court declared this appeal admissible (see also paragraphs 99 and 101-102 below).

3. Continuation of the debates

89. During the hearing on October 15, 2008, Mr. Mancini's defense counsel filed a note dated October 6, 2008 in which the PdCM had

reminded State agents of their duty not to disclose during criminal proceedings. facts covered by state secrecy and their obligation to inform him of any hearing and questioning that may relate to such facts, in particular with regard to "any relationship between the Italian and foreign [intelligence] services, including contacts concerning or which may concern the case known as the "kidnapping of Abu Omar".

90. During the same hearing, during the testimony of a former member of SISMi, Mr. Pollari's defense attorney asked the witness if he was aware of the existence of orders or directives from Mr. Pollari aimed at prohibiting illegal activities related to "extrajudicial transfers". Invoking state secrecy, the witness refused to answer. Mr Pollari's defense counsel asked the court to apply the procedure provided for in Article 202 of the Code of Criminal Procedure (hereinafter "the CPP") and to ask the PdCM to confirm that the facts on which the witness refused to express themselves were covered by state secrecy. The public prosecutor opposed this request and asked the court to qualify the facts as “disturbing the constitutional order”, a qualification excluding the possibility of invoking the existence of a State secret. According to him,

91. At the hearing of October 22, 2008, the court initiated the procedure provided for in Article 202 of the CPP on the question of whether "the directives and orders given by General Pollari (...) to his subordinates in order to prohibit the use of any illegal measure in the context of the fight against international terrorism and, in particular, with regard to so-called “rendition” activities were covered by secrecy”, and it ordered the continuation of the proceedings.

92. During the hearing, another former SISMi agent, questioned about the information which Mr Mancini had or had not given him concerning his involvement in the applicant's abduction, also invoked State secrecy.

93. At the hearing of October 29, 2008, the court, applying article 202 of the CCP, asked the PdCM to confirm that the facts on which the witnesses refused to answer fell under state secrecy and suspended the hearing of all the agents of the SISMi called to testify.

94. The debates continued. At the hearing of 5 November 2008, the court heard the rapporteur of the Parliamentary Assembly of the Council of Europe on the illegal transfers of detainees and secret detentions in Europe, Mr Dick Marty (see also paragraphs 178-179 above below), and the rapporteur of the temporary committee of the European Parliament on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners, Mr Claudio Fava (see also paragraph 180 below).

At the hearing on 12 November 2008, two journalists, including Mr Farina, were heard as witnesses.

95. In two notes dated November 15, 2008, the PdCM, responding to the court's question, confirmed the existence of the state secrecy invoked by the former SISMi agents at the hearing of October 22, 2008. It specified that the

maintenance of secrecy was justified by the need, on the one hand, to preserve the credibility of the Italian services in their relations with their foreign counterparts and, on the other hand, to safeguard the requirements of confidentiality relating to the internal organization of the services. Concerning the need to preserve the relations of the Italian services with their foreign counterparts, he added that an attack on these relations would create the risk of a restriction of the flow of information towards the Italian services which would affect their ability to operate. Finally,

96. At the hearing of December 3, 2008, the court again suspended the trial, pending the decision of the Constitutional Court.

4. The conflict of jurisdiction raised by the Milan court in relation to the letters from the President of the Council of Ministers of November 15, 2008

97. On December 3, 2008, the Milan court seized the Constitutional Court of an appeal for conflict of jurisdiction directed against the PdCM (no. 20/2008). Emphasizing that the latter had expressly indicated that the abduction was not a matter of State secrecy, he asked the Court to declare that the PdCM did not have the power to include in the scope of application of the secrecy the relations between the Italian and foreign services relating to the commission of this offence. Such a decision, since it had the effect of preventing the establishment of the facts constituting the infringement, would have been neither coherent nor proportionate. He added that in any event, secrecy could not be opposed a posteriori in relation to facts or documents already verified, in particular during the preliminary investigations.

98. By an order of 17 December 2008, the Constitutional Court declared this appeal admissible.

E. Judgment no. 106/2009 of the Constitutional Court

99. In judgment no. 106/2009 of 18 March 2009, the Constitutional Court joined all the appeals for conflict of jurisdiction raised in the context of the proceedings concerning the applicant's abduction. It declared inadmissible the cross-appeal brought by the Milan GIP and appeal no. 6/2007 from the Milan public prosecutor's office, partially upheld appeals nos. paragraph 88 above) of the PdCM and dismissed appeal no. 20/2008 of the GIP (paragraphs 97-98 above).

100. In its judgment, the Constitutional Court first summarized the principles resulting from its case-law on State secrecy. It affirmed the pre-eminence of the interests protected by State secrecy over any other constitutionally guaranteed interest and recalled that the executive was vested with the discretionary power to assess the need for secrecy for the purposes of protecting these interests, a power "whose the only limits reside

in the obligation to send Parliament the essential reasons on which the decisions are based and in the prohibition on invoking state secrecy with regard to facts constituting a disturbance of public order constitutional (fatti eversivi dell'ordine costituzionale)". She specified that this power was exempt from any judicial control, including her own, and underlined that it was not her task to assess,

1. Appeals by the President of the Council of Ministers (nos 2/2007, 3/2007 and 14/2008)

101. The Constitutional Court considered that the search of the headquarters of SISMi and the seizure of documents on the spot, carried out on 5 July 2006 in the presence of agents of the service (see paragraph 63 above) when State secrecy had not been invoked, were legitimate acts and at the time fell under the investigative measures open to the judicial authorities. On the other hand, it ruled that, after the issuance of the note of 26 July 2006 by which certain facts and information contained in the documents seized had been declared secret and that instead of these elements, documents showing only the information not covered by secrecy had been communicated,

102. The high court also considered that the judge's refusal to proceed in this way could not be justified by the nature of the facts that were the subject of the investigation and the trial. It recognized the illegality of the practice of "extrajudicial transfers", but nevertheless judged that "an individual criminal act, even serious, [could] not be qualified as a disturbance of the constitutional order if it [was] not liable to undermine, by dismantling it, the overall architecture of democratic institutions". It therefore concludes that, even if the applicant's abduction was not covered in itself by State secrecy, the application of State secrecy could not be excluded in the investigation of the facts.

103. Thus, according to the Constitutional Court, the public prosecutor's office and the GIP did not have jurisdiction to base, respectively, the request and the decision to commit the defendants to trial on the elements added to the file at the end of the search. of July 5, 2006.

104. Noting, moreover, that the existence of the state secret on the relations between the Italian and foreign services was known both to the public prosecutor's office and to the GIP when it had been requested that an ad hoc hearing be held for the purposes of the production as evidence (incidente probatorio) of Mr Pironi's statements, the High Court considered that the prosecution should not have asked for testimony relating to these relations and that the GIP should not have accepted it.

105. As to the procedural documents, the Constitutional Court held that the court had also exceeded its jurisdiction when, by an order of 14 May 2008 (see paragraph 87 above), it had admitted evidence relating to the applicant's abduction relating to specific aspects of the relationship between

SISMi and the CIA, excluding only information relating to the general framework of the relationship between the two services.

106. The high court recalled that the declaration by which it was judged that an authority had exceeded its competences resulted exclusively in the invalidity of the acts or parts of the acts which had harmed the interests in question, and that it was up to the judicial authorities before which the trial took place to assess the consequences of this invalidity on the case, having regard to the rules respectively providing for the invalidity of acts resulting from void acts (article 185 § 1 of the CPP) and the prohibition to use the evidence acquired in violation of the law (article 191 of the CCP). In other words, the judicial authority remained free to conduct the investigation and judge, subject to respecting the prohibition on using information covered by secrecy.

107. Lastly, the Constitutional Court dismissed the remaining pleas in the appeal, which concerned the investigative measures taken by the public prosecutor's office, in particular the systematic listening in on the communications of SISMi agents. She pointed out, however, that any information obtained about the relations between the Italian and foreign services was covered by State secrecy and therefore unusable.

2. Appeal by the Court of Milan (no. 20/2008)

108. The Constitutional Court considered that the notes of the President of the Council of Ministers, which generally indicated the matters covered by State secrecy (July 30, 1985), recalled the duties of agents of the Republic in matters of State secrecy, in particular regarding relations with third countries (11 November 2005) and confirmed the existence of state secrecy regarding the information and documents requested by the public prosecutor's office on 18 July 2006 (26 July 2006), were part of a coherent approach according to which the information and documents relating to relations between the Italian and foreign services or to the internal organization of the services were covered by State secrecy even though they concerned the applicant's abduction.

109. Lastly, it recalled that it was not for it to assess the reasons for the decision to apply State secrecy taken by the President of the Council of Ministers in the context of his discretionary power. It considered, however, that information and documents essential for establishing the facts and the criminal responsibilities in the case of the applicant's abduction could be covered by State secrecy without it applying to the abduction itself. In this respect, it relied on Article 202 § 6 of the CCP, which provides that if the state secret is confirmed and it is necessary to have knowledge of the elements covered by the secret in order to decide the case, the judge must declare the case dismissed on the grounds of state secrecy.

F. The resumption of the proceedings and the judgment of the Milan court

110. The proceedings resumed on April 22, 2009. By an order pronounced at the hearing of May 20, 2009, the Milan court declared unusable all the evidence previously admitted which related to the relations between SISMi and the CIA or to the organization SISMi, including the orders and directives given, and accepted a request from the public prosecutor's office to exclude any testimony from SISMi agents.

111. At the hearing of May 29, 2009, the accused members of SISMi, questioned, opposed state secrecy. In subsequent hearings, the court dismissed a question raised by the prosecution as to the constitutional legitimacy of the state secrecy laws.

112. On 4 November 2009 the Milan court gave judgment.

First of all, he reconstructed the facts on the basis of the conclusions of the investigation recorded in the briefs presented by the public prosecutor at the hearings of 23 and 30 September 2009.

The court found that the applicant's abduction was established fact. He took it as established that on 17 February 2003 a "commando" made up of CIA agents and Mr Pironi, a member of the special operational group in Milan, had kidnapped the person concerned in Milan, put him on in a van, brought him to Aviano airport, loaded him on a Lear Jet 35 plane which took off at 6:20 p.m. for the Ramstein base and, finally, put him on board a Gulfstream Executive Jet, which had taken off at 8:30 p.m. for Cairo.

During the trip, phone calls had been made to Mr. Lady, head of the CIA in Milan, to Mr. Romano, head of security in Aviano, and to CIA headquarters in the United States.

113. Taking into account all the evidence not covered by state secrecy, the court establishes that:

(i) the “kidnapping” had been wanted, planned and carried out by a group of CIA agents, in execution of what had been expressly decided at the political level by the competent authority;

(ii) the operation had been planned and carried out with the support of CIA officials in Milan and Rome, with the participation of the American commander of the Aviano air base and with the significant assistance of Mr. Pironi;

(iii) the abduction had been carried out even though the abducted person was the subject, during this period, of investigations by Digos and the public prosecutor's office, without the knowledge of these Italian authorities and, with the conviction that they could know nothing of the consequences of this act;

(iv) the existence of an authorization to abduct Abu Omar, given by very senior officials of the CIA in Milan (the defendants Castelli, Russomando, Medero, De Sousa and Lady), led to the presumption that the Italian

authorities had knowledge of the operation, or even were accomplices to it (but it had not been possible to go into the existing evidence in this regard, as state secrecy was invoked);

(v) the identities of the members of the CIA "operational group" had been correctly established;

(vi) the effective participation of all the defendants of American nationality had been decisive at the legal level, even if some of them had been limited to carrying out preparatory activities;

(vii) the fact that the defendants were aware of the illegitimacy of what they were about to do could not be doubted;

(viii) it could also not be doubted that the "extraordinary remissions" constituted a practice knowingly used by the American administration and by those who carried out its will.

114. The court also established that the applicant's abduction had seriously jeopardized the investigation which the public prosecutor's office was conducting into the Islamist groups (see paragraph 9 above). In addition, false information had been disseminated with the aim of directing the investigators on a false track. Thus, on March 3, 2003, an American agent of the CIA had informed the Italian police that the applicant had voluntarily gone to the Balkans. The information was later found to be ill-founded and deliberately disseminated (see also paragraph 31 above).

The SISMi had also circulated the rumor that the applicant had gone abroad voluntarily and had simulated his abduction. The Egyptian authorities, when publishing in the press the information that the applicant was in Egypt, had maintained that the applicant had gone to that country voluntarily (see also paragraph 24 above). The Milan court easily made the link between the false information.

115. It appears from the judgment of November 4, 2009 that state secrecy prevented the use of statements made by SISMi agents during the investigation.

116. In conclusion, the Milan court:

(a) sentenced in absentia twenty-two CIA agents and senior officials as well as an American army officer (Colonel J. Romano) to five years' imprisonment for the applicant's abduction and imposed on Mr. Lady sentenced to eight years imprisonment.

b) dismissed three other US nationals (B. Medero, J. Castelli and RH Russomando), the accused enjoying diplomatic immunity.

(c) convicted Mr Pompa and Mr Seno of harboring criminals and sentenced them to three years' imprisonment.

d) pronounced a non-suit, because of the application of the State secrecy, with regard to the former director of the SISMi and his deputy, MM. Pollari and Mancini, as well as three former members of SISMi (Messrs. Di Troia, Di Gregori and Ciorra).

117. The court also ordered the convicted persons to pay the applicants jointly and severally, in compensation for the human rights violations and injustices they had caused them, damages, the amount of which was to be established within the framework of the a civil trial. On a provisional basis, in accordance with Article 539 of the CCP, the court awarded the applicant a provision of one million euros and the applicant EUR 500,000. To arrive at a figure for these amounts, the Milan court drew inspiration from the case of the extraordinary surrender of Maher Arar, a Canadian national deported to Syria, in which the Canadian authorities had paid a sum of approximately ten million dollars as of compensation.

118. As to the state secrecy, the court formulated the following considerations:

> "The demarcation of the scope of application of state secrecy established by the Constitutional Court and the consequent silence of the defendants drew a 'black curtain' over all the activities of the members of SISMi relating to the act/offence of "kidnapping of Abu Omar", so that it is absolutely impossible to assess the legality of it. (...) The existence of such a gray area and, above all, the extent of its extent from the point of view of the evidence, makes it impossible to have knowledge of essential facts and that it is is required to render a decision of non-suit within the meaning of the new article 202 § 2 of the CPP".

119. The judgment of the Milan court of November 4, 2009 was appealed by the parties.

G. The continuation of the procedure with regard to the Italian agents of the SISMi accused of kidnapping

1. The judgment of the Milan Court of Appeal of December 15, 2010

120. As part of the appeal proceedings against the judgment of the Milan court of November 4, 2009, the Court of Appeal, by orders of October 22 and 26, 2010, decided to exclude from the file the minutes of the interrogations of four SISMi agents (Messrs. Ciorra, Di Troia, Di Gregori and Mancini), on the grounds that their statements were unusable.

121. In a judgment of 15 December 2010, the Milan Court of Appeal upheld the dismissal of five defendants (MM Pollari, Ciorra, Di Troia, Di Gregori and Mancini; see also paragraph 116 above). This judgment was challenged before the Court of Cassation.

2. Judgment of the Court of Cassation of September 19, 2012, no. 46340/12

122. The Court of Cassation annulled the orders of 22 and 26 October 2010 in which the Court of Appeal had declared unusable the statements made during the interrogation by MM. Ciorra, Di Troia, Di Gregori and Mancini. The high court admitted the evidence in the file. The central point of his reasoning was that state secrecy could not be opposed to personal

initiatives, namely to actions outside the institutional function and not authorized. The Court of Cassation noted that, on 11 November 2005, the President of the Council of Ministers had declared that the government and SISMi had nothing to do with the applicant's abduction, and that the director of SISMi, Mr Pollari, for his part had claimed to know nothing of the abduction (see paragraph 66 above). For the high court,

The Court of Cassation clarified its reasoning, observing more specifically that:

a) State secrecy had not been objected to by SISMi agents during the phase of the preliminary investigations, nor during the search of the SISMi headquarters in Rome, but only during the proceedings;

b) the Constitutional Court had affirmed in its judgment 106/09 that the abduction of Abu Omar was not, as such, covered by State secrecy, the latter concerning only international relations and "interna corporis" ;

(c) the law did not provide for absolute and general subjective immunity for members of the intelligence services, given that Article 17 of Law no. 124/2007 provided that their criminal conduct was not punishable provided that these conducts have been authorized and are essential to the institutional purpose, but to the exclusion of crimes against personal freedom;

d) it followed from the judgment of the Constitutional Court of 2009 that State secrecy did not cover individual conduct falling outside institutional functions and resulting from personal initiatives;

e) the PdCM had always declared that the government and the SISMi had nothing to do with the applicant's abduction;

(f) State secrecy could not therefore cover evidence relating to individual criminal conduct;

(g) State secrecy not having been opposed initially, the evidence had been lawfully collected during the investigation. One could not imagine that they would be destroyed subsequently, under penalty of making state secrecy a real guarantee of impunity. Moreover, belatedly covering by state secrecy information that had already been widely disclosed did not make sense, even from the perspective of the European Convention on Human Rights.

123. In conclusion, the Court of Cassation quashed the judgment of the Milan Court of Appeal of 15 December 2010 regarding the decision to dismiss the case against the five agents of the Italian secret services (see also paragraph 121 above), and sent the case back for examination before the Court of Appeal of Milan.

3. The judgment of the Milan Court of Appeal of February 12, 2013

124. In a judgment of February 12, 2013, the Milan Court of Appeal concluded that the five defendants were guilty. It establishes the following facts.

The historical fact of the applicant's kidnapping was established, the decision convicting twenty-three of the Americans who had organized and executed it was final, as was the conviction of Mr Pironi (see also paragraph 74 above and paragraphs 140 and 143 below), who had materially participated in the execution. The applicant had been the victim of an "extraordinary surrender" (see also paragraphs 172-175 below) planned by the Americans.

Mr. Pollari, at the time director of SISMi, had received from J. Castelli, responsible for the CIA in Italy, a request to collaborate in the operation, and in particular to carry out preparatory activities. Once the request was accepted, Mr. Pollari gave instructions to General Pignero (who died in 2006) and to Mr. Mancini, who was responsible for SISMi for northern Italy.

To prepare for the abduction, MM. Di Gregori, Ciorra and Di Troia had been sent to the scene to observe the situation. All five were well aware that this was not an operation for the purposes of a criminal investigation, and they were aware that there was already a police investigation in progress concerning the applicant. They knew that they were participating in an illegal "sampling" operation. It turned out that the results of their observations had been passed on to CIA agents. They had therefore made an active contribution, and in any case they had not prevented the criminal act.

Having regard to the indications of the Court of Cassation, the Court of Appeal considered that, in its judgment of 2009, the Constitutional Court had said that State secrecy limited judicial power over a given document, from the moment when the secrecy was opposed. However, on November 11, 2005, the PdCM had claimed to know nothing of the abduction, then in July 2006, in October and in November 2008, the PdCM had stated that the state secret concerned relations with foreign services and interna corporis but not the very existence of the abduction.

However, the defendants' defense had produced two notes dated January 25 and February 1, 2013, which indicated that the state secret concerned all the behavior of SISMi agents. These notes had not been written by the PdCM, the sole holder of the power to oppose state secrecy, but by the director of the Security Agency (AISE). In addition, they contradicted previous PdCM communications.

Consequently, the Court of Appeal decided to place in the file the minutes of the interrogations of the defendants going back to the phase of the investigation and to take account of the statements made at the time. It considered that the opposition to state secrecy only after the start of the debates, and on much broader aspects, should be considered as a refusal to answer. For the Court of Appeal, it was therefore necessary to isolate the parties to the statements covered by state secrecy in the sense indicated by the Constitutional Court in 2009 and not to take them into account.

All the defendants opposed state secrecy, because of which they could not defend themselves.

125. In conclusion, the Court of Appeal condemned MM. Di Troia, Di Gregori and Ciorra to six years' imprisonment, Mr. Mancini to nine years' imprisonment and Mr. Pollari to ten years' imprisonment. It also ordered them to pay damages, the amount of which was to be determined in separate proceedings.

4. The appeal of the President of the Council of Ministers concerning the conflict of competence between the powers of the State

126. In the meantime, on February 11, 2013, the PdCM lodged a new appeal with the Constitutional Court for conflict of jurisdiction between state powers. This appeal was aimed at the judgment of the Court of Cassation of 19 September 2012, more specifically the part concerning the interpretation of the judgment of the Constitutional Court of 2009 in the matter of State secrecy. It also referred to the procedural decision by which the Milan Court of Appeal had decided to place in the file the minutes of the interrogation of the accused and the note from the AISE of January 25, 2013. The latter had been addressed to Mr. Mancini and stated that the PdCM had noted that state secrecy extended to all aspects concerning the relationship between national and foreign intelligence services, the internal organization of the service as well as its mode of operation,

127. On 3 July 2013 the PdCM lodged a second appeal against the Milan Court of Appeal, on the ground that the latter had, inter alia, not suspended the trial.

5. Judgment 24/2014 of the Constitutional Court

128. On January 14, 2014, the Constitutional Court accepted the appeals for conflict of jurisdiction which had been raised on the grounds that the courts in question had encroached on the powers of the PdCM.

Consequently, it stated that the Court of Cassation should not have annulled the dismissal of the five defendants nor the orders of 22 and 26 October 2010 of the Milan Court of Appeal admitting the evidence in question. Furthermore, it considered that the Court of Appeal should not have convicted the said officers on the basis of the records of their interrogations.

The Constitutional Court therefore quashed the judgment of the Court of Cassation and the judgment of the Milan Court of Appeal on these points, adding that the judicial authority would resume the proceedings and draw the consequences in terms of the criminal procedure. .

129. In reaching these conclusions, the Constitutional Court first recalled that according to the principles developed in its case-law, which persisted even after the introduction of the new law of 2007 ("law no. 124/2007"; see

also paragraphs 153-161 above), the power to oppose state secrecy involved the overriding interest of state security over its own integrity and independence. She added that the interference of state secrecy with other constitutional principles, including those relating to the judiciary, was inevitable. According to the High Court, the power to oppose State secrecy could not prevent a public prosecutor from carrying out his investigations into criminal acts; however, it could inhibit the power of the judicial authority to admit information covered by state secrets. The Constitutional Court declared that, in this field, the PdCM had a wide discretionary power of appreciation, which could not be called into question by the judges. She explained that when, as in the present case, evidence was covered by State secrecy, in the absence of other inculpatory evidence, it was necessary to dismiss the case within the meaning of Article 41 of Law no. 124/2007 and Article 202 § 3 of the CCP, which clearly established the primacy of state security over the need to establish "judicial truth (accertamento giuridizionale)". That said, the criminal act (the applicant's abduction) remained. She explained that when, as in the present case, evidence was covered by State secrecy, in the absence of other inculpatory evidence, it was necessary to dismiss the case within the meaning of Article 41 of Law no. 124/2007 and Article 202 § 3 of the CCP, which clearly established the primacy of state security over the need to establish "judicial truth (accertamento giuridizionale)". That said, the criminal act (the applicant's abduction) remained. She explained that when, as in the present case, evidence was covered by State secrecy, in the absence of other inculpatory evidence, it was necessary to dismiss the case within the meaning of Article 41 of Law no. 124/2007 and Article 202 § 3 of the CCP, which clearly established the primacy of state security over the need to establish "judicial truth (accertamento giuridizionale)". That said, the criminal act (the applicant's abduction) remained. which clearly established the primacy of state security over the need to establish "judicial truth (accertamento giuridizionale)". That said, the criminal act (the applicant's abduction) remained. which clearly established the primacy of state security over the need to establish "judicial truth (accertamento giuridizionale)". That said, the criminal act (the applicant's abduction) remained.

130. The High Court then examined the Court of Cassation's thesis that secrecy could not cover the conduct of the SISMi agents in this case on the grounds that this conduct was extra-functional and that the persons concerned had acted in a personal capacity. According to the Constitutional Court, this thesis could not be accepted. Indeed, the officers had been convicted with the aggravating circumstance of "abuse of office" and therefore, implicitly, it had been recognized that their conduct fell within the scope of their duties. In addition, the Constitutional Court recalled that Article 18 of Law no. 124/2007 prohibited unlawful conduct from being covered by State secrecy. Where the criminal conduct had not been

authorized, or was outside the scope of the authorization, the PdCM was required to adopt the necessary measures and to inform the judicial authority thereof without delay. Given that in this case the PdCM had not denounced such a situation, and that on the contrary, it had reiterated the existence of State secrecy, it was necessary to deduce from this that the thesis of personal initiative does not was implausible.

131. Furthermore, the objective scope of the secrecy had been established in the present case by the previous decision of the Constitutional Court (judgment no. 106/2009; see also paragraphs 99-109 above). It had certainly been said that the secret did not concern the fact that the applicant had been abducted; however, it covered everything relating to relations with foreign intelligence services and to the organizational and operational aspects of SISMi, in particular the orders and directives given by its director to agents of the service, even if they were linked to the 'removal.

For the Constitutional Court, it could therefore not be denied that the state secrecy – the limits of which could only be defined by the sole power empowered to apply it – covered everything relating to the abduction and transfer of Abu Omar (facts, information, documents relating to any directives, relations with foreign services), provided that the acts committed by SISMi agents were objectively aimed at protecting state security.

6. Judgment of February 24, 2014, no. 20447/14 of the Court of Cassation

132. The proceedings resumed before the Court of Cassation, the five defendants having challenged the judgment of the Milan Court of Appeal of 12 February 2013 (see paragraphs 124-125 above).

133. In a judgment of February 24, 2014, the Court of Cassation declared from the outset that it had to take into account the judgment of the Constitutional Court.

She then observed that, for years, the authorities had not "lowered the black curtain of secrecy", even though they knew that the accused agents were revealing the facts. Furthermore, since the information in question was known and disclosed at the time when the State secrecy had been asserted, it was not justified in the context of the criminal proceedings. Furthermore, the Constitutional Court in its judgment no. 106 of 18 March 2009 (see paragraphs 99 et seq. above) had not stated that the evidence collected had to be destroyed retroactively.

Given this context, the decision of the Constitutional Court was, for the Court of Cassation, resolutely innovative because it seemed to completely eliminate the possibility for a judge to verify the legality, the scope and the reasonableness of the power to oppose state secrecy.

As for the two notes produced by the defense of the accused before the Court of Appeal, the Court of Cassation noted that:

a) in the memorandum of 25 January 2013, the director of the AISE communicated the opinion of the PdCM and confirmed the state secrecy as it had been opposed in the procedure by the PdCM which had succeeded one another; and at the same time confirmed that the government and the SISMi were foreign to the events in question;

b) in the note of February 1, 2013, the director of the AISE, in his own name, although he did not have the power to do so, communicated a new position: the conduct of the accused should be considered as being institutional SISMi in the fight against Islamic terrorism. They were therefore in opposition to the declarations of the government and the SISMi according to which they had nothing to do with the kidnapping of the applicant.

134. In conclusion, the Court of Cassation quashed the conviction of the defendants by applying state secrecy.

H. The subsequent proceedings against the Italian SISMi agents accused of obstructing the investigation

135. In a judgment of 15 December 2010 (see paragraphs 120-121 above), the Milan Court of Appeal upheld the convictions of MM. Seno and Pompa. It varied the sentences imposed on the latter and fixed them at two years and eight months. In addition, the Court of Appeal quashed their order to pay damages in favor of the applicants (see also paragraph 116 above).

136. On 19 September 2012 the Court of Cassation upheld the judgment of the Court of Appeal (judgment no. 46340/12; see also paragraphs 122-123 above).

I. The rest of the procedure with regard to the American agents

1. Agents convicted at first instance

137. In a judgment of 15 December 2010 (see also paragraphs 120-121 and 135 above), the Milan Court of Appeal upheld the conviction of the twenty-three American nationals. It varied the sentences and fixed that of Mr Lady at nine years' imprisonment, and those of the other defendants at seven years' imprisonment.

138. The Court of Appeal agreed with the establishment of the facts and the conclusions drawn from the evidence by the Milan court. It also replied to the arguments of the defense suggesting that the abduction of which the applicant complained was in fact voluntary. In particular, the defense disputed the credibility of Mrs R., the only direct witness, pointing out that she had said that she had seen a man wearing Arab clothes, without shouting, getting into a van, without being told use of violence. Furthermore, according to the defence, Mrs R.'s husband, MSS, who was

summoned several times, had provided different versions on each occasion (see also paragraphs 29 and 32 above). On this specific point, the Court of Appeal expressed itself in the following terms:

"The various attempts to pass off Abu Omar's removal as a voluntary fact are devoid of all credibility, both because the false rumors have not been confirmed and because it is not possible to believe in a hypothesis of spontaneous removal (...) taking into account the circumstances recalled that day and recounted by the eyewitness [Mme R.]. Any consideration relating to the possible use of violence at this precise moment is irrelevant. (...)

The thesis put forward by the defence, which cast doubt on the credibility of the witness, cannot be considered justified since the statements [of Mrs. R.] coincide exactly with what was reported by Abou Omar to his wife as well than with the story of Mr. Pironi, who was present. (...)

The court correctly considered [Ms R.]'s statements to be credible, in the absence of evidence to the contrary, and the prosecution used them as a starting point for subsequent investigations into the telephone recordings.

Assuming that things took place in the manner described by [Ms R.], that is to say without recourse to violence, this does not call into question the fact that a person was abducted against his will. . While it is likely that Abu Omar did not react with words or gestures, this does not mean that he agreed to get into the van. It is obvious that, seeing himself suddenly surrounded by several people, invited, in a categorical tone, to get into a van with the door open and aware that he could not count on the help of anyone, nor of a friend or stranger, he decided to return there unopposed, certain that any resistance was useless. This reconstruction corresponds to what his wife reported having learned during her subsequent telephone conversations with him. (...) »

139. In the reasons for its decision, the Court of Appeal expressed itself on the question of compensation in the following terms:

"There is no doubt about the right of Nasr Osama Mostafà Hassan to obtain compensation for having been the victim of the offense referred to in article 605 of the Criminal Code, and it does not seem necessary to dwell on this point. .

In addition, there is also reason to answer in the affirmative to the question of the existence of an equal and autonomous right in the name of his wife Nabila Ghali. (...).

(...) Ms. Nabila Ghali certainly has standing to bring the claim for compensation for the damage she suffered directly as a result of her husband's abduction. Indeed, there can be no doubt that the criminal action weighed directly on the intangibility of the applicant's marital bond, on the rights which flow from this bond, as well as on the right to her psychological integrity and that of her husband. . (...)

It should be added that the abduction caused other moral damage, concerning, this time, iure prorio, the spouse of the kidnapped person, who, moreover, can also denounce the violation of the right to psychological integrity of his spouse, arising the sudden and violent breakdown of the marital relationship.

The forced and clandestine separation of the spouses, caused by the criminal action, undoubtedly caused each of them a different type of psychic suffering which lasted over time on the part of the wife, who for a long time was unaware of the fate of her husband and therefore doubted that he was still alive, with the consequences, including social and economic, of such a loss; in the head of the kidnapped, who was abruptly deprived of his daily marital bond without any certainty of being able to

reconstitute it in the future and with the concern of his wife, whom he knew was unaware of what had happened to him, and the suffering of it.

The restrictions on Mr Abu Omar's freedom of movement, which lasted for a long time, also weighed on the right to freedom and movement of his family nucleus, considered as a whole.

Consequently, the damage, for which it is believed that the evidence has been obtained here, should be assessed in relation to the human and personal context with which the victim and his spouse were confronted, taking into account their suffering and the disturbances caused to their emotional situation as well as the attack on their personal dignity ..."

140. In a judgment of 19 September 2012 (no. 46340/12), the Court of Cassation upheld the conviction (see also paragraphs 122-123 and 136 above).

2. Agents who have been dismissed at first instance

141. The three American defendants who had been dismissed at first instance (see paragraph 116 above) because of diplomatic immunity (B. Medero, J. Castelli and RH Russomando) were the subject of separate appeal.

142. In a judgment of February 1, 2013, the Milan Court of Appeal declared the three Americans guilty. It sentenced J. Castelli, the organizer of the kidnapping, to seven years' imprisonment and the two other defendants to six years' imprisonment. In addition, the three Americans were ordered to pay damages, the amount of which was to be determined in subsequent proceedings.

The Court of Appeal considered that the applicant's abduction was a proven fact, as was the responsibility of the twenty-three American agents already convicted. It stated that Article 39 of the Vienna Convention of 18 April 1961 protected diplomats who had left the country of accreditation only within the limits authorized by international law, namely for acts performed in the exercise of their functions in as members of the diplomatic mission. She believed that the "extraordinary surrenders" did not involve the diplomatic structure but the CIA. For the court of appeal, kidnapping a person and torturing them could not be part of diplomatic activity, and kidnapping for the purpose of torture clashed with national law and human rights. The Court of Appeal observed that the applicant, transported to Egypt,

Therefore, the Court of Appeal concludes that the criminal conduct of the defendants could not be removed from the jurisdiction of the Italian courts.

143. In a judgment of 11 March 2014, the Court of Cassation upheld the conviction of the defendants. It rejected, among other things, their thesis according to which the practice of extrajudicial transfers was lawful and even "compulsory" within the meaning of American law (Patriot Act),

because of the state of war between the United States and the terrorist organizations international.

For the High Court, the pardon granted in the meantime by the President of the Republic to Mr Romano (paragraph 148 below), did not change the assessment of the CIA's responsibilities; on the contrary, it confirmed the applicant's criminal responsibility.

3. Subsequent developments regarding US nationals

144. To date, the applicants have not been compensated insofar as the provisions decided by the criminal courts have not been paid by the convicted American agents.

During the criminal proceedings, on an unknown date, half of the villa, belonging to Mr Lady, seized in January 2007 in order to guarantee, inter alia, the damages which could be awarded to the applicants (see paragraph 73 above), was foreclosed on by the bank, which had granted a loan for the purchase of the house because the owners were no longer paying the monthly installments. The villa was subsequently sold. No part of the proceeds of the sale was reserved for the applicants.

145. No Italian government body asked the American authorities to extradite the convicted American nationals. The European arrest warrants issued against them during the proceedings remain enforceable (see also paragraphs 48-49 above and paragraph 151 below).

146. On December 12, 2012, the then Minister of Justice decided to issue an international arrest warrant exclusively against Mr Lady. According to the press, the latter was arrested in Panama in July 2013 and released a few days later. The Minister of Justice would have signed, at the time, a request for provisional detention (domanda di fermo provvisorio) which opened a period of two months to request extradition.

147. On an unspecified date, B. Medero (sentenced to six years' imprisonment; paragraphs 142-143 above) and S. De Sousa (sentenced to five years' imprisonment; paragraphs 116, 137 and 140 above) presented a request for pardon to the President of the Republic.

148. In April 2013, the President of the Republic pardoned Colonel Joseph Romano.

149. On September 11, 2013, Mr. Lady also submitted a request for pardon to the President of the Republic, in which he said “to regret the events of 2003 and [his] participation in any activity that could be considered contrary to Italian law”.

150. On 23 December 2015 the President of the Republic pardoned B. Medero, whose sentence was quashed, and Mr Lady, whose sentence was reduced from nine years (see paragraphs 116 and 137 above) to seven years of imprisonment. The press release, published on this occasion on the President of the Republic's website, indicates that the Head of State has, before any other consideration, taken into account the fact that the United

States had, since the first election of President Obama, discontinued the practice of extraordinary discounts, a practice that had been considered by Italy and by the European Union as being incompatible with the fundamental principles of the rule of law.

151. Meanwhile, on October 5, 2015, S. De Sousa had been arrested in Portugal on the basis of a European arrest warrant issued by the public prosecutor.ar of Milan. Upon surrender of her passport, she was released the following day. On January 12, 2016, the Lisbon Court of Appeal decided on his extradition to Italy.

Ms De Sousa appealed against that decision to the Supreme Court. At the date of the adoption of this judgment, the appeal was pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Italian Constitution

152. The Italian Constitution does not mention state secrecy. Nevertheless, according to the consistent case-law of the Constitutional Court, summarized in judgment no. 106/2009 (see paragraphs 99-109 above), the constitutional framework in this area is as follows:

> "3 – (...) [the legal framework governing State secrecy] responds "to the supreme interest of State security as a subject of international law, that is to say the interest [residing in the protection] of the territorial integrity and independence of the State, indeed of its very existence" (judgments nos. 82/1976, 86/1977 and 110/1998) (...).
>
> This interest, which "exists and takes precedence over any other in all states and under any political regime", is expressed in the Constitution "by the solemn formula of article 52, which affirms the sacred duty of the citizen to defend la Patrie" (judgments nos. 82/1976 and 86/1977 cited above). In order to grasp the concrete scope of the notion of State secrecy, it is necessary to refer to this concept and put it "in relation to the other constitutional norms determining the essential elements and moments of our State: in particular, national independence , the principles of unity and indivisibility of the State (Article 5) and the provision which, under the formula of the "Democratic Republic", summarizes its essential characteristics (judgment no. 86/1977).
>
> (...) Consequently, the matter of State secrecy "raises a question of the relationship and interaction between [the different] constitutional principles", including those "governing the jurisdictional function". »

B. Legal provisions

1. The reform of state secrecy and the problems of applicability ratione temporis

153. Previously, State secrecy was governed by Law no. 801 of 24 October 1977 on the institution and organization of the intelligence and security services and State secrecy ("Law no. 801/1977").

This law was repealed by the law reforming the intelligence services and state secrecy ("law no. 124/2007" or "reform law", paragraph 83 above), which entered into force on 12 October 2007 while the criminal proceedings concerning the applicant's abduction were ongoing.

Although the rules of domestic law relating to the application of State secrecy and its opposition during the criminal proceedings in question in the present case are contained in both laws, all judicial activity subsequent to the date of the he entry into force of the reform law falls under the authority of law no. 124/2007 by virtue of the principle tempus regit actum.

2. The object of State secrecy and its material and temporal limits

154. Article 12 § 1 of Law no. 801/1977 was worded as follows:

> "Are covered by state secrecy all acts, documents, information, processes and other elements whose dissemination is likely to undermine the integrity of the democratic state, even in relation to international agreements, the defense of its institutions created by the Constitution, the free exercise of the functions of constitutional bodies, the independence of the State from and relations with other States and the preparation and military defense of the State".

155. Article 39 § 1 of Law no. 124/2007 reads as follows:

> "Are covered by state secrecy all acts, documents, information, processes and other elements whose dissemination is likely to undermine the integrity of the Republic, even in relation to international agreements, the defense of its institutions created by the Constitution, the independence of the State from other States as well as its relations with them and the military preparation and defense of the State".

156. Article 12 § 1 of Law no. 801/1977 excluded from the scope of application of State secrecy any "fact constituting a disturbance of the constitutional order".

In the reform law, this provision has been maintained, and certain offenses such as those related to terrorism or the mafia and "mass murder" (strage) (article 39 § 11 of law no 124/2007) add to the facts exempt from State secrecy.

157. Under the influence of the old law no. 801/1977, the president of the Council of Ministers had indicated, in note no. 2001.5/07 of July 30, 1985, a list of areas covered by state secrets, including " the operations and (...) the intelligence activities" of the special services and their "relations with the intelligence authorities of other States".

158. After the entry into force of the reform law, the President of the Council of Ministers adopted, on April 8, 2008, a decree listing certain elements likely to be covered by State secrets. These elements include, inter alia, information relating to “international cooperation in the field of security, in particular in the fight against terrorism (…)” and “relations with the intelligence authorities of other States”.

According to Article 4 of the said decree, State secrecy may be applied within the limits provided for in Article 39 § 11 of Law no. 124/2007 and 204 § 1 of the CCP. Under the terms of these provisions, information, documents or elements relating to acts of terrorism, acts constituting a disturbance of the constitutional order or acts constituting the offenses of pillage, "mass murder", mafia-type association and politico-mafia electoral vote-swapping.

159. Article 39 § 4 of Law no. 124/2007 further provides that state secrecy applies to acts, documents or elements declared secret on the express order of the President of the Council of Ministers and that, if possible, it is the subject of a statement on the documents to which it applies.

On the other hand, in its judgment no. 106/2009, the Constitutional Court underlined the objective nature of State secrecy as defined by law, and ruled that certain acts or facts could present a content or a form such as their secrecy was intrinsic, independently of any formal decision by the competent authorities.

160. There is also a distinction in Italian law between state secrecy, on the one hand, and, on the other, the classification of documents in the categories "top secret", "secret", "top confidential" and "confidential". The classification, which is defined by the author of the document, exclusively determines restrictions on access, the extent of which depends on the level of classification, and which can never prevent the judicial authorities from becoming aware of it.

161. Prior to the reform, the law provided no time limit for state secrecy. The reform law set the maximum duration of state secrecy at fifteen years. This period may be extended up to a maximum of thirty years by the President of the Council of Ministers, who then informs the Parliamentary Committee for the Security of the Republic (Comitato parlamentare per la sicurezza della Repubblica, COPASIR) (Article 39 §§ 7, 8, 9 and 10).

3. The competent authority for the application of state secrecy and the political nature of its control

162. Decisions on state secrets fall within the remit of the executive power. In the system prior to the reform law, the power to enforce and oppose state secrecy was shared between the President of the Council of Ministers and the Ministries of Interior and Defence. The reform law vested this power exclusively in the President of the Council of Ministers, who is

responsible for directing and coordinating intelligence activities (Article 1 § 1 a), b) and c)).

The power to enforce state secrecy escapes any judicial review. In this regard, the Constitutional Court, in its judgment no. 106/2009 (see also paragraphs 99-109 above), recalled that:

> "... the President of the Council of Ministers is vested with very broad powers in this matter, the only limits of which are the obligation to communicate to Parliament the essential reasons on which the decisions [to apply secrecy of State] and the prohibition [to invoke it] with regard to facts constituting a disturbance of the constitutional order (fatti eversivi dell'ordine costituzionale) (Laws no. 801 of 1977 and no. 124 of 2007). In reality, the "determination of the facts, acts, information, etc... [whose disclosure is likely to] threaten the security of the State and which must therefore remain secret" comes [from a power of] appreciation " largely discretionary" ... (judgment no. 86/1977). In these circumstances, and with the exception of the powers exercised by [the Constitutional Court] in the context of conflicts of attribution, any jurisdictional review of the appropriateness and methods of imposing state secrecy is excluded. In fact, "the assessment of the usefulness and necessity of certain measures for the purposes of ensuring State security is purely political in nature and, falling within the prerogatives of the political authorities, it does not lend itself to a control by the judge" (judgment no. 86/1977). Any different conclusion would lead "to the elimination of secrecy in practice" (judgment no. 86/1977). » it does not lend itself to judicial review" (judgment no. 86/1977). Any different conclusion would lead "to the elimination of secrecy in practice" (judgment no. 86/1977). » it does not lend itself to judicial review" (judgment no. 86/1977). Any different conclusion would lead "to the elimination of secrecy in practice" (judgment no. 86/1977). »

Thus, the jurisdiction of the Constitutional Court is limited to the question of whether, by applying or opposing state secrecy, the President of the Council of Ministers has exceeded the powers conferred on him by law, but it cannot s extend to the substantive assessment of the reasons for the decision.

163. However, the President of the Council of Ministers must communicate any case of application, opposition and confirmation of the existence of a state secret, in particular during a criminal trial (Article 202 of the CPC, paragraph 129 above), and indicate the "essential reasons" to a parliamentary committee (the "COPASIR"), composed of five members of the Chamber of Deputies and five members of the Senate of the Republic and chaired by a member of the parliamentary opposition. If the COPASIR considers that the opposition to state secrecy is unfounded, it informs the two chambers of Parliament (Article 41 § 9 of Law no. 124/2007).

COPASIR may obtain information, documents and acts from any public authority, including intelligence services, except those covered by state secrecy, "the communication or transmission of which may compromise the security of the Republic, to relations with foreign States, to the conduct of ongoing operations, or to the integrity of informants, collaborators or members of the intelligence services". In case of disagreement within COPASIR, the President of the Council of Ministers decides. However, he

cannot oppose a unanimous decision by COPASIR to investigate the legitimacy of the behavior of members of the special services (Article 31 §§ 7, 8 and 9 of Law no. 124/2007).

In its report on its 2010 activities, COPASIR noted a divergence of views among its members as to the nature and extent of its supervisory power:

> "According to some of its members, the [COPASIR] must limit [its activities] to the provision of the law under which the President of the Council of Ministers indicates the "essential reasons" which determined his decision to confirm the State secret. . He can only inform the Chambers of decisions that he considers to be unfounded. According to this approach, he would exercise "external" control limited to the essential reasons, but could not examine the substance of the decision of the President of the Council [of Ministers], who alone is responsible for the use of State secrecy.
>
> According to other members, on the other hand, the mission of control that the law confers on [COPASIR] could only be duly accomplished through full knowledge of the reasons on which the decision of the President of the Council [of Ministers] was based to confirm the state secret. The [COPASIR] would therefore have the right to request the acquisition of any element of information on the events subject to State secrecy, unless the confidentiality requirements provided for by law justify a refusal by the President of the Council. [ministers]. »

COPASIR indicated that there was no agreement among its members regarding the confirmation of state secrecy in two cases, including the situation that is the subject of the present case.

4. Protection of State secrecy, particularly in the context of criminal proceedings

164. Article 41 of Law No. 124/2007 prohibits State officials and persons in charge of a public service from disclosing any fact covered by State secrecy. In particular, in the context of a criminal trial, this article, as well as Article 202 of the CCP in its version resulting from Article 40 § 1 of Law No 124/2007, requires them to abstain from filing as witnesses to such facts.

165. In the event of opposition to the State secret by a witness, Article 202 of the CCP provides for a procedure by which the judicial authority concerned asks the President of the Council of Ministers for confirmation of the existence of the State secret. Article 202 of the CPC reads as follows:

> "1. State officials and persons in charge of a public service are required to abstain from giving evidence in court on facts covered by State secrecy.
>
> 2. If the witness opposes state secrecy, the judicial authority shall inform the President of the Council of Ministers of this, for the purposes of his eventual confirmation, and shall suspend any activity aimed at gathering information subject to state secrecy.
>
> 3. When the secrecy is confirmed and the proof is necessary to decide the case, the judge declares the case dismissed on the grounds of State secrecy.
>
> 4. If, within thirty days of notification of the request, the President of the Council of Ministers does not confirm the state secret, the judicial authority collects the information and orders the continuation of the trial.

5. Opposition to state secrecy confirmed by a reasoned act of the President of the Council of Ministers prevents the judicial authority from collecting and using, even indirectly, information covered by state secrecy.

6. The judicial authority may continue the procedure on the basis of elements which are autonomous and independent of the acts, documents and elements covered by the state secret.

7. When, following a conflict of competence [between the President of the Council of Ministers and the judicial authority], the existence of State secrecy is excluded, the President of the Council of Ministers can no longer contrast with respect to the same elements. Otherwise, the judicial authority can no longer either collect or use, directly or indirectly, the acts and documents covered by State secrecy.

8. State secrecy can never be opposed to the Constitutional Court. The latter adopts the necessary measures to ensure the secrecy of the procedure. »

In its judgment no. 106/2009, the Constitutional Court clarified that these provisions also apply to the phase of the preliminary investigations.

166. According to the wording of articles 185 and 191 of the CPP, "[t]he invalidity of a void act extends to the acts resulting from it" and "[t]he evidence acquired in violation of the prohibitions provided for by law is unusable". .

167. In its relevant parts, Article 204 of the CCP, in its version resulting from Article 40 § 2 of Law No 124/2007, is worded as follows:

"1. Facts, information and documents relating to offenses constituting disturbances to the constitutional order or offenses provided for in articles 285 riot aimed at undermining state security], 416-bis and 416-ter [mafia-like association] and 422 ["mass murder"] of the penal code cannot be a state secret. When state secrecy is invoked, the nature of the offense is defined by the judge. Before the exercise of the public action, the judge of the preliminary investigations decides at the request of the parties.

(...)

2. The decision rejecting the exception of secrecy is communicated to the President of the Council of Ministers. »

5. The exemption clause for criminal conduct by members of the intelligence services

168. Article 17 of Law no. 124/2007 contains a special clause applicable to the conduct of agents of the intelligence services:

1. ... an agent of the intelligence services who has committed a criminal offense shall not be punishable if his conduct has been authorized by law ... on the ground that the conduct in question was indispensable to achieve the institutional goals of the services (..).

2. However, this special clause does not apply if the criminal conduct of the agent relates to offenses endangering the life or the physical integrity or the personal freedom (...) of one or more individuals.

3. (...)

4. Criminal conduct in respect of which it is not possible to oppose State secrecy within the meaning of Article 39 § 11 may not be authorized. The crime of terrorist association/ undermining the democratic order and the crime of mafia-type criminal association.

5. (...)

6. The special disclaimer applies if the conduct:

a) falls within the institutional activities of the intelligence services and if the operation has been authorized within the meaning of Article 18 of this law and under the terms of the provisions on the organization of the intelligence services;

b) is indispensable and proportionate to the achievement of the objectives of the operation, which cannot otherwise be achieved;

(...)

169. Article 18 of Law no. 124/2007 establishes the procedure for authorizing criminal conduct, within the limits set by Article 17 of this law. It is the responsibility of the President of the Council of Ministers or the delegated authority to respond to a written request for authorization and to issue the authorization in written and reasoned form. The authorization is modifiable and revocable in writing.

In cases of extreme urgency, when it is not possible to obtain the authorization in time, the Director of the Intelligence Services authorizes the conduct requested and informs the President of the Council of Ministers within 24 hours. The latter ratifies the authorization if the criteria set out in Article 17 have been met.

When criminal conduct has not been authorized or has exceeded the limits of authorization, the President of the Council of Ministers adopts the necessary measures and informs the judicial authority without delay.

Documents relating to authorization requests are kept in the secret archives.

170. Pursuant to Article 19 of Law No 124/2007, the director of the intelligence service concerned or a member thereof shall assert the existence of the special clause vis-à-vis the judicial authority which initiated criminal proceedings. If the authorization has been issued, the President of the Council of Ministers informs the judicial authority and provides reasons; the judicial authority then pronounces a dismissal or an acquittal. The Committee set up within Parliament is also informed. If there is no response within ten days, the authorization is deemed not to have been issued.

III. THE EXTRADITION TREATY CONCLUDED BETWEEN ITALY AND THE UNITED STATES

171. Under Article 4 of the Italian-American Treaty on Extradition of October 13, 1983, amended by a bilateral agreement of May 3, 2006 and

ratified by Law No. 25 of March 16, 2009, the two States undertake not to not refuse to extradite their own nationals because of their nationality.

IV. INTERNATIONAL MATERIALS AND OTHER RELEVANT PUBLIC DOCUMENTS

A. The CIA High Importance Detainee Program

172. Following the September 2001 attacks in the United States, the US government implemented an elaborate interrogation and detention program for terrorist suspects. On September 17, 2001, President Bush signed a document attributing broad powers to the CIA, particularly in terms of the detention of terrorist suspects and the creation of incommunicado detention centers outside the United States, with the cooperation of the governments of the countries concerned. Subsequently, the CIA set up a program aimed at the detention and interrogation of terrorist suspects abroad. US authorities refer to this program as the "High-Value Detainees Program" (HVD), or the program for high-value detainees, or the "Rendition Detention Interrogation Program" (RDI)",

173. The CIA memorandum of December 30, 2004 constitutes the reference document on the combined use by the CIA of different interrogation techniques. The document "deals with the combined use of different interrogation techniques [the purpose of which] is to convince High-Value Detainees to give timely information on threats and intelligence on terrorism. (...) Effective interrogation is based on the comprehensive, systematic and cumulative use of both physical and psychological pressure to influence the behavior of a high-ranking detainee or to overcome a detainee's resistance . Interrogation aims to create a state of learned helplessness and dependence (...) The interrogation process can be divided into three distinct phases: the initial conditions, the transition to the interrogation and the interrogation itself". As the memorandum describes, the "initial conditions" phase includes "capture shock," "handover," and "receipt at the Black Site." The memorandum includes the following passages:

> "Capture ... contributes to bringing the high-value detainee into a certain physical and psychological state before the interrogation begins ...
>
> 1) Discount
>
> (...) A medical examination is carried out before the flight. During this, the detainee is tightly chained and deprived of sight and hearing by means of blindfolds, earmuffs and balaclavas ..."

The part devoted to the 'interrogation' phase includes chapters entitled 'Conditions of detention', 'Conditioning techniques' and 'Corrective techniques'.

More detailed information in this respect can be found in the Al Nashiri v. Poland (no. 28761/11, §§ 43-71, 24 July 2014) and Husayn (Abu Zubaydah) v. Poland (no. 7511/13, §§ 45-69, 24 July 2014).

174. In a statement dated 5 December 2005, Condoleezza Rice, then Secretary of State of the United States, while excluding the use of practices tantamount to torture in the fight against international terrorism, acknowledged the existence of secret prisons in the CIA in Europe and the use of European airports for transfers of "enemy combatants". She asserted that it was necessary to resort to "extrajudicial transfers" (extraordinary renditions, sometimes referred to in French as "restitutions" or "extraordinary discounts") in the fight against terrorism, and considered that, when a State could not imprison or prosecute a suspected terrorist, he could "make a sovereign choice to cooperate with 'rendition'". According to her,

175. On December 9, 2014, the US Senate released a Select Committee on Intelligence report regarding the CIA's detention and interrogation program.

The European Parliament welcomed the publication of this report in its Resolution of February 11, 2015 on the use of torture by the CIA. In particular, he observed that the US Senate committee had refuted CIA claims that torture had yielded information that could not have been obtained through traditional, non-violent interrogation techniques. Furthermore, he noted that the report in question brought to light new facts which reinforced the allegations that a number of Member States of the European Union, the administrations, civil servants and agents of their security services and intelligence were complicit in the CIA's covert extraordinary detention and rendition program.

B. Public Sources Reporting Concerns About Human Rights Violations in the Context of “Extraordinary Surrenders”

176. For an overview of the numerous public sources reporting concerns about human rights violations in the context of the “extraordinary surrenders” in 2002-2003, reference should be made to El-Masri v. former Republic of Macedonia ([GC], no. 39630/09, §§ 112-121 and 127, ECHR 2012), and in the aforementioned judgments in Al Nashiri (§§ 214-224 and 230-232) and Husayn (Abu Zubaydah) , (§§ 208-218 and 224-226).

C. International reports on “extraordinary surrenders” practiced in the context of the fight against terrorism

177. The allegations of “extraordinary surrenders” in Europe and of the involvement of European governments in these operations have given rise to several international investigations (Al Nashiri and Husayn (Abu

Zubaydah), cited above, §§ 241-286). The following reports refer to the applicant's case.

1. The first "Marty report" of the Parliamentary Assembly of the Council of Europe

178. This report, published on 12 June 2006 and entitled "Allegations of secret detentions and illegal inter-State transfers of detainees concerning member States of the Council of Europe", mentions, inter alia, the case of the applicant. You can read this there:

> "231. The most disturbing case – because the best documented – is probably that of Italy. As we have already mentioned, the Public Prosecutor's Office and the police of Milan were able, thanks to an investigation which testifies to remarkable competence and [a] independence, to reconstruct down to the details a case of extraordinary rendition, that of Imam Abu Omar, kidnapped on February 17, 2003 and handed over to the Egyptian authorities. The Public Prosecutor's Office has identified 25 perpetrators of this operation set up by the CIA and against 22 [it] has issued arrest warrants. The Minister of Justice then in charge actually used his skills to obstruct the work of the judicial authority: not only did he delay forwarding the requests for legal assistance to the American authorities, but he categorically refused to hand over to them the arrest warrants issued for 22 American citizens. But there is worse: the same Minister of Justice accused the magistrates of Milan of attacking the hunters of terrorists, rather than the terrorists themselves. Moreover, the Italian government did not even consider it necessary to demand explanations from the American authorities about the operation carried out by American agents on its own national territory, nor to complain about the fact that the kidnapping of Abu Omar nullified a major anti-terrorism operation that was underway by the justice and police of Milan. Given the scale of the operation that led to the kidnapping of Abu Omar, it is hard to believe – as the Italian government asserts – that the Italian authorities, at one level or another, were unaware of, if not actively participated in, this surrender. The attitude, strange to say the least, of the Minister of Justice seems to plead in this direction. This is, moreover, the conclusion that the Italian courts seem to have reached: as we have just mentioned above (2.3.2.4), the investigation in progress is in the process of demonstrating that Italian civil servants directly took part in the kidnapping of Abu Omar and that the intelligence services are involved.
>
> (...)
>
> 237. In this case, the Italian judiciary and police have shown great competence and remarkable independence, despite political pressures. Competence and independence, moreover, already demonstrated during the tragic years bloodied by terrorism. The Milan public prosecutor's office was thus able to reconstruct in detail a clear case of restitution as well as a deplorable example of a lack of international cooperation in the fight against terrorism".

2. The second "Marty report"

179. This report, published on June 11, 2007, explains in detail the progress of the investigation concerning the "Abou Omar" affair. You can read this there:

"5. Certain European governments have and continue to obstruct the search for truth by invoking the notion of "State secrets". Secrecy is invoked so as not to provide explanations to parliamentary authorities or to prevent the judicial authorities from establishing the facts and prosecuting those responsible for criminal acts. These criticisms are particularly valid towards Germany and Italy (...) As regards Italy, it is striking to note that the doctrine of State secrecy is invoked against the prosecutor in charge of the investigation the Abu Omar case with justifications that are almost identical to those advanced by the authorities of the Russian Federation to repress scientists, journalists and lawyers, many of whom have been prosecuted and convicted for so-called espionage activities. The same move led the authorities of "the former Yugoslav Republic of Macedonia" to hide the truth and give a manifestly false version of the actions of its own national agencies as well as the CIA when they carried out the detention secrecy and the "rendition" of Khaled El-Masri.

6. Resorting to the doctrine of state secrecy, in such a way that it applies even years after the fact, appears unacceptable in a democratic society based on the principle of the rule of law. It becomes frankly shocking when the very authority which avails itself of it seeks to define the notion and the scope of secrecy, in order to thereby evade its responsibilities. The invocation of state secrecy should not be authorized when used to cover up human rights violations and its recourse should, in any case, be subject to a rigorous control procedure. (...)

322. In my [previous] report I had already had occasion to pay tribute to the competence and the high quality of the work of the magistrates and the police services of Milan. It is distressing to see today what kind of treatment are subjected to magistrates of the caliber of Armando Spataro and Ferdinando Pomarici, prosecutors engaged for years, not without great personal risk, in the repression of terrorism, a fight which they have always carried out with efficiency and in strict compliance with the rules of a State based on the rule of law. We have now reached the point of denouncing these magistrates for violation of state secrecy! »

3. The Report of the European Parliament

180. On January 30, 2007, the European Parliament published a report titled "Alleged use of European countries by the CIA for the transport and illegal detention of prisoners". In its passages concerning the applicant's case, this report reads as follows:

" The European Parliament,

(...)

50. Regrets that the representatives of the former and current Italian governments, who are or have been responsible for the Italian secret services, have declined the invitation to appear before the temporary committee;

51. Condemns the extraordinary rendition by the CIA of the Egyptian cleric Abu Omar, who had been granted asylum in Italy and was abducted in Milan on 17 February 2003, to be subsequently transferred to the NATO military base in Aviano in a car, before being airlifted via the NATO military base in Ramstein, Germany, to Egypt, where he was held incommunicado and tortured;

52. Condemns the active role played by a captain of the carabinieri and by certain officials of the Italian Military Intelligence and Security Service (SISMI) in the kidnapping of Abu Omar, as shown by the judicial investigation and the evidence gathered by the Milanese prosecutor Armando Spataro;

53. Notes with regret that General Nicolò Pollari, former director of SISMI, concealed the truth when he appeared before the temporary committee on 6 March 2006, stating that the Italian agents had played no role in the kidnappings organized by the CIA and that the SISMI was unaware of the plan to kidnap Abu Omar;

54. Considers it highly probable, given the involvement of SISMI, that the Italian government then in office was aware of the extraordinary rendition of Abu Omar on its territory;

55. Thanks Prosecutor Spataro for his testimony before the Temporary Committee, commends the effective and independent investigation he has carried out in order to shed light on the extraordinary rendition of Abu Omar and fully endorses his conclusions and the decision of the GUP (judge of the preliminary hearings) to bring to justice twenty-six American citizens, CIA agents, seven senior SISMI officials, a rifleman from the Raggruppamento Operativo Speciale (ROS, special operations group) and the deputy director of the daily " Libero"; welcomes the opening of the trial in the Milan court;

56. Regrets that the abduction of Abu Omar prejudiced the investigation led by Prosecutor Spataro into the terrorist network to which Abu Omar was linked; recalls that, if Abu Omar had not been illegally abducted and transported to another country, he would have been the subject of an ordinary and fair trial in Italy;

57. Takes note that the testimony given by General Pollari is incompatible with a number of documents found on the premises of SISMI and seized by the Milan public prosecutor's office; considers that these documents show that SISMI was regularly informed by the CIA about the detention of Abu Omar in Egypt;

58. Deeply regrets that the leadership of SISMI systematically misled, among others, the Milanese public prosecutor's office, with the aim of undermining the investigation into the extraordinary rendition of Abu Omar; expresses its very serious concern, on the one hand, that the management of SISMI seemed to be working on a parallel program and, on the other hand, the absence of appropriate internal and governmental controls; asks the Italian government to urgently remedy this situation by putting in place reinforced parliamentary and governmental controls;

59. Condemns the unlawful prosecution of Italian journalists investigating the extraordinary rendition of Abu Omar, the tapping of their telephone conversations and the confiscation of their computers; stresses that the testimonies of these journalists have been extremely beneficial to the work of the temporary committee;

60. Criticizes the slowness with which the Italian government decided to dismiss and replace General Pollari;

61. Regrets that documents on Italian-American cooperation in the fight against terrorism, which would have enabled progress to be made in the investigation into the extraordinary rendition of Abu Omar, have been classified by the former Italian government and that the current government has confirmed the classified status of these documents;

62. urges the Italian Minister of Justice to respond as soon as possible to the requests for the extradition of the twenty-six American citizens mentioned above so that they may be tried in Italy”.

D. International legal documents

1. The Vienna Convention on Consular Relations, adopted in Vienna on April 24, 1963 and entered into force on March 19, 1967

181. Article 36 of the Vienna Convention on Consular Relations, in its relevant passages in this case, reads as follows:

Section 36

Communication with Nationals of the Sending State

"1. In order to facilitate the exercise of consular functions relating to nationals of the sending State:

(...)

b. If the person concerned so requests, the competent authorities of the receiving State must notify the consular post of the sending State without delay when, in its consular district, a national of that State is arrested, imprisoned or in preventive detention or any other form of detention. Any communication addressed to the consular post by the person arrested, imprisoned or placed in preventive detention or any other form of detention must also be transmitted without delay by the said authorities. These must without delay inform the person concerned of his rights under this paragraph ..."

2. The International Covenant on Civil and Political Rights (ICCPR)

182. The relevant provisions of this pact, adopted on December 16, 1966 and entered into force on March 23, 1976, read as follows:

Section 4

"(...)

2. The preceding provision does not authorize any derogation from Articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18.

(...) »

Section 7

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, it is prohibited to subject a person without his free consent to medical or scientific experimentation.. »

Section 9

"1. Everyone has the right to liberty and security of person. No one may be subjected to arbitrary arrest or detention. No one may be deprived of his liberty except on grounds and in accordance with the procedure provided by law.

2. Any person arrested shall be informed, at the time of his arrest, of the reasons for such arrest and shall be promptly notified of any charges brought against him.

3. Anyone arrested or detained on the charge of a criminal offense shall be brought promptly before a judge or other authority empowered by law to exercise judicial

functions, and shall be tried within a reasonable time or released. The detention of persons awaiting trial should not be the rule, but release may be subject to guarantees ensuring the appearance of the person concerned at the hearing, for all other acts of the procedure and, where applicable, for the execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention has the right to appeal to a court to rule without delay on the lawfulness of his detention and order his release if the detention is unlawful.

5. Any individual victim of unlawful arrest or detention has the right to compensation. »

3. The International Convention for the Protection of All Persons from Enforced Disappearance

183. The relevant provisions of this Convention, which was adopted on 20 December 2006 and entered into force on 23 December 2010 – and which was signed, but not ratified, by the Respondent State – are as follows:

First article

"1. No one shall be subjected to enforced disappearance.

2. No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other state of emergency, may be invoked to justify enforced disappearance. »

Section 2

"For the purposes of this Convention, 'enforced disappearance' means the arrest, detention, abduction or any other form of deprivation of liberty by State agents or by persons or groups of persons who act with the authorization, support or acquiescence of the State, followed by the denial of recognition of the deprivation of liberty or the concealment of the fate or whereabouts of the missing person, removing him to the protection of the law. »

Section 3

"Each State Party shall take appropriate measures to investigate acts defined in article 2 which are the work of persons or groups of persons acting without the authorization, support or acquiescence of the State, and to bring those responsible to justice. »

Section 4

"Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offense under its criminal law. »

4. The Handbook for effectively investigating torture and other cruel, inhuman or degrading treatment or punishment – the Istanbul Protocol, published in 1999 by the Office of the United Nations High Commissioner for Human Rights

184. The relevant passage of this manual reads as follows:

"80. Alleged victims of torture or ill-treatment and their legal representatives are informed of any hearing that may be organised, have the opportunity to attend and have access to all information relating to the investigation; they can produce other evidence. »

5. The articles on State responsibility for internationally wrongful acts, adopted by the International Law Commission on 3 August 2001, Yearbook of the International Law Commission, 2001, vol. II

185. These articles, in their relevant passages, read as follows:

Section 7

Excess of power or behavior contrary to instructions

"The conduct of an organ of the State or of a person or entity empowered to exercise governmental prerogatives shall be considered an act of the State under international law if that organ, person or entity that entity acts in that capacity even if it exceeds its jurisdiction or contravenes its instructions. »

Section 14

Extension in time of the breach of an international obligation

"1. The breach of an international obligation by an act of a State which is not of a continuous character takes place when the act occurs, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring the State to prevent a given event takes place when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that event. obligation. »

Section 15

Violation constituted by a composite fact

"1. The breach of an international obligation by a State by reason of a series of actions or omissions, defined as a whole as wrongful, takes place when the action or omission occurs which, together other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period beginning with the first of the actions or omissions in the series and lasts as long as these actions or omissions are repeated and remain not in conformity with the said international obligation. »

Section 16

Aid or assistance in the commission of the internationally wrongful act

"A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for having done so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; And

(b) The act would be internationally wrongful if committed by that State. »

6. The report submitted on 2 July 2002 to the General Assembly of the United Nations by the Special Rapporteur of the Commission on Human Rights responsible for examining questions relating to torture and other cruel, inhuman or degrading (A/57/173)

186. The relevant passage of that report reads as follows:

"35. Finally, the Special Rapporteur would like to call on all States to ensure that under no circumstances should persons they intend to extradite, to face charges of terrorism or other charges , are handed over, unless the government of the receiving country unequivocally guarantees to the extraditing authorities that they will not be subjected to torture or any other form of ill-treatment upon their return and that a system has been put in place to ensure that they are treated with full respect for human dignity. »

7. Resolution No. 1433 (2005), Legality of the detention of persons by the United States at Guantánamo Bay, adopted on 26 April 2005 by the Parliamentary Assembly of the Council of Europe

187. This resolution, in its relevant passages, is worded as follows:

"7. On the basis of a thorough analysis of the legal and factual material produced by these and other reliable sources, the Assembly concludes that the circumstances surrounding the detention of persons at Guantánamo Bay by the United States are unlawful and do not do not comply with the principle of the rule of law, for the following reasons:

(...)

vii. By practicing "rendition", i.e. the transfer of people to other countries, outside of any legal process, for the purposes of interrogation or detention, the United States has allowed detainees to be subjected, in other countries, to torture and cruel, inhuman or degrading treatment, in violation of the prohibition of non-refoulement ..."

8. Resolution No. 1463 (2005), Enforced disappearances, adopted on 3 October 2005 by the Parliamentary Assembly of the Council of Europe

188. The relevant passages of this resolution read as follows:

"1. The term "enforced disappearance" covers the deprivation of liberty, the refusal to recognize this deprivation of liberty or to reveal the fate and whereabouts of the disappeared person, and the removal of the person from custody. protection of the law.

2. The Parliamentary Assembly categorically condemns enforced disappearance, which it regards as a very serious violation of human rights, on a par with torture and murder, and notes with concern that, even in Europe, this humanitarian scourge continues to rage. »

9. Resolution 60/148 on torture and other cruel, inhuman or degrading treatment or punishment, adopted on December 16, 2005 by the United Nations General Assembly

189. The relevant passages of this resolution read as follows:

" The general Assembly :

(...)

11. Reminds all States that a prolonged period of incommunicado detention or detention in secret locations may facilitate the practice of torture and other cruel, inhuman or degrading treatment or punishment and may in itself constitute such treatment , and urges all States to respect guarantees of liberty, security and dignity of the person. »

10. Opinion No. 363/2005 on the international legal obligations of Council of Europe member states regarding secret places of detention and interstate transport of prisoners, adopted on 17 March 2006 by the European Commission for Democracy by the law (Venice Commission)

190. The relevant passages of this opinion of the Venice Commission read as follows:

"30. With regard to the terminology used to designate the irregular transfer and detention of prisoners, the Venice Commission notes that the term "rendition" is frequently used in public debate. It is not a term of international law. It is used when a State places a person suspected of being involved in a serious crime (a terrorist act for example) in detention in another State. It also designates the transfer of such a person with a view to his detention on the territory of the first State, or in a place under its jurisdiction, or in a third State. "Surrender" is therefore a general term which refers more to the result – the detention of a suspected person – than to the means. The lawfulness of a "surrender" will depend on the laws of the States concerned and applicable rules of international law, including international human rights law. However, a particular "surrender" in accordance with the national law of one of the States involved (which does not prohibit or regulate the extraterritorial activities of State organs) is not necessarily in conformity with the domestic law of the other States concerned. . In addition, a "surrender" may be contrary to customary international law or customary or treaty obligations incumbent on participating States under international human rights law and/or international humanitarian law. a particular "surrender" in accordance with the national law of one of the states involved (which does not prohibit or regulate the extraterritorial activities of state organs) is not necessarily in accordance with the domestic law of the other states concerned. In addition, a "surrender" may be contrary to customary international law or customary or treaty obligations incumbent on participating States under international human rights law and/or international humanitarian law. a particular "surrender" in accordance with the national law of one of the states involved (which does not prohibit or regulate the extraterritorial activities of state organs) is not necessarily in accordance with the domestic law of the other states concerned. In addition, a "surrender" may be contrary to customary international law or customary or treaty obligations incumbent on participating States under international human rights law and/or international humanitarian law.

31. The term “extraordinary rendition” seems to be used when there is little or no doubt that the detention of a person is not in accordance with the legal procedures that apply in the State where the person was found. at the time of his arrest.

(...)

159. With regard to the transfer of prisoners between States

f) There are only four legal ways to transfer a prisoner to foreign authorities: deportation, extradition, transit and transfers of convicted persons for the purpose of serving their sentence in other countries. Extradition and deportation procedures must be defined by applicable law, and prisoners must be provided with appropriate legal safeguards and access to competent authorities. The prohibition to extradite or deport to a country where there is a risk of torture or ill-treatment must be respected. »

11. Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HCR/10/3, 4 February 2009

191. In his report, the Special Rapporteur makes the following considerations:

“38. (...) The Special Rapporteur is concerned that people are detained for a long period for the sole purpose of obtaining information or for vague reasons in the name of prevention. These situations constitute an arbitrary deprivation of liberty. The existence of grounds for prolonged detention should be determined by an independent and impartial tribunal. Prolonged detention of persons triggers an obligation for the authorities to establish without delay whether suspicions of a criminal nature can be confirmed and, if so, to charge the suspect and bring him to justice. (...)

51. It remains of great concern to the Special Rapporteur that the United States has established a whole system of extraordinary renditions, prolonged incommunicado detention and practices that violate the prohibition of torture and other forms of ill-treatment. This system, involving an international intelligence-sharing network, created a corrupt information base that was systematically shared with partners in the war on terror through intelligence cooperation, thus corrupting the institutional culture. of the legal and institutional systems of the recipient States.

(...)

This is inconsistent with Article 2 of the International Covenant on Civil and Political Rights, and could also violate the obligation of States to provide legal assistance in the investigation of gross human rights violations. and serious violations of international humanitarian law. »

12. Resolutions 9/11 and 12/12 on the right to the truth, adopted on September 18, 2008 and October 1, 2009 by the United Nations Human Rights Council

192. The relevant passage of these resolutions reads as follows:

"(...)the Human Rights Committee and the Working Group on Enforced or Involuntary Disappearances (...) have recognized that victims of gross human rights violations and their family members have the right to know the truth about the events that took place, and in particular to know the identity of the perpetrators of the acts which gave rise to these violations ...”

13. Guidelines adopted by the Committee of Ministers of the Council of Europe to eliminate impunity for serious human rights violations, 30 March 2011

193. These guidelines deal with the issue of impunity for omissions or acts leading to serious human rights violations. They cover States' obligations under the Convention to take positive action not only with regard to their officials, but also non-State actors. According to these guidelines, "(...) impunity is caused or facilitated in particular by the lack of diligent reaction of State institutions or agents in the face of serious human rights violations. (...) States have a duty to fight impunity in order to bring justice to the victims, to deter the subsequent commission of human rights violations and to preserve the rule of law as well as public confidence. public opinion in the judicial system".

14. The "Marty report" of 2011 (Doc. 12714 of the Parliamentary Assembly of the Council of Europe, published on 16 September 2011)

194. In this report, titled "Overuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Review of Human Rights Violations", it reads:

> 6. Parliamentary oversight of intelligence and security services, civilian and military, is either non-existent or grossly insufficient in many Council of Europe member states. The permanent or ad hoc parliamentary committees created in several countries to monitor the activities of the secret services suffer from a lack of information, which is controlled exclusively by the executive itself, most often, moreover, by a very restricted circle of it.
>
> 7. The Assembly welcomes the development of co-operation between the secret services of different countries, an essential tool for dealing with the most serious manifestations of organized crime and terrorism. This international cooperation must, however, be accompanied by equivalent collaboration between the supervisory bodies. It is unacceptable that activities concerning several countries escape all control because in each country the services concerned invoke the need to protect future cooperation with their foreign partners to justify the refusal to inform their respective control bodies.

PLACE

I. ON THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The Government's objection based on the premature nature of the application and the non-exhaustion of domestic remedies in criminal matters

1. The Government

195. The Government observes from the outset that the application was lodged on 4 August 2009, while the criminal proceedings relating to the applicant's abduction were pending before the national courts. He notes in particular that the decision of the court of Milan of November 4, 2009, like the decisions of the Court of Appeal of Milan and the Court of Cassation, had not yet been pronounced. The Government asked the Court to assess the situation at the time the application was lodged and to dismiss it for non-exhaustion of domestic remedies.

In short, he considers that, when they lodged their application with the Court, the applicants had not previously exhausted the remedies available at national level, in breach of Article 35 § 1 of the Convention. .

2. The applicants

196. For the applicants, the obligation to exhaust domestic remedies under Article 35 § 1 of the Convention is only applicable insofar as there are, at national level, remedies which make it possible to establish the violation of the Convention in question and to provide adequate redress to the victim.

197. As to the allegedly premature nature of the application, the applicants state that the inadequacy of the investigation within the meaning of Articles 3 and 13 of the Convention had, in their view, already been demonstrated by the decision of the President of the Council of Ministers of oppose State secrecy and by the judgment of the Constitutional Court no. 106/2009 of March 18, 2009 ruling in this regard. Therefore, regardless of the fact that they did avail themselves of the remedies available in domestic law, the applicants considered that they were not required to wait for the judgment of the Court of Cassation to seize the Court. Indeed, no remedy was effective against the use of State secrecy, as is also apparent from the judgments delivered by the Court of Cassation and by the Court of Appeal of Milan.

3. Court's assessment

a) General principles

198. Under Article 35 § 1 of the Convention, proceedings may only be brought before the Court after domestic remedies have been exhausted, as understood by generally recognized principles of international law, and within a time limit six months from the date of the final internal decision.

The Court has already held, in certain cases brought before the end of the criminal proceedings concerning ill-treatment under Article 3, that the respondent Government's objection based on the premature nature of the application had lost its raison d'être. once the criminal proceedings in question have been completed (Kopylov v. Russia, no. 3933/04, § 119, 29 July 2010, referring to Samoylov v. Russia, no. 64398/01, § 39, 2 October 2008; and Cestaro v. Italy , no. 6884/11, § 145, 7 April 2015).

Moreover, if, in principle, the applicant has the obligation to try various local remedies fairly before seizing the Court and if the respect of this obligation is assessed on the date of lodging of the application (Baumann v. France, no. 33592/96, § 47, ECHR 2001V), the Court tolerates that the last step of these remedies is reached shortly after the filing of the application, but before it is called upon to rule on the admissibility of the latter (Karoussiotis v. Portugal, no. 23205/08, §§ 57 and 87-92, ECHR 2011, Rafaa v. France, no. 25393/10, § 33, 30 May 2013 and Cestaro, cited above, §§ 146 and 205-208 and references therein).

b) Application of these principles

199. In the instant case, the Court notes that the applicant alleges that he was the victim of an “extraordinary surrender” operation, which began with his abduction in Milan on 17 February 2003. The judicial authority, seized of a complaint of the applicant on 20 February 2003, opened an investigation into the applicant's disappearance. The Court then notes that at the time the application was lodged – on 6 August 2009 – the criminal proceedings relating to the applicant's disappearance, in which the applicants had joined as civil parties, had already been pending for six and a half years (paragraph 30 above). Furthermore, its further development depended, to a large extent, on the decisions of the President of the Council of Ministers to make use of state secrecy, as well as on the judgment of the Constitutional Court no. concluded,

200. In these circumstances, the Court cannot criticize the applicants for having sent their complaints to it on 6 August 2009, without waiting for the subsequent decisions of the national courts. Therefore, in the present case, it must be tolerated that the proceedings in issue ended after the application was lodged, but before the Court was called upon to rule on its admissibility.

201. Consequently, this exception cannot be upheld.

B. The second part of the Government's objection based on non-exhaustion of domestic remedies in civil matters

1. The Government

202. During the pleadings, the Government observed that the applicants had not exhausted the civil remedies either. He explained that after the judgment of the Milan court of 4 November 2009 (see also paragraphs 112-117 above), which granted them interim relief, the applicants had not initiated proceedings for the purpose of obtaining the payment of the sums in question, even though a precautionary measure had been imposed on the property of one of the convicted persons in Italy.

The Government added that the applicants had not initiated subsequent proceedings with a view to obtaining an overall and final determination of damages for the harm suffered.

2. The applicants

203. The applicants replied that they had no chance as civil parties of obtaining payment of the sums awarded by the national courts or of initiating proceedings for damages. Indeed, the SISMi defendants would have benefited from a dismissal and their actions would have been covered by state secrecy. The applicants acknowledged that the CIA agents had been convicted, but recalled that they were protected by immunity in the United States, and were therefore unassailable. As for the interim measure referred to by the Government, the applicants specified that it was a matter of enforcement proceedings, brought in Italy by creditors against Mr Lady who had lent him a sum of money to finance the purchase of a house,

3. Court's assessment

a) General principles

204. The Court refers, first of all, to the general principles relating to the rule of the exhaustion of local remedies which were recently summarized in the Vučković and Others v. Serbia ((preliminary objections) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014). It recalls, in particular, that Article 35 § 1 of the Convention only requires the exhaustion of remedies relating to the violations complained of, which are available and adequate. A remedy is effective when it is available both in theory and in practice at the material time, i.e. when it is accessible, capable of offering the claimant redress for his grievances and presents reasonable prospect of success (Akdivar and Others v. Turkey, 16 September 1996, § 68, Reports of Judgments and Decisions 1996IV, and Demopoulos and Others v. Turkey (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04 and 21819/04, § 70, ECHR 2010). In its assessment of

the effectiveness of the remedy indicated by the respondent Government, the Court must therefore take into account the nature of the complaints and the circumstances of the case in order to establish whether this remedy provided the applicant with an adequate means of redress of the alleged violation (Łatak v. Poland (dec.), no. 52070/08, 12 October 2010).

Finally, it should be recalled that the obligation to grant reparation at the internal level is in addition to the obligation to carry out a thorough and effective investigation aimed at identifying and punishing those responsible and does not replace to her ; exclusively compensatory remedies cannot be considered effective under this provision (Sapožkovs v. Latvia, no. 8550/03, §§ 54-55, 11 February 2014)

b) Application of these principles

205. In the present case, the main argument put forward by the Government concerns the fact that the applicants failed to bring two sets of proceedings, the first with a view to enforcing the judgment of the criminal courts awarding them interim damages and the second to ask the civil courts to fix the final amount of these damages (see paragraph 202 above).

206. In this regard, the Court notes that, in its judgment of 4 November 2009, the Milan court sentenced twenty-three American citizens (including twenty-two CIA agents and Colonel Romano) and two Italian citizens, Mr Pompa and Mr. Seno, to pay jointly and severally damages to the applicants, in compensation for the human rights violations and injustices they had caused them to suffer. On a provisional basis, the court awarded a retainer of EUR 1,000,000 to the applicant and EUR 500,000 to the applicant (see paragraph-117 above). In its judgment of December 15, 2010, the Milan Court of Appeal overturned the conviction of MM. Pompa and Seno to pay damages to the applicants, but confirmed the compensation to be paid by the American citizens (see paragraph 135 above). As for the SISMi agents,

It should be noted that the Constitutional Court, in its ruling no. of the State could not, even when questioned as an accused, disclose facts covered by State secrecy (see paragraph 106 in fine above). This principle should also be enforceable in the context of any civil proceedings initiated by the applicants against the Italian agents with a view to obtaining financial compensation (see also paragraph 107 above).

207. It follows from the foregoing that none of the Italian agents involved in the facts in dispute could, in reality, be held liable before the Italian civil courts for the damage suffered by the applicants.

The only persons legally responsible against whom the amounts already awarded or the damages subsequently awarded could be claimed are the twenty-six convicted American citizens, who left Italy on unspecified dates, probably at the beginning of 2005, and who since then were considered “untraceable” and then “at large” by the Italian authorities (see paragraphs 38-39 and 42-45 above).

Despite requests from the public prosecutor's office or the judicial authorities to this effect, the Minister of Justice decided not to request either the extradition of these twenty-six persons or the publication of wanted notices against them (paragraphs 46 -48 and 145-146 above). Although the European arrest warrants issued against these individuals have been in force since at least the beginning of January 2006 (see paragraphs 49 and 145 above), only one of the convicted persons has so far been arrested for a short period, the procedure for the extradition against her being pending at the date of the adoption of this judgment (see paragraph 151 above).

In view of the attitude adopted by the Italian executive authorities towards the convicted American citizens, the Court considers that these bodies considerably compromised – or even destroyed – the applicants' chances of obtaining compensation from the persons responsible.

208. The Government also suggested that the protective measure affecting the property of one of the convicted persons was likely to enable the applicants to receive the provisions which had been granted to them (see paragraph 202 above).

It is true that in January 2007, half of the Piedmontese villa of Mr Lady, the principal convict, was seized by a protective measure initiated by the Milan public prosecutor's office (see paragraph 73 above). Nevertheless, as the applicant points out, the property in question was eventually foreclosed on by a privileged creditor, namely the bank which granted a loan to Mr Lady and his wife. No part of the proceeds of the sale was reserved for the applicants (see paragraphs 73 and 144 above).

In sum, the Government had not submitted any evidence or arguments capable of convincing the Court that the applicants had a real possibility of obtaining damages.

209. Accordingly, the Court dismisses the Government's objection.

C. The objection based on non-compliance with the six-month time limit

210. The Government then maintained that, since domestic remedies had not been exhausted, the application was out of time.

211. The applicants oppose the Government's argument.

212. In so far as the objection of lateness of the application seems to be, for the Government, the consequence of the non-exhaustion of domestic remedies, the Court recalls that it rejected the objection relating to non-exhaustion (paragraphs 199 -201 above).

213. In any event, the Court notes that while it is true that the applicant's abduction took place on 17 February 2003 and that the present application was lodged on 6 August 2009, the national proceedings – initiated following the facts complained of by the applicant a few days after her husband's abduction – related to the applicant's disappearance and it therefore

interrupted the six-month period which had begun to run on the day of the abduction (see, mutatis mutandis, El-Masri, cited above, §§ 137-148).

214. Consequently, this objection by the Government must be dismissed.

II. establishment of the facts AND assessment of the EVIDENCE by the court

A. Submissions of the parties

1. The applicant

215. The Applicant alleges that he was the victim of an extraordinary surrender operation carried out by CIA agents with the assistance of agents of the Respondent State. He considers that the international investigations and, above all, the investigations undertaken in the Respondent State have made it possible to bring to light a number of damning elements corroborating his allegations. He alleges a violation of his rights guaranteed by Articles 3, 5, 8 and 13 of the Convention on account of acts committed by agents of the respondent State and by foreign agents operating in the territory and under the jurisdiction of that State. -this.

216. The applicant asks the Court to take into account all the evidence gathered during the investigation carried out at national level.

2. The Government

217. The Government accept that the applicant was abducted in Milan, by foreign agents, with the help of an Italian carabinieri who acted in an individual capacity. He acknowledges that, according to the results of the investigation, the complainant was transported from Milan to the Aviano military base, and that from there he was flown to Ramstein and then to Egypt.

218. However, the Government contests any involvement of the Italian authorities. He adds that the evidence collected against the SISMi agents had to be excluded because of state secrecy. The Government considered that the Court could not decide otherwise, since no evidence covered by State secrecy could be taken into account.

B. Court's assessment

1. General principles

219. In cases where there are divergent versions of the facts, the Court inevitably finds itself grappling, when it has to establish the circumstances of the case, with the same difficulties which any court of first instance must face. It recalls that, for the assessment of evidence, it retains the criterion of

proof “beyond all reasonable doubt”. However, it never intended to borrow the approach of the national legal orders which apply this criterion. Its task is not to rule on guilt under criminal law or on civil liability, but on the responsibility of the Contracting States under the Convention.

The specificity of the task assigned to it by Article 19 of the Convention – to ensure compliance by the High Contracting Parties with their commitment to recognize the fundamental rights enshrined in this instrument – conditions its way of approaching questions of evidence. In the proceedings before it, there are no procedural obstacles to the admissibility of evidence or predefined formulas applicable to their assessment. It adopts the conclusions which, in its opinion, are supported by the free assessment of all the evidence, including the inferences it may draw from the facts and the observations of the parties. In accordance with its settled case-law, proof may result from a bundle of unrefuted, sufficiently serious, precise and concordant indications or presumptions.

220. Furthermore, the Court recalls that the procedure provided for by the Convention does not always lend itself to a rigorous application of the principle affirmanti incumbit probatio (the burden of proof is on the person who affirms). It refers to its case-law relating to Articles 2 and 3 of the Convention according to which, when the events in question are known exclusively to the authorities, as in the case of persons under their control in police custody, any bodily injury or death occurring during this period of detention gives rise to strong presumptions of fact. The burden of proof in this case rests with the authorities, who must provide a satisfactory and convincing explanation. In the absence of such an explanation, the Court is entitled to draw conclusions which may be unfavorable to the respondent Government (Salman v. Turkey [GC], no. 21986/93, § 100, ECHR 2000VII, Çakıcı v. 23657/94, § 85, ECHR 1999IV, El Masri, cited above, § 152 and Al Nashiri, cited above, § 396 as well as the cases mentioned there).

2. Application of these principles

a) On the question whether the Court can take into account all the elements of the file

221. First, the Court is called upon to examine the Government's argument that it must limit its assessment to the elements of the file which are not covered by State secrecy. The national courts having concluded that no criminal liability could be imputed to the Italian agents of the SISMi because of State secrecy, the Court would be required to comply with that conclusion.

222. As to liability for the events in dispute, the Court notes that the national courts have established that the extraordinary surrender operation was attributable to:

(a) to twenty-six American agents, all sentenced to terms of imprisonment and to pay retainers to the petitioners;

(b) six agents of the Italian services (SISMi), one of whom died during the proceedings, the five others having had their convictions quashed because of the application of State secrecy to the evidence against them;

(c) a rifleman, Mr Pironi, convicted in separate proceedings (see paragraphs 74, 112-116, 134, 137-140 and 142-143 above).

223. The Court then notes that the confessions of the rifleman Pironi are not covered by state secrecy. The latter stated that the "operation" had been concerted between the CIA and the SISMi (see paragraphs 56, 69 and 74 above).

224. Then there were attempts to mislead the investigation by both the CIA and SISMi (see paragraphs 31, 61 and 114 above). The journalist who contributed to the dissemination of the false information was convicted of harboring criminals in separate proceedings, in the context of which State secrecy did not come into play (see paragraphs 61 and 74 above).

225. Two SISMi agents (Mr Seno and Mr Pompa, convicted of harboring criminals) helped the SISMi defendants to evade the investigation (see paragraphs 116 and 135-136 above).

The Court also notes that certain SISMi agents, accused of complicity in the applicant's abduction (see paragraph 59 above), stated that SISMi was involved in the extraordinary surrender operation. Moreover, telephone tapping (see paragraph 60 above) and the recording of a conversation between two SISMi agents (see paragraph 64 above) confirmed the involvement of the Italian agents. Furthermore, documents relating to the applicant's abduction were seized on 5 July 2006 at the headquarters of SISMi in Rome (see paragraph 63 above). This evidence served as the basis for the Milan Court of Appeal to convict the five SISMi agents (judgment of 12 February 2013, paragraphs 124-125 above).

226. Furthermore, the Court notes in passing that the above information was widely disseminated in the press and on the internet before the state secret was mentioned (see paragraph 65 above). The President of the Council did not mention this until 26 July 2006 (see paragraph 68 above).

227**.**In view of the foregoing, and recalling that, in the context of the proceedings before it, there are no procedural obstacles to the admissibility of evidence and that it adopts the conclusions which, in its opinion, are supported by the free assessment of all the evidence, including the inferences it may draw from the facts and the observations of the parties (El-Masri, cited above, § 151, Al Nashiri, cited above, § 394 and paragraph 219 above), the Court will take into account in its assessment all the circumstances of the case, as set out by the applicants and supplemented by information in the public domain, as well as all the evidence available to it. provision, in particular the findings of the investigators and the Italian courts.

b) On the existence of disputed points between the parties concerning the facts

228. The Court notes at the outset that, unlike the El-Masri, Husayn (Abu Zubaydah) and Al Nashiri cases cited above, in the present case the facts of the case have been reconstructed by the national courts.

229. Moreover, the facts of the case, as presented by the applicant, have not been contested, in substance, by the Government.

The latter in no way called into question the reconstruction of the facts carried out by the national courts and presented no argument relating to the role and activities of the CIA in Italy.

In particular, the Government admitted that the applicant had been kidnapped in Milan, by foreign agents, with the help of an Italian rifleman. He acknowledged that, according to the results of the investigation, the complainant had been transported from Milan to the Aviano military base, and that from there he had been flown to Ramstein and then to Egypt. However, the Government has ruled out that these facts are attributable – directly or indirectly – to the Italian authorities, maintaining that the operation was entirely organized and carried out by CIA agents, with the help of an Italian rifleman, who had acted as an individual (see paragraph 239 below).

230. Consequently, the only point in dispute is whether, at the material time, the Italian authorities knew that the applicant was the victim of an "extraordinary surrender" operation and whether they were involved in the execution of that operation.

c) Whether there was an extraordinary surrender

231. The facts of the case as reconstructed by the national courts can be summarized as follows.

On 20 February 2003 the applicant notified a Milan police station of the disappearance of her husband. On 26 February 2003 a certain Mrs R. was interviewed by the police (see paragraphs 28-29 above).

In April and May 2004 the investigators intercepted telephone conversations between the applicant and her husband, heard a witness who had spoken on the telephone with the latter (see paragraph 33 above), and obtained the memorandum drawn up by the applicant (see paragraphs 10 - 22 above).

The results of the investigation contained in the briefs presented by the public prosecutor at the hearings of 23 and 30 September 2009 (see paragraph 112 above), as well as the establishment of the facts by the Milan court and the Court of Appeal of Milan (see paragraphs 28-75, 82-87, 89-96, 112-118, 124-125 and 138-139 above) confirm that the fact of the applicant's abduction was established. It was clear from these elements that, on 17 February 2003, the applicant had been abducted in Milan by a "commando" made up of CIA agents and Mr Pironi, a member of the Milan special operational group, who had put the applicant in a van, took him to

Aviano airport, boarded a Lear Jet 35 plane, which took off at 6.20 p.m. for the Ramstein base and, finally, boarded a Jet Executive Gulfstream,

Thanks in particular to a verification of telephone communications made in the relevant areas, the investigators were able to identify a certain number of potentially suspicious telephone SIM cards. Verification of telephone communications, cross-checking of called and calling numbers of these SIM cards, checking of credit cards used, travel by rental car or plane or hotel stays enabled the investigators to arrive at the identification of real telephone card users. One of the SIM cards in question was found in Egypt within two weeks of the kidnapping (see paragraphs 36-37 above).

232. In conclusion, it is clear from the case file, and the Government admits, that the applicant was abducted in Italy, in the presence of an Italian rifleman. The applicant was therefore subject to the jurisdiction of Italy and, at the time of the abduction, a State agent was present. The plane, which took off from Aviano towards Ramstein in Germany, flew over Italian airspace. The Government in no way disputed the reconstruction of the facts by the national courts and presented no argument relating to the role and activities of the CIA in Italy.

233. Italian investigators and magistrates have established that it was "obvious that an operation such as that carried out by CIA agents in Milan, according to a scheme "endorsed" by the American [intelligence] service, could not take place without the corresponding service of the [territorial] State being at least informed" (see paragraph 62 above) and that "the existence of an authorization to kidnap Abu Omar, given by very senior officials of the CIA in Milan ..., led to the presumption that the Italian authorities had knowledge of the operation, or even were accomplices to it" (see paragraph 112 above).

The Court agrees with their conclusions.

234. On the question of whether there was extraordinary surrender, the Court also attaches importance to the reports and relevant case-law of international and foreign bodies which, already at the material time, in 2002-2003, constituted reliable sources giving an account of practices employed or tolerated by the American authorities and which were manifestly contrary to the principles of the Convention (see paragraphs 172-173 above, with the references to the documents describing the relevant public sources recounted in the El Masri cases, Al Nashiri and Husayn (Abu Zubaydah)).

235. In the light of the above, the Court takes it as established that the Italian authorities knew that the applicant was the victim of an "extraordinary surrender" operation, which began with the applicant's abduction in Italy and ended continued by his transfer outside Italian territory. The allegations of the applicants and the elements of the file are sufficiently convincing and established beyond any reasonable doubt.

III. THE RESPONSIBILITY OF NATIONAL AUTHORITIES

A. Submissions of the parties

1. The applicant

236. The applicant maintains that the responsibility of the respondent State is engaged in several respects, for the following reasons:

(a) the ill-treatment he claims to have suffered at the time of his abduction in Milan;

(b) the failure of the authorities to adopt appropriate measures to prevent him from being subjected to treatment contrary to Article 3 of the Convention when he was taken into the care of the CIA surrender team;

(c) the authorities' failure to take appropriate measures to prevent his arbitrary deprivation of liberty in Italy and his transfer to Egypt for detention. The applicant considers that his prolonged disappearance during his subsequent detention in Egypt is also attributable to the Italian Government;

(d) the ill-treatment he allegedly suffered during his detention in Egypt, on the grounds that the Italian authorities knowingly allowed him to be abducted by American and then Egyptian agents, even though he existed serious grounds for believing that he ran a real risk of being subjected to ill-treatment.

237. The applicant also observes that the Italian authorities left him in the hands of CIA agents as part of an operation which they could not ignore and which exposed him to a proven risk of torture. He accuses them of having thus consented to his transfer to Egypt, when he had refugee status.

2. The Government

238. The Government contests any involvement of the Italian authorities. According to him, the CIA agents acted without their knowledge in Italian territory. They point out that the applicant was immediately removed from Italian territory on the very day of the abduction to be transferred to Germany, then to Egypt. He explains that the airport from which the plane took off is in the hands of American forces and has never been known to be a transit point under the American program of extraordinary discounts.

239. The outcome of the criminal proceedings initiated at national level would moreover confirm the lack of responsibility of the Italian authorities. The Government observes that these proceedings concluded that the American agents were exclusively liable and that of the rifleman Mr Pironi, who acted in an individual capacity.

B. Principles applicable to assess the responsibility of the Italian authorities

240. The Court notes at the outset that the applicant's complaints relate to events which took place on Italian territory and then abroad, in Germany and, finally, in Egypt, in unknown places of detention, after his transfer from Italy (see also Al Nashiri, cited above, §§ 451-459).

1. On the responsibility of the State for events that take place on its territory

241. In this respect, the Court recalls that the responsibility of the respondent State is engaged under the Convention for acts committed on its territory by agents of a foreign State, with the formal or tacit approval of its authorities (Ilaşcu and others v. Moldova and Russia [GC], no. 48787/99, § 318, ECHR 2004VII: El Masri, cited above, § 206 and Al Nashiri, cited above, § 452).

2. On the responsibility of the State for the events which followed the abduction in Italy and the transfer abroad of the applicant within the framework of the "extraordinary surrender" operation

242.According to the settled case-law of the Court,the decision of a Contracting State to return a fugitive – and a fortiori the return itself –may raise a problem under Article 3, and thus engage the responsibility of the State in question under the Convention, when there are serious and proven grounds to believe that the person concerned, if returned to the country of destination, will run a real risk there of being subjected to treatment contrary to this provision. (*Soering v. United Kingdom*, July 7, 1989, § 91, Series A no. 161,*Saadi c. Italy*[GC], no. 37201/06, §§125-126,ECHR 2008, *Mamatkulov and Askarov v. Türkiye*[GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I, El Masri,cited above, § 212 and Al Nashiri, cited above, §§ 453-454).

243. In the context of the similar "extraordinary surrender" cases of El Masri, Al Nashiri and Husayn (Abu Zubaydah) (aforementioned) the Court also pointed out that, where it is established that the returning State knew, or should have known, at the material time that the person returned from the territory was the subject of an "extraordinary surrender" – concept which designates the "extrajudicial transfer of a person from the jurisdiction or territory of one State to that of another State, for the purposes of detention and interrogation outside the ordinary legal system, the measure involving a risk torture or cruel, inhuman or degrading treatment" – the possibility of a violation of Article 3 is serious and must be considered as an intrinsic element of the transfer (El Masri,aforementioned, § 218, Al-Nashiri,aforementioned, § 454, and Husayn (Abu Zubaydah,aforementioned, § 451).

244. Furthermore, the Contracting State would be in breach of Article 5 of the Convention if it returned an applicant, or made such removal possible, to a State where the person concerned would be exposed to a real risk of a flagrant violation of this provision (Othman (Abu Qatada) v. United Kingdom, No. 8139/09, § 233, ECHR 2012 (extracts), El Masri, cited above, § 239).

Similarly, this risk is inherent when an applicant has been subjected to an "extraordinary surrender", a measure which involves detention "outside the ordinary legal system" and which "by its willful disregard for the guarantees of a fair trial is totally incompatible with the rule of law and the values protected by the Convention" (Al Nashiri, cited above, § 454, and Husayn (Abu Zubaydah),aforementioned, § 452).

245.If, in order to establish such liability, one cannot avoid assessing the situation in the country of destination in the light of the requirements of the Convention, it is not a question of finding or proving the responsibility of this country, whether under general international law, under the Convention or otherwise. If liability is or may be incurred under the Convention, it is that of the Contracting State which refers, on account of an act which has the direct result of exposing someone to ill-treatment prohibited or other violations of the Convention (El Masri,cited above, § 212, and Al Nashiri, cited above, § 457, as well as the cases mentioned there).

246. Po determine the existence of serious and proven grounds for believing in a real risk of breaches of the Convention, the Court relies on all the information provided to it or, if necessary, obtained on its own initiative . It must examine the foreseeable consequences of returning the applicant to the country of destination, taking into account the general situation in that country and the circumstances specific to the case of the person concerned..

In verifying the existence of this risk, reference must be made in priority to the facts of which the Contracting State in question had or should have had knowledge at the time of the reference, but this does not prevent the Court from taking account of subsequent information; they can be used to confirm or invalidate the manner in which the Contracting Party concerned has judged the merits of an applicant's fears (El Masri, cited above, §§ 213-214, and Al Nashiri, cited above, § 458as well as the cases mentioned therein).

3. Conclusion

247. In the light of these principles, the Court will examine the complaints of the applicants and the extent to which the facts in question are attributable to the Italian State.

IV. ON THE VIOLATION OF ARTICLE 3 OF THE CONVENTION ALLEGED BY THE APPLICANT

248. The applicant alleged a violation of Article 3 of the Convention on account of the treatment which he said he had suffered in the context of the extraordinary surrender operation, from his abduction in Milan and throughout his detention. ensued. He criticizes the Italian authorities for not having prevented his abduction, when they were aware of the CIA program and even when there was a proven risk of treatment contrary to Article 3. Moreover, invoking Articles 3 and 6 § 1 of the Convention, the applicant maintains that the investigation carried out by the national authorities was not effective for the purposes of these provisions. Finally, he denounces the absence of an offense of torture in national law.

249. Article 3 of the Convention reads as follows:

> "No one may be subjected to torture or to inhuman or degrading treatment or punishment"

250. The Government disputed the applicant's argument.

251. The Court will first examine the applicant's complaint relating to the lack of an effective investigation into his allegations of ill-treatment (El Masri, cited above, § 181 and Al Nashiri, cited above, § 462).

A. The procedural aspect of Article 3 of the Convention

252. Both applicants alleged a violation of Article 3 in its procedural aspect (see paragraph 311 below). In this regard, they made the following common observations.

1. Submissions of the parties

a) The applicants

253. The applicants considered that in the event of a violation of Article 3 of the Convention, it was essential at national level to establish the truth, identify those responsible and impose on them penalties proportionate to the seriousness of the ill-treatment perpetrated. However, they note that in the present case, the national authorities did not convict the SISMi agents, even though the evidence overwhelming them had been gathered, this evidence having had to be excluded from the file because of State secrecy. .

254. For the applicants, the decision of the executive to oppose State secrecy, when the evidence was known to the investigators, the national courts, the press and the general public, cannot be explained by the the need to preserve their confidentiality and by the need to safeguard the interests of a democratic State. The applicants observe that the executive took no steps to eliminate the sources of information and thus showed its consent to the

disclosure of this information. They add that State secrecy was extended to all documents and all evidence, thus preventing the national judge from selecting the evidence which could relate to State security and that which concerned individual criminal conduct.

According to the applicants, it is obvious that the conduct of the executive was aimed solely at preventing the discovery of the individual criminal responsibilities of the Italian civil servants. The executive would indeed have first expressed its willingness to collaborate with the judicial authority and would have declared to be foreign to the extraordinary surrender operation. Subsequently, once the elements implicating the responsibility of SISMi had been gathered, the executive would have refused to collaborate with the judicial authority.

The applicants conclude that the Italian government wanted to ensure the impunity of the defendants, which, for them, is not acceptable under the Convention.

255. The applicants then observe that the twenty-six American agents sentenced in absentia to terms of imprisonment were never the subject of an extradition request from the Italian Ministry of Justice. It follows, according to them, that the CIA agents in question circulate freely and that the Italian authorities have not taken the necessary steps to obtain the execution of the convictions.

256. For the applicants, this had the financial consequence that they were unable to obtain payment of the advances awarded to them by the national courts. The interested parties observe in this respect that it would serve no purpose to institute civil proceedings in the United States, since the American nationals in question benefit from immunity. Moreover, they claim that Italy never offered them any compensation.

b) The Government

257. The Government considers that the State has indeed fulfilled the positive obligation – which derives from Article 3 of the Convention – to carry out an independent, impartial and thorough investigation. He affirms that the authorities adopted all the measures which would have allowed the identification and the condemnation of those responsible for the kidnapping of the applicant to a sentence proportionate to the offense committed as well as the compensation of the victims. It recalls in this regard that the national courts sentenced twenty-six American agents to prison terms and that they awarded the applicant a retainer of one million euros and the applicant a retainer of half a million euros against the final amount of damages.

258. The Government therefore considers that the dismissal of the charges against the Italian SISMi agents (and, subsequently, the quashing of their conviction) did not harm the effectiveness of the investigation and that the application state secrecy in this case was legitimate and necessary. This would also be confirmed by the judgments of the Constitutional Court.

The Government explained that Law no. 124/2007 did not substantially change the pre-existing rules on State secrets and that it did not modify either their definition or their purpose. The purpose would be the same as before, with the only exception that it now speaks of protecting national security instead of protecting the democratic state. These changes have in any case had no impact on the effectiveness of the investigation, namely on the way of investigating, collecting and assessing evidence. The Constitutional Court has indicated principles to which the judicial authority had to conform. There was no retroactive use of state secrecy.

259. As to the fact that the national authorities did not request the extradition of the convicted Americans, the Government observes that, in accordance with the practice of the Department of Justice, only those convicted to severe sentences, heavier than those imposed on those convicted in case, are the subject of extradition requests. In other words, in the present case, the time necessary to request extradition and to implement it would have been too long in relation to the sentence to be served. It would therefore have been pointless to address extradition requests to the United States government. The Government denies that by acting in this way the authorities have tried to guarantee the de facto impunity of the convicted persons. He explains that they acted in a transparent and legitimate manner, in compliance with national provisions on extradition.

The Government explains that Mr Lady was sentenced by the judgment of the Milan Court of Appeal of 15 December 2010 to a nine-year prison term and that, on 12 December 2012, the Ministry of Justice requested the issuance of an international arrest warrant. Mr. Lady having been arrested in Panama, the Minister of Justice reportedly sent a letter requesting his extradition on September 19, 2013. UNITED STATES.

As for Colonel Joseph Romano, sentenced to five years in prison, the Government points out that he benefited from a presidential pardon, a measure which constitutes a discretionary and indisputable decision which falls to the President of the Republic.

The Government then observes that there was an order for the execution of the convictions issued by the General Prosecutor of Milan, and that an international arrest warrant was issued and circulated in the countries of the European Union thanks to the Schengen information system. No action was reportedly taken to hinder or prevent the search for the Americans with a view to their arrest. These arrest orders are reportedly still in effect. For the Government, however, these measures have no impact as long as the convicted officers remain outside Europe.

260. In any event, the applicants' right to obtain the final settlement of damages in the context of subsequent civil proceedings would be intact. Indeed, in the eyes of the Government, the criminal proceedings instituted against the persons responsible for the events concluded in particular with the violations of the Convention complained of by the applicants, since they

had specified in their act of constitution of civil party that they alleged the violation of personal freedom, of the right to physical and mental integrity and to private and family life. At the end of this procedure, the applicants obtained recognition of the right to compensation for the damage suffered. Therefore, for the Government, the investigation conducted at national level meets the requirements of Article 3 of the Convention.

2. Court's assessment

a) Admissibility

261. Noting that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other ground, the Court declares it admissible.

b) Background

i. General principles

262. The Court recalls that where an individual arguably claims to have suffered, at the hands of the police or other comparable state services, or as a result of acts committed by foreign agents operating with the acquiescence or connivance of the State, treatment contrary to Article 3, this provision, combined with the general duty imposed on the State by Article 1 of the Convention to "secure to everyone within [his] jurisdiction the rights and freedoms defined ... [in] the Convention", requires, by implication, that there be an effective official investigation. This investigation must be able to lead to the identification and, if necessary, the punishment of those responsible and the establishment of the truth. If it were not so, notwithstanding its fundamental importance, and El-Masri, cited above, § 182).

263. The relevant principles concerning the elements of "an effective official investigation", which the Court recently recalled in its judgment in the Cestaro case (cited above), are the following:

i) Firstly, for an investigation to be effective and to identify and prosecute those responsible, it must be initiated and conducted promptly. In addition, the outcome of the investigation and the criminal proceedings it triggers, as well as the sanction imposed and the disciplinary measures taken, are considered decisive. They are essential if we want to preserve the deterrent effect of the legal system in place and the role it is required to play in preventing breaches of the prohibition of ill-treatment;

ii) When the preliminary investigation has led to the initiation of proceedings before the national courts, it is the entire procedure, including the trial phase, which must meet the requirements of the prohibition laid down by this provision. Thus, domestic judicial authorities must in no case show themselves disposed to allow attacks on the physical and moral

integrity of individuals to go unpunished. This is essential to maintain public confidence and ensure adherence to the rule of law as well as to prevent any appearance of condoning illegal acts, or colluding in their perpetration;

iii) As to the criminal sanction for those responsible for ill-treatment, the Court recalls that it is not for it to rule on the degree of guilt of the person in question or to determine the sentence to be imposed, these matters falling within the exclusive jurisdiction of domestic criminal courts. However, under Article 19 of the Convention and in accordance with the principle that the Convention guarantees rights which are not theoretical or illusory, but practical and effective, the Court must ensure that the State fulfills as it owes its obligation to protect the rights of persons under its jurisdiction. Consequently, the Court must retain its function of control and intervene in cases where there is a manifest disproportion between the seriousness of the act and the sanction imposed. Otherwise,

iv) The assessment of the adequacy of the sanction therefore depends on the particular circumstances of the given case;

v) The Court also held that, in cases of torture or ill-treatment inflicted by agents of the State, the criminal action should not be extinguished by the effect of the prescription, as well as the amnesty and grace should not be tolerated in this area;

vi) The same applies to the suspension of the execution of the sentence and a remission of the sentence (Cestaro, cited above, §§ 205-208, and the references therein).

ii. Application of these principles

264. As a preliminary point, the Court considers that, having regard to the formulation of the applicant's complaints (see paragraph 248 above), it is appropriate to examine the question of the lack of an effective investigation into the alleged ill-treatment from the angle of the procedural aspect of Article 3 of the Convention (Dembele v. Switzerland, no. 74010/11, § 33, 24 September 2013, with references therein and Cestaro, cited above, § 129).

265. The Court notes that, unlike the El-Masri, Husayn (Abu Zubaydah) and Al Nashiri cases cited above, the domestic courts in the present case carried out an in-depth investigation which enabled them to reconstruct the facts. It pays tribute to the work of the national judges who have done everything possible to try to “establish the truth”.

266. Having regard to the principles summarized above and, in particular, to the obligation incumbent on the State to identify and, where appropriate, to punish adequately the perpetrators of acts contrary to Article 3 of the Convention , the Court considers that the present case essentially raises two issues: the quashing of the conviction of the Italian SISMi agents

and the lack of adequate steps to enforce the sentences pronounced against the American agents.

267. Contrary to what it has ruled in other cases (see, for example, Batı and others v. Turkey, nos. 33097/96 and 57834/00, §§ 142-147, ECHR 2004IV (extracts); Erdal Aslan v. Turkey, nos. 25060/02 and 1705/03, §§ 76-77, 2 December 2008, Abdülsamet Yaman v. Turkey, nos. 68881/01, §§ 68-70, 20 May 2008), the Court notes that if the SISMi agents benefited from the annulment of their conviction, it is not because the investigation did not not been thoroughly investigated, that it did not lead to the identification of those responsible or that the statute of limitations of the offense blocked the path of justice, or for any other reason relating to the negligence of the investigators or the judicial authorities. Nor can the Court criticize the domestic courts for not having assessed the seriousness of the charges against the accused (Saba v. Italy, no. 36629/10, §§ 79-80, 1 July 2014 and Cestaro, cited above, § 223) or, worse, of having used de facto the legislative and repressive provisions of national law to avoid any effective conviction of the police officers prosecuted (Zeynep Özcan v. Turkey, no. 45906/99, § 43, 20 February 2007). The appeal and cassation judgments, in particular, demonstrate exemplary firmness and find no justification for the disputed events. of having de facto used the legislative and repressive provisions of national law to avoid any effective conviction of the police officers prosecuted (Zeynep Özcan v. Turkey, no. 45906/99, § 43, 20 February 2007). The appeal and cassation judgments, in particular, demonstrate exemplary firmness and find no justification for the disputed events. of having de facto used the legislative and repressive provisions of national law to avoid any effective conviction of the police officers prosecuted (Zeynep Özcan v. Turkey, no. 45906/99, § 43, 20 February 2007). The appeal and cassation judgments, in particular, demonstrate exemplary firmness and find no justification for the disputed events.

268. In this context, the Court notes that the evidence finally excluded by the national courts on the ground that the Constitutional Court had indicated that it was all covered by State secrecy was sufficient to convict the defendants. This is apparent, moreover, from the conviction of the Milan Court of Appeal of 12 February 2013 (see paragraph 124 above).

The Court then notes that the information implicating the responsibility of the SISMi agents had been widely disseminated in the press and on the Internet (see paragraph 65 above); it therefore considers that they were part of the public domain. The Court therefore finds it difficult to see how the use of State secrecy once the disputed information has been disclosed could serve the purpose of preserving the confidentiality of the facts.

Considering these elements, the Court considers that the decision of the executive power to apply State secrecy to information, which was already widely known to the public, had the effect of avoiding the condemnation of the SISMi agents.

269. Consequently, despite the high quality of the work of the Italian investigators and magistrates, the investigation did not meet, on this point, the requirements of the Convention.

270. As to the convicted American agents, the Court noted that the Government had admitted that they had never requested the extradition of the persons concerned. He stated that he had issued European arrest warrants and a single international arrest warrant, in 2013, against Mr Lady, which was however unsuccessful (see paragraphs 146 and 259 above).

271. Furthermore, the President of the Republic pardoned three of the convicted persons (see paragraphs 148 and 150 above), including Mr Lady, who had received a heavier penalty in proportion to his degree of responsibility in the operation to hand them over. extraordinary.

272. The Court notes, once again, that despite the work of the Italian investigators and magistrates, which made it possible to identify those responsible and to pronounce sentences against them, the judgments in issue remained without effect, and this because of the attitude of the executive which exercised its power to oppose state secrecy, as well as of the President of the Republic. As noted by the Court of Cassation in its judgment of February 24, 2014, the authorities had not "lowered the black curtain of secrecy, even though they knew that the accused agents were revealing the facts" (paragraph 133 above).

In this case, the legitimate principle of “State secrecy” was obviously applied in order to prevent those responsible from answering for their actions. Consequently, the investigation, however effective and thorough, and the trial, which led to the identification of the culprits and the conviction of some of them, did not lead to their natural outcome which, in the species, was “the punishment of those responsible” (see paragraph 262 above). In the end, therefore, there was impunity. This is even more deplorable in a situation such as the present case, which concerns two countries – Italy and the United States – which have signed an extradition treaty in which they consent to extradite their nationals (paragraph 171 above).

273. Finally, as regards the applicants' argument that the Italian criminal legislation applied in the present case is inadequate in relation to the requirement of penalties for the acts of torture alleged by the applicant, the Court considers that the absence of a specific provision in the Criminal Code had no impact on the impunity of those responsible in the case in question, this impunity stemming from the attitude of the Italian executive authorities and the President of the Republic (see paragraphs 145-150 above; see also, a contrario, Cestaro, cited above, § 225).

274. In view of the foregoing, the Court considers that there has been a violation of Article 3 of the Convention, in its procedural aspect.

B. The substantive aspect of Article 3 of the Convention

275. The applicant alleged that he had been the victim of treatment contrary to Article 3 of the Convention in the context of the extraordinary surrender to which he had been subjected.

276. The Government opposes this thesis.

1. Submissions of the parties

277. The applicant maintains that in the context of his extraordinary surrender he was subjected to psychological and physical torture, starting from his abduction. He refers to his memorandum for the description of his conditions of captivity. As for the treatment suffered during the transport from Milan to the Aviano military base, the applicant states that he was hooded, tied up, possibly drugged, that he was unwell, and that he was not treated. He was reportedly treated similarly at US bases and during flights. His abduction and transfer to Egypt would have taken place outside any legal framework and any judicial supervision.

The applicant accuses the Italian authorities of having consented to his abduction by the CIA, when they could not ignore the proven risk of torture. They would thus have consented to his transfer to Egypt, when he had refugee status and there was a proven risk of ill-treatment and prolonged disappearance.

278. The Government reiterates the thesis that the national authorities are not involved in the extraordinary surrender operation. He asserts that in any event the applicant was not subjected to ill-treatment in Italy. He adds that neither the signature nor the date of the complainant's memorandum have been authenticated. Lastly, he considers that there is no evidence to support his allegations as to the treatment he has undergone.

2. Court's assessment

a) Admissibility

279. Noting that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other ground, the Court declares it admissible.

b) On the merits

i. General principles

280. Article 3 of the Convention, as the Court has repeatedly said, enshrines one of the fundamental values of democratic societies. It does not provide for exceptions, in which it contrasts with the majority of the normative clauses of the Convention, and according to article 15 § 2, it does not allow any derogation, even in the event of public emergency threatening

the life of the nation (Selmouni v. France [GC], no. 25803/94, § 95, ECHR 1999-V, and Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000IV). The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, whatever the actions of the victim (El Masri, cited above, § 195; Al Nashiri, cited above, § 507).

281. To fall under Article 3, ill-treatment must reach a minimum level of severity. The assessment of this minimum depends on all the facts of the case, in particular the duration of the treatment and its physical or mental effects, as well as, sometimes, the sex, age and state of health. of the victim (Ireland v. the United Kingdom, 18 January 1978, § 162, Series A no. 25, and Jalloh v. Germany [GC], no. 54810/00, § 67, ECHR 2006IX). Other factors to consider include the purpose for which the treatment was inflicted and the intent or motivation behind it (see, among other authorities, Aksoy v. Turkey, 18 December 1996, § 64, Reports 1996VI, Egmez v. Cyprus, no. 30873/96, § 78, ECHR 2000XII, and Krastanov v. Bulgaria, no. 50222/99, § 53, 30 September 2004; El Masri, cited above, § 196 and Al Nashiri, cited above, § 508) .

282. To determine whether a given form of ill-treatment should be classified as torture, the Court must have regard to the distinction that Article 3 makes between this notion and that of inhuman or degrading treatment. This distinction appears to have been enshrined in the Convention to mark with special infamy deliberate inhuman treatment causing very serious and cruel suffering (Aksoy, cited above, § 62). In addition to the seriousness of the treatment, the notion of torture presupposes an intentional element, recognized in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which entered into force on 26 June 1987, which specifies that the term "torture" means the intentional infliction of severe pain or suffering for the purposes of, among other things, obtaining information,

283. Taken together with Article 3, the obligation that Article 1 of the Convention imposes on the High Contracting Parties to guarantee to everyone within their jurisdiction the rights and freedoms enshrined in the Convention requires them to take appropriate measures to prevent the said persons are not subjected to torture or to inhuman or degrading treatment, even administered by private individuals (Z and Others v. the United Kingdom [GC], no. 29392/95, § 73, ECHR 2001V). The responsibility of the State may therefore be engaged where the authorities have not taken reasonable measures to prevent the materialization of a risk of ill-treatment of which they were or should have been aware (Mahmut Kaya v. Turkey, no. 22535 /93, § 115, ECHR 2000III; El Masri, cited above, § 198; Al Nashiri, cited above, § 509).

ii. Application of these principles

284. The Court recalls having found that the Italian authorities knew that the applicant was the victim of an "extraordinary surrender" operation (see paragraph 235 above). It remains to be determined whether the treatment to which the applicant was subjected fell within the scope of Article 3 of the Convention and, if so, to what extent it should be imputed to the national authorities.

285. As regards the applicant's abduction in the middle of the street in Milan, the Court notes that the statements of the eyewitness who recounted the applicant's abduction cast doubt on the question of whether violence was committed against the person concerned . Nevertheless, the Court shares the assessment made by the Milan Court of Appeal that "[a]ny consideration relating to a possible resort to violence at this precise moment is irrelevant". As noted by the Milan Court of Appeal, "It is obvious that, seeing himself suddenly surrounded by several people, invited, in a categorical tone, to get into a van whose door was open and aware that he could not count on the help of no one (...), he decided to return there without opposition,

In this regard, the Court recalls that Article 3 does not refer exclusively to physical pain but also to mental suffering resulting from the creation of a state of anguish and stress by means other than attacks on the integrity physical (El Masri, cited above, § 202 and Husayn (Abu Zubaydah), cited above, § 510).

There is no doubt that the kidnapping of the applicant, according to a protocol put in place by the CIA for extraordinary surrender operations (paragraph 160 above, with references to documents describing the procedures used by the CIA, such as set out in the Al Nashiri and Husayn (Abu Zubaydah) cases), involved the combined use of techniques which inevitably caused the person concerned a feeling of emotional and psychological distress. According to these documents, the abduction, in itself, was intended to "affect the physical and psychological condition of a detainee prior to his first interrogation" (Husayn (Abu Zubaydah), cited above, § 61).

286. The subsequent detention, including the transfer on board an aircraft to an unknown destination, always carried out according to a protocol used by the CIA in this type of operation (paragraphs 11-12 and 172-173 below above, and Al Nashiri, cited above, § 64), certainly placed the applicant in a situation of total vulnerability. He undoubtedly lived in a permanent state of anguish because of the uncertainty as to his future fate.

287. In his statements addressed to the Milan public prosecutor's office, the applicant described precisely the conditions of his abduction and his detention in Egypt as well as the treatment suffered, in particular the violent interrogation sessions (see paragraphs 10-19 above). In its judgment, the Milan court took note of these facts (see paragraphs 112-113 above). It is also apparent from a medical certificate, submitted by the applicant and

dated 9 June 2007, that the applicant was suffering from post-traumatic stress disorder and at that time still showed signs of visible injuries (see paragraphs 26-27 above).

The Court has already held that the similar treatment reserved for a detainee of high importance, within the meaning of the program of "extraordinary surrender" of the CIA, should be qualified as torture within the meaning of Article 3 of the Convention (El Masri, cited above , § 211; Al Nashiri, supra, §§ 511-516; and Husayn (Abu Zubaydah, supra, §§ 504-511).

Nevertheless, the Court does not consider it necessary to examine every aspect of the treatment meted out to the applicant at the time of his abduction, during his transfer outside Italian territory and during the subsequent detention, nor of the physical conditions in which the concerned was detained. Taking into account the cumulative effects of the treatment to which he was subjected – as described in detail in his written statements, confirmed by a medical certificate and held to be credible by the Italian courts –, the Court considers them sufficient to consider that this treatment has reached the degree of seriousness required by Article 3 (see paragraphs 281-282 above).

288. The Court considers that it is also not necessary to determine whether, at the time, the Italian authorities knew or should have known that the applicant's abduction in Milan by the CIA and his transfer outside Italy had the specific purpose of purpose of handing him over to the Egyptian authorities, with the inherent likelihood that he would face harsh interrogations involving torture and be held incommunicado. As established by the Italian courts, "the existence of an authorization to kidnap Abu Omar, given by very senior officials of the CIA in Milan (...), led to the presumption that the Italian authorities had knowledge of the operation, or even were accomplices to it" (see paragraph 113 above). It was at the very least predictable for the Italian authorities, who collaborated with the CIA agents,

In this regard, the Court also notes in passing that the SISMi had been informed, no later than 15 May 2003, of the fact that the applicant "was detained in Egypt and that he [had been] subjected to interrogation by the Egyptian intelligence services" shortly after his transfer from Italy (see paragraph 63 above).

Therefore, given that the "extraordinary surrender" operation under the CIA's program for high-value detainees was known to the Italian authorities and that the latter actively cooperated with the CIA during the initial phase of the operation , namely the abduction of the applicant and his transfer outside Italy, the Court considers that the Italian authorities knew, or should have known, that this operation exposed the applicant to a proven risk of treatment prohibited by Article 3.

In these circumstances, the possibility of a violation of Article 3 was particularly high and should have been considered intrinsic to the transfer (see paragraph 243 above). Consequently, by allowing the CIA to transfer the applicant outside their territory, the Italian authorities exposed him to a serious and foreseeable risk of ill-treatment and conditions of detention contrary to Article 3 of the Convention. (see paragraph 242 above and Al Nashiri, cited above, § 518).

289. Under Articles 1 and 3 of the Convention, the Italian authorities were therefore required to take appropriate measures to ensure that the applicant, who came under their jurisdiction, was not subjected to acts of torture or inhuman treatment or punishment. and degrading. However, that was not the case, and the respondent State must be considered directly responsible for the violation of the applicant's rights under this head, its agents having failed to take the measures which would have been necessary in the circumstances of the cause to prevent the disputed processing (El Masri, cited above, § 211 and Al Nashiri, cited above, § 517).

This was all the more so since, as the applicant pointed out, he enjoyed refugee status in Italy (see paragraphs 8 and 277 above).

Furthermore, the Italian Government did not seek assurances to prevent the applicant from being subjected to ill-treatment and thus did not dispel the doubts on this subject (El Masri, cited above, § 219). The elements which emerged after the applicant's transfer confirmed the existence of that risk (see paragraph 63 above).

290. In these circumstances, the Court considers that by allowing the American authorities to abduct the applicant from Italian territory under the program of "extraordinary surrenders", the Italian authorities knowingly exposed the applicant to a real risk of treatment contrary in Article 3 of the Convention.

291. Accordingly, there has been a violation of the substantive aspect of Article 3 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION BY THE APPLICANT

292. The applicant complains that he was deprived of his liberty and detained outside any legal framework, in violation of Article 5 of the Convention.

This provision reads as follows:

> “1. Everyone has the right to liberty and security. No one may be deprived of his freedom, except in the following cases and according to legal means:
>
> (a) if he is lawfully detained after conviction by a competent court;
>
> (b) if he has been lawfully arrested or detained for failure to comply with an order made according to law by a court or to secure the performance of an obligation prescribed by law. law ;

(c) if he has been arrested and detained with a view to bringing him before the competent judicial authority, where there are reasonable grounds to suspect that he has committed an offense or there are reasonable grounds for believe in the necessity of preventing him from committing an offense or from fleeing after the commission of it;

d) if it concerns the lawful detention of a minor, decided for his supervised education or his lawful detention, in order to bring him before the competent authority;

e) in the case of the lawful detention of a person liable to spread a contagious disease, a lunatic, an alcoholic, a drug addict or a vagrant;

(f) if it concerns the lawful arrest or detention of a person to prevent him from entering the territory irregularly, or against whom proceedings for expulsion or extradition are in progress.

2. Any person arrested must be informed, as soon as possible and in a language that he understands, of the reasons for his arrest and of any charges brought against him.

3. Any person arrested or detained, under the conditions provided for in paragraph 1 (c) of this article, shall be promptly brought before a judge or other officer authorized by law to exercise judicial functions and shall have the right to be tried in a reasonable time, or released during the procedure. Release may be subject to a guarantee ensuring the appearance of the person concerned at the hearing.

4. Any person deprived of his liberty by arrest or detention shall have the right to appeal to a court, so that it may rule speedily on the lawfulness of his detention and order his release if the detention is unlawful.

5. Any person who is the victim of an arrest or detention contrary to the provisions of this article has the right to compensation. »

A. Submissions of the parties

1. The applicant

293. The applicant observes that he was abducted and deprived of his liberty in Italy, then transported by plane to Germany and Egypt, outside any legal framework and judicial supervision. He considers that his prolonged disappearance during his subsequent detention in Egypt also violated article 5 of the Convention. In addition, he maintains that there was no effective investigation into his allegations relating to his detention as a result of an operation carried out jointly by Italian agents and American agents, given the dismissal of the case. with regard to the SISMi agents (and, subsequently, the quashing of their convictions) and the fact that the Minister of Justice never requested the extradition of the convicted American nationals.

2. The Government

294. The Government disputes these theses. Mainly repeating the arguments developed under Article 3, he observes that no responsibility can

be attributed to the Italian authorities, given that the procedure conducted at national level concluded that the American agents, and that the rifleman Pironi, condemned in another procedure, acted in an individual capacity.

B. Court's assessment

1. Admissibility

295. Noting that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other ground, the Court declares it admissible.

2. Background

a) General principles

296. The Court notes at the outset the fundamental importance of the guarantees contained in Article 5 in order to guarantee to individuals in a democracy the right not to be subjected to arbitrary detention by the authorities. It is for this reason that it continues to emphasize in its case law that any deprivation of liberty must observe the substantive and procedural standards of national legislation but also comply with the very purpose of Article 5: to protect the individual against the arbitrary (Chahal v. United Kingdom, 15 November 1996, § 118, Reports 1996V). Testifies to the importance of the protection granted to the individual against arbitrariness the fact that Article 5 § 1 draws up an exhaustive list of the circumstances in which an individual may be lawfully deprived of his liberty,

297. It should also be emphasized that the authors of the Convention strengthened the protection of the individual against arbitrary deprivation of his liberty by enshrining a set of substantive rights designed to minimize the risk of arbitrariness, by providing that acts of deprivation of liberty must be subject to independent judicial review and that the responsibility of the authorities must be capable of being sought. The requirements of paragraphs 3 and 4 of Article 5, which emphasize promptness and judicial review, are of particular importance in this respect. Prompt judicial intervention can lead to the detection and prevention of measures likely to endanger the life of the person concerned or of serious abuse infringing the fundamental guarantees set out in Articles 2 and 3 of the Convention (Aksoy, cited above, § 76). What is at stake here is the protection of the physical liberty of individuals and the safety of persons in a context which, in the absence of guarantees, could undermine the rule of law and make the most rudimentary forms of legal protection inaccessible to detainees (El Masri, cited above, § 231 and Al Nashiri, cited above, § 528).

298. Investigations into terrorist offenses undoubtedly present the authorities with particular problems. This does not mean, however, that the

authorities have carte blanche, under Article 5, to arrest and detain suspects, free from any effective control by the domestic courts and, ultimately, by the supervisory bodies of the Convention, whenever they consider that there is a terrorist offense (El Masri, cited above, § 232 and Al Nashiri, cited above, § 529).

The Court emphasizes in this connection that the unacknowledged detention of an individual constitutes a total negation of these guarantees and an extremely serious violation of Article 5. When the authorities seize an individual, they must always be able to indicate where it is. This is why it must be considered that Article 5 obliges them to take effective measures to mitigate the risk of a disappearance and to carry out a rapid and effective investigation when they are seized of a plausible complaint according to which a person has apprehended and has not been seen since (Kurt v. Turkey, 25 May 1998, §§ 123-124, Reports 1998-III,*El Masri,*cited above, § 233, and Al Nashiri, cited above, § 529).

b) Application of these principles

299. In this case, it is established that on 17 February 2003 the applicant was abducted on Italian territory by a team of foreign agents, that he was transported to Aviano airport on the same day and that, in the hands of a CIA team, he was transported to Egypt, via the Ramstein base. The person concerned thus disappeared and no one heard from him until the end of April 2004, once released after his period of incommunicado detention. Then, between May 2004 and February 2007, he was detained by the Egyptian police, without charge.

300. The illegal nature of the applicant's deprivation of liberty was found by the national courts, which established that the applicant, from the outset, had been the subject of unacknowledged detention, in total disregard of the guarantees enshrined in the Article 5 of the Convention, which constitutes a particularly serious breach of his right to liberty and security guaranteed by that provision (see paragraphs 10-21, 90, 113, 139 and 142 above, and El Masri, cited above , § 237).

301. Moreover, the detention of persons suspected of terrorism within the framework of the “extraordinary surrender” program set up by the American authorities has already been deemed arbitrary in similar cases (El Masri, cited above, §§ 103,106, 113, 119, 123 and 239; Al Nashiri, cited above, §§ 530-532; and Husayn (Abu Zubaydah), cited above, §§ 524-526).

302. In the context of the examination of the applicant's complaint under the substantive aspect of Article 3, the Court has already held that Italy knew that the applicant had been transferred outside its territory in the context of a "surrender extraordinary” and that the Italian authorities, by allowing the CIA to abduct the applicant from Italian territory, knowingly exposed him to a real risk of treatment contrary to Article 3 (see paragraph 290 above). It considers that these conclusions are also valid in the context

of the applicant's complaint under Article 5 of the Convention and that Italy is responsible for both his abduction and the entire detention following his surrender to the American authorities (ElMasri, cited above, § 239 and Al Nashiri, cited above, § 531).

303. Accordingly, there has been a violation of Article 5 of the Convention.

VI. ON THE ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION BY THE APPLICANT

304. The applicant also alleged a violation of Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There may be interference by a public authority with the exercise of this right only insofar as such interference is prescribed by law and constitutes a measure which, in a democratic society, is necessary for the security national security, public safety, the economic well-being of the country, the preservation of order and the prevention of criminal offences, the protection of health or morals, or the protection of the rights and freedoms of others . »

A. Submissions of the parties

305. For the applicant, the ordeal he suffered was totally arbitrary and constituted a serious violation of his right to respect for his private and family life guaranteed by Article 8. He maintained that, for more than a year , he was held in solitary confinement, in contact only with those who monitored and interrogated him, and separated from his family, who reportedly had no information about his fate. According to the person concerned, this situation had a devastating effect on his physical and psychological integrity. Furthermore, he was subsequently imprisoned without charge under the Egyptian anti-terrorist law (see paragraphs 23-25 above).

306. The Government contests this argument and reiterates that no responsibility can be imputed to the Italian authorities.

B. Court's assessment

1. Admissibility

307. Noting that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other ground, the Court declares it admissible..

2. Background

308. The notion of "private life" is broad and does not lend itself to an exhaustive definition; it may, depending on the circumstances, encompass the moral and physical integrity of the person. The Court further recognizes that these aspects of the concept extend to situations of deprivation of liberty. Article 8 also protects the right to personal development and the right to establish and maintain relationships with other human beings and the outside world. No one shall be treated in a manner involving loss of dignity, human dignity and freedom being the very essence of the Convention". Moreover, for members of the same family, being together is a fundamental element of family life.

309. Having regard to its conclusions concerning the responsibility of the respondent State under Articles 3 and 5 of the Convention (see paragraphs 290 and 302 above), the Court considers that the latter's actions and omissions also engaged its responsibility. under Article 8 of the Convention. In the light of the established facts, it considers that the interference with the applicant's exercise of his right to respect for his private and family life was not "in accordance with the law".

310. It therefore concludes that there has been a violation of Article 8 of the Convention in the present case.

VII. ON THE VIOLATION OF ARTICLE 3 OF THE CONVENTION ALLEGED BY THE APPLICANT

A. Submissions of the parties

311. The applicant claims to be herself the victim of inhuman and degrading treatment on account of the disappearance of her husband during the period when he was in the hands of the foreign agents involved in the extraordinary surrender operation. In that regard, it relies on the considerations of the Milan Court of Appeal in its judgment of 15 December 2010 (see paragraph 139 above). She invites the Court to find that the suffering suffered by her engages the responsibility of the respondent State under Article 3 of the Convention.

Furthermore, it considers that the investigation carried out by the national authorities was not effective (see also paragraphs 253-256 above).

312. The Government oppose this argument (see also paragraphs 257-260 above).

B. Court's assessment

1. Admissibility

313. Noting that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other ground, the Court declares it admissible.

2. Background

a) Material aspect

314. According to the Court's case-law, the suffering endured by an individual following the disappearance or loss of a relative due to an action by State authorities may raise an issue under Article 3. For example , in Kurt v. Turkey the Court held that the suffering of a mother following the disappearance of a son had reached the threshold of gravity to fall within the scope of Article 3 of the Convention (see Kurt, cited above, §§ 130-134).

The Kurt case, however, did not establish a general principle that any member of the family of a "disappeared" would thereby be the victim of treatment contrary to Article 3. The question whether a family member the family is thus victim depends on the existence of particular factors conferring on the suffering of the applicant a dimension and a character distinct from the emotional distress which one can regard as inevitable for the close relations of a victim of serious violations of human rights 'male. These factors will include the closeness of the family bond – in this context, some weight should be attached to the parent-child bond – the particular circumstances of the relationship, the extent to which a family member witnessed the events in question ,

Moreover, the essence of such a violation lies not so much in the fact of the “disappearance” of the family member as in the reactions and behavior of the authorities to the situation brought to their attention. It is in particular with regard to this last element that a relative can claim to be a direct victim of the authorities' behavior (Çakıcı, cited above, § 98 and Imakaïeva v. Russia, no. 7615/02, § 164, ECHR 2006 XIII (extracts)).

315. In this case, the applicant is the wife of the missing person. At the time of the abduction, on 17 February 2003, she was living with the applicant in Milan. It was she who alerted the police authorities to the disappearance of her husband. The applicant was not able to hear from her husband until 20 April 2004, more than fourteen months after the abduction (see paragraphs 10, 28 and 33 above). The applicant therefore remained in anguish, because she knew that her husband had been deprived of his liberty and no official information on his fate was given to her.

316. Admittedly, the police – the “Digos” – and the Milan public prosecutor's office reacted promptly, in particular by opening an investigation and hearing witnesses (see paragraphs 28-30 above). However,

they were initially deceived as to the Applicant's whereabouts and fate by CIA agents. The latter told the Digos agents that the applicant would be in the Balkans (see paragraphs 31 and 114 above). As the Court has already noted above, it is clear that the Italian security services – SISMi – were informed from the outset that the applicant was being held in Egypt and was being interrogated by Egyptian intelligence services. Despite this, they concealed this information from the police and the prosecution. The relevant document has been updated, in July 2005 at the latest, following the search of the headquarters of SISMi in Rome ordered by the public prosecutor's office (see paragraphs 63, 114 and 288 above). Because of this intentional manipulation of crucial information relating to the Applicant's abduction and the obstructionist tactics of SISMi, which was acting in cooperation with its counterparts in the CIA, the Applicant was unable to obtain any explanation of what had happened to her husband.

317. As the Italian courts have recognized, the applicant, because of the disappearance of her husband, suffered significant non-pecuniary damage due in particular to the sudden breakdown of her marital relationship and the attack on her psychological integrity and that from her husband. The unjustified conduct of the Italian authorities and the resulting suffering on the part of the applicant were considered sufficiently serious by the Italian courts for them to award the applicant a retainer of EUR 500,000 (see paragraph 139 above). below). Despite the fact that, for the reasons explained above (see paragraphs 206-208 and 269-273 above), the judgments were not enforced and damages were not paid , the assessment by the Italian courts remains valid in the context of the grievance examined. Indeed, the Court shares their assessment.

For the Court, the uncertainty, doubts and apprehension experienced by the applicant for a prolonged and continuous period caused her severe mental suffering and anguish. Having regard to its conclusion that not only the applicant's disappearance but also the fact that the applicant was deprived of news concerning the fate of her husband for a prolonged period are attributable to the national authorities, the Court considers that the applicant undergone treatment prohibited by Article 3.

b) Procedural aspect

318. As to the procedural aspect of Article 3, in examining the complaints raised by the applicant under this head, the Court has already concluded that the investigation which was carried out in this case, although effective and thorough, and the trial, which led to the identification of the culprits and the conviction of some of them, did not lead to their natural outcome which, in the present case, was “the punishment of those responsible” (see paragraph 272 above).

319. The Court sees no reason to depart from this conclusion as regards the applicant's complaint.

320. Accordingly, there has been a violation of the substantive and procedural aspects of Article 3 of the Convention in respect of the applicant.

VIII. ON THE VIOLATION OF ARTICLE 8 OF THE CONVENTION ALLEGED BY THE APPLICANT

A. Submissions of the parties

321. The applicant alleges that the ordeal she suffered constitutes a violation of her private and family life, within the meaning of Article 8 of the Convention. She underlines that for more than a year, she remained without news of her husband and in anguish. She adds that the vicissitudes, subject of the request, have seriously harmed family life.

322. The Government opposes this argument and reiterates that the disputed events are not attributable to the Italian authorities and that nothing can be blamed on them.

B. Court's assessment

1. Admissibility

323. Noting that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other ground, the Court declares it admissible.

2. Background

324. The Court recalls having concluded that the responsibility of the respondent State is engaged under Article 8 in respect of the applicant's disappearance and that the interference in the applicant's private and family life was not foreseen by law (see paragraph 309 above).

325. It considers that the applicant's disappearance, attributable to the Italian authorities, also amounted to an interference in the applicant's private and family life. This interference was not prescribed by law.

326. Accordingly, there has been a violation of Article 8 of the Convention in respect of the applicant.

IX. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION BY THE APPLICANTS

327. The applicants also complain that, in order to assert their rights resulting respectively from Articles 3, 5, 8 and 3, 8 of the Convention, they did not have any effective remedy within the meaning of Article 13 of the Convention, which reads as follows:

"Anyone whose rights and freedoms recognized in the (...) Convention have been violated, has the right to an effective remedy before a national authority, even though the violation would have been committed by persons acting in the exercise of their official functions. »

A. Submissions of the parties

1. The applicants

328. Beyond their complaint based on the procedural aspect of Article 3 or on Articles 5 and 8 of the Convention, the applicants, under Article 1, complain that the authorities failed to request the arrest and extradition of the convicted persons. In addition, they complain that the criminal courts had to dismiss the SISMi agents, following the application of state secrecy. The applicants allege that they had no recourse to challenge those decisions, which ensured impunity for the Italian agents of SISMi and the American agents and which, moreover, had the effect of depriving them of any possibility concrete way to obtain payment of the damages awarded to them at national level.

2. The Government

329. The Government opposes this thesis. He reiterates that the investigation carried out by the national courts must be regarded as effective within the meaning of the Convention, that the American agents have been convicted and that State secrecy has rightly been invoked with regard to the Italian agents. The courts have awarded the applicants provisions on damages and, even from this point of view, nothing can be blamed on the national authorities.

B. Court's assessment

1. Admissibility

330. The Court notes that this part of the application is linked to that examined under the procedural aspect of Article 3 of the Convention (see paragraphs 252-274 and 318-320 above). It must therefore be declared admissible.

2. Background

a) General principles

331. The Court reiterates that Article 13 guarantees the existence in domestic law of a remedy enabling the rights and freedoms of the Convention to be invoked therein, as they may be enshrined therein. This provision therefore has the effect of requiring a domestic remedy

empowering the competent national authority to hear the content of the complaint based on the Convention and to offer the appropriate redress, even if the Contracting States enjoy a certain margin of appreciation as to how to comply with their obligations under this provision. The scope of the obligation flowing from Article 13 varies according to the nature of the complaint which the applicant bases on the Convention. However, the remedy required by Article 13 must be "effective" in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably impeded by acts or omissions of the authorities of the respondent State. When an individual makes an arguable allegation of ill-treatment suffered at the hands of agents of the State, the notion of "effective remedy", within the meaning of Article 13, implies, in addition to the payment of compensation where it purpose, in-depth and effective investigations capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigation procedure (Aksoy, cited above, §§ 95 and 98; El Masri, cited above, § 255, and Al Nashiri, cited above, § 546 and the references mentioned).

332. The Court further recalls that the requirements of Article 13 go beyond the obligation which Articles 3 and 5 impose on a Contracting State to carry out an effective investigation into the disappearance of a person who is shown to be he owns it and for whose well-being he is therefore responsible (Kurt, cited above, § 140; El Masri, cited above, § 256; and Al Nashiri, cited above, § 548).

333. For the Court, given the irreversible nature of the damage likely to be caused if the risk of ill-treatment materializes and given the importance it attaches to Article 3, the concept of an effective remedy within the meaning of Article 13 requires an independent and rigorous examination of any claim that there are substantial grounds for believing that there is a real risk of treatment contrary to Article 3 (Jabari v. Turkey, no. 40035/98, § 50, ECHR 2000-VIII). This examination must not take into account what the person concerned may have done to justify an expulsion or the threat to national security possibly perceived by the expelling State (Chahal, cited above, § 151; El Masri, cited above, § 257; and Al Nashiri, cited above, § 549).

b) Application of these principles

334. The Court established that the investigation carried out by the national authorities – the police, the prosecution and the courts – which related to the allegations, presented by the applicants, relating to attacks on their personal freedom, their physical and mental integrity and to their private and family life has been rendered ineffective by the application of State secrecy by the executive (see paragraphs 272-74 above). It has already concluded that the responsibility of the respondent State was engaged on account of the violations of the applicants' rights resulting from Articles 3, 5 and 8 of the Convention which it found (see paragraphs 274, 291, 303, 310,

320 and 326 above). -above). The complaints submitted by the applicants under these provisions were therefore “arguable” for the purposes of Article 13.

Accordingly, the applicants should have been able, for the purposes of Article 13, to pursue concrete and effective remedies capable of leading to the identification and punishment of those responsible, the establishment of the truth and the the granting of reparation.

335. For the reasons set out in paragraphs 264-274 above, it cannot be considered that the criminal proceedings were ultimately effective within the meaning of Article 13, as regards the complaints presented by the applicant under the angle of Articles 3, 5 and 8 of the Convention (see El Masri, cited above, § 259 and Al Nashiri, cited above, § 550).

336. As the Government themselves acknowledge, it was not possible to use the evidence covered by State secrecy and it was not useful to request the extradition of the convicted American agents (see paragraphs 258-259 above). -above).

As to the civil consequences, as indicated in paragraphs 206-208 above, the Court concluded that it was in practice impossible, in the circumstances of the case, for the applicants to have the possibility of obtain damages.

337. In sum, the Court is led to conclude that there has been a violation of Article 13 taken together with Articles 3, 5 and 8 of the Convention in respect of the applicant, and a violation of Article 13 taken together with Articles 3 and 8 of the Convention in respect of the applicant.

X. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION BY THE APPLICANTS

338. The applicants complain that the procedure initiated by the Italian authorities was not fair because of the application of State secrecy and the dismissal of the charges against the SISMi agents. They point out that the possibility of obtaining damages has thus been reduced to nothing.

339. The Government opposes this thesis.

340. Noting that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other ground, the Court declares it admissible..

341. The Court considers, however, that this complaint merges with that which the applicants allege under the procedural limb of Article 3 of the Convention, in so far as it concerns only a specific aspect of the conduct of proceedings which, for the Court, does not meet the criterion of effectiveness within the meaning of the Convention (see paragraphs 264-274 above).

342. In conclusion, the Court considers that it is not necessary to examine this complaint separately under Article 6.

XI. ON THE APPLICATION OF ARTICLE 41 OF THE CONVENTION

343. Under Article 41 of the Convention,

> "If the Court declares that there has been a violation of the Convention or its Protocols, and if the internal law of the High Contracting Party allows only partial reparation to be made for the consequences of this violation, the Court shall grant the party injured party, if need be, just satisfaction. »

344. The applicants, who had 13 June 2012 within which to submit their claims for just satisfaction, submitted them on 13 June 2012.

A. Damage

345. The applicants maintain that following the executive's decision to oppose state secrecy with regard to the Italian agents of SISMi and the position of the Constitutional Court on this matter, they were deprived of possibility of bringing an action for damages. They point out in this respect that American agents enjoy immunity in the United States. As for the Italian agents, the state secrecy opposed by the executive would prevent any civil or criminal action.

346. Emphasizing the enormous suffering they endured and the repercussions this had on a physical and psychological level, the applicants consider that they suffered very serious damage, which is moreover confirmed by the amounts of the provisions which the national courts awarded them (see paragraphs 117 and 139 above), namely 1,000,000 euros (EUR) for the applicant and EUR 500,000 for the applicant. Before the Court, the applicant claimed EUR 10,000,000 and the applicant EUR 5,000,000.

347. The Government opposes the applicants' requests. He maintains that the claims for just satisfaction were not filed in time and therefore cannot be taken into account by the Court. He adds that the applicants have not specified whether the sums in question are claimed for material or non-pecuniary damage. For him, the claims of those concerned are not substantiated and, in any case, their claims are exorbitant.

348. The Court notes that the applicants did not specify their claims; they just referred to the enormous suffering they faced and the physical and psychological consequences they suffered. According to the Court, in the present case, therefore, only non-pecuniary damage is taken into account.

In this respect, it considers that the applicants suffered certain non-pecuniary damage as a result of the violations found. Having regard to the circumstances of the case and, in particular, to the fact that the advances awarded by the national courts were not paid to them, the Court, ruling on an equitable basis, considers that the applicant should be awarded 70,000 EUR and to the applicant EUR 15,000 in this respect, plus any tax due.

B. Costs and expenses

349. The applicants each claimed EUR 100,653, including EUR 89,470 in fees, for costs and expenses incurred before the Court.

350. The Government opposes the applicants' claims and observes that the amounts claimed are exorbitant.

351. According to the Court's case-law, an applicant can obtain reimbursement of his costs and expenses only insofar as their reality, their necessity and the reasonableness of their rate are established. In the present case, having regard to the documents in its possession and its case-law, the Court considers the sum of EUR 30,000 to be reasonable for the costs and expenses of the proceedings before the Court and awards it jointly to the applicants.

C. Default interest

352. The Court considers it appropriate to base the rate of default interest on the interest rate of the European Central Bank's marginal lending facility plus three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. Dismisses the objections raised by the Government;

2. Declares the application admissible;

3. Holds that there has been a violation of the substantive and procedural aspects of Article 3 of the Convention in respect of the applicant;

4. Holds that there has been a violation of Article 5 of the Convention on account of the overall period of the applicant's detention;

5. Holds that there has been a violation of Article 8 of the Convention in respect of the applicant;

6. Holds that there has been a violation of the substantive and procedural aspects of Article 3 of the Convention in respect of the applicant;

7. Holds that there has been a violation of Article 8 of the Convention on the part of the applicant;

8. Holds that there has been a violation of Article 13 of the Convention in conjunction with Articles 3, 5 and 8 of the Convention in respect of the applicant and a violation of Article 13 in conjunction with Articles 3 and 8 of the Convention in respect of the applicant;

9. Holds that there is no need to examine separately the complaint based on Article 6 of the Convention;

10. Said
(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
(i) EUR 70,000 (seventy thousand euros) to the applicant, plus any tax that may be chargeable, for non-pecuniary damage;
(ii) EUR 15,000 (fifteen thousand euros) to the applicant, plus any tax that may be chargeable, for non-pecuniary damage;
(iii) EUR 30,000 (thirty thousand euros), plus any tax that may be payable by the applicants, for costs and expenses;
(b) that from the expiry of the said period and until payment, these amounts shall be increased by simple interest at a rate equal to that of the marginal lending facility of the European Central Bank applicable during this period, increased by three percentage points;

11. Dismisses the remainder of the claim for just satisfaction.

Done in French, then communicated in writing on February 23, 2016, pursuant to Article 77 §§ 2 and 3 of the Rules of Court.

Francoise Elens-Passos
Clerk

George Nicolaou
President