The untidy dystopias of anti-terrorism: Italian State Secrets, CIA Covert Operations, and the Criminal law in the Abu Omar Judgment

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Doves and hawks?

Judgments delivered by the Fourth Criminal Section of the Tribunal of Milan, in Italy, do not generally make compelling reading for admirers of John Le Carré or Ian Fleming. Nevertheless, the one delivered in February 2010 by Dr Oscar Magi is a remarkable exception, for it contains a graphically detailed account of how the CIA and the Italian secret services conducted their 'anti-terrorism' operations in 2003 – down to the mobile phone numbers they used, the Internet map services they employed, and the type of private jets they chartered.[1] Above all, however, a rather chaotic state of affairs emerges from all this. Those CIA agents whose job was to abduct people in the 'extraordinary renditions' program probably believed that they were welcome to act as they pleased in Italy, and that they would be allowed to do so irrespective of Italian law.[2] Judge Magi strongly affirmed that they were not – and long prison sentences were imposed on many of them. One does not very often see CIA agents convicted by the courts of a friendly state. This may explain why the CIA committed one of its worst strategic mistakes in the last decade and overlooked both the constitutional independence of the Italian judicial system and the strong institutional tensions between different branches of the Italian government. In practice, because all the convicted Americans were tried *in absentia*, this simply means that they will not be able to travel to Europe for quite some time – or will have to do so under different identities, which presumably should not be an insurmountable problem for them. Yet, this case is quite remarkable because it is the only 'renditions' trial that reached the verdict stage. As such, it had quite some impact in the multifaceted relationship between Italy and the United States (see here and here for the 'concerns' and 'disappointment' of the State Department). In addition, it highlighted the untenability of some aspects of the fight against terrorism: not surprisingly, Human Rights Watch declared that this case 'put the war on terror on trial'. Because it would be inappropriate for an international lawyer to comment on the former aspects (Italo-American relationships are best left to those who know more about them), I will focus on the latter issues – why renditions are untenable as a matter of law and policy. To do so, I will start by describing the evident conflict of power arising from the outset in this particular case.

At the beginning of 2003, the Special Operations Division of the Italian Police dealing with terrorism, known as DIGOS, was conducting a complex investigation on the activities of Mr Osama Mustafa Hassan Nasr, aka Abu Omar. These efforts were irreparably disrupted by the sudden disappearance of the suspect in the early afternoon of Monday, 17 February 2003. He had been abducted by a group of CIA agents aided by an Italian military police officer (a *carabiniere*) and later flown from the US base in Aviano, in North-East Italy, first to Germany and then to Cairo, in Egypt, where he was probably tortured. The latter transfer had occurred on the same Executive Gulfstream private jet which the CIA rented on many occasions to carry out renditions.[3] What had started as an investigation on Abu Omar's activities in support of terrorism morphed into an investigation on his abduction. The DIGOS soon realized that both the CIA and the Italian Military Secret Service (SISMI) were somewhat involved. In other words, SISMI and CIA agents became the principal suspects in an investigation that a branch of the Italian government (DIGOS) was conducting upon another branch of the same government (the SISMI) and a 'friendly' foreign secret service (CIA). It

should come at no surprise that there were various attempts to divert the investigation: two SISMI agents and one journalist were eventually convicted for aiding and abetting the crime of abduction after it had been committed. Nonetheless, DIGOS and the Milan magistrates presiding over the investigation succeeded in preparing the case and bringing it to trial, amidst the half a dozen complex 'conflict of powers' proceedings which were brought before the Italian Constitutional court and which I have more fully described elsewhere.

However, seeing the DIGOS and the Milan magistrates as the 'doves' standing on one side while SISMI and the CIA were the 'hawks' on the other side would be most inappropriate. Just like the Special Branch in the UK and other analogous institutions, DIGOS has had a long and at times quite controversial history – the Italian Ministry of the Interior candidly admits that its historical origins have to be traced back to (the slow Republican rejection of the methods of) Mussolini's secret political police, the OVRA. The Milan magistrates supervising DIGOS's investigation had many years of experience in anti-subversive and anti-terrorism investigations, including during the difficult times of the Seventies and the Eighties – one of them had even trained in the United States at some point (see here). In sum, no suggestion could credibly be made that those investigating the SISMI and the CIA for the abduction of Abu Omar had different purposes in terms of fighting terrorism than the SISMI and the CIA: if Abu Omar ever returned to Italy, he would immediately be arrested and tried on a standing request of the same magistrates based on DIGOS investigations. The conflict was about methods and the rule of law, not the motives.

And the rule of law is precisely what concerns us here. On 1 February 2010, Judge Magi, sitting as the Tribunal of Milan in monocratic (i.e. one-judge) composition, delivered his judgment convicting 23 American citizens, mostly CIA agents, of the crime of kidnapping Abu Omar, sentencing the chief of CIA in Milan to 8 years in prison and all the others to 5 years in prison. Judge Magi also sentenced two SISMI (Italian military secret service) agents to 3 years in prison each for trying to divert the subsequent investigation. At the same time, however, he declared that the court could not proceed against three other American citizens, including the head of CIA in Italy, on grounds of diplomatic immunity. Nor could the conduct of five Italian SISMI officers, including its head, be adjudicated upon, because a 'state secret' existed creating a procedural bar to further prosecution.

The question before Judge Magi was framed in terms of individual criminal responsibility, yet his judgment also shed light on some issues which are relevant to state responsibility. Indeed, when analyzing a case of extraordinary rendition such as that of Abu Omar, at least two separate legal issues arise. One is whether the United States, Italy, and Egypt are responsible *as states* for an internationally wrongful act. This would entail that the responsible state(s) would be under an obligation to make reparation for any injury caused to other states and to avoid repeating the same conduct. The second issue is whether renditions are 'crimes' under domestic or international law. This would entail that those CIA agents carrying out the rendition and those other persons who helped them should be tried before a court *as individuals*, unless there are any procedural bars to prosecution such as immunity. I will briefly consider these two issues in turn.

State secrecy and Italian complicity

I will start with state responsibility. As the Articles on State Responsibility (ASR) explain, an internationally wrongful act of a state is an act or omission that is both attributable to that state (i.e. committed, directed or under the effective control of one of its organs or agents) and that breaches an obligation of that state under international law (Article 2). Thus, to establish whether the United States is responsible for an internationally wrongful act in the Abu Omar case, we must satisfy both the 'attribution' and the 'obligation' requirement. We can assume that CIA agents were acting in their capacity as US organs, so the attribution of their acts to the US is quite straightforward under Article 4 ASR. As to the existence of one or more international obligations breached by 'renditions', we should consider what rules of international law the abduction and transfer of Abu Omar may have breached. There are many of those. Depending on what view one takes on the vexed question of the applicability of international human rights law (IHRL) outside the territory of the obliged state, certain IHRL obligations may apply (see here; note that the law of armed conflict is irrelevant in the Abu Omar's case, although it may be relevant to other renditions: see here). Furthermore, whenever US agents abduct someone in the territory of another state, they would be violating the latter state's sovereignty unless it consented or acquiesced to such exercise of power on its soil – it is a well-established rule of international law that states cannot go about arresting people in other states.[4] In other words, a complex web of international

legal obligations may be breached by renditions generally and by the Abu Omar one specifically, and the US are most likely under an obligation to stop this practice and make appropriate reparation under Articles 29 to 31 ASR.

In this context, it would also be necessary to establish whether Italy consented to Abu Omar's rendition. If Italy did not consent, its sovereignty was violated by the US. If it consented, Italy might be deemed co-responsible for any international wrongful act of the US under IHRL (Article 16 ASR). Such cooperation would also be likely to constitute a breach of some of Italy's obligations under the European Convention on Human Rights. But we cannot know for sure: here is where Judge Magi complains of a 'black hole' in his power to ascertain the facts.[5] The many 'conflicts of power' cases before the Constitutional Court which I mentioned above had led to the final decision by the Constitutional Court declaring that a 'state secret' existed covering the relationship between SISMI and the CIA, including those aspects of that relationship which concerned the Abu Omar abduction. This very broad definition was criticized but respected by Judge Magi:

Following the delimitation of the area of secrecy operated by the Constitutional Court, and the subsequent claims by the persons under trial, a sort of 'black curtain' has been drawn over all the activities of SISMI agents in relations to the fact/crime 'abduction of Abu Omar', so that its evaluation is absolutely forbidden … [in what constitutes an] area of undecidability. [6]

Therefore, it is impossible to (judicially) know whether SISMI in fact cooperated with the CIA, and if such cooperation was the result of a policy of the Italian government. The head of SISMI at the time has always maintained that he was personally opposed to the rendition program, but that he could not prove this for reasons of state secrecy. Because of how the Constitutional Court interpreted the question of secrecy, Judge Magi had to suspend the proceedings against him and other SISMI agents, because the secrecy constituted a procedural bar to their prosecution. This renders it very difficult to comment on the responsibility of Italy, as a state, under international law. Judge Magi hints at the fact that 'the hypothesis of an active involvement [of SISMI agents] in the abduction' was justified at the start of the trial because of the evidence which had now become unusable.[7] I will leave it to other international lawyers to establish how far some evidence which is inadmissible before a domestic court on grounds of state secrets could be used in an international context to establish the responsibility of a state under international law. My guess is that it probably could (Articles 3 and 32 ASR seem to go in that direction), but that no such international adjudication is likely to ever take place anyway. We thus have to content ourselves with the statement that the Abu Omar judgment seems to implicitly suggest that Italy may be an accomplice of the United States, rather than a victim of a violation of sovereignty by CIA agents.

Criminal responsibility and immunity from prosecution

Now I will move on to the issue of individual criminal responsibility. Quite apart from being internationally wrongful acts of one or more states, renditions may also constitute international or domestic crimes. However, neither the International Criminal Court, nor other International Criminal Tribunals have any jurisdiction over facts involving rendition, so any prosecution would be in a domestic court. International law, however, obliges states to criminalize and prosecute certain acts. These are what some call 'international crimes of domestic implementation' (as opposed to 'pure' international crimes); they may arise from both customary international law and treaty law. I have developed this question elsewhere (SSRN version here) in relation to the obligations of states to criminalize and prosecute torture incidental to renditions under the 1984 UN Convention Against Torture (CAT). In my view, this remains the international criminal law provision which is most relevant to renditions, because extraordinary renditions will almost invariably constitute acts of complicity in torture (namely, the torture occurring at destination). States parties to the CAT are under an obligation to prosecute or extradite any persons involved in renditions, as well as being under a more general obligation to proscribe torture and complicity in torture (or their equivalents) in their statute books. However, the question remains whether renditions are crimes as such, rather than in connection with their torturous consequences. A more direct route of prosecution will come into existence when the 2006 International Convention for the Protection of All Persons from Enforced Disappearance enters into force. It will oblige its member states to criminalize and prosecute

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or

groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. (Article 2).

In the meantime, ordinary domestic criminal law has provided an imperfect yet usable framework for the prosecution of extraordinary renditions. It is indeed possible to find the agents involved in renditions guilty of the common crime of abduction – as the Tribunal did in Milan.

This, however, leaves open the question of immunity. As Dapo Akande noted in a detailed post on Ejil:Talk!, there are three types of immunity which come into question here: diplomatic immunity, consular immunity, and state immunity (immunity *ratione materiae*). Many – Akande included – somewhat expected Judge Magi to adopt a narrow view of immunity because of those Italian precedents such as *Ferrini* which led to the dispute between Germany and Italy before the International Court of Justice. But there was no mention or application of *Ferrini* in *Abu Omar*. This is because *Ferrini* was about (the lack of) immunity for 'international crimes' – or, rather, what the Court of Cassation thought of as international crimes but are in fact 'serious breaches of peremptory obligations' in the context of state, not individual, responsibility. As I said elsewhere, one of the main problems with the *Abu Omar* case is that it focused on the domestic side of the rendition, and left aside the (complicity with) the (alleged) torture in Egypt. In other words, what was on trial before Judge Magi was not an international crime, but the ordinary domestic crime of abduction. *Ferrini* could not be relevant to that.

Nonetheless, this might be yet another case where the Italian doctrine on immunity will need scrutiny. The concept of state immunity (*ratione materiae*) as such was not even invoked before Judge Magi, and was not considered in the judgment. What was elaborated upon was, instead, the difference between consular and diplomatic immunity. According to Judge Magi's interpretation, while diplomats have 'absolute jurisdictional immunity (both criminal and civil or administrative) for the acts they carried out while in the exercise of their functions (immunity which remains even after the end of the diplomatic mission to which they belonged)'[8], consular agents do not enjoy immunity for grave crimes (Article 41 of the Vienna Convention on Consular Relations of 1963), but only for lesser crimes committed in the exercise of their function. Therefore, the two consular agents involved in the abduction of Abu Omar were not deemed to be immune from prosecution; at the same time, the three CIA agents who were accredited to the Rome Embassy, including the CIA head in Italy, did benefit from diplomatic immunity. I am not entirely convinced by Judge Magi's reading of the difference between diplomatic and consular immunity. In particular, I am not sure that Article 41 of the Vienna Convention does quite what Judge Magi thinks it does: as Akande said in his post, I think the question here is that it would be hard to qualify the rendition as occurring in the exercise of 'consular' functions.

On the other hand, Judge Magi is adamant that the abduction was an official act that the CIA agents who were also diplomats committed in the exercise of their functions. As the judge said, 'the activity of "extraordinary renditions" committed by CIA agents, albeit being a crime in Italy, may and should be understood within the functional ambit of Article 3 of the Vienna Convention [on Diplomatic Relations] ("Protecting in the receiving State the interests of the sending State")'.[9] The problem with this finding is that, if the rendition were indeed an official act of the CIA agents involved, the other type of immunity (immunity *ratione materiae*) would unquestionably become an issue for those who are not already protected by diplomatic immunity – namely all the other convicted Americans, including the consuls. In other words, Judge Magi's own finding that the 'rendition' was a policy of the US government adopted in the interest of the US directly leads to the application of *state* immunity under international law (and renders questions of consular immunity redundant). Of course, one of the exceptions mentioned by Akande in his post could in theory be applied to 'extraordinary renditions'. For instance, an exception may succeed if one qualifies the rendition of Abu Omar as a crime under international law (complicity in torture), regardless of how it is then defined under the domestic proceedings concerned. In other words, on the international plane Italy could argue that it has not violated state immunity because it has convicted American citizens for what constituted a crime under international law.

Untidy dystopias

These glimpses of post-9/11 anti-terrorism machinery are not particularly edifying, whatever one's views are on

global efforts to prevent terrorism. The sheer sloppiness of the whole 'Abu Omar operation' on 17 February 2003 is at least as striking as the grave human rights implications. CIA agents were leaving such obvious traces that identifying, prosecuting, and sentencing them was possible for ordinary magistrates in an ordinary Italian city – perhaps a case study for the next Langley Handbook on Deniability of Covert Operations. At the same time, the cooperation between different branches of the Italian government was so low that Italian anti-terrorism police officers ended up wiretapping the Italian secret services – something which, although admirable from a checks-and-balances perspective, is indeed worthy of a spy story. Furthermore, and quite ironically, the whole 'state secret' proceedings led to a judgment which is more lenient with the Italians than with the Americans. Italian 'state secrets' protected the former, but not the latter, from prosecution – were it not such an obviously dangerous idea, it would be tempting to suggest that an International Convention for the Protection of Common Secrets should be established. The real solution to terrorism is more rule of law, not less. The tension between those conducting regular criminal investigations (such as the DIGOS and Milan magistrates) and those trying to adopt other means (such as SISMI and the CIA) is both healthy and inevitable. The lesson from the Abu Omar case is that if the latter really wish to get away with using illegal means to prevent terrorism, they should at least get their act together.

[With many thanks to Marko Milanović and Brian Sloan]

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[1] *Adler Monica Courtney and ots.*, Tribunale Ordinario di Milano in composizione monocratica, Sezione IV Penale [Fourth Criminal Section of Milan Tribunal sitting in 'monocratic' (i.e. one-judge) composition], n. 12428/09, verdict of 4 November 2009, judgment delivered by Dr. Oscar Magi, registered on 1 February 2010, unreported, on file with author [*Abu Omar judgment* hereinafter].

[2] The term 'extraordinary renditions' is a euphemism which leaves much to be desired, and there are many definitions of what it means exactly. Suffice it to say here that they usually consist in the abduction of someone from a certain country, their transfer to a detention facility in another country, their interrogation and often their torture, all without any charge or trial by independent judicial authorities. In September 2006, President George W. Bush explained that renditions belonged to the so-called 'CIA Program', a series of anti-terrorism measures adopted by subsequent US administrations at least since 1995. These measures were often modified but never altogether repealed, not even by the Obama administration (see § 5(e) of Executive Order n. 13491).

[3] *Abu Omar judgment*, at p. II-15.

[4] See e.g. F.A. Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law', in Y. Dinstein and M. Tabory (eds), *International law at a time of perplexity: essays in honour of Shabtai Rosenne* (Dordrecht; London: M. Nijhoff, 1989) 407-421.

[5] *Abu Omar judgment*, at pp. II-94 ff.

[6] *Abu Omar judgment*, at p. II-97.

[7] *Abu Omar judgment*, at p. II-100.

[8] *Abu Omar judgment*, at p. II-90.

[9] *Abu Omar judgment*, at p. II-93.