



## United Nations Human Rights Council

7<sup>th</sup> Session of the Working Group on the Universal Periodic Review  
8 – 19 February 2010

### ICJ Submission to the Universal Periodic Review of Italy

*September 2009*

The International Commission of Jurists (ICJ) welcomes this opportunity to present its submission to the Universal Periodic Review (UPR) of Italy. In this review, the Working Group on the UPR and the Council should address the breaches or risks of breaches of Italy's human rights obligations resulting from: its immigration law, policy and practice; frequent expulsions on grounds of national security; widespread attacks on the judiciary and its members; the abuse of the state secrets privilege in order to obstruct the prosecution and trial of international crimes, and the failure to define torture as a criminal offence in its domestic legislation.

#### **1. Legislation affecting migrants' rights**

The Italian Parliament recently passed Law no. 94 of 15 July 2009<sup>1</sup>, which introduces measures against irregular migrants.<sup>2</sup> The ICJ is concerned at some of the measures introduced, in particular the creation of a new offence of "illegal entry and stay on Italian territory." This new criminal provision serves to criminalise irregular migration and is likely to be used to accelerate the expulsion of migrants without the human rights protections guaranteed under international law. New procedures could effectively place individuals at risk of unlawful transfer to countries where they face a real risk of torture or cruel, inhuman or degrading treatment or other serious violations of human rights. The legislation also extends the maximum length of administrative detention for irregular migrants from the previous 60 days to six months, with serious implications for the right to liberty as protected by Article 9 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 of the European Convention on Human Rights (ECHR).

The Parliament also adopted Law no. 125 of 24 July 2008,<sup>3</sup> which provides that when a convicted person has committed the offence while unlawfully present in the national territory, this condition of unlawful presence will be taken as an aggravating factor in respect of sentencing. As a result, the sentence of imprisonment may be increased by up to one third. The imposition of an aggravated sentence for all crimes, even those unrelated to immigration status, solely on the basis of illegal presence in the State, will lead to arbitrary and discriminatory deprivations of liberty, in breach of Italy's obligations under Article 9 ICCPR and Article 5 ECHR.

**The ICJ calls on the Working Group and the Council to recommend that Italy repeal the provisions of the laws identified above that are inconsistent with Italy's international human rights law obligations.**

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<sup>1</sup> Law no. 94 of 15 July 2009 at

[http://www.governo.it/GovernoInforma/Dossier/sicurezza\\_legge/legge\\_15\\_luglio\\_2009\\_n.94.pdf](http://www.governo.it/GovernoInforma/Dossier/sicurezza_legge/legge_15_luglio_2009_n.94.pdf) (Italian).

<sup>2</sup> For a deeper and more complete analysis, see the ICJ submission to the House of Representatives on this law at [http://www.icj.org/news.php3?id\\_article=4468&lang=en](http://www.icj.org/news.php3?id_article=4468&lang=en) (English and Italian).

<sup>3</sup> Law no. 125 of 24 July 2008 at <http://www.parlamento.it/parlam/leggi/081251.htm> (Italian).

## 2. Expulsion of aliens and the Principle of *Non-Refoulement*

Expulsion of aliens on national security grounds is used by the Italian Government as a main instrument of counter-terrorism policy. Article 3(1) of Law 155 of 31 July 2005<sup>4</sup> (the “Pisanu Law”) allows for expulsion of aliens by decree of the Minister of the Interior or the prefect when the alien is suspected of terrorist activities.<sup>5</sup> The European Court of Human Rights has found Italy in violation of the ECHR for deportation of terrorist suspects to Tunisia under the “Pisanu Law”, despite the provision of weak diplomatic assurances by the Tunisian authorities, including in the cases of Nassim Saadi<sup>6</sup> and Essid Sami Ben Khemais.<sup>7</sup> In December 2008, Mourad Trabelsi, another Tunisian national, was expelled to Tunisia under the “Pisanu Law,” despite the issuance of interim measures to stop the expulsion by the European Court of Human Rights. A similar expulsion, in contravention of interim measures, also occurred in the case of *Ali Ben Sassi Toumi on 2 August 2009*.<sup>8</sup> Under the ECHR, states parties are under an obligation to respect interim measures indicated by the European Court of Human Rights, as affirmed repeatedly by the Court.<sup>9</sup> A number of other *non-refoulement* cases are pending before the Court.<sup>10</sup>

The Government is also using the expulsion of aliens as an instrument of migration policy. Following the ratification in February 2009 of a treaty with Libya, which reinforced cooperation in addressing the phenomenon of irregular migration,<sup>11</sup> the authorities have begun intercepting migrants in international waters and transferring them immediately to Libya, without passing through Italian territory and without undertaking checks on their identity and to determine whether there is a need for international protection. The government have declared such operations to be part of Italy’s standard immigration measures.<sup>12</sup>

Between 6 and 10 May 2009, Italian authorities intercepted in international waters some 500 migrants, who were trying to reach Italy in small boats, and escorted them back to Libya.<sup>13</sup> According to the figures of *Fortress Europe*, between 5 May and 5 July 2009, 1,136 migrants have been intercepted in the Mediterranean Sea and sent back to Libya.<sup>14</sup> On 29 August 2009, the Italian authorities accompanied another 70 migrants to Libyan shores.<sup>15</sup> The UN High Commissioner for Refugees interviewed 82 people intercepted and sent to Libya by the Italian Navy on 1 July 2009 and ascertained that 76 of them, including six children, were of Eritrean origin and in need of international protection. They also heard accounts that the Italian authorities did not even try to determine their country of origin or residence or their need for international protection, that force was used against the migrants during the transfer and that their goods had been seized by the Italian authorities and never returned.<sup>16</sup>

<sup>4</sup> Law 155 of 31 July 2005 at <http://www.camera.it/parlam/leggi/051551.htm> (Italian).

<sup>5</sup> Both the UN Working Group on Arbitrary Detention and the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, criticized such policy. See, *Report of the Working Group on Arbitrary Detention, Addendum: Visit to Italy*, UN Doc. A/HRC/10/21/Add.5, 26 January 2009, paragraphs 52 – 55; and *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Following his Visit to Italy on 13 – 15 January 2009*, Doc. No. CommDH(2009)16, 16 April 2009, paragraphs 106-119.

<sup>6</sup> *Case of Saadi v. Italy*, Application no. 37201/06, 28 February 2008, Grand Chamber.

<sup>7</sup> *Affaire Ben Khemais c. Italie*, Application no. 246/07, 24 February 2009, available in French.

<sup>8</sup> See summary of the story of Mourad Trabelsi with the request and granting of interim measures by the European Court of Human Rights at <http://www.statewatch.org/news/2008/dec/12italy-tunisia.htm>. See also, *Affaire Cherif et autres c. Italie*, Application no. 1860/07, 7 April 2009. On *Ali Ben Sassi Toumi*, HRW Press Release at <http://www.hrw.org/en/news/2009/08/05/italy-expulsion-tunisian-violates-european-human-rights-convention>.

<sup>9</sup> *Mamatkulov and Askarov v Turkey* App Nos. 46827/99 and 46951/99. Judgment of the Grand Chamber, 4 February 2005.

<sup>10</sup> 37336/06 (Soltana), 11549/05 (Darraji), 46792/06 (Bouyahia), 2638/07 (Abdelhedi), 37257/06 (O.), 38128/06 (Ben Salah), 44006/06 (C.B.Z.), 16201/07 (Hamraoui), 12584/07 (Sellem), 44448/08 (Drissi).

<sup>11</sup> Law no. 7 of 6 February 2009 at <http://www.camera.it/parlam/leggi/090071.htm> (Italian). See, in particular its Article 19.

<sup>12</sup> ‘Se ne faccia carico l’Europa. I respingimenti continueranno’, ANSA, 12 May 2009, 22:30; La Repubblica, ‘Immigrati, Maroni insiste sulla linea dura. Il premier: “No all’Italia multietnica”’, 9 May 2009. Il Sole 24 Ore, Berlusconi: «La nostra idea dell’Italia non è multietnica», 9 May 2009; La Repubblica, ‘Immigrati, Maroni insiste sulla linea dura. Il premier: “No all’Italia multietnica”’, 9 May 2009.

<sup>13</sup> See, News article at <http://www.repubblica.it/2009/04/sezioni/cronaca/immigrati-6/secondo-respingimento/secondo-respingimento.html>.

<sup>14</sup> <http://fortresseurope.blogspot.com/2006/01/libia-elenco-dei-respingimenti.html>.

<sup>15</sup> <http://www.repubblica.it/2009/05/sezioni/cronaca/immigrati-8/respinti/respinti.html> (in Italian)

<sup>16</sup> See UNHRC Press Release at <http://www.unhcr.org/4a5c638b6.html>.

The ICJ is concerned that these operations and the expulsions under counter-terrorism legislation take place without taking due account of Italy's obligations of *non-refoulement*, as provided both under international refugee law and international human rights law. The ICJ recalls that Article 33 of the 1951 *Geneva Convention Relating to the Status of Refugees*, to which Italy is a party, prohibits the expulsion or return of a refugee or asylum-seeker "in any manner whatsoever" without reference to his or her entrance onto the territory of the State. International human rights law also imposes obligations of *non-refoulement* of persons who would risk torture or cruel, inhuman or degrading treatment or punishment, imposition of the death penalty or flagrant denial of fair trial guarantees, with no exception or derogation under any national security grounds.<sup>17</sup> These obligations apply from the moment when the State's authorities exercise effective control over the people concerned, including in international waters.<sup>18</sup>

**In light of these obligations, the ICJ calls on the Working Group and the Council to request that the Government of Italy:**

- **Ensure that no person, including those suspected of terrorism offenses, be transferred to any country, including those of origin or residence, where the transferred person would be at real risk of serious human rights violations, including torture and other ill-treatment;**
- **Desist from seeking or relying on diplomatic assurances from any state where there is a real risk that a person transferred to that state would be subjected to serious human rights violations, as diplomatic assurances do not and cannot provide an effective safeguard against torture, other ill-treatment or other serious human rights violations;**
- **Refrain from interception of migrants in international waters and from their forced returns in disregard of the obligations of *non-refoulement* and of international protection of refugees and asylum-seekers.**

### **3. Independence of the Judiciary**

In July 2006, searches ordered by the Milan Public Prosecution resulted in the discovery of documentation on surveillance carried out by the Italian Military Secret Services (SISMi) on members of the judiciary from 2001 to 2006. Reportedly, the intelligence activities concerned at least four prosecutor's offices in Italy (Milan, Turin, Rome and Palermo) and 203 judges in 12 European countries.<sup>19</sup> On 4 July 2007, the High Council of the Magistrature<sup>20</sup> (*Consiglio Superiore della Magistratura*) issued a "protective" resolution,<sup>21</sup> finding that such intelligence activity was directed against Italian and European magistrates considered to have centre-left political views; that monitoring of their activities, movements, and correspondence was systematic until 2003 and sporadic until 2006; and that it was an official SISMi activity in which SISMi's Director, Nicolo Pollari, was involved. The Council found that SISMi also made specific interventions that aimed to obstruct the professional activity of the

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<sup>17</sup> See, Article 3(1) of the Convention against torture; Human Rights Committee, *Kindler v. Canada*, UN Doc. CCPR/C/48/D/470/1991 (1993), § 13.2; HRC, *General Comment No. 31*, cit., § 12. ECHR Article 6: ECtHR, *Soering v. UK*, Judgment of 7 July 1989, § 113, *Drozdz and Janousek v. France and Spain*, Judgment of 26 June 1992, § 110; Article 5 and Article 6: *MAR v. UK*, Judgment of 19 September 1997; *Tomic v. UK*, Admissibility decision of 14 October 2003, §3. See, *inter alia*, *Chahal v. UK*, Judgment of 25 October 1996; *Saadi vs. Italy*, Judgment of 28 February 2008, Application no. 37201/06; Human Rights Committee, *Mohammed Alzery vs. Sweden*, CCPR/C/88/D/1416/2005, 10 November 2006, para. 11(8). HRC, *Zhakhongir Maksudov and others vs. Kyrgyzstan*, CCPR/C/93/D/1461 and others, 31 July 2008, para. 12.7 (also on article 6); and, CPT/Inf (2005) 15, para. 30.

<sup>18</sup> See, UNHCR Briefing Notes, 12 May 2009. See also, UNHCR Press Release of 7 May 2009.

<sup>19</sup> See news article at <http://ricerca.repubblica.it/repubblica/archivio/repubblica/2008/09/28/processate-per-peculato-pollari-pio-pompa.html>. On the case see also, <http://www.repubblica.it/2006/07/sezioni/cronaca/arrestato-mancini/fabbrica-sismi/fabbrica-sismi.html>; [http://www.lefigaro.fr/international/2007/07/07/01003-20070707ARTFIG90742-les\\_services\\_italiens\\_sont\\_accuses\\_d\\_espionner\\_des\\_magistrats.php](http://www.lefigaro.fr/international/2007/07/07/01003-20070707ARTFIG90742-les_services_italiens_sont_accuses_d_espionner_des_magistrats.php); [http://www.marianne2.fr/Italie-Des-juges-francais-espionnes\\_a170523.html](http://www.marianne2.fr/Italie-Des-juges-francais-espionnes_a170523.html); [http://quotidianonet.ilssole24ore.com/2007/07/11/23823-niente\\_segreto\\_stato.shtml](http://quotidianonet.ilssole24ore.com/2007/07/11/23823-niente_segreto_stato.shtml); [http://news.xinhuanet.com/english/2007-07/12/content\\_6365918.htm](http://news.xinhuanet.com/english/2007-07/12/content_6365918.htm). Resolution of the Plenary of the High Council of the Magistrature no. 461/RR/2006 of 4 July 2007, paragraph 3, available at [http://www.csm.it/circolari/070704\\_1.pdf](http://www.csm.it/circolari/070704_1.pdf) (Italian).

<sup>20</sup> It must be recalled that in Italy the Magistrature (term preferred to Judiciary) includes the sitting judges and the public prosecutors.

<sup>21</sup> A "protective" action is an internal procedure of the High Council of the Magistrature, which allows it to investigate without criminal law powers and procedures facts and situations which threaten the independence of the judiciary. It has been recently regulated by CSM Decree of 15 July 2009, published in the Official Gazette no. 166 of 20 July 2009.

magistrates.<sup>22</sup> According to news reports, on 28 September 2008 the Rome Public Prosecutor sought the prosecution of former Director Nicolo Pollari and agent Pio Pompa, who allegedly undertook these operations, for the offence of embezzlement (*Peculato*).<sup>23</sup> Although General Pollari and Pio Pompa were reportedly removed from the Secret Service, they have both been granted other government appointments.<sup>24</sup>

The ICJ considers that such allegations, if substantiated, constitute a serious attack on the independence of the judiciary and the application of the rule of law, including the principle of the separation of powers. They would also breach Italy's international obligations under Article 14 ICCPR and contravene Principles 1 and 4 of the *UN Basic Principles on the Independence of the Judiciary*.<sup>25</sup>

**The ICJ is concerned that, three years after they began, criminal investigations have still not been concluded and that no disciplinary or parliamentary investigations into the role of the intelligence services and/or of the Government in these activities appears to have taken place. The ICJ calls on the Working Group and the Council:**

- **To call on the Government to take all necessary measures to ensure and guarantee the effective administration of justice by an independent and impartial judiciary;**
- **to urge the Government to conduct thorough and independent investigation into the surveillance of judges by the intelligence services;**
- **to ask the Government whether effective preventive measures have been taken and safeguards put in place to avoid the repetition of such practices in the future.**

The Italian magistrature is and has for several years been under heavy attack by members of the Government, including Members of Parliament. Of particular concern to the ICJ are the regular verbal attacks by members of the Government, and prominently by the present President of the Council of Ministers, Silvio Berlusconi, who has accused judges and prosecutors of presenting false charges against him, labelling them as "militant and politicised magistrates".<sup>26</sup>

In 2002, the then UN Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy, after two missions to Italy in March and November 2002, recommended that "magistrates should still not be personally attacked for their judgments even if the judgments are manifestly wrong".<sup>27</sup> Nonetheless, such attacks have continued. In 2006, the Human Rights Committee also noted the concern of Italian magistrates that their

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<sup>22</sup> See, Resolution of the Plenary of the High Council of the Magistrature no. 461/RR/2006 of 4 July 2007, paragraph 3, available at [http://www.csm.it/circolari/070704\\_1.pdf](http://www.csm.it/circolari/070704_1.pdf) (Italian). The High Council of the Magistrature refers to "specific interventions aimed at obstruct or contrast the professional or political-cultural activity of the magistrates and of the concerned associations". This is "foreseen and theorised in the programmatic guidelines" of the Secret Service, but it also concretised in two actions: "a media campaign of delegitimation of magistrates seconded to OLAF", and "the press campaign by some information organs, repeated in political spheres, on an alleged conspiracy against the Government organised at an European level by MEDEL". (see Resolution of the Plenary of the High Council of the Magistrature no. 461/RR/2006 of 4 July 2007, paragraph 3)

<sup>23</sup> The Preliminary Judge did not allow for the trial to take place in Rome as some of the judiciary members in the Rome district could have been victims of the SISMI's activities, and ordered to transfer the proceeding to the judicial district of Perugia.

<sup>24</sup> See, news article at [http://www.corriere.it/Primo\\_Piano/Politica/2006/11\\_Novembre/21/sarzanini.shtml](http://www.corriere.it/Primo_Piano/Politica/2006/11_Novembre/21/sarzanini.shtml)

<sup>25</sup> The UN Special Rapporteur on the Independence of Judges and Lawyers sent a communication to the Italian Government on these facts on 25 September 2007, but according to his annual reports he received no replies. See, *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, "Addendum: Situations in Specific Countries or Territories"*, UN Doc. A/HRC/8/4/Add.1, 28 May 2008, paragraphs 183-184.

<sup>26</sup> See news articles: Non temo i giudici, su di me solo fango, Repubblica — 05 luglio 2008 pagina 2 sezione: POLITICA INTERNA, <http://ricerca.repubblica.it/repubblica/archivio/repubblica/2008/07/05/non-temo-giudici-su-di-me-solo.html>. Attacks to the judiciary came also from other members of the present Government and political majority in the Parliament: Sentenza per Eluana, no alle interferenze, Repubblica — 01 febbraio 2009 pagina 9 sezione: CRONACA, <http://ricerca.repubblica.it/repubblica/archivio/repubblica/2009/02/01/sentenza-per-eluana-no-alle-interferenze>. See *inter alia*, ICJ Press Release of 24 June 2008 at [http://www.icj.org/news.php3?id\\_article=4313&lang=eninterferenze.html](http://www.icj.org/news.php3?id_article=4313&lang=eninterferenze.html); Intervista al Presidente dei Senatori PDL, Gasparri, Il Tempo, 4 giugno 2009, pagina 5. Berlusconi contro la Gandus È un mio nemico politico, Repubblica — 30 settembre 2008 pagina 12 sezione: POLITICA INTERNA, <http://ricerca.repubblica.it/repubblica/archivio/repubblica/2008/09/30/berlusconi-contro-la-gandus-un-mio-nemico.html>

<sup>27</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Addendum: Report on the Mission to Italy*, UN Doc. E/CN.4/2003/65/Add.4, 31 January 2003, paragraph 89 (c).

independence was being threatened and recommended that Italy “ensure that the judiciary remain independent of the executive power”.<sup>28</sup> The ICJ is deeply concerned that seven years after the Special Rapporteur’s visit and three years after the Committee’s recommendations, the situation remains unchanged. Such attacks by the executive and members of the majority in Parliament run contrary to Italy’s international obligations under Article 14 ICCPR and contravene Principles 1 and 4 of the *UN Basic Principles on the Independence of the Judiciary*.

### **The ICJ calls on the Working Group and the Council to recommend that the Italian Government end all attacks on the judiciary and its members**

#### **4. Use of state secrets privilege in Extraordinary Renditions trial**

On 17 February 2003, Hassan Mustafa Osama Nasr, also known as Abu Omar, an Egyptian citizen with refugee status in Italy, was allegedly kidnapped by United States CIA agents and forcibly transferred to the NATO airbase of Aviano from which he was subsequently transported to Egypt. Both there and during the transfer he was allegedly subjected to torture and other cruel, inhuman or degrading treatment or punishment and to arbitrary detention. The Italian Military Secret Service (SISMI) is alleged to have collaborated with the US intelligence agents and facilitated the kidnapping.

The criminal trial in *absentia* against 26 CIA agents and five members of the SISMI for the kidnapping of Abu Omar is presently in its final phase. However, the effectiveness trial has been considerably hampered by the use of state secrets privilege by the Italian Government and its validation by the Constitutional Court. The “state secrets” concern all evidence concerning the relationship of the Italian secret service with foreign secret services. The Constitutional Court affirmed that, where purported state secrets are concerned, the President of the Council enjoys wide discretionary power “that can be limited only by the necessity that the essential reasons grounding the decision be explained to the Parliament and by the prohibition on invoking the secret of state for facts that are disruptive of the constitutional order”.<sup>29</sup> In the particular matter of the Abu Omar case, the Court did not find the existence of facts disruptive of the Constitutional order and consequently upheld the invocation of the state secret privilege by the Government.<sup>30</sup>

The ICJ considers that the use of state secrets in this case contravenes Italy’s international law obligations. Renditions, as practiced by the United States between 2001 and 2008 involve multiple human rights violations, including of the prohibition on torture or other cruel, inhuman and degrading treatment (Article 7 ICCPR, the Convention Against Torture, Article 3 ECHR), the prohibition on arbitrary detention and the right to be recognised as a person before the law. Renditions such as that of Abu Omar also amount to enforced disappearance, which constitute a crime under international law.<sup>31</sup> Domestic Italian legislation does not include offences of enforced disappearance and therefore the Constitutional Court allows the imposition of the state secret privilege in enforced disappearance cases.<sup>32</sup> Nevertheless, under international law, Italy has an obligation to investigate such acts effectively, and to bring to justice those responsible for them, irrespective of considerations of national security or international co-operation.<sup>33</sup>

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<sup>28</sup> *Concluding Observations of the Human Rights Committee: Italy*, UN Doc. CCPR/C/ITA/CO/5, 24 April 2006, paragraph 17.

<sup>29</sup> Constitutional Court, Sentence 106/2009, paragraph 3 (The Law).

<sup>30</sup> Constitutional Court, Sentence 106/2009, paragraph 8.5 (The Law).

<sup>31</sup> See, Inter-American Court of Human Rights, *Case of Goiburú et al. v. Paraguay*, Judgment of 22 September 2006, Series C N° 153, para. 84; *General Comment no. 29: States of Emergency (Article 4)*, Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, paragraphs 12-13; *UN Declaration on the Protection of All Persons from Enforced Disappearances*, General Assembly resolution 47/133 of 18 December 1992, UN Doc. A/RES/47/133, Preamble and Article 1; *International Convention for the Protection of All Persons from Enforced Disappearance*, Preamble. According to Article 7 of the Rome Statute, enforced disappearance “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”, constitutes a crime against humanity. See, ICTY, *Case Prosecutor v. Zoran Kupreskic and others*, Judgment of 14 January 2000, IT-95-16-A, paragraph 566.

<sup>32</sup> See, Law no. 124 of 3 August 2007 at <http://www.parlamento.it/parlam/leggi/07124l.htm> (Italian). For the discipline, equally insufficient, precedent to Law 124/2007, see Law no. 801 of 24 October 1977 at [http://www.camera.it/\\_bicamerale/sis/norme/1801-77b.htm](http://www.camera.it/_bicamerale/sis/norme/1801-77b.htm) (Italian).

<sup>33</sup> See, *inter alia*, Human Rights Committee, *General Comment no. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant*, 21 May 2004, UN Doc. CCPR/C/74/CRP.4/Rev.6, paragraph 18; Inter-American Court of Human Rights, *Case Velasquez Rodriguez v*

The ICJ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights highlighted in its report *Assessing Damage, Urging Action* the worrisome use of secrecy in order to foreclose remedies to victims. The Panel, after hearing the misuse of state secrecy in several situations, including in the case of Abu Omar, stressed that “[v]ictims must not be deprived of effective remedies or reparations on the grounds of national doctrines such as “state secrecy”.”<sup>34</sup> The UN Special Rapporteur on the promotion and protection of human rights while countering terrorism also recommended in its last Annual Report that “[i]nformation and evidence concerning the civil, criminal or political liability of State representatives, including intelligence agents, for violations of human rights must not be considered worthy of protection as State secrets.”<sup>35</sup>

The invocation of the state secret privilege by the Presidency of the Council of Ministers places a heavy, almost insurmountable, burden on the prosecution and trial of the alleged perpetrators of this crime. Furthermore, while the effect of the state secret privilege on the position of the 26 CIA agents might be limited, the general impossibility for the prosecution and the defence to make use of evidence on the links between the Italian secret services and the CIA seriously hampers the chances of a fair trial for the members of the SISMI.

**The ICJ calls on the Working Group and the Council to recommend that the Government:**

- **lift immediately the state secret privilege in respect of essential information related directly or indirectly to the Abu Omar case;**
- **modify its Secret of State Law to prohibit use of the state secret privilege where it would prevent the effective investigation of and accountability for serious human rights violations, particularly those constituting crimes under international law, and to ensure that the state secrets privilege cannot be invoked to protect the Government or a public authority from embarrassment or exposure of wrongdoing;**
- **take all necessary measures to ensure an effective prosecution in the Abu Omar case, including requesting extradition of suspects from the US;**
- **put in place effective measures of accountability for intelligence services, including the military intelligence services;**
- **ratify the *International Convention for the Protection of All Persons from Enforced Disappearance*, and criminalise the act of enforced disappearance.**

#### **5. Compliance with the *Convention against Torture*: absence of a criminal offence of torture**

On 16 July 2007, the Committee against Torture reiterated its recommendations to “proceed to incorporate into domestic law the crime of torture and adopt a definition of torture that covers all the elements contained in article 1 of the Convention.”<sup>36</sup> Italy has been party to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* since 12 January 1989, but has so far failed to incorporate the crime of torture in its criminal code as required by articles 1 and 4 of the Convention. Although there are currently seven Bills in the Parliament which attempt to introduce the offence of torture in the Italian Penal Code,<sup>37</sup> they are all private initiatives and do not enjoy the Government’s endorsement, therefore making it highly unlikely that they will be adopted into law.

**The ICJ calls on the Working Group and the Council to recommend that Italy provide in its Criminal Code the crimes of torture and cruel, inhuman and degrading treatment, in accordance with the UN Convention against Torture.**

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*Honduras*, Judgment of 29 July 1988, Series C No. 4, paragraphs 166 and 175; European Court of Human Rights, *Case of X and Y v the Netherlands*, Judgment of 26 March 1985, Series A 91, paragraph 27; *Case of Aksoy v Turkey*, Judgment of 18 December 1996, Reports 1996-VI, paragraph 98. For a more comprehensive analysis, see *ICJ Practitioners’ Guide on the Right to a Remedy and to Reparation for Gross Human Rights Violations*, Practitioners’ Guide Series N. 2, Geneva, 2006; and *Impunidad y Graves Violaciones de Derechos Humanos*, Guía para Profesionales No. 3, Geneva 2008 (available only in Spanish).

<sup>34</sup> Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action*, International Commission of Jurists, Geneva, 2009, p. 90.

<sup>35</sup> *Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism*, Martin Scheinin, Human Rights Council, UN Doc. A/HRC/10/3, 4 February 2009, paragraph 75.

<sup>36</sup> *Conclusions and recommendations of the Committee against Torture: Italy*, UN Doc. CAT/C/ITA/CO/4, 16 July 2007, paragraph 5

<sup>37</sup> Namely, Bills no. 1596, 1237, 264, 256 in the Senate, and no. 1838, 1508, 857 in the House of Representatives.