

## **“The US Senate reveals the truth on renditions and torture, now it’s Europe’s turn”**

*Armando Spataro*<sup>1</sup>

On 9 December 2014, as had been announced the day before by Josh Earnest, the White House spokesman, the US Senate released a report of around 500 pages that officially acknowledged all sorts of torture (including water-boarding) and the practice of extraordinary renditions, enacted by the CIA for around a decade within the framework of an unacceptable strategy to fight international terrorism. Moreover, the report consists of a summarised review of an even wider study which is around 6,700 pages long, the rest of which will remain ‘classified’, as is said in jargon, and hence secret. The work by the Senate’s Intelligence Committee monitoring the secret services, on which the report is based, lasted for around five years and included analysis of around 6 million documents.

Thus, practically the whole world had official confirmation of what was already known to an extent and which, according to several commentators, constituted a practice enacted since the years that immediately preceded the 11 September [attacks], when the CIA was headed by George Tenet (from 1997 to 2004), and up until 2009 (hence, also at the time when Tenet’s role was assumed first by Porter Gross and then by Michael Hayden). In any case, these were methods developed with certainty - according to the report - after 11 September. Yet, the truly innovative element did not consist in this practice being revealed, but in its clear and unequivocal condemnation by the United States Senate.

The president of the Senate’s Intelligence Committee, the California Democrat Dianne Feinstein, who had already reported the violation of the computers of the Committee she presided over by the CIA<sup>2</sup> in March 2014, insisted for the immediate publication of this dossier. The senator, who overcame internal resistance even within her party by those who opposed the report’s publication, declared: *“We have to divulge it because whoever reads it will act in order for it never to happen again”*. The position taken by President Obama was no different, as he stated: *“We were not worthy of our values... Torture has not even contributed to making us safer against terrorism. I will continue to use my presidential authority to guarantee that we will never use those methods again”*<sup>3</sup>. Brutal and inefficient methods, whose only consequences were summed up by Harry Reid, leader of the outgoing Democratic majority in the Senate, in just a few words: *“All of this has just muddied us”*.

But the top echelons of the CIA immediately stated that they had done what was asked of them, assuring that everything was lawful.

Hence, it is worth reconstructing the route along which, at a certain point, governments, including European ones, political leaders and many jurists came to claim that acts of torture and the kidnapping of suspected terrorists had a juridical legitimation and, therefore, could be practised.

It all arises from an abstruse juridical theorisation, that of the *war on terror*, whereby war must be met with war, also because it is a way of producing democracy, so much so that “after the bombing of Falluja, the inhabitants of the destroyed city were happier and voted in great numbers”<sup>4</sup>. It was a theory that was drawn up in the wake of 11 September and had quickly become so popular as to be mentioned using an acronym: “W.o.T.”.

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<sup>2</sup> La Repubblica e Il Corriere della Sera, 12.3.2014

<sup>3</sup> La Repubblica, 10.12.2014)

<sup>4</sup> John Ballard, head of the Pentagon’s antiterrorist staff (Florence, May 2006, conference of the N.Y. Univ.)

In essence, acts of so-called international terrorism supposedly constitute acts of war that may be countered with similar techniques among which kidnappings and torture are included. Of course, it is true that acts of terrorism may also be carried out in times and zones of war, but it is likewise evident that this does not justify that kind of response in any way. In fact, everyone, and not just jurists, knows that in war situations the law for armed conflict situations is applicable as it is laid out in the Geneva Convention, its additional protocols and its further, more general purposes that are found in humanitarian law.

However, within the frame of the WoT principles become flexible, “grey areas” in which rights exist in a limited form become admissible, where any rule subsides or rules are often violated, starting from, for example, the very creation of the category of enemy combatants, that is, of illegal enemy combatants which, according to the view of those who created it, enables terrorist suspects who are “captured” in any part of the world to be denied their fundamental rights.

We owe the creation of this monstrous juridical category to John Woo from the US Department of Justice’s Legal Advice Office, the author of a 42-page memorandum in which Al Qaeda and the entire Taleban regime were included among the illegal enemy combatants, to whom the Geneva Conventions would not be applied.<sup>5</sup>

Moreover, John Yoo later complained (in 2008) in some press articles that the unveiling of his role as counsellor-strategist exposed him to the risk of reprisals, whereas he now claims, with renewed pride and following the publication of the Feinsein report, the authorship of that memorandum. Yoo recently published the book “Point Attack”, in which he redevelops that “emergency law” which was decisive - in his view - after 11 September<sup>6</sup>.

Fears that were somewhat similar to those expressed by Woo prior to his more recent *coming out*, had been voiced by Matthew Waxman, professor at the Columbia Law School and a high ranking official in the staff of the US State Department between 2005 and 2007, who complained about<sup>7</sup> the worldwide release of the photographs that documented the inhumane treatment inflicted upon prisoners in Abu Ghraib and Guantánamo: «*What image are we giving of the fight against terrorism?*», he commented.

In reality, using the words of Antonio Cassese, this system constitutes a “juridical limbo”, which is enriched by ad hoc clauses and provisions directed at further legitimating it.

For example, regarding Guantánamo, chief officials in Washington (it is, again, Cassese who recalls this<sup>8</sup>) “have decided that, since that camp is abroad, it was lawful not to apply to those prisoners the fundamental rights that apply to anyone who is arrested by a democratic state” like “the right of *habeas corpus* (that is, the fundamental right that we all enjoy [...] to contest the lawfulness of an arrest before a judge) or the right to know what charges you have been detained for and that to a fair trial”.

In those years, objections by critics of this system (particularly European jurists) that it was incompatible with the Geneva Convention were met by answers of this kind: «*It’s true, but it is precisely why we want to change the Geneva Convention*». And those who continued to condemn the

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<sup>5</sup> Alfred W. McCoy, of the University of Wisconsin, recalls this in “*Una questione di tortura*” (Socrates, Rome 2008, p. 277)

<sup>6</sup> Giulio Meotti, “*Parla Yoo, prof. tortura*”(Il Foglio, 13.12.2014)

<sup>7</sup> Florence, May 2006, conference of the N.Y. Univ. .

<sup>8</sup> “Tre motivi per fare in fretta” in La Repubblica, 10 December 2008.

use of torture were countered by excuses that were uncouth on the one hand (Steve Rodriguez, who was the supervisor of the interrogation of detainees in Guantánamo for around two years, between 2003 and 2005, asked this author in 2006 «*How can we obtain strategic information if we must apply the Geneva Convention? [...] It's not enough to offer them fishburgers!*») and apparently sophisticated on the other, like the one by the Harvard law professor Alan M. Dershowitz, which was repeatedly aired in popular American television programmes, in press articles and scientific texts. In essence, he claims that it would be acceptable to torture a captured terrorist who refuses to reveal where a bomb that is primed and will cause death and destruction.

Setting off from this hypothesis, Dershowitz concludes that it would be better, in such cases, for torture to be lawful in order to “reduce the bearing of abuses”. The scenario evoked by Dershowitz is extravagant and unreal: the hypothesis that a captured terrorist possesses key information about a nuclear bomb in Times Square - as stated by Alfred W. McCoy of Wisconsin University<sup>9</sup> in a way that may be agreed with - cannot serve as the foundation for laws and diplomatic choices.

Apparently sophisticated juridical theorisations have also been developed regarding the now sadly notorious practices of extraordinary renditions and the waterboarding of terrorist suspects before which a miscellaneous world, too often distracted and cynical, is capable, even in Europe, of discouraging comments of this sort: «*..after all, they have caught or tortured a terrorist!*».

However, kidnapping people to carry them to countries in which it is possible to torture them (doing so in the United States would contravene the Constitution!) cannot be justified in any way: in truth, this represents a veritable [form of] barbarianism and is common criminal activity. It is not by chance that Tyler Drumheller, formerly responsible for clandestine CIA activities in Europe from 2001 to 2005, that is, in the most intense period of *renditions*, did not limit himself to reciting a clear *mea culpa* for those useless and harmful practices, but he also explained that such operations were enacted by “paramilitary agents, courageous and colourful, who entered Iraq before the bombings and Afghanistan before the army”, later adding: “If they had not conducted military actions to live, they would have probably been bank robbers”<sup>10</sup>.

Regarding waterboarding, in Phnom Penh, in the Khmer Rouge Museum of Genocide, a complex of buildings designed for schools that has now taken on the name S-21, alongside the photographs of people who underwent that torture, you can still see the necessary instruments to carry it out: a tub that can contain a man, a plank crossing it to rest their head on and a sort of enormous watering system; naked, bound and hooded, men and women used to be immobilised in that tub, while their torturers poured imposing jets of water on their faces, giving rise to a sense of imminent drowning. The French also used to do this during the Algerian War, but that form of torture that is now known as waterboarding has been considered an “interrogation technique” by the US administration.

After Attorney General Alberto Gonzales resigned, president Bush nominated the retired federal judge Michael Mukasey to this post. When he appeared before the US Senate's Justice Commission on 18 October 2007, he basically refused to answer the question by a Democratic senator who asked whether he considered waterboarding a form of torture. He evasively stated that «*if waterboarding is equivalent to torture, then it is unconstitutional*». In turn, President Bush, who continued to support the candidature of Mukasey, who was later appointed Attorney

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<sup>9</sup> *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror*, Metropolitan Books, New York 2006 [Italian trans., *Una questione di tortura*, Socrates, Rome 2008, p. 277] –

<sup>10</sup> Tyler Drumheller with Elaine Monaghan, *On the Brink. An Insider's Account of How the White House Compromised American Intelligence*, Carroll & Graf Publishers, New York 2006, p. 36.

General, said that «*American citizens must know that any technique that we use is within the law*».

Then, when he was asked to clarify whether he deemed waterboarding to be legal, he added: «*I don't talk of the techniques. The enemy is outside*». Moreover, in April 2009, news was published in the United States that the first political authority to authorise the practice of waterboarding had been Secretary of State Condoleezza Rice in July 2002<sup>11</sup>.

Hence, the same conduct may be called torture if it is enacted by the Khmer Rouge in Cambodia or by the French in the 1950s on members of the Algerian Front de Libération Nationale but, instead, it is defined as an interrogation technique if it is adopted by the CIA or American military personnel.

“Interrogation techniques has also been the likely designation of other unequivocal methods of torture studied by the CIA to wear down the resistance of detainees, such as sleep deprivation or forcing them to listen to music at full volume for 24 hours a day (a system that aroused the protests of rock singers and bands whose songs were used) or sodomy and electric shocks.

To close on the issue of variously described renditions and torture, it is worth recalling the underlying “philosophy” within which they are framed: that of a search, at any cost, for informations deemed useful, even if they are not, with the resulting and violent breaks from the rules on which every democracy is founded. Rather, some people state that by sacrificing rights, removing someone from a legal process and transporting them to a “hard” or secret prison, it becomes easier to obtain useful information to prevent risks for collective security.

However, the Feinstein report does not just condemn those methods, it also clearly acknowledges that they are absolutely useless with regards to their declared purpose. Rather, they constitute an obstacle to investigations and a factor that results in a multiplication of potential terrorists: in fact, terrorist groups are thus provided new reasons to proselytise new followers. Consider the tragic stage setting of the even more tragic and cruel “beheadings” that the ISIS criminals present to the world through the online distribution of their video recordings: the victims, against the backdrop of a boundless desert, appear there in orange overalls, in an evident reference to those worn by prisoners in Guantánamo.

The uselessness of such methods has been repeatedly stated by European investigators in front of those people who obstinately continue to repeat that, precisely in this way, the CIA has obtained important information, enacted many arrests and avoided attacks. How many, which ones, when? No precise answer has ever been provided to such questions. If any, they have only been false answers (like the one on the localisation of Osama Bin Laden, which the US Senate denies occurred thanks to those techniques), which are perhaps most useful at a media level, but do not fool those who work in this field and people who are equipped with common sense.

Now, those same experts, no longer whispering and not just from the European tradition anymore, are stating that not a single piece of truly useful information has ever been obtained in this way. On this matter, Malcolm W. Nance, a counsellor of US antiterrorism (US Government’s Special Operations Homeland Security), has effectively recalled that during a trip on the Mekong river, he had “met a man who, under torture, had confessed he was a homosexual, a CIA spy, a Buddhist

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<sup>11</sup> Alberto Flores d’Arcais, *Nuovi documenti incastrano la Rice*, in *La Repubblica*, 24 April 2009

monk, a Catholic bishop and the son of the king of Cambodia. In reality, he was a school teacher, whose only crime was that he had once spoken in French”.<sup>12</sup>

This story is already well known and has been seen in Italy: in *Osservazioni sulla tortura* [Observations on torture], Pietro Verri, recalling the trial of the propagators [of disease] in Milan in 1630 and the death sentences against Guglielmo Piazza and Giangiacommo Mora, who had confessed under torture, wrote: «*with the name of torture, I don't mean a punishment imposed upon a culprit by a sentence, but rather the supposed search for the truth through torment*». He had also added that «*even when torture may be a method to discover the reality about crimes, it would be an intrinsically unjust means*».

After all, the analysis of the reasons put forward to justify secret interceptions and data collection by trawling lead to the same conclusions. The secret interception programme (Terrorist Surveillance Program, TSP) had already been revealed by the «New York Times» at the end of 2005: they are the telephone and e-mail interceptions undertaken at the time of the Bush administration on US citizens, without judicial authorisation.

It is a system which, due to some of its characteristics, represented an exception even in relation to what was envisaged by the Patriot Act, which was already quite exceptional. A succinct sentence dated 17 August 2006 by the Detroit federal judge, Anna Diggs Taylor, branded the interceptions in question «unconstitutional», ordering their immediate interruption. The Detroit judge defined them as «a very serious abuse of power by the president George W. Bush», who, «by not respecting the legislative procedures, has certainly violated the First and Fourth amendments of the Constitution» [on the protection of privacy], as well as «the doctrine of the separation of powers and the laws on administrative procedures»<sup>13</sup>.

During the trial, the White House had barricaded itself behind «national security reasons» to refuse to provide the details of its secret programme and, in an official note in which it announced its appeal against the judge's ruling, the Justice Department described the National Security Agency's (NSA) programme «a crucial instrument that provides the possibility of having an early warning system to thwart or prevent terrorist attacks».

In its report on 11 September 2008, the organisation Statewatch denounced “the digital tsunami” that would be unleashed on Europe: surveillance technologies targeting people's movements and transactions and the objects they use that would give rise to the creation of enormous databases that would be useful for the “war on terror”. US and European authorities (including the so-called Futures Group of the European Parliament)\* were cooperating in the project to develop these data collection systems which were meant to improve security and prevention. It is the same philosophy that serves as the basis for bank data controls using Swift (Society for Worldwide Interbank Financial Telecommunication) and for the collection of PNRs (Passenger Name Records), that is, a long list of personal details that must be provided by passengers leaving for the United States from various parts of the world (including 27 EU countries).

But what was discovered in 2005 and denounced in 2008 would later turn out to have only been a small fraction of what was happening out of view: since 2010 (the Wikileaks case), continuing

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<sup>12</sup> Cfr. <http://smallwarsjournal.com/blog/2007/10/print/waterboarding-istorture-perio>

<sup>13</sup> The sentence was issued in the case no. 06-CV-10204 by the mentioned judge of the Eastern District of Michigan-Southern Division. The lawsuit (*Aclu vs. Nsa*) was filed against the NSA, the US National Security Agency, by the American Civil Liberties Union and by other associations working in the field of human rights, in the interest of many US citizens who complained about being unlawfully subjected to telephone interceptions during conversations that took place for various reasons with people living in the Middle East.

with E. Snowden's escape to Russia and the sentencing of the soldier Manning, what has emerged is an even more serious and unacceptable breach of the privacy and fundamental rights of millions of people resulting from the indiscriminate collection of information concerning phone calls, e-mails, text messages, Internet use, air travel, bank transactions, DNA, etc.

Once again, this is all justified on the basis of the results that have been obtained: "they were useful to prevent attacks", it is claimed. But, if we accept that such an undermining of rights is acceptable in a democracy - and it isn't - can it at least be claimed that such extensive collections of data have actually been useful in terms of the fight against terrorism and the protection of citizens' security?

In reality, those who work in this field and are equipped with professionalism and experience are fully aware that these instruments are of no use with regards to their proclaimed goals: in fact, it is false that millions of pieces of data collected without prior selection criteria are useful against terrorists and criminals, or that they have been useful to capture fugitives or thwart attacks (which ones? Once again, nobody tells us).

Conversely, it is true that "too much data", especially if they are put together in a random way or using general and abstract categories (all the emails, all the text messages, all the movements, all the telephone contacts, all the bank transactions of millions of people...) turns out like having "no data", an obstacle for investigations.

Rather, positive results are obtained by working - following authorisation from the magistrature, as is required by Italian law - on more limited data in terms of their number that are logically organised, like emails and text messages between people who can reasonably be deemed suspects, personal communications intercepted in certain territorial settings, access to specific websites, etc.

Hence, not even the theoretical preconditions for such practices are acceptable: if someone has nothing to hide they do not have anything to fear from the collection of personal data, which is an acceptable "collateral damage" for the sake of security. This is a further philosophical outlook that was also born in the United States in the wake of the 11 September [attacks] which, however, was met by an uncritical acquiescence by many European governments, as well as the European Union itself.

Fortunately, other American jurists, academics and lawyers, both civilian and military, have repeatedly condemned the unlawfulness of the methods used in the War on Terror, including those used to acquire evidence against prisoners in Guantánamo and the secrecy imposed on the sources of evidence against the accused which made the trials against those detainees absolutely incompatible even with the rules of trials held before military courts. In fact, they were celebrated before Military Commissions.

The former Chief Prosecutor in Guantánamo, coronel Morris Davis of the US Air Force, also did so, first through a formal complaint about the pressure exerted by the Pentagon with regards to cases that were to be tried in Guantánamo before the military commissions and, after his refusal to use evidence acquired through unlawful systems, including waterboarding and other forms of torture, by resigning from his post. Furthermore, in April 2008, in one of the first trials celebrated in Guantánamo after the 2006 Military Commissions Act came into force, he appeared as a witness on behalf of Salim Ahmed Hamdan, who was accused of having been Osama Bin Laden's driver, and spoke of the pressure exerted upon him and of the reasons leading to his resignation.

In turn, the United States' Supreme Court, in a sentence issued in June 2008, struck a very hard blow against the Military Commissions Act, asserting the right of Guantánamo prisoners to resort to the ordinary justice system "because the laws and Constitution have been defined precisely to survive and not to wilt in extraordinary times. Because freedom and security can be reconciled within the framework of the rule of law"<sup>14</sup>.

## European repercussions

The delicate balance between the requirements of security and respect for citizens' rights and guarantees, or between morality and opportunism, nonetheless appears endangered in Europe as well. Over the last few years derogations, breaks and breaches of greater or lesser significance to the principle of legality have expanded.

The practices introduced by the Bush administration have been supported by further, "authoritative", theorisations by experts and political leaders, laden with significant allusions. It suffices to consider those by Tony Blair («The rules of the game are changing») and by the then president of the Italian Council of Ministers, Silvio Berlusconi, uttered in December 2005 («governments cannot be expected to fight terrorism with the rulebook in their hands»).

In particular, the period that immediately followed 11 September was characterised by the adoption of measures which, especially with regards to the internal legislations of the European Union's member states, followed the tracks laid by the United States' choices included in the Patriot Act as if they were almost "instinctive" reactions to terrorism.

This led to the strengthening of competencies that are typically reserved for police and intelligence apparatuses which, for example, led to the introduction in Great Britain of detention for as many as twenty-eight days for terrorist suspects (although the then British prime minister Gordon Brown would have preferred a limit of forty-two days) or the extensive use of *control orders* (which were fortunately the subject of a unanimous decision by nine judges from the House of Lords in June 2009 which effectively cancelled them), that is, administrative measures that contain heavy restrictions on freedom (electronic surveillance, curfews, bans on meeting specific people or frequenting specific places, bans on using the telephone and on leading prayer in mosques, etc.) adopted in relation to people suspected of terrorist activities who could not be legally tried as a result of the secrecy imposed upon the sources of evidence or suspicion against them.

In France, the *garde à vue* still exists, enabling the police to hold and interrogate people stopped for terrorism for four days without lawyers or magistrates intervening, but nonetheless obtaining statements that represent admissible evidence in trials. The weakening of jurisdictional controls has become glaring in the norms concerning the expulsion of foreigners for the purpose of preventing terrorism that are becoming widespread throughout Europe.

On this matter, it cannot be denied that relevant problems exist in western countries concerning those who move there with the deliberate goal of committing crimes, and it is obvious that, in such cases, other responsive logics, of prevention and repression, become compulsory. But we cannot accept wholesale solutions, that are the same and are applicable to any kind of migrant, or the expansion of expulsions for security reasons.

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<sup>14</sup> Sentence of 12 June 2008 in the cases, *Boumediene vs. Bush* and *Al Odah vs. United States*. They were decisions that, moreover, perfectly follow the track beaten by those of 28 June 2004 in the *Rasul v. Bush* case and of 29 June 2006 in the *Hamdan v. Rumsfeld* case that was already mentioned above.

Moreover, in a significant symmetry with the systems that have been theorised across the [Atlantic] ocean, several European governments, as the European Parliament and the Council of Europe denounced in 2007, either enabled or failed to obstruct the practices of extraordinary renditions and of “secret prisons”.

There has not been any answer to the successive resolutions by the Council of Europe or the European Parliament or the UN’s Council for Human Rights (which approved the report by the High Commissioner on the protection of human rights and fundamental freedoms in the fight against terrorism) which unreservedly condemned such practices.

Among many others, the European Parliament’s resolution on the situation of fundamental rights in the European Union approved on 27 February 2014 was up to date and unequivocal: it reiterates the request for States to fully shed light on their cooperation in the United States and CIA programmes on extraordinary renditions and on the “secret flights and prisons in the Union’s territory”, specifying that no space can be granted for impunity in this field, all the more so because “the ban on torture is absolute and, therefore, that state secrecy cannot be invoked to limit the obligation on states to investigate serious human rights violations”.

In spite of point 19 of the Resolution specifying that “the Member States’ reputation and trust in their commitment to protect fundamental rights will be at stake should they fail to comply with the above” and point 20 stressing that “the climate of impunity as regards the CIA programme has made it possible for fundamental rights violations to continue under EU and US counter-terrorism policies, as emphasised by the revelations concerning the mass espionage activities which were conducted under the surveillance programme of the US National Security Agency and by intelligence bodies in various Member States and which are currently being considered by Parliament”, the answer - I repeat - has consisted in absolute silence by governments, starting from that of the Italian government regarding the kidnapping of the Egyptian Abu Omar (Milan, 17 February 2003) which will also be mentioned below.

Returning to the US Senate’s report, it must be said that it clearly states that the CIA appears to have lied to the White House regarding the seriousness, duration and results of the techniques that were described, which would reduce the degree of knowledge and role of George Bush who, however, firmly defended the CIA’s conduct: “*The CIA’s men and women are patriots who serve their country, we are lucky to have them. If the report belittles their work it is entirely wrong*”<sup>15</sup>, declarations that are in perfect agreement with those spoken in the past, when he had described the CIA’s interrogations as “*humane and lawful*”. There have obviously been further, hard, responses against the conclusions and release of the Feinstein report which - it was argued - often employed distorted information in a targeted and selective way.

However, the Commission for the oversight of the US intelligence [service] disagrees and meticulously listed what it had ascertained, sometimes on the basis of admissions by several CIA officials: not just the use of the torture methods listed so far, but also other types including subjecting prisoners to freezing conditions, sleep deprivation, forcing them to stand for several hours without interruption, sometimes for as long as 72 hours; anal hydration and nourishment, subjecting the prisoner Khaled Sheik Mohammed to waterboarding 183 times; 119 detainees who ended up in the CIA’s hands of whom 39 were subjected to the harshest treatment, many of them kidnapped using the technique of extraordinary renditions and transferred to secret centres in third countries in eastern Europe (Poland, Lithuania and Romania) and in the Middle East; the use of two psychologists to oversee a part of the programme on behalf of the CIA.

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<sup>15</sup> La Repubblica, 9.12.2014



All of this was marked by various cases of mistaken identity and, as stated above, by an absolute lack of results in the fight against terrorism, insofar as confessions extorted through torture were revealed to be false or contained information that investigators already knew. In particular, twenty successes that had been claimed to result from this course of action in the fight against terrorism were belied, including the fact that Osama bin Laden's hiding place in Abbottabad was found thanks to the interrogations of Amman al Baluchi, aka "the cashier".

It was John McCain himself, the elderly Republican senator from Arizona who is known as a "hawk" for his foreign policy and was Obama's rival in the presidential elections in 2008, who contradicted colleagues from his own political party, pragmatically arguing that "*if we torture our enemies, we cannot expect them not to do so when they capture American soldiers... Torturing is a stain for our honour and it doesn't serve any good purpose*".

For those who do not recall this, McCain had been a prisoner of the Vietcong during the Vietnam War.<sup>16</sup> The N.Y.T. also published a chilling "confession" by Eric Fair, who was one of the tormentors in the Iraqi prison of Abu Ghraib in 2004 and, among other things, he stated the following: "*I conducted interrogations in Abu Ghraib. I have tortured... I still hear the sounds and continue to see the men who they called detainees. My son will never be able to be proud of me*".<sup>17</sup>

According to the American Civil Liberties Union (ACLU) and authoritative voices from the United Nations, those responsible for such acts of torture should be tried and punished, yet five former CIA chiefs (including George Tenet and gen. M. Hayden) replied with a document published by the Wall Street Journal on 10 December 2014, asserting the lawfulness of the CIA's actions, which were supposedly authorised by the political power at the time (the Bush government), rejecting the term "torture" and stating that through those actions, which were admittedly very tough, the American secret services had saved numerous innocent lives<sup>18</sup>. And if Dick Cheney argues that the CIA personnel should be honoured for their courage rather than tried, even John Brennan, the current head of the CIA and a former antiterrorist advisor to Obama, while he confirms that it was right to reject torture, has once again asserted - as he had already done in past years - that those brutal acts have saved human lives.<sup>19</sup>

In this climate, it is absolutely unrealistic to imagine that a trial on renditions and torture will ever be held in the United States. But at this point, it may be more important to learn of and know everything about those years in order for inhumane mistakes and violence not to be repeated. Thus, it is important to reveal any remaining secrets, including State secrets, which still conceal those inhumane practices. It is a wish that primarily refers to the duties of European governments.

In fact, once again, the United States have shown an ability to recognise and reveal their own mistakes, as already happened after the catastrophe in Vietnam<sup>20</sup>.

In fact, it is true, as has been said, that after all the "Feinstein report" reveals illegal facts and practices that were already notorious throughout the world, although all the details concerning those facts were not known, but this reason does not suffice to keep quiet about the importance of the hundreds of pages in the report which, once again, bear witness to the admirable ability for painful and tragic self-criticism that American democracy has always shown that it possesses.

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<sup>16</sup> F.Rampini, La Repubblica, 11.12.2014

<sup>17</sup> Eric Fair, "*Così infierivo sui prigionieri..*", La Repubblica 12.12.2014

<sup>18</sup> Corriere della Sera, 11.12.2014

<sup>19</sup> Corriere della Sera, 11.12.2014

<sup>20</sup> Vittorio Zucconi recalled this (La Repubblica, 10.12.2014)

Nor have the United States, prior to this development, ever denied their direct responsibility for the many cases of extraordinary renditions that have arisen throughout the world and were revealed, in particular, by the European Parliament (Claudio Fava's report approved on 14.2.2007) and by the Council of Europe (the reports by Dick Marty in June 2006 and June 2007), but rather, they claimed such acts. In short, the United States cannot be accused of hypocrisy.

Instead, many European countries supported their American allies, but they never admitted it and, rather, they have used the State secret to avoid providing the answers that, even before the magistrature, the aforementioned international assemblies had demanded from them.

This is not something new either. In fact, at the end of 2005 during an official visit to Europe, journalists had subjected Condoleezza Rice wherever she went to a barrage of questions that were all concentrated on the criticised modalities for the fight against terrorism that were adopted by the USA and, in particular, on so-called renditions. The Secretary of State's reply was always the same: the United States had never carried out kidnappings of terrorists in Europe without their allied governments being warned in advance and conceding their authorisation to do so.

As, at the time, the only European inquiry in which US citizens were investigated was that concerning the kidnapping of Abu Omar (Milan, 17.2.2003), journalists were asking Rice, in particular, if her claims also concerned that incident. The answer was always an icy "no comment".

From further news concerning the Feinstein report, it appears that, in the redacted part, there was also a list of 50 allied countries which supposedly cooperated with the CIA, in particular by allowing kidnappings and the "delocalisation" of acts of torture. Hence, the data and news about the attitudes of the Governments of countries allied to the USA in the verified cases of renditions and torture carried out abroad have not been released.

Thus, one must hope that the governments of such states, and particularly European ones, follow the American choice to reveal this information. The search for a juridical and historical truth would benefit from this as, in relation to that kind of crime, it has often been objectively obstructed, as effectively happened in Italy, with the state secret imposed on the Abu Omar case by as many as four successive governments, that is, those led respectively by the prime ministers Romano Prodi, Silvio Berlusconi, Mario Monti and Enrico Letta.

On this matter, it is worth recalling that, unlike the American Senate's Committee on the oversight of intelligence activities, the author of the courageous Feinstein report mentioned thus far, its analogous Italian parliamentary Committee (first named CoPaCo, Parliamentary Control Committee, and then CoPaSiR, Parliamentary Committee for the Security of the Republic) has never raised any objection concerning the imposing of a State secret on the activity of certain members of SISMi (the name of one of the two secret services that were operating in 2003, now called AISE) concerning the Abu Omar case.

Yet, some leading officials in that Service - including its Director at the time of the events - had been charged alongside 26 Americans for involvement in the Egyptian man's kidnapping. Instead, the 'affair' ended with a judicial outcome that was almost surreal: all the American defendants were definitively convicted as being responsible for the kidnapping, whereas the five Italian defendants, who the prosecution considered complicit with the American CIA agents, were able to benefit from the effects of the aforementioned State secret despite receiving long sentences in the appeal trial (Milan appeals court sentence of 12.2.2013).

In fact, as a result of the last two conflicts of attribution between the State's powers (respectively raised on 9.2.2013 and on 24.5.2013, by prime ministers Monti and Letta), the Italian Constitutional Court, which had recognised the Government's reasons, accepted the conflicts that had been raised with an explanation that was criticised by several jurists<sup>21</sup>, annulled their convictions.

As a result, on 24 February 2014, the Court of Cassation [Italy's highest appeal court], while it criticised the Constitutional Court and ruled on the appeal filed by the five members of SISMI against their conviction by the Milan Appeals Court on 12.2.2013, annulled it without deferment because "*due to the existence of the State secret, penal action could not be pursued*" against the aforementioned five defendants.

Hence, the wish for European governments to follow the choice made by the Americans soon is both current and reasoned. This would benefit the search for a juridical and historical truth that – for this kind of crimes – has objectively been obstructed, as happened in Italy in the Abu Omar case (and in other European states).

Moreover, considering that the sentences decreed are now definitive with regards to both the conviction of the twenty-six Americans (including - and it is a unique case - twenty-five CIA agents and one US Air Force officer, five of whom were also diplomats but were denied any form of immunity) and the obligation not to proceed against the five Italians, such an outcome would not determine any consequence for the people responsible for or involved in the kidnapping of Abu Omar, who was transferred and tortured in Egypt.

At most, it would be a "revelation of secrets" that would be useful for the assessments by the European Court on Human Rights in Strasbourg, before which the appeal filed by the lawyers of Abu Omar and his wife Ghali Nabila is pending, which complains about the violation by the Italian government of various principles established in the European Convention on Human Rights (in particular, those provided in articles 3, 5, 6, 8 and 13 of the ECHR).

In this sense, however, it is not encouraging to record the silence maintained by the new Italian foreign minister Paolo Gentiloni when he met the US Secretary of State John Kerry in Washington precisely in the days that followed the release of the Feinstein report. He criticised the American secret services for the "*unacceptable methods*" they used, which are "*not compatible with the values of a democracy*", before expressing appreciation for the act of transparency that intervened as "*an example ... an act through which, in practice, America accuses itself*", adding that, however, this "*does not reduce the condemnation, nor the seriousness of what happened*", because "*you cannot come to compromises to reduce human rights: it is not lawful to torture in order to avoid the risk of attacks*".

Not a word was spent on the Abu Omar case, a victim of kidnapping and acts of torture, nor on the choice by as many as four Italian governments to impose the State secret before the Milan Judicial Authority on pieces of evidence that, according to the prosecution, concerned the responsibility of Italians!

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<sup>21</sup> Among other things, the Constitutional Court's sentence states that: "*...redacted...With such a prospect, hence, it appears difficult to deny that the cover provided by the secret - whose effective scope can obviously only be drawn by the same authority that imposed and confirmed it, and which is the holder of the related prerogative\* - is cast over all the facts, information and documents concerning any operative directives, internal workings of an organisational and operative kind, as well as upon relations with foreign Services, even if these concern renditions and the kidnapping of Abu Omar. All of this applies, of course, on condition that the acts and conduct of the agents are objectively directed at the safeguard of the State's security.*"

Nor was there any hint of a possibility of reviewing that choice, all the more so as it had been repeatedly justified by the need not to harm relations with the American allies, who - however - have given up any secret concerning the activities of their own secret agents and the conduct of which they were responsible, if we accept that such secrets had ever existed previously. Then, one can only disappointedly cite Furio Colombo's conclusions: *"..it is true that the State secret burdens that country (author's note: the United States) and our own, where, however, it is declared ten times as often as in the USA, where senators do not make a stand like Feinstein, where for decades investigations and trials and the verification of facts, in many cases very serious ones, have been blocked"*<sup>22</sup> and where - adds this author - the criminal offence of torture does not exist yet, due to Italian non-compliance with the obligations arising from the UN Convention which it has signed.

### **"After Paris"**

Countering international terrorism is become increasingly tough and difficult and the tragedies carried out by criminals all over the world are multiplying. After the mass killings in Paris on the past 7 and 9 January, not only are forms of veritable Islamophobia resurfacing, but so are widespread calls for decisive methods, those "dirty tricks" which are supposedly the secret services' prerogative.

As far as ethnic-religious intolerance is concerned, this is not the place to talk about it in depth, although it must be stated once again that, if it is right to demand that the rules of our society must be fully observed also by those who, coming from distant countries, have only come to know them recently, it is likewise correct to recall that, in order for this to happen, it is necessary for those who are institutionally tasked with the duty of ensuring their respect to be subjected to them.

It is such an evident principle that it may be further specified using the words of the writer-journalist Jason Burke: the battle that is underway between the West and terrorism "is not a battle for global supremacy. It is a battle to conquer hearts and minds. And it is a battle that we and our allies in the Muslim world are losing"<sup>23</sup>.

With regards to the Secret Services or Information Agencies, they take on an essential role in every democracy, and flanking the expression "dirty tricks" to the Services' activity is offensive, first of all for those who are their members, engaged in activity to prevent the risks to the security of States and citizens.

However, hearing the word "intelligence" so often and out of context refers us to the formidable confusions in the international community between the role of the Services and that of the judicial police in countering terrorism: the latter works to identify and acquire evidence to be used in trials and evaluated by judges, whereas the information services' competence is, as mentioned above, the prevention of risks.

Thus, it becomes clear that the information which they collect will only feature in trials, at least according to Italian law, when it assumes the form of recognised acts that are envisaged in the code of penal procedure. This means that they cannot be information notes without a signature, based on confidential or secret sources, but acts that can be attributed to identified persons who assume responsibility for what they have said and who may be subjected to questions by public prosecutors and defendants' lawyers in the courtrooms, in front of judges.

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<sup>22</sup> Furio Colombo: *La tortura e le ragioni di Stato* (Il Fatto Quotidiano, 7 January 2015)

<sup>23</sup> Jason Burke, *Al-Qaeda: The True Story of Radical Islam*, I.B. Tauris, London 2003 [Italian trans., *Al Qaeda, la vera storia*, Feltrinelli, Milan, 2004, p. 288].

In my view, this subdivision of competencies constitutes a compulsory technical choice, and the only correct way to use forces and institutions that must all be deployed in this all-out struggle. In this way, it will be possible to avoid overlaps in the activities that must be undertaken and misunderstandings on the rules of conduct, such as those which surface when the judicial police tends to act as if it were an information service and vice-versa. It will also help to avoid useless and often unfounded alarms about hypothetical plots or thwarted attacks, alarms which - when they are unfounded - cause insecurity and may prejudice investigations.

Within this context, the role of the magistrature is clear: to ensure everyone's subjection to the law, in equal conditions, even in the presence of tragic emergencies. This affords moral authority to those who intend to dissuade others from terrorism, convincing them that effective alternatives to improve their own living conditions and those of the communities they belong to exist, and they are practicable. Conversely, every time that force is used, it ends up providing the enemy further evidence of the clash of civilisations on which they base their radicalisation effort.

Hence, in spite of calls to do so, there is no need for attempts to bypass the judicial system by resorting to interventions by the intelligence services. A recent report by the UN High Commissioner on the protection of human rights and fundamental freedoms in the fight against terrorism even states that the drifts enacted by states in this field do not just include the principle of legality that is repeatedly trampled on, including as a result of a lack of precision in the definition of criminal offences, but also the setting aside of guarantees that serve to prevent abuses that stem from an excessive resort to intelligence agencies. The same report's final recommendations also state that the ban on torture and inhuman and degrading treatment is included in a *ius cogens* norm and is therefore binding.

Against any type of terrorism and against international terrorism, hence, as the historical Feinstein report has reminded us, there is no need for illegal practices which - as shown by the US Senate - are harmful and useless, setting aside their incompatibility with the principles on which our democracies are founded.

Rather, it is necessary to deploy a virtuous synergy of all available resources, including the judicial police, magistrature, information services, agreements between governments for the purpose of better coordinating investigations. There is also a need, at the judicial level, for homogeneous intervention systems, and to defeat the enduring conviction by certain states - which are also found among the European Union's members - that the information available to them should only be made available to other states when their internal requirements have been exhausted, following slow and belated bureaucratic procedures.

Instead, there is a need to affirm and enact the rule according to which nobody is the exclusive owner of information that is useful for investigations and that information exchange must be immediate and spontaneous. These are obvious principles, which have already been written into conventions, but they are too often disregarded.

Moreover, in Europe, the commendable choices that have strengthened the fight against terrorism, including the establishment of Eurojust and Europol, the adoption of the European arrest warrant, the framework decision on the establishment of joint investigative teams and that by the European Council which has tackled and largely resolved the problems in the definition of an act of terrorism, are insufficient. There is a need for a decisive political turn to holistically direct all the governments' antiterrorist activity, none of which may claim leadership or impose modes of action that stray from the bounds of the law and respect for people's fundamental freedoms upon its allies.

To explain our duties, once again, the image evoked by the pen of a judge is revealing: the former president of the Israeli Supreme Court, Aharon Barak, wrote in an historic and oft-cited sentence in 2004 that democracies are forced to fight terrorism with a hand tied behind their backs, but also that this apparent weakness ends up explaining the reason for the endurance and success of democratic systems.<sup>24</sup>

However, he also stated that “the protection of rights, *per se*, is one way of understanding security” and that “law needs the Muses precisely when weapons are doing the talking”.<sup>25</sup>

These images and reflections must be set alongside the Feinstein report, for which unbounded gratitude to the US Senate is due.

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<sup>24</sup> Aharon Barak cites this part of the sentence in his *The Judge in a Democracy*, Princeton University Press, Princeton 2006, p. 283

<sup>25</sup> Speech on occasion of the granting of the *honoris causa* degree on 18.5.2003 by the Brandeis University of Waltham (Massachusetts)