INTRODUCTION

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1. State secrecy in historical perspective

The term *secret* is rooted in the Indo-European radix -*krei*, corresponding to the Latin -*cern*, which, together with the prefix *se*-, converged into the verb *secernere*, meaning 'to separate, to distinguish'. [1] By its etymology, therefore, a secret is what it is known by someone, that it is also separated from the knowledge of others.

It follows that 'State' *secrets* [2] are, by definition, pieces of information known only to governmental authorities, and kept from foreign States and the rest of society. [3] In fact, since ancient times governmental authorities have relied on secrecy as a vital tool to protect and uphold public order [4] and their political independence, preventing the disclosure of information to potential enemies. [5]

As such, secrecy has always been entrenched in the internal and external exercise of political authority, [6] acting as a structural element of different forms of government, either authoritarian or democratic. [7] Whilst the recourse to State secrets is indeed often seen as inherently undemocratic, it is the dialectic relationship between secrecy and transparency that seems, at most, to reveal the level of democracy of a spe-

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[1] A. Ernout, A. Meillet, *Dictionnaire étymologique de la langue latine: histoire de mots*, Paris, 1932, p. 172.

[2] The decision to adopt mainly the expressions 'State secrets' and 'State secrecy' has been driven by their growing use in international documents and judgments. In the book, however, the terms State secrecy and government secrecy are often used interchangeably.

[3] See B.A. Garner (ed.), *Black's Law Dictionary*, St. Paul, 1999, which defines State secret as "the name that it is given to information that concerns the matters of governments that cannot be and should not be revealed even by witnesses in court".

[4] A. Marrone, *Il nomos del segreto di Stato*, in G. Illuminati (ed.), *Nuovi profili del segreto di Stato e dell'attività d'intelligence*, Torino, 2011, p. 4.

[5] *Ibid*., p. 13.

[6] R. Orestano, *Sulla problematica del segreto nel mondo romano*, in AA.VV., *Il segreto nella realtà giuridica italiana*, Padova, 1983, p. 95 ff.

[7] A. Marrone, *Il nomos del segreto di Stato* cit., p. 11.

cific society: the more information is made public and the more the reasons for secrecy are to be found in the community's interests, the more the system could be regarded as intrinsically democratic. [8]

1.1. *Arcana imperii* in Ancient Rome

The notion of government secrecy in Ancient Rome was generally conveyed by the compound terms *arcana imperii* [9] and *secreta imperii* and – following the establishment of the *res publica* in the 6th century B.C. – by the expression *secreta ad rem publicam pertinentia.* [10]

Like the word *secretum*, the Latin idiom *arcanum* also carried the idea of a 'separation' of knowledge. It was indeed rooted in the term *arca*, which was used to indicate the silver case in which the Empire's treasure was contained. [11]

According to their etymological roots, the expressions *arcana imperii* and *secreta imperii* originally referred to those *res* that, if stolen, would have impaired the survival of Rome (*pignora imperii*). [12] These include, for example, the *ancilia* of Mars, whose theft by the enemies it was believed would trigger the end of the Roman Empire. [13]

However, parallel to the expansion of the Roman Empire, the list of *arcana imperii* also grew to the point that, even in lack of any normative discipline concerning secrecy, it became possible to identify in practice at least three categories of sensitive information: the *secreta ad bella pertinentia* (military secrets); religious secrets; and those pieces of information relating to the internal security and external policy of the Empire. [14]

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[8] *Ibid*. See also C. BONZANO, *Il segreto di Stato nel processo penale*, 2010, Milano, p. 3. As to the inherent tension between democracy and secrecy see, *inter alia*, E. DUHAMEL, *Secret et démocratie*, *Matériaux pour l'histoire de notre temps*, vol. 58, 2000, pp. 77-80. On the relationship between secrecy and democracy more generally see also A. GUTMANN, D.F. THOMPSON, *Democracy and Disagreement*, Cambridge, London, 1996, p. 95 ff. and D. MOKROSINSKA, *The People's Right to Know and State Secrecy*, *Canadian Journal of Law & Jurisprudence*, vol. XXXI, 2018, pp. 87-106.

[9] See A.X. FELLMETH, M. HORWITZ, *Guide to Latin in International Law*, Oxford, 2009, p. 36 (*Arcana imperii*). About the early use of secrecy see also M. BUTTI, Aracana Imperii. *Sulla geneaologia del segreto*, in L. FORNI, T. VETTOR (eds.), *Sicurezza e libertà in tempi di terrorismo globale*, Torino, 2018, pp. 193-204.

[10] C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d'informazione e il segreto di Stato: legge 3 agosto 2007, n. 124*, Milano, 2008, p. 461.

[11] A. ERNOUT, A. MEILLET, *Dictionnaire étymologique de la langue latine*, cit., see *arca*, *arceo*, *arx*.

[12] The first use of the expression *arcana imperii* is in P.C. TACITUS, *Historiae, liber* I.4 ("*finis Neronis ut laetus primo gaudentium impetu fuerat, ita varios motus animorum non modo in urbe apud patres aut populum aut urbanum militem, sed omnis legiones ducesque conciverat, evulgato imperii arcano posse principem alibi quam Romae fieri*").

[13] C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d'informazione e il segreto di Stato*, cit., p. 463.

[14] *Ibid.*, p. 465.

The Digest of Justinian contains two norms dealing with *secreta ad bella pertinentia* and, more specifically, with the prohibition of their disclosure to the enemy. Both norms refer to a particular class of militaries – the *exploratores* – who were generally entrusted with the task of acquiring information on the morphological features of the battlefield – i.e. those *milites* who were actually likely to encounter the enemy. [15] According to title 6.4 of the 16th section of the 49th *liber* of the Digest: "*exploratores, qui secreta nuntiaverunt hostibus, proditores sunt et capitiis poenas luunt*" ("the explorers who reveal secrets to the enemies are betrayers and can be sentenced to death"). [16]

Title 3.4 of the same section of the Digest instead establishes that: "*is qui explorationem emanet, hostibus insistentibus, aut qui a fossato recedit capite puniendus est*" ("the explorer who stays far from the camp longer than the time established while the enemies are close and who goes away from the camp should be condemned to death"). [17]

The list of military secrets grew with time and in the face of new defensive necessities. For instance, the Theodosius II's Code of 438 B.C. expressly envisaged the death sentence for those guilty of disclosing to the barbarians the secrets concerning the construction of ships. [18] At that time, the most important cities of the Roman Empire were located along the coast and thus information related to the construction of ships would have strengthened the enemies' position and threatened the Empire's survival. [19]

Besides military secrets, priests in Ancient Rome were privy to information that was treated as secret, for examples the names of the guardian gods of Rome (known only to the highest pontiff). [20] At that time, in fact, it was believed that invoking the name of the guardian gods of Rome in a specific order could cause the Empire's downfall. [21] Accordingly, if disclosed to the enemy, similar information would have threatened its survival.

Finally, coming to the third category of 'Roman secrets', the members of the Senate were not allowed to disclose any information related to internal security and ex-

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[15] On the meaning of *exploratores* see, *inter alia*, P. PRETO, *Le parole dello spionaggio*, *Gnosis - Rivista italiana di intelligence*, vol. 6, 1996.

[16] D.49.16.6.4 (unofficial translation).

[17] D.49.16.3.4 (unofficial translation).

[18] Theodosius Code, Liber XI, 40.24: "(…) *His, qui conficiendi naves incognitam ante peritiam barbaris tradiderunt propter petitionem viri reverentissimi Asclepiadis Chersonesitanae civitatis episcopi imminenti poena et carcere liberatis capitale tam ipsis quam etiam ceteris supplicium proponi decernimus si quid simile fuerit in posterum perpetratum*". For the translation and commentary of the Theodosian Code see C. PHARR, *The Theodosian Code and Novels and the Sirmodian Constitutions. A Translation with Commentary, Glossary and Bibliography*, Princeton, 1952.

[19] C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d'informazione e il segreto di Stato*, cit., p. 467.

[20] See R. ORESTANO, *Sulla problematica del segreto nel mondo romano*, in AA.VV., *Il segreto nella realtà giuridica italiana*, cit., p. 113.

[21] *Ibid.*

ternal strategies that the Assembly as a whole had decided should be kept secret. According to Valerius Maximum, this prohibition was breached only once by senator Fabius Maximum, who accidentally revealed to a Carthaginian that Rome was planning to begin a third war against Carthage.[22] Although it is unknown whether it was the case for Fabius Maximum, exclusion from the Senate was certainly a punishment for the accidental disclosure of 'classified' information' (whilst the intentional disclosure would have been seen as *crimen proditionis* – 'betrayal').[23]

The authority to invoke secrecy, however, was not an exclusive prerogative of the Senate, although, as said, it certainly played a key role in establishing what information was categorised as secret. Indeed, in light of the structure of the Roman system, such authority was shared among the Senate, the priests and the *comitium* (Curiate assembly), each one being competent to establish what was to be kept secret within their respective spheres of influence.[24]

As already mentioned, the intentional disclosure of sensitive information was seen as *crimen proditions*. Although that expression in Ancient Rome covered all those acts that amounted to betrayal, it is believed that originally this term only referred to the disclosure of secrets.[25] This seems to be confirmed by the same meaning of the term *proditio*, which means 'disclosure'.

The monarch and then, in the Republican era, the highest authorities (usually the consuls) were entitled to the repression of the *crimen proditionis* by ascertaining, in public hearings, whether the accused had effectively disclosed sensitive information.[26] Such disclosure would have impaired the *maiestas* of the Roman people[27] and was punishable by death.

In sum, even in Ancient Rome there was a belief that some information, if made public and thus also available to the enemy, would have been likely to threaten the survival of the Roman Empire. This information was of military, religious or political nature and corresponded to the core of knowledge that, *de facto*, allowed its *grandeur*.

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[22] VALERIUS MAXIMUM, *Factorum et dictorum memorabilium* (I century B.C.), Liber II, 2.1: "*Adeo autem magna caritate patriae tenebantur, ut arcana consilia patrum conscriptorum multis saeculis nemo senator enuntiauerit. Q. Fabius Maximus tantum modo, et is ipse per inprudentiam, de tertio Punico bello indicendo quod secr<et>o* (…)".

[23] C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d'informazione e il segreto di Stato*, cit., p. 469.

[24] *Ibid.* On the notion and functions of the *Comitium* see D. GARGOLA, *Roman Assemblies*, in M. GAGARIN, E. FANTHAM (eds.), *The Oxford Encyclopaedia of Ancient Greece and Rom*e, Oxford, 2010, p. 282 ff.

[25] C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d'informazione e il segreto di Stato*, cit., p. 471.

[26] *Ibid.*, p. 474.

[27] Justinian's Digest, D.48.4.1: "*proximum sacrilegio crimen est quod maiestas dicitur. Maiestatis autem crimen illud est, quod adversus populum Romanum vel adversus securitatem eius committitur: quo tenetur is* (...) *quive hostium populi Romani nuntium litterasve miserit*". See also D.48.4.10.

1.2. State secrecy and the advent of the Modern State

Although the importance of concealing sensitive information is something that all governmental authorities throughout history have understood, [28] the ancient notion of *arcana imperii* was really recovered and extensively theorised from the 16th-17th centuries, parallel to the establishment of the Modern State. [29]

At that time, many treatises engaged with the doctrine of the *raison d'état* (reason of State) and identified secrecy and dissimulation as fundamental instruments to ensure governability. In *La Ragion di Stato* (1589) Giovanni Botero wrote, for instance, that:

> "For those who deal with negotiations of the highest importance, concerning either peace or war, secrecy is the most important thing (...). The intentions of the Prince, if kept secret, are effective and powerful but, as soon as they are disclosed, lose their value granting advantages to the enemies (…)". [30]

Accordingly, Botero outlined how dissimulation – that is "to pretend not to know or care for what you know and estimate" – [31] should have represented an element of primary importance for the rulers.

Botero's work also revealed an increasing attention for the 'internal' relevance of secrecy. While, as previously pointed out, the Roman *arcana imperii* had mostly referred to that information that, if revealed to foreign enemies, would have hindered the survival of Rome, Botero's concept of *raison d'état* mainly dealt with the importance of secrecy in allowing the Prince to retain power over his subjects. [32] In this respect, Botero was largely inspired by *Il Principe* of Machiavelli, where simulation and dissimulation had already been described as powerful instruments that the Prince could use to preserve the State. [33]

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[28] History provides many examples of the creation of intelligence services and of attempts by governments to keep secrets from foreign enemies. In the 13th century, for instance, Genghis Khan relied on secret agents to obtain relevant information that could support his expansionist goals and even resorted on dissimulation to deceive his rivals. During the Middle Age, the Byzantines' Empire fiercely protected information concerning the 'Greek fire', one of the most powerful weapons to exist at that time, which gave them a huge military advantage on the battlefield. See C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d'informazione e il segreto di Stato*, cit., p. 5 ff.

[29] See, *inter alia*, M. CATANZARITI, *New* Arcana Imperii, *Journal on European History of Law*, vol. 2, 2012, p. 59 ff.

[30] Unofficial translation. G. BOTERO, *La Ragion di Stato*, Venezia, 1589, p. 45.

[31] *Ibid*., p. 46. In the original version: "(…) *E dissimulazione si chiama un mostrare di non sapere o di non curare quel che tu sai e stimi* (…)". Botero also made an example of the negative consequences that can follow when the ruler does not resort to the *ars dissimulandi*, recalling the rebellions that burst out when Alfonso Duca di Calabria revealed his intention to rearrange the Kingdom of Naples.

[32] According to Botero, secrecy makes the Prince similar to God and raises expectations and dependence among his subjects, who ignore his real intentions. See again G. BOTERO, *La Ragion di Stato*, cit., p. 52.

[33] N. MACHIAVELLI, *The Prince*, ed. and trans. by A.M. Codevilla, New Haven, 1997, p. 66.

During the 16th and 17th centuries, many political writers focused, in fact, on secrecy and the management of knowledge as possible sources of power, [34] arguing, *inter alia*, that the rulers should even disregard, at times, the law and ethics in order to defend the State apparatus and their own power. [35] Secrecy was generally seen as an essential tool in the hands of the Prince to preserve the very existence of the State.

As a further example, Arnold Clapmar traced a link between the doctrine of the reason of State and the ancient *arcana* and even enlisted among them the *simulacra*, i.e. the ways in which the rulers could show their adherence to a specific form of government also when, in practice, they followed a different one. [36]

At that time, however, there was not a unanimous attitude towards government secrecy. Whilst most of the political literature endorsed the 'culture of political mystery' as a fundamental aspect of the reason of State, [37] other authors – among which, John Streater – vehemently supported universal knowledge. [38]

On the one hand, this doctrinal debate mirrored what has been described as the "emergence of a discourse on dissimulation among the dominant social groups of the Old Regime" [39] in Early Modern Europe, which also impacted on the management of the affairs of State. On the other hand, it ended up 'codifying' the use of secrecy and the *ars dissimulandi* from governmental authorities, thus removing it from the realm of tacit practice.

Whilst the *raison d'état* doctrine mainly linked secrecy to the protection of the *salus rei publicae*, [40] and not to the personal power of the ruler, it nonetheless entrusted him with the task of assessing what constituted national interest and thus of potentially triggering the use of secrecy claims, without requiring, to this end, the establishment of legal parameters or the provision of institutional oversights. This theoretical construct is reflected in the practice of that time. In the United Kingdom (UK), for instance, the King could ban the disclosure of sensitive information to protect existing

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[34] V. KELLER, *Mining Tacitus: Secrets of Empire, Nature and Art in the Reason of State*, *British Journal of History of Science*, 2012, p. 3.

[35] R. FOXLEY, *Marchamont Nedham and Mystery of State*, in G. MAHLBERG, D. WIEMANN (eds.), *European Context for English Republicanism. Politics and Culture in Europe, 1650-1750*, Farnham, 2013, p. 56. It is worth clarifying that, as appears also from Botero's words, the political writers of that time analysed not only the role of dissimulation and secrecy in the relationship between the rulers and their subjects, but also with reference to international relations.

[36] P. DONALDSON, *Machiavelli and Mystery of State*, Cambridge, New York, 1989, p. 113.

[37] M. NEDHAM, *Mercurius Politicus*, 1651, p. 1111. In his work Nedham endorsed the division existing between the people and the Senate in Ancient Rome, which, according to him, allowed secrets to be handled by men wise and experienced enough for similar State affairs.

[38] J. STREATER, *A Glympse of that Jewel, Judicial, Just, Preserving Libertie*, London, 1653, p. 1.

[39] G.R. SNYDER, *Dissimulation and the Culture of Secrecy in Early Modern Europe*, Berkeley, Los Angeles, London, 2009, p. 15.

[40] In the 17th century, however, some authors, such as Cardinal Mazarin, ended up erasing any reference to a moral or political imperative guiding the need for secrecy. See *ibid*., p. 236.

State secrets (the so-called ‘Crown privilege’). This prerogative was listed among the King’s royal prerogatives and was placed beyond the reach of the law.

As Nathaniel Bacon argued: “It may be the great Lords thought the Mysteries of State too sacred to be debated before the vulgar, lest they should grow into curiosity”. [41] Along the same line, in 1620, James I addressed the UK parliament as follows: “We discharge you to meddle with Matters of Government or Mysteries of State”. [42] Similarly, in France, secrecy constituted an exclusive prerogative of the sovereign, who was alone entitled to decide if sensitive information could or could not be disclosed. [43]

More generally, as it has been noted:

> “in [the] monarchical order, secrecy was a wholly legitimate practice that protected the Prince’s private affairs from the eyes of third parties – included his very own people. Secrecy, organized to the advantage of the Prince and legitimized by his status, constituted the routine paradigm of political activity (...)”. [44]

Following the transition to liberalism and democracy in most European countries during the 18th and 19th centuries, however, the Prince or King was no longer sovereign and governmental authorities, regardless of the form of government in place, started to be held accountable for their actions. Secrecy thus became the exception – subjected to strict limits – while, as a rule, the public (the people sovereign) should always be informed about matters of State. This transformation, linked to the pervasive rise of the transparency discourse, inevitably affected also the regime of State secrecy, as a prelude to the upsurge of freedom of information and transparency laws during the 20th century. [45]

Notably, however, the 19th century also marked the shift towards the enactment of laws specifically protecting State secrets, especially against press disclosure, beginning with the 1911 UK Official Secrets Act. [46]

That notwithstanding, from a substantive point of view, the ancient doctrines of *arcana imperii* and *raison d’état* still partially shape the current regulation on State secrecy, as it is evident, for example, from the executive’s discretionary power in in-

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[41] N. BACON, *An Historical and Political Discourse of the Laws and Government of England, From the First Times to the End of the Reign of Queen Elizabeth*, London, 1739, p. 176.

[42] Proceedings and Debates of the House of Commons in 1620 and 1621 collected by a Member of that House, Oxford, 1766, p. 326. On the topic see, *inter alia*, G. CARAVALE, *Aspetti della disciplina del segreto di Stato nel Regno Unito: il* Justice and Security Bill *del 2012*, *Nomos*, 2012, pp. 2-3.

[43] For an overview see L. BELY, *Les secrets de Louis XIV: mystères d’Etat et pouvoir absolu*, Paris, 2013.

[44] A. COLSON, *The Ambassador Between Light and Shade: The Emergence of Secrecy as the Norm for International Negotiation*, *International Negotiation*, vol. 13, 2008, p. 185.

[45] For a brief overview of government secrecy and the continuous upsurge of transparency laws in the 20th century, see D.J. METCALFE, *The History of Government Transparency*, in P. ALA’I, R.G. VAUGHN (eds.), *Research Handbook on Transparency*, Cheltenham, Northampton, 2014, pp. 247-262.

[46] H. NASU, *State Secrets Law and National Security*, *International and Comparative Law Quarterly*, vol. 64, 2015, pp. 368-369.

voking secrecy and by the recurring reference – in most doctrines governing its use and in current practice more generally – to the existence of an internal or external security threat as a precondition for resorting to it.

2. States' recourse to secrecy: current trends

Secrecy is an inherent part of the organisation of governmental power and, as such, is nowadays embedded and protected in most domestic legal systems. In fact, it is seen as a vital tool for defending national security interests and protecting foreign and diplomatic affairs against potential threats. Information whose disclosure is believed to undermine the State's survival or to put it at great risk, or even to disrupt mutual trust with other States, are labelled 'State secrets' and thus will not be subject to public scrutiny.

This circumstance rests on the widely accepted assumption that States have a legitimate prerogative to protect their secrets, especially in relation to diplomatic negotiations, certain intelligence sources and military operations: [47] a prerogative which is not limited to interstate relations (*vis-à-vis* other States), but also applies to intrastate scenarios (*vis-à-vis* those parts of the society not holding executive power). In fact, as noted by Georg Simmel:

> "if an objective controlling structure has been built up, beyond the individual interests, but nevertheless to their advantage, such structure may very well, by virtue of its formal independence, have a rightful claim to carry on a certain amount of secret functioning without prejudice to its public character, so far as real consideration of the interest of all is concerned". [48]

State secrecy claims usually take the form of executive acts provided by the law. However, other State practice may also interfere with the disclosure of information, either against a request of access or in the course of judicial proceedings. Moreover, certain rules governing proceedings before international and regional courts and tribunals also provide for the possibility not to disclose State secrets. [49]

Governmental authorities' recourse to doctrines aimed at preserving State secrets may create troubling consequences. First, the use of secrecy arguments, at least when they result in the dismissal of proceedings, can, in practice, grant immunity to wrong-

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[47] Examples concerning the admissibility of a certain degree of secrecy are found in the Report of the United States Commission on Protecting and Reducing Governmental Secrecy, issued on 3 March 1997, p. 6.

[48] G. SIMMEL, *The Sociology of Secrecy and of Secret Societies*, *American Journal of Sociology*, vol. 11, 1906, p. 469.

[49] One example is Article 72 of the Statute of the International Criminal Court (Rome, 17 July 1998, entered into force on 1° July 2002, 2187 UNTS 90), which upholds the protection of national security information.

doers from either criminal or civil consequences. Second, secrecy claims may hinder the possibility for one or all of the parties to proceedings to know or use relevant evidence in court. Third, even 'out of court', classification of information and denials of disclosure based on secrecy and classification claims may end up drawing a 'black veil' over facts of historical relevance and obscuring the responsibilities of those involved.[50]

Two examples may help to highlight the issues at stake. On 17 February 2003, the imam Hassan Mustafa Osama Nasr, also known as Abu Omar, an Egyptian citizen with the status of political refugee in Italy, was abducted in Milan and forcibly removed to Egypt. Once in his country of origin, the imam, who was suspected of being involved in terrorist activities, was held *incommunicado* and subjected to torture and other cruel, inhuman and degrading treatment until his liberation in 2004. After his first release, however, he was imprisoned again and, starting from 2007, was confined to house detention. Following the complaint filed by Abu Omar's wife, the Office of the Public Prosecutor of Milan opened a criminal file and, at the end of the preliminary investigations, charged twenty-six United States (US) citizens – Central Intelligence Agency (CIA) agents and diplomatic representatives – and six Italian citizens – former members of the intelligence services – for their part in his abduction and removal. The investigations concerning the Italian citizens resulted in a long judicial saga, in which the executive repeatedly invoked State secrecy in order to prevent the use as evidence in court of documents related to the existing relationships between Italian and US intelligence services (although they were already publicly available). In 2014, as a result of the repeated invocation of State secrecy claims, and in line with the Italian Constitutional Court's stance, the Supreme Court eventually annulled a previous conviction judgment and dismissed the case on the grounds that judicial action could not continue due to State secrecy.

In 2005, ZZ, a French and Algerian citizen, who had permanently resided in the United Kingdom since 1990, was refused permission to enter the aforesaid country upon his return from a trip to Algeria, after that the UK Secretary of State had cancelled his right of permanent residence. In 2006, ZZ tried once again to enter the United Kingdom but was refused return due to national security concerns and was removed to Algeria. ZZ lodged an appeal against the Secretary of State's decision before the Special Immigration Appeals Commission (SIAC). During the proceedings, the Secretary of State objected to the disclosure of evidence to the appellant and required the application of a closed material procedure (i.e., a specific prerogative for judges to decide on a claim by relying on material that has been disclosed only to one of the parties). The SIAC upheld the Secretary of State's request and, according to its

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[50] As this book focuses on secrecy, it does not take into account other means that can be relied upon in order to conceal the truth or change the course of judicial proceedings, such as, for instance, distorted or fake documents. On this topic see, e.g., K. KOUROS, *How Official Documents and Statements can Subtly Subvert the Essence of Protracted International Problems related to Gross Violations of International Law and Human Rights with Special Focus on the Situation in Cyprus*, in K. KOUFA (ed.), *Might and Right in International Relations*, Thessaloniki, 1999, pp. 570-586.

rules of procedure, appointed two special advocates to represent ZZ's interests. Evidence against ZZ was thus disclosed only to the special advocates, who were prevented from providing any information to or to seek instructions from the appellant. In 2008, the SIAC dismissed ZZ's appeal on the grounds that it was satisfied that the appellant had been involved in some terrorist activities in 1995 and 1996.[51] Part of the judgment, including the reasons leading to it, was also 'closed' and, as such, transmitted only to the Secretary of State and to the special advocates.[52]

These two cases – which are rooted in counter-terrorism efforts following the 9/11 terrorist attack in New York –[53] are representative examples of how State authorities' use of secrecy doctrines or claims may permeate judicial proceedings and weaken the position of one of the parties or, in some instances, even prevent prosecution and punishment for alleged wrongdoings.

At least in recent years, the so-called 'war on terror'[54] has actually acted as a major catalyst for secrecy claims: counter-terrorism efforts have prompted an unprecedented use of secrecy arguments and endowed the phenomenon with a global dimension. In Helen Duffy's words, the fight against international terrorism, waged after 9/11, has in fact amounted to "an exercise in clandestinity",[55] characterized by a "defensive and absolute approach to secrecy".[56]

As denounced by the United Nations (UN) High Commissioner for Human Rights and by the Parliamentary Assembly of the Council of Europe, State secrecy has, for instance, been consistently invoked with respect to the abduction, transfer and secret detention of suspected terrorists (the so-called 'extraordinary renditions programme'),[57] having the effect of preventing parliamentary or judicial scrutiny over this

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[51] See Appeal No. SC/63/2007, judgment of 20 July 2008.

[52] The developments occurred in both cases, especially as far as supranational jurisdictions are concerned, are described *infra*, Chapters 1 and 3.

[53] About the invocation of State secrecy doctrines in the context of counter-terrorism efforts see, *inter alia*, D. MARTY, *Guerre, menzogne e segreti di Stato. Per una strategia globale contro il terrorismo*, in L. FORNI, T. VETTOR (eds.), *Sicurezza e libertà*, cit., pp. 91-106.

[54] This expression refers to the whole array of counter-terrorism measures that the United States and their allies adopted in the wake of the 9/11 terrorist attack. These measures have often been framed as a response to a new kind of 'war' against terrorists.

[55] See H. DUFFY, *The 'War on Terror' and the Framework of International Law*, 2nd ed., Cambridge, 2015, p. 931.

[56] *Ibid.*

[57] According to the definition given by the European Court of Human Rights (ECtHR), extraordinary rendition is "an extrajudicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment" (see, for instance, *Babar Ahmad* et al. *v. United Kingdom*, joined case App. Nos. 24027/05, 11949/08, 36742/08, partial decision on admissibility, 6 July 2010, para. 113). For an overview of the practice of extraordinary renditions and the enhanced interrogation techniques used against suspected terrorists in the context of counter-terrorism operations see, *inter alia*, the Executive Summary of the US Senate Select Committee on Intelligence, 'Committee Study of the Central Intelligence Agency's Detention and Interrogation Program', released on 3 April 2014 and declassified on 3

controversial practice and, hence, impeding access by the victims to an effective remedy.[58] In this context, arguments of State secrecy have been mainly based on the alleged need to protect national security and international relations – especially with regard to intelligence co-operation –[59] and have concerned several countries, including (but not limited to) Italy and the United States, where – as also shown by the above-mentioned *Abu Omar* case – the upholding of secrecy doctrines mostly ended with the full dismissal of court claims.[60]

However, secrecy has also permeated the 'war on terror' in other ways. For instance, governments have maintained secrecy and called on classification of information to deny requests to access documents concerning other controversial practices, such as targeted killings of suspected terrorists abroad.[61] Similarly, classification claims

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December 2014. Among the conspicuous literature on extraordinary renditions see, *inter alia*, P. SANDS, *International Rule of Law: Extraordinary Renditions, Complicity and its Consequences*, *European Human Rights Law Review*, vol. 11, 2006, pp. 408-421; L. N. SADAT, *Ghost Prisoners and Black Sites: Extraordinary Renditions Under International Law*, *Case Western Reserve Journal of International Law*, vol. 37, 2006, pp. 1-45; A. BERGQUIST, D. WEISSBRODT, *Extraordinary Renditions: A Human Rights Analysis*, *Harvard Human Rights Journal*, vol. 19, 2006, pp. 123-160; M.N. FORNARI, *La pratica delle consegne straordinarie in altri Stati di individui sospettati di terrorismo e il ricorso alle garanzie diplomatiche*, in I. PAPANICOLOPOLU (ed.), *Atti del V incontro di studio tra giovani cultori delle materie internazionalistiche*, Milano, 2009, pp. 125-171; G. CARELLA, *Nominalismo e lotta al terrorismo internazionale: il caso delle* extraordinary renditions, in G. VENTURINI, S. BARIATTI (eds.), *Diritti individuali e giustizia internazionale*, Milano, 2009, pp. 111-123; S. BORELLI, *Extraordinary Rendition, Counter-Terrorism and International Law*, in B. SAUL (ed.), *Research Handbook on International Law and Terrorism*, Cheltenham, 2014, pp. 361-378.

[58] See Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 17 December 2002, UN Doc. A/HRC/22/26, para. 38. See also, *inter alia*, Parliamentary Assembly of the Council of Europe, Resolution 1551(2007), adopted on 19 April 2007, on *Fair trial issues in criminal cases concerning espionage or divulging state secrets*, para. 12; *Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, Doc. 12714, 16 September 2011, p. 5 ff; Resolution 1838 (2011), adopted on 6 October 2011, on *Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, para. 2.

[59] On the close link between intelligence activities and State secrecy see, *inter alia*, R.D. SCOTT, *Territorially Intrusive Intelligence Collection and International Law*, *Air Force Law Review*, vol. 46, 1999, p. 222. In this respect, see also the definition of *éspion* in J. SALMON (ed.) *Dictionnaire de droit international public*, Bruxelles, 2001.

[60] For an overview (although limited to the European context) see, *inter alia*, D. BIGO, S. CARRERA, E. GUILD, R. RADESCU, *A Quest for Accountability? EU and Member States Inquiries into the CIA Renditions and Secret Detention Programme*, Study for the Civil Liberties, Justice and Home Affairs Committee, European Parliament, Brussels, September 2015. In the same vein, see also the Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Assessing Damages, Urging Action*, Geneva, 2009, p. 86: "(…) the Panel heard that secrecy is growing: legal doctrines such as 'State secrecy' and 'public interest immunity' are being used to foreclose remedies to victims. Attempts to conceal human rights violations on national security grounds are not new, but the current counter-terrorism climate is encouraging yet greater secrecy". On the topic see, *ex multis*, K. CAVANAUGH, *Unspoken Truths: Accessing Rights for Victims of Extraordinary Renditions*, *Columbia Human Rights Law Review*, vol. 47, 2015, pp. 1-54.

[61] See A. KRISHNAN, *Targeting Individuals: Overcoming the Dilemma of Secrecy*, *Contemporary Security Policy*, vol. 34, 2013, p. 286 ff.