Corte costituzionale

JUDGMENT NO. 106 OF 2009

FRANCESCO AMIRANTE, President
ALFONSO QUARANTA, Author of the Judgment

JUDGMENT NO. 106 YEAR 2009

In this case the Court considered a reference from the criminal court of Milan regarding the classification by the Prime Minister of certain information relating to the activities of the security and intelligence services as state secrets, some of which was already on file pursuant to pre-trial discovery. The Court rejected the complaint, finding that the information had been validly classified, and that any review of the substantive merits of that classification was a matter for Parliament and not the courts. Although certain information which could be useful to the inquiries was indeed classified, the offence as such was not an official secret, and the courts were not barred from investigating, and where appropriate prosecuting, the offence (the abduction and "extraordinary rendition" of Abu Omar) on the basis of non classified information.

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning a jurisdictional dispute between branches of state arising between the President of the Council of Ministers, the Public Prosecutor's Office at the *Tribunale di Milano*, the office of the judge for preliminary investigations at the same court, also sitting as the judge for the preliminary hearing, and the *Tribunale di Milano*, judge sitting alone of the 4th Criminal Law Division, concerning: acts carried our during the course of preliminary investigations by the Public Prosecutor's Office at the *Tribunale di Milano* on the basis of evidence and in relation to facts classified as official secrets concerning the kidnapping of Nasr Osama Mustafa Hassan, *alias* Abu Omar; the

request for referral for trial issued by the same Public Prosecutor's Office at the *Tribunale di Milano* on 5 December 2006; the resulting committal for trial by the judge for the preliminary hearing of the *Tribunale di Milano* on 16 February 2007; the notes of the President of the Council of Ministers of 11 November 2005 No. USG/2.SP/1318/50/347, 26 July 2006 No. USG/2.SP/813/50/347 and 5 June 2007, and the direction of the President of the Council of Ministers of 30 July 1985 No. 2001.5/707; the orders of the *Tribunale di Milano*, judge sitting alone of the 4th Criminal Law Division issued on 19 March 2008 and 14 May 2008; the notes of the President of the Council of Ministers of 15 November 2008 No. USG/2.SP/556/50/347 and No. USG/2.SP/557/50/347 and of 6 October 2008 No. 6000.1/42025/GAB, in proceedings commenced pursuant to the appeals by the President of the Council of Ministers (appeals Nos. 2 and 3 of 2007), of the Public Prosecutor's Office at the *Tribunale di Milano* (appeal No. 6 of 2007), of the President of the Council of Ministers (appeal No. 14 of 2008) and of the *Tribunale di Milano*, judge sitting alone of the 4th Criminal Law Division (appeal No. 20 of 2008), served respectively on 10 May and 2 October 2007, 17 July and 22 December 2008, filed in the Court Registry on 17 May and 9 October 2007, 23 July and 30 December 2008 and registered as Nos. 2, 3 and 6 in the Register of Jurisdictional Disputes between Branches of State 2007 and as Nos. 14 and 20 in the Register of Jurisdictional Disputes between Branches of State 2008, merits stage.

Considering the entries of appearance by the Public Prosecutor's Office at the *Tribunale di Milano*, the office of the judge for preliminary investigations of the *Tribunale di Milano*, the President of the Council of Ministers and the *Tribunale di Milano*, judge sitting alone of the 4th Criminal Law Division;

having heard the Judge Rapporteur Alfonso Quaranta in the hearing of 10 March 2009;

heaving heard the *Avvocati dello Stato* Ignazio Francesco Caramazza and Massimo Giannuzzi for the President of the Council of Ministers and Alessandro Pace, barrister, for the Public Prosecutor's Office at the *Tribunale di Milano* and Federico Sorrentino, barrister, for the office of the judge for preliminary investigations at the *Tribunale di*

Milano and for the *Tribunale di Milano*, judge sitting alone of the 4th Criminal Law Division.

The facts of the case

1.— Five jurisdictional dispute between branches of state have arisen between the President of the Council of Ministers and various judicial authorities (Public Prosecutor's Office at the *Tribunale di Milano*, office of the judge for preliminary investigations, also sitting as the judge for the preliminary hearing, and judge sitting alone of the 4th Criminal Law Division of the same court), seized with the criminal proceedings, and thereafter the oral proceedings, relating to the kidnapping of Nasr Osama Mustafa Hassan, *alias* Abu Omar, pursuant to five appeals, respectively registered as numbers 2, 3 and 6 in the Register of Jurisdictional Disputes between Branches of State 2007 and numbers 14 and 20 in the Register of Jurisdictional Disputes between Branches of State 2008.

2.— The first two appeals (numbers 2 and 3 of 2007) were filed by the President of the Council of Ministers against the Public Prosecutor's Office at the *Tribunale di Milano* and the judge for preliminary investigations, also sitting as the judge for the preliminary hearing, at the same court.

2.1.— In particular, in appeal No. 2 of 2007 the applicant requests this Court to rule that the public prosecutor was not entitled, in the first place, to pursue his investigations using documents classified as official secrets (and in particular all those obtained following search and seizure at the offices of the SISMi [*Military Information and intelligence service*] in Via Nazionale, Rome, on 5 July 2006, registered as item D-19), documents subsequently attached to the request for referral for trial of the individuals considered to be responsible for the kidnapping.

The Public Prosecutor's Office in Milan is in fact claimed to have violated the official secret on the grounds that it used “as evidence (and evidence of particular importance), as a basis for further investigations and as grounds for the referral for trial”, all documentation constituting item D-19 mentioned above rather than that, “largely identical” to the former, transmitted – moreover at the express request of the public prosecutor – by the Director of the SISMi by note of 31 October 2006, but with

certain passages “blacked out”, insofar as liable to reveal the names of foreign agents, secret acronyms of the related services and reports between the Italian and foreign intelligence services. The fact that the entire documentation was subsequently transmitted by the court to the European Parliament and published on the internet constituted a further violation of an official secret.

Secondly, in the same appeal, the President of the Council of Ministers complains that the Public Prosecutor's Office in Milan carried out investigative activities – more precisely telephone taps and questioning of suspects – the specific procedures for which violated the official secret classified by the President of the Council of Ministers.

In the first place in fact, “blanket” telephone taps were carried out on “service” numbers of the SISMi, notwithstanding the awareness – resulting from the fact that the relevant mobile telephone contract with the operator has been expressly classified, and the operator had warned the magistrates which made the request of the need for particular discretion – that the association of the numbers with the SISMi was classified as an official secret.

This phone tapping activity made it possible – according to the applicant – to gain knowledge according to a knock-on effect of around 180 “classified” telephone numbers and to reveal the service's entire network communication system, as well as the identify of 85 individuals belonging to it, in addition to various individuals belonging to foreign intelligence services.

In addition, the conduct of the public prosecutors consisting, according to the President of the Council of Ministers, in “obliging the persons under investigation to respond even when the answer would entail the violation of a specific official secret” amounted to a further violation of the prerogatives of the applicant in the area of official secrets. This conduct, which at times involved the denial of the existence of an official secret, at times with the invitation to violate it, and at other times the consideration of the failure to respond due to the invocation of an official secret as a refusal to respond; and went so far as to request the taking of evidence by special arrangements, on 18 September 2006, in order to ascertain the relations between the SISMi and the CIA, that is relations classified as an official secret, under the terms of laws, directions and other specific measures.

A similar challenge was made with reference to the taking of evidence by special arrangements – consisting in the questioning of some of the persons under investigation in order to ascertain, according to the applicant, facts which were also classified – carried out on 30 September 2006.

The applicant therefore concluded on the basis of the above, requesting the Court to rule that the Public Prosecutor's Office in Milan was not entitled to operate according to the procedures specified in greater detail above, and as a result annul the investigative measures and request for referral for trial also based on them.

2.1.1.— After this Court ruled the dispute admissible by order No. 124 of 2007, the Public Prosecutor's Office at the *Tribunale di Milano* entered an appearance, arguing that the appeal should be ruled inadmissible or dismissed.

In summarising the three grounds for infringement complained of by the President of the Council of Ministers, it claims that its own actions were absolutely correct.

It accordingly points out that "the documents in the case file for proceedings were never classified, nor *a fortiori* were classified documents ever used in investigations and for the purposes of the referral for trial"; that no telephone number was classified as an official secret, since the mobile telephone operators with which the phone taps had been ordered had limited themselves to asserting (concerning numbers not registered to private individuals but assigned to an "Institutional Body") the existence of "requirements of particular contractual confidentiality", an expression which could not be regarded as having the effect of creating an official secret and given, in general, the absence of any statutory prohibition on the interception of communications between telephone numbers used by members of the SISMi; and finally that none of the members of the Service who were consulted as persons with knowledge of the case or questioned as suspects suffered the slightest pressure or intimidation.

In the light of the above, the Public Prosecutor's Office in Milan claims that an official secret cannot be invoked against the facts at issue in the investigation, given "their subversive nature for the constitutional arrangements" which characterises them.

Indeed, this category is claimed to include not "only politically subversive acts *stricto sensu*", but also "those unlawful acts which contrast with the 'supreme principles' of Italian law, including the constitutional provisions which guarantee the inviolable

rights of man”: in the case before the Court, this consisted in the so-called 'extraordinary rendition', i.e. kidnapping, in Italy of persons to be sent *manu militari* to other countries for interrogation there with recourse to physical or psychological violence.

In the alternative, assuming that , in his note of 11 November 2005, the President of the Council of Ministers did not intend to classify the documents, the Public Prosecutor's Office in Milan claims that the subsequent note of 26 July 2006 was unlawful. In fact, it is claimed to be unlawful for a series of reasons: because it was an *ultra vires* act, asserting a fact which “was not true”; because it classified matters relating to “acts which subvert the constitutional order”; because, in purporting to confirm an official secret previously created, it did not indicate how and when the classification occurred, nor did it specify the essential reasons for the classification; and finally because it purported to give retroactive effect to the note previously issued.

2.1.2.— The parties to the dispute subsequently restated their positions and arguments, filing written statements both in the hearing of 29 January 2008 (originally intended for the discussion of the present dispute) as well as that of 10 March 2009.

2.2.— In the second of the above appeals (No. 3 of 2007), the President of the Council of Ministers commenced a similar jurisdictional dispute against the judge for preliminary investigations, also sitting as the judge for the preliminary hearing, of the *Tribunale di Milano*.

In this appeal the Court is requested – according to the same arguments indicated above, given that the violation of the official secret which the judge for the preliminary hearing is claimed to have committed amounted to an “automatic consequence of the previous violation by the public prosecutor” – to rule that the public prosecutor was not entitled, in the first place, to obtain and use (in any manner, whether directly or indirectly) reports, documents and sources of evidence classified as official secrets, nor to inspect the same and on the basis of this − following a request made by the public prosecutor pursuant to Article 416 of the Code of Criminal Procedure − refer the suspects for trial and schedule the hearing for oral arguments, thereby exposing these documents and sources of evidence to further publicity.

The ruling that the judicial authority was not entitled to act should, according to the applicant, result both in the annulment of the decision of 16 February 2007 to refer the

suspects for trial as well as the order to return the documents classified as official secrets to their rightful holders.

2.2.1.— After this Court had ruled that this jurisdictional dispute was also admissible, by order No. 125 of 2007, both "the acting chairman of the aforementioned section" as well as "the judge for preliminary investigations to whom case No. 1966/05 was assigned" intervened "in the interest of the *GIP* [preliminary investigating judge] section of the *Tribunale di Milano*", also filing a "cross appeal".

The interveners in fact consider that all the documents referred to by the President of the Council of Ministers – namely the note of 11 November 2005 (which, whilst asserting that the government and the SISMi were not involved in the kidnapping, restated the classified nature of the information concerning relations between the SISMi, the SISDe [*Service for Information and Democratic Security*] and the intelligence agencies of other countries), the direction No. 2001.5/07 of 30 July 1985 (containing a list of matters to be regarded as classified) and the note of 26 July 2006 (which accepted the request of the Public Prosecutor's Office in Milan to hand over the documents available to the Ministry of Defence concerning the kidnapping and, in general, the practice of extraordinary renditions) – entail "an encroachment on the competences and powers of the judiciary guaranteed under Article 101 of the Constitution".

3.— By appeal No. 6 of 2007, the Public Prosecutor's Office at the *Tribunale di Milano* commenced a jurisdictional dispute against the President of the Council of Ministers, requesting this Court to rule that the President of the Council of Ministers was not entitled either "to classify the documents and information concerning the planning, organisation and implementation" of the kidnapping, "since they amount to 'acts which subvert the constitutional order'", or equally "to classify information and documents generically, without justification and retroactively" in relation to the same affair.

The applicant complains that, although the President of the Council of Ministers in office at the time – given the "informed certainty" that the Government and the SISMi had nothing to do "with any aspect related to the kidnapping", but in any case restating the "unyielding institutional duty (to) safeguard, according to the procedures and forms

provided for under statute, the confidentiality of records, documents, information and any other object likely to cause harm to interests protected" pursuant to Article 12 of law No. 801 of 24 October 1977 (Establishment and regulation of the intelligence and security services and provisions governing official secrets) – had demonstrated, by note of 11 November 2005, his willingness to "provide the information requested insofar as it could be disclosed to the judiciary", by subsequent note of 26 July 2006 he on the other hand informed the Public Prosecutor's Office in Milan that all the "facts relating to the kidnapping", all the events "which preceded it" and "in general", "all documents, information or records relating to the practice of so-called "renditions" had been classified by the previous President of the Council of Ministers".

In particular – noting that it had carried out, since May 2006, various inquiries without any official secret being classified, but by contrast with express assurances from the Director of the SISMi (already provided to the Public Prosecutor's Office in Milan by letter of 11 July 2006 and reiterated by the same at least once after he had become a suspect) regarding the absence of any official secret over matters relating to the kidnapping – the applicant complains that the above note of 26 July 2006 not only applied "the official secret regarding the facts of the case [retroactively] to 11 November 2005 or to any other earlier date as yet unknown", thereby purporting to "interfere with the celebration and/or outcome of the trial" already commenced, but which would have in any case rendered more difficult "the performance of further investigations by the Public Prosecutor's Office in Milan" regarding these circumstances, infringing the prerogatives vested in the latter pursuant to Article 112 of the Constitution.

Therefore, in accordance with these arguments the Public Prosecutor's Office at the *Tribunale di Milano* requested the annulment of both of the notes issued by the President of the Council of Ministers, pointing – as a preliminary matter – to the existence of a breach of Article 12 of law No. 801 of 1977. Indeed, the case before the Court is claimed to concern matters falling under those those which "subvert the constitutional order" to which law No. 801 prevents the application of official secret, given that the alleged kidnapping (as, the appeal argues more generally, the practice of so-called extraordinary renditions) is clearly incompatible with the rules which are

characteristic of a state governed by a constitution, which prohibit "the kidnapping in Italy of persons to be sent *manu militari* to other countries for interrogation there with recourse to physical or psychological violence".

Moreover, the applicant has formulated its second ground of appeal as follows: "the note of 26 July 2006 is unlawful because it falsely asserts that the facts related to the kidnapping had been classified as an official secret by his predecessor; it is *ultra vires* on the grounds that its premises are false or mistaken". In making these complaints, the applicant argued that the aforementioned note breached the principle which prohibits the retroactive application of an official secret and also claimed the violation of Article 16 of law No. 801 of 1977, due to the failure to specify the essential reasons for the classification.

On this basis therefore, the applicant requests the annulment of the above notes and, moreover, "if appropriate", of the direction of the President of the Council of Ministers No. 2001.5/07 of 30 July 1985 (since, were it to be interpreted as imposing a general prohibition on the courts from obtaining and using all information and documents concerning relations between Italian and foreign intelligence services, it would also infringe the constitutional prerogatives vested in it, *de facto* imposing upon it a general requirement to request from the President of the Council of Ministers from time to time express exceptions to a generically imposed classification) and the "Press Release" of 5 June 2007 of the Press Office and spokesperson of the President of the Council of Ministers", in which – in clear contradiction with the note of 26 July 2006 – it is asserted that there is no document in the records of the SISMi regarding the alleged kidnapping and "therefore no official secret".

3.1.— After this Court had ruled that this jurisdictional dispute was also admissible, by order No. 337 of 2007, the President of the Council of Ministers entered an appearance.

He argues, in the first place, that the appeal is inadmissible, since – following the issue of the note of 26 July 2006 (in which the President of the Council of Ministers restated the classified nature of the information) – the Public Prosecutor's Office in Milan had failed to make a reference pursuant to Articles 202 or 256 of the Code of Criminal Procedure, considering that (citing the appeal) "the evidence which may be

obtained was not essential for the resolution of the trial, having already obtained evidence considered sufficient for prosecution".

According to the state representative, this assertion provides sufficient grounds, as a question of law, to conclude that the appeal is inadmissible due to the lack of relevance and specificity of the dispute given that, according to the assertions of the applicant itself, "no specific and actual infringement of the powers conferred on the public prosecutor by the Constitution is apparent".

In the alternative, the President of the Council of Ministers challenges the view that the object of the investigation in Milan may be considered "an act which subverts the constitutional order" − defined as one "which seeks to change the constitutional order through revolutionary or other violent means" − since in this case the offence charged is that governed by Article 605 of the Criminal Code (kidnapping) and not that contained in Article 289-*bis* (kidnapping for the purposes of terrorism or subversion of the democratic order).

Accordingly, he argues that had the Public Prosecutor's Office in Milan considered the classification of the material unlawful – for this reason – "he could have asked the *GIP* to re-qualify the offence as falling under Article 204 of the Code of Criminal Procedure and, should the latter agree that the offence was subversive in nature, notify it to the President of the Council of Ministers in accordance with the combined provisions of Articles 204 and 66 of the Code of Criminal Procedure as currently in force": and it would only then have been able to commence the jurisdictional dispute had the President of the Council of Ministers confirmed that the material was classified.

Finally, the state representative argues that the actions of the President of the Council of Ministers were legitimate since – without any contradiction or ambiguity – he had always intended to classify only the relations between national and foreign intelligence services, and not all matters related to the alleged kidnapping indiscriminately.

3.2.— The parties to the dispute also restated their respective positions and arguments, filing written statements both in the hearing of 29 January 2008 (originally intended for the discussion of the present dispute) as well as that of 10 March 2009.

4.— The two additional jurisdictional disputes (appeals Nos. 14 and 20 of 2008) concerning the same matters on the other hand arose in relation to the oral discussion stage of the trial concerning the alleged kidnapping and involve, with inverted roles, the President of the Council of Ministers and the judge sitting alone of the 4th Criminal Law Division of the *Tribunale di Milano*, before which the trial was being celebrated.

4.1.— In particular, with appeal No. 14 of 2008, the President of the Council of Ministers seeks to annul the measures of inquiry issued by the court on 19 March and 14 May 2008.

With the first of these measures, the aforementioned judge sitting alone revoked his previous order of 18 June 2007 which had suspended, pursuant to Article 479 of the Code of Criminal Procedure, the trial pending before him (considering at the time that the decision on the appeals concerning jurisdictional disputes between branches of state illustrated above was a question to be addressed prior to the resolution of the proceedings before him).

Moreover – in the same order of 19 March 2007 – the judge also ordered the replacement in the special evidence file of the "non redacted documents" obtained by the public prosecutor (comprising that is item D-19, cited above), with "the redacted documents" subsequently transmitted by the SISMi to the Public Prosecutor's Office in Milan.

With the subsequent order of 14 May 2008 the judge on the other hand allowed the examination of all the witnesses indicated by the prosecution at Nos. 45 to 65 of its own list, filed pursuant to Article 468 of the Code of Criminal Procedure, regarding all the circumstances indicated therein.

In fact, the applicant claims that the choice – made by the judge in the first of the contested orders (that of 19 March 2008) – to "proceed further with the oral discussion" infringed "in itself" the applicant's constitutional powers, "since the principle of loyal cooperation would appear to require the judge to await the outcome of the dispute" (or better of the jurisdictional disputes already commenced before this Court) "before using sources of evidence potentially inadmissible insofar as classified".

Moreover, in the same way the order of 14 May 2008 is claimed to infringe the constitutional powers of the President of the Council of Ministers, insofar as the judge's

decision to allow the hearing of witness testimony requested by the public prosecutor regarding all the circumstances indicated by the latter did not offer appropriate guarantees to safeguard the official secrets. Indeed, according to the applicant, the judge's decision – on the basis of an assessment which was not carried out *ex ante*, and therefore when ruling that the evidence could be taken, but rather *ex post*, that is during discovery of the same – to limit the exclusion only to those questions which "sought to reconstruct the broader network of relations between the CIA and the SISMi" (by contrast allowing those relating "to specific relations between individuals belonging to the said organisations", insofar as aimed at identifying "aspects of individual responsibility for the sequence of events of the case"), is tantamount to the assertion that "an official secret can never cover a source of evidence in investigations into an offence", a principle which "is diametrically opposed" to that laid down by law (Article 202 of the Code of Criminal Procedure) and reiterated under settled constitutional case law.

Therefore, in view of these arguments, the President of the Council of Ministers requested this Court to rule that the judge sitting alone of the *Tribunale di Milano* was not entitled "to allow, discover or use classified records, documents and sources of evidence and on this basis move on to the stage involving the hearing of evidence in open court, thereby exposing these documents and sources of evidence to further publicity", as well as, more generally, to "proceed further with the oral discussion", whilst the proceedings concerning the jurisdictional dispute were still pending and which "were considering the admissibility of investigative acts and/or documents carried out or obtained in violation of the official secret", and as a result to annul the measures of inquiry issued by the Milan court on 19 March and 14 May 2008.

Finally, the President of the Council of Ministers requests the Court to rule "in any case" that "the *Tribunale di Milano* was not entitled to move on to the stage involving the hearing of evidence in open court and declare as a precautionary rule, in order to ensure respect for official secrets concerning relations between the SISMi and the CIA, the principle that this secret concerned" the broader network of relations between the CIA and the SISMi" but never "specific relations" capable of identifying "aspects of individual responsibility", thereby overturning the rule governing the relationship

between official secrets and court action and asserting the predominance of the courts' right to acquire knowledge of the offence over the executive power to classify sources of evidence".

4.1.1.— After this Court had ruled that this jurisdictional dispute was also admissible, by order No. 230 of 2008, the judge sitting alone of the *Tribunale di Milano* entered an appearance in order to contest the application made by the President of the Council of Ministers, arguing that it was inadmissible, or in the alternative groundless.

In the first place, the judge sitting alone challenges, as a question of fact, the assertion of the President of the Council of Ministers that "the reopening of the trial on the one hand would violate the principle of loyal cooperation between branches of state, whilst on the other hand infringing the powers of the President of the Council of Ministers, which he sought to protect by commencing the previous jurisdictional disputes".

The respondent first asserts that it "ordered the removal from the special evidence file of the documents to which the previous jurisdictional disputes referred (in particular, item D-19)", whilst on the other hand emphasising that the "only classified sources of evidence concerned which are contained in the special evidence file" are "the transcriptions of the phone taps", which have moreover already been "carried out by the *GIP*" and "may not be further transcribed" by the trial court judge.

On the basis of these arguments, the respondent judge first and foremost claims that this appeal is inadmissible "due to lack of specific and relevant interest".

In fact, in emphasising that the application by the President of the Council of Ministers appears to be "instrumental" in furthering the protection goals pursued by him "in the previous jurisdictional disputes" (since the present appeal also seeks to safeguard the dual interest "in ensuring that those sources of evidence which were argued to be classified in the previous appeals are not used" and moreover "in avoiding a situation in which several agents, or former agents, of the intelligence services give evidence regarding circumstances classified as official secrets"), the judge sitting alone considers that the dispute under examination here is of a "merely hypothetical nature", and is therefore inadmissible (citing, *inter alia*, judgment No. 420 of 1995).

In addition, the appeal is claimed to be inadmissible, “not only because it complains of a future and contingent risk”, but also because the very same precautions adopted by the judge sitting alone – that is the decision not to use “the sources of evidence at issue in the previous disputes”, the preordained decision to suspend the trial a second time should this by contrast turn out to be necessary, as well finally as the confirmation that “the witnesses and suspects are under an obligation, punishable under criminal law, to invoke an official secret should they be requested to give evidence regarding classified matters” – mean “that the concerns raised cannot become reality”.

In the alternative, the judge sitting alone claims that the appeal is groundless, above all “insofar as it complains of that the ruling of 19 March 2008 which ordered the hearing of evidence” infringed the applicant's constitutional powers.

Indeed, since the kidnapping in question was not classified as an official secret, the respondent judge was vested with the “power – and indeed the duty – to celebrate the trial”. Furthermore, the principle of loyal cooperation is “improperly relied upon”, since it would imply in the case before the Court “a duty on the judge not to use evidence discovered with is under dispute” before the Constitutional Court, “but not on the other hand the duty to suspend the trial *sine die*”.

Finally, the appeal is claimed to be groundless “insofar as it complains that the ruling of 14 May 2008 which ordered the hearing of evidence” infringed the applicant's constitutional powers.

Indeed, the applicant's argument that the simple acceptance of witness testimony requested by the public prosecutor “is in itself capable of 'frustrating' the arrangements governing official secrets”, is *prima facie* groundless, since Article 202 of the Code of Criminal Procedure “ensures the protection of official secrets through the duty, punishable under criminal law, of the witness to refrain from disclosing classified information and not, by contrast, as the President of the Council of Ministers appears to consider, through a prohibition directed at the judge against accepting witnesses on such matters”.

4.1.2.— The parties to the dispute also restated their positions and arguments, filing written statements during today's hearing.

4.2.— Finally, appeal No. 20 of 2008 was filed by the judge sitting alone of the *Tribunale di Milano* "in relation to two letters of the President of the Council of Ministers of 15 November 2008 (USG/2.SP/556/50/347 and USG/2.SP/557/50/347), in which he confirmed the official secret invoked by the witnesses Messrs Giuseppe Scandone and Lorenzo Murgolo during the course of the hearings for oral arguments held respectively on 15 and 29 October 2008" and, "if necessary", the "letter of the President of the Council of Ministers dated 6 October 2008 (No. 6000.1/42025/GAB)".

The applicant judge states that, during the hearing for oral arguments of 15 October 2008, the counsel for one of the accused submitted the above letter of the President of the Council of Ministers of 6 October 2008, "sent to all members or former members of the intelligence services called upon to testify" in the aforementioned trial, in which he reminded them of the existence of the official secret concerning "all and any relations between Italian and foreign intelligence services within the ambit of the protection of the international relations [of the state]", and the resulting duty to invoke the official secret with regard to "any relations between Italian and foreign intelligence services" even if "they are or may be in some way related" with the actual kidnapping.

It also states that the witnesses Messrs Scandone and Murgolo – the former examined in relation to any orders or directions issued by one of the accused, General Pollari, aiming "to prohibit his subordinates from using unlawful means to combat international terrorism including, in particular, so-called extraordinary renditions", whilst the latter was asked "to repeat the statements already made during the preliminary investigations regarding some of his conversations with the accused Mr Mancini concerning Mr Mancini's involvement in the kidnapping and his participation in a meeting with 'the Americans' in Bologna" – invoked the official secret, "referring to the letter/direction cited above" of 6 October 2008.

Having stated the above, the applicant points out that, with the notes cited of 15 November 2008, the President of the Council of Ministers – responding to the two references made by the judge pursuant to Article 202 of the Code of Criminal Procedure – confirmed the official secret invoked by the witnesses, justifying his decision both in view of the need to "maintain the credibility of the intelligence service within the ambit of its international relations with related agencies" (since "the disclosure of revealing

information, even regarding only part of these relations, would expose our intelligence services to the specific risk of not being made privy to information by their foreign counterparts, with clear negative ramifications on the performance of intelligence operations at present and in future"), as well as the "need for discretion in order to protect the internal affairs (or *interna corporis*) of every intelligence service, shielding their organisation and operational procedures from undue publicity".

The applicant moreover restated the existence of the official secret concerning "any relations between Italian and foreign intelligence services" even if "they are or may be in some way related" with the kidnapping at issue in the trial, specifying that the courts "are free to investigate, make findings and reach a verdict regarding the offence concerned, which is not classified as an official secret, using all forms of evidence permitted", with the sole exclusion however of "those which concern relations between Italian and foreign intelligence services", precisely because they are "classified as official secrets".

Accordingly, since – according to the applicant – these assertions "*de facto*" render "the specific and full exercise of judicial powers very difficult", the judge sitting alone of the *Tribunale di Milano* considered it necessary to initiate this jurisdictional dispute.

The appeal in the first place challenges the inherent contradiction in the arguments of the President of the Council of Ministers: if the offence consisting in the alleged kidnapping is not classified as an official secret, then "also the conduct of the accused" should not be classified, since it pertains to "constituent elements" of these events. It therefore follows that when ascertaining the facts of the case the judge cannot be prevented from obtaining and using also that evidence "which concerns" relations between agents (or former agents) of the Italian or American intelligence services, even if "they are or may be related" with the commission of the offence, since this ultimately involves preventing the courts "from obtaining knowledge of facts which could prove the active participation in the offence of an accused (Murgolo testimony), or the innocence of another (Scandone testimony)", thereby preventing it "from gaining knowledge of the 'dynamics of the offence', which however is asserted not to be classified".

The judge also claims that the principle of proportionality has been violated, since the requirements underpinning the two declarations confirming the official secret (namely the need to maintain both "the credibility of the intelligence service within the ambit of its international relations with related agencies", as well as the "need for discretion in order to protect the internal affairs of every intelligence service, shielding their organisation and operational procedures from undue publicity"), could have been guaranteed through a distinction – which the President of the Council of Ministers did not however decide to draw – between "information relating to the organisation and operational procedures of the services, or relations of a general and institutional nature with foreign intelligence services, including eventual understandings which specify shared courses of conduct", which are destined to remain secret, and on the other hand "conduct actually carried out by individual agents/accused and which had a causal impact on a criminal offence, which may be freely ascertained by the court".

With specific reference to the confirmation of the official secret invoked by the witness Mr Murgolo, the judge also claims that this breaches the "principle that classification occur *ex ante*", since the decision of the President of the Council of Ministers refers to information "already revealed during the course of the preliminary investigations" which had hence already been disclosed (and as such could no longer be classified).

Finally, with specific reference to the confirmation of the official secret invoked by the witness Mr Murgolo, the applicant points to "a further anomaly". In fact, confronted with an Article 202 reference concerning "the role which the accused Mr Mancini may have had in the kidnapping", the President of the Council of Ministers, "on the basis of a 'reinterpretation'" of that role, identified its essence – as confirmed by the justification focussing on the need to "maintain the credibility of the intelligence service within the ambit of its international relations with related agencies" – "as consisting in specifically classified information (relations between the CIA and the SISMi)", thereby "essentially rejecting the request for confirmation, in contrast with the principle of correctness and loyalty".

Finally, the judge also avers – in relation to all contested decisions – the violation of the principle of correctness and loyalty, since the power to classify had not been

exercised, as it should have been, “in a clear, explicit and unequivocal manner”, considering in particular that the assertion of the President of the Council of Ministers that the offence at issue in the trial was not classified, whilst “the evidence (…) concerning relations between Italian and foreign intelligence services” is, is tantamount “to a kind of rhetorical trick intended to mask, through its formal aspects, the actual scope of the classification”, which “in essence becomes so broad as to entail the risk of rendering meaningless the power/duty of the judge to hear evidence regarding the *actus reus* and *mens rea* of the offence”.

In accordance with the above therefore, the applicant judge requested the court to rule that the President of the Council of Ministers was not entitled to classify “any relations between Italian and foreign intelligence services” even if “they are or may be in some way related” with the events constituting the alleged kidnapping, nor “to prevent the applicant judge from obtaining and using all evidence which 'concerns relations between Italian and foreign intelligence services'”, nor finally “to confirm the classified status of information already disclosed during the course of preliminary investigations”, and as a result annul the two notes of 15 November 2008 (USG/2.SP/556/50/347 and USG/2.SP/557/50/347), and “if necessary”, the letter of the President of the Council of Ministers dated 6 October 2008 (No. 6000.1/42025/GAB).

4.2.1.— After this Court ruled the dispute admissible by order No. 425 of 2008, the President of the Council of Ministers entered an appearance, represented by the *Avvocatura Generale dello Stato*, challenging the application made by the judge sitting alone of the *Tribunale di Milano*.

The respondent points out that the appeal under examination was argued on the basis of the violation averred “of four constitutional principles”, more specifically: “the principle of legality, which prohibits the application of an official secret to the commission of offences; the principle of proportionality which, whilst it permits the classification of relations of a general and institutional nature with foreign intelligence services, however prohibits the classification of specific relations involving criminal conduct; the principle that classification must occur *ex ante*, which prohibits the classification during a trial of information already obtained during the course of the preliminary investigations; and the principle of correctness and loyalty, which has been

violated by two different Presidents of the Council of Ministers *pro tempore* on two counts".

The *Avvocatura Generale dello Stato* argues that none of these principles has been violated in the case before the Court.

First, as far as the alleged violation of the principle of legality is concerned, the state representative denies that the President of the Council of Ministers "violated this principle by classifying as secret the '*actus reus*'" of the kidnapping.

Indeed, all of the "decisions to establish an official secret, from the first to the last ...clearly distinguished" between on the one hand the "*actus reus*, which was not classified" and on the other hand the "organisation of the intelligence services" and "the relations between Italian and foreign intelligence services", and it was these latter issues "which were by contrast classified".

Nor on the other hand can it be asserted – the *Avvocatura Generale dello Stato* argues, moving on to an examination of the averred violation of the principle of proportionality – that in the case before the Court "the means used was not proportionate to the end".

In fact, according to the state representative, in claiming that the "classification of relations of an institutional nature with foreign intelligence services", but not of those "of a specific nature capable of providing evidence of criminal conduct" is permissible, the Milan judge "asserts the principle that official secret can never cover a source of evidence that may be used in order to gain knowledge of an offence", a principle "which is diametrically opposed" to that asserted in the law and restated under constitutional case law (referring to judgments No. 86 of 1977, No. 110 and No. 498 of 1998).

The *Avvocatura Generale dello Stato* goes on to refute the claim that, in the case before the Court, the principle that classification occur *ex ante* has been violated.

The applicant judge is argued to have committed "three conceptual mistakes" in claiming that the confirmation given by the President of the Council of Ministers – in his response to the Article 202 reference procedures concerning the testimony of the witness Mr Murgolo – concerns facts already divulged through statements given by the same witness when he was examined during the course of the preliminary investigations pursuant to Article 362 of the Code of Criminal Procedure.

The first of these mistakes consists in the "failure to recognise official secrets as self-standing entities on the basis of the law which defines them as a category", which however – both as formulated in Article 12 of law No. 801 of 1977, as well as Article 39 of law No. 124 of 3 August 2007 (Information system to ensure the security of the Republic and new provisions governing official secrets) – according to the state representative, contains an "absolutely detailed" definition, as such capable "of permitting any legal professional to ascertain the classified status" of "records, documents, information, activities and any other object, the disclosure of which is likely to cause harm to the integrity of the democratic state" (or "the Republic" under the version currently in force).

The second mistake, which is closely linked with the first, consists in "the argument that official secrets cannot be imposed on general categories but only specifically and according to the procedures envisaged under the Code of Criminal Procedure".

By contrast, it is already clear from a simple reading of Article 1(2) of law No. 801 of 1977 that the President of the Council of Ministers is entitled, according to the state representative, "to issue directions which intend to identify better classes of documents, records and other objects classified as official secrets".

Moreover, it was not by chance that the President of the Council of Ministers – first with circular No. 2001 of 30 July 1983 (Directions concerning the protection of official secrets concerning the intelligence and security services) and subsequently the decree of the President of the Council of Ministers of 8 July 2008 (Criteria for the identification of data, information, documents, records, activities, objects and places liable to be classified as an official secret), issued pursuant to Article 39(5) of law No. 124 of 2007 – stipulates that "any information, data, documents, records, activities, places and objects relating to the reference matters listed as examples in the schedule are liable to be classified as an official secret", which include "the relations with the intelligence agencies of other states".

Finally, the third mistake attributed by the *Avvocatura Generale dello Stato* to the applicant judge consists in his assumption "that an official secret lapses when it has already been disclosed to a certain number of persons".

However, according to the case law of the Court of Cassation, the further disclosure of secret information "gives the information greater prominence and wider diffusion" (Court of Cassation, 1st Criminal Law Division, judgment No. 10135 of 24 September 1995), specifying "that it is irrelevant whether the secret records or information were already known", as it is always necessary to prevent "the outcome of disclosure to broader sectors of the public" (Court of Cassation, 4th Criminal Law Division, judgment No. 35647 of 17 April 2004).

Finally, the *Avvocatura Generale dello Stato* argues that the "principle of correctness and loyalty" has not been violated, rejecting the charge of "ambiguity" levelled against the presidents of the Council of Ministers *pro tempore* who have occupied that office and based on the assumption that, "when classifying matters as secret", they "have always blurred the boundaries of the power reserved to the courts", and in this case have in particular made it possible "to obtain knowledge of and ascertain the mere factual event" consisting in the kidnapping first under investigation and subsequently subject to prosecution – citing the present jurisdictional appeal *verbatim* – "but not the reasons for it or the conduct which resulted in its commission".

On the contrary, the state representative claims that "a clear picture of a line of continuity" is clear from an "uncomplicated reading" of the notes of 11 November 2005, 26 July 2006, 2 October 2007, 6 October 2008 and 15 November 2008 since the issue common to these decisions is the assertion that the offence of the kidnapping was not an official secret, "but the organisation of the intelligence services and the relations between Italian and foreign intelligence services are official secrets", which by definition confirms that the official secret refers "not to conduct but to information obtained by our intelligence agents through their dealings with foreign agents, and which have therefore filtered through the framework of our organisation, level by level".

As far as the additional specific challenge of "ambiguity" levelled against the President of the Council of Ministers currently in office is concerned, regarding the initiative taken by him (pursuant to Article 202 of the Code of Criminal Procedure) relating to the testimony by the witness Mr Murgolo – namely "that he 'reinterpreted' the Article 202 reference from the court, distorting the meaning of the questions put to

the witness and hence rejecting the request for confirmation" – the state representative considers that it should be "overturned".

In fact, according to the appeal – the state representative cites the passage *verbatim* – "the testimony requested by the public prosecutor in no sense concerned the international relations of the SISMi with related agencies but related exclusively to the statements made to the witness by the accused Mr Mancini regarding his personal involvement in the commission of the offence".

In view of the above, the *Avvocatura Generale dello Stato* points out that it is clear from a reading of the sound recordings documenting the contents of the examination of the witness Mr Murgolo, first, that the question put by the representative of the accused was the following: "Now however tells us what … You have stated two pages of what Mr Mancini told you regarding the inquiries requested from the (*sic*: by the) Americans at the meetings in Bologna. So tell us everything that Mr Mancini told you". Similarly, again according to the sound recordings, it is clear that, when confronted with this question, the witness objected that he could not answer "regarding the inquiries requested from the (*sic*: by the) Americans", referring to – the state representative emphasises – the directions of the President of the Council of Ministers.

Thus – according to the *Avvocatura Generale dello Stato* – it is precisely the Article 202 reference made by the trial court judge (and certainly not the reply given by the President of the Council of Ministers) which is not consistent with the tone of the public prosecutor's question and the witness's answer, since the judge requested the President of the Council of Ministers to confirm whether it was "legitimate for the witness Lorenzo Murgolo to invoke an official secret in response to the question concerning his knowledge of matters divulged to him in confidence by the accused Marco Mancini" regarding the role played by the latter in the kidnapping.

In accordance with the above arguments therefore, the state represented concluded, requesting the Court to reject the application.

4.2.2.— Also in this case the parties to the dispute also restated their respective positions and arguments, filing written statements during today's hearing.

Conclusions on points of law

1.— This Court is called upon to examine – following the outcome of the hearing for discussion of 10 March 2009, behind closed doors, pursuant to the ruling of the Chairman of the Court of 18 February 2009 – the five jurisdictional disputes between branches of state (appeals numbers 2, 3 and 6 of 2007, as well as numbers 14 and 20 of 2008) arising between the President of the Council of Ministers and various judicial authorities (the Public Prosecutor's Office at the *Tribunale di Milano*, the office of the judge for preliminary investigations – also sitting as the judge for the preliminary hearing – and the judge sitting alone of the 4th Criminal Law Division of the same court) seized with criminal proceedings and, subsequently, the oral discussion concerning the offence charged of the kidnapping of Nasr Osama Mustafa Hassan, *alias* Abu Omar.

The similarity of the applications filed justifies their union for the purposes of joint treatment and the adoption of a single decision.

In order to identify the *thema decidendum* with precision, it is necessary *in limine* to summarise the individual appeals filed by the various parties to the disputes.

1.1.— With appeal No. 2 of 2007, filed against the Public Prosecutor's Office at the *Tribunale di Milano*, the President of the Council of Ministers requests this Court to rule that the public prosecutor was not entitled, in the first place, to pursue its investigations using documents classified as official secrets (and in particular all those obtained following search and seizure activities carried out at the offices of the SISMi [*Military Information and intelligence service*] in Via Nazionale, Rome, on 5 July 2006, registered as item D-19), documents subsequently attached to the request for referral for trial formulated against the individuals considered to be responsible for the kidnapping.

The Public Prosecutor's Office in Milan is in fact claimed to have violated the official secret on the grounds that it used “as evidence (and evidence of particular importance), as a basis for further investigations and as grounds for the referral for trial”, all of the documentation seized, and hence also item D-19, mentioned above, rather than that, “largely identical” to the former, transmitted – moreover at the express request of the public prosecutor – by the Director of the SISMi by note of 31 October 2006, but with certain passages “blacked out”, insofar as liable to reveal the names of foreign agents, secret acronyms of the related services and reports between the Italian

and foreign intelligence services. The fact that the entire documentation was subsequently transmitted by the court to the European Parliament and published on the internet is claimed to amount to a further violation of the official secret.

Secondly, the applicant complains that the Public Prosecutor's Office in Milan carried out investigative activities – more precisely telephone taps and questioning of suspects – the specific procedures for which violated the official secret classified by the President of the Council of Ministers.

In the first place in fact, "blanket" telephone taps were carried out on "service" numbers of the SISMi, notwithstanding the awareness – resulting from the fact that the relevant mobile telephone contract with the operator has been expressly classified, and the operator had warned the magistrates which made the request of the need for particular discretion – that the association of the numbers with the SISMi was classified as an official secret. This phone tapping activity made it possible – according to the applicant – to gain knowledge according to a knock-on effect of around 180 "classified" telephone numbers and to reveal the service's entire network communication system, as well as the identify of 85 individuals belonging to it, in addition to the various individuals belonging to foreign intelligence services.

In addition, the conduct of the public prosecutors consisting in "obliging the persons under investigation to respond even when the answer would entail the violation of a specific official secret" amounted to a further violation of the prerogatives of the applicant in the area of official secrets. This conduct, which at times involved the denial of the existence of an official secret, at times with the invitation to violate it, and at other times the consideration of the failure to respond due to the invocation of an official secret as a refusal to respond; and went so far as to request the taking of evidence by special arrangements, on 18 September 2006, in order to ascertain the relations between the SISMi and the CIA, that is relations classified as official secrets under the terms of laws, directions and other specific measures. The said evidence was taken by special arrangements on 30 September and concerned – a fact which constitutes further grounds for complaint by the applicant – the circumstances classified as an official secret.

The applicant therefore concluded on the basis of the above, requesting the Court to rule that the Public Prosecutor's Office in Milan was not entitled to operate according to the procedures specified in greater detail above, and as a result annul the investigative measures and request for referral for trial also based on them.

1.2.— In the second of the above appeals (No. 3 of 2007), filed against the judge for preliminary investigations – also sitting as the judge for the preliminary hearing – of the *Tribunale di Milano*, the President of the Council of Ministers requested this Court, according to the same arguments indicated above, given that the violation of the official secret which the judge for the preliminary hearing is claimed to have violated amounted to an "automatic consequence of the previous violation by the public prosecutor", to rule that the public prosecutor was not entitled, in the first place, to obtain and use (in any manner, whether directly or indirectly) reports, documents and sources of evidence classified as official secrets, nor to inspect the same and on the basis of this − following a request made by the public prosecutor pursuant to Article 416 of the Code of Criminal Procedure − refer the suspects for trial and schedule the hearing for oral arguments, thereby exposing these documents and sources of evidence to further publicity.

The ruling that the judicial authority was not entitled to act should, according to the applicant, result both in the annulment of the decision of 16 February 2007 to refer the suspects for trial as well as the order to return the documents classified as official secrets to their rightful holders.

1.3.— In order to contest appeal No. 3 of 2007, interventions were made "in the interest of the *GIP* [preliminary investigating judge] section of the *Tribunale di Milano*" both by "the acting chairman of the aforementioned section" as well as "the judge for preliminary investigations to whom case No. 1966/05 was assigned"; the interveners also filed a "cross appeal".

The interveners in fact consider that all the documents referred to by the applicant – namely the notes of 11 November 2005 (which, whilst asserting that the government and the SISMi were not involved in the kidnapping, restated the classified nature of the information concerning relations between the SISMi, the SISDe and the intelligence agencies of other countries), direction No. 2001.5/07 of 30 July 1985 (containing a list of matters to be regarded as classified) and the note of 26 July 2006 (which rejected the

request of the Public Prosecutor's Office in Milan to hand over the documents available to the Ministry of Defence concerning the kidnapping under investigation and, in general, the practice of extraordinary renditions) – entail "an encroachment on the competences and powers of the judiciary guaranteed under Article 101 of the Constitution".

As a measure of inquiry, the Court is requested "to order the CO.PA.CO. [*Parliamentary Committee for Control over the Secret Services*]" (now, COPASIR [*Parliamentary Committee for the Security of the Republic*]) "to transmit any communications from the President of the Council of Ministers regarding the notes of 11 November 2005 and 26 July 2006, as well as the related decisions adopted when exercising its oversight functions; and to order the President of the Council of Ministers to submit direction No. 2001.5/07 of 30 July 1985 and any other decision to classify the matters in question as secret".

1.4.— By appeal No. 6 of 2007, the Public Prosecutor's Office at the *Tribunale di Milano* commenced a jurisdictional dispute against the President of the Council of Ministers, requesting this Court to rule that the latter was not entitled either " to classify the documents and information concerning the planning, organisation and implementation" of the kidnapping, "since they amount to 'acts which subvert the constitutional order'", or equally "to classify information and documents generically, without justification and retroactively" in relation to the same affair.

The applicant complains that, although the President of the Council of Ministers in office at the time – given the "informed certainty" that the Government and the SISMi had nothing to do "with any aspect related to the kidnapping", but in any case restating the "unyielding institutional duty (to) safeguard, according to the procedures and forms provided for under statute, the confidentiality of records, documents, information and any other object likely to cause harm to interests protected" pursuant to Article 12 of law No. 801 of 24 October 1977 (Establishment and regulation of the intelligence and security services and provisions governing official secrets) – had demonstrated, by note of 11 November 2005, his willingness to "provide the information requested insofar as it could be disclosed to the judiciary", by subsequent note of 26 July 2006 he on the other hand informed the Public Prosecutor's Office in Milan that all the "facts relating to

the kidnapping", all the events "which preceded it" and "in general", "all documents, information or records relating to the practice of so-called "renditions" had been classified by the previous President of the Council of Ministers".

In particular – noting that it had carried out, since May 2006, various inquiries without any official secret being classified, but by contrast with express assurances from the Director of the SISMi (already provided to the Public Prosecutor's Office in Milan by letter of 11 July 2006 and reiterated by the same at least once after he had become a suspect) regarding the absence of any official secret over matters relating to the kidnapping.

In view of the above, the Public Prosecutor's Office in Milan complains that the above note of 26 July 2006 not only applied "the official secret regarding the facts of the case [retroactively] to 11 November 2005 or to any other earlier date as yet unknown", thereby purporting to "interfere with the celebration and/or outcome of the trial" already commenced, but which would have in any case rendered more difficult "the performance of further investigations by the Public Prosecutor's Office in Milan" regarding these circumstances, infringing the prerogatives vested in the latter pursuant to Article 112 of the Constitution.

Therefore, in accordance with these arguments the Public Prosecutor's Office in Milan requested the annulment of both of the above notes issued by the President of the Council of Ministers, pointing – as a preliminary matter – to the existence of a breach of Article 12 of law No. 801 of 1977. The applicant argues that the case before the Court concerns matters falling under those those which "subvert the constitutional order" to which law No. 801 prevents the application of official secret, given that the alleged kidnapping and, the appeal argues more generally, the practice of so-called extraordinary renditions, is clearly incompatible with the rules which are characteristic of a state governed by a Constitution, which prohibit "the kidnapping in Italy of persons to be sent *manu militari* to other countries for interrogation there with recourse to physical or psychological violence".

Moreover, it is claimed that in the second of the notes cited above – that of 26 July 2006 – the President of the Council of Ministers "falsely asserts that the facts related to the kidnapping" had been "classified as an official secret by his predecessor", thereby

breaching the principle which prohibits the retroactive application of an official secret. It is also claimed to be "*ultra vires* on the grounds that its premises are false or mistaken". Finally, it is argued that both of the notes also violate Article 16 of law No. 801 of 1977, due to the failure to specify the essential reasons for the classification .

On this basis therefore, the applicant requests the annulment of these notes and, moreover, "if appropriate", of the direction of the President of the Council of Ministers No. 2001.5/07 of 30 July 1985 since, were it to be interpreted as imposing a general prohibition on the courts from obtaining and using all information and documents concerning relations between Italian and foreign intelligence services, it would also infringe the constitutional prerogatives vested in it, *de facto* imposing upon it a general requirement to request from the President of the Council of Ministers from time to time express exceptions to a generically imposed classification. Finally, the applicant requests the annulment of the the "Press Release" of 5 June 2007 "of the Press Office and spokesperson of the President of the Council of Ministers", in which – in clear contradiction with the note of 26 July 2006 – it is asserted that there is no document in the records of the SISMi regarding the alleged kidnapping, the object of investigations by the Public Prosecutor's Office in Milan, and "therefore no official secret".

Finally, the Public Prosecutor's Office in Milan requested that the President of the Council of Ministers be ordered – as a measure of inquiry – to submit the direction of 30 July 1985 cited above and "any other decision to classify the matters in question as secret".

1.5.— The two further jurisdictional disputes (appeals Nos. 14 and 20 of 2008) on the other hand arose in relation to the oral discussion stage of the criminal trial against agents or former agents of the CIA, the SISMi and other accused and involve, with inverted roles, the President of the Council of Ministers and the judge sitting alone of the 4th Criminal Law Division of the *Tribunale di Milano*, before which the trial was being celebrated.

1.5.1.— In particular, with appeal No. 14 of 2008, the President of the Council of Ministers requests the annulment of the measures of inquiry issued by the court on 19 March and 14 May 2008.

With the first of these measures, the trial court judge on the one hand revoked his previous order of 18 June 2007 which had suspended, pursuant to Article 479 of the Code of Criminal Procedure, the trial pending before him (considering at the time that the decision on the appeals concerning jurisdictional disputes between branches of state illustrated above was a question to be addressed prior to the resolution of the proceedings before him). In the same order of 19 March 2008, the judge ordered the replacement in the special evidence file of the "non redacted documents" obtained by the public prosecutor (comprising that is item D-19, cited above), with "the redacted documents" subsequently transmitted by the SISMi to the Public Prosecutor's Office in Milan. With the other order of 14 May 2008, the judge on the other hand allowed the examination of all the witnesses indicated by the prosecution at Nos. 45 to 65 of its own list, filed pursuant to Article 468 of the Code of Criminal Procedure, regarding all the circumstances indicated therein.

In fact, the applicant claims that the choice – made by the judge in the first of the contested orders (that of 19 March 2008) – to "proceed further with the oral discussion" infringed "in itself" the constitutional powers of the President of the Council of Ministers, "since the principle of loyal cooperation would appear to require the judge to await the outcome of the jurisdictional dispute" (or better of the jurisdictional disputes already commenced before this Court) "before using sources of evidence potentially inadmissible insofar as classified".

Moreover, in the same way the order of 14 May 2008 is claimed to infringe the constitutional powers of the President of the Council of Ministers, insofar as the judge's decision to allow the hearing of witness testimony requested by the public prosecutor regarding all the circumstances indicated by the latter did not offer appropriate guarantees to safeguard the official secrets. Indeed, according to the applicant, the judge's decision – on the basis of an assessment which was not carried out *ex ante*, and therefore when ruling that the evidence could be taken, but rather *ex post*, that is during discovery of the same – to limit the exclusion only to those questions which "sought to reconstruct the broader network of relations between the CIA and the SISMi" (by contrast allowing those relating "to specific relations between individuals belonging to the said organisations", insofar as aimed at identifying "aspects of individual

responsibility for the sequence of events of the case"), is tantamount to the assertion that "an official secret can never cover a source of evidence in investigations into an offence", a principle which "is diametrically opposed" to that laid down by law (Article 202 of the Code of Criminal Procedure) and reiterated under settled constitutional case law.

Therefore, in view of these arguments, the President of the Council of Ministers requested this Court to rule that the judge sitting alone of the *Tribunale di Milano* was not entitled "to allow, discover or use classified records, documents and sources of evidence and on this basis move on to the stage involving the hearing of evidence in open court, thereby exposing these documents and sources of evidence to further publicity", as well as, more generally, to "proceed further with the oral discussion", whilst the proceedings concerning the jurisdictional dispute were still pending and which "were considering the admissibility of investigative acts and/or documents carried out or obtained in violation of the official secret", and as a result to annul the measures of inquiry issued by the Milan court on 19 March and 14 May 2008.

Moreover, the President of the Council of Ministers requests the Court to rule "in any case" that "the *Tribunale di Milano* was not entitled to move on to the stage involving the hearing of evidence in open court and declare as a precautionary rule, in order to ensure respect for official secrets concerning relations between the SISMi and the CIA, the principle that this secret concerned" the broader network of relations between the CIA and the SISMi" but never "specific relations" capable of identifying "aspects of individual responsibility", thereby overturning the rule governing the relationship between official secrets and court action and asserting the predominance of the courts' right to acquire knowledge of the offence over the executive power to classify sources of evidence".

1.5.2.— Finally, appeal No. 20 of 2008 was filed by the judge sitting alone of the *Tribunale di Milano* in relation to two letters of the President of the Council of Ministers of 15 November 2008, in which he confirmed the official secret invoked by the witnesses Messrs Scandone and Murgolo during the course of the hearings for oral arguments held respectively on 15 and 29 October 2008 and, "if necessary", the "letter of the President of the Council of Ministers dated 6 October 2008.

The applicant states that, during the hearing for oral arguments of 15 October 2008, the counsel for one of the accused submitted the letter cited above, “sent to all members or former members of the intelligence services called upon to testify” in the aforementioned trial, in which he reminded them of the existence of the official secret concerning “all and any relations between Italian and foreign intelligence services within the ambit of the protection of the international relations [of the state]”, and the resulting duty to invoke the official secret with regard to “any relations between Italian and foreign intelligence services” even if “they are or may be in some way related” with the actual kidnapping.

It also states that the witnesses Messrs Scandone and Murgolo – the former examined in relation to any orders or directions issued by one of the accused, General Pollari, aiming “to prohibit his subordinates from using unlawful means to combat international terrorism including, in particular, so-called extraordinary renditions”, whilst the latter was asked “to repeat the statements already made during the preliminary investigations regarding some of his conversations with the accused Mr Mancini concerning Mr Mancini's involvement in the kidnapping and his participation in a meeting with 'the Americans' in Bologna” – invoked the official secret, “referring to the letter/direction cited above” of 6 October 2008.

Having stated the above, the applicant points out that, with the notes cited of 15 November 2008, the President of the Council of Ministers – responding to the two references made by the judge pursuant to Article 202 of the Code of Criminal Procedure – confirmed the official secret invoked by the witnesses. The President of the Council of Ministers justified his decision both in view of the need to “maintain the credibility of the intelligence service within the ambit of its international relations with related agencies” (since “the disclosure of revealing information, even regarding only part of these relations, would expose our intelligence services to the specific risk of not being made privy to information by their foreign counterparts, with clear negative ramifications on the performance of intelligence operations at present and in future”), as well as the “need for discretion in order to protect the internal affairs of every intelligence service, shielding their organisation and operational procedures from undue publicity”.

The applicant moreover restated the existence of the official secret concerning "any relations between Italian and foreign intelligence services" even if "they are or may be in some way related" with the kidnapping at issue in the trial, specifying that the courts "are free to investigate, make findings and reach a verdict regarding the offence concerned, which is not classified as an official secret, using all forms of evidence permitted", with the sole exclusion however of "those which concern relations between Italian and foreign intelligence services", precisely because they are "classified as official secrets".

Accordingly, since – according to the applicant – these assertions "*de facto*" render "the specific and full exercise of judicial powers very difficult", the judge sitting alone of the *Tribunale di Milano* considered it necessary to initiate the jurisdictional dispute.

The appeal in the first place challenges the inherent contradiction in the arguments of the President of the Council of Ministers: if the offence is not classified as an official secret, then "also the conduct of the accused" should not be classified, since it pertains to "constituent elements" of these events. It therefore follows that when ascertaining the facts of the case the judge cannot be prevented from obtaining and using also that evidence "which concerns" relations between agents (or former agents) of the Italian or American intelligence services, even if "they are or may be related" with the commission of the offence, since this ultimately involves preventing the courts "from obtaining knowledge of facts which could prove the active participation in the offence of an accused (Murgolo testimony), or the innocence of another (Scandone testimony)", thereby preventing it "from gaining knowledge of the 'dynamics of the offence', which however is asserted not to be classified".

The judge also claims that the principle of proportionality has been violated, since the requirements underpinning the two declarations confirming the official secret (namely the need to maintain both "the credibility of the intelligence service within the ambit of its international relations with related agencies", as well as the "need for discretion in order to protect the internal affairs of every intelligence service, shielding their organisation and operational procedures from undue publicity"), could have been guaranteed through a distinction – which the President of the Council of Ministers did not however decide to draw – between "information relating to the organisation and

operational procedures of the services, or relations of a general and institutional nature with foreign intelligence services, including eventual understandings which specify shared courses of conduct", which are destined to remain secret, and on the other hand "conduct actually carried out by individual agents/accused and which had a causal impact on a criminal offence, which may be freely ascertained by the court".

With specific reference to the confirmation of the secret invoked by the witness Mr Murgolo, the judge also claims that this breaches the "principle that classification occur *ex ante*", since the decision of the President of the Council of Ministers refers to information "already revealed during the course of the preliminary investigations" which had hence already been disclosed (and as such could no longer be classified).

Finally, the judge also avers – in relation to all contested decisions – the violation of the principle of correctness and loyalty, since the power to classify had not been exercised, as it should have been, "in a clear, explicit and unequivocal manner", considering in particular that the assertion of the President of the Council of Ministers that the offence at issue in the trial was not classified, whilst "the evidence (…) concerning relations between Italian and foreign intelligence services" is, is tantamount "to a kind of rhetorical trick intended to mask, through its formal aspects, the actual scope of the classification", which "in essence becomes so broad as to entail the risk of rendering meaningless the power/duty of the judge to hear evidence regarding the *actus reus* and *mens rea* of the offence".

Finally, again with specific reference to the confirmation of the official secret invoked by the witness Mr Murgolo, the applicant points to "a further anomaly".

In fact, confronted with an Article 202 reference concerning "the role which the accused Mr Mancini may have had in the kidnapping", the President of the Council of Ministers, "on the basis of a 'reinterpretation'" of that role, identified its essence – as confirmed by the justification focussing on the need to "maintain the credibility of the intelligence service within the ambit of its international relations with related agencies" – "as consisting in specifically classified information (relations between the CIA and the SISMi)", thereby "essentially rejecting the request for confirmation, in contrast with the principle of correctness and loyalty". In accordance with the above therefore, the applicant judge requested the court to rule that the President of the Council of Ministers

was not entitled to classify “any relations between Italian and foreign intelligence services” even if “they are or may be in some way related” with the events constituting the kidnapping at issue in this case, nor “to prevent the applicant judge from obtaining and using all evidence which 'concerns relations between Italian and foreign intelligence services'”, nor finally “to confirm the classified status of information already disclosed during the course of preliminary investigations”, and as a result annul the two notes of 15 November 2008, and “if necessary”, the letter of the President of the Council of Ministers dated 6 October 2008 (No. 6000.1/42025/GAB).

Finally, the applicant requested that the Court order – as a measure of inquiry – the disclosure of the communications sent in relation to the present case by the President of the Council of Ministers to the Parliamentary Committee for the Security of the Republic, as well as the decisions which classify as secret both “the circulars and orders issued by General Pollari aiming to prohibit his subordinates from using unlawful means to combat international terrorism including, in particular, extraordinary renditions, as well as the Mr Mancini's conduct in relation to the kidnapping” at issue in the trial.

2.— As a preliminary matter, the Court confirms the standing to be parties in these proceedings pursuant to Article 37 of law No. 87 of 11 March 1953, concerning the classification as, challenges to or confirmation of official secrets, both of the President of the Council of Ministers (most recently, judgment No. 487 of 2000 and order No. 404 of 2005 concerning, respectively, his standing as an applicant and as a respondent), as well as the various judicial authorities involved in these disputes (most recently, regarding standing as an applicant, order No. 209 of 2003 and, as regards standing as a respondent, order No. 404 of 2005).

3.— Having summarised the contents of the individual jurisdictional disputes between branches of state as set out above, it must be noted as a preliminary point that, in spite of the fact each undoubtedly raises its own specific issues, they display one common feature which enables them to be resolved on the basis of an essentially unitary line of argument.

In fact, the core issue within the overall *thema decidendum* submitted for review by this Court consists in the need to establish – heaving previously identified however the

precise object of the official secret which the President of the Council of Ministers intended first impose and subsequently to confirm, at the stages through which the criminal trial concerning the alleged kidnapping has passed up to now – the respective extent of the constitutional powers which may lawfully be exercised, on the one hand, by the President of the Council of Ministers and on the other hand the various judicial authorities, including both investigating judges and trial court judges, vested with functions exercised in the same trial.

It is therefore necessary – in accordance moreover with the nature of proceedings before this Court involving rulings of competence pursuant to Article 37 of law No. 87 of 11 March 1953 – to delineate the respective spheres of competence, and of conflicting powers, in relation to official secrets. This means therefore that it is necessary to recall, as a preliminary matter, the principles which have traditionally been expressed within constitutional case law in this area through the adoption of certain judgments which have influenced the legislative provisions first enacted by law No. 801 of 1977 – applicable *ratione temporis* to the facts at issue in the first three appeals under examination – and more recently by law No. 124 of 3 August 2007 (Information system to ensure the security of the Republic and new provisions governing official secrets).

Within this perspective it must first be reiterated that the said legislation embraces "the supreme interest of the security of the state as an international actor, that is the interest of the state-community in its own territorial integrity, independence and – in exceptional cases – its very survival" (judgment No. 82 of 1976; followed by judgments No. 86 of 1977 and No. 110 of 1998).

This is an interest which "is present in and predominates over every other interest within all state organisations, regardless of the political regime", and is expressed within the Constitution "through the solemn wording contained in Article 52, which asserts that it is the sacred duty of the citizen to defend the Homeland" (judgment No. 86 of 1977, following judgment No. 82 of 1976). And it is precisely to this concept that we must refer in order to give substantive content to the concept of official secret, considering it "in relation to other provisions contained in the Constitution which lay down indispensable principles for our state: in particular, consideration must be given to national independence, the principles of the unity and the indivisibility of the state

(Article 5) and the provision which encapsulates the essential characteristics of the state itself through the term "democratic republic" (Article 1)" (judgment No. 86 of 1977).

Therefore it is with reference not only to Article 52 of the Constitution but rather to the broader legislative framework that one may "speak of the external and internal security of the state, the need for protection against any violent action or any other action incompatible with the democratic spirit which inspires our constitutional ordering of the supreme interests which apply to any collectivity organised as a state and which, as mentioned above, may touch on the very existence of the state" (judgment No. 86 of 1977).

It therefore follows that, as far as official secrets are concerned, "a problem necessarily arises of the interaction or interference with other constitutional principles", including those "which underpin the judiciary". Moreover, the requirement to weigh up these principles means that "the invocation of an official secret by the President of the Council of Ministers" cannot have "the effect of preventing the public prosecutor from investigating criminal conduct to which a *notitia criminis* in his possession refers, and where appropriate from initiating a prosecution", but only that "of preventing the courts from obtaining and in consequence using information and evidence classified as an official secret" (judgment No. 110 of 1998). This is in any case without prejudice to the fact that "the security of the state constitutes the essential, irrepressible interest of the collectivity, which clearly enjoys absolute predominance over any other interest since it impinges upon, as stated above, the very existence of the state, one aspect of which is the judiciary" (judgment No. 86 of 1977).

It follows from the above that the President of the Council of Ministers is vested with broad powers over such matters, which may be restricted only by the requirement that Parliament be informed of the essential reasons underlying the decisions taken and by the prohibition on classifying matters relating to acts which subvert the constitutional order (according to the express provision both of law No. 801 of 1977 as well as the subsequent law No. 124 of 2007). Indeed, the "identification of facts, records, information, etc. which may compromise the security of the state, and must therefore remain secret" is the result of an assessment that is "largely discretionary and, more specifically, of discretionary powers which extend beyond the ambit and limits of purely

administrative discretion, since they impinge upon the *salus rei publicae*" (judgment No. 86 of 1977).

In these circumstances therefore – without prejudice to the competences of this Court in jurisdictional disputes – any judicial review not only of the existence of the power to classify material, but also of the manner in which it is exercised, is precluded since "the assessment regarding the measures appropriate and necessary in order to guarantee the security of the state is of a purely political nature, and therefore is intrinsically a matter for the organs and the political authorities charged with its protection, and is certainly not pertinent to the activities of the courts". In fact, to draw any other conclusion "would be to overturn some of the essential principles of our legal order" (starting from the principle that "the courts are as a rule prohibited from acting in the stead of the executive and the public administration and, therefore, from reviewing the merits of their acts") and above all "in practical terms eliminate official secrets" (judgment No. 86 of 1977).

The procedures according to which power to classify matters as official secrets is exercised are therefore subject to review by Parliament, this being "the natural forum for control of the merits of the most high-ranking and serious decisions of the executive", since "it is before the body representing the people, in which the sovereignty which could be undermined is vested (Article 1(2) of the Constitution) that the government must justify its decisions and it is the representatives of the people who may adopt the most appropriate measures to guarantee security" which, as noted above, the legislation governing official secrets was enacted in order to protect (again judgment No. 86 of 1977).

4.— Having clarified this, the enduring contemporary significance of the principles contained in constitutional case law (which clearly do not have a reserve status and cannot be remodelled in the light of possible changes *de facto* brought about by the passage of time) must be underscored, notwithstanding the introduction of the new provisions enacted by law No. 124 of 2007.

In providing for far-reaching structural changes to the arrangements governing the intelligence system to guarantee state security, whilst at the same time amending the legislation governing official secrets, law No. 124 has maintained the conceptual

definition of the “objective” aspect of official secrets, which is substantially in line with the traditional approach already adopted by Article 12 of law No. 801 of 1977.

Article 39(1) of law No. 124 of 2007 in fact provides that “any records, documents, information, activities and any other object, the disclosure of which is likely to cause harm to the integrity of the Republic, shall be classified as an official secret, which may also apply in relation to international agreements, the defence of institutions established by the Constitution as a basis thereto, the independence of the state from other states and the relations with these, as well as the military preparation and defence of the state”.

However, whilst it may be true that – as a rule – the prerequisites for classification as an official secret are considered to be fulfilled by a decision made by specific individuals authorised by law to classify information (decisions which, in this case, have on the one hand declarative and on the other hand constitutive status of the official secret), nevertheless the document, object, information or relationships that are from time to time concerned may display substantive or formal characteristics such as to suggest that they patently have aspects that are in themselves classified as official secrets. In other words, in the said special cases, the characteristic of secrecy is inherent in the decision since it may be perceived immediately and unequivocally, as moreover may be inferred from the text of Article 12 of law No. 801 of 1977, according to which official secrets cover: “any records, documents, information, activities and any other object, the disclosure of which is likely to cause harm to the integrity of the Republic, which may also apply in relation to international agreements, the defence of institutions established by the Constitution as a basis thereto, the independence of the state from other states and the relations with these, as well as the military preparation and defence of the state”.

It is clear that, in this case, the absence of an express declaration leaves a significant level of discretion to whoever has to use the document, object, information or relationship.

However, in the cases in which an express declaration by the President of the Council of Ministers regarding the existence of an official secret is necessary, Article 39 of the later law No. 124 of 2007 provided, precisely in order to render it immediately “apparent”, that “the restriction resulting from an official secret is established and,

where possible, noted at the express instructions of the President of the Council of Ministers on the records, documents or objects which are classified, even if they were obtained abroad".

As far as the consequences of the creation or invocation of an official secret are concerned, this Court has specified that classification does "not have the effect of imposing an absolute prohibition on the public prosecutor from carrying out inquiries and launching prosecutions in relation to circumstances specified in a *notitia criminis*, but rather the effect of preventing the courts from obtaining and in consequence using information and evidence classified as an official secret". According to the Court, this prohibition "relates to the use of records and documents classified as official secrets either directly, in order to launch a prosecution on the basis of them, or indirectly, in order to use them as the basis for further investigations, since any results would in turn be flawed due to the unlawful nature of their origin" (judgments Nos. 410 and 110 of 1998).

The assertions and principles discussed above are restated – using formulations essentially similar to those contained in the previous procedural legislation – by the new version of Article 202 of the Code of Criminal Procedure, as amended by Article 40 of law No. 124 of 2007, stipulating on the one hand that "the invocation of an official secret, confirmed by a statement containing reasons by the President of the Council of Ministers, prevents the courts from obtaining and using, directly or indirectly, classified information" (sub-section 5); whilst on the other hand that "the courts are at any event not precluded form proceeding on the basis of self-standing evidence which is independent of the classified records, documents and objects" (sub-section 6). Therefore, official secrets effectively operate as "bar" on the powers of the courts, albeit only within the limits of the record or document classified as secret and starting from the time when the existence of the secret was notified to the prosecuting authority.

5.— In view of the above discussion of the development of the constitutional case law and legislation governing official secrets, moving now to an examination of the present jurisdictional disputes between branches of state, the Court finds that those filed by the President of the Council of Ministers registered as Nos. 2 and 3 of 2007 and No.

14 of 2008 deserve to be partially accepted under the terms specified in greater detail in the following.

In fact, in relation to the first two appeals, the interest in their resolution remains, as it cannot be argued that the matter in dispute no longer subsists in view of the removal by the trial court judge (and therefore in a stage of the trial different from that of the preliminary investigations and the preliminary hearing at issue in the above appeals) of the records not containing the redactions made in order to safeguard the requirements of official secrets.

Indeed, the jurisdictional dispute is aimed at defining the extent of the spheres of competences of the branches in dispute at the time when it arose, and is as a rule immune to subsequent developments in the matters which gave rise to the dispute.

6.— On the other hand, both the dispute filed by the Public Prosecutor's Office in Milan (appeal No. 6 of 2007), as well as that commenced – pursuant to a "cross appeal" filed "in the interest of the *GIP* [preliminary investigating judge] section of the *Tribunale di Milano*" – by the "acting chairman of the aforementioned section" and by the "judge for preliminary investigations to whom case No. 1966/05 was assigned", when intervening in proceedings concerning a jurisdictional dispute commenced pursuant to appeal No. 3 of 2007, are inadmissible.

6.1.— As far as appeal No. 6 of 2007 is concerned, it should be noted that, when carrying out its initiatives, the Public Prosecutor's Office in Milan – as is already clear from the use in the appeal of arguments seeking to justify the legitimacy of its own actions rather than to demonstrate the occurrence of an infringement of its constitutional powers – admits that it has not suffered any encroachment on its own investigative activities through the decisions which it has requested the Court to annul.

Indeed, the applicant expressly asserts that – despite the refusal of the President of the Council of Ministers, in the note of 26 July 2006, to transmit "all documents, information or records relating to the kidnapping concerned and, more generally, the practice of so-called renditions" – it was all the same able to gather the "evidence considered sufficient for prosecution", requesting the referral of the suspects for trial; in doing so, it therefore contradicted the premise on which it based its own initiative,

namely that the competences attributed to it pursuant to Article 112 of the Constitution had been infringed.

Under this perspective, the Court's rulings not only in order No. 404 of 2005, which stated that "as the arbiter of disputes, [this Court] is called upon to rule not on disputes which are abstract or hypothetical, but current and specific", but above all in order No. 259 of 1986 are of significance. In fact, the latter judgment, in which the Court ruled on a dispute concerning the refusal to reveal the names of certain "secret service informers", asserted – on the grounds that they were "already known to the court, also as a result of the 'copious' documentation transmitted to it, as well as the events at issue in the proceedings and the information for which it requested the source" – that "since it was not specified in the appeal what impact the knowledge of the names of the informers" could have "on the performance of further investigations", it was not "made clear in what way the reliance on the official secret" could "actually prevent the specific exercise of the courts' powers"; this therefore had the further consequence that it was impossible "to enter into the merits of the appeal".

Moreover, similar points must all the more so be raised in the case now under examination since the Public Prosecutor's Office in Milan even asserts, as mentioned above, that it did not encounter any limitations when carrying out its own inquiries and in the formulation of the request for referral for trial of the suspects, since it acted – on its own assertion – on the basis of inquiries that did not fall within the ambit of the official secret invoked by the note of the President of the Council of Ministers of 26 July 2006 and the note of the SISMi of 31 October 2006.

In addition, as further confirmation of the inadmissibility of the appeal filed by the Public Prosecutor's Office in Milan, the Court notes that the complaints relating to the supposed "retroactive effect" of the note of 26 July of the President of the Council of Ministers are not accompanied by a detailed and specific illustration of the effect which this supposedly "*ex post*" classification had on the applicant's constitutional powers pursuant to Article 112 of the Constitution.

6.2.— In the same way, the "cross appeal" filed "in the interest of the *GIP* [preliminary investigating judge] section of the *Tribunale di Milano*" is inadmissible.

Even disregarding the objection that the expiry of the stage of the proceedings pending before the *GIP*, following the issue of the measures pursuant to Article 429 of the Code of Criminal Procedure, means that the preliminary investigating judge cannot be considered to be vested – at the time when the cross appeal was filed – with judicial functions [in these proceedings], and hence to be entitled to express the position of the branch of state to which it belongs (orders No. 127 of 2006 and No. 144 of 2000), the argument that to permit the examination of the merits of the above procedural initiative would *de facto* be equivalent to modifying – by avoiding of the preliminary stage involving a ruling on the admissibility of the dispute – the necessarily "two stage" structure which characterises, according to the settled case law of the Constitutional Court, proceedings involving jurisdictional disputes between branches of state, is decisive.

On this issue, it is sufficient to recall judgment No. 116 of 2003, which states that "when considering the existence of a 'jurisdictional dispute', the Constitutional Court is vested with very broad powers concerning the identification of the public authorities with standing to participate and the determination of the *thema decidendum* of the dispute, which are so broad on occasion to risk addressing issues regarding the merits of the question"; this power "to configure proceedings involving jurisdictional disputes" would be thwarted were the Court to permit initiatives taken "as cross appeals" by the "respondent" parties in proceedings commenced in accordance with recognised procedures.

7.— As specified above on the other hand, appeals No. 2 and No. 3 of 2007 are partially well founded, within the limits set out below. They must be allowed, above all, with reference to the complaints regarding the use – both by the Public Prosecutor's Office at the *Tribunale di Milano*, as well as the judge for preliminary investigations (also sitting as the judge for the preliminary hearing) of the same court – of documents in non redacted form.

8.— In order to set the precise limits within which the question of the well foundedness of this encroachment contested by the President of the Council of Ministers must be assessed, it is necessary to start from a detailed account of the events which provide the backdrop to the contested infringement by the judicial authority of

the prerogatives reserved to the government, acting through the President of the Council of Ministers, in the area of official secrets.

8.1.— Therefore, it must first be pointed out that – as is unequivocally clear from the appeals under examination, the documentation attached to them and referred to by the parties to the dispute, in addition to the written statements filed by all the parties in conflict – on 5 July 2006, on the initiative of the Public Prosecutor's Office in Milan, a search was carried out at the offices of the SISMi in Via Nazionale 230, Rome, in the presence of functionaries from the service, who did not resist the search, and which concluded with the seizure of documentation and computer data, described in greater detail in the relative report. On 6 October 2006, the entire case file – including the documents relating to the seizures made at the offices of the SISMi in Via Nazionale – was filed pursuant to Article 415-*bis* of the Code of Criminal Procedure.

However, this documentation included material, registered as "Item D-19", which was largely identical to some of the documents which were transmitted to the Public Prosecutor, at a later date, by the SISMi itself. In particular, the problem concerned a memorandum and thirteen appendices, seized on 5 July in "unabridged" form and sent by the SISMi on 31 October with redactions and deletions relating to the holders, addressees and names of offices.

By note of 31 October 2006 in fact, in compliance with the disclosure order issued by the Public Prosecutor in Milan on 3 July, the SISMi transmitted to that office "918 + 37 documents", specifying that they contained documentation "covered by a prohibition on disclosure pursuant to Articles 256, 258 and 262 of the Criminal Code"; in view of the inappropriateness – at the time – of the disclosure of their its contents and the need to liaise further with the competent authority, the Public Prosecutor ordered, on 27 November 2006, the inclusion of this documentation in a reserved protocol. The documents contained – as can be inferred from the contents of the note – "a complex and vast body of information" relating "to matters which, on account of the specific circumstances of the intelligence and security services" were "classified as official secrets". The above note went on to point out that this classification had been imposed "in accordance with the decisions previously adopted by the President of the Council of Ministers pursuant to Article 1 of law No. 801 of 1977 – decisions the validity and

reasonableness of which have been confirmed in significant rulings of the merits courts as well as the Court of Cassation". Finally, it emphasised that it was precisely for this reason that the President of the Council of Ministers, before whom "the overall management [had been] duly placed at the outset as the only authority competent to make definitive decisions in the area of official secrets", had "classified the material", of which the above note accordingly informed the prosecuting authority.

8.2.— Several important corollaries may be inferred from the sequence of events recounted above:

a) first, the search and seizure of documentation carried out on 5 July 2006 at the offices of the SISMi in Via Nazionale – in the absence of any resistance by the functionaries present or, also subsequently, by express communication from the SISMi as an organisation – represented investigative acts which were legitimate on a procedural level;

b) secondly, the lawful acquisition of the documents was accordingly followed by the inclusion of the material in the preliminary investigations file. In fact, within this perspective, it is sufficient to point out that, in addition to the measures required under Article 366 of the Code of Criminal Procedure, the documentation was filed, and notice was given of the conclusion of preliminary investigations pursuant to Article 415-*bis* of the Code of Criminal Procedure, before the SISMi sent, along with further copious documentation, also an excerpt of that already seized, specifying that the redacted parts were classified.

Therefore, on the basis of the documentation obtained following the above search, the public prosecutor could – theoretically – have carried out all ensuing investigative activities, and even have requested and obtained from the judge for preliminary investigations the adoption of a precautionary measure against the suspects. At the same time, and without prejudice to the possibility that the documentation obtained could indeed also influence the investigations to the benefit of the suspects under the terms of Article 358 of the Code of Criminal Procedure, precisely because the results of the investigations flowing from the seizure mentioned above were made available to the suspects, at least starting from the time when the measures taken pursuant to Article

415-*bis* of the Code of Criminal Procedure were notified, they now constituted a "body of information" on which the procedural powers and rights of the same were based.

As further confirmation that the acquisition and use of all evidential material was lawful, it should also be pointed out that the search and seizure carried out by the public prosecutor in July 2006 were implemented at one of the offices of the SISMi and in the presence of functionaries from that body, which meant that the SISMi was aware of the activity carried out by the public prosecutor and, above all, of the precise nature of the material discovered and seized. Moreover, the fact that the material was not classified on that occasion, which meant that at the time no restriction was applicable, precluded the subsequent activation of the procedure involving an Article 202 reference to the President of the Council of Ministers in order to confirm whether or not the material was classified.

It was only with the note of 31 October that the SISMi transmitted another copy of the documentation to the court, containing redactions, and formally classified the redacted parts as official secrets. This classification of the material as an official secret by the note in question therefore adopted a stance in stark contrast with that manifested *per facta concludentia* during the search and seizure of July 2006.

8.3.— Therefore, there is no doubt that, in compliance with the disclosure and surrender order issued by the Public Prosecutor's Office in Milan pursuant to Article 256 of the Code of Criminal Procedure, the SISMi was entitled – also taking into account the mass of documentation requested, due to the very broad extent of the disclosure order – not only to sort between the documents which were fully disclosable and those entirely classified as official secrets, but also to transmit documents redacted as necessary in order to protect classified information. In fact, in the note of 31 October 2006, the Public Prosecutor's Office was informed that precisely for this reason, the President of the Council of Ministers – "before whom the overall management [had been] duly placed at the outset as the only authority competent to make definitive decisions in the area of official secrets" – had ordered the classification of certain documents sent containing the above redactions.

8.4.— Having provided the above account of this crucial stage in the sequence of events at issue in the proceedings, it is now necessary to draw the implications of this

account for the definition, at least in part, of the *thema decidendum* referred to this Court for examination.

In the first place, the argument that the dispatch of partially classified documentation would in itself sweep aside, and with retroactive effect, the use of the identical documents obtained during the search carried out on 5 July 2006 cannot be shared; this is in fact an argument for which there is no corroboration not only under procedural law, but above all within the context of the legislation enacted by law No. 801 of 1977, applicable in the case before the court.

Moreover, this invocation of an official secret can also not be "immaterial" for further inquiries by the courts, including both investigating judges and trial court judges, and in relation to the procedural deadlines imposed by the law of criminal procedure.

Indeed, it is undeniable that the mechanism for the invocation of an official secret presupposes, by its very nature, that it as a rule precedes and does not follow the acquisition and use of the record, document or information to be classified in order to safeguard those primary requirements, pertaining to the *salus rei publicae*, which justify *erga omnes* classification as an official secret, even to the detriment of other primary requirements of scrutiny inherent in the exercise of criminal prosecutions. However, it is equally beyond doubt that, starting from the time when the prosecuting authority is made aware of the classified status of the documents, it is confronted with the alternative of either removing the non redacted documents from the case file (returning them to the SISMi) and replacing them with those containing the redactions (judgment No. 487 of 2000) or, if it intends to continue to use the documentation in non redacted form, to initiate procedures aimed at an eventual confirmation of the official secret by the President of the Council of Ministers.

In reality, although the notification of the classification of the parts redacted from the documentation as official secrets did not entail the retroactive invalidation of the inquiries already carried out on the basis of the previous lawful acquisition of the same documents, this certainly did not exempt the judicial authority from the obligation to draw its own conclusions as regards the course of action which had been imposed upon

it precisely through the notification of the classified status of the redacted parts of the documentation concerned.

On the other hand, as mentioned above, the investigating judge – which considered that the partially classified documents were "not essential for the resolution of the trial, having already obtained evidence considered sufficient for prosecution" (according to the jurisdictional dispute filed by the Public Prosecutor's Office) – could have used the established procedures to make an Article 202 reference to the President of the Council of Ministers.

If therefore the argument that, in the case before the Court, the prosecuting body had "obtained documents patently (i.e. *ictu oculi*) classified as official secrets and many parts of which were expressly redacted when officially transmitted" is groundless, to actually disregard this classification as secret would however breach the values and purposes of official secrets – namely to ensure that state security is guaranteed, which "amounts to an essential interest" (judgment No. 86 of 1977). This however is precisely what occurred in the case under examination, since the judicial authority did not adopt any of the available measures necessary in order to prevent the further disclosure of the documents in the version which did not contain the redactions necessary in order to protect the classified information.

Therefore, in the case before the Court the prerogatives vested in the President of the Council of Ministers in the area of official secrets have been infringed. This is because, once the fact that part of the documentation transmitted by the SISMi was classified had been notified, it was in any case incumbent upon the prosecuting judicial authority to adopt all precautionary measures necessary in order to prevent the non "redacted" copies of those documents from entering into the normal mechanism for disclosures within the trial, thus *de facto* violating that secret and thereby exposing the national security requirements and primary values which that secret was intended to protect to the risk of being undermined, as well naturally as endangering the very personal safety of the various individuals whose names had been "hidden" through the redaction of the document in question. In order to satisfy in real terms the predominant value attached to the official secret, these precautions cannot be subject to limitations of any sort resulting from the specific stage or instance of the proceedings, once the

prosecuting authority has been made aware of the official secret: ultimately, the courts are charged with the task of upholding that value, regardless of any prior use of the material which has been classified as an official secret.

Therefore, the constitutional powers of the President of the Council of Ministers have been infringed in the terms set out above by the Public Prosecutor's Office at the *Tribunale di Milano* and the judge for preliminary investigations of the same court.

8.5.— By the same token, the Public Prosecutor's Office in Milan cannot rely on the arguments detailed in its submissions.

This applies above all to the claim that the events at issue in the criminal trial should be considered as falling under those which "subvert the constitutional order", with the result that the official secret cannot be invoked, according to the provisions of Article 12(1) of law No. 801 of 1977.

On a general level, this Court above all agrees with the resolutions of the European Parliament regarding the unlawful nature of so-called "extraordinary renditions", because they contrast with the constitutional traditions and principles of law of the Member States of the European Union and qualify as specific offences. However, the conclusion that the offence of the kidnapping amounts to a fact "which subverts the constitutional order" cannot be inferred even from these resolutions, as suggested by the Public Prosecutor's Office in Milan.

Indeed, the assertion of this link is contradicted, irrespective of any other consideration, in the first place by the conclusions of the Public Prosecutor's Office itself, which considered that the case before the Court did not concern the offence falling under Article 289-*bis* of the Criminal Code (kidnapping for the purposes of terrorism or subversion), but only that established and punished under Article 605 of the Criminal Code (kidnapping).

Secondly, when activating the reference procedure provided for under Article 202 of the Code of Criminal Procedure in relation to the testimony given by the witnesses Messrs Murgolo and Scandone, the fact that the trial court judge himself disregarded the request made by the public prosecutor – moreover in contrast with his previous decisions – to classify the offences with which the accused were charged as acts which subvert the constitutional order is significant. The judge reached this conclusion on the

grounds that “no official secret was established or invoked” concerning matters relating to the kidnapping, and therefore “any declaration that the offence charged subverted the constitutional order” would not “make it any easier or more difficult to prosecute the offence in question”.

Therefore, leaving aside the point that the offence of the kidnapping was not classified as an official secret, but rather only the sources of evidence concerning relations between Italian and foreign intelligence services, the fact that for the offence in question it was impossible to identify the fundamental core of the fact which subverted the constitutional order – consisting in its necessary design to subvert the democratic order or the institutions of the Republic, or to cause harm to the primary interest of the international standing of the state – is in any case decisive.

Moreover, the case law of the Court of Cassation identifies the goal of subversion of the constitutional order as that “of undermining the constitutional order and overturning the pluralist and democratic nature of the state, disrupting its structures, preventing its functioning or leading it astray from the fundamental principles which constitute the essence of the constitutional order” (Court of Cassation, 1st Criminal Law Division, judgment No. 11382 of 11 July 1987); one single criminal offence, no matter how serious it may be, is not in itself capable of qualifying as an act which subverts the constitutional order unless it is capable of undermining and disrupting the overall structure of democratic institutions.

Finally, the above is not to mention the fact that in the case before the Court, as noted by the *Avvocatura Generale dello Stato*, the procedure regulated by the combined provisions of Articles 204 and 66(2) of the Code of Criminal Procedure as currently in force was not implemented. It therefore follows that the President of the Council of Ministers was never put in a position to give his opinion on the nature of the offence in question (which allegedly subverted the constitutional order); and only this, following confirmation of the official secret by the President of the Council of Ministers, would have entitled the Public Prosecutor's Office to commence a jurisdictional dispute in relation to this specific issue.

8.6.— Turning to another argument, it cannot be claimed that the violation of the official secret is precluded – as claimed by the Public Prosecutor's Office in Milan – on

the grounds that the decisions taken by the public prosecutor when complying with the procedural formalities specified under Article 416 of the Code of Criminal Procedure were valid from a procedural point of view.

Indeed – even though the documentation filed (on 6 October 2006) when the suspects were notified of the conclusion of investigations did not mirror that attached to the request for referral for trial (on 5 December 2006) – the public prosecutor should have removed the classified documents from the material supporting the prosecution, replacing them with those partially redacted, and releasing the former to the SISMi.

If this were not the case – and hence if it were concluded that in the case before the Court the course of conduct followed by the Public Prosecutor's Office in Milan had only to comply with the rules set out in the Code of Criminal Procedure, which require the public prosecutor to make available all of the investigative material lawfully available to the judge for the preliminary hearing (see also judgment No. 145 of 1991 which, however, ruled on the denial of discretionary powers to the public prosecutor regarding the composition of the file) – the judgment on the suitability of the public prosecutor's conduct to guarantee respect for the constitutional prerogatives vested in the President of the Council of Ministers in the area of official secrets would end up being tantamount to the very different assessment of only the averred legitimacy of that conduct from a merely procedural point of view.

Moreover, the case law of the Constitutional Court (judgment No. 487 of 2000; order No. 344 of 2000) has in the past already emphasised that there cannot be any overlap between these types of judgment, specifying that a declaration that material obtained in breach of the legislation governing official secrets is “inadmissible in a trial” must be made – where this Court exercises the functions vested in it pursuant to Article 37 of law No. 87 of 11 March 1953 – “not by applying” procedural rules, “but rather in accordance with the constitutional principles put in place in order to protect official secrets and the principle of correctness and loyalty, which must inform relations between the courts and the President of the Council of Ministers, accepted as parameters for the resolution of the jurisdictional disputes raised by the latter, since jurisdictional dispute between branches of state cannot be resolved by applying choices which have been made by Parliament through ordinary legislation”.

8.7.— It follows from the above that neither the Public Prosecutor's Office in Milan nor the judge for the preliminary hearing of the *Tribunale di Milano* was entitled to use all of the partially classified material as a basis, respectively, for the request for referral of the accused for trial and the subsequent order issued pursuant to Article 429 of the Code of Criminal Procedure. Therefore it is necessary for this Court to order to annulment of these procedural documents insofar as the parts redacted and blacked out relating to holders, addressees and names of offices classified as secret by the note of 31 October 2006 are concerned.

8.8.— However, with regard to the effects which this declaration is destined to have on the criminal proceedings still in progress, the principles traditionally expressed by this Court must be reiterated.

Indeed, "the invalidating effects of a declaration that a body was not entitled to act must be limited to the measures, or parts thereof, which were recognised as infringing the interests at issue in the constitutional proceedings involving a jurisdictional dispute" (judgment No. 451 of 2005; see the similar judgment No. 263 of 2003), since "it will be a matter for the competent courts seized of the trial" (which may even have passed on to subsequent stages compared to that in which the act which infringed the powers of a branch of state other than the judiciary occurred) to assess, with reference to the specific case, "the consequences, if any, of this annulment on a procedural level" (judgments No. 451 of 2005 and No. 284 of 2004).

This assessment must evidently be carried out in accordance with the procedural rules applicable to the relevant proceedings, and therefore, in the case before the Court, those laid down by Article 185(1) of the Code of Criminal Procedure ("The invalidity of an act invalidates all subsequent acts which depend on that declared invalid") and Article 191 of the same code ("Evidence obtained in breach of the prohibitions imposed by law may not be used"), and therefore identifying which aspects of the procedural rulings or documents annulled by this Court, as well as their effects on the individuals involved in the trial, may be regarded as self-sufficient with respect to the reasons which led to their partial annulment; and if necessary the court may be required to separate the trials.

9.— In the same way, the complaint – filed again by the President of the Council of Ministers in appeals No. 2 and No. 3 of 2007 – concerning the request to take evidence by special arrangements made on 18 September 2006 by the Public Prosecutor's Office in Milan, as well as the discovery of the evidence, which occurred on 30 September, in accordance with the discovery order adopted pursuant to Article 398 Code of Criminal Procedure, is well founded.

With regard to the first complaint, the Court finds that the application made pursuant to Article 393 Code of Criminal Procedure indicated, amongst the other issues under examination in relation to five of the suspects, also that concerning the relations between Italian and foreign intelligence services.

As far as the report of the evidence taken by special arrangements is concerned, it is clear from its wording that the public prosecutor considered it necessary to question one of the suspects also with reference to a statement made by him during the course of the preliminary investigations regarding the fact that between "the end of December and the start of January 2003" an American intelligence agent explained to him what his role would be "in the joint intelligence operation with the SISMi", thereby requesting confirmation from the accused of the existence "of an operation involving the CIA and the SISMi".

9.1.— Accordingly, the Court accepts the complaint filed with reference to the aforementioned taking of evidence by special arrangements.

In fact, whilst the judiciary is always free to investigate, make findings and reach a verdict regarding the offence concerned, which is not classified as an official secret – as subsequently emerged with greater clarity from the reasons given in appeal No. 20 of 2008 – it was unable to rely on those sources of evidence which, although they were linked with the kidnapping, "concern relations between Italian and foreign intelligence services"; these relations must clearly be understood with reference not only to the general and strategic forms of cooperation between the relevant services, but also the exchange of information and acts of mutual assistance carried out in relation to specific individual operations.

In fact, from this perspective, the Court finds that, already under the terms of the note of the President of the Council of Ministers of 30 July 1985 (which at the time was

well known) in addition to the organisational structures of the SISMi, amongst other things specifically also “the relations with the intelligence agencies of other states” were to be regarded as being “classified as official secrets pursuant to Article 12 of law No. 801 of 24 October 1977”.

It was therefore not by chance that in the note of 11 November 2005 – issued on the express request of the director of the SISMi, during the course of the consultation which had been initiated by the Public Prosecutor's Office in Milan, in parallel with the development of investigations, with senior figures in the intelligence services our of country – the President of the Council of Ministers in office at the time considered it appropriate to restate the regulations previously issued by his predecessors in the area of official secrets.

In particular, recalling his own “unyielding institutional duty [to] safeguard, according to the procedures and forms provided for under statute, the confidentiality of records, documents, information and any other object likely to cause harm to interests protected” pursuant to Article 12 of law No. 801 of 1977, he clarified that the investigations being conducted by the Public Prosecutor's Office in Milan “also touched on relations with other states”, of which the relations between the respective intelligence services “are without doubt one of the most sensitive aspects”. For this reason, when emphasising the existence on this point of an assessment “reiterated through time” also by his predecessors, in accordance with “specific directions still in force” (thus clearly referring specifically to the note of 30 July 1985), the President of the Council of Ministers considered it necessary to stress that compliance with them requires “the utmost discretion over any aspect concerning these relations, obliging any person who has knowledge of them to respect the official secret”.

Again maintaining continuity with previous decisions, the President of the Council of Ministers – responding to the note of 18 July 2006 in which the Public Prosecutor's Office in Milan had requested him to transmit “every communication or document” exchanged between the Ministry of Defence and the SISMi “concerning the official secret in question or the events described above”, or “in general all documents, information or reports relating to the practice of so-called 'renditions'”, also inviting him to consider “the possibility of declassifying the official secret... in the event that such

reports, documents or information, should they actually exist, are classified as official secrets" – stated, to quote, that "the said documentation had in fact been classified as an official secret by the previous President of the Council of Ministers". And the above note also clarified that this secret had "been subsequently confirmed", finally stating that "under current circumstances... the conditions for declassifying the said documentation" are not satisfied.

Accordingly, confronted with these overall results, and in particular those which emerged – not even two months before the request was made by the public prosecutor pursuant to Article 393 of the Code of Criminal Procedure – following the express refusal by the President of the Council of Ministers of the specific request by the Public Prosecutor's Office in Milan to "declassify" the material "where classified", it is clear that the taking of evidence by special arrangements concerning the issue of the relations between Italian and foreign intelligence services which the President of the Council of Ministers had clearly intended to classify as secret could not be requested, accepted or carried out.

The Court therefore finds that the Public Prosecutor's Office in Milan and the judge for preliminary investigations of the same court were not entitled to request, accept or take evidence by special arrangements on 30 September 2006, since the taking of evidence was aimed at ascertaining – being as a matter of fact referred to – also circumstances concerning the relations between the Italian intelligence services and those of foreign countries.

This means that the Court must annul the corresponding elements of the procedural decisions taken by the above judicial authorities pursuant to Articles 393 and 398 of the Code of Criminal Procedure, as well as, for the same reasons, those issued by them pursuant to Articles 416 and 429 of the Code of Criminal Procedure insofar as they were based on the basis of the evidence taken by special arrangements affected by the present declaration of annulment, since they related to matters classified as official secrets. It follows from this that the evidence obtained through the special arrangements is inadmissible, in accordance with the provisions of Article 185(1) and 191 of the Code of Criminal Procedure, referred to above, and the observations made above.

10.— On the other hand, the Court finds that the other two challenges raised by the President of the Council of Ministers, in particular in appeal No. 2 of 2007, are groundless.

According to the applicant, the pressure applied "by the public prosecutor on the suspects that they reveal the official secret invoked by them" amounted to a further violation of his prerogatives in the area of official secrets.

The President of the Council of Ministers argues, in this regard, that the "public prosecutor in Milan had (…) intimidated the suspects-accused challenging, first and foremost, the very existence of an official secret, thus attempting on various occasions to convince them to violate the official secret when exercising their right to a defence, the value of which, albeit of constitutional significance, cannot be compared with the supreme interests of the state protected by the official secret, and thereby usurping the prerogative of declassifying official secrets, which is vested in the President of the Council of Ministers alone".

However, on this point it must be noted that this conduct in any case falls outwith any situation involving an infringement which may be protected according to the procedures for jurisdictional disputes between branches of state. In fact, a mandatory prerequisite for this remedy is that the decision or conduct which is claimed to be infringing be related to the exercise of a constitutionally guaranteed power. This eventuality must certainly be excluded in cases in which a public official exercises "undue pressure" over an individual. Indeed, this would amount to unlawful conduct which may only be censured, as necessary, in the appropriate fora.

Finally, the President of the Council of Ministers complains that "the 'blanket' telephone taps of numbers registered to the SISMi by the Milan court" infringed the "sphere of competences of the President of the Council of Ministers, with reference to the power to direct and coordinate intelligence and security policy in the interest and for the defence of the democratic state and to protect official secrets, pursuant to Article 1 of law No. 801 of 1977, and implementing Articles 1, 5, 52, 87, 94, 95 and 126 of the Constitution".

This Court also does not accept this argument.

It cannot in fact be argued that the existence of "requirements of particular contractual confidentiality" pointed to by the operator of the telephone service when setting up the telephone taps could operate as a substitute for the failure to create an official secret, also in view of the absence of any statutory prohibition on the interception of communications on telephone numbers used by members of the intelligence services. The absence of any prohibition is also, significantly, confirmed by the subsequent law No. 124 of 2007, in accordance with Article 270-*bis* inserted by it into the Code of Criminal Procedure, which provides for special arrangements only in relation to the use of evidence obtained from telephone taps involving communications by members of the intelligence services.

However, it is clear that the problem – which is similar to that which affected the results of the evidence taken by special arrangements on 30 September 2006 – of the specific admissibility in the trial of the contents of the phone taps ordered by the investigators is framed in different terms. With regard to this distinct issue, the public prosecutor will not in any case be able to base his decisions, at any stage of the trial, on any information which is classified as an official secret, if and insofar as they relate to, either directly or indirectly, precisely the issue of the relations between Italian and foreign intelligence services. This follows from the principle, already asserted by this Court, that an official secret invoked in accordance with recognised procedures and duly confirmed operates in specific individual cases as a "bar" on the powers of the courts by "preventing the judicial authority from obtaining and using any information and evidence classified as an official secret" (judgment No. 110 of 1998, cited above).

11.— As far as appeal No. 14 of 2008 filed by the President of the Council of Ministers against the judge sitting alone before whom the trial was being celebrated is concerned, it must be accepted insofar as it requests the annulment of the ruling of 14 May 2008 ordering the taking of evidence.

It is important to state the premise that the measures which accompanied the other order, of 19 March 2008, which reactivated the oral discussion – and in particular the choice to adopt "all possible procedural precautions, given the delicate nature and seriousness of the facts at issue in the trial", thereby ordering "the removal from the special evidence file of the documents submitted by the prosecution, registered as items

D-19, D-20, D-21, D-22, on which the jurisdictional disputes" already pending at the time "had been focussed" – were certainly appropriate to prevent the further disclosure of secret information, and therefore to preclude, from that moment, the violation of the constitutional prerogatives vested in the President of the Council of Ministers in the area of official secrets.

The same cannot however be said of the order of 14 May 2008, which permitted the examination of the witnesses indicated by the public prosecutor in the list filed pursuant to Article 468 of the Code of Criminal Procedure regarding all the circumstances specified therein.

Indeed, the decision of the trial court judge to permit the examination of the witnesses also in relation to "specific relations between individuals belonging" to the SISMi and the CIA, excluding only those questions which "sought to reconstruct the broader network of relations" between the above intelligence agencies, was taken – as for those adopted in relation to the evidence taken by special arrangements on 30 September 2006 by the Public Prosecutor's Office and the judge for preliminary investigations – in breach of the decisions taken by the President of the Council of Ministers regarding the classification of certain matters relating to the kidnapping as official secrets.

As pointed out above, and as will be clarified in greater detail in the examination of appeal No. 20 of 2008 below, as of 11 November 2005 the President of the Council of Ministers had expressed the desire to "safeguard, according to the procedures and forms provided for under statute, the confidentiality of records, documents, information and any other object likely to cause harm to interests protected" pursuant to Article 12 of law No. 801 of 1977, emphasising the need to ensure "the utmost discretion" over any aspect concerning the relations between our intelligence services and those of foreign countries, "obliging any person who has knowledge of them to respect the official secret".

If follows therefore that appeal No. 14 of 2008 must be allowed within the limits set out above, with the resulting annulment of the order of 14 May 2008.

Also in this case, the trial court judge will have to assess the consequences of this annulment on the further prosecution of the trial.

Nevertheless, any future examination of the witnesses must occur within the limits of the *thema probandum* set out in this judgment, and also under the terms of Article 202(1) of the Code of Criminal Procedure, according to which public officials "are obliged to refrain from giving evidence regarding facts classified as official secrets", an obligation – the violation of which is punishable under Article 261 of the Criminal Code – of which the interested parties must be informed also in the light of the contents of this judgment. Moreover, Article 41 of law No. 124 of 2007 gave a general scope to this obligation, providing in fact that public officials, state employees and public service contractors "are prohibited from disclosing information regarding matters classified as official secrets"; the same provision also charges the courts – and specifically the court seized of the criminal trial during the course of which, at any "stage or instance" an official secret is invoked by such persons, including where they are suspects or accused – with the duty of "informing the President of the Council of Ministers" in order that he may take "any necessary decisions within his competence".

12.— Finally, the jurisdictional dispute commenced by the trial court judge against the President of the Council of Ministers (appeal No. 20 of 2008) is groundless.

12.1.— The applicant complains of the fact that the two decisions to confirm the official secret, invoked by the witnesses Messrs Scandone and Murgolo whilst under examination as witnesses (and, along with these decisions, the letter "sent to all members or former members of the intelligence services called upon to testify", reminding them of the existence of the official secret concerning "all and any relations between Italian and foreign intelligence services within the ambit of the protection of the international relations [of the state]"), are affected by an "inherent contradiction" and violate the "principle of legality" and that "of proportionality", also breaching the principles "that classification occur *ex ante*" and "of correctness and loyalty", on the grounds that the President of the Council of Ministers did not exercise his own powers, as he should have done, "in a clear, explicit and unequivocal manner".

In fact, the President of the Council of Ministers is claimed to have asserted – in a contradictory manner – that the offence of the kidnapping was not classified as an official secret *per se*, whilst on the other hand classifying issues concerning relations between Italian and foreign intelligence services, even if they were "or may be in some

way related" to the actual kidnapping at issue in the trial. On this basis moreover, the President of the Council of Ministers concluded that "the courts are free to investigate, make findings and reach a verdict regarding the offence concerned, which is not classified as an official secret, using all forms of evidence permitted", with the exclusion however of "those which concern relations between Italian and foreign intelligence services", precisely because they are "classified as official secrets".

However, by proceeding in this way – in addition to acting in a contradictory manner – the President of the Council of Ministers is claimed to have made use of "a kind of rhetorical trick intended to mask, through its formal aspects, the actual scope of the classification", which "in essence" became – in violation of the principles referred to – "so broad as to entail the risk of rendering meaningless the power/duty of the judge to hear evidence regarding the *actus reus* and *mens rea* of the offence".

A further specific violation of the principle of correctness and loyalty was claimed by the applicant to have been committed by the President of the Council of Ministers when confirming the official secret invoked by the witness Mr Murgolo during the course of his testimony.

In fact, when confronted with the Article 202 reference from the trial court judge concerning the "role which the accused Mr Mancini may have had" in the alleged kidnapping, the President of the Council of Ministers, "on the basis of a 'reinterpretation'" of that role, identified its essence – as confirmed by the justification focussing on the need to "maintain the credibility of the intelligence service within the ambit of its international relations with related agencies" – "as consisting in specifically classified information (relations between the CIA and the SISMi)".

By contrast, "the testimony requested by the public prosecutor" – again according to the applicant – "in no sense concerned the international relations of the SISMi with related agencies but related exclusively to the statements made to the witness by the accused Mr Mancini regarding his personal involvement in the commission of the offence", which means that, in "reinterpreting" the Article 202 reference, the President of the Council of Ministers "essentially reject[ed] the request for confirmation, in contrast with the principle of correctness and loyalty".

12.2.— With reference to this specific issue, it is necessary to make a preliminary clarification.

It must be pointed out that the question put to the witness Mr Murgolo – against which he invoked the official secret, making it necessary for the trial court judge to initiate the Article 202 reference procedure – did not "relate *exclusively* to the statements made to the witness by the accused Mr Mancini regarding his personal involvement in the commission of the offence".

By contrast, during the course of his examination, the witness Mr Murgolo invoked the official secret precisely in relation to the issue which had always – since the start of the court proceedings relating to the alleged kidnapping – been classified as secret by the President of the Council of Ministers.

It is clear from a reading of the report of the hearing for oral arguments of 29 October 2008, or rather from the report of the sound recordings attached to it, that the public prosecutor's question in relation to which the witness invoked the official secret was formulated as follows: "Now however tells us what … You have stated two pages of what Mr Mancini told you concerning the inquiries requested from the (*sic*: by the) Americans at the meetings in Bologna. So tell us everything that Mr Mancini told you".

Therefore, far from concerning "exclusively" (and generically) the involvement of Mr Mancini in the alleged kidnapping, this question specifically related to what the accused himself had said to the witness "regarding the inquiries requested from the (*sic*: by the) Americans in the meetings in Bologna". The question put to the witness ends, significantly, with the following phrase: "So tell us everything that Mr Mancini told you". But this clearly (and logically) still refers to the previous part of the question, that is the "inquiries requested from the (*sic*: by the) Americans". This is confirmed by the fact that – when responding – the witness specified that he could not make any statements "regarding the inquiries" concerned in the light of the note of 6 October 2008 of the President of the Council of Ministers, thereby invoking the official secret, specifically insofar as it related to "the meetings in Bologna".

Therefore, no ambiguity can be found in the decision of the President of the Council of Ministers to confirm the classified information covered by this question since it inevitably regarded a form of relationship between the SISMi and the CIA which had

for some time been classified as an official secret, even if these relations were related to the alleged kidnapping.

12.3.— It is necessary to add to these remarks – which specifically concern the alleged breach of the principle of correctness and loyalty by the confirmation of the official secret with reference to this particular aspect of Mr Murgolo's examination as a witness – on a general level, and therefore from a perspective which embraces the entire extent of the appeal filed by the trial court judge, the further considerations set out below.

In particular, the principle that classification occur *ex ante* has not been violated.

It was stated above that since the direction of 30 July 1985 that, for the purposes of Article 342 of the Code of Criminal Procedure as previously in force, in addition – for our present purposes – to "intelligence operations and (…) activities" carried out by the secret services, also "the relations with the intelligence agencies of other states" were to be regarded as "classified as official secrets pursuant to Article 12 of law No. 801 of 24 October 1977". It must also be reiterated that, with specific reference to the case under examination, in his note of 11 November 2005 the President of the Council of Ministers expressed his desire to ensure, also in relation to this matter, "the utmost discretion" over any aspect concerning the relations between Italian and foreign intelligence services, "obliging any person who has knowledge of them to respect the official secret".

Therefore, it cannot be concluded that the President of the Council of Ministers intended to classify these relations on an *ex post* basis, nor that he breached the requirement of clarity regarding the object of classified information imposed by the need to comply with the principle of correctness and loyalty.

Indeed – as pointed out by the state representative – there is "an [objective] line of continuity" between the notes of 11 November 2005, 26 July 2006, 6 October 2008 and 15 November 2008, since each contain the assertion that the object of the official secret has never been the kidnapping in question, but only the relations between the Italian intelligence services and those of other states.

From the same perspective, it must be emphasised – once again – that in its note of 18 July 2006, essentially following the questioning of the Director of the SISMi as a

suspect (who invoked the right to silence, relying on the official secret, and pointed out that as a result of this decision he would be denied the ability to exercise the right to a defence guaranteed under the Constitution), the Public Prosecutor's Office in Milan requested the President of the Council of Ministers to transmit “every communication or document” exchanged between the Ministry of Defence and the SISMi “concerning the official secret in question or the events described above” (that is the kidnapping as such), as well as “in general all documents, information or reports relating to the practice of so-called 'renditions'”. And on this basis of this premise, the Public Prosecutor's Office requested the President of the Council of Ministers, to “consider the possibility of declassifying the official secret... in the event that such reports, documents or information, should they actually exist, are classified as official secrets”.

Responding to this request in the note of 26 July 2006, it was repeated that “the said documentation had in fact been classified as an official secret by the previous President of the Council of Ministers” and that this official secret had “subsequently been confirmed by the undersigned”, since moreover “under current circumstances, the conditions for declassifying the said documentation” are not satisfied .

Indeed, it follows incontrovertibly from the succession and contents of these documents that, at least as of 26 July 2006, the Public Prosecutor's Office in Milan had been made aware of the classified status and the ambit of the same with reference to relations between the various intelligence services.

Therefore, also the reasons given for the two decisions to confirm the official secret invoked by the witnesses Messrs Scandone and Murgolo were consistent with this position – and therefore with the decision to guarantee “the utmost discretion” over any aspect concerning the relations between Italian and foreign intelligence services, “obliging any person who has knowledge of them to respect the official secret”; at the express decision of the President of the Council of Ministers, these reasons consisted in the need to “maintain the credibility of the intelligence service within the ambit of its international relations with related agencies” and to guarantee the “need for discretion in order to protect the internal affairs of every intelligence service, shielding their organisation and operational procedures from undue publicity”.

Therefore, the official secret never covered the offence of the kidnapping in itself, which could be investigated by the competent courts according to standard procedures, but rather on the one hand the relations between the Italian and foreign secret services, and on the other hand the organisation and operational procedures of the SISMi, with particular reference to the directions and orders which had been issued by its Director to the members of the agency, even if those relations, directions or orders were in some way related to the offence itself; with regard to the sources of evidence in question, this resulted in a "bar" on the powers of the courts flowing from the invocation and the confirmation of the official secret, which occurred in accordance with recognised procedures.

12.4.— Finally, as far as the complaints concerning the alleged failure to respect the principle of legality and proportionality are concerned, the ultimately seek to obtain a review of the reasons for the classification ordered.

This Court has however asserted – as pointed out above – that the " identification of facts, records, information, etc. which may compromise the security of the state, and must therefore remain secret" is the result of an assessment that is "largely discretionary and, more specifically, of discretionary powers which extend beyond the ambit and limits of purely administrative discretion, since they impinge upon the *salus rei publicae*" (judgment No. 86 of 1977).

In these circumstances, as the Court clearly stated in judgment No. 86 of 1977, cited at various points above, any review over the actual exercise of the power to classify material is precluded, since the assessment regarding the means which it is considered must or may be used in order to guarantee the security of the state is a matter for the President of the Council of Ministers, acting subject to parliamentary oversight.

Therefore, as a supplement to parliamentary oversight over the reasons given for the confirmation of the official secret – confirmation which must, to this specific end, be transmitted to the competent parliamentary committee (now the COPASIR [*Parliamentary Committee for the Security of the Republic*]) – the judicial review also of the proportionality of the means compared to the end (proportionality which, not by chance, judgment No. 86 of 1977 identified only as a criterion which Parliament must comply with when legislating in the area of official secrets) is not possible.

Besides, on a constitutional level, Parliament's entitlement to review the ways in which the power to classify information is exercised is justified precisely because Parliament, as stated above, is "the natural forum for control of the merits of the most high-ranking and serious decisions of the executive", since "it is before the body representing the people, in which the sovereignty which could be undermined is vested (Article 1(2) of the Constitution) that the government must justify its decisions and it is the representatives of the people who may adopt the most appropriate measures to guarantee security", that is the interest which, as noted above, the official secrets legislation has been enacted in order to protect.

It should be added to the observations made above that, under the terms of Article 202(7) of the Code of Criminal Procedure, in the version introduced by law No. 124 of 2007, in jurisdictional disputes commenced by the courts against the President of the Council of Ministers, the Court is called upon to assess whether or not the prerequisites for an official secret invoked and confirmed in accordance with recognised procedures have been fulfilled, and not to make its own assessment on the merits of the reasons for and specific development of the sequence of events involving the creation, invocation and confirmation of the official secret; this last judgment is reserved, as mentioned above, to the political authorities, namely Parliament. And in the event that such jurisdictional disputes result in the confirmation of the existence of the official secret, the courts are under a duty not to obtain (where they have not already done so) or use (where already obtained), directly or indirectly, any reports, documents, information, evidence or any other material classified as an official secret.

Another no less relevant point is that there is no logical or legal contradiction between the acceptance that any given conduct, which is presumably an offence, is not classified as an official secret, and may therefore be investigated according to the ordinary rules of criminal procedure, and the classification or one or more sources of evidence, even if they are or may be related to that offence and therefore also essential for the investigation of the offence itself. In accordance with this position in fact, Article 202(6) of the Code of Criminal Procedure, as pointed out above, provides that "the courts are at any event not precluded form proceeding on the basis of self-standing evidence which is independent of the classified records, documents and objects". And if

the classified source of evidence is indeed essential and there are no other self-standing sources of evidence, the court will have no choice other than to apply Article 202(3), which provides that "where the official secret is confirmed and knowledge of the information classified as an official secret is essential in order to reach a decision in the trial, the court shall declare that it is not competent to rule due to the existence of the official secret".

12.5.— In conclusion, appeal No. 20 of 2008 filed by the trial court judge must be dismissed, as the Court finds that the President of the Council of Ministers was entitled to establish and confirm the official secret in the terms specified above, that is – with reference to the matters under examination by the Milan court – prevent the discovery of evidence both regarding the internal affairs of the SISMi, as well as the relations between the SISMi and the CIA in any way related to those matters. Therefore, the President of the Council of Ministers was entitled to issue the note sent on 6 October 2008 (No. 6000.1/42025/GAB) as well as the two notes of 15 November 2008 (USG/2.SP/556/50/347 and USG/2.SP/557/50/347).

13.— On the basis of all the considerations set out above, the Court finds that the requests regarding evidence formulated by the trial court judge in his own appeal are irrelevant since they concern relations between constitutional organs with significance on a purely political level.

14.— Moreover, the prerequisites for accepting the request made by the Public Prosecutor's Office to "cancel the words indicated in the following, as contained in the appeal of the President of the Council of Ministers of 14 February 2008 (*sic*: 2007) which commenced the present proceedings have not been satisfied, since the relevant criminal acts attributed to the Milanese public prosecutors have not been corroborated by the slightest evidence:

1) "A further line of conduct followed by the Public Prosecutor's Office in Milan which appears to have scant respect for the official secret is that of *obliging the suspects* to respond even when the answer would entail the violation of a specific official secret" (p. 7, § 3, lines 3-5 of the appeal).

2) "A third possible violation concerns the *deplorable pressure exercised by the public prosecutor* on the suspects in order that they reveal the official secret invoked by

them, as described in detail in the description of the facts" (p. 16, § 2.2.3., lines 1-4 of the appeal).

3) "… the behaviour of the Milanese public prosecutor appears to pay scant regard to the principle of loyal cooperation between branches of state, and was aimed at *intimidating the suspects/accused* in order to obtain information classified as an official secret, with the stated purpose of making findings definitively prohibited under the law in force" (p. 19, § 2.2.4, lines 3-6 of the appeal)".

The above expressions cannot be regarded as improper or offensive, since they amount to rhetorical expressions within the procedural debate, which has been harsh in these proceedings, but always substantially correct.

Indeed, the same logic lies behind the expression contained in appeal No. 6 of 2007 filed by the Public Prosecutor's Office in Milan where it is stated that the President of the Council of Ministers "falsely asserts" that the official secret had been established by his predecessor; under its second ground of appeal, the applicant itself distinguished between this complaint and its objection that the decision was "*ultra vires* on the grounds that its premises are false or mistaken" (page 51 of the appeal).

In fact, all these expressions are intended not to censure presumed unlawful conduct carried out by the protagonists of the case under examination, but rather – in accordance with the ruling requested in each appeal – to object to the infringement of the constitutional powers vested in the bodies, the position of which they were respectively entitled to express on a definitive basis.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

ruled that the cross appeal filed "in the interest of the *GIP* [preliminary investigating judge] section of the *Tribunale di Milano*" against the President of the Council of Ministers is inadmissible;

rules that appeal No. 6 of 2007 filed by the Public Prosecutor's Office at the *Tribunale di Milano* against the President of the Council of Ministers is inadmissible;

allows partially appeals No. 2 and No. 3 of 2007 filed by the President of the Council of Ministers against the Public Prosecutor's Office at the *Tribunale di Milano* and the judge for preliminary investigations at the same court, also sitting as the judge for the preliminary hearing and, as a result, rules that the above judicial authorities were not entitled to base, respectively, the request for referral for trial and the committal for trial of the individuals considered responsible for the kidnapping of Nasr Osama Mustafa Hassan, *alias* Abu Omar, on the documents obtained during the search carried out on 5 July 2006 and subsequently transmitted to the court, with partial redactions of classified information, as well as the request for the the taking of evidence by special arrangements, along with both the order which ordered it as well as the related report detailing the evidence obtained of 30 September 2006, hence invalidating the corresponding parts of these procedural acts;

allows partially appeal No. 14 of 2008 filed by the President of the Council of Ministers against the judge sitting alone of the 4th Criminal Law Division of the *Tribunale di Milano*, limited to the order of 14 May 2008, and rules that the above judge was not entitled to admit the evidence specified therein;

dismisses appeal No. 20 of 2008 filed by the judge sitting alone of the 4th Criminal Law Division of the *Tribunale di Milano* against the President of the Council of Ministers, and rules that the latter was entitled to issue both the note of 6 October 2008 (No. 6000.1/42025/GAB) as well as the two notes of 15 November 2008 (No. USG/2.SP/556/50/347 and No. USG/2.SP/557/50/347).

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 March 2009.

Signed:
Francesco AMIRANTE, President
Alfonso QUARANTA , Author of the Judgment
Giuseppe DI PAOLA, Registrar
Filed in the Court Registry on 3 April 2009.
The Director of the Registry
Signed: DI PAOLA