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CURRENT DEVELOPMENTS

The unsolved case of Giulio Regeni

An attempted legal analysis

FEDERICA VIOLI — MARTINA BUSCEMI — 3 July, 2017

More than one year after the dead body of the Italian Ph.D. student Giulio Regeni was found in Cairo, his ghastly demise remains unresolved. The circumstances of his death cast a shadow of suspicion over potential involvement of either Egyptian police forces or secret services in the killing. Egyptian authorities initially denied any allegations, consistently maintaining unconvincing accounts. Only recently, have Egyptian authorities displayed dubious signs of cooperation with their Italian counterparts in the investigation. What appears clear from the post-mortem examinations is that the body of Giulio Regeni reported several signs of torture. Even though the complete and final findings on the case are pending in Cairo, one may speculate on Egypt's potential international responsibility in relation to Regeni's death for the violation of the *ius cogens* and *erga omnes* (*partes*) norm establishing a prohibition of torture, which is also enshrined in the 1984 Convention against Torture ('CAT') ratified by Egypt in 1986. This norm establishes positive and negative obligations, including the obligation to take procedural steps to repress the criminal offence, by means of a «prompt and impartial investigation» (Art. 12 CAT), and the obligation to cooperate with other States concerned (Art. 9 CAT), and simultaneously under the rules on the standard of treatment of aliens.

Egypt could incur *direct* international responsibility for the acts of its organs (*de facto*, *de iure* or acting *ultra vires*), that amount to torture. This seems plausible. Especially in light of the Italian criminal investigation, which found evidence of Egyptian authorities surveying Regeni before his disappearance. This conclusion is also purported by further evidence, which shows a recurrent *modus operandi* of Egyptian secret services in similar cases. Egypt could also incur (indirect) international responsibility for the violation of positive obligations, especially considering that Egypt has not exerted best efforts to shed light on the circumstances leading to Regeni's death. This, along with numerous inconsistencies surrounding the investigations and judicial action, points, at a minimum, toward Egyptian non-compliance with obligations to effectively investigate and punish acts of torture.

With this in mind, the intent of the authors is to frame a legal discourse as to what has become a thorny diplomatic case, especially considering highly political interests involved (such as, the significant role of Egypt in the stability of the region – most notably regarding Libya). This post will focus on inter-state mechanisms available at the international level, on the one hand, and available remedies for the family, on the other hand, to implement Egypt's alleged responsibility stemming the potential violation of

applicable primary norms.

Possible way-out at the international level

Which actions can the State of nationality taketo enforce compliance with international obligations?

Assuming international responsibility (be it direct or indirect) on the part of Egypt, Italy as a (specially) injured State is entitled to invoke the consequences of the wrongful act, resorting to diplomatic protection through either diplomatic action or other means of peaceful dispute settlement, e.g. invoking Article 30 of CAT to call for settlement by arbitration with Egypt. Should this fail within six months, Italy may unilaterally bring the case before the International Court of Justice.

Whatever diplomatic or judicial routes are taken, Italy may not only demand Egypt to fulfill its obligation to conduct an effective and impartial investigation, but may also claim compensation for the non-material injuries suffered by Regeni's family, generally understood to encompass loss of loved one, as well as pain and suffering (see Commentary Article 34 of ASR, p. 101). Furthermore, Italy may request the State to issue an official statement of regret or to offer formal apologies to Regeni's relatives. Considering the ongoing diversion by Egypt, a form of reparation for the prejudice against Italian *dignity* could be claimed with the same action.

However, thus far, Italy does not appear to be exerting diplomatic protection – *stricto sensu* – but rather to be acting in *démarche diplomatique*, *i.e.* taking measures intended to warn and pressure Egypt into action (see Condorelli, RDI, 2003, p. 5). Italy's past declarations in relation to Egypt's conducts (see here, p. 46) rather call for a corrective action in order to find the truth.

Several elements point in this direction. First, there has been no formal invocation of Egyptian responsibility. The fact that no reparation has been requested yet further clarifies that Italy is insisting on compliance with the *primary* norm (what has been asked so far is merely the "truth" through an effective judicial investigation). Lacking an exchange of notes between the Governments (as far as we know), mere protests or calls for observance do not amount to an invocation of responsibility. Neither should the recall of the Italian ambassador for "consultations" be characterized as the adoption of countermeasures, but rather as an act of «retaliation». The same goes for the fact that Italy did not vote for Egypt in the election of the 47 Member States of the UN Human Rights Council. Conversely, some doubts are raised by an amendment approved by the Italian Parliament reverting the previously agreed concession of aircraft parts to Egypt. Italy also seems reluctant to adopt economic countermeasures to induce Egypt's compliance with its obligations. This could be attributed to the long-standing tradition of good political and economic relationships between the two countries, including six billion euros in commercial exchanges (see here and here).

This brings us to the next question.

Is the State of nationality obliged to react?

Since human rights treaty-based mechanisms are not viable in the case at hand (see *infra*), diplomatic protection resurfaces as a powerful instrument to protect human rights. Yet, it remains a mere discretional power of the State – at least in its traditional understanding. However, there might be some room for evolution. It has been suggested

that, in exceptional circumstances, States would be *required* to act, (i) when the diplomatic action is seen as the *only* existing remedy to ensure reparation to the victims (ii) in relation to a violation of a primary *ius cogens* norm. During the discussion on the adoption of the Draft Articles on the law of Diplomatic Protection, Italy endorsed a proposal to introduce a legal duty to exercise diplomatic protection on behalf of the injured person, if the two above-mentioned requirements were fulfilled. Likewise, Article 19 of the Draft Articles reflects this idea, albeit in "recommendatory" terms. However, it is also reasonable to question whether an individual right to diplomatic protection could exist at least at the *national* level under the Italian Constitution, a question that we will address below.

What is the role of States other than the injured one?

In the present case, other States – besides the State of nationality – may be entitled to act. Article 48 of ASR sets out specific rules in the case of violation of a norm which has an *erga omnes* (*partes*) character – as is the case of prohibition of torture, as well as the positive obligation of prosecution (see the rather controversial ICJ Belgium v. Senegal case, see here and here),). While the coordination between actions taken *uti universi* and those taken in diplomatic protection can be problematic (see Papa, RDI 2008, p. 669), third States might consider reacting within the limits laid down in Article 48.

In practice, the role of States other than the State of nationality of the victim has not been significant. The United Kingdom, the US, and the Vatican have shown interest in the Regeni case (see here, here, here, and more recently here), but not to the point of invoking Egypt's international responsibility. A noteworthy reaction has been that of the European Union: the latter recommended States the adoption of measures which could fall under the «lawful measures» category of Art. 54 ASR. According to the Council's conclusions on Egypt (Foreign Affairs Council meeting Brussels, 21 August 2013 and here) referred to in the resolution, Member States are committed «to suspend export licences to Egypt of any equipment which might be used for internal repression and to reassess export licences of equipment covered by Common Position 2008/944/CFSP and review their security assistance with Egypt».

Remedies available for the family

Against Egypt?

As aforementioned, international human rights judicial and quasi-judicial treaty-based mechanisms are not available to Regeni's relatives, since Egypt has not accepted the competence of the relevant bodies to receive individual complaints.

A remedy could be sought at the Italian domestic level. Pending the outcome of the judicial proceedings in Cairo, the possibility of bringing a civil claim before the Italian courts against Egypt to obtain compensation for damages has been repeatedly suggested. However, such an action seems unviable for several reasons:

(i) It is difficult to imagine what the Italian jurisdictional title would be in this case. First, the nature of the civil tort in question is unclear (is the tort deriving from the commission of acts of torture itself or also from the breach of the positive obligation to investigate and prosecute?). Further, the elements of such tort are connected to Egypt, hence the latter's judges would retain civil competence. There exists the possibility for Regeni's parents to seek compensation for moral damages in their own right ('*danno tanatologico*').

(ii) Alternatively, civil action for damages could be connected to the criminal action initiated by the Italian prosecutor, in compliance with Art. 5 CAT. This procedure has been employed in the case concerning war crimes committed by individuals. In such cases, the respondent States (Germany and Serbia) were held jointly liable with the material offenders for civil damages. Such action would first require a settled conviction. This option seems dubious considering the murky evidentiary situation.

(iii) Should Italian jurisdiction be established, Italian judges will hardly decide to not recognize Egyptian *immunity*. Although progressive and (r)evolutionary on the matter of the humanitarian exception to State immunity, Italian judges have thus far either linked jurisdiction to territorial tort elements or to a criminal proceeding within Italy. Additionally, cases thus far were related to well-established gross and systematic violations of *ius cogens* norms. While the prohibition of torture is arguably an imperative norm of international law, it will prove difficult to show, in a civil context, that Regeni's torture is part of systematic practices. Let alone, if the claim is brought by his parents in their own right.

(iv) Regardless, immunity from enforcement of the decision will constitute a bar for effective compensation.

..and against Italy?

Another possible claim of the family is related to a potential refusal of the Government to act in diplomatic protection, should Italy drop claims against Egypt. Notwithstanding the absence, *de iure condito*, of an obligation to act in diplomatic protection at the international level, a different reasoning might apply at the domestic level – especially following judgment 238/2014 issued by the Constitutional Court in relation to State immunity and supremacy attributed by the Court to those fundamental principles expressed by the combination of Arts. 2 (inviolability of individual rights) and 24 (right of access to justice) of the Constitution. While foreign policy is traditionally left to the discretion of the State, it remains subject to the Constitution (see Papa, Salerno). Jurisdictional control over such decisions may be justified by the need to avoid a permanent infringement of fundamental rights, thus creating a denial of justice. The Court previously specified that in principle political acts are not removed *per se* and *in abstracto* from jurisdictional control (judgement 81/ 2012). Similarly, lower courts have acknowledged the 'legitimate interest' of an individual to request diplomatic action (Corte di Cassazione, judgement 21581/2011). The intensity of the control over, e.g., an explicit or implicit refusal to act is limited to a reasonableness review on the decision of the State. Arguably, concerned individuals have at least the right to be informed by the State on its actions and decisions at the international level.

At the domestic level, some scholars (see Palchetti, Cannizzaro) have put forward the idea that the burden of compensating affected individuals, who failed to obtain redress at the international level, could – in some circumstances – shift to the State. This solution would guarantee leeway to the State to conduct diplomatic relations as it deems, including a scenario where State's international actions prove unsuccessful. While this is not the most desirable solution (what Regeni's parents are seeking is first and foremost the truth), it provides a form of redress to Regeni's parents who – otherwise – would face an absolute denial of justice.

Dr. Federica Violi (Ph.D., University of Milan) is Assistant Professor in International Law at

the Erasmus School of Law, University Rotterdam.

Dr. Martina Buscemi (Ph.D., University of Milan) is a Post-doctoral Researcher in International Law at the University of Florence.

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