
Article:
Parisi, Piergiuseppe orcid.org/0000-0001-7647-6732 and Pinto, Mattia orcid.org/0000-0001-7537-3942 (2024) In Pursuit for Greater Accountability for Torture:The Case of Giulio Regeni After Judgment No. 192/2023 of the Italian Constitutional Court. Italian Yearbook of International Law. pp. 287-308. ISSN: 2211-6133

https://doi.org/10.1163/22116133-03301015

IN PURSUIT OF GREATER ACCOUNTABILITY FOR TORTURE: THE CASE OF GIULIO REGENI AFTER JUDGMENT NO. 192/2023 OF THE ITALIAN CONSTITUTIONAL COURT

PIERGIUSEPPE PARISI* and MATTIA PINTO**

"But we cannot stop. After such a long wait and such outrageous lies, we need action to follow words: we need to know who and why took, tortured, and killed Giulio"
Paola and Claudio Regeni[1]

Abstract

This article examines the Italian Constitutional Court's Judgment No. 192/2023 on a question of constitutional legitimacy raised in the course of the criminal trial against four Egyptian nationals for the murder and torture of Italian doctoral researcher Giulio Regeni in Egypt in 2016. By declaring the partial unconstitutionality of the Italian legislation on in absentia *proceedings, the Court's decision allowed the trial to proceed even in the defendants' absence. The judgment is assessed against a backdrop of institutional inertia in securing justice for Regeni. The article first analyses the significance of the Court's decision, highlighting its implications for international human rights law and, in particular, the duty to exercise criminal jurisdiction over acts of torture under the UN Convention Against Torture. It then critiques the emphasis placed on criminal accountability for grave human rights abuses, as illustrated by Regeni's case. It argues that such emphasis, combined with the inadequacy of other State responses, risks diluting the right to truth and accountability in its broader sense.*

Keywords: Giulio Regeni; prohibition of torture; accountability; Italian Constitutional Court; passive nationality jurisdiction; trials *in absentia*.

1. INTRODUCTION

Before Rome's Court of First Instance, on 20 February 2024, began the trial of four Egyptian National Security agents accused of torturing and murdering the Italian doctoral researcher Giulio Regeni in Egypt in 2016.[2] While Regeni's parents attended the hearing, the four defendants did not. "Today is a very important day", the parents declared before entering the courtroom.[3] And yet this day almost did not happen. For years, the Egyptian authorities had obstructed and deceived the investigation into Regeni's murder and torture and refused to cooperate with Italy in identifying and notifying the suspects. If the trial eventually started

* Lecturer, Centre for Applied Human Rights and York Law School, University of York (UK).
** Lecturer, Centre for Applied Human Rights and York Law School, University of York (UK).

[1] "Noi, genitori di Giulio Regeni, senza verità da 32 mesi", La Repubblica, 4 October 2018. This and subsequent translations from Italian are by the authors.

[2] The defendants have, in fact, not been indicted for the crime of torture, introduced in Art. 613-*bis* of the Italian Penal Code in 2017, but for kidnapping, bodily injury and murder, aggravated by ill-treatment, cruelty and abuse of public power.

[3] IZZO, "Al via il processo contro quattro 007 egiziani per la morte di Giulio Regeni", AGI, 20 February 2024.

it was only because of a recent landmark decision of the Italian Constitutional Court. In its Judgment No. 192/2023, issued on 26 October 2023,[4] the Court allowed the proceedings to go ahead even in the defendants' absence. It was not an obvious decision: the Court not only aligned Italian law with international human rights standards, but also interpreted and applied these standards in a broad and progressive manner, aiming to secure the victim's right to truth and uphold the state's obligation to end torture.

In this article, we analyse the judgment of the Italian Constitutional Court and read it against a context of generalised institutional stagnation in the pursuit of accountability – in its broader sense – for Regeni's torture and killing. Our discussion is divided into two main sections. Section 2 unpacks the judgment of the Constitutional Court. It highlights how the Court found that the Italian framework on *in absentia* trials was not equipped – and thus was unconstitutional – to deal with torture cases where the alleged perpetrator cannot be notified of pending proceedings due to the law of cooperation of the nationality or residence State. We linger on the significance of the Constitutional Court's judgment from the perspective of international human rights law (IHRL) and, in particular, the duty to exercise criminal jurisdiction over acts of torture encapsulated in the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[5] Section 3 of the article critiques the emphasis placed on criminal accountability to deal with such a serious human rights violation as the torture and killing of the young Italian doctoral researcher. We argue that such emphasis, coupled with the inadequacy of other State responses, risks diluting the right to truth and accountability in its broader sense.

2. JUDGMENT NO. 192/2023 OF THE ITALIAN CONSTITUTIONAL COURT

Traditionally, victims of crime – or their family members – have played a marginal role in criminal proceedings instituted before Italian courts.[6] From a human rights perspective, this state of affairs has elicited critiques that highlight how, for example, the principle of equality of arms would require granting victims of crime enhanced participation rights in criminal proceedings.[7] The Italian normative framework that regulates *in absentia* trials – whatever may have caused the absence of the accused person – has often been framed as a balancing act between the rights of the defendants to participate in the proceedings and those of the victim to obtain justice even when the perpetrator cannot be notified of the trial notwithstanding the authorities' efforts.[8] In the spirit of securing the accused person's

[4] *Corte Costituzionale*, 26 October 2023, No. 192.

[5] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, entered into force 26 June 1987.

[6] See, for example, BELLUTA, "Which Role for the Victim in the Italian Criminal Process?", Revista Brasileira de Direito Processual Penal, 2019, p. 73 ff.

[7] See, for example, RUGGERI, "Equality of Arms, Impartiality of the Judiciary and the Role of the Parties in the Pre-Trial Inquiry: The Perspective of Italian Criminal Justice", Revista Brasileira de Direito Processual Penal, 2018, p. 559 ff.; in the field of international criminal justice, see, for example, ZAPPALÀ, "The Rights of Victims v. the Rights of the Accused", JICJ, 2010, p. 137 ff.

[8] For arguments that privilege the rights of the victims, see, for example, DIAMANTIS, "Invisible Victims", Wisconsin Law Review, 2022, p. 1 ff.; for arguments that, conversely, frame trials *in absentia* as problematic for the rights of the accused person, see, for example, RUGGERI, "Personal Participation in Criminal Proceedings, In Absentia Trials and *Inaudito Reo* Procedures. Solution Models and Deficiencies in ECtHR Case-Law", in QUATTROCOLO and RUGGERI (eds.), *Personal Participation in Criminal Proceedings: A Comparative Study of Participatory Safeguards and* in absentia *Trials in Europe*, Cham, 2019, p. 579 ff.

participation rights, the so-called "Cartabia reform", among other things, sought to partially redesign the Italian system of criminal procedure to enhance the efficiency of criminal proceedings while guaranteeing adherence to the constitutional principle of the presumption of innocence.[9] The reform was adopted to implement Italy's international obligations in relation to fair trial rights following, in particular, jurisprudential inputs from the European Court of Human Rights (ECtHR).[10]

Judgment No. 192/2023 of the Italian Constitutional Court challenges the balance struck by the reform between the rights of the defendants and those of the victims and their family members in cases of offences that can be qualified as torture under the UNCAT. In relation to the accused persons' participation in the criminal proceedings, the reform privileged the rights of the defendants by safeguarding their position where their absence during the trial could not be imputed to them.[11] The pronouncement of the Constitutional Court seeks to re-expand the rights of the victims in the specific case in which the defendants' absence from the trial is caused by the lack of cooperation of their nationality or residence state in the notification of the trial, even though they have otherwise acquired knowledge of the proceedings. It is worth underlying from the very beginning that the partial redesign of this delicate balance only applies to cases of torture that fall within the scope of Article 1 UNCAT.

In this Section, we will first summarise the procedural history of the case and the Constitutional Court's judgment, highlighting its most salient parts; second, we will assess the judgment in the context of the history of the specific case but also more generally; third, we will review the interpretive standard employed by the Court to determine the content of Italy's obligation to investigate and prosecute allegations of torture.

2.1. The procedural history of the case

The case originated from a remittance order from the *Giudice dell'udienza preliminare* (GUP) in Rome, i.e. the Judge for the Hearing of Confirmation of Charges, upon a request from the Public Prosecutor. The proceedings sought to establish the criminal responsibility of four Egyptian nationals – National Security agents – who had been charged with the kidnapping, bodily injury and murder of Giulio Regeni. In the first instance, as the four nationals – all residing in Egypt – could not be notified of the hearing of confirmation of charges, the GUP decided to proceed nonetheless having considered that they must have voluntarily shirked the notification, and thus declared their absence pursuant to Article 420-*bis* of the Italian Code of Criminal Procedure (CCP). The *Corte d'assise* – which had competence to try the defendants after the confirmation of charges – voided the declaration of absence and sent the case back to the GUP. The GUP ordered new attempts to notify the four Egyptian nationals of the proceedings, but these were unsuccessful due to the lack of cooperation of the competent Egyptian authorities. The GUP ordered the suspension of the proceedings. Following an appeal by the Public Prosecutor against the GUP's order, the Court of Cassation confirmed the GUP's determination based on the fact that there was not enough evidence to demonstrate that the

[9] D.Lgs. No. 150/2022. On the normative framework regulating trials *in absentia* in Italy prior to the Cartabia reform, see MANGIARACINA, "Report on Italy", in QUATTROCOLO and RUGGERI, *cit. supra* note 8, p. 229 ff.; on the impact of the Cartabia reform on the pre-existing normative framework regulating trials *in absentia* see MANGIARACINA, "Alla ricerca di un nuovo statuto per l'imputato assente", Sistema Penale, 2022, p. 1 ff.

[10] See, extensively, MANTOVANI, "'Riforma Cartabia': per chi è il processo *in absentia*?", Legislazione penale, 2023, p. 1 ff.

[11] *Ibid*.

Egyptian nationals had knowledge of the proceedings.[12] The Prosecutor requested that the case be remitted to the Constitutional Court to determine the constitutionality of the relevant parts of Article 420-*bis* CCP (*in absentia* proceedings).[13] The contentious issue was that, pursuant to Article 89(2) of Legislative Decree No. 150/2022, the judge should have dismissed the case without the possibility of appeal given that the absence of the accused persons could not be declared pursuant to Article 420-*bis* CCP. However, this would have resulted in a *de facto* immunity from criminal proceedings for the four Egyptian nationals. It would have also harmed the interests of Regeni's family members, putting them at a disproportionate disadvantage given that the dismissal of the case could not have been reversed.

The GUP questioned the constitutionality of Article 420-*bis*(2) and (3) of the Italian CCP: in relation to paragraph (2),

> to the extent that it does not provide that the judge proceed in the absence of the accused person, even when he or she considers otherwise proven that the absence from the hearing is caused by the failure to provide legal assistance or the refusal to cooperate by the State of nationality or residence of the accused[14]

and, in relation to paragraph (3),

> to the extent that it does not provide that the judge proceed in the absence of the accused person even outside the cases referred to in paragraphs 1 and 2, if he or she considers it proven that the lack of knowledge of the pending proceedings depends on the failure to provide legal assistance or the refusal to cooperate by the State of nationality or residence of the accused.[15]

According to the GUP, the mentioned provisions, by precluding the judge from proceeding with the confirmation of charges against the Egyptian National Security agents alleged to have committed the crimes against Regeni, violated Articles 2 (protection of fundamental human rights), 3 (principle of reasonableness and equality) and 117(1) of the Italian Constitution. Article 117(1) establishes that "[l]egislative powers shall be exercised by the State and the Regions in compliance with the Constitution and with the constraints deriving from the EU legal order and international obligations".[16] This article determines that international treaty obligations binding on Italy are to be treated as a parameter to assess the constitutionality of domestic legislation. In other words, a domestic norm – not of constitutional rank – at odds with a treaty obligation has to be declared unconstitutional.[17]

According to the GUP's remittance order, Article 117(1) of the Constitution, coupled with Law No. 498/1988 (giving execution to the UNCAT within the Italian legal system), vests the obligations arising from UNCAT with (quasi-)constitutional status within the domestic order.

[12] *Corte di Cassazione (Sez. I penale)*, 15 July 2022, No. 5675.

[13] Judgment No. 192, *cit. supra* note 4, para. 2.8.

[14] *Ibid*., para. 1.

[15] *Ibid*.

[16] Art. 117 of the Italian Constitution.

[17] See, for example, CONFORTI and IOVANE, *Diritto internazionale*, 12th ed. (with updates), Napoli, 2023, pp. 384-385.

2.2. The Constitutional Court's judgment

The Constitutional Court frames its reasoning in the following terms:

> This Court is called upon to rule on a legal situation marked by the unresolved tension between the fundamental right of the accused to be present at their trial, the obligation for the state to prosecute crimes amounting to acts of torture and the right – not only of the victim and his family, but of the entire human consortium – to judicially ascertain the truth about the perpetration of such crimes.[18]

The Court emphasised that Law No. 498/1988 gave execution to the UNCAT within the Italian legal system and that, pursuant to Article 3(1)(b) of this Law, Italian judicial authorities, upon a request of the Justice Minister, are empowered to prosecute a foreign national who has committed torture against an Italian citizen on foreign soil.[19] Furthermore, the Court recalled Article 9 UNCAT, which establishes a series of duties of mutual judicial assistance among State parties to the Convention.[20]

Upon a meticulous examination of Italian criminal procedure governing *in absentia* trials and consideration of Egypt's breach of its duties of mutual judicial assistance under the UNCAT, the Court determined that the preclusion to proceed with the trial due to the defendants' absence would put Italy in breach of its UNCAT obligations – thereby violating Article 117(1) of the Italian Constitution. Although the Court did not explicitly specify the exact UNCAT obligation breached, the judgment contains indications that hint at the underlying duty binding Italy. In the authors' view, the Court implicitly relied on the State's responsibility to exercise criminal jurisdiction pursuant to Article 5(1)(c) of the UNCAT. This obligation is rooted in Italy's legislative choice, exercised with Law No. 498/1988, to incorporate the principle of passive nationality jurisdiction over acts of torture into domestic law.

Article 5(1) UNCAT encompasses two distinct obligations. First, it requires the legislature to adopt the necessary legislative measures to establish jurisdiction over acts of torture. Second, it imposes an obligation on administrative and judicial authorities to action these legislative measures.[21] Although the Court does not explicitly delineate the obligation arising from Article 5(1) UNCAT, it contends that the legislative choice to incorporate the passive nationality principle into domestic law via Law No. 498/1988 triggers Article 7(1)(5) of the Italian Criminal Code. The latter provision stipulates that a foreign national who commits in a foreign territory a crime "for which special legal provisions or international conventions establish the applicability of Italian criminal law" shall be punished according to Italian criminal law.[22]

---

[18] Judgment No. 192, *cit. supra* note 4, para. 3.

[19] *Ibid*., paras. 7.1 and 7.1.3.

[20] *Ibid*., para. 7.1.4.

[21] SCHMIDT, "Article 5 – Types of Jurisdiction over the Offence of Torture", in NOWAK, BIRK and MONINA (eds.), *The United Nations Convention Against Torture and its Optional Protocol*, 2nd ed., Oxford, 2019, p. 194 ff., p. 196.

[22] Judgment No. 192, *cit. supra* note 4, para. 7.1.3.

The Court then examined the procedural duty associated with the prohibition of torture arising from the case law of the ECtHR.[23] It affirmed that this prohibition – enshrined in Article 3 ECHR – requires an "efficient criminal-law response".[24] The Court argued that trial delays due to Egypt's lack of cooperation would jeopardise this efficiency, thereby highlighting a violation of the State's duty to prosecute torture.[25] Furthermore, the Court emphasised that the prohibition of torture is inherent in the concept of human dignity, as encapsulated in Article 2 of the Italian Constitution. According to the Court, "the right to a judicial determination represents the procedural manifestation of the duty to safeguard human dignity".[26]

Such "right to a judicial determination" can only be subsumed under the obligations arising from Article 5(1) UNCAT, notably the exercise of criminal jurisdiction, which is frustrated by the Egyptian authorities' lack of cooperation. This is further confirmed by the Court's lack of engagement with Article 112 of the Constitution (duty to exercise criminal jurisdiction), which the GUP raised as a ground for challenging the constitutionality of Italian laws on *in absentia* trials. Instead, the Court deemed the discussion surrounding this article "absorbed" by its determinations in relation to Article 117(1) of the Constitution.[27]

Finally, in seeking a delicate balance between the accused person's fair trial rights and the victim's (or their family members') right to a remedy in the form of a criminal investigation and subsequent prosecution, the Court noted that dismissing the case without appeal – as required by Article 89(2) of Legislative Decree No. 150/2022 – disproportionately compressed the rights of the victim's family, who lacked any other recourse under Italian criminal law.[28] In contrast – reasoned the Court – the defendants would have still been able to appeal any decisions during the trial if proceedings had continued despite their absence, provided that they could demonstrate their lack of knowledge of the proceedings until a later stage.[29]

2.3. Assessment of the judgment

The Court's judgment undoubtedly represents an important step towards justice and accountability for the torture and murder of Regeni. More generally, it stands as a modest victory for victims of torture in Italy. Indeed, the inertia of the criminal proceedings against the four Egyptian defendants, coupled with the stagnation of the Italian and European diplomatic initiatives relating to this case,[30] had generated an accountability gap.

---

[23] In particular, see *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, Grand Chamber, Judgment of 13 December 2012; *Abu Zubaydah v. Lithuania*, Application No. 46454/11, Judgment of 31 May 2018; *Al Nashiri v. Poland*, Application No. 28761/11, Judgment of 24 July 2014.

[24] Judgment No. 192, *cit. supra* note 4, para. 8; ECtHR, *Ochigava v. Georgia*, Application No. 14142/15, Judgment of 16 February 2023, para. 60; see also ACCONCIAMESSA, "Esiste un obbligo internazionale dell'Italia di perseguire atti di tortura commessi all'estero ai danni di un proprio cittadino?", DUDI, 2024, forthcoming, who argues that the parameter to determine the unconstitutionality of the legislation regulating *in absentia* trials should have been Art. 3 ECHR – as the Court seems to suggest in the author's view.

[25] Judgment No. 192, *cit. supra* note 4, para. 9.

[26] *Ibid*., para. 9.3.

[27] *Ibid*., paras. 4.4 and 18.

[28] *Ibid*., para. 13.2.

[29] *Ibid*., paras. 16-17.

[30] See *infra* Section 3 and Camera dei Deputati, Commissione parlamentare d'inchiesta sulla morte di Giulio Regeni (XVIII Legislatura), Doc. XXII-bis N. 1, Relazione sull'attività svolta dalla Commissione, pp. 346-363.

The Court – whose constitutional mandate restricts it to adjudicate only the constitutional legitimacy of laws passed by either the State or the regions – could only address the specific questions presented to it, namely whether paragraphs (2) and (3) of Article 420-*bis* CCP were constitutional. It could neither order the GUP to lift the suspension of the case nor compel State authorities to take diplomatic or other action against Egypt or any of its nationals.

Within the confines of the existing legal framework, the Court's judgment contributed to securing the right to truth of Regeni's family. However, we should note that the resulting expansion of the victim's right to truth remains confined to cases of torture under Article 1 UNCAT. Consequently, it does not encompass cases of torture perpetrated by non-State actors[31] or extend to other serious human rights violations suffered by Italian nationals abroad. In this sense, the Court's intervention is likely limited beyond Regeni's case. Nonetheless, it has been noted that the Italian legal system provides a solution to overcome the seemingly limited applicability of the Court's pronouncement through the tool of the constitutionally oriented interpretation.[32] This interpretive mechanism would allow – and indeed should require – lower-tier judges to extend the rationale underpinning the Court's decision to cases of international crimes other than torture.

Furthermore, one might question whether the Court struck a reasonable balance between safeguarding the accused person's fair trial rights and the victim's right to justice and truth. We contend that the Court's intervention leaves the rights of the accused person virtually untouched. The Court clarified that its addition to the cases of valid *in absentia* trials (as identified in Article 420-*bis* (2) and (3) CCP) does not preclude the accused person – who was correctly declared absent from the proceedings in the first instance – from exercising their remedial right to a new trial, as prescribed by the CCP, should they acquire knowledge of the trial at a later stage.[33] The accused person's participatory rights remain unaltered in quality and quantity, but their exercise is merely delayed. This way, the balance between the accused person's fair trial rights and the victim's right to justice and truth is partially redefined. By expanding the cases of *in absentia* trials, the Court overcame the challenge posed by the foreign State's lack of cooperation in notifying the accused person of the trial, which risked generating an impunity gap for torture cases. Simultaneously, the Court left the accused person's fair trial rights virtually unaltered by allowing them to obtain a new trial, should they be able to demonstrate that they only acquired knowledge of the trial at a later stage. The resulting balance aligns with the case law of the ECtHR[34] and the evolving body of European Union (EU) criminal law,[35] both of which the Constitutional Court cites in its judgment.[36]

[31] For a debate centred on the definition of torture in international law, including the UNCAT, see LE MOLI, "Torture by Non-state Actors: Four Inquiries", JICJ, 2021, p. 363 ff.

[32] AITALA and PALOMBINO, "La Corte Costituzionale nel processo *Regeni*: l'efficacia espansiva di una pronuncia storica", RDI, 2024, p. 165 ff., pp. 172-176.

[33] See, in particular, Judgment No. 192, *cit. supra* note 4, para. 15.2.

[34] See, in particular, *Colozza v. Italy*, Application No. 9024/80, Judgment of 12 February 1985, para. 29; *Sejdovic v. Italy*, Application No. 56581/00, Judgment of 1 March 2006, paras. 81-85.

[35] See, in particular, Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1, Arts. 8-9; Case C-569/20, *Criminal Proceedings against IR*, 19 May 2022.

[36] More extensively on this point DONNARUMMA, "La sentenza della Corte costituzionale sul caso Regeni. Processo in absentia per i crimini di tortura di Stato", Giurisprudenza Penale Web, 15 November 2023.

2.4. Extensive interpretation of the UNCAT

The judgment of the Constitutional Court hinges on an extensive interpretation of the duty to prosecute acts of torture under the UNCAT. As shown above, the Court appeared to endorse the GUP's argument that "Egypt's violation of its duties of mutual judicial assistance established by Art. 9 of the [UNCAT] would highlight a normative gap which places the Italian [judicial] system in a position of inability to observe its treaty obligations".[37] Indeed, Egypt's lack of cooperation in the notification of the trial to the four Egyptian National Security agents – notes the Court – would have forced the Italian judge to declare the trial inadmissible.[38] This predicament arose from the normative gap identified by the GUP, which made it impossible to proceed with the trial in the defendants' absence when this absence was caused by the lack of cooperation of their State of nationality. The Court held this gap to be in violation of Articles 2, 3 and 117(1) of the Constitution.[39] As noted above, we argue that the unconstitutionality of Article 420–*bis* CCP was based on Article 5(1)(c) UNCAT (passive nationality jurisdiction).

Article 5(1)(c) UNCAT allows a State party the *discretion* to assert criminal jurisdiction over a foreign national accused of committing any of the offences outlined in Article 4 UNCAT (duty to criminalise torture) against one of its nationals abroad. The Convention explicitly characterises the exercise of passive nationality jurisdiction as facultative ("if the state considers it appropriate"), in contrast to the obligatory nature of territorial, flag and active nationality principles.[40] The rationale behind this choice is the contested nature of the passive nationality principle as a ground for criminal jurisdiction under international law.[41] It is often argued that the passive nationality principle has the potential to create legal uncertainty for a defendant who may not know the nationality of those they interact with, and thus, the applicable legal regime.[42]

Nonetheless, the Court recognised that Italy had exercised the discretion provided by Article 5(1)(c) UNCAT when incorporating the UNCAT into domestic law with Law No. 498/1988, thereby validating passive nationality as a ground to assert jurisdiction.[43] Therefore, the duty of Italian authorities to investigate and prosecute acts of torture under passive nationality jurisdiction stems not directly from the UNCAT but from Law No. 498/1988. Law 498/1988 provides a duty to assert passive nationality jurisdiction over acts of torture, but this duty does not necessarily extend to eliminating any impediments to such prosecutions provided by laws of equal standing (including the inadmissibility of *in absentia* trials). This extension of the duty cannot also be derived directly from Article 5(1)(c) UNCAT, which, as we have seen, only allows a State party the discretion to assert passive nationality jurisdiction – it does not provide a duty to either prosecute or to eliminate legal impediments to prosecutions. This interpretation stands unless the duty to investigate and prosecute acts of torture is deemed not a simple duty but an absolute one, overriding any legal barriers (such as *in absentia* trials) to torture prosecutions.

The UNCAT does not explicitly provide for an absolute obligation to prosecute torture in all circumstances. The Convention's allowance for discretionary passive nationality jurisdiction

[37] Judgment No. 192, *cit. supra* note 4, para. 4.5.

[38] *Ibid*., para. 9.1.

[39] *Ibid*., para. 14.

[40] SCHMIDT, *cit. supra* note 21, pp. 214-215.

[41] IRELAND-PIPER, "Prosecutions of Extraterritorial Criminal Conduct and the Abuse of Rights Doctrine", Utrecht Law Review, 2013, p. 68 ff., pp. 75-76; SCHMIDT, *cit. supra* note 21, pp. 214-215.

[42] IRELAND-PIPER, *cit. supra* note 41, pp. 75-76.

[43] Judgment No. 192, *cit. supra* note 4, para. 7.1.3.

suggests that States are not always bound to this duty. However, relevant international jurisprudence often interprets the duty to prosecute as absolute, stemming from the non-derogable nature of the ban on torture.[44] For instance, the Committee against Torture's General Comment No. 2 asserts that legal "impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability".[45]

The inadmissibility of *in absentia* trials, specifically when the defendant has not received notification from their national authorities, could be such a legal impediment. Although the Constitutional Court's judgment did not directly reference General Comment No. 2, its rationale implies that the absolute nature of the prohibition of torture determined that Art. 420-*bis* CCP had to be considered unconstitutional, to the extent that it prevented trials from proceeding in the defendants' absence when they were not notified by their State of nationality. This interpretation aligns with the view in IHRL that the duty to investigate and prosecute, derived from the absolute duty not to torture, is itself absolute. Nonetheless, this interpretation is not an obvious one, as it somehow diverges from the UNCAT's own text and presents conceptual challenges, as some scholars have noted.[46]

The Court's interpretation notably diverges from the stance of the majority of the Committee against Torture in the case of *Marcos Roitman Rosenmann v. Spain*.[47] This case originated from a 1996 complaint by alleged torture victims in Spain, who sought to have Spanish authorities initiate criminal proceedings against Chile's former president and dictator, Augusto Pinochet, for alleged violations of the UNCAT during his regime. In 1998, Pinochet was arrested in the United Kingdom (UK) following an extradition request from Spain. However, after a series of appeals before UK courts, the British authorities allowed Pinochet to return to Chile. The Spanish Ministry of Foreign Affairs, who had originally requested the extradition, eventually desisted from appealing the decision of the UK Home Office to authorise the departure of Pinochet. Before the Committee against Torture, the complainant submitted that Spain had jurisdiction over crimes against its citizens anywhere in the world (passive nationality jurisdiction) and that the Spanish authorities had failed to uphold this by not pursuing Pinochet's extradition, thus violating, among others, Articles 13[48] and 9(1)[49] UNCAT.

---

[44] International Criminal Tribunal for the Former Yugoslavia (ICTY), Trial Chamber, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, paras. 155-157. For a critical comment, see PINTO, "Beyond Criminalisation: Torture as a Political Category", Critical Legal Thinking, 1 March 2021.

[45] UN Committee against Torture, General Comment No. 2: Implementation of art. 2 by States parties, UN Doc. CAT/C/GC/2 (2008), para. 5.

[46] The argument is that "not every duty grounded in an absolute right is itself absolute" (JACKSON, "Amnesties in Strasbourg", Oxford Journal of Legal Studies, 2018, p. 451 ff., p. 453) or "limitless" (MAVRONICOLA, *Torture, Inhumanity and Degradation under Article 3 of the ECHR*, Oxford, 2021, p. 128). In particular, for these authors, restraints on the duty to punish torture should be possible if they are meant to ensure the effectiveness of human rights protection, such as in case of amnesties aimed at facilitating national reconciliation, peace negotiations or the end of oppressive regimes.

[47] UN Committee against Torture, *Marcos Roitman Rosenmann v. Spain*, Communication No. 176/2000, UN Doc. CAT/C/28/D/176/2000 (2002).

[48] "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given".

[49] "States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings".

The Committee against Torture deemed the communication inadmissible. It acknowledged that Spain's domestic legislation provided for "extraterritorial jurisdiction over acts of torture committed against its nationals".[50] However, it found that Articles 8 and 9 UNCAT do not require State authorities to seek extradition or appeal a decision by foreign authorities to refuse an extradition request. Recalling Article 5(1)(c), the Committee stated that it considered "this provision to establish a discretionary faculty rather than a mandatory obligation to make, and insist upon, an extradition request".[51] This interpretation of Article 5(1)(c) determines that the discretion afforded by the UNCAT to national authorities encompasses not only the decision to incorporate the passive nationality principle into domestic law but also to decide when and how to apply such legislation.[52] In other words, for the Committee, the duty to investigate and prosecute under passive nationality jurisdiction is not absolute. This interpretation was challenged by Committee member Guibril Camara, who contended that such discretion should only extend to the decision of national authorities to adopt a norm enabling domestic courts to exercise their jurisdiction over allegations of torture – not to the application of such a domestic norm in a specific case.[53] This – argued Camara – would be at odds with the spirit of the UNCAT and with the rationale that underpins the emphasis of the Convention on the duty of States that have jurisdiction to exercise it.

The case examined by the Committee presents striking similarities with that decided by the Italian Constitutional Court, the most relevant of which is the jurisdictional basis upon which the arrest warrant (in the case decided by the Committee) and the criminal investigation (in the case of Regeni's torture) were predicated, namely the passive nationality principle. The Committee's interpretation of Article 5(1)(c) UNCAT seems to contradict the argument made in the GUP's remittance order that, had the domestic legal framework been left untouched, Italy would have been in breach of its international obligation to prosecute the acts of torture allegedly perpetrated against Regeni. This is because, according to the Committee, this obligation simply does not exist under the UNCAT. However, the Constitutional Court seemed to leverage not only Italy's international obligation to prosecute acts of torture but especially the State's duty to prosecute cases over which jurisdiction is established according to domestic legislation (pursuant to Article 3(1)(b) of Law No. 498/1988 and Article 7(1)(5) of the Italian Penal Code).[54] The Court's reasoning echoes Camara's opinion that the discretion afforded to the State by the UNCAT only extends to the choice to empower domestic courts to exercise criminal jurisdiction based on the passive nationality principle. Once the State has adopted legislation that enables criminal courts to assert their jurisdiction, its application becomes a matter of domestic law, and the obligation to prosecute becomes absolute.

To sum up, the Constitutional Court faced two options: it could have narrowly interpreted UNCAT obligations, adhering strictly to the text and the Committee against Torture's decision in *Marcos Roitman Rosenmann v. Spain*, and stated that the duty to prosecute torture did not extend to the duty to exercise passive nationality jurisdiction in all circumstances. Alternatively, it could have adopted a more expansive and progressive interpretation, extending the absolute duty to prosecute torture acts – eliminating any legal impediments to such prosecutions – to cases of Italian citizens tortured abroad by foreign

[50] *Rosenmann v. Spain*, *cit. supra* note 47, para. 6.7.

[51] *Ibid*.

[52] SCHMIDT, *cit. supra* note 21, pp. 215-216.

[53] *Rosenmann v. Spain*, *cit. supra* note 47, Individual opinion of Committee member Mr. Guibril Camara, dissenting in part, pp. 10-11.

[54] Judgment No. 192, *cit. supra* note 4, para. 7.1.3.

nationals. The Court chose the latter option. Although the Court's reasoning was not explicit on this point, its decision should not be taken for granted within the existing IHRL framework. Nonetheless, while the decision has had a palpable impact on the case at hand, its wider implications are more modest given its limited applicability to cases of torture as defined by Article 1 UNCAT against Italian nationals abroad.

3. Beyond Individual Criminal Accountability

The Constitutional Court's decision is a vital step towards ensuring that Italy provides accountability for torture and justice for its victims. As mentioned, the Court eliminated a legal obstacle that granted *de facto* immunity to those accused of torture and, more importantly, impeded the fulfilment of the victims' right to truth. However, the effective protection of human rights, especially the right to be free from torture, goes beyond ensuring individual criminal responsibility. It would be a mistake to assume that Italy's role in fighting torture and seeking justice for Regeni is confined to prosecuting his alleged torturers. Such an assumption would overlook the multi-faceted justice and accountability mechanisms that can and should operate in relation to Regeni's abduction, ill-treatment and death. In short, the Constitutional Court did what it could within its legal remit. Now, the responsibility lies with various other actors and institutions to ensure justice for Regeni and full reparation for his family in a broader sense than merely penal.

This Section interrogates the goals that criminal accountability for serious IHRL violations (e.g., torture, extrajudicial killing and enforced disappearance) is supposed to serve and explores whether they can be better attained through alternative models of justice and accountability.[55] Regeni's case illustrates the limitations of relying solely (or mostly) on criminal law to address such violations. The human rights framework provides a rich array of mechanisms for the State to account for its own or other States' compliance (or lack thereof) with human rights. However, international human rights bodies and domestic courts, as well as human rights scholars and practitioners, generally regard individual criminal accountability as the main remedy that states should pursue.[56] Both human rights instruments and doctrine emphasise a legal and moral duty to hold human rights violators *criminally* accountable and, thereby, end impunity.[57] As the Constitutional Court pointed out, this obligation is clear in the UNCAT. The assumption that "the safeguarding of human dignity"[58] and the "public" investigation of cases of torture[59] (the overarching duties that, according to the Court, Italy needs to fulfil as a matter of international and constitutional law) are best (if not, exclusively) achieved through criminal law has unduly restricted the concept of justice and accountability and limited the responses needed for human rights violations.

3.1. Limitations of criminal proceedings

[55] Mallinder and McEvoy, "Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies", Contemporary Social Science, 2011, p. 107 ff.

[56] Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights", Cornell Law Review, 2015, p. 1069 ff., p. 1070; see also Pinto, "Historical Trends of Human Rights Gone Criminal", Human Rights Quarterly, 2020, p. 729 ff.

[57] See, for example, *El-Masri*, *cit. supra* note 23, paras. 182 and 255.

[58] Judgment No. 192, *cit. supra* note 4, para. 9.3.

[59] *Ibid*., para. 17.

Criminal proceedings are not an end in themselves, but a tool to achieve certain goals. By examining the judgment of the Constitutional Court, we can discern the following objectives that the trial of those accused of torturing Regeni would pursue: 1) "establishing the truth";[60] 2) safeguarding the victims' "human dignity" and providing them with an effective remedy;[61] as well as 3) publicly acknowledging the harm done.[62] We contend that criminal law is more constrained than we commonly assume in fulfilling these objectives and that alternative means may be more suitable for pursuing them.

A postulated goal of criminal proceedings for human rights violations is to uncover the truth.[63] The assumption is that by exposing evidence to rigorous examination in an open court, a lasting record of the violations will be created that can withstand time and denial.[64] However, criminal trials are not the most suitable venues for establishing the truth.[65] Criminal trials are designed to adjudicate specific individuals for specific actions. This means that the criminal process may limit the scope and depth of what is investigated and proven regarding the violations. First, it reinforces "an individualized and decontextualized understanding" of the abuses.[66] Criminal trials focus on the personal responsibility of particular perpetrators, who tend to be portrayed as "the few bad apples".[67] They conceal the involvement of the "poisoned orchards" (the wider social, political, cultural and material ecosystem of abuse)[68] and obscure State responsibility, missing how bureaucracy works (through individual actors) to perpetuate torture and other grave human rights violations.[69] Secondly, a criminal-law approach to truth-finding may impoverish the way a situation of abuse is documented and narrated. The danger is that the facts established within the criminal trial (under very high standards of proof) are regarded as the definitive truth of what happened, disregarding all that cannot be admitted as evidence in the criminal trial as irrelevant or, worse, non-existent.[70]

A common assumption within the international human rights framework is that prosecution can foster a sense of justice for the victims. This is based on the idea that witnessing their perpetrators prosecuted and, potentially, punished will achieve that effect and that the process of actively participating in the trial and, in the case of conviction, receiving monetary compensation will also do so. However, criminal law offers this opportunity only to a few victims and, even for them, only to a very small degree. Given the paucity of criminal trials for human rights violations, very few victims have the opportunity to see their offenders brought to justice. The decision to prioritise investigations of certain

[60] *Ibid*., para. 3; see also para. 8.

[61] *Ibid*., paras. 9.1 and 13.2.

[62] *Ibid*., para. 17.

[63] See generally DOUGLAS, "Truth and Justice in Atrocity Trials", in SCHABAS (ed.), *The Cambridge Companion to International Criminal Law*, Cambridge, 2015, p. 34 ff.

[64] CRYER, ROBINSON and VASILIEV, *An Introduction to International Criminal Law And Procedure*, 4th ed., Cambridge, 2019, p. 38; CASSESE, "Reflections on International Criminal Justice", JICJ, 2011, p. 271 ff.

[65] ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil*, New York, 1963.

[66] ENGLE, *cit. supra* note 56, p. 1071.

[67] PUNCH, "Rotten Orchards: 'Pestilence', Police Misconduct and System Failure", Policing and Society, 2003, p. 171 ff.; MAVRONICOLA, "Coercive Overreach, Dilution and Diversion: Potential Dangers of Aligning Human Rights Protection with Criminal Law (Enforcement)", in LAVRYSEN and MAVRONICOLA (eds.), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR*, Oxford, 2020, p. 184 ff., pp. 199–200.

[68] CELERMAJER, *The Prevention of Torture: An Ecological Approach*, Cambridge, 2018, p. 9.

[69] ENGLE, *cit. supra* note 56, p. 1120.

[70] *Ibid*., p. 1126.

human rights violations and not others, or not to charge certain crimes, has implications for which victims are given redress and which are not.[71] Evidence that victim participation in criminal proceedings is beneficial is also inconclusive. Studies show that some victims are actually "ambivalent or even against the prosecution of those who allegedly offended against them"[72] and that they are unwilling "to legitimize or cooperate with processes nominally undertaken in their name".[73] For those who want to participate, like Regeni's family, the need to balance their rights and a fair procedure mainly focused on the defendants' prosecution rather than the victims' redress may disappoint their expectations and hinder their desired involvement (this was exactly what was occurring in Regeni's case before the Constitutional Court's intervention). As for reparations, criminal courts can grant monetary compensation only to a limited number of individuals who have suffered harm: the award is generally dependent on a finding of guilt and the convicted person has to have sufficient funds to compensate the victims.[74] Moreover, criminal courts frequently lack the capacity to offer wider forms of reparations. This includes various measures of satisfaction like guarantees of non-repetition, which transcend mere acknowledgement of the violation.[75]

Some advocates of criminal law claim that criminal proceedings serve to restore faith in the rule of law after a wrong has been committed. Criminal law not only enforces the law that has been breached but, by punishing the offence that has been committed, it allegedly communicates to "the offender, the victim and wider society the nature of the wrong done".[76] This objective seems especially relevant in the case of torture given the absolute ban of this practice and the strong moral and emotional reactions to its appalling nature. However, criminal law is not the only way to enforce the law and communicate the seriousness of the wrongdoing at stake. These objectives can also be achieved through administrative and disciplinary measures, removal of privileges (e.g., loss of authority positions), public condemnation and apologies, infliction of reputational harm (e.g., boycott or "naming and shaming"), and other more or less formal modes of accountability that come with the violation being exposed and addressed.[77] It is also questionable whether criminal trials are fit for educating society. If they acquit the accused person, they risk sending the message that no wrongdoing was committed or that the violation is not so serious as to warrant punishment. Consider for a moment the reactions should Regeni's alleged torturers be acquitted: Egypt could claim that the Italian doctoral researcher was never tortured or that his abuse was not severe enough. If, on the other hand, criminal trials are designed to achieve conviction at any cost, they lose their fairness and become show trials.[78]

---

[71] KENDALL and NOUWEN, "Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood", Law and Contemporary Problems, 2013, p. 235 ff.

[72] MÉGRET, "The Strange Case of the Victim Who Did Not Want Justice", International Journal of Transitional Justice, 2018, p. 444 ff., p. 445.

[73] *Ibid*.

[74] ENGLE, *cit. supra* note 56, p. 1124.

[75] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (2005), para. 23. Guarantees of non-repetition may take different forms, including civilian control of armed groups, strengthening of the independence of the judiciary, promotion of human rights training and codes of conduct, as well as institutional reforms.

[76] ZEDNER, *Criminal Justice*, Oxford, 2004, p. 109.

[77] MASON and SCHMIDL, "What We Talk about When We Talk about Accountability", Universal Rights Group, 14 June 2021.

[78] KOSKENNIEMI, "Between Impunity and Show Trials", Max Planck UNYB, 2002, p. 1 ff.

In sum, the preference given to criminal proceedings may marginalise or even replace alternative forms of justice and accountability. If one observes where the most attention, energy and resources are directed in cases of serious human rights violations (including those committed against Regeni), one sees how criminal trials end up functioning as a symbol that something is being done, while other (often more effective and immediate) responses are downplayed, postponed until the criminal process is finished, or even left untried.

3.2. What Italian (and European) actors and institutions are doing and what else they could do

Examined as a whole, Italy's response to Regeni's human rights violations seems to be centred on the criminal trial of his alleged torturers before domestic courts. The other few measures taken so far, at the judicial, diplomatic and economic levels, are remarkable for their heightened caution and limited impact. In 2016, Italy temporarily recalled its ambassador to Egypt for "consultations", in protest at the lack of progress in the investigation by Egyptian authorities. In the same year, the Italian Parliament decided to freeze the free supply of spare parts for F-16 fighter jets to Egypt.[79] However, as these measures did not have any significant effect, Italy has chosen to continue the path of political dialogue with Egypt. Martina Buscemi and Federica Violi have suggested that the Italian authorities may be waiting for more and stronger evidence to emerge in the ongoing criminal trial,[80] thus making the whole of Italy's response to Egypt dependent on the outcome of these proceedings and the limitations we have highlighted. Moreover, during the hearings before the Parliamentary Commission of Inquiry on the Death of Giulio Regeni,[81] concerns have been raised that a possible internationally supported action could harm and, to some degree, obstruct the domestic criminal investigations.[82] Most importantly, Italy has never formally invoked the responsibility of Egypt, indirectly endorsing the narrative that Regeni's torture and death are due to "a few bad apples" within Egypt's National Security Agency.

Yet there are various possible non-penal measures that Italian (and European) authorities could adopt to ensure effective accountability and justice for Regeni. These measures are not easy to implement in the current legal, political and economic context, but they are not impossible either. Domestic and international actors have shown great willingness to use individual criminal accountability as a tool for human rights protection, by adopting new legal instruments, creating new penal institutions and changing the interpretation of treaty-based and customary international law to facilitate prosecutions. Nothing prevents Italian and European actors from showing the same proactivity in exploring alternative avenues of accountability and justice.

3.2.1. Legal responses

[79] VIOLI and BUSCEMI, "The Unsolved Case of Giulio Regeni: An Attempted Legal Analysis", Völkerrechtsblog, 3 July 2017.

[80] BUSCEMI and VIOLI, "Atti di tortura e ricorsi interstatali: prospettive nell'ambito della Convenzione ONU contro la tortura e oltre", DUDI, 2021, p. 615 ff., p. 637.

[81] Commissione parlamentare, *cit. supra* note 30.

[82] *Ibid*., p. 638.

Accountability and justice for Regeni can be sought through legal remedies of a compensatory nature and focused on State responsibility for violations of international law. One approach could involve the Italian government providing support, such as financial aid, to Regeni's family to file a civil lawsuit before Italian courts against Egypt to obtain reparations for harm.[83] Although the family is already participating as a civil party in the ongoing criminal trial, pursuing a separate civil lawsuit offers the benefit of not linking reparations to a criminal conviction. Reparations could consist of monetary compensation or symbolic measures, such as official apologies, monuments, museums or memory projects. This option faces some legal hurdles, such as jurisdictional issues, since Egyptian courts would normally have competence over a civil wrong committed in their territory.[84] Egypt might also claim State immunity.[85] A possible counterargument is that torture is "a crime against humanity" whose prohibition is a norm of *jus cogens*, as recognised by the Constitutional Court.[86] Therefore, following the *Ferrini* decision of the Italian Court of Cassation[87] and the Constitutional Court's Judgment No. 238/2014,[88] it appears that foreign State immunity cannot be effectively invoked in Italy in cases involving international crimes or *jus cogens* norms.[89] Questions remain as to how to collect evidence to support the case without Egypt's collaboration, but this problem is even more acute in the criminal case that requires a higher standard of proof.

Regeni's relatives have limited or no recourse to international human rights judicial and quasi-judicial treaty-based mechanisms, since Egypt has not recognised the competence of the relevant bodies to receive individual complaints.[90] An alternative is for Italy to invoke Article 30 of the UNCAT to initiate an inter-State dispute with Egypt.[91] Both Italy and Egypt have ratified the UNCAT and neither of them has made reservations to this provision. It allows a State party to the UNCAT to start a dispute with other State parties concerning the interpretation or application of the Convention. If the dispute is not settled by negotiations, it must be submitted to arbitration and, if the parties fail to agree on the organisation of the arbitral proceedings, either of them may refer the dispute to the International Court of Justice (ICJ). Article 30 was successfully used by Belgium against Senegal in 2009, regarding the case of Chadian dictator Hissène Habré.[92] Currently, a case jointly introduced by Canada and the

[83] PISILLO MAZZESCHI, "Il caso Regeni: alcuni profili di diritto internazionale", OIDU, 2018, p. 526 ff., pp. 532-534; LOPES PEGNA, *Accesso alla giustizia e giurisdizione nel contenzioso transfrontaliero*, Bari, 2022, p. 158 ff.

[84] For possible solutions in this regard, see PISILLO MAZZESCHI, *cit. supra* note 83.

[85] VIOLI and BUSCEMI, *cit. supra* note 79.

[86] Judgment No. 192, *cit. supra* note 4, para. 7.

[87] *Corte di Cassazione (Sezioni Unite Civili)*, *Federal Republic of Germany v. Heirs of Luigi Ferrini,* 21 January 2014, No. 1136, IYIL, 2013, p. 436 ff., with a comment by CATALDI; for a case report and analysis, see CHECHI, ILDC 2724 (IT 2014).

[88] *Corte Costituzionale*, *Simoncioni, Alessi and Bergamini v. Federal Republic of Germany and Presidency of the Council of Ministers*, 22 October 2014, No. 238, IYIL, 2014, p. 1 ff., with comments by FRANCIONI, PISILLO MAZZESCHI, BOTHE, CATALDI and PALCHETTI.

[89] But note the distinct factual contexts of the *Regeni* and *Ferrini* cases: Germany has never challenged the crimes committed in the *Ferrini* case, which contrasts with Egypt's stance on Regeni's case to date. Moreover, in the *Ferrini* case, some actions occurred on Italian territory, whereas in Regeni's case, the events seem to be exclusively connected to the jurisdiction of Egypt.

[90] PASQUET, "L'Italia, l'Egitto, e il 'diritto alla verità': alcune considerazioni sul caso Regeni", SIDIBlog, 25 February 2016.

[91] BUSCEMI and VIOLI, *cit. supra* note 80; "Nota Sul Webinar. Il Caso Regeni: Gli Strumenti Del Diritto Internazionale", Centro Studi di Politica Internazionale, 29 April 2021.

[92] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, Joint Application Instituting Proceedings of 6 August 2023.

Netherlands against Syria, based on the same arbitration clause, is pending before the ICJ.[93] In Regeni's case, Italy could ground the dispute in Egypt's alleged breaches of Articles 9 (duty of mutual judicial assistance) and 12 (duty of prompt and impartial investigation of cases of torture) of the UNCAT. Despite this option being suggested to members of the Italian government and parliament by international law scholars,[94] the government has not, so far, expressed an interest in invoking Article 30.[95]

3.2.2. Diplomatic responses

Italian authorities should not wait for the criminal proceedings to conclude but rely on the numerous reports and analyses that indicate that Regeni was tortured and killed by agents of Egypt.[96] Given the probable involvement of the Egyptian government and its lack of cooperation with Italian investigators, Italy should act diplomatically to protect the interests and rights of its citizen harmed by that government. The Italian government has various options to exercise diplomatic protection in Regeni's case. Examples are formally invoking Egypt's responsibility for breaching international law, seeking remedy, resorting to international arbitration, suspending diplomatic relations (e.g., expelling Egyptian diplomats) or adopting economic countermeasures and disrupting trade relations.[97]

Moreover, Italy could hold Egypt accountable for its widespread State-sponsored human rights abuses (as reported by several international organisations)[98] in international fora, such as the UN General Assembly. Italy could also urge more scrutiny of the human rights situation in Egypt by UN bodies and Special Procedures. The next cycle of Egypt's Universal Periodic Review (scheduled for June 2024) could be another opportunity to question Egyptian authorities and demand justice for Regeni. Italy could also make more serious attempts to push the issue at the EU level. Since 2016, the European Parliament has passed several resolutions on Regeni's case, condemning his torture and killing, and calling for Egyptian cooperation.[99] However, these resolutions have not been followed by effective actions by other EU bodies.[100] Among other measures, the EU could impose individual targeted sanctions under the EU Global Human Rights Sanctions Regime,[101] against the alleged perpetrators of Regeni's abuses or individuals "associated" with them.[102] Whereas the agents directly

[93] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, ICJ Reports 2012, p. 422 ff.

[94] Commissione parlamentare, *cit. supra* note 30, p. 358 ff.

[95] BUSCEMI and VIOLI, *cit. supra* note 80, p. 636.

[96] See generally Commissione parlamentare, *cit. supra* note 30.

[97] PISILLO MAZZESCHI, *cit. supra* note 83, p. 529.

[98] See, for example, UN Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/27/49 (2014), para. 74; European Parliament, Resolution on the deteriorating situation of human rights in Egypt, in particular the case of the activists of the Egyptian Initiative for Personal Rights (EIPR), 18 December 2020; Report of the Committee against Torture, UN Doc. A/72/44 (2017), paras. 58-71; Human Rights Council, Office of the United Nations High Commissioner for Human Rights, Compilation on Egypt, UN Doc. A/HRC/WG.6/34/EGY/2 (2019).

[99] See, for example, Resolution on Egypt, notably the case of Giulio Regeni, 10 March 2016; Resolution on executions in Egypt, 8 February 2018; Resolution on the deteriorating situation of human rights in Egypt, *cit. supra* note 98; Resolution on the human rights situation in Egypt, 24 November 2022.

[100] BUSCEMI and VIOLI, *cit. supra* note 80, p. 640.

[101] Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses.

[102] BUSCEMI and VIOLI, *cit. supra* note 80, pp. 649-652.

responsible for Regeni's case may not have assets or property in the EU or desire to enter the EU, this may not be the case for others higher up in the chain of command that led to Regeni's torture and death.[103]

There are many options available. Not all of them would be immediately effective and most of them would likely strain the relations between Italy and Egypt. But if Italian authorities are serious about accountability for torture and justice for Regeni, they must consider implementing these strategies. Yet Italy has done very little so far. As mentioned, it has never invoked Egypt's responsibility or formally demanded Egypt to remedy the harm.

3.2.3. Economic responses

Italy has taken few economic measures so far. Except for freezing the supply of spare parts for F-16 fighter jets (which was free of charge and, thus, without economic consequences), it has maintained excellent relations with Egypt in the areas of trade and defence cooperation.[104] To meet its obligation to end torture and ensure justice for its victims, Italy could adopt several economic countermeasures. For example, it could stop the trade and export of arms and other security and military equipment to Egypt. It could also leverage its position as Egypt's largest European trading partner to demand more thorough investigations and the establishment of independent accountability mechanisms in Egypt.[105] It could, for instance, pause or reduce more investments in the Egyptian market, where about 1,200 Italian companies operate with total investments of 6 billion euros, until Egypt shows more cooperation.[106] The EU could also play a role in putting economic and financial pressure on Egypt. A possible option, to be considered carefully, is a targeted and cautious temporary suspension of financial assistance flows, or even of the 2004 Association Agreement that creates a free-trade area between the EU and Egypt, which could have some positive effects in ensuring Egypt's cooperation in the investigations regarding Regeni's case.[107] However, the EU's recent actions have been contrary to this approach. For instance, in March 2024, the EU finalised a deal worth 7.4 billion euros with Egypt aimed at bolstering the country's economy, promoting regional stability and managing the migration flows heading towards Europe.[108]

3.2.4. Other responses

Despite their dominance, criminal trials are hardly the only way to uphold human rights values after atrocities. Alternative forums, such as commissions of inquiry, may just as satisfactorily – and perhaps even more satisfactorily – examine episodes of violence and abuse to understand how they happened. Structural and pluralistic measures, such as guarantees of non-repetition and transformative reparations, may be more effective than penal sanctions in preventing the recurrence of violations. In this regard, Regeni's case could inspire a

[103] *Ibid*., p. 651.

[104] *Ibid*., p. 638.

[105] "Italy Is Egypt's First European Trade Partner – Diplomat", Egyptian Gazette, 26 May 2023.

[106] *Ibid*.

[107] BUSCEMI and VIOLI, *cit. supra* note 80, pp. 642-649.

[108] EU Directorate-General for Neighbourhood and Enlargement Negotiations, Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Republic Of Egypt and the European Union, 17 March 2024.

transformative approach to justice and accountability for grave human rights violations, rather than a punitive one.

United Nations-mandated commissions of inquiry are widely used to address situations of serious human rights violations, whether systematic or resulting from sudden events, and to promote truth and accountability.[109] These commissions, usually established by the Human Rights Council, have a high degree of independence and autonomy. They establish facts based on the applicable IHRL, without being bound by the usual rules of evidence, and make recommendations to foster accountability for past violations and deterrence for future ones. They are more flexible than criminal courts and, therefore, may be better suited to reveal the truth of what happened: as the people involved do not face legal consequences, they tend to be more candid about their actions. In Regeni's case, a commission of inquiry could circumvent several hurdles that have emerged in the ongoing criminal trial before the Italian courts, considering that much evidence seems to be in the hands of the Egyptian authorities. These commissions also have more room to explore the socio-political context that enabled the violations as well as the role of specific agents. However, Regeni's case poses challenges: the commission's establishment depends on a majority vote within the Human Rights Council and its scope would likely cover torture and other human rights violations in Egypt in general, rather than Regeni's case in particular.[110]

The criminal trial of Regeni's torturers will end with a verdict of guilty or not guilty. Even if they are convicted, they will likely escape punishment as Egypt may not extradite them to Italy. In other words, the measures to address and sanction Regeni's torture and death will be mostly declaratory and concern individual agents. A different way to overcome these limitations and rethink measures to tackle human rights violations is through guarantees of non-repetition.[111] These guarantees can take various forms, such as enhancing the judiciary's independence, providing human rights training and codes of conduct, and implementing institutional reforms.[112] These measures can be applied after a civil trial, or demanded by UN bodies, such as the ICJ, if Italy makes use of the procedure in Article 30 of the UNCAT.

The goal of non-recurrence can be further advanced through transformative reparations. This kind of reparation aims to change the conditions that led to the violations, including the social, cultural and political factors that enabled or allowed them.[113] The concept of transformative reparations acknowledges that reparations can only truly repair atrocities if they result in structural changes and help build a more just and inclusive society. This implies, in Regeni's case, addressing the underlying structures that cause torture, enforced disappearance and extrajudicial killing in Egypt. A transformative approach to reparations supports a process that not only ensures participation and redress for all survivors, but also enables them to challenge structures that have contributed to their victimisation.[114] The objective is to strengthen the capacities and respect the agency of survivors with a view to

[109] PARISI, "International Fact-Finding Missions", in ROMANIUK and MARTON (eds.), *The Palgrave Encyclopedia of Global Security Studies*, London, 2019.

[110] RONZITTI, "Le vie legali per risolvere il caso Regeni", TPI, 1 April 2016.

[111] See *supra* note 75.

[112] *Ibid*., para. 23(c), (e), (f) and (h).

[113] YEPES, "Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice", Netherlands Quarterly of Human Rights, 2009, p. 625 ff.; MCGONIGLE LEYH and FRASER, "Transformative Reparations: Changing the Game or More of the Same?", Cambridge International Law Journal, 2019, p. 39 ff.

[114] GREADY and ROBINS, "From Transitional to Transformative Justice: A New Agenda for Practice", International Journal of Transitional Justice, 2014, p. 339 ff., p. 358.

individual and collective empowerment, as well as meaningful and material reparation. Of course, it is hard to envisage how transformative reparations could be pursued in Regeni's case. However, if we look at the broader human rights situation in Egypt and the reactions to it, we realise that Egyptian activists have been fighting for justice in their country for years, including support for the campaign seeking justice for Regeni.[115] By funding, supporting and assisting them, these local activists could perhaps be empowered to initiate a transformative process of reparations in Egypt.

4. CONCLUSION

Even if the criminal trial of Regeni's torturers ends with a guilty verdict, it is unlikely that the Egyptian agents will ever be punished. As recognised by the Italian Constitutional Court, this does not make their trial "pointless".[116] It will at least partly fulfil the Regeni family's right to truth, safeguard their human dignity and publicly acknowledge the harm inflicted upon their son. These reasons alone make Judgment No. 192/2023 a crucial step towards accountability and justice for serious human rights violations. Albeit modestly, the judgment also strengthens the Italian legal framework on the State's duty to end torture, by extending the absolute duty to prosecute acts of torture – eliminating any legal impediments to such prosecutions – to cases of Italian citizens tortured abroad by foreign nationals. Nonetheless, this judgment and the ongoing criminal trial should not absolve the Italian authorities from pursuing other, more immediate and meaningful, forms of accountability and justice for Regeni and his family. No doubt these alternatives have significant political (and possibly economic) costs, but the Court's willingness to overcome legal difficulties and embrace a progressive interpretation of the UNCAT should inspire other Italian authorities (and, notably, the government) to demonstrate equal determination in advancing effective human rights protection.

Acknowledgments

The authors wish to thank two anonymous reviewers for their invaluable comments on an earlier draft of this article.

[115] TETI et al., "Giulio Regeni e le ragioni della giustizia", Minima & Moralia, 20 August 2017.
[116] Judgment No. 192, *cit. supra* note 4, para. 17.