Università Ca'Foscari Venezia

Master's Degree programme – Second Cycle (D.M.270/2004)
in Comparative International Relations

Final Thesis

The functioning of diplomatic protection and the case of Giulio Regeni

Supervisor
Ch. Professor Sara De Vido

Assistant supervisor
Ch. Arianna Vettorel

Graduand
Sofia Franceschini 854168

Academic Year
2019/2020

Be the change you want to see in the world

TABLE OF CONTENTS

Abstract

L'istituto di protezione diplomatica, le cui origini risalgono alla creazione dello Stato Nazione formalmente sancito dal Trattato di Vestfalia nel 1648, è uno degli elementi cardine su cui poggia il sistema giuridico internazionale.

Il seguente elaborato tratta lo studio del funzionamento di questo meccanismo di protezione dell'individuo, partendo dalle sue origini e dai principi fondamentali a cui esso fa fede. Benché la creazione dell'istituto di protezione diplomatica venga convenzionalmente accostata alla nascita dello Stato Nazione, verrà dimostrato come, già in epoche precedenti, si sviluppò una forma, seppur primordiale, di protezione diplomatica alla quale si aggiunse una rete di relazioni diplomatiche, anch'esse definibili come primordiali, preludio di un sistema giuridico internazionale che a poco a poco verrà istituendosi.

Se la creazione del concetto di protezione diplomatica, così come la sua formalizzazione, venne approvata dai paesi del "vecchio continente", lo stesso non può essere affermato in relazione ai paesi del Centro e del Sud America, i quali non riconobbero tale istituto come un elemento volto a garantire una tutela ai cittadini all'estero i cui diritti fossero stati violati a seguito di illeciti perpetrati da uno Stato straniero, ma bensì come un'intromissione nella giurisdizione interna dello Stato ritenuto responsabile. Questo pensiero, sviluppatosi possibilmente come conseguenza al lungo periodo coloniale imposto dalle potenze Europee nei confronti dei paesi oltreoceano, spianò la strada alla dottrina Calvo, dalla quale nacque poi la Clausola Calvo[1]. La Dottrina Calvo[2] prese il nome dal giurista argentino Carlos Calvo, il quale definì come ingiusta e soprattutto non necessaria, l'applicazione del principio di protezione diplomatica, basandosi sulla necessità di riconoscere internazionalmente il concetto di eguaglianza tra individui. Nonostante la clausola Calvo - attraverso la quale la controparte straniera di un contratto stipulato tra cittadini o istituzioni si impegnava a rinunciare al diritto di protezione diplomatica da parte del suo Stato di origine – venne comunemente utilizzata nell'America Centrale e Meridionale, la sua applicazione fu comunque soggetta a delle

[1] Lipstein, K., *The Place of the Calvo Clause in International Law*, 22 BYIL, 1945.
[2] Calvo, C., *Le Droit International Théorique Et Pratique: Précédé D'un Exposé Historique Des Progrès de la Science Du Droit Des Gens*, Vol. III, 1896.

eccezioni, le quali contribuirono a limitarne gradualmente l'importanza e la rilevanza nel contesto internazionale.

L'applicazione dell'istituto di protezione diplomatica viene definita dalla dottrina consuetudinaria come un diritto dello Stato, il quale può essere dallo stesso esercitato nel solo caso in cui un proprio cittadino sia vittima di illecito internazionale all'estero. Chiaramente, il ricorso a questo meccanismo internazionale deve rispettare alcune condizioni, tra cui: il principio della nazionalità e il principio del previo esaurimento dei mezzi di ricorso interni. Condizioni le quali nel tempo e attraverso l'evoluzione della dottrina internazionale - e quindi dell'istituto stesso - , hanno subito delle modifiche, rendendo la protezione diplomatica un diritto non più solamente orientato a tutelare lo Stato leso, ma piuttosto diretto a tutelare l'individuo, vittima diretta dell'illecito. A questo proposito, è fondamentale citare il progetto di articoli sulla protezione diplomatica adottato nel 2006 dalla Commissione di Diritto Internazionale, la quale ha ritenuto necessario sottolineare la direzione nella quale il processo di evoluzione della protezione diplomatica in corso, si stia orientando: da diritto dello Stato a dovere dello Stato nei confronti del cittadino vittima di violazioni di norme fondamentali. A conferma di ciò, l'articolo 19 della stessa Commissione sancisce come uno Stato, laddove fosse nella piena condizione di agire attraverso l'applicazione dell'istituto di protezione diplomatica, dovrebbe considerare sia la gravità dell'illecito subito dal proprio cittadino sia le volontà e la posizione dello stesso a riguardo[3].

Tuttavia, una considerazione legata al principio delle mani pulite - secondo il quale né lo Stato né il suo cittadino devono aver tenuto in passato una condotta biasimevole nei confronti della controparte responsabile dell'illecito - sancito dalla dottrina classica, merita di essere avanzata. Il suddetto principio, la cui applicazione limita, di fatto, il diritto di tutela garantito agli Stati nei confronti dei propri cittadini all'estero, venne applicato a numerosi casi risalenti al diciannovesimo secolo[4], malgrado con il tempo la sua applicazione venne, soprattutto dalla Commissione di Diritto Internazionale e dagli

[3] United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection*, Supplement No. 10, A/61/10, vol. II, 2006.

[4] Per citarne alcuni: Revue Générale de droit international public, *Chronique des faits internationaux, Belgique et Grande-Bretagne – Affaire Ben Tillet – Expulsion – Arbitrage de m. Arthur Desjardins (1)*, 1899, pp. 46 – 55; United Nations Reports of International Arbitral Awards, *Case of the Enterprise v. Great Britain (United States of America v. Great Britain),* 23 December 1854, Vol. XXIX, pp.26-53.

interventi dei Relatori Speciali, categorizzata come necessaria solo nella fase di esaminazione preliminare[5] del caso, in modo da poter fornire un contesto generale nel quale includere l'illecito, escludendo di fatto il principio dal progetto di articoli stipulato dalla stessa Commissione Internazionale nel 2006.

L'esclusione del principio delle mani pulite dal progetto di articoli della Commissione di Diritto Internazionale, così come l'evoluzione del principio della nazionalità e del previo esaurimento dei ricorsi interni necessari per invocare l'istituto di protezione diplomatica, indicano come l'evoluzione stessa sia il vero *fil rouge* del meccanismo internazionale in esame. Evoluzione, la quale vede un'ulteriore conferma conseguentemente al riconoscimento universale dei diritti dell'uomo, svolta fondamentale che porrà l'individuo in una posizione molto più centrale in relazione al funzionamento del meccanismo internazionale esaminato nel presente elaborato. Svolta che porrà inoltre, un quesito essenziale circa la rilevanza e la necessità della protezione diplomatica laddove un sistema universale di salvaguardia dei diritti umani, fondato sul principio di uguaglianza tra gli individui, possa conferire un grado di protezione agli stessi tale da rendere inefficace o per meglio dire obsoleto, il ricorso ai mezzi diplomatici sulla base del principio del legame tra Stato e cittadino. Innegabile è la rilevanza assunta dai sistemi di ricorso individuale a fronte di una grave violazione umanitaria, implementati successivamente alla progettazione e strutturazione di una rete di istituzioni volte a tutelare i diritti umani stessi. Tuttavia, se da un lato la possibilità dei singoli individui di ricorrere alla giurisdizione di istituti internazionali quali ad esempio la Corte Penale Internazionale o la Corte Europea dei Diritti dell'Uomo è rilevante, dall'altro è importante ricordare l'indiscutibilità del ruolo che tutt'oggi gioca l'istituto di protezione diplomatica sul piano internazionale. Ricorsi individuali e protezione diplomatica sono due elementi che giuridicamente coesistono, sebbene il ruolo di quest'ultima sia ad oggi da considerare decisivo, soprattutto laddove il ricorso alternativo alla sua applicazione non garantisca un risultato volto a risolvere la controversia. L'istituto di protezione diplomatica è dunque ad oggi definito come il meccanismo giuridico principale per ottenere giustizia a fronte di un illecito internazionale subito da un individuo in uno Stato estero.

[5] United Nations General Assembly, Report of the International Law Commission, *Fifty-seventh session, Supplement No. 10 (A/60/10),* 2005, pp.110- 116.

La frammentazione di trattati e convenzioni, internazionali e regionali, su cui si basa l'esistenza del regime universale dei diritti umani è in parte il motivo per il quale i ricorsi individuali non sono ad oggi considerati al pari livello dell'istituto di protezione diplomatica. Inoltre, è fondamentale ricordare come questa condizione venga accentuata dal fatto che ad oggi la protezione diplomatica è ancora, nonostante la sua evoluzione, un diritto arrogato allo Stato, e lo Stato stesso continua ad essere l'istituzione più influente sul panorama internazionale.

Il parallelismo tra diritti umani e funzionamento dell'istituto di protezione diplomatica risulta ancora più importante dal momento in cui nel seguente elaborato si andrà ad analizzare un caso noto all'opinione pubblica, tanto nazionale quanto internazionale, per le numerose e gravi violazioni dei diritti umani: il Caso di Giulio Regeni. Giulio Regeni, ventottenne friulano, svolgeva un dottorato di ricerca all'Università di Cambridge ed era in Egitto, più precisamente al Cairo, per completare il suo progetto incentrato sui sindacati egiziani e la loro cruciale funzione nel contesto politico del paese, soprattutto in seguito alle rivolte del 2011, quando venne torturato e brutalmente assassinato. Il ruolo dei diritti umani nel Medio Oriente - perché di diritti umani in questo caso si parla - è da sempre molto controverso e questa caratteristica è data principalmente dall'ostilità con la quale questi paesi guardavano, e guardano tutt'ora, ai diritti universalmente garantiti all'uomo. Diritti umani che, come anticipato in precedenza, nascono in Europa, così come fanno parte dell'Europa i paesi che per secoli colonizzarono lo stesso Medio Oriente. Questa stretta relazione tra colonizzazione e nascita dei diritti umani è alla radice dell'ostilità verso le garanzie umanitarie e dietro alla quale si cela un timore di un'ulteriore imposizione da parte dell'Occidente sull'Oriente, una mutazione delle pratiche coloniali sotto forma di trattati internazionali a tutela dell'umanità[6]. L'innegabile reticenza con la quale il mondo Mediorientale accolse la possibilità di riconoscere un'universalità di diritti garantiti all'uomo ostacolò, ma non impedì, la diffusione di tali principi e diritti, i quali vennero divulgati soprattutto tramite l'incessante impegno delle organizzazioni non governative. Organizzazioni non governative la cui attività, soprattutto nel contesto egiziano, è stata ed è sottoposta a continue censure e limitazioni, attraverso leggi d'emergenza e sistematiche violazioni dei più basilari concetti su cui si fondano i principi

[6] Yesfet, B., *The politics of Human Rights in Egypt and Jordan*, London, Lynne Rienner Publishers, 2015.

umanitari. Leggi d'emergenza, ma più precisamente leggi anti-terrorismo, le quali violano sia i principi sanciti dalla Costituzione Egiziana, sia i principi sanciti da trattati e convenzioni internazionali di cui l'Egitto è Stato parte. Tra le violazioni più comuni perpetrate dal governo egiziano, vi sono: la violazione del diritto di associazione, di libertà di pensiero e di libertà di stampa, nonché le pratiche di arresto arbitrario, detenzione prolungata senza mandato e diritto a processo, così come le pratiche di tortura. L'ultima legge anti-terrorismo[7] approvata dal governo di al-Sisi nel 2015 di fatto amplia il raggio d'azione delle autorità egiziane e inasprisce ulteriormente le pene, laddove un atto illecito venisse riconosciuto, riducendo all'osso la valenza e l'importanza dei diritti umani nel paese. L'omicidio di Giulio Regeni – perché di omicidio si tratta – si inserisce in questo contesto di violazioni sistematiche che vanno in scena su un palco internazionale, in cui la comunità globale è spettatrice assente. Essere spettatori assenti di un protrarsi di comportamenti illegali e internazionalmente punibili, non fa altro che alimentare queste pratiche, contribuendo a limitare e sminuire la portata fondamentale dei diritti garantiti all'intera umanità sulla base di un pericoloso silenzio assenso. Giulio Regeni venne rapito il 25 Gennaio 2016, in un giorno particolare per l'Egitto e per gran parte del Medio Oriente. Il suo corpo senza vita, e con evidenti segni di tortura, venne poi ritrovato alla periferia del Cairo, ai bordi di una superstrada che porta verso Giza. Sin dalle prime ore dalla sua scomparsa, incessante fu il lavoro dell'ambasciata italiana e dell'ambasciatore Massari, così come incessante fu la riluttanza a qualsiasi forma di collaborazione da parte delle istituzioni egiziane. Istituzioni, le quali poco o nulla hanno fatto per indagare sui reali motivi dell'omicidio di Giulio e per trovarne un reale colpevole. Al contrario, numerosi i tentativi di depistaggio. La reazione del governo italiano, parte lesa in questo incidente che potrebbe facilmente sfociare in una controversia internazionale, è stata ricca di dichiarazioni, alcune prese di posizione, incontri e richieste. Tuttavia, dopo cinque lunghi anni e un'ostacolata inchiesta, l'Italia non ha ancora formalmente e giudiziariamente preso una posizione nei confronti dell'illecito subito. Agire attraverso l'invocazione e conseguente applicazione dell'istituto di protezione diplomatica, aprirebbe numerosi scenari, alcuni più percorribili di altri, i quali indubbiamente potrebbero dare giustizia e pace a Giulio e ai suoi cari. Decidere di intraprendere un'azione giudiziaria nei confronti dell'Egitto, aiuterebbe

[7] Legge n°94 del 2015, approvata dal Parlamento egiziano il 17 agosto 2015.

inoltre a puntare i riflettori sulle gravi, costanti e ormai consuetudinarie violazioni dei diritti umani che il popolo egiziano subisce da decenni ridestando, possibilmente, le basi sulle quali si fondano i principi umanitari promossi a gran voce dalla comunità internazionale.

ABBREVIATIONS

AIDI	Annuaire de l'Institut de Droit International
AJIL	American Journal of International Law
ARSIWA	Articles on the Responsibility of States for International Wrongful Acts
Cass.	Corte di Cassazione
CAT	Convention Against Torture and Other and Cruel and Inhuman or Degrading Treatment or Punishment
CETS	Council of Europe Treaty Series
COM	Commission of the European Communities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GA	General Assembly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILA	Institute for Legislative Action
ILC	International Law Commission
NGO	Non-governative Organization
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights

O.J.	Official Journal
PCIJ	Permanent Court of International Justice
TFUE	Treaty on the Functioning of the European Union
TUE	Treaty of the European Union
UN	United Nations
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
VCDR	Vienna Convention on Diplomatic Relations
VCCR	Vienna Convention on Consular Relations
WTO	World Trade Organization
YB	Yearbook

INTRODUCTION

Milestone of the international legal system, the institute of diplomatic protection dates back to the creation of the Nation State, formally established by the Treaty of Westphalia in 1648, despite being accepted and applied as international legal mechanism later in the twentieth century.

The whole research will first begin with the analysis of the mechanism of diplomatic protection from an historical point of view. Providing a general framework over the roots and original characteristics that shaped diplomatic protection, is believed to be essential in order to understand the evolutionary process that the international jurisprudence, but more precisely, the mechanism studied in this dissertation, underwent.

In this first historical analysis, attention will be placed in relation to the Calvo Doctrine[8], essentially the first juridical opposition – and potential alternative - to the mechanism of diplomatic protection. Although the Calvo Doctrine, which later will also shape the Calvo Clause,[9] will be applied and supported for long time, year after year we will see that its importance will diminish until fading completely. Moreover, in this first section, a definition of the wrongful acts considered as illicit – based work of the International Law Commission which in 2001 developed the *Articles on Responsibility of States for Internationally Wrongful Acts*[10] -, which could potentially trigger an international dispute, will also be provided. On the basis of the same work established by the International Law Commission, a study over the possible resolutions in case of illicit will be outlined.

The second part of the dissertation will be focused on the analysis of diplomatic protection from a juridical point of view. Essentially, a deep study related to the conditions according to which this mechanism can be invoked will follow. The research will first begin with a definition of the two main preconditions necessary to have access to diplomatic protection: the principle of nationality and the principle of the prior exhaustion of local remedies. The structure of this analysis will have as *leitmotiv* the evolutionary processes which have characterized both preconditions. According to the principle of nationality, it

[8] Calvo, C., *Le Droit International Théorique Et Pratique: Précédé D'un Exposé Historique Des Progrès de la Science Du Droit Des Gens,* Vol. III., Paris, A. Rousseau 1896.
[9] Lipstein, K., *The Place of the Calvo Clause in International Law*, 22 BYIL, 1945.
[10] United Nations General Assembly, *Draft Articles on Responsibility of States for internationally Wrongful Acts,* 2001, fifty-third session, (2001 YB, vol II, part two). Text corrected by document A/56/49 (vol. I)/Corr. 4.

will be underlined how essential it still is, notwithstanding the progressive work that has been carried out, which enlarged the chances for individuals to be protected, even by States that formally are not directly connected with a person's nationality, as in the case of stateless people or refugees. In relation to the concept of citizenship, it must be underlined that part of this chapter will be dedicated to the European citizenship and the further diplomatic and consular protection guaranteed to people owning it,which, it must be recalled, cannot be defined as a second nationality but rather as an additional one.

As far as the principle of the prior exhaustion of local remedies is concerned, attention will be placed on the exceptions formalized and accepted by the international jurisdiction in relation to the application of this principle. Considering the evolutionary concept as the *leitmotiv* of the second chapter, I will also try to explain the functioning of the principle of the clean-hands doctrine by providing cases of diplomatic protection at which it was applied in the past. Moreover, the reasons for which it has been excluded from the *Draft Articles on Diplomatic Protection* of 2006 established by the International Law Commission, will be provided.

The second chapter will be concluded with a consideration over the possibility agreed to a State to act diplomatically by applying a certain degree of force in order to safeguard a citizen in danger abroad. The analysis of this last part will be focused on the position of the international doctrine on the basis of the United Nations Charter, and the potential exceptions guaranteed, especially according to the principle of the responsibility to protect, enshrined by the Report of the International Commission on Intervention and State Sovereignty of 2002[11].

Once a general framework over the functioning of diplomatic protection is provided, I will deepen the study of this international mechanism, within the context of the universal human rights regime. Context which is believed to be crucial in relation to the evolutionary character that has shaped the whole research so far, and which characterizes the mechanism of diplomatic protection. In point of fact, the establishment of the universal human rights regime led to the creation of alternative legal options, enlarging the chances of individuals' interests safeguard. In the analysis, a comparison between the mechanism of diplomatic protection and the new legal mechanisms created in order to be directly accessible to individuals, will be provided. This comparison will outline

[11] United Nations General Assembly, ICISS, A/57/303, Annex.

information and facts considered as necessary in order to understand whether diplomatic protection is to be defined as an obsolete mechanism or not, and if it still plays an essential role in order to guarantee individuals with protection, whereas they have suffered from an illicit abroad.

The last part of this project will be centred on the analysis of a concrete case in which diplomatic protection could be exercised: the Case of Giulio Regeni. Giulio Regeni, a young Italian phD student, was in el Cairo whilst conducting a research for his project with the University of Cambridge over the Egyptian trade unions, when on the 25 of January of 2016 was kidnapped and murdered. This case will be analysed on two different levels: the humanitarian and the legal one. As far as the humanitarian field is concerned, I will provide a general framework of the Egyptian internal legislation in relation to the respect of human rights, including the international treaties and covenants signed and ratified by the country which is – or should be – obliged to respect. The framework will also mention the current ongoing repressive behaviour perpetrated by the Cairene authorities against the universal human rights regime. For what concerns the legal field of analysis, I will focus on the possible legal options available at an international level, in order to solve the case of Giulio. Three different legal scenarios at which the Italian Government could appeal to will be explained: the scenario that could be undertaken by the international community, by the Italian Government and by the family of Giulio Regeni.

The whole research aims at devising a consistent framework in relation to the mechanism of diplomatic protection, beginning from its origins and ending to the current use that countries make of it in order to safeguard their citizens' interests injured abroad. The study of the tragic murder of Giulio Regeni has been chosen in order to understand the concrete functioning of diplomatic protection in a specific case, with a special focus to the relevance of the human rights regime in a context of an international dispute.

As a young student who could potentially decide to continue the academic career by undertaking a doctorate, the story of Giulio Regeni hits close to home. As a person who strongly believes in the never-ending learning process and who is determined to understand the unknown by researching, relentlessly, I found necessary to write about Giulio Regeni. Researching and writing about his case has been essential in order to understand the options available, from a legal standpoint, to give peace to his tragic story

and possibly, to begin to shed light over the thousands of "Giulios of Egypt" that everyday are silent victims of human rights violations.

I. DIPLOMATIC PROTECTION: THE ORIGINS

1. Premise

The establishment of the mechanism of diplomatic protection found its roots in the Treaty of Westphalia of 1648, which, together with the Congress of Vienna in 1815, paved the way to the current international legal system[12]. International legal system which could be defined as cradle of diplomacy, officially designed at the beginning of the eighteenth century[13], although evidence has shown that, already in the very ancient Greek times, international relations regulated by a primitive system of laws existed[14]. The following chapter will begin with a brief analysis focused on the origins and further development of diplomatic protection within history. The historical analysis not only will entail the chronological events that shaped the establishment of the international legal framework but will also be focused on the philosophical concepts expressed by important scholars, such as Vattel and Grotius, which theorized what diplomatic protection should have meant and how it should have been implemented.

The historical research will follow with the analysis of the Calvo Doctrine. Created by Carlos Calvo, an Argentinian jurist in 1868, the Calvo Doctrine – from which the Calvo Clause was shaped – represented a mechanism used to oppose to the European supremacy, especially as a consequence to the period of colonization. It will be outlined how the Calvo Doctrine developed and in what consisted essentially. Moreover, reference to the Calvo Clause and its field of application will be made. The study of the Calvo Doctrine will terminates with an analysis related to its importance and relevance within the international legal jurisprudence.

Once a general historical overview will be provided, direct reference to the international law will be made. As a matter of fact, the last subchapters will be focused on the analysis of the functioning of diplomatic relations, by means of the Vienna Convention on

---

[12] Verosta, S., *History of the Law of Nations* from*, 1648 to 1815*, Oxford University Press, 2007, p. 181

[13] Ward, R., *An Enquiry into the Foundation and History of the Law of Nations in Europe from the Time of the Greeks and Romans to the Age of Grotius*, Gale Ecco Print Editions, 2018.

[14] Phillipson, C., *The International Law and Custom of Ancient Greece and Rome,* MacMillan Editions, 1979.

Diplomatic Relations[15] to the analysis of the extent to which an illicit can be considered as of international relevance by triggering a dispute between two States. For what concerns this last circumstance, reference to the Draft Articles on Responsibility of States for International Wrongful Acts[16] as well as to some of the most relevant cases of diplomatic protection within the history of international law, such as the *LaGrand*[17] and the *Avena*[18] judgement will be made.

1. DIPLOMATIC PROTECTION: AN HISTORICAL OVERVIEW

The ratification of the Peace of Westphalia in 1648 is believed to be the date of birth of "the modern system of international law"[19] whilst at the same time took to an end one of the longest and most horrifying wars of all times: the Thirty Years' War.
The Peace of Westphalia introduced for the first time the concept of Nation State[20] which substituted, in terms of power, the authority of both the Catholic Church and the Empire[21]. The birth of independent and equal nation states introduced rules which began to frame the international legal framework. Nevertheless, it must be underlined how, already in the ancient Greece - despite some primitives attempts during the Sumerians and Egyptians - [22] the relationships between independent city-states, which were considered as sovereign

[15] United Nations General Assembly, Treaty Series, *Vienna Convention on Diplomatic Relations*, done at Vienna, 18 April 1961, entered into force on 24 April 1964, vol.500, p.95.
[16] United Nations General Assembly, *Draft Articles on Responsibility of States for internationally Wrongful Acts,* 2001, fifty-third session, (2001 YB, vol II, part two). Text corrected by document A/56/49 (vol. I)/Corr. 4.
[17] International Court of Justice, judgement 27 June 2001, *LaGrand (Germany v. United States of America),* p. 466.
[18] International Court of Justice, judgment 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America),* p. 12.
[19] Amerasinghe, C.F*, The Historical Development of International Law,* cit. p 13.
[20] The Nation State is a territorially bounded sovereign polity —i.e., a state— that is ruled in the name of a community of citizens who identify themselves as a nation. The legitimacy of a nation-state's rule over a territory and over the population inhabiting it stems from the right of a core national group within the state (which may include all or only some of its citizens) to self-determination. Definition Retrieved at: https://www.britannica.com/topic/nation-state
[21] Cassese, A., *International Law in a divided world*, Oxford Clarendon Press, 1986.
[22] Rostovtzeff M., *International Relations in the Ancient World*, in E.A. Walsh (ed.) New York, 1922.

States, were regulated by treaties. The creation of the *proxeny*[23] in the Hellenic world, as a consequence to the relations among independent cities, can be considered as the first example of the modern idea of consulate[24], which had and still has, among its aims, the protection of foreigners. Centuries apart, the Roman Empire unprecedented conquests made necessary the development of diplomatic activities, although a great step forward in relation to the development of international law was achieved with the decision to join Latin communities in the establishment of the Roman Republic[25]some years before. It was precisely in this historical period that the concept of citizenship and the rights entailed, emerged. [26] Moreover, within the roman legal framework it was stated that, in case of war, whereas a roman citizen became a prisoner of the enemy, he would lose any rights accorded to its citizenship. Rights, that would eventually be regained at the end of the prisoning. [27]Essential was the development in international law practices and concepts carried out during the Middle Ages, as a consequence to the division of the Roman Empire and the further creation of independent territories. As far as the development of the international legal framework is concerned, it must be argued that, although the Peace of Westphalia has to be considered as the breakthrough for the establishment of international law, it has been proved that international relations and institution with international function existed well before the fifteenth century, although by means of early structures. Notwithstanding the primitive establishment of interrelations among independent entities, the crucial development within the legal field began an evolutionary process that changed the existent political and economic structures, paving the way to a set of supra-national rules limiting individual State's actions.

---

[23] Proxeny (proxenia) was an official honorific status granted by Greek states to members of external political communities and was closely related to the private institution of ritualied friendship (xenia). Proxeny was a central element of the Greek system of interstate institutions since, it enables state actors to establish connections with individuals at a wide range of other political communities within the densely fragmented city-state culture of the ancient Mediterranean.
Definition available at Oxford classical dictionary. Retrieved at: https://oxfordre.com/classics/view/10.1093/acrefore/9780199381135.001.0001/acrefore-9780199381135-e-5395

[24] Amerasinghe, C.F., *The Historical Development of Internaitonal Law* – Universal Aspects, Mohr Siebeck GmbH & Co. KG, 2001.

[25] Ibid. p 371.

[26] Ibid. p 372.

[27] Ibid.

The settlement and respect of treaties in case of war or peace were the first examples of international relations discipline, although similar procedures already existed[28]. Innovations were introduced in terms of disputes among States, which had to be solved by means of arbitration or mediation, whilst trade had to be regulated by commercial treaties. It must be underlined that the growing interrelations which States established among them, made essential the implementation of a new system of rules in order to regulate States' activities as to maintain stable, long-lasting and profitable connections. However, colonization is believed to be the phenomenon that triggered the necessity to establish further diplomatic mechanisms. As a matter of fact, it was especially after the colonial period that the concept of travelling emerged and, centuries apart, with the creation of independent nation States, the need to establish a system able to protect citizens located in different countries became essential[29].
In response to the need for the protection of citizens located abroad, the Swiss lawyer Emmerich de Vattel, one of the first scholars that theorized on this issue, asserted that:

«Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him, since otherwise the citizen will not obtain the chief end of civil society, which is protection.[30]»

Emmerich de Vattel conceptualized the protection of foreigners in a European context in which culture was unified, and begun its studies by asserting the necessity to provide the settlements of disputes between foreigners and citizens of a country by means of local courts[31]. This definition given by Vattel preceeded the further development of diplomatic protection, which will include the introduction of the principle of the exhaustion of local remedies as precondition to have access to this mechanism. Vattel, precisely defined the possibility of intervention by a foreign sovereign State as an action of protection over its

[28] Amerasinghe, C.F., *The Historical Development of International Law*, cit. p. 381.
[29] Ibid.
[30] Vattel E., *The Law of Nations, or the Principles of Natural Law*, 1758, Book II, Chapter VI: see 3 Classics of International Law, 1916, p. 136.
[31] Ibid.

citizen abroad, provided that the State where the injury took place did provide the alien with the same access to legal procedure guaranteed to a local citizen[32].

The process of evolution of the international legal framework saw a great development with the ratification of the bilateral Jay Treaty of 1794, signed by Great Britain and the United States in order to solve disputes related to seizure of vessels, confiscation of debts and general claims between these two countries, marking the beginning of the use of arbitration as an effective method of resolution for controversies. Moreover, this improvement saw a sharp increase in the use of diplomatic protection, also marking a great step forward in the concretization of this international tool.[33]

Considering the nineteenth century, it can be asserted that precisely in this period, a shift from theory to practice in relation to the protection of citizens abroad developed. Precisely, from the theoretical discourse about protecting citizens abroad, a set of written laws asserting rights and duties attributed to sovereign States, mainly in relation to the treatment of aliens in their territories[34], was established. Moreover, this century empowered the position of Western European countries, which underwent a second wave of colonialism, with a consequent spread and imposition of the western legal system abroad[35]. Expansion of western powers, which was made possible by a massive cluster of technological innovations, smoothen the transportation process of both people and materials from a country to another.

The capitulation system[36] represented the undisputed supremacy developed by Western European countries within countries colonized. As a matter of fact, this system defined the treatment of Europeans in non-European conquered territories, providing Europeans with a wide range of privileges, including the exemption from the payment of taxes and from territorial courts judgement. This system showed how the development of an international legal framework was mainly based on the western concept of law, which did not consider equal nor applicable other systems rather than its own. Justice, as a concept based on the capitalist western economic system, spread in western Europe as well as in

[32] Ibid.
[33] Moore, J.B., *International Adjudications ancient and modern: History and documents*, Oxford University Press, 1929.
[34] Amerasinghe, C.F., *The Historical Development of International Law*, cit. p. 383.
[35] Ibid.
[36] Cassese A., *International Law in a divided world*, cit. p. 40.

North America. Nevertheless, colonies located in Asia and Africa, as well as the new-born Latin American countries, did not share the same idea in relation to the meaning of justice. This conceptual difference, the belief that economic backwardness and permanent political and social instability were the main characteristics of former colonial countries, led western governments to perceive their citizens living in those specific areas as in danger and in need for protection[37]. As a consequence, the use of diplomatic protection by western countries increased dramatically. In response to the massive resort to the mechanism of diplomatic protection, Latin American countries tried opposed, claiming that the imposition of diplomatic protection was just a method applied in order to diminish Latin American countries' independence, possibly leading to a further invasion as an excuse to quell injurious behaviours against aliens [38]. Consequently, the Calvo Doctrine developed - which will be explained in the following subchapter – which consisted in a juridical response against the use of diplomatic protection, strongly supported by the majority of Latin American countries[39].

Within the early stage of international legal relations, it must be noted that by focusing the analysis of diplomatic protection on the position of the individual, it is clear how no particular attention was given to people's interests. Nevertheless, the first step towards placing attention to the treatment of individuals and, more generally foreigners, was made with the Congress of Vienna in 1815, when slavery was abolished. A crucial role was also played by the Treaty of Paris in 1814, with which wars on land and sea, pacific settlement of international disputes and general legal issues were internationally regulated by the creation of international laws[40]. It must be underlined that both the Congress of Vienna and the Treaty of Paris had been proceeded and influenced by previous historical events, such as the French Revolution in 1789, which principles were established by the Declaration of the Rights of the Man[41] as well as by the rebellion of the American colonies

[37] Amerasinghe, C.F, *Diplomatic Protection*, Oxford University Press, 2008.
[38] Dunn, F.S., *The Diplomatic Protection of American in Mexico*, New York, Columbia University Press, 1933.
[39]Shea, D. R, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy,* Universisty of Minnesota Press, 1955.
[40] See documents A/AC. 10/25, "*Historical survey of the development of international law and its codification by international conferences*"; and A/AC.10/8, "*Outline the codification of international law in the inter-American system with special reference to the methods of codification*".
[41] The Declaration of the Rights of Man and of the Citizen was adopted he 26th of August 1789 as a consequence of the French Revolution. It can be considered as one of the primitive documents

against the British some years before. The latter triggered the reaction of the British power with a suspension of the slave trade, in order to prevent American lands to become richer in labour force as well as in products. As the French international jurist George Scelle affirmed in 1934:

> *« […] The struggle against slavery, the protection of the bodily freedom of individuals only begin in international law when it is clearly demonstrated that slave labour has economic drawbacks and that the progress of modern technology allows it to be replaced. […] This proves that a moral conviction, even if of a general character, does not override the necessities of economic life in the formation of rules. [42]»*

The beginning of the twentieth century marked a great development in relation to diplomatic protection, since it was finally accepted as an international legal mechanism[43]. Throughout this century, international organizations, international courts and agencies specialized in international relations and legal framework, developed[44]. Nevertheless, before explaining the establishment of international organizations which framed the legal structure, attention should be given to an important change implemented after the First World War: the imposition of a gradual restraint in the use of force by States[45]. This imposition was made in order to avoid a possible second conflict, which in the end materialized anyway, proving how such restriction ended up being ineffective.

It was in 1919, with the winning powers of the first international conflict that, in order to maintain peace and prevent any other conflict to emerge, the decision to establish the League of Nations was taken. This move could be considered as a first attempt to change the political and legal orientation of the international community, yet still too weak. As far as the restriction in the use of force was concerned, no real legal ban was ever

---

which enshrined the human liberties and rights. Information retrieved at: https://www.britannica.com/topic/Declaration-of-the-Rights-of-Man-and-of-the-Citizen

[42] G. Scelle, *Précis de droit des gens, Paris, Sirey, 1934; G. Scelle on slavery: Le traite négreière aux Indes de Castille: Contrats et traitès d'asiento – Etude de droite public et d'histoire diplomatique puisèe aux sources originales et accompagnée de plusieurs documents inédits*, 2 vols, Paris, Sirey, 1906.

[43] Amerasinghe C.F., *The Historical Development of International Law,* cit. p.16.

[44] Ibid.

[45] Shea, D. R., *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy,* cit., pp.58-62.

established by the League in relation to the restraint in the use of force by States[46]. Nevertheless, articles 12, 13 and 15 of the Covenant of the League of Nations[47], explained the procedure to be applied in case of disputes between two States. First and foremost, the Covenant at article 12 stated that whenever a dispute emerged, it had to be settled by means of arbitration and States, before resorting to war, had to wait three months after the decision of arbitrators. It must be noted that within the article, no concrete legal imposition that obliged States not to resort to the use force was contained. However, the only restriction applied, was related to a short period of three months after the final verdict in which no action – including the use of force - among States could be carried out[48]. Moreover, no international military structure was provided in order to guarantee protection towards a State against which a declaration of war was made.

Although with the creation of the League of Nation a step further in the concept of international cooperation was made, it must be noted that no concrete improvements were really achieved in relation to the importance of States acting not as individual but rather as a community.[49]The attempt of the League of Nation to establish an institution able to solve disputes and prevent States from the resort to force, saw a crucial breakthrough towards the creation of an international legal institutions responsible for solving disputes among States: the establishment of the Permanent Court of International Justice in 1921[50]. The Court, which in 1946 will be replaced by the International Court of Justice[51], dealt with controversies related to diplomatic protection, which existence was definitely concretise by means of the court decisions. [52]

The role of diplomatic protection remained untouched, - although its importance had been strongly affirmed at the beginning of the twentieth century -despite protests of less-

[46] League of Nations, *The Covenant Of the League of Nations,* Including Amendments in Force, February 1, 1938. Source Retrieved at: https://history.state.gov/historicaldocuments/frus1919Parisv13/ch10subch1

[47] Ibid.

[48] League of Nations, *The Covenant Of the League of Nations*, cit., art.12.

[49] Shea, D. R., *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy,* cit. p 63.

[50] The establishment of the Permanent Court of Justice is enshrined within article 14 of The Covenant Of the League of Nations.

[51] It must be recalled that the International Court of Justice is the main legal organ of the United Nations. The seat of the Court is in The Hague (Netherlands) and its is composed by 15 judges which are periodically elected every nine years. Information retrieved at: https://www.icj-cij.org/en/court

[52] Amerasinghe, C.F., *The Historical Development of International Law,* cit., p. 17.

developed countries. Moreover, it became essential right after the end of the Second World War.

This brief historical excursus over diplomatic protection sees the International Law Commission as the last piece of the puzzle. The Commission, which was established in 1947 by the United Nations General Assembly, had as main purpose the one of*: « […] initiate studies and make recommendations for […] encouraging the progressive development of international law and its codification. »*[53]. As a matter of fact, on the basis of the purpose expressed by the United Nations General Assembly which consisted in the «*development international law and its codification*»[54], approximately a decade later, in 1961, the formal recognition of the status of diplomatic actions and the rules regulating them were established by the Vienna Convention on Diplomatic Relations[55]. As a matter of fact, article 53 articles of the Convention aimed at maintaining international peace and security on the basis and principles of the Charter of the United Nations, in order to develop friendly relations among states by ensuring diplomatic missions abroad[56]. The International Law Commission has been essential in order to provide a series of documents regulating international relations among States, such as: the project of Articles on State Responsibility[57] in 2001 and the Draft Articles on Diplomatic Protection of 2006. The latter has been essential in order to codify and define what does diplomatic protection means and can be implemented. Accordingly, article 1 of the Draft Articles on Diplomatic Protection explain what diplomatic protection entails, and states that:

> *« […] diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility ».*[58]

---

[53] United Nations General Assembly, *Charter of the United Nations*, art. 13 (1) (a), 1947.
[54] Ibid.
[55] United Nations General Assembly, Treaty Series, *Vienna Convention on Diplomatic Relations*, done at Vienna, 18 April 1961, entered into force on 24 April 1964.
[56]Ibid.
[57] United Nations General Assembly, *Draft Articles on Responsibility of States for internationally Wrongful Acts,* 2001, fifty-third session, (2001 YB, vol II, part two). Text corrected by document A/56/49 (vol. I)/Corr. 4.
[58] United Nations General Assembly, International Law Commission, *Articles on Diplomatic Protection, 2006.* Source Retrieved at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf

2.THE CALVO DOCTRINE: DIPLOMATIC PROTECTION AS A WEAPON FOR SUPREMACY

In the first historical part of this chapter, reference was made to the Calvo Doctrine and to the Calvo Clause, elements that will be deeply studied within this chapter.

It must be noted that the Calvo Doctrine took the name from an Argentinian jurist, Carlos Calvo, which strongly opposed to the Western European countries' idea in relation to the application of diplomatic protection in case of injuries suffered by their citizens in a foreign State and, in 1868, concretely developed a concept that will shape the constitutions and legal frameworks of great part of Latin America[59].

The opposition promoted by Calvo was mainly political, since often times foreign Western European States used to intervene against the country in which the injury took place (Latin American, in this case) on behalf of their citizens, claiming for a compensation, despite few and unverified evidence. If on the one hand the invocation of diplomatic protection was seen as unequal and unjust, providing foreigners with more protection than nationals of the State in which the dispute took place, on the other developed countries justified this intervention, not only as a mechanism to protect their citizens, but also as a process to improve the backward local legal system of developing countries. [60] As a consequence, the principles upon which the Calvo Doctrine developed were the following: equality and sovereignty of all States and equality of nationals and foreigners. According to the supporters of the Calvo Doctrine, diplomatic protection was defined as unnecessary since, according to the principle of equality among States, judgements and resolution of disputes will have had the same value anywhere.

Carlos Calvo in relation to this concept, claimed that:

> *« […] sanctioning the doctrine that we are combatting, one would deal, although indirectly, a strong blow to one of the constituent elements of the independence of nations, that of territorial jurisdiction; here is, in effect, the real extent, the true significance of*

---

[59] Freeman, A.V., *Recent Aspects of the Calvo Doctrine and the challenge to International Law,* The American Journal of International Law, Cambridge University Press, 1946, Vol. 40. No.1. Source retrived at: https://www.jstor.org/stable/2193897?seq=1#metadata_info_tab_contents

[60] Summers, L.M., The Calvo Clause, Virginia Law Review, 1933, Vol. 19, No. 5, pp. 459-484.

such frequent recourse to diplomatic channels to resolve the questions which from their nature and the circumstances in the middle of which they arise come under the exclusive domain of the ordinary tribunals.[61]*»*

The Doctrine was mainly established to limit State responsibility whenever foreigners suffered from damages caused by a belligerent situation. A further limitation of responsibility was then introduced in relation to any other injury. Later, at the beginning of the twentieth century, the Institute of International Law pronounced itself negatively in relation to States' limitation of responsibility with a resolution that announced:

« […] states should refrain from inserting in treaties clauses of reciprocal irresponsibility […] such clauses are wrong in excusing states from the performance of their duty to protect their nationals abroad and their duty to protect foreigners within their own territory. [..] states which, by reason of extraordinary circumstances, do not feel able to assure in a manner sufficiently efficacious the protection of foreigners on their territory, can escape the consequences of such a state of things only by temporarily denying foreigners to access to their territory. »[62]

The Calvo Doctrine and its limitation of responsibility were, by the majority of Latin American States, introduced in their constitutions, treaties, laws and conventions.[63] Moreover, the concept of non-responsibility of a State in case of war damages was also codified in the article 2 of a Pan-American convention signed in 1902 in Mexico, and stated that:

« […] The States are not responsible for damages sustained by aliens through acts of rebels or individuals, and in general, for damages originating from fortuitous causes of

[61] Calvo C., *Le Droit International Théorique Et Pratique: Précédé D'un Exposé Historique Des Progrès de la Science Du Droit Des Gens,* 1896, Vol. III, par. 1280, p. 142 (translation found in Summers Lionel Morgan, 1933. The Calvo Clause, Virginia Law Review, Mar., 1933, Vol. 19, No. 5).
[62] Moore J.B., *A Digest of International Law,* Cambridge University Press, 1907.
[63] Calvo C., *Le Droit International Théorique Et Pratique: Précédé D'un Exposé Historique Des Progrès de la Science Du Droit Des Gens,* cit. p 461.

any kind, considering as such the acts of war whether civil or national; except in the cause of failure on the part of the constituted authorities to comply with their duties.[64] »

Focusing on article 3 of the Pan-American convention regarding the limited responsibility for injuries suffered by foreigners, it was stated that:

«Whenever an alien shall have claims or complaints of a civil, criminal or administrative order against a State, or its citizens, he shall present his claims to a competent Court of the country, and such claims shall not be made through diplomatic channels, except in the cases where there shall have been […] a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law»[65]

Despite many attempts made by Latin American countries to legally introduce the Calvo Doctrine at an international level, or at least, to make it internationally considered, it must be noted that neither Western European countries nor the United States decided to take this possibility into account. If on the one hand attempts to make the Calvo Doctrine internationally recognized and respected failed, on the other attempts to insert the Calvo Clause in international contracts between foreigners and host States, were successful in implementing the basic concept of the doctrine[66]. Contracts between Latin American countries and foreign corporations or individuals were subjected to the Calvo Clause, according to which the foreigner renounced to seek for any form of diplomatic protection from own nation State in case of injury suffered. Not only the contracts included the explicit renounce of the foreigner to ask for diplomatic protection, but also provided, in case of dispute, a method of resolution of disputes by means of local courts[67] - where the illicit took place.

Nevertheless, it must be underlined that between the Calvo Clause and the Calvo Doctrine differences exist. Accordingly, the Calvo Doctrine is a legal, unilateral act, recognized by the international law, that should materialise into a behaviour in case of controversies whilst the Calvo Clause is related to the formal renounce of an internationally recognized

[64] Second International Conference of American States, SEN. Doc. 330, 57th Congress, 1st Session, p.228.
[65] Ibid.
[66] Amerasinghe C.F., *The Historical Development of International Law*, cit., p.192.
[67] Lipstein K., *The Place of the Calvo Clause in International Law*, 22 BYIL, 1945, p. 130.

right, in order to conclude a contract[68]. According to these differences, many questions arise. First and foremost, in case of "denial of justice" from a local foreign court towards a foreigner, a request of diplomatic protection could be made by the latter. In relation to this concept, it must be noted that the extent to which the "denial of justice" emerged, was difficult to outline, since the concept had different interpretations according to different States[69]. This created great confusion among States in relation to the extent to which intervention could be defined as legal since, according to the circumstance, the clause will have to be defined as valid or not. On the contrary, in the case in which the foreigner decided not to respect the Clause, appealing to his government for diplomatic protection, a premature withdrawn from the contract with negative consequences for the part not respecting the Clause could concretized. A further issue was related to the concept of diplomatic protection as a tool owned by the State itself, which could not be owned by an individual and as a consequence it could not be withdrawn[70]. Following this reasoning, the Calvo Clause, in case of severe injury caused by a State towards a foreigner could be defined as irrelevant since, despite the contract prohibit the access to diplomatic protection, being this a right of the sovereign State, the resort to diplomatic action to defend citizens could be appealed to, being this right is enshrined within the international legal system. Therefore, the Calvo Clause could not act as a concrete prohibition against the mechanism of diplomatic protection since it could be exercised by the State of nationality of the foreigner anyway, being this a right of the State and not part of the contract.

Another point which can be defined as relevant, is related to the act of denounce of a foreigner injured abroad towards its State of nationality. According to the functioning of the Calvo Clause, denouncing an illicit to a State in order to enjoy diplomatic protection will breach the conditions of the contract but, whereas the Government decided to intervene without notifying the other part of the contract the denounce made by its

---

[68] Borchard, M., *Diplomatic Protection of Citizens Abroad,* 1919; Garcia-Mora, M.R., *The Calvo Clause in Latin American Constitutions and International Law,* Law Review, 1950.

[69] Shea, D. R., *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy,* cit.

[70] Jimenez de Aréchaga, International Responsibility, in Sørensen, *Manual of Public International Law,* New York, St. Martin's Press, 1968; Jessup, *A Modern Law of Nations,* New York, The Macmillan Company, 1948; Shea, D. R., *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy,* cit.

national, no proof of a part having breach the contract will be found[71]. Nevertheless, the fact that only the ambassy, minister or ambassador could denounce their nationals claiming for help, made this act of justice very unlikely, underlying the difficulty to fully implement the Calvo Clause.

In relation to the implementation of the Calvo Clause, reference to the exhaustion of local remedies needs to be made[72]. According to this principle, the case of the *North American Dredging Company of Texas (USA) vs United Mexican State* in 1926[73] must be cited. This case was judged by the arbitral awards for a contentious between the two counterparts, and the main issue was related to the application of article 18, which stated:

«The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favor of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract. »[74]

The Commission of the United States had to pronounce and solve a dispute between the North American Dredging Company of Texas and the United Mexican States. In relation to the actions perpetrated by the former, a monetary recovery equal to the number of losses and damages caused for a breach of a part of the contract was requested.[75] The Commission recognized the Calvo Clause and its importance within the contract between the two counterparts, underlying how the commitment made by the American Dredging Company not to look for any help by its own Government in order to solve the dispute,

[71] Shea, D. R., *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy,* cit. p. 473.
[72] Amerasinghe, C.F, *Diplomatic Protection*, cit., p. 195.
[73] United Nations General Assembly, Reports of International Arbitral Awards, *North American Dredging Company of Texas (USA) v. United Mexican States,* 31 March 1926, Volume IV pp.26-35.
[74] Ibid.
[75] Ibid., p. 26.

was rather unrealistic[76] since an individual has no power to deny or refuse a right that does not possess. The State of nationality of an individual had – and still has - the undisputed right to apply the principles enshrined by the international law whenever its national suffered from injuries while in a foreign country. As a consequence, resort to the mechanism of diplomatic protection was defined as, a right that the State should be entitled to appeal to, whenever necessary. Nevertheless, it must be noted that at article 18 of the contract between the North American Dredging Company of Texas and the United Mexican States had, as main purpose, the one of placing Mexican existing legal remedies on the same level as any other foreign State's ones, avoiding foreign governments abuse of power with a consequent loss of juridical sovereignty of - in this specific case- Mexico[77]. Moreover, developing the concept of equality between foreigners and local citizens was another objective of the article 18 of the contract[78].

In order to underline even more the importance of equality and justice, during the Third Conference of the Inter-American Bar Association[79]in 1944, a proposal in relation to the diplomatic protection of citizens abroad was made. The proposal consisted in substituting the mechanism of diplomatic protection to an institute protecting the right of human beings in general, but it never found acceptance.

Although the role of the Calvo Clause has been crucial in many international contracts, especially among Latin American countries, it had never been internationally codified. It was only in the second half of the 1950s that an attempt to codify the Calvo Clause, with the Special Rapporteur on State Responsibility in the International Law Commission, was made[80]. As the United Nations Special Rapporteur Garcìa Amador stated in his first report[81], access to diplomatic protection could not be waived by an individual since he had no right to do so, being the right to protect an individual exclusively owned by its State of nationality[82]. A further explanation in relation to the functioning of diplomatic

[76] Ibid.
[77] Ibid.
[78] Ibid., p. 34.
[79] Alwyn Freeman, V., *The American Journal of International Law,* January 1946, Vol 40, No.1., Cambridge University, p.121.
[80]Amerasinghe C.F, *Diplomatic Protection,* cit., p. 198.
[81] United Nations, International Law Commission, Second Yearbook, *García Amador, First Report on State Responsibility,* 1956, pp. 223–5.
[82] Ibid.

protection in case of non-performance of an obligation was made in 1961, although the concept of the Calvo Clause was later abandoned[83].

It was with the new millennium that a new proposal for the international official codification of the Calvo Clause was made. The United Nations Special Rapporteur John Dugard developed, at article 16 of the Third Report of the International Law Commission on Diplomatic Protection, a statement which underlined how, in case of contract between a foreigner and a State where the former had business, controversies could only be solved by resorting to local courts of the State in which the dispute took place, highlighting how the alien would have had the same treatment as a local people[84]. This decision made reference to the already existing principle of the exhaustion of local remedies in international law, which was a precondition in order to have access to diplomatic protection[85]. Clearly, the right of a State to exercise diplomatic protection on behalf of a citizen that had suffered from an injury abroad, remained.

The debate over the Calvo Clause has continued for centuries, and concretely has never found a common and shared vision that could regulate it and make it internationally relevant. It must be underlined that the application of the Calvo Clause was not against the international legal framework, since it was established in order to ensure sovereignty of the nation States and equality among people. Its nature though, left some shadows on the invocation procedure since, despite the Clause obliged the foreigner part of the contract not to seek protection from its State of nationality and being diplomatic protection a right exclusively owned by States, concrete sanctions could not be applied in case the State of nationality of the alien decided to apply this principle in order to protect its citizens.

In recent years, the Calvo Clause has lost its importance and power, as a consequence of State's behaviour being strongly influenced by the development of the human rights regime and by the standards it has created throughout years[86]. Accordingly, it may be concluded that the basic concept according to which the Calvo Doctrine was created, is nowadays considered as obsolete. This consideration arose as a consequence to the

[83] Amerasinghe C.F., *Diplomatic Protection*, cit., p. 198.
[84] Dugard, J., *Third Report to the ILC on Diplomatic Protection, Addendum*, 2002, United Nations Doc A/CN.4/523/Add.1.
[85] Crawford J. & Grant T., *Exhaustion of local remedies*, Oxford, Oxford University Press, 2000.
[86] Amerasinghe C.F., *Diplomatic Protection*, cit. p. 201.

creation of international bodies guaranteeing equality of treatment among human beings, established by international structures, such as: the American Convention on Human Rights and the International Covenant on Civil and Political Rights[87], which aim at controlling the activities carried out by the international judicial systems in order to avoid unjustified interference from other countries or the implementation of wrongful acts or judgments, such as denial of justice from local Courts.

3.THE DIPLOMATIC PROTECTION OF INDIVIDUALS AND THEIR PROPERTIES, AS ONE OF THE *RAISON D'ÊTRE* OF DIPLOMATIC AND CONSULAR RELATIONS

> *«The functions of a diplomatic mission consist, inter alia, in: […] protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law»* [88]

The second paragraph of the third article contained in the Vienna Convention on Diplomatic Relations established in 1961 and entered into force in 1964, stated one of the five purposes to be respected in order to implement diplomatic and consular relations among foreign States. As a matter of fact, diplomacy is achieved through communication and mediation which, hopefully, in case of dispute between two States, can lead to find a pacific solution. Permanent diplomatic missions carried out by diplomatic agents in foreign States and special or ad hoc missions, are elements that characterize diplomatic activity. Implementing diplomatic activities requires first, the establishment of diplomatic relations among States which, according to article 2 of the Vienna Convention on Diplomatic Relations[89] (VCDR hereafter), can be obtained by means of an expressed mutual consent of States. Nevertheless, in order to establish diplomatic relations, it is necessary that States recognize the existence of other States, and this is especially true whenever a belligerent conflict culminates with the acquisition of independence of a part

[87] Ibid. p. 206.
[88] United Nations Treaty Series, *Optional Protocol concerning the Acquisition of Nationality,* on April 18 1961, Vol.500, UNTS 223, art.3 (2); *Optional Protocol concerning the Compulsory Settlement of Disputes,* 18 April 1961, 500 UNTS 241.
[89] Ibid., p. 53.

of a territory which previously was owned by another State. It must be noted that, once an international diplomatic relation is settled, States can decide to exercise diplomatic missions according to different reasons which, as stated by article 3 of the VCDR[90] can be related to: *« […] Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law».* In order to fulfil this objective, the State from which the mission is sent[91] usually employs State officials to be sent to the foreign State. Being the mission and the diplomatic agent abroad implemented for the purpose of establishing and promoting relations, immunity is to them guaranteed and recognized[92] as stated by the VCDR[93.] According to this Convention, diplomatic agents have the right to be protected by intrusion or by acts that could endangered the mission[94]. Protection to diplomatic agents' privacy is guaranteed by article 23 of the VCDR, which also allows agents to benefit from the exemption of the payment of taxes and dues. Article 24 of the same Convention[95] also ensure the protection of the ambassy bank account, archives and documents of the mission whilst, article 29 states that a diplomatic agent cannot be arrested or detained, and this right is, according to the article 37 of the VCDR, extended to the members of the diplomatic mission.

These rights are guaranteed to diplomatic agents on the basis of two different principles: the acknowledgement of the sovereignty and independence of the sending State as well as the public nature of the agents and their consequent immunity the local jurisdiction[96]. Nevertheless, diplomatic agents must *«respect the laws and regulations of the receiving State»[97],* otherwise they could be declared as persona non grata by the receiving State and be obliged, although informally, to leave the country. According to the article 9 (2) of the VCDR, whereas the sending State decides not to respect the will of the receiving State, the latter could be entitled to refuse the recognition of the agent as a diplomatic. This

[90] Ibid.
[91] The International doctrine defines it as "Sending State", meanwhile the other part is defined as "Receiving State".
[92] Crawford J., *Brownlie's Principles of public international law*, Oxford University Press, 1966; Carreau D., Marrella, F. *Diritto internazionale*, Torino, Giuffrè Editore, 2018.
[93] It must be noted that, although immunity is a characteristic of diplomacy, it could be waived by the sending State. Information retrieved at: Crawford J., *Brownlie's Principles of public international law*, cit., p. 410.
[94] United Nations Treaty Series, *Vienna Convention on Diplomatic Relations*, cit. Art 22 (1).
[95] United Nations Treaty Series, *Vienna Convention on Diplomatic Relations*, cit. art 24.
[96] Crawford J., *Brownlie's Principles of public international law*, cit. p. 397.
[97] United Nations Treaty Series, *Vienna Convention on Diplomatic Relations*, cit. art 41(1).

decision will entail the decline of any benefit and immunity previously guaranteed. However, it must be noted that the sending State could also decide to call the diplomatic agent back to the homeland, as a consequence to a wrongful act perpetrated by the receiving State. This decision could then be used as a non-military sanction against the receiving country by means of a unilateral act which will be considered as a reprisal, invoked as a consequence to the severe illicit suffered[98].

As far as diplomatic relations are concerned, diplomatic missions are not the only method available in order to build and implement them. Accordingly, in 1961 the International Law Commission created a draft of articles in order to regulate consular relations, which is another method available in order to achieve diplomatic relations among States. Articles which in 1963 shaped the Vienna Convention on Consular Relations[99] (VCCR hereafter). The necessity to create a section of international rules defining the functioning of the consular activities was related to the fact that, despite some existing similarities between diplomatic mission and consular activities, many differences characterized the two institutes. Where diplomatic missions are directly related to the development of States' relations, which mainly involve diplomatic protection and negotiations among States for political or economic reasons, consular missions instead are not directly related to political activities. Precisely, if on the one hand protecting the interests of a State and its nationals in a foreign country is a crucial activity implemented by diplomatic missions and agents, on the other, as enshrined within article 5 of the VCDR, protection of the sending State's interests as well as individuals' interests are a matter of consular protection. Moreover, it must be noted that cultural and economic promotion as well as administrative activities, such as issuing of identity documents, are also part of the consular activities[100].

Although similarities between diplomatic agents and consuls are to be found in relation to the protection of documents and archives, as stated by article 31 of the VCCR and article 33 of the VCDR, distinction in relation to the immunity guaranteed must be underlined. The immunity is ensured to diplomatic agents as much as to consuls, with the difference that consuls are not completely immune from foreign jurisdiction and, as

[98] Curti Gialdino, C., *Lineamenti di diritto diplomatico e consolare*, Torino, Giappichelli, 2015, pp.73-79.
[99] Ibid., p. 412.
[100] United Nations Treaty Series, *Vienna Convention on Consular Relations*, cit., art.5 (b).

article 41(1) of the VCCR states: *«Consular officials may not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority».*[101] Despite the difference between the activity of consuls and diplomatic agents, the VCCR had as main objective the transformation of the general usage regulating consuls activities into concrete laws, in order align to the ones regulating diplomatic agents[102].

It must be noted that on a general basis, national missions in foreign countries are, apart from diplomatic activities and consular ones, regulated by the Convention on Special Missions of 1969[103], which entered into force later in 1985. This Convention was established in order to regulate ad hoc missions or special missions related to diplomacy on the basis of what the VCDR provided for diplomatic agents[104]. Moreover, the United Nations General Assembly in 1973 established a further Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons[105], with the aim of limiting any act that could endangered the life of people that are internationally protected by the mission they are conducting in a foreign State[106]. Nevertheless, whereas a wrongful act will take place, the parts involved could solve the controversy by means of arbitration, as stated by article 13[107]. Moreover, in case the counterparts will not be able to find a solution to the controversy within six months from the request, the dispute could be solved by resorting to the International Court of Justice. As Crawford states: *«Inviolability of diplomatic personnel is one of the oldest principles of international law […] »*[108] and as a consequence, whereas such principle will be violated, the State in which the wrongful act take place is to be charged with international responsibility.

---

[101] Ibid., Art. 41 (1).
[102] Crawford J., *Brownlie's Principles of public international law*, cit. p. 412.
[103] United Nations Treaty Series, *Convention on Special Missions,* adopted on 8 December 1969 and entered into force on 21 June 1985, Vol.1400, p.231.
[104] Crawford J., *Brownlie's Principles of public international law*, cit., p. 414.
[105] United Nations General Assembly, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,* Annexed to RES/ 3166 (XVIII), entered into force on 20 February 1977, vol.1035, p.167.
[106] *Convention on the Prevention and Punishment and Crimes against Internationally Protected Persons, including Diplomatic Agents*, New York, 14 December 1973. 2.
[107] Ibid., Art13 (1), (2), (3).
[108] Crawford J., *Brownlie's Principles of public international law*, cit., p 414.

The activities carried out by diplomatic and consular relations are essential in order to establish, develop and maintain relations among States, although the essence of diplomacy lies within the necessity to protect citizens abroad.

4.THE STATE INTERNATIONALLY RESPONSIBLE FOR A WRONGFUL ACT AND THE MECHANISM OF DIPLOMATIC PROTECTION: TWO SIDES OF THE SAME COIN?

The analysis of the mechanism of diplomatic protection provided so far, has been related to an historical overview and to an explanation of what diplomatic actions and the legislation that regulating these activities entail. Nevertheless, in order to have a deep understanding of the functioning of this international legal method, there are some points that need to be deepened. First and foremost, it is necessary to clarify in which cases a State is considered to be internationally responsible for having committed a wrongful act, circumstance in which the resort to diplomatic protection could be justified. In relation to this, it is essential to analyse which are the laws regulating the punishments and further sanctions that will be applied to a States once proved to be responsible of an illicit.

The first concept to be explained in order to understand the mechanism behind the attribution of international responsibility towards a State, is related to the work of the Special Rapporteur of the International Law Commission, Roberto Ago[109]. Ago, defined the distinction between primary rules and secondary rules[110]in relation to the activity of States. Accordingly, it must be clarified that primary rules are related to the imposition of duties[111] upon States in relation to their activities involving, for instance, the treatment of foreigners within their property, whilst secondary rules allow a reaction, whenever a primary rule has not been respected. Reaction which often materialize into a sanction, whereas a wrongful act take place. As Amerasinghe explained: *« […] secondary rules relate to the conditions that must be met for the bringing of a claim and to the remedies*

[109] Yearbook of the International Law Commission, *Third Report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, the internationally wrongful act of the State, source of international responsibility,* 1971, vol II. (1), A/CN.4/246 and Add.1-3.
[110] Freeman, A.V., *Recent Aspects of the Calvo Doctrine and the challenge to International Law*, cit. p. 45.
[111] Ibid.

available»[112]. It must be noted that primary rules establish rights and obligations, whilst secondary ones express the consequence of a violation of the former. Both, in equal ways, possess different roles which are essential for the establishment, functioning and respect of an international legal system. On the basis of this analysis, it must be noted that diplomatic protection and State responsibility are, as previously mentioned, directly connected. They are both part of the mechanism of the secondary rules, although in some cases they can be also referred to as primary. Taking the mechanism of diplomatic protection as example to explain this case in point, we can assert that on a general basis, this mechanism is required whenever a primary rule is breached. Nevertheless, primary rules can also be considered as secondary ones as in the case of omission of responsibility regarding the respondent State.[113] As stated by *Judge Huber in Spanish Zone of Morocco*[114], responsibility is a consequence of relations and commitments with the principle of responsibility at the basis of international relations which, despite being given for granted at first, with the Convention on Consular and Diplomatic Relations[115], a clarification in relation to this circumstance was made.

It must be noted that in 2001 the Articles on Responsibility of States for Internationally Wrongful Acts[116](ARSIWA hereafter) established by the International Law Commission, formally regulated the concept of States' responsibility and, later in 2006 it was completed by the drafting of the Articles on Diplomatic Protection and by the Draft Articles on Responsibility of International Organizations[117] of 2011.

In order to understand clearly the mechanism of State responsibility, it is necessary to refer to article 2 of the ARISWA, which states that: *« There is an internationally wrongful act of a State when conduct consisting of an action or omission: is attributable to the State under international law; and constitutes a breach of an international obligation of*

[112] Amerasinghe C.F., *The Historical Development of International Law*, cit. p.2.
[113] Ibid.
[114] Crawford J., *Brownlie's Principles of public international law*, cit. p. 540.
[115] United Nations Treaty Series, *Vienna Convention on Diplomatic Relations,* cit.
[116] United Nations General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* 2001, fifty-third session, (2001 YB, vol II, part two). Text corrected by document A/56/49 (vol. I) /Corr. 4.
[117] United Nations General Assembly, *Draft Articles on the Responsibility of International organizations,* 2011, Yearbook of the International Law Commission, A/66/10, para. 87, vol.II, part two.

the State».[118] In relation to this article, it is important to focus on the relevance given to the concept of responsibility which, in case of breach of law, if attributable to an element of a State, will see the latter to be charged with international responsibility[119]. In order to be charged with international responsibility, a State does not necessarily need to perpetrate a wrongful act. It must be noted that a negligent behaviour of the State or its officials, could also trigger international responsibility, since it could lead to the fulfilment of a wrongful act[120]. *The Corfu Channel Case*[121] is a precise example of international responsibility emerging from a negligent behaviour of a State. In reference to this precise case in point, Albania was considered to be internationally responsible for not having warned the international community of the presence of mines in its territorial waters[122]. It must be underlined that State responsibility could also emerge from a wrongful act perpetrated by a private organ, which did not respect the obligations on his account. Nonetheless, in this case the State of nationality will be charged as responsible, as in the case of *Canada - Dairy*[123].

If we deepen the analysis in relation to the circumstance in which a State is considered as internationally responsible for a wrongful act committed, it must be noted that at article 4 of the ARISWA[124] the way in which actions of State organs are to be considered as direct actions performed by the State is underlined. According to the following article, a State can also be defined as internationally responsible whenever a nongovernmental entity exercise State functions[125]. Clearly, responsibility can also be triggered by a wrongful act perpetrated by the State armed force or by the State police officials and consequently in case of military forces responding to orders coming from a different entity rather than the governmental one, as in the case of the *United Nations Security Council* resolution for the deployment of the forces to Kosovo at the end of the '90s[126],

---

[118] Ibid., art 2.
[119] Crawford J., *Brownlie's Principles of public international law,* cit. p. 542.
[120] United Nations General Assembly, *Draft Articles on Responsibility of States for internationally Wrongful Acts*, cit., art. 2.
[121] International Court of Justice, judgement 25 March 1948, *Corfu Channel (UK vs Albania)*, pp. 4 - 23.
[122] Crawford J., *Brownlie's Principles of public international law*, cit. p.543.
[123] *Canada – Dairy (25.5 II),* WTO Doc WT/DS103/AB/RW2, 20 December 2002, 95 – 6.
[124] United Nations Treaty Series, *Vienna Convention on Diplomatic Relations*, cit.
[125] Ibid., art. 5.
[126] See UNSC, Security Council Resolution 1244 (1999) on the situation relating to Kosovo; Crawford J., *Brownlie's Principles of public international law,* cit. p.546.

issues may arise. In that case, the orders according to which military forces responded to, were not coming from a State, but rather from an international institution.[127] Injuries to foreigners, according to a *denial of justice* or to a wrong implementation of it, are also cause of State international responsibility, being this a *jus cogens* principle.

A further circumstance in which a State could be considered as international responsible for a wrongful act could arise, whenever the activity of national courts will be implemented without respecting domestic laws and international treaties signed and ratified by the country's legislation, especially in the case in which foreigners will be implied in the judgement. This is the circumstance in which the *LaGrand*[128] and *Avena*[129] judgements took place, proving how international responsibility can definitely arose from a missed implementation of signed and ratified international treaty (in this case, the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations).

The *LaGrand* judgement characterized the story of two German citizens, Karl and Walter LaGrand, who were sentenced to death by the American Court of Arizona in 1982[130]. The Court of Arizona in sentencing to death Karl and Walter LaGrand, violated article 36 of the Vienna Convention on Consular Relations (hereafter VCCR), which provided foreign citizens to be guaranteed with a series of consular rights in case of detention[131]. According to this article, the State of Arizona should have had the duty to notify the German

---

[127] European Court of Human Rights, Grand Chamber Decision As to Admissibility, 71412/01 & 78166/01, p. 1402007, *Behrami & Saramati v France, Germany & Norway*. Source retrieved: https://www.tjsl.edu/slomansonb/3.1_UN_attrib.pdf

[128] International Court of Justice, judgement 27 June 2001, *LaGrand (Germany v. United States of America)*, p. 466.

[129] International Court of Justice, judgment 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America),* p. 12.

[130] Ibid.

[131] See paragraph (b) and (c) of article 36 of the VCCR which stated that: *« […] (b) the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action ».*

Consulate of the detention and further sentence to death of the *LaGrand* brothers, in order to allow the consulate to provide assistance to German citizens with legal representation as well as consular assistance. As a consequence to the violation of article 36 of the VCCR, the German consulate could not provide any assistance and further legal representation to the *LaGrand* brothers who, later in the 1999, will be executed by order of the same Court. This, as previously mentioned, was considered as a violation of article 5[132] and 36 (c)[133] of the VCCR and, as a consequence to this, international responsibility over the United States of America, arose. In this case, as previously mentioned, the American Court applied the procedural default doctrine[134] - a principle of domestic law - breaching an international Convention signed by both the United States and Germany. Concretely, the breach of law perpetrated by the United States made it to be considered as internationally responsible of a wrongful act.

The second case to be considered, is related to a dispute between the United States of America and Mexico, globally known as the *Avena*[135] judgement. It was in 2003 when Mexico brought to the International Court of Justice the United States of America for having violated articles 5 and 36 of the VCCR after having sentenced to death 54 Mexican citizens. As a consequence to the violations perpetrated by the United States of articles 5 and 36 of the VCCR, Mexico appealed to the Court, claiming for provisional measures in order to provide their citizens with protection of their rights, in this case, consular

---

[132] See paragraph (e), (h), (i), (j), of article 5 of the VCCR which stated that: *« […] (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State; (h) (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons; (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests; (j) transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State […]».*

[133] Crawford J., *Brownlie's Principles of public international law*, cit.

[134] International Court of Justice, *LaGrand (Germany v. United States of America)*, Overview of the case. Retrieved at: https://www.icj-cij.org/en/case/104

[135] International Court of Justice, *Avena and Other Mexican Nationals (Mexico v. United States of America),* cit.

rights[136]. After a deeper analysis, it can be noted that in 52 cases out of 54, the Unites States failed to respect article 36 paragraph 1 (a)[137] of the VCCR by not notifying to the Mexican consul the arrest of its own nationals. In 34 cases instead, there was a further violation of the article 36, paragraph 1 (c)[138], since no legal representation was allowed to foreign citizens arrested[139].

It must be noted that both cases outlined and studied above, are concrete examples of States judged as internationally responsible for wrongful acts committed. The consequences can definitely vary according to many factors, although it can be stated that: whenever a State commits an illicit for the first time, the consequences and compensations will be different from the ones applied in case of a perpetrated wrongful act. It must be noted that both in *LaGrand* and in the *Avena* judgement, a wrongful act was carried out by the United States. Where in *LaGrand* article 36 on the VCCR was, for the first time, violated by the United States, leading them to be fined with a formal warning of not repeating the violation of article 36 of the VCCR[140], in the *Avena* judgement instead, the International Court of Justice ruled that the United States of America had not respected the article 36 of the VCCR, failing to notify to the consul of Mexico the arrest and further sentence to death of Mexican citizens, not guaranteeing them with the right of consular protection[141]. In response to this, the Court decided that the United States, as a remedy to the violation of an international Convention, had to review and reconsider the whole number of death verdicts regarding Mexican citizens[142].

---

[136] Ibid.

[137] Article 36 para.1 (a) states that: *« […] consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State».*

[138] Article 36 para. 1 (c) states that: *« consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action ».*

[139] International Court of Justice, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Overview of the case. Retrieved at: https://www.icj-cij.org/en/case/128

[140] International Court of Justice, judgement 27 June 2001, *LaGrand*, cit.

[141] International Court of Justice, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, cit.

[142] Secretaría de Relaciones Exteriores del Gobierno de Mexico, United Nations General Assembly Approvs Resolution on ICJ Ruling on Avena and Other Mexican Nationals, 20

LaGrand and *Avena* are two among the most important judgements concerning the international jurisprudence, involving international responsibilities and the functioning of diplomatic protection of citizens abroad.

It must be noted that the International Law Commission has worked on clarifying these cases and the circumstances in which they took place, tackling the issues on the ARSIWA[143], which also includes the countermeasures to be applied as a consequence of an international wrongful act suffered, as well as the forms of reparation available. Accordingly, at article 21 the principle of self-defence[144] as a form of countermeasure is enshrined. As a consequence, it must be noted that the resort to the use of force, which will be deeply explained in further sub-chapters, could, to some extent, not be internationally sanctioned whereas the reason for which a State decide to occur to it is proved to be necessary[145]. Nevertheless, it must also be underlined that whereas the claimant State is found to be responsible of an act which is provoked by a case of force majeure[146], international responsibility upon the State will not emerge. Similarly, the necessity of committing a wrongful act, described in the article 25 of the ARSIWA, could avoid the State to be internationally sanctioned, whereas committing an illicit is proved to be the only possible way to avoid an imminent danger. On the contrary, it cannot be invoked in the case in which a claimant State contributed, by means of its behaviour, in creating a situation in which necessity becomes the only way to avoid a peril[147]. Understanding which are the acts that can be internationally defined as wrong and therefore sanctioned, paves the way to a further part of the discourse: the consequences of an illicit. Whenever a State or its organ are found to be responsible of an act defined as violating the international legal framework, consequences materialize.

The second part of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* is in fact dedicated to the clarification of the mechanisms according to

---

December 2018. Retrieved at: https://www.gob.mx/sre/prensa/un-general-assembly-approves-resolution-on-icj-ruling-on-avena-and-other-mexican-nationals

[143] Crawford J., *Brownlie's Principles of public international law*, cit.

[144] United Nations General Assembly, *Draft Articles on Responsibility of States for internationally Wrongful Acts*, 2001, article 21 stated that: *«The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self- defence taken in conformity with the Charter of the United Nations».*

[145] United Nations General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* art. 23.

[146] Ibid.

[147] Ibid., art. 25 (2).

which a State, declared to be internationally responsible, has to provide the reparation to the damage inflicted to an individual, company, objects or foreign country. Cessation[148] and reparation[149] are generally direct requests coming from a State, person or organ victim of an illicit. Accordingly, the request of cessation is the first step of the process, which includes, as the ARSIWA underlines, non-repetition of the act in the future[150]. It must be noted that once cessation of the wrongful act is reached, the part that suffered from the wrongful act perpetrated will ask for reparation. Reparation, which can be achieved by means of restitution[151], compensation[152] or satisfaction[153], is a principle based upon the following concept expressed by the Permanent Court of International Justice: *« […] reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would have existed if that act had not been committed»*[154].

If on the previously mentioned *Avena* judgement, the International Court of Justice recognized the need to repair a damage caused by the United States towards Mexico and, as a consequence, established that the former had to review the judgements in favour of Mexican nationals as a reparation to the wrongful act committed, it must be noted that a second judgement that can help the understanding of this mechanism of international responsibility is the *Mavrommatis* case[155], which is an example of the invocation of both reparation and diplomatic protection.

The *Mavrommatis* case concerned a dispute related to the supply of electricity and water in Palestine in the early 1920s. As a matter of fact, the Ottoman Empire governing the area before the outbreak of the first world war, guaranteed the concession to supply electricity and water to a Greek man, Mavrommatis. Notwithstanding the agreement, after the Ottoman's dissolution, the Great Britain took the power on the area and, as a consequence, decided to guarantee the very same concessions to another man, Mr.

[148] Ibid. art. 30.
[149] Ibid. art. 31
[150] Ibid. art. 20 (b).
[151] Ibid. Art. 35
[152] Ibid. Art. 36
[153] Ibid. Art. 37
[154] Permanent Court of International Justice, *Factory at Chorzow (Germ. v. Pol.)*, Ser. A No. 17, 47 Sept. 13, 1928. Retrieved at: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf
[155] Permanent Court of International Justice, *The Mavrommatis Palestine Concessions, (Greece v. Great Britain)*, Ser. A No 2, 1924.

Rutenberg[156]. The *Mavrommatis case* was settled by the Permanent Court of International Justice which recognized the wrongful act suffered by Mavrommatis, who saw its legally acquired concessions to be ensured to Rutenberg, although it could not agree on the request of Movrammatis who claimed of having suffered from economic losses as a consequence to the unavailability of the concessions. Accordingly, the Court decided that in order to settle the dispute, a declaration of excuses and restoration of the concessions to Mavrommatis could solve and to put an end to the litigation, as no real losses concretely materialized[157]. *The Mavrommatis case* paved the way to the explanation of the concept of compensation, as a reparation to the damage arising from an internationally wrongful act, and to the concept related to the mechanism according to which the existence of a damage is assessed. As stated by article 36 of the ARSIWA, whenever a restitution is not possible, compensation (which is in the majority of cases a pecuniary compensation) is mandatory. It must be noted that compensation is directly applied in case of material damage inflicted to a State or an individual[158]. Nevertheless, it is important to underline that compensation does not include the repayment of the damages only, but it also includes the loss of potential gains in relation to the damages suffered. It is in the article 37 of the ARSIWA that another type of restitution is described: satisfaction. Official apologies, salute to the flag or punishments of the individuals who committed the crime with a trial, are the methods included within the principle of satisfaction[159]. Accordingly, satisfaction is defined as an alternative to restitution or compensation, despite the fact that no clear rules or indication in relation to the circumstances and the reasons for which a tribunal should choose among them has been legally defined[160]. The context and the circumstances according to which a breach of law take place, are seriously taken into account in order to provide a judgement, as in the case of the *Rainbow warrior*[161], the right restitution. In relation to this case, which saw the destruction of the Dutch vessel in New Zealand by action of three French secret service agents, measures of satisfaction

[156] Ibid.
[157] Ibid.
[158] Crawford J., *Brownlie's Principles of public international law*, cit. p.571.
[159] Ibid. p.576.
[160] Crawford J., *Brownlie's Principles of public international law*, cit. pp. 574-75.
[161] Reports of International Arbitral Awards, *Case concerning the differences between New Zeland and France arising from the Rainbow Warrior affair*, Ruling of 6 July 1986, by the Secretary-General of the United Nations, Volume XIX, pp. 199-221.

were taken. The intention was, and still is, one of the elements that address the final decision of the judges, despite, as previously anticipated, no rules draw a line between compensation and satisfaction. It must be noted that the ARSIWA also takes into account the possibility of conceding interests over a loss of profit coming from a damage. The crucial point is related to the assessment of interests, which may vary according to treaty, contract or judgments of a tribunal, as stated in article 38[162].

International wrongful acts are a general statement used to define a variety of acts, connected by the fact that are against internationally accepted principles and laws. Clearly, not all the illegal acts have the same degree of severity and accordingly, not every illicit act could trigger a dispute between two States. Nevertheless, the International Court of Justice declared as *erga omnes* – and so principle whereas violated by a State that could trigger an international dispute - prevention and punishment of the genocide[163], respect for the right to self-determination[164] and respect to all the obligations related to the humanitarian law[165]. It must be underlined that, in case of violation of these principles, which are at the very basis of the international law, the system will provide the same punishments provided in case of international wrongful act. Nonetheless, article 41 of the ARSIWA underlines that, in case of serious breach of international law, States should co-operate in order to take the violation to an end[166], although at the article 42 of the ARSIWA it is stated that, whenever an illicit takes place, only the State victim of an illegal act can invoke the international responsibility of the wrongdoer.[167] However, it must be highlighted that in case the breach of law has affected other States of the international community, since the illicit : *« change the position of all the other States to*

---

[162] United Nations General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, cit., art. 38 stated that: *«1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.*
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled».

[163] International Court of Justice, judgement 11 July 1996, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v Serbia and Montenegro)*, pp. 595-616.

[164] International Court of Justice, judgement 30 June 1995, *East Timor (Portugal v Australia), Judgement*, pp. 90-102.

[165] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 pp. 136-199.

[166] United Nations General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, cit., art.41.

[167] Ibid. art.42.

which the obligation is owed»[168]*,* international responsibility could be invoked by all the other States since such violation could directly affect them[169].

From this analysis emerged that in case of no direct involvement, meaning that a State has not been negatively affected by the illicit, no action on the international panorama can be implemented. The reason for which this rule has been settled is purely political[170] since, as stated by International Law Commission representant, allowing States not directly involved in the controversy to invoke international responsibility upon a third State, could result as counterproductive, potentially mining political stability. Nevertheless, limitations are not to be applied in case the breach involved the International community as a whole. In this regard, it is important to cite article 48[171] of the ARSIWA, which can be, to a certain extent, considered as an extention of article 42 of the same Convention. As a matter of fact, in both cases, a group of States could decide to claim for international responsibility whereas their interests are threatened. Nonetheless, as explained by the Commentaries of both articles[172], States injured by a wrongful act can invoke responsibility pleading to article 42, meanwhile States that have a legal interest but are not directly injured, can rise international responsibility against the wrongdoer invoking article 48[173]. Although in both cases, the cessation of the wrongful act and a reparation will be asked[174], it can be difficult to decide whether a State is directly injured or has a legal interest in claiming for the responsibility of the wrongdoer. Deepening the analysis of article 48 of the ARSIWA, it is possible to observe a strict connection to the mechanism of diplomatic protection. Whereas diplomatic protection lies on bilateral relations between States, where one fails to treat an alien as international

---

[168] Ibid., (b), ii.

[169] United Nations General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, cit., art. 42 p. 294.

[170] Crawford J. *Brownlie's Principles of public international law*, cit. p 584.

[171] See para. 1 of article 48 of the Draft Articles on Responsibility of States for internationally Wrongful Acts, 2001: *«1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:*
(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
(b) the obligation breached is owed to the international community as a whole».

[172] Commentary to article 42, at 300; Commentary to article 48, p. 319.

[173] Vermeer-Kunzli A.M.H, 2007. *The Protection of Individuals by means of Diplomatic Protection. Diplomatic Protection as a Human Right Instrument,* Phd Law Thesis, University of Leiden, cit. p. 127.

[174] Ibid.

standards requires and, as a consequence, the other act against the former[175], with article 48 there has been an attempt by the International Law Commission to broaden the picture of protection, enlarging the sphere of action related to diplomatic protection[176]. As a matter of fact, article 48 provides the international community with the possibility to rise a claim whenever an *erga omnes partes* or an *erga omnes* obligation is breached[177]. The difference between these two principles stands on the origin of the obligation. Where *erga omnes* relates to the international legal framework of laws, *erga omnes partes* is related to a breach of an international treaty in which several States are part of. The latter provides a great entitlement to act against the breach, since collective interests of some States which are part of the treaty are threatened. Nevertheless, it must be underlined that the first paragraph of article 48(b), saw the State, part of the international community, able to claim international responsibility over a State that has breached an *erga omnes* law. In this case in point, the claim is carried out on behalf of the international community[178].This content of article 48 (b) can, without any doubt, considered as an evolution of diplomatic protection since, whenever a violation which breach an *erga omnes* law is perpetrated by a States against another, affecting the whole international community since that principle is at the basis of the international legal framework[179], States can directly rise international responsibility on the wrongdoer. It can happen though, that diplomatic protection and *erga omnes* responsibility could be either claimed[180]. In the case of humanitarian breaches of law by a State, the claim could be brought both by the State of nationality of the individual who suffered the injury abroad, as well as from the International community since the violation regards *erga omnes* international laws[181].

---

[175] Vermeer-Kunzli A.M.H, 2007. *The Protection of Individuals by means of Diplomatic Protection. Diplomatic Protection as a Human Right Instrument*, Phd Law Thesis, University of Leiden, cit.
[176] Ibid.
[177] United Nations General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, cit. art. 48.
[178]Vermeer-Kunzli A.M.H, *The Protection of Individuals by means of Diplomatic Protection. Diplomatic Protection as a Human Right Instrument*, Phd Law Thesis, University of Leiden, cit.
[179] Crawford J., *International Law Commission*, Fourth Report on State Responsibility, A/CN.4/517, 2001, at para 52.
[180] Vermeer-Kunzli A.M.H, *The Protection of Individuals by means of Diplomatic Protection. Diplomatic Protection as a Human Right Instrument*, Phd Law Thesis, University of Leiden, cit., p. 129.
[181] Ibid.

Despite the evolution of the international legal framework on behalf of basic principles of international law for the protection of individuals, it is still unlikely that States that are involved in the controversy on the basis of the *erga omnes* principle has been breached but that are not directly affected by it, will act. This, as explained before, is due to a possible deterioration of the delicate stability that exist between States at an international level.

Before concluding the analysis in relation to the illicit perpetrated by a State and the consequences that the illicit could entail, reference to the third part of the ARSIWA must be made. Accordingly, it must be underlined that in case the wrongdoer perpetrates the illicit despite the requests for cessation, the victim could invoke some countermeasures. In has been noted that in the past times, the typical countermeasure applied was force. An attack made by a State towards another was usually followed by a counterattack perpetrated by the victim[182]. The resort to this countermeasure was supported and justified by two of the most important jurists of the XV and XVI centuries: Grotius[183] and Vattel[184]. The use of force as a countermeasure, was internationally accepted until the beginning of the twentieth century[185], precisely when in 1907 the International Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts[186] at the Hague, deliberated on a new principle accepted by the States part of the Convention, paving the way to the limitation of the use of force by asserting that the use of armed force for the recovery of debts among States had to be abolished[187].

The use of force has, according to the ARSIWA, been replaced by two possible actions: self-defence[188] and countermeasures[189]. Furthermore, as stated by article 51,[190] any countermeasure taken must be proportional to the wrongful act suffered, otherwise, in

[182] Amerasinghe C.F., *The Historical Development of International Law*, cit.
[183] Grotius, *De Jure belli et pacis libri tres*, Forgotten Books, reprinted in 2018.
[184] Vattel E., *Le Droit des gens* ,1758, II.xviii, p.432.
[185]Crawford J., *Brownlie's Principles of public international law*, cit. p.586.
[186] *Limitation of Employment of Force for Recovery of Contract Debts*, Convention signed at The Hague, 36 Stat. 2241; Treaty Series 537, 18 October 1907. Retrieved at: https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0607.pdf
[187] Ibid.
[188] United Nations General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, cit. art. 21.
[189] Ibid., art.22
[190] Ibid., art.51.

case of disproportion, the risk for the victim to become wrongdoer exist[191] . As we have already underlined, the international responsibility of a State for an illicit perpetrated is the condition that allows another to exercise diplomatic protection and, in order to do so, the wrongful act or omission must be attributable to the foreign State[192]. An omission is attributable to the State whenever it is perpetrated by the State itself through its organ's actions. As clarified in the *Lovett Case*[193]*: « […]an injury done by one of the subjects of a nation is not to be considered as done by the nation itself. »*[194] As a general rule, the State is not responsible for wrongful acts of individuals who do not have institutional roles in the State organs. So, as in the *Janes Claim,*[195] where an individual committed an illicit against an alien, the State should not have had any responsibility, unless the judicial process necessary for the alien to get justice had not worked according to the international standards. In this circumstance, in fact, international responsibility over the State in which the illicit took place will be related to the fact that the State did not punished the wrongdoer, accordingly.

Article 4 of the ARSIWA, underlines that any activity of the organs if the State should be considered as actions made by the State, upon which international responsibility could rise. The *Chattin Case*[196] is a concrete example of what is enshrined within the article. This case relates to a dispute between USA and Mexico, which arose from a series of wrongful acts perpetrated by the State organs of the latter, which consisted in the arrest for embezzlement of Mr Chattin, employed in a Mexican company, (charge which was never fully proved) followed by several acts of mistreatment in jail[197]. On the basis of these two charges, Mexico was charged with international responsibility, which arose as a consequence of wrongful acts of organs of the State[198]. As a consequence, the International Court of Justice had, in the *Difference Relating to Immunity from Legal*

[191] Crawford J., *Brownlie's Principles of public international law*, cit. p. 588-589.
[192] see Article 2 of the ILC's Articles on State Responsibility and heading of Part One, Chapter II
[193] United States Supreme Court, *United States v. Lovett,* 328 U.S. 303, 1946.
[194] Moore J.B., *3 History and Digest of the International Arbitrations to which the United States Has Been a Party*, 1898, p. 2991.
[195] *Decision of the Claims Commissions*, United Nations Reports of International Arbitral Awards, Volume 4, 1926, (USA v Mexico) 87.
[196] United Nations Reports of International Arbitral Awards, *C. W. Parrish (U.S.A.) v. United Mexican States*, 1927.
[197] Ibid.
[198] Ibid.

Process of a Special Rapporteur of the Commission on Human Rights Opinion[199], confirmed that any act of State's organs has to be considered as directly attributable to the State itself[200]. The very same concept expressed could be also taken as a concrete example of article 7 of the ARSIWA, which stated that: *«The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions»*[201]. Moreover, it must be noted that, on the basis of the principle which saw a State being considered as internationally responsible for the illicit perpetrated by its own organs, the same concept can be asserted whenever an individual commits an illicit against a foreigner or whenever an individual, who pretends to be an organ of the State, commits a wrongful act against a foreigner.

It must be noted that historically, in this respect, international jurists representing the ancient concept of international law of Calvo[202] or Bluntschli[203] believed that only acts perpetrated within the respect of the role of a State's representant could be, if violating the law, punished by international law, whilst the modern juridical concept define violation and responsibility arising upon a State as any act of the State or its organs, even in case of *ultra vires acts*[204]. Nevertheless, it must be underlined that eventually, the modern jurisprudence prevailed and as a consequence, acts making the State internationally responsible can be carried out by the State itself, violating international rules, but also by State organs. There are cases in which the State can be charged with international responsibility for the negligence of its own organs, especially in relation to the legal field. What needs to be underlined in order to understand the mechanism of international responsibility, is the role of the State. The State is an entity in which many actions are taken, many situations occur. The responsibility of a State lies within the

[199] International Court of Justice, *The Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Opinion*, reports 87, para. 62, referring to the Draft Articles on State Responsibility, 1999.
[200] Ibid.
[201] United Nations General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, cit. art.7.
[202] Calvo C., *Le Droit International Théorique Et Pratique: Précédé D'un Exposé Historique Des Progrès de la Science Du Droit Des Gens*, cit. p. 120.
[203] Bluntschli J.C., *Das Moderne Völkerrecht der Civilisierten Staaten als Rechts buch Dargesteldz,* 1878, p. 261.
[204] Crawford, J., *Brownlie's Principles of public international law*, cit. p. 244.

maintenance of international justice and international commitments through the control over its own organs and over their correct functioning. A State will be responsible for not having punished a private organ's illegal activity, which could violate international laws, and not for the activity perpetrated. A State could be charged with international responsibility whenever the behaviour of a person exercising institutional acts without being authorized, or in the absence of an official authority, violated international laws[205].
A State could also be defined as internationally responsible in case of aids given to another State allowing it to commit an internationally wrongful act[206]. Moreover, a State will be charged with international responsibility whereas, by means of its actions, could control and direct another State to commit internationally wrongful acts[207].
In all these circumstances, the common element is the attitude of the State in relation to the illicit. The negligence of State organs, which implies the knowledge of the State as entity of the illicit, is the element that makes the State internationally responsible, and that allows the State of a foreigner that has suffered from an illicit, to implement the diplomatic protection mechanism.

[205] United Nations Treaty Series, *Vienna Convention on Consular Relations*, cit. art. 9.
[206] United Nations General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, cit. art.16.
[207] Ibid. art. 17.

II. DIPLOMATIC PROTECTION: AN EXPLANATION OF THE CONDITIONS NECESSARY FOR ITS INVOCATION

1. Premise

Diplomatic protection is one of the most important mechanisms provided by the law in order to protect individuals. According to the international legal framework, if an individual has been victim of an illicit act in a State which is different from the one of his or her nationality, the individual's nation State might take action in order to protect its citizen injured abroad[208]. Nationality of a State[209], is therefore the first precondition for the invocation of diplomatic protection. This notion was born, together with the tool of diplomatic protection, as a consequence of the establishment of the Nation State in 1648[210]. Nevertheless, the concept of nationality has had a deep evolution throughout centuries.

If at first it was conceived as an exclusive right, with the end of the Second World War, an historical phase characterized by growing attention for social, political, civil and human rights[211], a new inclusive idea related to the meaning of nationality in the context of diplomatic protection developed[212]. The concept of nationality and its evolution as a precondition to the invocation of the mechanism of diplomatic protection, will be analysed in the first section of this chapter.

On the ground of this evolution, a chapter will be dedicated to the study of the European Citizenship[213] and its characteristics. Special focus will be placed on the analysis of the article 23 of the Treaty on the Functioning of the European Union, in order to clarify to what extent further diplomatic protection could be guaranteed to individuals on the basis of their European Citizenship. The analysis will be followed by a study of the principle of the exhaustion of local remedies[214], another precondition for the invocation of the

[208] Amerasinghe, C.F., *Diplomatic Protection*, Oxford, Oxford University Press, 2008, p. 21.
[209] Van Panhuys H.F., *The Role of Nationality in International Law: An Outline*, Cambridge, Cambridge University Press, 1959, pp. 59 - 73.
[210] Zagato L., *Introduzione ai diritti di cittadinanza*, Venezia, Cafoscarina, 2007. p.11.
[211] Ibid., pp. 11-15.
[212] Ibid.
[213] Olsen D.H., *The origins of European citizenship in the first two decades of European integration*, 2008, Journal of European Public Policy, p.40.
[214] Crawford J. & Grant T., *Exhaustion of local remedies*, cit.

international mechanism studied. The study analyses the importance of the principle as well as the exceptions that exclude its implementation. In order to provide a clear framework related to its functioning, a selection of international judgements will be provided to support the study. Additionally, the principle of the clean-hands doctrine will also be examined, deepening the analysis over the reasons that led the International Law Commission to exclude this principle from the Draft Articles on Diplomatic Protection of 2006[215]. The chapter terminates with the study of the use of force as a principle potentially applied to solve international disputes. This analysis will focus on to what extent the use of force could be possibly justified, in order to implement the mechanism of diplomatic protection where necessary.

1. THE EVOLUTION OF THE CONCEPT OF NATIONALITY AS A PRECONDITION FOR A STATE TO ACT ON BEHALF OF AN INDIVIDUAL INJURED ABROAD

"The State entitled to exercise diplomatic protection is the State of nationality."[216]

Diplomatic Protection is exercised by a State on behalf of its citizens whenever they have been victim of an illicit act in a foreign country[217]. As a general rule, nationality[218] is the first element necessary for an international step to be taken, as stated by article 3 of the International Law Commission Draft Articles of 2006. The relationship between a State and the individual that has suffered from a wrongful act, is essential for a State to act in his or her defence[219]. Nationality as precondition to apply diplomatic protection, was previously recognized by the Permanent Court of International Justice in the *The*

[215] United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection*, Supplement No. 10, A/61/10, vol. II, 2006.
[216] United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection*, cit. art. 3 para. 1.
[217] Amerasinghe C.F, *Diplomatic Protection*, cit. p 91.
[218] Quadri R., *Diritto Internazionale Pubblico*, Napoli, Liguori, 1989, p. 651; Van Panhuys H.F., *The Role of Nationality in International Law: An Outline*, cit. pp. 59-73; Kymlicka W., Norman W., *Return of the Citizen*: *A Survey of Recent Work on Citizenship Theory*, The University of Chicago Press, 1994; Rubenstein, K., "Globalization and Citizenship and Nationality" in *Jurisprudence for an Interconnected Globe*, Dauvergne C., 2003.
[219] Amerasinghe, C.F, *Diplomatic Protection*, cit., p. 91.

Panevezys-Saldutiskis Railway Case[220] judgement, when it was underlined how diplomatic protection could only be exercised by a State on behalf of its citizens.

The nationality of a State can be conferred to people according to different mechanisms, depending on the State's domestic legal framework. Generally, the attribution is connected with the birth of an individual and can be assigned according to the principle of *Jus sanguinis or Jus soli*[221]. The former, is a mechanism that attributes the right of nationality according to a person's parents nationality, which can be different from the country in which they are living in. The latter instead, is connected to the place in which an individual is born, which will define his or her nationality[222], irrespectively of the parent's nationality. Despite the fact that the attribution of nationality is a matter of domestic law, this, however, has consequences on the international panorama[223]. The general rule of an existing bond between the State and the individual, also exists in the case of naturalization of a foreign person. Undoubtedly, each State has its own domestic laws and principles regulating the naturalization of an alien as a national.

Generally, however, the physical permanence in a foreign country for a certain period of time, is a precondition applied by States[224]. Moreover, nationality can also be acquired by marriage or adoption[225]. What is essential, apart from the real attachment and inclusion in the society of a State, is the individual proved good faith[226] in acquiring the nationality of a State. In the same way, the State has to respect the principles imposed by the international legal framework for the recognition of an individual as a citizen,[227] otherwise the nationality conferred will not be internationally valid and recognized. As a consequence, the State will be unable to apply the mechanism of diplomatic protection on behalf of its citizen, being this a mechanism enshrined within the law. As a matter of

---

[220] Permanent Court of International Justice, judgement 23 February 1939, *The Panevezys-Saldutiskis Railway Case, Estonia v. Lithuania*, general list n.76, p 16.
[221] Zagato L., *Introduzione ai diritti di cittadinanza*, cit. p. 62.
[222] Clerici. R, "Italian Nationality and the Situation of Immigrants", in Ferrari V., *Citizenship and Immigration*, Giuffrè, 1998, pp.45- 60.
[223] International Agreements stating the right described above: article 13 paragraph 2 of the Universal Declaration of Human Rights, 1948; article 3, protocol 4 of the European Convention on Human Rights, 1950; article 22, paragraph 5 of the Inter American Convention on Human Rights, 1969, and article 22 of the Arab Chart of Human Rights, 2004.
[224] Weis, *Nationality and Statelessness in International Law*, 2nd edition, BRILL 1979, p. 99.
[225] Crawford J., *Brownlie's Principles of public international law*, cit. p. 512.
[226] Crawford J., *Brownlie's Principles of public international law*, cit., p. 93.
[227] See the International Law Commission Draft Articles on Nationality in Relation to Succession of State, United Nations Doc A/CN.4/L.581/Add.1.

fact, article 4 of the International Law Commission Draft Articles of 2006, states that the process for acquiring the nationality of a State by birth, descent, succession of States or naturalization, must not be inconsistent with the principles of international law. In other words, the status of nationality will not be internationally recognized in case of acquisition by negligence, serious error or by means of fraudulent conduct[228], preventing the mechanism of diplomatic protection to be applied. In reference to this circumstance, we should take in to account the *Nottebohm judgement*,[229] which is believed to be one of the most important cases concerning the functioning of diplomatic protection.

The Nottebohm judgement outlined the principle of the genuine and effective link as a necessary precondition for a case of naturalization of an alien to be internationally recognized, enabling the State, if necessary, to apply the mechanism of diplomatic protection. The principle of the genuine and effective link was underlined by the International Court of Justice in *the Nottebohm judgement*, while explaining the general rule that should be respected by States conferring their nationality[230]: *« […] According to the practice of States, […] nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties»*[231].

The analysis of the Nottebohm case is essential to better understand the importance of this principle. Nottebohm was a German citizen who had been living in Guatemala for decades. In the wake of the beginning of the Second World War, Nottebohm was determined to acquire the nationality of Lichtenstein. This, in order to be guaranteed with the right of being a citizen of a neutral country in relation to the conflict and in order to protect his business in Guatemala. In point of fact, Guatemala did not recognize the naturalization of Nottebohm as a Lichtenstein citizen, not allowing him to bypass the prohibition of a German citizen to enter the country, with the consequence of further detention and extradition until the end of the belligerent conflict. With regard to the decision of Guatemala, Lichtenstein appealed to the International Court of Justice to protect Nottebohm by means of diplomatic protection, being him a citizen of Lichtenstein.

---

[228] Ibid., p.460; Weiss, *Nationality and Statelessness in International Law*, cit., pp. 218 – 240; Brownlie, *Principles of Public International Law*, Oxford, 2003, pp. 218-220.

[229] International Court of Justice, judgement 6 April 1995, *Nottebohm, Lichtenstein v. Guatemala, (second phase).*

[230] Amerasinghe, C.F, *Diplomatic Protection*, cit., p. 94.

[231] Ibid., p. 23.

The Court had to pronounce itself not on the validity of the naturalization of Nottebohm as a Lichtenstein citizen, being this a matter of domestic law, but rather on the right of Lichtenstein to protect Nottebohm as its own citizen, being this a matter of international law.[232] On the ground that Lichtenstein required Nottebohm to be defined as its citizen, the recognition of his status as citizen of Lichtenstein at an international level was refused by the International Court of Justice.

Despite having acquired the nationality through a legal process, Nottebohm's only connection with the country was his brother, who had settled in Lichtenstein many years before. No attachment to Lichtenstein traditions, nor any will to be part of the society of the country in the future, was proved in the Nottebohm's claim. There was no bond other than his brother's domain and, as a consequence, no effective genuine connection was proved to exist. For this reason, the naturalization could not be defined as internationally valid and, consequently, no diplomatic protection could be exercised by Lichtenstein on behalf of Nottebohm. Despite Nottebohm had become a citizen of Lichtenstein, the Court did not consider him as a national to be protected by the tool of diplomatic protection. This consideration came from the absence of essential elements, such as: the habitual residence of the individual concerned, participation in public life, family ties or any attachment to the country[233]. In spite of the importance of the principle of the genuine link, it must be noted that legal experts are divided on its recognition within the customary international law[234], although they agree on the fact that nationality acquired without respecting international principles, should not be recognized by international courts[235].

As far as the implementation of the mechanism of diplomatic protection is concerned, another principle that is considered to be essential, is the rule of continuous nationality of a natural person,[236] which is contained in the article 5 of the International Law Commission Draft Articles of 2006. At paragraph 1, reads:

> *"A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official*

[232] International Court of Justice, *Nottebohm, Lichtenstein v. Guatemala*, cit., p. 21.
[233] Ibid., p. 22.
[234] Amerasinghe, C.F, *Diplomatic Protection*, cit. p 94-95, p. 116.
[235] Brownlie, *Principles of Public International Law*, cit., p. 422; Bar-Yaacov, B., *Dual Nationality*, Stevens & Son, 1961, p.150-52.
[236] Schwarzenberger G., *Manual of International Law*, Stevens & Sons Ltd, 1967, p. 366.

presentation of the claim. Continuity is presumed if that nationality existed at both these dates."[237]

Despite this could be perceived as a traditional logic upon which diplomatic protection lies, a great debate has been developed over the principle of continuous nationality[238]. Notwithstanding the fact that a claim, to be internationally accepted, has to be presented by the State of nationality of the individual injured, it can be argued that, in relation to the principle of continuity, a growing tendency to limit its application has developed throughout years,[239] in order to guarantee greater protection to the interests of individuals[240]. Concerns related to the necessity and fairness of this principle mainly arose after the Second World War[241]. In fact, the Institute de Droit International in 1965, emphasized the importance of the individual nationality at the moment of the injury suffered, as well as at the moment of the formal presentation of a claim, without focusing on the principle of continuity,[242] and arguing that, when applied, the principle had been rather controversial[243]. As a matter of fact, throughout years, the debate over the importance of the principle of continuous nationality and whether it was outdated[244] or not developed. Nevertheless, a clarification over the relevance of the principle of continuous nationality was later expressed by the International Law Commission at article 5 of the Draft Articles of 2006. In the second paragraph of article 5, the Commission outlined some standards for the requirement of continuous nationality with the aim to maintain the principle with a certain degree of flexibility, necessary to safeguard the individual's interests. However, legislators recognized that loosening the principle of continuity could pave the way to a growing tendency from individuals to change nationality, in order to be guaranteed with a greater State protection. In order to avoid this

[237] United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection,* cit., art. 5.
[238] Crawford J. *Brownlie's Principles of public international law*, cit., p.103.
[239] Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, Clarendon Press, 1996, p. 45; Brower C. N., and Brueschke J. D., *The Iran-United State Claims Tribunal*, Cambridge University Press, 1998, pp. 76-80.
[240] Amerasinghe C.F, *Diplomatic Protection*, cit., p. 104.
[241] Amerasinghe C.F, *Diplomatic Protection*, cit., p. 100.
[242] Annuaire de l'Institut de Droit International, n°51, 1965 II, pp. 260-262.
[243] Annuaire de l'Institut de Droit International, n°51, 1965 I, pp.72-73.
[244] Dugard, J., *First Report on Diplomatic Protection, by Mr. John Dugard, Special Rapporteur, International Law Commission*, United Nations, Document A/CN.4/506 and Add.1

circumstance, the lack of continuity had to be justified by the loss of the previous State nationality as well as the acquisition of the new one for reasons unrelated to the claim presented[245]. Furthermore, no claim could be brought against the former State of nationality of the injured individual if the illicit happened when the person was a national of the former State[246]. However, an individual could acquire the nationality of another State, whilst maintaining another one. This circumstance could rise, on the field of diplomatic protection, the issue of the dual or multiple citizenship.

It is quite common for people nowadays to be of two or more nationalities. This is mainly due to the interrelations among countries, as a consequence of globalization. However, when it comes to the functioning of diplomatic protection though, a dual or multiple citizenship could prevent a citizen to be protected, rising some issues. Dual or multiple citizenship, right established and recognized by the international jurisprudence in 1930,[247] could rise some concerns in relation to the exercise of diplomatic protection. The issue in this circumstance will be related to the case in which an individual presented a claim against a State of nationality. The classic doctrine approach, first expressed in 1929[248], underlined the absence of responsibility of a State of nationality in relation to a claim brought by its own national[249]. On this particular point, other legal institutions attempted to formulate concrete laws, such as the Institute de Droit International, which in the end agreed on the inadmissibility of a claim made against an individual's own State[250]. Despite the classic international doctrine affirmed the inadmissibility of a claim presented against a State of nationality, a different principle supported by the "modern" doctrine emerged. This principle is related to the concept of effective – or dominant – nationality,

---

[245] United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection*, cit. art 5; Crawford J., *Brownlie's Principles of public international law*, cit., pp.102-104.

[246] United Nations General Assembly, International Law Commission, Draft Articles on Diplomatic Protection, cit., art 5 para. 3.

[247] League of Nations, C*onvention on the Certain Questions relating to the Conflict of Nationality Laws*, 13 April 1930, Treaty Series, vol 179, p. 89, No.4137, art. 3. Retrieved at: https://www.refworld.org/docid/3ae6b3b00.html

[248] The American Journal of International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Persons or Property of Foreigners*, Vol. 23, No.2, Supplement: Codification of International Law (April., 1929), pp. 131-239. Retrieved at: https://www.jstor.org/stable/2212862?seq=1#metadata_info_tab_contents

[249] Ibid., p. 133.

[250] Institut de Droit International, *The National Character of an International Claim Presented by a State for Injury Suffered by an individual,* 1965, art. 4.

according to which an individual, despite possessing more than one nationality, should be treated as owning only the dominant one at the moment of the presentation of the claim[251], endorsing what the classical doctrine had previously prohibited. This principle was enshrined by article 7 of the Draft Articles on Diplomatic Protection, stating that:

> *«A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim»*[252]

In relation to this context, I have analysed the *Canevaro judgement*[253] and the *Florence Strunsky Mergé Case*[254], which are related to the application of the principle of dominant nationality when a claim is risen against a State of nationality.
In relation to the *Canevaro judgement,* a dispute between Italy and Perù emerged. The Governent of Perù, owed to the company *"Josè Canevaro & Sons"* an amount of money which had never been paid by the government and, as a consequence to the death of the owner – Josè Canevaro - and to the further decision of his sons to dissolve the company, had never been collected[255]. Napoleon, Carlo and Raphael Canevaro, possessed a dual citizenship: the Italian – attributed to them due to their father's Italian nationality - and the Peruvian one – State in which they were born and had always lived. Because of the right denied by the Government of Perù to the Canevaro brothers, the Italian government decided to act by means of diplomatic protection. Nevertheless, the Court of Permanent Arbitration stated that, having Raphael Canevaro acted on many occasions as a Peruvian citizen[256], the status of Italian citizen, on the basis of the principle of dominant nationality, could not be proved and as a consequence, the claim of the Italian Government to act by

[251]United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection*, cit. art. 5.
[252] Ibid., art.7.
[253] Permanent Court of Arbitration, judgement 3 May 1912, *Canevaro claim, Italy v. Perù*, pp. 328-333.
[254]United Nations Reports of International Arbitral Awards, 10 June 1955, *Mergè Case – Decision No.55*; See also, Balladore - Pallieri G., "La determinazione internazionale della cittadinanza ai fini dell'esercizio della protezione diplomatica", in *Studi T. Perassi*, 1957, II, p.113.
[255] *Canevaro claim, Italy v. Perù*, cit., pp. 330-333.
[256] Raphael Canevaro was a candidate for the Peruvian Senate and accepted office at the Consul General of the Netherland in Perù.

means of diplomatic protection, was refused. In this case in point, we can observe how the dominant nationality was proved to be the Peruvian one, and for that reason, no claim could be presented by the Italian Government, notwithstanding the fact that the Canevaro brothers owned the State nationality.

In the *Florence Strunsky Mergé Case,* the reference to the issue of dual nationality on the basis of the principle of continuity was also expressed[257]. Mrs Florence Strunsky Mergè, a citizen of the United States of America, rose a claim against the country in which she was living and of which nationality she had acquired: Italy. This dispute was risen by the claimant in order to obtain a compensation for the damages caused to the properties of Mrs Mergè, by the bombings of the Second World War. The claim was based on the article 78 of the Treaty of Peace between Italy and the United States, according to which:

> *« […] The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. […] »*[258]

In point of fact, the article according to which Mrs Mergè wanted to base her claim, referred to the protection of holdings and properties of American nationals in Italy at the moment of the belligerent period[259]. However, as Mrs Mergè had acquired the Italian nationality after having married Mr Mergè, an Italian diplomat and the Treaty did not contain any references to the case in point, the dispute was submitted to the United Nations Conciliation Commission. In the final decision, the Commission appealed to the principle of dominant nationality which, in relation to Mrs Mergé, was not her nationality of birth but rather the one acquired as a consequence of her marriage, being her permanent domain in Italy. Apart from the domain, her preference over the use of the Italian passport

[257] *Mergè Case – Decision No.55*., cit. pp.113-14.
[258] Treaty of Peace with Italy – February 10, 1947, Part VII, Property, Rights and Interests, art.78 (4) a. Retrieved at: https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0311.pdf
[259] Ibid.

to travel rather than the American one, furtherly proved the Italian nationality as the dominant one. On the ground of the evidence reported, the Commission rejected the claim on the basis of the proved Italian dominant nationality over the American one. As a consequence, the Commission's judgement focused on the application of the principle of dominant nationality which, being in this case the same against which the claim was risen, made the request unacceptable.

After the *Mergé case* and other similar disputes, the principle of dominant nationality[260] in case of claim risen by individuals owning multiple or dual nationality, was applied[261]. In relation to the cases studied, it can be argued that in both circumstances, there has been a tangible evolution of the doctrine in relation to the rule supported by the international legal authorities, concretized. As a matter of fact, the importance of the rule according to which a national cannot rise a claim against its own State of nationality has been for decades, the pillar upon which diplomatic protection developed[262]. According to this principle, it can be argued how diplomatic protection was conceived at the moment of its establishment: a concession to foreign institutions and individuals necessary to solve conflicts between States[263].

Nevertheless, as stated by the previously cited article 7 of the International Law Commission, the evolution of the concept according to which no claim must be presented against a State of nationality evolved so to overcome this restriction, in order to provide the individual with a wider range of protection[264]. A further evolution related to the concept of nationality can be found in article 6 of the Draft Articles on Diplomatic Protection which, in order to provide individuals with a higher level of protection, established the right of two or more States of nationality to jointly provide diplomatic protection to their individual injured.

Considering what has been said so far, it can be pointed out that the development of the concept of nationality as a precondition to apply diplomatic protection, has made several steps forward, especially in relation to the protection of individuals and their private interests, walking away from the strict concept of protection on the basis of the original

[260] United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection*, cit., art.7.
[261] Amerasinghe C.F., *Diplomatic Protection*, cit., p. 109.
[262] Ibid., p.110.
[263] Ibid.
[264] Schwarzenberger, G., *International Law*, Vol I, Stevens,1957, p. 366.

nationality only[265]. It must be noted that the real improvement was made by the International Law Commission with the article 8 of the 2006 Draft Articles on Diplomatic Protection[266]. This article guaranteed to people stateless and refugees the right to be internationally protected, discarding the principle according to which an injury to an alien is an injury to his own State[267].

Historically, people stateless and refugees were not even taken into account in conventions and treaties regulating international relations, despite their existence. As a matter of fact, in the *Dickson Car Wheel Company Case*[268] for instance, it was underlined how a stateless was not considered as an individual that could be guaranteed with diplomatic protection in case of injury[269]. Moreover, it was stated that committing a crime against an individual who had no nationality, was legally considered as no crime since no State had the power to intervene on behalf of a citizens who did not have a nationality[270]. What is undeniable is that, back in 1931, no attention was given to individual rights. Apart from the revolution carried out by the establishment of the human rights regime, the issue of diplomatic protection over stateless and refugees was first confronted with the Convention Relating to the Status of Refugees of 1951[271] and with the Convention on the Reduction of Statelessness of 1961[272]. Where the former defined the concept of refugee as an individual who cannot stay in its own country for his or her own safety and integrity[273], the latter defined the statelessness as a person who is not considered as a national by any State under the operation of its law[274]. The establishment of the

---

[265] Lillich, R.B., *Lillich on the Forcible Protection of Nationals Abroad: In Memory of Professor Richard B. Lillic*, Naval War College Pr, 2002.
[266] Amerasinghe, C.F, *Diplomatic Protection*, cit. p. 117.
[267] United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection,* cit. art. 8.
[268] United Nations Reports of International Arbitral Awards, *Dickson Car Wheel Company (USA) v. United Mexican States*, Decision of July, vol IV (Sales NO.1951, V.1), pp. 669- 668.
[269] Ibid.
[270] Ibid.
[271] United Nations General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, A/CONF.2/108.
[272] United Nations General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, Treaty Series, vol. 989. See also the previous *Convention on Stateless Persons: United Nation General Assembly, Convention Relating to the Status of Stateless Persons*, 28 September 1954, Treaty Series, vol. 360.
[273] United Nations High Commissioner for Refugees, *The Convention Relating to the Status of Refugees* of 1951 and its 1967 *Protocol on the Status of Refugees*, art. 1.
[274] United Nations General Assembly, *Convention on the Reduction of Statelessness*, cit. art. 1.

Conventions, together with the development of the human rights regime, paved the way to the evolution of international law in relation to individual rights protection, improving the field of diplomatic protection and enlarging the circumstances of application[275]. As previously anticipated, the article at which we make reference to when we explain the evolution of the mechanism of diplomatic protection in relation to statelessness and refugees, is the article 8 of the International Law Commission Draft Articles on Diplomatic Protection[276]. As the article states, protection to statelessness can be guaranteed if the individual was, at the time of the injury suffered as well as at the moment of the official presentation of the claim, lawfully resident in the State that will exercise diplomatic protection on his behalf[277]. As for this requirement, we can assert that an analogy with the principle of dominant nationality previously cited, is to be found. Specifically, there must be a connection between the individual - who in this case has no nationality - and the State that will protect him.

The second paragraph of the article takes into account the issue of refugees instead. It is important to analyse even further what this definition entails, as the statement made in relation to the term refugees is not limited to the definition given by the 1951 Convention[278], but rather enlarge the category,[279] extending the protection to any person recognized and treated as such. Despite the similarities in relation to the requirements necessary by the statelessness and by the refugee who need to be guaranteed with diplomatic protection[280], the difference on the application of this article could exist on the basis of the concept of habitual residence. The requirement for a refugee to benefit from diplomatic protection is, as stated by the Article 28 of the Convention Relating the Status of Refugees, a period of "stay"[281] in the State that will act in his behalf, rather than a prolonged residence as in the case of a statelessness[282]. As a matter of fact, the

[275] International Court of Justice, preliminary objections, 24 May 2007, *Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of Congo,* para. 39.
[276] United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection*, cit., art 8.
[277] Ibid., para. 1.
[278] United Nations General Assembly, *Convention Relating to the Status of Refugees*, cit.
[279] As Stated by the Commentary of the Article 8 of the International Law Commission, it may be possible to exercise diplomatic protection to the individuals granted political asylum in relation to the Convention established in 1954 on territorial asylum.
[280] Amerasignhe, C.F., *Diplomatic Protection*, cit., p. 118.
[281] Indicating a period that is shorter than the habitual residence.
[282] Amerasinghe, C.F., *Diplomatic Protection*, pp.118-119.

International Law Commission focused on maintaining the same concept of habitual residence as a precondition for refugees and for statelessness, in order to benefit from diplomatic protection. In relation to the third paragraph of article 8, reference to the application of diplomatic protection on behalf of a refugee against his or her State of nationality, is made. The International Law Commission on this ground clarified how no action could be taken against the State of nationality of a refugee, since this will go against the basic principle of diplomatic protection and could potentially endangered international stability among States[283].

When we refer to the principle of nationality and the protection of individuals, we cannot leave aside the field of corporations and shareholders[284]. In point of fact, corporations own the nationality of the State in which the headquarter is located – according to the principles of civil law – or, where the corporation has been established - according to the principles of Common Law [285]. As in the *Barcelona Traction Co judgement*[286], when the business activity of a company has suffered from wrongful acts endangering its existence, shareholders as well suffer from losses and should be considered as victims of a wrongful act[287]. On this regard, the issue that consequently arise is the following: which State should be entitled to act in order to protect the shareholders victims of illicit? Before answering to this question, the *Barcelona Traction Co judgement* will be analysed, in order to provide a framework essential to better understand the circumstances in which diplomatic protection and the principle of nationality applies when we refer to corporations and shareholders.

The Barcelona Traction, Light and Power Company was a corporation established in Toronto, a Canadian city, in 1911. At that time, this corporation focused its business activity mainly in Spain. Later in the 1918, the majority of the shares of the corporation, specifically the eighty-eight per cent of them, came to be owned by Belgian shareholders.

---

[283] Ibid., p.119.

[284] De Hochepied, J.p., *La Protection diplomatique des societés et des actionnaries*, A. Pedone, 1965 ; Seidl-Hohenveldern, I., *Corporations in and under International Law,* Cambridge, 1987; Caflisch, L., *La Protection des sociétés commerciales et des intérêts indirects en droit international public*, La Haye, M. Nijhoff, 1969; Battaglini G., *La protezione diplomatica delle società*, CEDAM, 1957.

[285]Carreau, D., Marrella F., *Diritto Internazionale*, cit., p. 569.

[286]International Court of Justice, Judgement of 24 July 1964, *Barcelona Traction, Light and Power Company Limited.*

[287] Amerasinghe, C.F. *Diplomatic Protection*, cit., p. 123.

The *Barcelona Traction Co* dispute acquired international relevance when the corporation went bankrupt as a consequence of legal actions undertaken by the Spanish Government. These damaging actions carried out by the Spanish government saw the decision of the counterpart to appeal to the International Court of Justice was held [288]. Although the Barcelona Traction had a Canadian nationality, and for this reason, according to the principles of international customary law Canada was entitled to act by means of diplomatic protection on behalf of the corporation and against Spain, diplomatic action was carried out by Belgium instead, claiming to protect its nationals as shareholders of the corporation. On this ground, the International Court of Justice rejected the claim made by Belgium, since the right of exercising diplomatic protection was owned by the nation State of the corporation[289]. The Court also specified that diplomatic protection of shareholders could be possible if the company did not exist anymore[290] and in case of responsibility of the State of nationality of the corporation for wrongful acts inflicted to the shareholders. The final decision over the *Barcelona Traction Co judgement* was taken by the International Court of Justice in 1970 and, despite many decades have passed, this case is still considered as a great example and a guidance for the international jurisdiction on diplomatic protection of corporations[291]. It was worth noticing that it was after the *Barcelona Traction Co judgement* that the International Law Commission begun to develop the Draft of the Articles on Diplomatic Protection, which also refers to the protection of corporations and shareholders. Despite the analysis started from the same milestones that characterizes the protection of individuals, the Barcelona Traction judgement was essential in order to provide a clarification of the principles of diplomatic protection to be applied as well as to pave the way to further development of these principles[292]. After underlying that the State of nationality of the corporation is the one entitled to exercise diplomatic protection[293], the set of articles clarify the way in

[288] Ibid.
[289] Ibid., p. 122.
[290] Ibid., p. 48. The legislation has been made on the basis of the judgement in relation to the Mexican Eagle Company Case, 1938. See also, Wortley, B.A, *The Mexican Oil Dispute* 1938-46, Cambridge University Press, 1957.
[291] In 1987, the British Government published in 37 ICLQ, (1988) 1006. A set of rules on the basis of the Barcelona Traction Co Case in relation to claim raised by corporations.
[292] Amerasinghe, C.F., *Diplomatic Protection*, cit., p. 132.
[293] United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection*, cit., art 9.

which shareholders can be protected[294] in case of direct injury[295].When referring to the relationship between corporation and shareholders, what is to be noted is that each national jurisdiction plays a key role on regulating this field. As a matter of fact, international law is concerned with the exercise of diplomatic protection, not with the establishment and management of a corporation,[296] which is instead regulated by the domestic jurisprudence. It is at articles 11 and 12 of the Draft Articles on Diplomatic Protection,[297] that we can find the essential principle of the diplomatic protection of corporations and shareholders. In relation to the former, the articles provide the establishment of the principle according to which a corporation has to be protected by its State of nationality and not by the nationality of the shareholders, whilst in the latter the principle of customary law according to which exceptions that guarantee to the State of the shareholders the opportunity to act on their behalf in case of illicit suffered is retained. The safeguard of individuals' interests in this fields is essential and, in order to provide a greater degree of protection, the article 12 of the Draft Articles allows States of nationality of any shareholders injured to act by means of diplomatic protection. It must be noted that the principle of continuous nationality, with the same exceptions, is applied in the case of diplomatic protection of corporations, providing also in this case, an evolution in the field of nationality, which is necessary to act diplomatically. Moreover, the principle according to which diplomatic protection is jointly exercised on behalf of citizens owning a dual or multiple nationality, can be recognized if we analyse the possibility guaranteed to the State of nationality of any shareholders when victims of a direct injury. These principles were established by the International Law Commission Draft Articles of 2006 in order to provide a greater degree of protection to individuals on the basis of their nationality.

What emerges from the above analysis, is the consistent evolution that the international legal framework has undergone regarding the application of diplomatic protection in relation to the concept of nationality, entailing a greater degree of protection of individual interests. It must be noted that the real breakthrough in this field was made in relation to

[294] Ibid., art 11.
[295] Ibid., art 12.
[296] Amerasinghe, C.F., *Diplomatic Protection*, cit. p. 133.
[297] United Nations General Assembly, International Law Commission, *Draft Articles on Diplomatic Protection*, cit., art. 11 and art. 12.

the protection of the statelessness and the refugees, especially after the establishment of the human right regime, as we will see in the third chapter of the dissertation. This development has contributed on rising awareness on the individual interests rather than on nation States interests, redirecting the orientation of the international doctrine towards a more attentive protection of people. Notwithstanding the relevance that the concept of nationality as a precondition to apply the mechanism of diplomatic still has in the field of international customary law, the evolutionary process that has undergone is undeniable. As a result, the aim of diplomatic protection has been enlarged, especially after having loosened some rigid rules – as in the case of the principle of continuous nationality – that could have: *«lead to a situation in which important interests go unprotected, claimants unsupported and injuries undressed»*[298]

2. THE EUROPEAN CITIZENSHIP ENFORCING THE RIGHT OF PROTECTION ON BEHALF OF EUROPEAN CITIZENS: THE DILEMMA BETWEEN CONSULAR AND DIPLOMATIC PROTECTION

In the previous paragraph, I provided a study related to the principle of nationality as a precondition for the purpose of the diplomatic protection to be applied. In relation to this concept, a further research has to be undertaken as, according to the Charter of Fundamental Rights of the European Union[299] and to the Treaty on the Functioning of the European Union[300] (hereafter TFEU), European citizens are provided with additional protection guaranteed by the European citizenship. Before deepening the analysis over diplomatic and consular protection as a right guaranteed to the European citizens on the

[298] International Court of Justice, Judgement of 24 July 1964, *Barcelona Traction, Light and Power Company Limited*, cit., report 73.
[299] The Charter of Fundamental Rights of the European Union was proclaimed in Nizza on December 2000, but it was with the Lisbon Treaty in 2009 that entered into force and started to be considered as an imperative document at European level.
[300] As a matter of fact, the TFEU was amended by the Lisbon Treaty, which was signed at Lisbon, 13 December 2007 and entered into force in December 2009. The main objective of the Treaty was to improve the European institutions and provide European citizens with greater democratic rights, ensuring a greater degree of protection and democratization.

basis of communitarian treaties, it is important to start from the definition of the European citizenship[301].

The concept of European citizenship was first introduced in the 1970s[302], but it was only in 1992 ,with the Treaty on European Union[303] at article 9, that a definition for this concept was legally established. The article stated that: *« […] Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.[304]»* Apart from being - at least on paper - a great evolution that challenges the long-lasting boundaries of the Nation State sole right to assign citizenship to individuals[305], the European citizenship guarantees to people additional rights, such as: the right to move and reside freely within the European Union[306], the right to vote and stand as candidates to the European elections[307], the right to enjoy diplomatic protection in the territory of a third country whereas a Member State is not represented[308] and the right to appeal to the European Parliament[309]. In relation to the right of enjoying protection in the territory of a third country, article 23 of the TFEU has to be considered. A deep analysis of this article is needed in order to clarify to what extent protection can be implemented on behalf of European citizens. The article states that:

> *« Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection*

[301] Downes, in Bellamy & Warleigh, Citizenship, *Democracy and Justice in the New Europe*, Routledge, 1997.; Shaw J., *The Transformation of Citizenship in the European Union*, Cambridge University Press, 2007.
[302] Olsen D.H., *The origins of European citizenship in the first two decades of European integration,* cit., p. 40.
[303] The Treaty on European Union was signed in 1992 but entered into force in 1993. This Treaty is also commonly known as the Maastricht Treaty, since it was signed in Maastricht, a city in the Netherlands.
[304] European Commission, Treaty on European Union, signed at Maastricht on 7 February 1992, O.J. 29 July 1992, n°191.
[305] Kostakopoulou D., *European Union Citizenship: Writing the Future*, European Law Journal, 6 August 2007, pp. 624-5
[306] Treaty on the Functioning of the European Union, O.J. C 202/56 – 7 June 2016, art. 20 (a). It must be noted that this article substituted the ex. article 17 of the Treaty establishing the European Community, O. J. C 340, 10/11/1997 P. 0173 - Consolidated version. Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT
[307] Treaty on the Functioning of the European Union, O.J. C 202/56–7 June 2016, cit. art. 20 (b).
[308] Ibid., (c).
[309] Ibid., (d).

by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection. »[310]

Following an accurate evaluation, article 23 of the TFEU seems to be unclear on some points. First of all, it refers to diplomatic and consular protection that must be guaranteed to citizens of Member States that, in a third country, are not diplomatically represented[311]. The inaccuracy here, is related to the combination of diplomatic and consular protection, as the former could be meant as a synonym of the latter[312]. On this particular point, it must be noted that diplomatic protection is, as it has already been explained, a mechanism regulated by the law that can be applied under two main conditions: the individual to be protected has to be a national of the claimant State[313] and the exhaustion of local remedies principle[314] has to be respected.

The activities that consular assistance entails, are actually very different from those related to diplomatic protection described above. Consular assistance, which is one of the activities included on diplomatic relations duties, is performed through diplomatic and consular agents operating at a local level and providing assistance to individuals. Where the diplomatic protection entails a dispute between States to be solved internationally, consular assistance provides, among other duties, supports to individuals abroad, requiring the victim of the illicit to be physically where the wrongful act took place, in order to provide the individual with assistance. In opposition to this very last characteristic, diplomatic protection, being a right of a State, does not require the injured citizen to physically be in the place where the injury happened in order to be

[310] *Treaty on the Functioning of the European Union*, O.J. C202/58, 7 June 2016, p.58, art.23 (1).
[311] Crespo Navarro E., *La Jurisprudencia del TJCE en Materia de Ciudadanìa de la Unìon: una Interpretaciòn Generosa basada en la Remisiòn al Derecho Nacional y en el Principio de No Discriminaciòn por razòn de la Nacionalidad,* in Revista de Derecho Comunitario Europeo, 2007, p. 910.
[312] Vigni P., *Diplomatic and Consular Protection in EU Law: Misleading Combination or Creative Solution*, European University Institute, Department of Law, Florence, Working Paper 2011, p. 2-4.
[313] Amerasinghe C.F., *Diplomatic Protection*, cit.; *Commentaries to the Draft Articles on Diplomatic Protection*, in Yearbook of the International Law Commission, 2006, vol. II, Part Two, pp. 30-31.
[314] Mazzeschi P. R., *Esaurimento dei ricorsi interni e diritti umani,* Giappichelli, Turin, 2004.

implemented[315]. As the Vienna Convention on Diplomatic Relations[316] stated, the main role of diplomatic agents in a foreign country is related to the maintenance of relations between States[317]. Moreover, the Vienna Convention on Diplomatic Relations at article 5, states that diplomatic agents through consular institutions, do also protect interests of citizens abroad. In light of this, it can be observed that, diplomatic protection and consular assistance are far from being the same thing[318] and in relation to this concept, a clarification over the European legislators' intentions according to the establishment of article 23, is necessary at this point.

It was in the Decision 95/553/EC[319] that a list specifying which actions related to consular and diplomatic protection guaranteed to European citizens was set out. It included, at article 5, assistance in case of: death, serious accident or illness, arrest or detention, severe crime suffered as well as repatriation[320]. It must be noted that all these activities are generally carried out by consulates or embassies and are not related to the concept of nationality or exhaustion of local remedies, preconditions necessary to apply the mechanism of diplomatic protection. As a matter of fact, already in 1993 Member States of the European Union had agreed on recognizing consular protection as the only assistance guaranteed to European citizen in need for assistance in a third country[321]. Despite the decision of the European legislators to combine consular and diplomatic protection, the latter was not recognized by Member States. If the dilemma between

---

[315] Ibid., p. 25.

[316] Done in Vienna on 18 April 1961, in UNTS, vol. 500, p. 95.

[317] *Vienna Convention on Diplomatic Relations, cit., art. 3 states: «The functions of a diplomatic mission consist, inter alia, in:*
(a) Representing the sending State in the receiving State;
(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
(c) Negotiating with the Government of the receiving State;
(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. »

[318] Vigni P., *Diplomatic and Consular Protection in EU Law: Misleading Combination or Creative Solution*, cit., p.9

[319] Decision 95/553/CE: *Decision of the Representatives of the Government of the Member of the States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations*, O.J.L. 314, 28.12.1995, p.73-76.

[320] Ibid., art. 5 (1).

[321] Commission of the European Communities, 21 December 1993, Brussels. COM (93) 702, final, p.8.

consular or diplomatic protection guaranteed to European citizens abroad seemed to have found an answer, the problem of the recognition by third States - not part of the European Union -, of the European Citizenship and the right that it entails, needs to be examined further.

The European Citizenship, which at first was by many scholars and authors considered as a symbolic concept[322], is not based on a strict relation between citizen and State; rather, it is a right guaranteed to the citizens of the European Union and considered as an additional citizenship, which cannot be intended as a second and independent one. Notwithstanding the recognition and respect that the European Union institution has gained globally, the concept of European Citizenship does not seem to have acquired relevance in the international legal framework[323]. The fact that European rules and rights cannot be invoked at an international level, make the implementation of article 23 of the TFEU difficult.[324] However, the inapplicability of this article could be overtaken by declaring the intervention of a diplomatic agent of another Member State, whose nationality is different from that of the injured, as an indirect action of the State of nationality of the injured, as a consequence of the lack of diplomatic agents or institutions representing the interests of the national abroad. In this case in point, the third State could not object to this action performed by the Member State diplomatic agents, since they will have to be considered as officials of the injured State[325].

It must be noted that, whenever a Member State's diplomatic agents act on behalf of an individual of another Member State victim of an illicit abroad, regulations defining their intervention needs to be implemented. Despite the fact that it will be rather uncommon for a Member State diplomatic agent to intervene in place of the injured State with no purpose[326], it is essential to outline the necessity of States part of the European Union

---

[322] Everson, in Shaw & Moore, *The New Dynamics of European Union*, Clarendon Press, 1995; d'Oliveria, in Rosas & Anatola, A Citizens' Europe, 1995; Lehning, in Lehning P.B. & Weale A., *Citizenship, Democracy and Justice in the New Europe*, Routldge, 1997; Downes, in Bellamy & Warleigh, *Citizenship and Governance in the European Union*, Continum Intl Pub Group, 2001.

[323] Vigni P., *Diplomatic and Consular Protection in EU Law: Misleading Combination or Creative Solution*, cit. p. 16.

[324] Ibid., p.8

[325] Ibid., p. 9.

[326] It must be recalled that in cases of emergency, already before the establishment and consequent ratification of the article 23, consular assistance among Member State was carried out. This principle was applied at the time of the Gulf War in 1990, since not every European State was

States to determine precise rules according to which every Member State have to refer in case of application of the article 23 of the TFEU, as stated by the second paragraph of the aforementioned article[327].

If at first the choice of the legislators to combine *protection of diplomatic and consular authorities*[328] within the same meaning created confusion, an in-depth analysis of the activities entailed was fundamental to come to the conclusion that legislators referred to consular assistance. As a matter of fact, the action concerning diplomatic protection cannot be delegated to a country different from the one of nationality of the citizen injured, being this bond, according to the international law, essential. Moreover, referring to the mechanism of consular assistance, it seems more plausible that the legislators were referring to this sort of protection since, as stated by article 23 of the TFEU, the protection is to be guaranteed precisely where the injury took place[329]. Focusing on the territorial element expressed in the article, it is to be noted that: for an individual to be guaranteed with diplomatic protection there is no need to be located in the place where the injury took place, whilst in case of consular assistance, the territorial principle is mandatory[330]. Furthermore, where the right to diplomatic protection is a right of the State, which can decide whether to assert it or not, consular assistance is instead an individual right, as declared by the International Court of Justice[331], is an individual right. This significant difference underpins the hypothesis – which was also clarified by the Decision 95/553/EC - that the article 23 of the TFEU refers to a consular assistance.

The concept of a communitarian network protecting citizens abroad is, without any doubt, very innovative on the ground that it moves the aim of protection from a right of a State,

---

diplomatically represented in Iraq as well as in 2004, when the Coast of Indonesia was hit by the tsunami Member State consular institutions co-worked in order to provide protection to the citizens of the European Union; for a deeper explanation see C. Close, The concept of Citizenship in the Treaty on European Union, in Common Market Law Review, 1992, p 1151.

[327] The paragraph to which reference has been made is the following: "[t]he Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection".

[328] Treaty on the Functioning of the European Union, art. 23, O.J. C 202/58; Treaty on the Functioning of the European Union, art. 20 (c), O.J. C 202/56.

[329] As stated at the beginning of article 23 of the TFEU: *«Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented […] »*

[330] United Nations Treaty Series, *Vienna Convention on Diplomatic Relations,* cit., art. 4.

[331] Vigni P., *Diplomatic and Consular Protection in EU Law: Misleading Combination or Creative Solution*, cit., p.19.

based on the exercise of its sovereignty, towards a right of the individual. Right of the individual which has to be universally recognized and on behalf of which, the State or a community of States act as supervisors. Notwithstanding the evolutionary concept upon which the notion of an enlarged safeguard of communitarian citizens is based, it is worth noticing this principle was anticipated by the Vienna Convention on Diplomatic Relation[332] and by the Vienna Convention on Consular Relations[333]. Nevertheless, in relation to the European Union, implementation of this article could solve the problem of representation.

As a consequence to the enlargement of the European Union[334], diplomatic representation sees nowadays see just three countries of the world in which the entire number of Member States is represented by a consulate or ambassy[335]: People's Republic of China, the Russian Federation and the United States of America. The situation is even worse if we look at the broader picture, where in 107 countries out of 167 not more than 10 Member States are represented[336]. In order to solve this issue, apart from implementing article 23 of the TFUE, the idea of creating a European Committee[337], emerged. The European Committee would require diplomatic officers to co-work for the protection of individuals and, in so doing, avoiding to established bilateral agreements between European Countries necessary to implement the article 23 of the TFEU. By creating a European Committee, the problem related to the consular representation of European States abroad could be solved[338].

The European Union was first conceived with the aim of establishing the United States of Europe, replacing the nationality of every single State with a European single one[339]. Regardless of the evolutionary character of the project, it clashed with the original

[332] United Nations Treaty Series, *Vienna Convention on Diplomatic Relations*, cit., art 45.
[333] United Nations Treaty Series, *Vienna Convention on Consular Relations*, cit., art 7-8.
[334] Commission of the European Communities, Green Paper – *Diplomatic and consular protection of Union citizens in third countries*, p.3., COM (2006) 712, final, 28 November 2006, Brussels.
[335] Ibid.
[336] Council Decision 15646/05, *on Presidency diplomatic representation in third countries*, 12 December 2005.
[337] European Economic and Social Committee on the Green Paper on diplomatic and consular protection of Union citizens in third countries, 2007/C 161/21, in O.J. 2007, C 161, 13-7-2007.
[338] Mungo D., A.A. 2012/2013, *Tendenze Evolutive dell'Istituto di Protezione Diplomatica*, Prova finale in Giurisprudenza, Università degli studi di Pisa, pp. 58-59.
[339] International Law Association, *Committee on Diplomatic Protection of Persons and Property, New Delhi Conference 2002*, Second Report, p.32.

concept of Nation State and its boundaries, which is still very much grounded on every country part of the European Union. If we observed the content of article 23 of the TFEU from this perspective, it could be hypothesised that including diplomatic protection was not an oversight, but rather an intention of legislators. However, at the current stage, being the European citizenship additional, and having the Member States of the European Union an independent character, article 23 of the TFEU can only guarantee -where necessary - consular assistance to European citizens in third countries.

3. THE RULE OF PRIOR EXHAUSTION OF LOCAL REMEDIES: AN OUTDATED CUSTOMARY PRINCIPLE?

The mechanism of diplomatic protection, as stated by the classical international doctrine, can be applied by a State on behalf of its citizen injured abroad, only when local remedies in the foreign State in which the injury took place, are exhausted[340]. In fact, this principle has its origin in medieval times, when citizens were injured in foreign territories and protection had to be guaranteed to them. It was common to provide this protection through the practice of reprisals which ensured justice to the individual injured[341]. With the establishment of the Nation State, reprisals were replaced by State and government actions and, as a consequence, the modern mechanism of diplomatic protection developed[342]. Notwithstanding the undisputed importance of the principle of the exhaustion of local remedies as part of the international customary law, its relevance seems to have diminished through years, while the tendency to avoid its application started to emerge[343]. Although the current legal practice defines this principle as not particularly relevant, it was historically established in order to guarantee independence and sovereignty to the foreign State in which the illicit took place, allowing the dispute

[340] Castor, H.P. Law, *The Local Remedies Rule in International Law*, Droz, 1961; Chappez J., *La régle de l'épuisement des voises de recours internes*, Editions Pedone, 1972; Amerasinghe, C.F., *Local Remedies in International Law*, 2nd edn, 2004; Crawford J. & Grant T., *Exhaustion of local remedies*, 2000; Witenberg, *La recevabilité des réclamations devant les jurisdictions iternationales*, in RCDI, 1932-III.
[341] Sereni, A.P., *Diritto Internazionale*, vol. 1, Milano, 1956.
[342] Mungo, D., A.A. 2012/2013, Tendenze Evolutive dell'Istituto di Protezione Diplomatica, Prova finale in Giurisprudenza, Università degli studi di Pisa, p. 80.
[343] Amerasinghe, C.F., *Diplomatic Protection*, cit., p. 142.

to be settled within the boundaries of local courts[344]. This method was shaped with the aim of avoiding, especially in former colonies and developing countries where a certain degree of backwardness in the legal field was perceived, an intrusion and disrespect of the local legal framework. Thus, according to this legal practice, no international legal activity could be undertaken, unless local remedies procedures were exhausted. Before deepening the concept related to the general practice of application of the principle of exhaustion of local remedies, it is essential to clarify its legal nature. If on the one hand, part of the international doctrine considers this as a principle of customary law, claiming that international responsibility arises once the principle of local remedies has been unsuccessfully applied, with a negative result for the claimant[345], on the other some argued that responsibility over a State rises automatically once the foreign citizen has been injured[346]. Despite this division, the majority of the international legal experts seems to define the principle as part of the international customary law and as such, essential. Although many exceptions in relation to its application have been established throughout years, and still, the international jurisdiction has left open the possibility to further expansions[347]. The decision to apply limitations over this principle when an international controversy arises, should be made after having conduct a deep analysis of the interests of the parts involved[348].

Limitations to the principle of exhaustion of local remedies were applied in relation to the *Finnish Ships Arbitration*[349]. This case marked the first attempt by the international doctrine to face the issue of limitations, as a consequence to the consideration of the foreigner's interest[350]. On this regard, if ineffectiveness or "obvious futility" of the appeal to local remedies was proved, the principle of the limitation would be applied[351].

---

[344] Ibid.

[345] Borchard, *The Diplomatic Protection of citizens abroad*, The Banks Law Publishing Company, p. 187; Hoijer, *La responsabilità internazionale des Etats,* Paris, 1939, p172-186; Durand, *Revue gènèrale de droit Intrnational public*, 1931; Brierly, *Règles gènèral du droit de la paix*, in Recueil des Cours, 1936.

[346] De Visscher, *Notes sur la responsabilitè,* 1927.

[347] Mc Nair, *International Law Opinions*, Cambridge, 1956.

[348] Amerasinghe, C.F., *Diplomatic Protection,* cit. p. 150.

[349] United Nations Reports of International Arbitral Awards, 9 May 1934, *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain),* Volume III, pp.1479-1550.

[350] Ibid.

[351] International Law Commission, *Draft Articles on Diplomatic Protection*, 2006, art 15.

Taking into account the *Finnish Ships Arbitration,* we can observe that the irrelevance of the application of the principle is based upon the fact that: once a final and successful judgement is reached by the claimant, as a consequence of the application of the local remedies of the State responsible of the illicit, the claimant is no longer required to proceed with any further reference to courts or tribunals of a higher grade of jurisdiction[352]. Although the principle of exhaustion of local remedies was in this case in point not fully respected, taking the claim even further would have involved a considerable loss of time and money for the injured. Regarding the respondent State, no opposition was risen since justice was reached through its local legal remedies[353]. Other cases of limitation to the principle of exhaustion of local remedies for "obvious futility" or proved ineffectiveness of the local court, exist.

As a matter of fact, in case the national legal framework of the country in which the injury took place does not condemn the injury, recourse to the local courts will be defined as futile, since that act is not defined by the country's jurisdiction as illegal, as in the *Forest of Central Rhodope Case[354]*. Furthermore, when the courts of a country are not independent from the government, it is guaranteed the exemption from recurring to local remedies[355]. For the same reason, the exhaustion of local remedies principle will not be mandatory in two further cases: if the national local courts jurisdiction would never guarantee to the alien victim of illicit a trial that could stand the international standards, and if he local courts' legal activities are characterized by inaccessibility of remedies or absence of due process characterize[356]. It must be observed that it is in the International Law Commission Draft Articles of 2006 that the exceptions are listed and regulated.

So far, the analysis has been based on article 15 (a) of the International Law Commission Draft Articles of 2006, although further exceptions do exist. The following exception to the exhaustion of local remedies principle is applied when an undue delay[357]in the trial, carried out by local courts of the responsible State take place. In this case, the traditional

---

[352] *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain),* cit. p.1545.

[353] Fachiri A.P., *The Local Remedies Rule in the Light of the Finnish Ships Arbitration*, 17 Brit. Y.B. Int'l L.19, 1936.

[354] Reports of International Arbitral Awards, 29 March 1933, Forest of Central Rhodope Case, (Greece v. Bulgaria), p. 1405.

[355] Amerasinghe, C.F., *Diplomatic Protection*, p. 154.

[356] HLS, "Research in International Law II. Responsibility of States", 1929, 23 AJIL, 1929.

[357] International Law Commission, *Draft Articles on Diplomatic Protection*, 2006, art 15 (b).

doctrine compares the delay to a denial of justice[358]. As in the *El Oro Mining and Railway Co Case,*[359] the procedure was declared ineffective as a consequence to a nine year's delay trial judgement. Nonetheless, there is no specific and fixed rule related to the amount of time acceptable for a trial to be defined as effective or not. For this reason, the exemption has to be proceeded by a deep analysis of the circumstances related to each case taken into question in order to be fair.[360]Article 15 (e) of the International Law Commission Draft Articles of 2006 states that there is no need for the claimant to refer to the local remedies in case the State that committed the injury waived the requirement that local remedies have to be exhausted. As expected, the respondent State could decide to renounce to the principle either explicitly or not[361]. Accordingly, when the respondent State renounces to the application of the principle, the waiver, if explicitly expressed, cannot be revoked on a latter stage[362].

The exceptions analysed until now are related to the applicability of the principle of exhaustion of local remedies, although there are cases in which the principle is, as stated by the international jurisdiction, inapplicable. If we analyse in depth the *Hostage case*[363] or to the *Interhandel judgement*[364], the applicability of the principle of exhaustion of local remedies could find some obstacles when the injury is direct, which is when the claimant State is injured by the direct wrongful act of another State[365]. This circumstance has been explained by the previously cited International Law Commission 2006 Draft Articles project at article 14 (3),[366] which underlines that the claim has to be based on an indirect

[358] Amerasinghe, C.F, *Diplomatic Protection*, cit. p. 157.
[359] United Nations Reports of International Arbitral Awards, Decision No.55 of 18 June 1931, *El Oro Mining and Railway Co Case (Great Britain v. United Mexican States)* – Volume V, pp. 191-199.
[360] United Nations, *Report of the International Law Commission – Fifty-eight session*, No.10 (A/61/10), p. 80.
[361] Garcia Amador, "Third Report on State Responsibility", YBILC, 1958, vol 2, p. 93; Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, The Banks Law Publishing Company, 1915; *Third Report on Diplomatic Protection by Mr. John Dugard*, Special Rapporteur, International Law Commission, United Nations Doc A/CN.4/523, 2002.
[362] Amerasinghe, C.F., *State Responsibility for Injuries to Aliens*, 1967.
[363] International Court of Justice, judgement 24 May 1980, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, p. 3.
[364] International Court of Justice, judgment 21 March I959, *Interhandel (Switzerland v. United States of America),* p. 6.
[365] Amerasinghe, C.F., *State Responsibility for Injuries to Aliens*, cit. p.172.
[366] *Third Report on Diplomatic Protection by Mr. John Dugard*, Special Rapporteur, International Law Commission, United Nations Doc A/CN.4/523, 2002, pp. 70-76.

injury - towards a national of a foreign State- for the principle of the exhaustion of local remedies to be applied[367]. In relation to this circumstance, it is rather complicated to define whether a claim is completely direct or indirect, since in some cases, indirect and direct injuries coexist.[368] In the *Interhandel case*, for instance, it can be underlined that the United States Supreme Court expressed the necessity to redress the illicit in the State in which the injury occurred, before resorting to an international court[369], defining the principle of exhaustion of local remedies mandatory. As a matter of fact, this case could be defined as a "mixed" case[370], in which both direct claims and indirect claim existed. The same explanation could be applied in relation to the *Hostages case*, in which indirect injuries towards nationals as well as direct injuries toward the Unite States' diplomatic agents, coexisted. It must be underlined that the International Court of Justice, after a deep analysis, declared how the *Interhandel case* was predominantly a case of indirect injury, and as a consequence, the principle of the exhaustion of local remedies was mandatory. In relation to the *Hostages case* instead, the Court defined it as mainly characterized by direct injuries, and in light of this, the principle of the exhaustion of local remedies was not mandatory[371].The international jurisdiction further questioned the applicability of the principle in case of diplomatic protection on behalf of a citizen injured abroad[372]. The cradle of this query lied on the case in which a lack of physical connection between the alien injured and the wrongdoer State existed. As a matter of fact, the physical connection should exist for the protection to be applied[373]. The International Law Commission on the 2006 Draft Article project, at article 15 (c) stated that a relevant connection must exist between the respondent State and the injured alien for the former to have the right to redress the illicit by its means. In fact, this article underlined the importance of a real and proved connection, whether it consist of a stable domain of the alien on the respondent State, a contract or a business relationship.

[367] Amerasinghe C.F., *State Responsibility for Injuries to Aliens*, cit. pp. 145-168.
[368] Report of the International Law Commission – Fifty-eight session, cit. p. 74, para. 10.
[369] *Interhandel (Switzerland v. United States of America),* cit. pp. 6-27; Report of the International Law Commission – Fifty-eight session, cit. p. 74.
[370] Report of the International Law Commission – Fifty-eight session, cit. pp. 73 – 74.
[371] Ibid.
[372] Amerasinghe, C.F, *State Responsibility for Injuries to Aliens*, cit., p. 181.
[373] Borchard, E.M., *Diplomatic Protection of Citizens Abroad*, cit.

The importance of the principle of the exhaustion of local remedies is undeniable, despite the evolution that the mechanism of diplomatic protection has had throughout centuries. Protecting countries' sovereignty, was at the basis upon which this rule was established. Nevertheless, limitations to its application in order to safeguard individuals emerged and needed to be codified. Despite the limits and rules regulating the application of this principle, what emerges from this analysis is the importance to establish the right mechanism of justice, in order to guarantee a right compensation for the damages suffered by the claimant and the respect of State's sovereignty in the legal process[374]. To conclude, it can be argued that the principle of the exhaustion of local remedies cannot be defined as outdated, since it still plays a key role in relation to the invocation of the mechanism of diplomatic protection although, as in the case of nationality, it has undergone an evolution. Evolution which, as a consequence to the growing importance of individual interests' safeguard, has seen the number of exceptions to this principle increase in volume, clearly without undermining its importance as a principle of customary law.

4. THE CLEAN HANDS DOCTRINE: A PRINCIPLE OF INTERNATIONAL LAW EXCLUDED FROM THE DRAFT ARTICLES ON DIPLOMATIC PROTECTION

Historically, the clean-hands doctrine has been widely applied and considered as one of the equitable principles invoked by international courts and tribunals[375]. This principle, according to the law, saw the necessity of the claimant to come to court with the clean-hands – without having committed any illicit at the expenses of the counterpart[376]- in order to have its appeal considered.

As a matter of fact, the principle could not be applied whenever the illicit committed by the respondent was a direct consequence of an illegal action perpetrated by the victim - the claimant. In this circumstance, the victim's claim could result as unacceptable on the

[374] Kokott J., Interim Report on "The Exhaustion of Local Remedies" ILA Report of the Sixty-ninth Conference, 2000, pp. 606-30.
[375] Reports of International Arbitral Awards, *Case of the Enterprise v. United Kingdom (United States v. United Kingdom)*, Mixed Commission established under the Convention of 8 February 1853 between the United States of America and Great Britain, Vol. XXIX, pp. 26-53.
[376] Carreau D., Marrella, F. *Diritto Internazionale*, cit. p. 571.

basis of the lack of clean- hands[377]. It must be underlined that the principle of the clean-hands applied to diplomatic protection, would obstacle the action of the claimant State in favour of its citizen victim of an injury in the event that the injury was proved to be a consequence of a previous wrongful act committed by the victim or by the claimant State[378]. Although this is an international legal principle and as such, relevant in relation to the functioning of diplomatic protection, it must be highlighted that in case of its application, it would deprive both the alien and the claimant State of their own right. To prove that the alien or its State acted in such a wrongful way that the application of diplomatic protection would not be possible on the basis of the clean-hands principle, is believed to be difficult and, to some extent, unlikely. Despite the invocation of this principle has hardly ever been faced by the international legal courts, there are some cases of diplomatic protection dating back to the 19th century, in which this principle was applied.

One of these first cases was the *Ben Tillet*[379] case of 1899. Ben Tillet was a British citizen who decided to participate in a trade union rally which had been forbidden by the Belgian authorities. Despite the prohibition, Tillet took part in the rally anyway. He was then arrested by the authorities and sent back to England. On this regard, the British authorities asked for a compensation on behalf of Tillet, as a consequence to an international wrongful act suffered by him as a consequence to its arrest carried out by the Belgian authorities. The request was eventually rejected on the basis of the principle of the clean hands, as a consequence to the individual conscious violation of the prohibition imposed by Belgian authorities[380]. Notwithstanding its role in the international legal framework, a great debate over the application of this principle developed. Although some authors and scholars believed that the clean-hands principle had the same value as others and as such, should be applied to diplomatic protection[381], some others claimed the necessity of its reconsideration within the international jurisprudence. With regard to this issue, it has to

[377] Crawford J., *Brownlie's Principles of public international law*, cit., p. 503; Fitzmaurice, "The General Principle of International Law Considered from the Standpoint of the Rule of Law", 92 Hague Recueil, 1957.
[378] Amerasinghe, C.F., *Diplomatic Protection*, cit. p. 212.
[379] Revue Générale de droit international public, *Chronique des faits internationaux, Belgique et Grande-Bretagne – Affaire Ben Tillet – Expulsion – Arbitrage de m. Arthur Desjardins (1),* 1899, pp. 46 - 55. Retrieved at: https://gallica.bnf.fr/ark:/12148/bpt6k734754/f48.item.zoom
[380] Ibid.
[381] Cheng B., *General Principles of Law as Applied by International Courts and Tribunals*, 1953.

be noted that in the Conference held in 2005 by the International Law Commission, the Special Rapporteur's conclusion provided the decision to avoid the inclusion of the clean-hands doctrine principle in the Draft Articles on Diplomatic Protection[382]. The Special Rapporteur claimed that the application of this principle had to be allowed only at the examination stage, in order to provide a clear framework of the circumstances in which the illicit took place[383]. This suggestion was in fact positively accepted by the majority of the Commission[384]. Other members of the commission instead expressed scepticism over the interpretation of the Special Rapporteur, who underlined how the inclusion of the clean-hands principle within the Draft Articles project could led to a wrongful exoneration of the respondent State internationally responsible for a wrongful act. Moreover, reference was made to article 39[385] on State Responsibility for Internationally Wrongful Acts, which stated that *«account should be taken of the contribution to the injury by wilful or negligent action of the injured State […][386]»*

The debate was characterized by the question related to whether or not an individual should be considered as internationally responsible for having committed an illicit against the host State. The illicit would therefore trigger the State wrongful reaction which would eventually result into a violation of the international laws at the expenses of the foreign individual. This question is indeed relevant in relation to the debate on the application of the clean-hands principle. In spite of its importance, the uncertainty of the authority supporting the principle's application to all the cases concerning diplomatic protection and the lack of concrete cases proving its fairness[387], led the International Law Commission to exclude this principle in the Draft Article of 2006. The Commission based its decision on the principle upon which the functioning of diplomatic protection lies: the right of the State to protect its own citizens when injured by a wrongful act carried out by

[382] United Nations General Assembly, Report of the International Law Commission, *Fifty-seventh session*, Supplement No. 10 (A/60/10), 2005, pp. 110- 116.
[383] Ibid.
[384] Further clarification: *Sixth Report on Diplomatic Protection, by Mr. John Dugard, Special Rapporteur,* United Nations, International Law Commission, 2005, United Nations Doc A/CN 4/546
[385] Ibid., Chapter V.
[386] United Nations General Assembly, *Draft Articles on Responsibility of States for internationally Wrongful Acts*, 2001, fifty-third session, (2001 YB, vol II, part two). Text corrected by document A/56/49 (vol. I)/Corr. 4.
[387] Dugard, J., *Sixth Report on Diplomatic Protection, by Mr. John Dugard, Special Rapporteur, United Nations*, International Law Commission2005, Doc A/CN 4/546, 5.

a foreign State. Being the latter an imperative right of the State, the application of the clean-hands doctrine on the basis of a wrongful act of the alien as a precondition to define the inapplicability of this right, could not be accepted[388].

The clean-hands principle, as stated by the modern international doctrine, cannot be applied in case of diplomatic protection. Nevertheless, it has been established as applicable in circumstances concerning the direct relationship between States[389]. In this instance, it has been noted that the ground upon which the dispute between two States develops, is completely different from the one concerning diplomatic protection. In fact, the wrongful act carried out by a State and directly affecting another, makes the invocation of the clean-hands doctrine possible, being the two counterparts are on the same legal ground. Notwithstanding the fact that the International Court of Justice has been theatre of several trials in which the principle of the clean hands has been invoked, it seems that the tendency of the Court is to consider this, as a principle of the international doctrine which application rarely occurrs.

If we analyse a specific case, such as the *Oil Platform Case*[390] , a dispute between United States against Iran in which the former claimed for the application of the clean-hands principle over the latter, the Court, despite rejecting the clean-hands application after having defined it as irrelevant in that instance, did not declare the principle as generally inapplicable[391].

As a matter of fact, cases in which the Court seriously took into account the application of this principle existed, and in those circumstances, the majority of the jury agreed on the non-application of the principle, despite some judges believed its application to be reasonable. The first case in place is the *Nicaragua Case*[392], which saw the State of Nicaragua against the United States of America in relation to a dispute over military and paramilitary activities implemented by the United States against Nicaragua. The principle of clean-hands was believed to be applicable upon Nicaragua by part of the jury since it was, according to this part of the doctrine, responsible of unlawful internal acts in El

[388] Ibid.
[389] Amerasinghe, C.F., *Diplomatic Protection*, cit., pp. 210-213.
[390] International Court of Justice, Judgement 12 December 1996, Preliminary Objection, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, p. 803.
[391] Amerasinghe, C.F. *Diplomatic Protection*, cit., p. 213.
[392] International Court of Justice, Judgement 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* p. 392.

Salvador[393]. Even though in the final judgement the Court defined as inapplicable the principle invoked by part of the jury, consideration to this vision was given and, if it had been applied, the claim of Nicaragua against the United States responsible of having invaded the country would have been inadmissible.

In the *Arrest Warrant Case*[394], the circumstances that lead to the final verdict were similar to the previous case in point. The dispute saw as counterparts Belgium and the Democratic Republic of Congo, in the aftermath of the arrest of the Congolese Minister of Affairs by the Belgian authorities for violations against the humanitarian law. The Congolese counterpart opposed the act, whilst Belgium insisted on the crimes committed by the Minister and on the right to arrest him. In reality, the clean hands doctrine was, by part of the jury, believed to be relevant in this particular case, supporting the Belgian counterpart and stating that *«The Congo did not come to Court with clean hands*[395]*»* as a consequence to the crimes committed. Although the clean-hands is a general principle of international law, the circumstances of its application are nothing but clear and established within the customary international doctrine. What is evident after this analysis, is the reluctancy of the Court in applying this principle.

The appeal to the clean-hands principle was common practice over cases of diplomatic protection in the 19th century, such as in the case of *Brig Lawrence*[396]. However, the principle has been defined as non-suitable for this circumstance by the modern international doctrine in order to avoid the exclusion of a State's right to exercise diplomatic protection over a citizen injured abroad, breaching an international customary principle. Nevertheless, lack of a general guideline over its functioning and application, encouraged the international legal institutions not to apply this principle despite, in specific cases, its implementation could perhaps be essential in order to guarantee a fair and impartial trial.

[393] Ibid., International Court of Justice, Reports 392, paragraph 268.
[394] International Court of Justice, Judgment 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* p. 3.
[395] Ibid., para 35, *Dissenting opinion of Judge ad hoc Van den Wyngaert.*
[396] United Nations Reports of International Arbitral Awards, *Case of the Enterprise v. Great Britain (United States of America v. Great Britain)*, 23 December 1854, Vol. XXIX, pp.26-53.

5. THE USE OF FORCE TO PROTECT CITIZENS ABROAD APPLIED TO IMPLEMENT THE MECHANISM OF DIPLOMATIC PROTECTION. IS THIS PRINCIPLE LEGALLY ACCEPTED BY THE INTERNATIONAL JURISPRUDENCE?

Relations between States have always been characterized by a certain degree of violence which, more often than not, escalated into the use of force through belligerent conflicts[397]. War used to be considered as the only effective method to solve disputes of various nature which emerged among sovereign States. In recent times, however, it emerged the idea of limiting the use of force as a remedy to solve discrepancies among States. The first concrete attempt in posing a limit to the use of force in order to solve disputes among States, was made in the twentieth century with the establishment of the League of Nations, although no effective ban to the use of force was ever created[398]. Greater effort was actually made in the General Treaty for the Renunciation of War[399], which aim was, as stated by article 1, to: *« […] condemn the recourse to war for the solution of international controversies».* The main objective of the Treaty was to try to prohibit the use of force in international relations among States, with a specific reference to self-defence. Notwithstanding the obligation to settle disputes by peaceful means, the use of force in this specific case was never completely forbidden[400]. Furthermore, the Treaty paved the way for another document banning, with even more intensity, the use of force as a method to solve international disputes: the Charter of the United Nations[401]. Despite the similarities with the Kellog-Briand pact, the United Nations Charter was provided with a decision-making organ, the Security Council which contributed to reinforce the principles

[397] Brownlie, I., *International Law and the Use of Force by States*, Cambridge University Press, 1963; Bobbitt, P., *The Shield of Achilles: War, Peace and the Course of History,* Anchor, 2002; Neff C., *War on the Law of Nations,* Cambridge University Press, 2005; Gray C., *International Use of force,* Oxford University Press, 2008; Keane J., *Violence and Democracy*, Cambridge University Press, 2004.

[398] Browlie I., *International Law and the Use of Force by States*, 1963, pp. 55-65.

[399] Established in 1928 and entered into force in 1929, the Treaty is generally known as the Kellog-Briand Pact. Retrieved at: https://treaties.un.org/pages/showDetails.aspx?objid=0800000280168041

[400] Talmon S., *Recognition of Governments in International Law*, Oxford University Press, 1996.

[401] Russell R. B., *History of the United Nations Charter*, The Brookings Institution, 1958; Simma B., Khan E.D., Nolte G., Paulus A., *The Charter of the United Nations*, Oxford University Press, 2002.

of laws established by the Charter. The Council's main responsibility is related to the maintenance of international peace and security, as stated by article 24 (1) of the United Nations Charter. Nevertheless, in case of breach of peace, threats or acts of aggression, the Council is entitled to take measures which can involve the use of force[402], as stated by article 39. Among the exceptions provided by the Charter and ensured by the Council in relation to the ban on the use of force, self-defence is also included. In point of fact, the principle of self-defence[403] is, within the United Nations Charter, regulated at article 51 which states that: *« Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations […] ».*[404]

Whenever we make reference to self-defence, we must acknowledge that this principle does not refer to a specific case in point, since there can be several circumstances in which it can be applied. Response to a direct armed attack is however, the most typical example to which we can think of in relation to the application of a self-defence measure. Nevertheless, measures of self-defence will be applied in case a citizen injured abroad will have his or her life put in danger by the wrongful acts of a territorial State. The incapacity of the State responsible for the illicit to act on behalf of the alien injured will also trigger the use of measures of self-defence. In this circumstance, the nation State of the victim will have the duty to intervene in order to rescue its nationals,[405] as stated by the international legal system. Notwithstanding the duty that a State has to protect its citizens abroad when in danger, a question may arise. Is diplomatic protection implemented by means of force recognised as a principle of customary international law? It may be argued that, although for centuries issues and disputes between States have been settled with the use of force, the tendency of the modern doctrine based on the previously cited international treaties and pacts, has been focused on limiting the resort to force. In relation to this, it could be claimed that the use of force as a mean to protect citizens abroad is, at least in modern time, not part of the customary law. Nevertheless, armed

[402] Crawford, J. *Brownlie's Principles of public international law*, cit., p.757
[403] Constantinou A., *The Right to Self-Defence under Customary International Law and Article 51 of the UN Charter*, Ant N Sakkoulas, 2000; Ruys T., "Armed Attack"and *Article 51 of the UN Charter,* Cambridge University Press, 2010.
[404] United Nations, Charter of the United Nations, 24 October 1945, art. 51.
[405] Gray C., *International Law and the Use of force*, cit.; Dinstein Y., *War, Aggression and Self-Defence*, Cambridge University Press, 2012.

interventions as a mechanism to rescue nationals in danger have been applied and guaranteed by the Security Council in several circumstances, such as: the rescue of Israeli nationals in Uganda in 1976[406] or the Panama case in which the United States invoked the use of force against Panama in order to protect its citizens in 1989[407]. In connection with the concept of self-defence, the concept of "responsibility to protect" was developed in the Report of the International Commission on Intervention and State Sovereignty[408]of 2002. The aim of introducing this principle in the report, was related to the encouragement to protect citizens abroad in case of severe abuses suffered. In the report it was established that in case the territorial State in which the illicit took place did not concretely act in order to put an end to the abuse or did not have the means to do it, the State of nationality of the injured had the responsibility to protect its citizens' life in danger abroad[409].

The very fact that a State is entitled to act against another on the basis of its responsibility to protect its citizens abroad whenever the law requires it, does not actually entail that the method to be applied will embrace the use of force. In fact, neither at article 51 of the United Nations Charter nor at article 2(4), there was any reference to the authorization to resort to the use of force in order to fulfil the State's responsibility to protect its citizen victim of an illicit abroad. Moreover, it is very difficult to define an illicit suffered by an individual abroad as a concrete armed attack which would justify, not without the approval of the Security Council, an armed self-defence against the State accountable for the offence[410]. Although the abuse suffered by a citizen abroad cannot be considered as an effective threat comparable to the one emerging from a direct armed attack - which could justify the use of force as self-defence -, it could be claimed that a justification to the application of a certain degree of force might be legitimate.

It must be noted that the principle of the state of necessity, contained in the article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts, could actually

---

[406] Dinstein Y., *War, Aggression and Self-Defence,* cit.

[407] Chesterman, in Goodwin-Gill & Talmon, *The Reality of International Law,* OUP Oxford 1999; Nanda, "The validity of the United States Intervention in Panama Under International Law", American Journal of International Law, Volume 84, Issue 2, April 1990.

[408] United Nations General Assembly, ICISS, A/57/303, Annex.

[409] United Nations Secretary - General Report, *Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields - Follow-up to the outcome of the Millennium Summit*, A/63/677, 12 January,2009.

[410] United Nations Security *Council official records*, 31st year, 1941st meeting, 12 July 1976, New York., Doc. S/PV. 1941, para. 77-81.

justify the necessity of a government to intervene in the territorial State in which the injury took place, as a consequence of the inability of the governmental institution to take measures in order to put an end to the illicit and protect the alien from further abuses[411]. The application of article 25 in this specific circumstance, seems to be more appropriate, since the principle of self-defence is strictly related to a direct attack suffered by a State within its boundaries. Despite the fact that the invocation of article 25 of the Articles on Responsibility of States for Internationally Wrongful Acts is believed to be more suitable in this particular case, being the State acting on behalf of its citizen abroad as a necessity – and duty –, it has to be noted that, the article has never been applied in this sense. The reason for this is related to the concrete possibility of a *« […] grave and imminent peril»*[412] which forces the State in danger, to behave accordingly. As previously mentioned, the modern doctrine is still very much divided in relation to the use of force on behalf of a citizen injured abroad. It must be underlined that the circumstances in which the illicit takes place can favour a greater tendency to allow an intervention, especially in case of proved unwillingness or inability of the territorial State to act in order to protect the alien[413]. Nevertheless, the power to decide whether the use of force could be applied or not, is always in the hands of the Security Council, which will have first to deliberate over the individual right of collective or self-defence principles application[414].

On the ground that the prohibition of the use of force – especially armed force – has been the main objective of various international treaties established between the twentieth and twenty-first century, it still seems to have wide space for application. Diplomacy and diplomatic means are still weak if compared to the power and effectiveness that the use of force entails. Nevertheless, it can be argued that the limitation to the use of force applied so far have played a key role and, despite the discrepancies in the international doctrine in relation to this aspect of the legal framework, there is still room for improvement. This improvement has, in the last years, been driven towards further

[411] Anzilotti, D., *Corso di Diritto Internazionale*, Cedam, 1955.
[412] United Nations General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, cit. art 25 para.1 (a).
[413] Sorensen M., *Principles de droit International public, in Recueil des Cours, Leyde: Académie de droit international*,1960, III; Fanara, *Gestione di affari e arricchimento senza causa nel diritto internazionale*, Milano, 1966.
[414] Crawford J., *Brownlie's Principles of public international law*, cit. p. 757.

implementation as a consequence to the growing importance that the human right regime has gained.

III. THE INTERNATIONAL HUMAN RIGHTS DEVELOPMENT AND THE EFFECT ON THE MECHANISM OF DIPLOMATIC PROTECTION

1. THE BIRTH AND EVOLUTION OF THE HUMAN RIGHTS REGIME: AN OVERVIEW FROM EUROPE TO AFRICA

The right of freedom of association[415], the right to life, liberty and security[416], the right to be recognized everywhere as a person before the law[417] and the right of not being subjected to torture or to cruel, inhuman or degrading treatment or punishment[418], are just some of the rights that nowadays should be guaranteed to the majority of people living in this world and which are part of the international human rights regime. In point of fact, the international human rights regime was concretely shaped after the end of the Second World War although, already in the 1919, the League of Nations Covenant provided ethnic minorities with protection and safeguard[419]. Nevertheless, this first attempt at introducing human rights in the international doctrine was nothing but concrete, since treaties over human rights protection could only be applied in specific locations as exceptional measures[420].

It was after the end of the Second World War that the real step towards the creation of the international human rights regime was made. The establishment of the United Nations in 1945 paved the way to the creation of the Universal Declaration of Human Rights[421]

---

[415] International Labour Organization, Declaration on Fundamental Principles and Rights at Work, 1998, art. 2.
[416] United Nations General Assembly, Universal Declaration of Human Rights, 1948, art. 3.
[417] Ibid., art. 6.
[418] Ibid., art 5.
[419] McKean W., *Equality and Discrimination under International Law*, Oxford University Press, 1983; Thornberry P., *International Law and Rights of Minorities*, Oxford: Clarendon Press, 1991; Knop K., *Diversity and Self-Determination in International Law*, Cambridge University Press, 2002.
[420] Crawford J., *Brownlie's Principle of Public International Law*, Oxford, OUP Oxford, 2003, p. 635.
[421] Alfredsson G. S.& Eide A., *The Universal Declaration of Human Rights,* Brill, 1999; Jaichand V. & Suksi M., *Sixty Years of the Universal Declaration of Human Rights in Europe*, Intersentia Publishers, 2009; Baderin M. A. & Ssenyonjo M., *International Human Rights Law*, Routledge, 2010; Donnely J., *International Human Rights*, Boulder, CO:Westview, 1998.

of 1948[422]. This document, adopted by the United Nations General Assembly, is considered as the milestone that concretely enshrined the existence of rights globally recognized to human beings. Notwithstanding its non-binding nature based on the principle of non-interference of nations within the domestic matter of other countries, the Universal Declaration of Human Rights triggered first, the incorporation of these principles within many domestic legal frameworks[423] and second, the establishment of institutions essential for the implementation of human rights worldwide[424].

It must be underlined that protection of human rights is not contained in one single document or treaty but rather, is a combination of conventions, covenants and treaties signed both at regional and international level among different countries[425]. The International Covenants of 1966 – which came into force in 1976 – can be defined as one of the first set of documents in which binding laws regulating the protection of human rights were established. As a matter of fact, the Covenant was divided in two parts: the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights[426], both implemented by optional protocols[427]. As a consequence of the binding nature of the Covenants, bodies that could watch over the application and respect of the rights established, were created. Essentially, both the Covenants were provided with specific bodies – the Committee on Economic, Social and Cultural Rights and the Human Rights Committee - to which ratifying countries had to submit reports proving their effort on implementing measures for the respect of human

[422] At the Declaration signed on December 1948, followed a second non-binding document: the Helsinki final act, adopted the 1 August 1975.

[423] Amnesty International, *Universal Declaration of Human Rights*. Information retrieved at: https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/

[424] Among the main institutions established in order to implement human rights there are: The United Nations Security Council, the International Criminal Courts and the United Nations Human Rights Council; Crawford. J., *Brownlie's Principle of Public International Law*, cit. p 638.

[425] Ibid.

[426] Craven M., *The International Covenant on Economic, Social and Cultural Rights,* Oxford Clarendon Press, 1995; Joseph S., Schultz J. & Castan M., *International Covenant on Civil and Political Rights,* OUP Oxford, 2004; Nowak M., *UN Convention on Civil and Political Rights,* Engel Publishers, 2005.

[427] The International Covenant on Economic, Social and Cultural Rights was completed by the additional Optional Protocol signed in 2008 which resolution is the following: GA Res 63/117, 2008. Regarding the International Covenant on Civil and Political Rights, the Protocol was adopted in 1989 with the following resolution: GA Res 44/128, 1989.

rights[428]. Although the importance of the covenants and conventions in relation to the protection of specific rights[429] as well as on the protection of endangered categories[430] is undeniable, the importance of regional multilateral conventions[431] , which played a key role in human rights development, cannot be left aside.

It was in Europe that the first regional document on human rights was implemented[432]: the European Convention on Human Rights[433], signed and ratified by the members of the Council of Europe[434]. The Convention had a binding effect, which aimed at implementing and protecting human rights throughout the ratification and further introduction of these rights within the national legal frameworks of signing countries. Nevertheless, in order to achieve this objective, some exceptions to the binding principles contained in the Convention had to be made. The most significant concession was related to article 15[435], in which it was stated that, in case of war or emergency, derogation deriving from the Convention were to be applied. Notwithstanding the concession, there are articles that cannot be subjected to such derogation, such as the article related to the right to life[436] , torture and inhuman punishments[437] or slavery and servitude[438]. With the establishment of human rights conventions and covenants, plenty of institutions were in charge[439] to supervise and watch over the respect of human rights enshrined by the Convention.

---

[428] Crawford J., *Brownlie's Principle of Public International Law*, cit. p. 639; Rodley, in Krause & Scheinin, *International Protection of Human Rights: A textbook*, Åbo Akademi University, 2009.

[429] United Nations, *International Convetion on the Suppression and Punishments of the Crime of Apartheid*, General Assembly Resolution No. 3068 (XXVIII), Document A/9030 (1974), 1015, UNTS 243, entered into force 18 July,1976.

[430] United Nations General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, A/CONF.2/108.

[431] Shelton D., *Regional Protection on Human Rights*, George Washington University Law School Legal Studies Research Paper Series, 2008.

[432]Ibid.

[433] O'Boyle H. & Warbrick, *Law of the European Convention on Human Rights,* OUP Oxford, 2009; Jacobs, White & Ovey, *The European Convention on Human Rights,* OUP Oxford, 2010.

[434] The Council of Europe is the organization within the European Union that watch over the implementation and respect of human rights. Information retrieved at: https://www.coe.int/en/web/about-us/who-we-are

[435] Crawford, J., *Brownlie's Principle of Public International Law*, cit., p. 660.

[436]Council of Europe, Treaty Series No.194, European Convention on Human Rights, 1948, art.2. Protocol No. 14 (CETS No. 194).

[437] Ibid., art 3(1).

[438] Ibid., art 4(1).

[439] The European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe.

Accordingly, before the end of the 20th century, the European Court of Human Rights, main regional judicial body related to the respect of human rights, was created[440]. The European human rights safeguard system saw a change at the end of the 1990s, with the elimination of one of the European bodies[441] which aimed at the safeguard of humanitarian principles, in order to guarantee a simplification of the procedures of the admissibility of complaints.

Although Europe was the first continent in which human rights awareness emerged, it must be underlined that specific regional multilateral treaties safeguarding human rights were also established in North, South and Central America as well as in Africa. Despite the undeniably eurocentrism that characterizes the human right regime[442], both the American and the African systems safeguarding people's rights, developed. In point of fact, it was in 1960 that the Inter-American Commission on Human rights was developed, as a consequence to the decision of the Organization of the American States to implement social economic and cultural rights[443] on the basis of the American Convention on Human Rights. Moreover, as happened in Europe some decades earlier, in 1979 the Inter-American Court of Human Rights was established. As a matter of fact, the development of human rights in North and South America followed a path which can be considered as similar to the European one.

If the development of the human rights regime in the Americas followed a similar path to the European one, carefulness needs to be applied while analysing the development of human rights in Africa, since rather recent and still far from meeting the standards required by the International Conventions is their implementation there. It was in 1981 that the Organization of African Unity decided to adopt the African Charter on Human

[440] Crawford, J., *Brownlie's Principle of Public International Law*, cit. p. 660.
[441] The European Commission of Human Rights worked from 1953 to 1998. This judicial body's functions were absorbed by the European Court of Human Rights in 1998. Information Retrieved at: International Justice Resource Center website: https://ijrcenter.org/european-court-of-human-rights/
[442] Falk, R. A., *Human Rights Horizons: The Pursuit of Justice in a Globalizing World*, Routledge 2000; Anghie, A., *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2004.
[443] Crawford, J., *Brownlie's Principle of Public International Law*, cit. p. 661.

and People's Rights[444], milestone of the African human rights system[445]. As a matter of fact, the entry into force of this document, despite its non-binding nature, outlined the will – and necessity – to move forward in the protection of human rights, which importance in these areas have always been underestimated, if not ignored. Nevertheless, it must be noted that the path for the implementation of the rights included in the Charter, has been nothing but unhindered. Considering its non-binding character, the rights enshrined by the Charter have often been limited by the domestic laws of sovereign States, slowing the process of diffusion of human rights. The Charter, in the following years of its establishment, had to be completed by further declarations and documents, such as the Child Rights Charter[446] and the Women's Rights Protocol[447]. Although the need to add new elements to the Charter could be perceived as a reinforcement to its already weak and fragmented character, it can be asserted that, especially in the case of declarations, this contributed to emphasize the obligation already in place, as in the case of The Grand Bay Declaration and Plan of Action adopted in 1999.[448]

The main institutional organ in charge of watching over the respect of the Charter, was the African Commission on Human and People's Rights[449]. According to its functions, it really had the objective of promoting the development of human rights as well as ensuring their protection by means of investigations, whether required[450]. The Commission has been the only mechanism of implementation and control of the respect of human rights in Africa, underlying the inadequacy of the instruments and mechanisms of control. It was in the 1998 that a further step towards development of human rights protection was taken[451]. Four years before the substitution of the Organization of African Unity into the

[444] Murray R., *The African Commission on Human and People's Rights in International Law,* Hart Publishing, 2000; Evans M. & Murray R., *The African Charter on Human and People's Rights: the System in Practice 1986-2006,* Cambridge University Press, 2008;
[445] Nmehielle O.V., *Development of the African Human Rights System in the Last Decade,* American University Washington College of Law, 2004.
[446] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.
[447] This document, internationally known as Maputo Protocol, entered into force the 25 November 2005.
[448] Naldi G., *The African Charter on Human and People's Rights: The System in Practice,* 1986-2000, Cambridge University Press, 2002.
[449] Crawford, J., *Brownlie's Principle of Public International Law*, cit. p. 662.
[450] African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), No. 26363, entered into force 21 October 1986, articles from 45 to 59.
[451] Crawford, J., *Brownlie's Principle of Public International Law*, cit. p. 663.

current Africa Union[452], the African Court on Human and People's Rights[453] was created. Africa was provided with a regional court where the principles applied followed the ones established by the European Court of Human Rights and by the Inter-American Court of Human Rights. Although widely and consistent improvements cannot be denied, African countries are still far from having implemented human rights as part of their cultural values. The Protocol establishing the African Court has been ratified by 31 countries out of 54, and just 6 of them have formally accepted the role and power of the Court[454]. This data show how great is the work that still needs to be done in order to implement the role and importance of human rights across Africa.

From a more general and international perspective, it can be argued that the covenants and conventions safeguarding human rights are many, although their implementation is not always respected or recognized. From the International Convention on the Protection of All Rights of Migrant Workers and Members their Families[455], which has never been ratified by pivotal countries such as the United States, to the United Nations Convention against Torture[456] whose power has been diminished by several countries by imposing clauses that guaranteed the immunity from the inspections of the Committee against torture, the human rights regime can be defined as a structure that is still fragmented and, as a consequence, lacks of generally and recognized mandatory principles. The whole international human rights regime stability is undeniably based upon the importance of implementing human rights within States' domestic law, since only by doing so, human rights will be respected internationally. Nevertheless, this objective is still far from being achieved globally.

---

[452] Constitutive Act of African Union, Thirty-sixth session, 11 July, 2000. Retrieved at https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf

[453] Cole J.V.R., *The African Court on Human and Peoples' Rights: will political stereotypes form an obstacle to the enforcement of its decisions?,* in "The Comparative and International Law Journal of Southern Africa, March 2010, Vol.43, No.1, pp. 23-45, Institute of Foreign and Comparative Law. Retrieved at: https://www.jstor.org/stable/pdf/23253141.pdf?refreqid=excelsior%3A9b8cb8c621a423701e4bc11c9eb82eb1

[454] Information retrieved at: https://www.african-court.org/wpafc/basic-information/#establishment

[455] United Nations Human Rights Office of the High Commissioner, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Resolution 45/158, 18 December 1990.

[456] United Nations Human Rights Office of the High Commissioner, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Resolution 39/46, 10 December 1984, entry into force 26 June 1987.

As far as the development of universal human rights is concerned, it must be outlined that a great role has been played by nongovernmental organizations which, throughout years, have worked for the actual respect of international conventions and treaties as well as for the inclusion of people's rights within countries domestic legal frameworks. As stated by article 1 of the Declaration on Human Rights Defenders[457]: *«Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international level. »*[458]

Nongovernmental organizations - commonly known with the acronym NGO – act in order to promote the protection of human rights, which does not only include tackling violence, racism and inequalities, but it also concerns issues related to environmental abuses. In order to achieve these objectives, nongovernmental organizations work to provide data necessary to prove injustices perpetrated by governments despite their commitments to respect internationally signed and ratified human rights treaties[459]. The need to collect and provide data, is related to the fact that public opinion is seldom aware of the obligations arising from international treaties and conventions signed by their government[460]. Organizations' activism is also focused in providing assistance to people that have suffered from human rights violations. Among the most important nongovernmental organizations, we find: Amnesty International, Human Rights Watch and the International Federation for Human Rights.

Nevertheless, international human rights recognition is today very much fragmented also as a consequence to different cultural and historical values, as well as political structures applied in the countries of the world. Notwithstanding critics related to the efficacy of the Security Council's decisions[461] - often been referred to as politically incorrect or based upon specific State's interests - attention towards human rights rises every day and as a consequence, human rights awareness is improving people's right to have access to protection in case of a violation of human rights suffered. Notwithstanding the undeniable

[457] United Nations General Assembly, Resolution A/RES/53/144, 8 March 1999.
[458] Ibid., art.1.
[459] Council of Europe, *Human Rights activism and the role of NGOs*. Retrieved at: https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos
[460] Ibid.
[461] Great critics were made in relation to the line of action taken by the Security Council in relation to the Iran-Iraqi war in 1980s.

development that the human rights regime has been undergoing in the last decades, it can be argued that commitments to comply with respecting human rights are still weak[462], especially in Middle East. It seems that, whilst the tendency to sign and ratify treaties and conventions on the respect and protection of human rights grows, State's unrespectful behaviour towards universal people's rights grows as well. The paradox of empty promises[463], according to which on the one hand a country commits to respect human rights conventions and treaties previously signed and ratified, whilst continuing to violate rights irrespectively, is a widespread behaviour, especially among developing countries. This paradox could be defined as the consequence to the weakness of the mechanisms of control of human rights protection, which should prevent ratifying countries to persist on the wrongful behaviour[464]. Notwithstanding the flaws in the system, the very fact that countries ratify conventions and treaties on human rights, reinforces their existence, enabling activists and nongovernmental organizations to continue rising awareness over the importance of international human rights and possibly, helping to bring every country to enshrine and guarantee to people a set of basic human rights within their domestic legal framework.

2. THE EFFECTS THAT THE HUMAN RIGHTS REGIME HAS HAD ON THE FUNCTIONING OF DIPLOMATIC PROTECTION

At the beginning of this chapter, an analysis over the evolution of the international human rights regime has been provided. This choice was based on the effects that the establishment of human rights has had on the mechanism of diplomatic protection. When the Universal Declaration of Human Rights entered into force, which was later followed by several conventions and covenants, the position of the individual became definitely more relevant within the international legal framework. Rights were to be guaranteed to all human beings, indistinctly. On the basis of this principle, the questionability of the

[462] Hafner-Burton E. M., *Human Rights in a Globalizing World: The Paradox of Empty Promises,* University of Chicago, Vol. 110, No.5, March 2005, p.1373-1411.
[463] Ibid., p.1378.
[464] Ibid., p.1385.

necessity of the mechanism of diplomatic protection could be asserted. Nevertheless, there still is general agreement over the importance of diplomatic protection[465] although human rights have, since their universal recognition, undoubtedly risen the international minimum standard in relation to the treatment of foreigners in countries different from their own. Notwithstanding this fact, it would be rather incorrect to assert that, the role of a well-established mechanism recognized by the principles of international customary law, has become obsolete and perhaps no more necessary[466], especially in relation to the fact that the set of laws regulating the human rights regime is still not widely respected and homogeneous. If on the one hand the mechanism of diplomatic protection should not be considered as obsolete, on the other the principle upon which its application lies, should, on the basis of the evolution of human rights, perhaps be reconsidered.

Traditionally, diplomatic protection is a right which can only be invoked by the State of nationality of the injured abroad. The very fact that the individual is not taken into account, underlines how the state-centricity upon which the mechanism lies, is to be considered as obsolete and as such, possibly reconsidered[467]. Today, as a consequence to the development of international human rights, the individual interest has great relevance within the international legal framework. This argument is proved by article 1 of the Universal Declaration of Human Rights, which states that: *« All human beings are born free and equal in dignity and rights […] »*[468], asserting that all human beings should be guaranteed with the same rights, no matter if they are, in a specific moment of their lives, foreigners or nationals. Nevertheless, at least from a legal standpoint, different are the dynamics that exist in case of injuries suffered by an individual in a country different from his own. However, in relation to the concept according to which importance to the individuals and their interests should be guaranteed, in 2006 the International Law Commission, with the objective of adapting the mechanism of diplomatic protection to the modern times, at article 19 (b) stated that: *«A State entitled to exercise diplomatic protection according to the present draft articles, should: […] take into account,*

[465] United Nations, Yearbook of the International Law Commission, Vol. 1 1998, A/CN.4/SER.A/1998.
[466] Amerasinghe, C.F., *Diplomatic Protection*, Oxford University Press, 2008, p.73.
[467] Garcìa Amador, *State Responsibility Some New Problems, Yearbook of the International Law Commission*, Vol. II, 1958, DOC. A/CN.4/106, Hague Recueil 421.
[468] United Nations General Assembly, Universal Declaration of Human Rights cit., art.1.

wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought»[469].

The decision of the International Law Commission to clarify the right of individuals to be taken into account in case of severe injury suffered abroad, is a clear recognition to the role of individuals according to the invocation of these mechanisms. Notwithstanding the importance that individuals receive in the international legal framework as a consequence to the introduction of human rights, it must be noted that if we leave aside the mechanism of diplomatic protection in order to solve an international illicit related to human rights violations suffered, the remedies available to individual in order to have justice, seem to be rather ineffective. The first reason that justify their ineffectiveness is related to the previously described fragmentation of the human rights regime.

Accordingly, it must be pointed out that: if on the one hand the European institutions for the safeguard of peoples' universal human rights can offer to individuals' victim of an illicit effective mechanisms whenever their rights have been violated, the same cannot be asserted whilst referring to citizens of countries that have ratified the American Convention on Human Rights or the African Charter on Human and People's Rights[470]. Attempts to implement mechanisms accessible to individuals in order to protect their basic human rights were designed by the United Nations with the adoption of two Declarations: the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live[471] and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families[472]. In relation to the former Convention, the United Nations aim was to provide the foreigner with the same rights as the citizen of the country in which the individual was living despite, also in this case, there was a lack of implementation mechanisms[473]. The principle of guaranteeing

[469] United Nations, A/61/10, vol. II, Supplement, International Law Commission, *Draft Articles on Diplomatic Protection*, 2006, No. 10., art.19 (b).
[470] Amerasinghe C.F., *Diplomatic Protection*, cit. p. 75.
[471] United Nations General Assembly, Resolution 40/144, *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live: resolution / adopted by the General Assembly*, 13 December 1985.
[472] United Nations Human Rights Office of the High Commissioner, Resolution 45/158, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, of 18 December 1990.
[473] Amerasinghe, C.F, *Diplomatic Protection*, cit. p. 75.

rights on the basis of the Universal Declaration, was applied to the Convention of the Protection of the Rights of All Migrants. Nonetheless, it was stated that:

> *« […] Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired […][474]»*

The statement of this article proves, once more, the importance that the role of diplomatic protection still has on the international legal framework, even though several progresses on the field of individual's rights have been made. The international human rights mechanisms safeguarding individual's rights are still incomplete and, as a consequence, it seems rather pointless to define diplomatic protection as obsolete, avoiding its application without having a better structure to which make reference to[475]. Moreover, it must be underlined that the State was and still is, the most authoritative institution in the international relations panorama, meaning that action taken by sovereign States in order to protect their own citizens abroad who suffered from an illicit, will be seriously taken into account by the counterpart since international responsibility will possibly rise[476]. Needless to say, diplomatic protection appears to be, at least at the current development stage of human rights mechanisms, the best way to ensure the safeguard of human rights whenever a violation has occurred[477].

Despite this mechanism was at first recognized as a right of the State, it is undeniable how, its real aim, was the protection of individuals. Protection of individuals which in fact has come to be the main reason for which the human rights regime has been established, with the aim of placing people's equal rights before States' sovereignty. The existent connection between diplomatic protection and the international human rights regime - which could be considered as an evolutionary process - is also proved by the fact

---

[474] Garcìa Amador, *State Responsibility Some New Problems*, cit. Art. 23.
[475] Przetacznik, *The Protection of Individual Persons in Traditional International Law (diplomatic and consular protection),* OZOR, 1971.
[476] Amerasinghe, C.F, *Diplomatic Protection*, cit., pp. 74-78.
[477] Dugard, J., *First Report on Diplomatic Protection, by Mr. John Dugard, Special Rapporteur, International Law Commission, United Nations,* Document A/CN.4/506, 5.

that in both cases, the principle of the exhaustion of local remedies is applied, although according to different conditions[478].

The rule of exhaustion of local remedies is, by the same Conventions and Covenants establishing the human rights regime, defined as a precondition to have access to international mechanisms – to the European Court of Human Rights, for instance - safeguarding human rights. The Article 41 of the International Covenant on Civil and Political Rights, states that: *« […] The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted […] »*[479]. Again, the European Convention on Human Rights at article 35 states that: *«The Court may only deal with the matter after all domestic remedies have been exhausted […] »*[480]. The same principle has been supported also by the American Convention on Human Rights, precisely at article 46, in which it was stated that:

«Admission by the Commission of a petition or communication […] shall be subjected to […] the remedies under domestic law have been pursued and exhausted […] »[481].

Imposing the exhaustion of local remedies as a precondition to the appeal to higher courts for the safeguard and respect of human rights was, originally, a decision taken in order to guarantee the respect of States' sovereignty, allowing the dispute to be solved domestically. Moreover, imposing the submission of a case to domestic courts first, was imposed with the aim of reducing the number of claims addressed to International Courts[482]. It must be noted that, as far as the protection of human rights is concerned, the principle of exhaustion of local remedies actually plays a key role in rising awareness in relation to the respect of human rights within domestic jurisdiction. The point is related to the concept according to which States that signed and ratified conventions and

---

[478] D'Ascoli Silvia, Scherr, Kathrin Maria, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, EUI Working Paper LAW No. 2007/02.

[479] United Nations General Assembly, International Covenant on Civil and Political Rights, 19 December 1966 entered into force 23 March 1976, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force 23 March 1976, art 41.

[480] Council of Europe, Treaty Series No.194, European Convention on Human Rights, cit., art. 35.

[481] Organization of American States, *American Convention on Human Rights "Pact of San Josè, Costa Rica", B-32, 22 November 1969*, art 46. Retrieved at: https://www.refworld.org/docid/3ae6b36510.html

[482] D'Ascoli Silvia, Scherr, Kathrin Maria, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, cit.

covenants related to the respect of human rights, should be the first ones that, within their legislation, impose the respect of the principle contained in the conventions and covenants whenever individual appeal to them[483].

The necessity to appeal first to local courts, could also be intended as a way to measure how the concept of respecting human rights is widespread at an international level. The invocation of the principle of exhaustion of local remedies found some exceptions[484] in its application, as in the case of diplomatic protection. Nevertheless, as a consequence to the higher degree of flexibility[485] applied to this principle used in reference to human rights protection, the exceptions are quite more than a few. The availability of the remedy is essential for the principle to be applied. In case the appeal to the local court is to be considered as not available – inaccessibility[486] as a consequence of indigence can be included in this category – no obligation upon the individuals in order to first appeal to them will be imposed[487]. The very fact that a remedy is provided by the domestic legal framework and it is consequently available, does not necessarily guarantee that it will also be effective. With the term effective, the possibility for the individual appealing to the local court to receive sentence which will guarantee an appropriate judgement is intended. On the contrary, if there are no chances for a fair judgement to be provided by domestic courts, the remedy is to be considered as ineffective and so, the principle would not be applied[488]. The matter of partiality of the judgements, was tackled by the International Covenant on Civil and Political Rights of 1966[489] which, at article 41 stated that: *« […] The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted […]. This shall not be the rule where the application of the remedies is unreasonably*

[483] Ibid.
[484] The exceptions to the application of the rule of the exhaustion of local remedies are found in the following document: United Nations General Assembly, Report, International Law Commission. Fifty-sixth session, July-August 2004, Supplement No. 10 (A/59/10), art. 16
[485] Mazzeschi, R.P., *Esaurimento dei ricorsi interni e diritti umani*, Giappichelli, Torino, 2004.
[486] Amerasinghe, C.F., *Diplomatic Protection*, cit. p. 332
[487] There are many sentences in which appeal to local Courts was define as not necessary as a consequence to the application of the principle of unavailability. As an example: European Court of Human Rights *Ciulla v. Italy,* judgement of 22 February 1989, case 9/1987/132/183.
[488] D'Ascoli Silvia, *Scherr, Kathrin Maria, The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, cit., pp. 12-14
[489] United Nations General Assembly, *International Covenant on Civil and Political Rights*, 19 December 1966 entered into force 23 March 1976. Document n. 14668.

prolonged. »[490]Stating that a trial is «*unreasonably prolonged»*, entails the ineffectiveness and unfairness[491] of the court, exempting the individual from the application of this principle as a precondition to appeal to higher international courts. Moreover, the decision of the State to waive the requirement that local remedies must be exhausted, could allow the individual to a direct access to international courts. Exemptions can also be triggered in case of severe violation of human rights, such as in case of torture. A severe violation of human rights could lead directly to an international trial without any appeal to domestic courts[492].

If after a first analysis, the application of the principle of the exhaustion of local remedies could seem to follow the same principles both for the diplomatic protection and for the international human rights regime, it can be claimed that, deepening the research it becomes clear that the conditions of application seem to work differently. Beginning from the context of application of this rule, where in the case of diplomatic protection sovereignty of the State is the guideline for its application involving an inter-state relation starting from an injury to a foreigner, if we observe the context of application of the rule – which procedural nature must be outlined[493]- in the international human rights regime, safeguarding the individual and placing people's interest first, is the main objective. Moreover, in this case in point, the relation is merely between the individual and the State. The exhaustion of local remedies principle in relation to the human rights regime found the reason of its application within the necessity of local courts to embrace human rights in their judgements, as a way to implement their development. On the basis of this principle, local trials are then necessary for the establishment of universal rights. The invocation is different in relation to diplomatic protection instead, as we have already saw[494].

---

[490] *International Covenant on Civil and Political Rights,* 19 December 1966 entered into force 23 March 1976, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force 23 March 1976, art.41 (c).

[491] The European Convention on Human Rights, at article 6, stated the right to a fair trial to be guaranteed to individuals.

[492] D'Ascoli Silvia, Scherr, Kathrin Maria, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, cit.

[493] Mazzeschi, R.P., *Esaurimento dei ricorsi interni e diritti umani*, cit. p.87.

[494] D'Ascoli Silvia, Scherr, Kathrin Maria, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection,* cit.

The fact that diplomatic protection and the international human rights regime are connected, is undeniable. To a certain extent, it could be claimed that the latter is the evolution of the former, despite the clear differences. What cannot be claimed is that the development of international human right regime did not affect the mechanism of diplomatic protection and that diplomatic protection will be briefly replaced by international human rights safeguard mechanisms. These mechanisms, as a consequence to a fragmented development of the human right regime cannot, at least at the present day, be considered as more suitable and effective than diplomatic protection, which for this reason, despite the evolution that underwent as a consequence to the development of the human rights regime, remains the most effective method to guarantee justice whereas individuals suffered from human rights violations.

3. THE CO-EXISTENCE OF DIPLOMATIC PROTECTION AND INDIVIDUAL MECHANISM ENSHRINED BY THE INTERNATIONAL LEGAL FRAMEWORK

In the previous paragraphs it has been argued how the importance and relevance of diplomatic protection has, despite the development and application of the international human rights regime, remained untouched. Notwithstanding the evolution that this mechanism has undergone throughout centuries, it is still considered by the majority of the international jurisprudence, as the most effective mechanism to be applied in order to protect people's rights. Nevertheless, diplomatic protection is not the only path that can be taken to submit a claim within the international legal framework.

First of all, it must be noted that whenever a violation of human rights has been perpetrated by a State, the individual victim of the illicit is provided with the right to*: « […] an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law »*.[495] Consequently, the victim owns the right to resort to the national courts independently, on the basis of the severe breach of international law suffered. The right to appeal to national courts is reiterated by several international and regional conventions. Beginning with the article 2

[495] United Nations General Assembly, *Universal Declarations of Human Rights*, Resolution 217 A, art. 8.

of the International Covenant for Civil and Political Rights which states that *«Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant […]»*[496] to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which at article 14 states that: *« Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress […]»*[497], the right guaranteed to the individual to resort to local courts in order to obtain the cessation of the illicit and a compensation as a consequence to its perpetration is enshrined by international treaties.

As previously advanced, regional conventions reaffirmed the right of individuals to resort to national courts whereas severe human rights violations have been perpetrated. As a matter of fact, the first regional Convention that enshrined this concept was the European Convention of Human Rights which at article 13 stated that: *« […] everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority»*[498]. The same concept was then stated by both the Interamerican Convention at article 25[499] and by the African Charter of Human and People's Rights at article 7[500]. Whenever the resort to local courts would not guarantee any positive response to the victim of the illicit, appeal to a further level of jurisdiction, which entails international institutions, could be undertaken. As a matter of fact, at a European level, the European Court for Human Rights is the regional judicial body to which individuals – as well as States - can refer to in specific cases[501] of violations of the

---

[496] *International Covenant on Civil and Political Rights,* 19 December 1966 entered into force 23 March 1976, cit., art.2 (2).

[497] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entered into force 26 June 1987, art. 14 (1).

[498] Council of Europe, Treaty Series No.194, European Convention on Human Rights, cit., art.13.

[499] *«Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention […] »*

[500] *«Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force […] »*

[501] As stated by article 32 of the ECHR*: «The Jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to its provided in Articles 33, 34, 46 and 47».* It must also be recalled that individuals can appeal to the Court only on the basis of disputes against sovereign States or International organizations.

rights enshrined by the European Convention on Human Rights and its further additional protocols. It must be noted that in order to have access to this proceeding, the principle of prior exhaustion of local remedies has to be respected in the first place[502].

From a general perspective, individuals could also appeal to the International Criminal Court whereas national courts are unwilling or unable to initiate a fair and independent trial in order to punish the responsible for a severe breach of international law[503]. Appeal, whenever an individual has suffered from a severe human rights violation, could also be addressed to specific bodies provided by the United Nations, which are divided into two different sections: the Charter-based bodies, such as the Human Rights Council, or the Treaty-based bodies.

As far as human rights violations perpetrated against an individual are concerned, it must be added that in the past, specific Commissions and Tribunals were established in order to punish severe international law violations by accepting claims directly made by individuals[504]. A specific international body established in order receive claims subjected directly by people and institution, was the Iran-United States Claims Tribunal, established in 1981[505]. Nonetheless, it must be argued that, in this specific case the reason for which the establishment of the tribunal and the decision to allow individual to directly address claims, was made as a consequence to sever belligerent acts.

A further perspective that needs to be analysed, is related to binding documents or, as in this case, conventions that exclude the possibility for States to appeal to the mechanism of diplomatic protection by providing individuals with specific bodies to which appeal whenever violations have been suffered. This is the case of disputes related to economic issues, mainly connected to financial investments, which are regulated by the Washington Convention[506]. The Convention, at article 27 stated that: *«No Contracting State shall give*

---

[502] As stated by article 35 (1) of the ECHR: *«The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken […] »*

[503] Reale P., *Lo Statuto della Corte penale internazionale*, Padova, 1999; Bassiouni M.C., *The Statute of International Criminal Court: a documentary history*, Ardsley, New York, 1998;

[504] It must be clarified that, according to the Resolution of the United Nations S/RES/687 (1991), claims made by Governments and international organization are also accepted.

[505] *Claims Settlement Declaration*, 19 January 1981. Retrieved at: http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf

[506] *Convention on the settlement of investment disputes between States and nationals of other States,* signed in Washington on March 1965 and entered into force the 17 October 1966, N. 8359.

diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention […] ».[507] Disputes, according to the Convention, must be addressed by the International Centre for the Settlement of Investment Disputes, established by the hereabove cited convention. The aim of the International Centre for the Settlement of Investment Disputes is enshrined by the second paragraph of article 1, which established that: *«The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention. »*[508] To some extent, the very fact that the Convention provides the counterparts with an institution in charge of solving disputes, depriving them with the right of applying diplomatic protection, seems to recall the mechanism according to which the Calvo Clause applied. Nevertheless, the Convention also stated that, diplomatic protection could be applied in case no solution to the dispute will be found[509]. Notwithstanding the fact that nowadays individuals can appeal directly to several regional courts and specific institutions for the settlement of their claims, – condition which in some case is mandatory - diplomatic protection again seems to be the only concrete mechanism able to solve disputes concerning States and individuals whenever contracts, conventions or international bodies are not able to provide the individuals with fair and effective judgements. As a matter of fact, the coordination between individual mechanisms and diplomatic protection can be legally structured, as in the case of the Washington Convention, facilitating the implementation of both measures. Nevertheless, the situation changes when there are no guidelines or concrete laws regulating the coexistence of diplomatic protection and remedies to which individuals have access to. This circumstance is very common with regional or universal conventions, especially in

[507] Ibid., art.27.
[508] *Convention on the settlement of investment disputed between States and nationals of other States*, Washington, cit. art.1 (2).
[509] *United Nations, Treaty Series, Convention on the settlement of investment disputes between States and nationals of other States,* cit., art. 27(1). Furthermore, the United Nations Report for the International Law Commission of 2004, at article 18 stated that diplomatic protection does not apply where inconsistent to the Bilateral Investments Treaties or, specifically, to the ICSID provisions. Fifty-ninth session Supplement No. 10 (A/59/10).

the case of human rights, in which no specific rules regulating the coexistence of these two methods are expressed[510].

Notwithstanding the growing importance and availability of the several mechanisms to which individuals can appeal to in order to solve directly their claims, on the basis of the analysis carried out hereabove, it must be argued that diplomatic protection remains the most effective mechanism to which make reference to whenever an international dispute affecting their citizens arise.

4. THE EVOLUTION OF DIPLOMATIC PROTECTION: A RIGHT OF THE STATE OR A RIGHT OF THE INDIVIDUAL?

Historically, the State of nationality of individuals was in charge to provide them with protection in case of injury suffered abroad. This concept was based on the principle of sovereignty, which shaped the action of the State. It was the State entitled to decide whether to apply or not the mechanism of diplomatic protection on behalf of its citizens injured abroad. The initial standpoint was strictly related to the interest of the injured State that, by means of diplomatic protection, had to be restored. Nevertheless, the individual position throughout years has become relevant within the international debate concerning diplomatic protection, especially as a consequence to the growing awareness over universal human rights. The importance of the individual position in the international legal system, as a consequence to the development of the universal human rights regime, was stated and recognized by the International Law Commission. It was first with the Special Rapporteur Mohammed Bennouna in 1998[511] and then with Special Rapporteur John Dugard in 2000[512], that great relevance was given to the individual in relation to the invocation of diplomatic protection in order to safeguard him, and his interests. In point

[510] Mungo D., AA 2012/2013, *Tendenze evolutive nell'istituto della protezione diplomatica*. Prova finale in Giurisprudenza, Università di Pisa.

[511] United Nations General Assembly, International Law Commission, Fiftieth session, *Preliminary Report on Diplomatic Protection by Mr. Mohamed BENNOUNA, Special Rapporteur,* A/CN.4/484, 1998.

[512] United Nations General Assembly, International Law Commission, *First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur*, 2000, Document A/CN.4/506 and Add.1.

of fact, *The Princz Case*[513] is a concrete example of diplomatic protection applied in response to the consideration of the individual interests as a consequence to a violation of human rights.

In this case in point, the United States of America acted on behalf of Hugo Princz, an American citizen who survived to the holocaust. The United States rose a claim against Germany for having perpetrated serious injuries against Hugo Princz. According to this case, the first element that need to be taken into account, is the decision of the District Court of suspending the State's immunity related to Germany as a consequence to a severe violation of the customary law. The very fact that an international customary law[514] was violated by the German State, triggered the action of the United State to proceed, in order to provide its own citizen with a compensation for the injuries suffered. The invocation of the mechanism of diplomatic protection in this circumstance, coincided with the concept expressed, some years later, by the Special Rapporteur John R. Dugard:

> *«Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a jus cogens norm attributable to another State.»*[515]

After a deep analysis concerning the *Princz Case*, apart from arguing that, at least to some extent, it could be considered as a predecessor of Dugard's concept expressed in 2000, it is possible to observe how the severe violation of human rights was the main reason for the United States to act against Germany; action which was enforced by the decision of the District Courts not to concede the immunity principle to the counterpart[516]. As a matter of fact, not conceding the immunity to a State over its governmental activities, could be also defined as an incentive – in case of violation that could pave the way to the

[513] Court of Appeals for the D.C. Circuit, judgement 23 December 1992, *Hugo Princz v. Federal Republic of Germany*, judgement, 813 F. Docu.67188, Supp. 22.
[514] The customary law at which reference is made, related to the prohibition of the genocide. Moreover, it must be noted that the international jurisprudence also defines the customary law as *jus cogens.*
[515] *First report on diplomatic protection, by Mr. John Dugard, Special Rapporteur*, Doc. A/CN.4/506 and Add.1, 7 March and 20 April 2000, Agenda Item 6, art.4., pp.223-226.
[516] Court of Appeals for the D.C. Circuit, judgement 23 December 1992, *Hugo Princz v. Federal Republic of Germany*, cit.

application of diplomatic protection - for a State to act on behalf of its citizen rights violated abroad. So, it can be noted that the importance given to the individual interests, in this case in point, overcome the sovereignty principle related to diplomatic protection[517].

Another element to be outlined in the analysis, which had been previously explained, is related to the fact that nowadays, a State can be entitled to activate the mechanism of diplomatic protection also on behalf of an individual who does not own its nationality, being the person a refugee or a stateless[518]. This fact indicates how far from the initial idea of diplomatic protection – conceived as a right own by States – this principle of international customary law has gone. Protecting an individual who does not possess any nationality or that does have one, but it is different from the one of the State acting on his or her behalf, is a clear sign of an evolution towards the protection of individuals rights rather than State sovereignty. The evolution of diplomatic protection towards the safeguard of individuals' rights can also be deduced by the fact that this mechanism could be applied against the State of nationality of the individual to be protected. The very fact that an individual can own two different nationalities[519] underlines, once more, the evolution towards individual rights safeguard. It must be noted that this case in point was, by the International Law Commission approved at article 7 of the Draft Articles project of 2006, weakening the historical concept upon which diplomatic protection was rooted. As argued in the previous subchapter, alternatives to diplomatic protection do exist, despite their chances to provide the individual with a successful result are, sometimes, lower than the expectations, especially if we consider that the individual does not have the same relevance of a State within the international legal framework. As a matter of fact, the State is still considered as the most important actor in the international panorama and, as a consequence, its actions are definitely more likely to be successful. Nevertheless, there are cases in which the State is deprived of the right to provide its citizens with diplomatic protection as a consequence to directives contained in conventions or agreement ratified by States. This is especially true if we consider the case

[517] Mungo D., AA 2012/2013, *Tendenze evolutive nell'istituto della protezione diplomatica*. Prova finale in Giurisprudenza, Università di Pisa, p.134.
[518] United Nations General Assembly, *International Law Commission, Draft Articles on Diplomatic Protection*, Doc. A/61/10, 2006, vol. II, Supplement No. 10, art.8.
[519] Ibid., art.7.

of the Washington Convention[520] which, at article 27 establishes the unavailability of resort to diplomatic protection in order to solve any dispute. Notwithstanding this prohibition, the same Convention at the same article[521] also stated that in case of impossibility to solve the dispute by arbitration, diplomatic protection could be legally applied. So, if on the one hand the individual has the chance to act on his own behalf by resorting to alternative remedies, it cannot be denied that diplomatic protection is still the most reliable mechanism that could be applied in order to solve disputes between States and people.

Answering to the initial question after this evolutionary overview, could be perceived as easy and predictable. Nevertheless, if on the on hand it can be argued that diplomatic protection is no more conceived as an exclusive right of the State, which protects and underlines its sovereignty, on the other we cannot assert that this mechanism has been entirely reshaped in order to provide an exclusive protection to the individual. However, what can certainly be stated is that the universal human rights regime has had a strong influence over the evolutionary process of diplomatic protection, which was born as an exclusive right of the State and it is currently heading towards becoming a mechanism which aims at safeguarding individuals' rights whereas severe violations has been perpetrated.

[520] D'Ascoli Silvia, Scherr, Kathrin Maria, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, cit.

[521] *Convention on the settlement of investment disputes between States and nationals of other States*, cit., art.27.

IV. A CASE OF DIPLOMATIC PROTECTION: GIULIO REGENI

1. Premise

The mechanism of diplomatic protection, which has been described in the previous chapters of the dissertation will be, in this final section, analysed from a different perspective. I will, in fact, outline how diplomatic protection could be applied in relation to a specific and concrete case of illicit perpetrated against an individual abroad. The following chapter is dedicated to the study of the case of Giulio Regeni, a young Italian researcher kidnapped in El Cairo on 25th of January 2016[522] and found dead nine days later, on 3rd of February, along the "the desert road" that goes from El Cairo to Alexandria. The context in which the murder of Giulio Regeni took place, has been characterized by a country in which a growing and unrestricted use of violence[523] has became a common practice after the protests of 2011, and that escalated after the elections of 2014, won by General Abdel Fattah al-Sisi. The unrestrained use of violence perpetrated within the Egyptian borders calls for repressions and several violations of human rights[524]: from the freedom of thought[525] and research[526] to the personal freedom[527].

In order to develop a complete analysis of the case, the first chapter will be dedicated to an overview of the process of development of universal human rights within the Middle East, with a specific focus on Egypt, followed by a general framework in relation to the

[522] It must be noted that the 25th of January is, in the Egyptian modern history, a sign of change. The 25th of January 1952 the Egyptian police opposed to the supremacy of the British army; fifty Egyptian were killed and hundreds were injured. The 25th of January 2011 civilians gathered in *Tharir Square* in the name of "We all are Khaled Said" protest against a corrupted Government that had, at least for thirty years, violated people's rights. Information retrieved at: Poljarevic, E. (2009). Egypt, Revolution of 1952. In The International Encyclopedia of Revolution and Protest, I. Ness (Ed.). Available at: https://doi.org/10.1002/9781405198073.wbierp0501; Alsaleh, A., *Voices of the Arab Spring: Personal Stories from the Arab Revolution Columbia* University Press, 2015, p.7; Declich, L., *Giulio Regeni le verità ignorate. La dittatura di al-Sisi e i rapporti tra Italia ed Egitto, Roma*, Alegre, 2016, p. 15.

[523] Human Rights Watch, World Report *2011: Egypt – Events of 2010*. Retrieved at: https://www.hrw.org/world-report/2011/country-chapters/egypt.

[524] Human Rights Watch, Egypt: *Year of Abuses Under al-Sisi – President Gets Western Support While Erasing Human Rights Gains*, 8 June 2015. Retrieved at: https://www.hrw.org/news/2015/06/08/egypt-year-abuses-under-al-sisi

[525] This right is enshrined by article 65 of the Egyptian Constitution of 2014.

[526] This right is enshrined by article 66 of the Egyptian Constitution of 2014.

[527] The right to life is enshrined by article 54 of the Egyptian Constitution of 2014.

international treaties and conventions that the Egyptian government has signed and ratified throughout years. I will also provide a detailed report of the Egyptian domestic legislation - which on the one hand ensure the safeguard of human rights and on the other, by means of Emergency Laws, provides the State's security bodies with the possibility to violate those very same laws - will be provided. The research will follow with a brief description of Giulio Regeni's life before moving to El Cairo and will continue with the chronological analysis of the facts, from the day in which he disappeared to the day in which he was found dead.

The second part of this last chapter will focus on studying the diplomatic and legal reactions and actions of the Italian government in relation to the death of Giulio Regeni, accompanied by a complete report describing the possible legal scenarios that could be undertaken by the Italian government by means of diplomatic protection in order to punish the individuals responsible for the death of an Italian citizen abroad. In addition to this, I will also include a reference to the role of the European Union in relation to the case of Giulio Regeni and the possible actions that could be implemented by the European Parliament in order to shed light over the case and condemn the human rights violations perpetrated, will also be included. The chapter terminates with a general summary of the case and the results that has been achieved so far.

1. EGYPT AND THE POLITICS OF HUMAN RIGHTS: FROM RECOGNITION TO "LEGAL" BREACH OF THE LAW

The process of evolution of the human rights regime in the Arab world can undoubtedly be defined as rather controversial. Notwithstanding its common contradictory character, it must be underlined that considering the Arab world as a whole to define a general framework on international human rights would be inaccurate, since every country has a different political, cultural and social set of values according to which human rights are included[528]. Nevertheless, in order to provide a contextualised analysis of the case of Giulio Regeni, - which, as previously stated, entails severe human rights violations - it is

[528] Wilson R. A., "Human Rights: Culture and Context – An Introduction," in Wilson A Richard, *Human Rights: Culture and Context – Anthropological Perspectives*, London, Pluto Press, 1996, pp. 1-27.

necessary to begin from a broad definition of how human rights are perceived in the Arab world, to then narrowing the perspective and focus on the Egyptian specific international and national commitments, which oblige the country to ensure the respect of universal human rights.

The reason for which the development of the human rights regime has been defined as controversial, is related to the conceptualization of what human rights represent and to the methods according to which the implementation of human rights has been attempted to be legalized[529]. It is not possible to date back the rise of human rights awareness in the Middle East to the same date given for the Western countries, since the European colonization in the Middle East played a strong – and negative - role on this field.

As a matter of fact, in the Charter of the League[530] of Arab States[531], the first document signed among independent Arab countries, no mention was made to the issue of human rights implementation[532]. The Charter aimed instead at implementing the principle of self-determination[533], as a consequence to the long-lasted period of colonization enforced by Western countries.

As far as the relationship between the West and the Middle East is concerned, it must be noted that a certain degree of hostility was developed by the latter towards the former, as a matter of fact, Arab countries looked at universal human rights suspiciously, being them strictly connected to Western countries, cradle of universal human rights[534]. The very fact that countries, which had previously colonized the Middle East depriving populations of basic rights, wanted to impose on the same populations a set of human rights to be respected, was unconceivable for Arab governments[535]. Regardless of the hostility shown by the Middle East towards the human rights regime, the birth of nongovernmental

---

[529] Yesfet B., *The politics of Human Rights in Egypt and Jordan,* London, Lynne Rienner Publishers, 2015, pp.1-10.

[530] The League of Arab States was originally made up by: Egypt, Iraq, Transjordan (which later will become Jordan) and Yemen. Further countries will later join the League.

[531] Recognized by the United Nations Treaty Series, Egypt, Iraq, Transjordania, Lebanon, Saudi Arabia, Syria, Yemen: Pact of the League of Arab States. Signed at El Cairo on 22 March 1945, Volume 70, 1950, I NOS 240-241.

[532] Galal No'M., "The Arab Draft Charter for Human Rights" in, *Human Rights: Egypt and the Arab World*, 1994.

[533] Lewis B., *Islam in History: Ideas, People and Events in the Middle East*, Open Court, 1993.

[534] Yesfet B., *The politics of Human Rights in Egypt and Jordan*, cit. p.10.

[535] Waltz, S.E. (2004). "Universal Human Rights: The Contribution of Muslim States" in *Human Rights Quarterly*, November 2004, Volume 26, Number 4, pp.799-844.

organizations,[536] which aimed at rising awareness towards universal people's rights, can be defined as an essential step. It was in the 1970s, that organizations such as the Tunisian League of Human Rights which focused on the protection of human rights in the Arab world,[537], were established.

Focusing on the Egyptian specific circumstance, it must be noted that the development of human rights was preceeded by a turbulent political situation which characterized the country from the 1950s to the 1970s, and that saw the establishment of a military regime[538]. As a consequence of the takeover of a strict military regime, the rise of universal human rights was perceived as an alternative path to begin a process of democratization, which could eventually led to the establishment of a democratic government[539]. It must be noted that precisely after the revolutionary period in 1952, Egypt adopted the first Emergency Law[540], which allowed the government to impose restrictions on freedom of expression and establishment of associations[541]. Moreover, under this law, security forces were empowered to imprison anyone suspected of attempting to national security and stability[542]. Nevertheless, if on the one hand at the beginning of 1960s Egypt began to follow a more liberal path, it was in the following

[536] The establishment of nongovernmental organizations promoting human rights was witnessed around the first half of 1980s when universal human rights entered into the political and social debate of the country. Yesfet B., The politics of Human Rights in Egypt and Jordan, cit. pp. 10-15.

[537] Waltz, S. H., *Human Rights and Reform: Changing the Face of African Politics*, University of California Press, 1995.

[538] The regime to which reference is made, is the military regime of Gamal Nasser, which was established on June 1956. On September 1970, as a consequence to a heart attack, Gamal Nasser died and with him, his regime. Information retrieved at: Colamartino, R., *La Rivoluzione in Egitto*, Roma, Manifestolibri, 1996.

[539] Jayyusi, S.K., *Human Rights in Arab Thought: A Reader: Ethical Universalism and the Arab Tradition*, I.B. Tauris, 2008.

[540] Law No.162 of 1958.

[541] Amnesty International Report, *Egypt Muzzling Society*, September 2000, Al Index: MDE 12/21/00, p.2. Retrieved at: https://www.amnesty.org/en/documents/MDE12/021/2000/en/

[542] In the 1998 report made by the Special Rapporteur Mr. Abid Hussain and submitted to the Commission on Human Rights, he stated that: *«the use and abuse by governments of anti-terrorism and national security legislation remains a grave concern. […]. Further, abuse of the powers granted under such laws often leads to: […] arbitrary detention, torture […] threats and intimidation».* Commission on Human Rights, *Question of the human rights of all persons subjected to ay form of detention or imprisonment – Promotion and protection of the right to freedom of opinion and expression – Report of the Special Rapporteur, Mr. Abid Hussain, submitted pursuant to Commission on Human Rights resolution 1997/26,* 28 January 1998, E/CN.41998/40.

decade, with President Sadat[543], that limitations to the feeble liberalization process started, were, once more, implemented[544].

After the murder of President Sadat, the exceptional character of the first Emergency Law was harshened in 1981, limiting the action and freedom of expression to people individually as well as by means of associations and organizations. Under this set of restrictions, it became even more difficult to establish nongovernmental organizations aiming at promoting human rights. Despite the emergency law, the very first nongovernmental organization promoting human rights, marking their existence within the country, managed to emerge in 1985[545] : the Egyptian Organization for Human Rights. It developed as a consequence to the increase of human rights violations, which included: torture, murderers and illegal detention applied as a consequence to the emergency law enforced in 1981. In relation to this law, which deprived people from the very basic concepts upon which human rights are built, it must be recalled that already in 1967, Egypt had signed and ratified both the International Covenants on Civil and Political Rights[546] and the International Covenants on Economic, Social and Cultural Rights[547]. This placed Egypt in the position to accept and respect the articles and principles enshrined[548].

With respect to the International Covenant on Civil and Political Rights, it must be underlined that at article 7, it was stated that: *«No one shall be subjected to torture or to cruel and inhuman or degrading treatment or punishment»*[549]. Article 9 (1) instead, stated that: *« Everyone has the right to liberty and security of person. No one shall be subjected*

---

[543] Muhammad Anwar el-Sadat, was an Egyptian army officer and politician who took office as Egyptian president in 1970. His presidential mandate lasted until 1981, years in which he was assassinated. Information retrieved at: https://www.britannica.com/biography/Anwar-Sadat

[544] Yesfet B., *The politics of Human Rights in Egypt and Jordan*, cit., pp.22-23.

[545]Ibid., p23.

[546] It must be noted that Egypt did not ratify the First Optional Protocol of this Convention, according to which individuals would have been entitled to address a complaint directly to the Human Rights Committee. Retrieved at : https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=54&Lang=EN

[547] Egypt ratified both the ICCPR and the ICESCR on 14 January 1982.

[548] Nevertheless, it must be added that Egypt has never ratified the optional protocol of the International Covenant on Civil and Political Rights which allows individuals who have suffered from severe human rights violations, to submit to the Human Rights Committee a complaint.

[549] *International Covenant on Civil and Political Rights*, 19 December 1966 entered into force 23 March 1976, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entered into force 23 March 1976, art 7.

to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. »[550]

Accordingly to the articles cited above, it must be noted that: if on the one hand Egypt was – and still is – obliged to respect international commitments for which signed and ratified international treaties and covenants, on the other it is undeniable that the internal procedures applied were – and still are – far from fulfilling the international commitments. Nevertheless, it must be noted that in case of emergency, according to article 4 of the International Covenant on Civil and Political Rights, derogating measures can legally be implemented. Article 4 in fact, stated that: *« In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant»*[551]. However, the Covenant does not allow any derogation concerning articles safeguarding: the right to life (art.6), prohibition of torture and any degrading treatment (art.7), prohibition of slavery (art.8), prohibition of imprisoning a person on the ground of the inability to fulfil a contractual obligation (art.11), prohibition of unfair accusation (art.15), right of recognition as a person before the law (art.16) and the right of freedom of thought, conscience or religion (art.18).

Although limits to derogation existed, the government's harsh line of action in order to fight terrorism included tortures, arbitrary detention, abduction, forced disappearances and mass trials – many of which judged by military courts -, and was in total opposition to the previously cited International Covenant on Civil and Political Rights and to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment of 1984, signed and ratified by Egypt in 1986. In relation to the Convention against Torture, it must be noted that Egypt decided not to ratify an essential part necessary to criminalize and eradicate the practice of torture: the Optional Protocol to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. This would have allowed the establishment of monitoring mechanisms with the aim of avoiding the implementation of torture[552]. On the same ground, Egypt has

[550] Ibid., art. 9 (1).
[551] Ibid., art. 4.
[552] United Nations Treaty Body Database. Retrieved at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=54&Lang=EN

never ratified another essential document in order to provide a concrete safeguard to people who suffered from severe human rights violations: the Statute of Rome of 1998 which issued and regulated the functioning of the International Criminal Court[553].

On the basis of the international commitments undertaken by the Egyptian Government and the lack of effort to fulfil them, it must be noted that the role of nongovernmental organizations has been essential in order to fight for the human rights regime safeguard in Egypt. However, nongovernmental organizations began soon to be in the cross hair of the government, as a consequence to their categorization as potential alternatives to political parties[554]. For this reason, under the emergency status, they became the main target of government's harsh action on the ground of public safety and national security principles.

Political activity until the 1990s continued to be mixed up with human rights nongovernmental organizations, although in the meantime the number of organizations advocating for human rights protection doubled[555]. Among the most influent on the national ground there were: the Center for Human Rights and Legal Aid[556] (opened in 1994), the Center for Egyptian Women's Legal Assistance[557] (opened in 1995) and the Land Center for Human Rights[558] (opened in 1996). Nevertheless, the legal framework within which new organizations protecting human rights emerged was nothing but favourable[559]. In fact, in 1992 the Egyptian government decided to further enlarge its

---

[553] International Criminal Court Website, *The State Parties to the Rome Statute*. Retrieved at: https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

[554] Risse T., Sikkink K., "The Socialization of International Human Rights Norms Into Domestic Practice: Introduction," in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, Cambridge, Cambridge University Press, 1999.

[555] Ibid.

[556] The Center for Human Rights Legal Aid, founded in 1994. Information retrieved at: http://www.chrla.org

[557] Center for Egyptian Women's Legal Assistance. Information Retrieved at: https://namati.org/network/organization/the-center-for-egyptian-womens-legal-assistance-cewla-foundation/

[558] Land Center for Human Rights. Information Retrieved at: https://arab.org/directory/land-center-for-human-rights/

[559] Pratt, N., "Hegemony and Counter-Hegemony in Egypt: Advocacy NGOs, Civil Society, and the State" in Sarah Ben Nefissa in, *NGOs and Governance in the Arab World,* New York, American University in Cairo Press, 2005, p.47.

power, by introducing the Military decree and the Law n°97 on Terrorism[560], which had severe repercussions on the field of human rights. In relation to the latter, it must be underlined how the principles concerning the definition of terrorism[561]and terrorists enshrined, were vague and of wide interpretation. Consequently, a wide range of activities could be defined as connected to terrorism and so, harshly punishable. Deepening the analysis of the Law n° 97 on Terrorism, it can be noted how, at article 86, a rather general definition of terrorism was given. Article 86 stated that:

> *« […] any use of force or violence or any threat or intimidation to which the perpetrator resorts in order to disturb the peace or jeopardize the safety and security of society and of such nature as to harm or create fear in persons or imperil the lives, freedoms or security; harm the environment; damage or take possession of communications; prevent or impede the public authorities in the performance of their work; or thwart the application of the Constitution or of laws or regulations. »*[562]

As a matter of fact, a *«threat or intimidation to which the perpetrator resorts in order to disturb the peace»*[563] was a definition which could be applied on several circumstances, and in which nongovernmental activities, aiming at safeguarding human rights, could definitely be included. The same vague definition is to be detected in the last part of the article, which defines terrorism as an activity that *« […] prevent or impede the public authorities in the performance of their work; or thwart the application of the Constitution or of laws or regulations»*[564]. As for the previous part of the same article, the definition is wide and could potentially include several activities: from a simple demonstration of a nongovernmental organization to a public meeting of political opponents. Accordingly, it must be noted that in the years following the entry into force of the law n°97, hundreds of supporters of the Muslim Brotherhood[565] were arrested and sentenced to spend years

[560] Yesfet, B., *The politics of Human Rights in Egypt and Jordan*, cit.
[561] Law n°97 of 18 July 1992, art.86.
[562] Ibid.
[563] Ibid.
[564] Ibid.
[565] The Muslim Brotherhood is a religious political organization established in 1928 which aims at reintroducing religious guidelines for a modern islamic society. Despite its suppression in 1954 under the Nasserite Government, in 2012 Mohamed Morsi the leader of the Muslim Brotherhood was democractly elected. Nevertheless, he will be later replaced by the current president Abdel Fattah al-Sisi. Information retrieved at: https://www.britannica.com/topic/Muslim-Brotherhood/Uprising-and-electoral-success

in jail for having expressed their political dissent in a pacific way[566], for their dissent was defined as a: *«threat or intimidation to which the perpetrator resorts in order to disturb the peace»*[567].

The hostility of the Egyptian Government towards any form of association, became even more evident in relation to the same article at part (a), in which it was stated that: *« […] execution or a life sentence of hard labour for the supplying of groups, gangs or other terrorist formations with weapons, ammunition, explosives, materials, instruments, funds or information that assist them in carrying out their aims. »*[568] This part of the article provides a list of the acts defined as punishable by the law in connection to the act of terrorism. Focusing on the last sentence, which is related to funds and information owned by the organizations, it is very clear that the application of this law could actually be extended to any form of organization. Moreover, the very fact that funds and foreign funds in the majority of the cases came from the West, was perceived by the government as an instrument to promote foreign ideas at the expenses of national unity and stability[569]. For this reason, the government first in 1964 with Law n°32[570] and later in 1999 with Law n°53[571] introduced stricter conditions on nongovernmental organizations activities, which prevent human rights from being implemented. According to law n°53, the government had the power to punish organizations in case of irregular funding received[572] . Moreover, it had the power to decide whether an organization could be defined as lawful or not according to its objectives and participants. Despite the recognitions of this law as unconstitutional in early 2000, many restrictions were maintained and applied anyway, as a consequence to the previous Law n°32.

[566] Amnesty International Report, *Egypt Muzzling Society,* cit.
[567] Law n°97 of 18 July 1992, art.86.
[568] Ibid., art.86 (a).
[569] Yesfet, B., *The politics of Human Rights in Egypt and Jordan*, cit. p 35.
[570] Law n° 32 of Civil Associations and Institutions, 1964.
[571] Law n°53 on Civil Associations and Institutions, 1999.
[572] Pratt, N., "Bringing Politics Back in: Examining the Link Between Globalization and Democratization", *Review of International Political Economy,* 2004; Grunert A., "Loss of Guiding Values and Support, September 11, and the Isolation of Human Rights Organizations in Egypt", in Annette Junemann, *Euro-Mediterranean Relations After September 11: International, Regional, and Domestic Dynamics,* 2004.

As already argued, further restrictions on people's rights were imposed with the Military Decree n°4 of 1992[573]. As a consequence, accusation and arrests of human rights activists skyrocketed. The most striking case in which the decree was implemented, is related to Doctor Sa'ad al-Din Ibrahim[574], a university professor and leader of a nongovernmental organization promoting human rights: *the Ibn Khaldun Center for Development Studies.* Doctor Ibrahim was arrested, together with other 27 people employed in his nongovernmental organization in 2000, with the charge of having received illegal funds from foreign sources. Moreover, he was accused of undermining national stability due to information possessed. Information defined by the government as dangerous if spread publicly by means of a report[575]. Notwithstanding the seven-years jail accusation, the sentence was quashed later in 2002[576]. The reason for which this case has been cited, is based on the several violations of international human rights laws "legally" perpetrated by means of Emergency Law and internal decrees, which were originally established in order to prevent illegal and terroristic organization to spread but were instead came to be used by the government as a tool to limit people's rights indistinctly instead. The report and the information that Ibrahim possessed[577], defined by government as aiming at putting in danger the government and national stability, allowed the Egyptian security bodies to arrest Ibrahim, violating internal constitutional principles[578] as well as international obligations enshrined by the International Covenant on Civil and Political Rights'at article 19 (freedom of expression) and article 22 (freedom of association).

[573] Amnesty International Report, *Egypt Muzzling Society,* September 2000, Al Index: MDE 12/21/00, pp. 11-12. Retrieved at: https://www.amnesty.org/en/documents/MDE12/021/2000/en/
[574] Roniger, L., "A Discourse on Trial: The Promotion of Human Rights in Egypt and Jordan," an article 1, *Journal of Human Rights* 5:2, 2006.
[575] Yesfet, B., *The politics of Human Rights in Egypt and Jordan*, cit. p 80.
[576] Human Rights Watch, *The State of Egypt vs. Free Expression: The Ibn Khaldun Trial,* 1 Juanuary 2002. Retrieved at: https://www.hrw.org/report/2002/01/01/state-egypt-vs-free-expression/ibn-khaldun-trial
[577] Ibrahim had conducted research in relation to democracy, fair elections and minorities rights and violences. Since 1995, he focused though on the electoral process which was due to end with election of November 2000.
[578] The Egyptian Constitution of 2014 at article 65 guarantees freedom of thought whilst at article 75 it guarantees the right to establish associations.

Moreover, principles enshrined within the African Charter[579] guaranteeing freedom of expression[580] and freedom of associations[581] were violated.

However, it must be noted that at the beginning of the new Millennium, an event that could be considered as the breakthrough of the Arab world towards the implementation and safeguard of the human rights regime happened, and coincided with The Casablanca Conference, held in 1999[582]. This Conference was an essential step towards the public recognition of the importance of human rights. In point of fact, it was believed to be crucial in order to introduce human rights[583] within Arab governments and cultures.

Focusing on the Egyptian case in point, it must be noted that, just few years after the Egyptian participation to the Conference and further public recognition of the universal human rights, the Cairene authorities enacted the Law n° 84 of 2002 which, contrary to the expectations after the Casablanca Conference, enforced the already strict and limited condition imposed to nongovernmental organizations[584]. The entry into force of this law showed how Egypt's international commitments on respecting and promoting human rights were systematically and legally not respected, overruling the good intentions and hopes for the rise of human rights expressed at the Casablanca Conference.

The Law n° 84 of 2002, at article 76 stated the compulsory registration of any nongovernmental organization to the Government with the consequence of one year's imprisonment in case of non-registration of the organization. What certainly could be defined as a violation to the right of freedom of association, is stated by article 8 of the Law 84 n° of 2002. According to this article, the Ministry of Insurance and Social Affairs[585] could legally object to the organization's founders, undermining the purpose and the *raison d'etre* of the organization. Notwithstanding the limits that this new law

---

[579] Egypt ratified the principles of the African Charter on Human and Peoples' Rights on 20th March 1984. The Charter entered into force on 21st October 1986.

[580] African Commission on Human and People's Rights, African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art. 9(2)

[581] Ibid., art. 10.

[582] Yesfet, B., *The politics of Human Rights in Egypt and Jordan*, cit. pp. 21-23.

[583] Ibid.

[584] Egyptian Organization for Human Rights, *NGOs Law: The Confiscation of Civil Work in Egypt,* Cairo, May 2002; Egyptian Organization for Human Rights, *Critical Analysis of the New Associations Law,* Cairo, 4 July 2005.

[585] The MISA is the public institution to which nongovernamental organization have to submit their registration in order to be authorized to act and develop their research projects.

imposed on the Ministry's previous powers[586], it still had the power to dissolve the organization, as stated by article 42. The main issue for nongovernmental organization was, and still is, related to funds, which are essential for the organizations in order to survive. Receiving funds from a foreign organization or institution without a previous clearance from the Egyptian Government could be the reason for having an organization dissolved[587]. The article that empowers the governmental institutions on acting in limiting the freedom of associations as well as the freedom of thoughts of members of the organization, was article 11 of the Law n° 84 of 2002. According to this article, associations or organizations would be banned in case of wrongful acts perpetrated. It must be noted that the wide and vague definition of wrongful acts as *«threatening national unity»*[588] or *«practicing any political activity»*[589] empowered the government to enlarge the cases in which this article could be applied, limiting even more the freedom of association and of thought and preventing many organizations from providing the implementation of the international human rights regime. If on the one hand the establishment of the Egypt's National Council for Human Rights in 2003[590], whose main

[586] According to articles 29, 59 and 79 of the previous Law 32/1964, harsher controls were applied in relation to the organizations' activities.
[587] Law 84/2002, art. 17, art. 58.
[588] Law 84/2002, art. 11: *«Associations seek to implement their purposes in various community development domains according to the rules and procedures set forth by the executive regulations.*
Subject to the opinion of the competent federation and opproval of the administrative body, an association may operate in more than one field. Secret associations shall be banned. Associations shall not be allowed to conduct any of the following purposes or activities:
1. Form military or para-military formations or detachments.
2. Threaten national unity, violate public order or morality or advocate discrimination against citizens, an account of sex, origin, colour, language, religion or creed.
3. Practice any political or trade union activity exclusively restricted to political parties and trade unions.
4. Seek profit or practice any profit-oriented activity. However, adopting commercial controls to generate such income that contributes to the realization of the association's purposes shall not be considered a contravening activity».
[589] Ibid., art. 11 (3).
[590] The National Council for Human Rights was harshly criticized by nongovernmental organization at first for its lack of democratic principles since, it did not have any executive power and its members were not democratically elected but rather chosen by the Government. Nevertheless, if one the one hand the creation of the Council seemed to be a way to improve Egypt's image abroad, on the other it did at least recognize that human rights issue on the country existed. Cardenas S., Flibbert A., "National Human Rights Institutions in the Middle East", *Middle East Journal*, 2005.

role was to receive complaints about any act perpetrated against human rights[591], could have helped limiting humanitarian violations, the fact that pressure over nongovernmental organizations continued, was a clear sign that little have changed.

A further practice perpetrated by the Egyptian government in order to limit nongovernmental organizations' action, consisted in refusing their registration to the Ministry of Insurance and Social Affairs[592]. As a matter of fact, among the several registration policies rejected as a consequence to the breach of Law n°84 of 2002, there are the cases of the Egyptian Association Against Torture[593] and the El Nadeem Center for the Psychological Rehabilitation of Torture Victims[594]. The activities carried out by both organizations were related to the practices of torture perpetrated by the Egyptian authorities, with the aim of acting against their implementation, although by following different methods. It is essential however to provide a general framework over the international and domestic obligation in relation to the use of torture that Egypt should comply with, before deepening the analysis of those two nongovernmental organizations in order to understand the actions of the Egyptian government in relation to this field.

As previously said, Egypt in 1986 committed to the Convention Against Torture, although it never ratified nor incorporated the definition of torture provided by the Convention[595]. The definition of torture was later provided in 1987 as follows: *« […] torture is a form of violence, assault or coercion […] includes beating, injuring, tying the limbs, detention, humiliation, deprivation of food or sleep or any other forms of physical harm and prevention. […] Moral torture, however, aims to humiliate a person to force a confession […] ».*[596] The definition given by the Egyptian court is clear in stating the extent to which an act can be defined as an act of torture, although this practice seems not

[591] Yesfet, B. *The politics of Human Rights in Egypt and Jordan*, cit. p 58.
[592] Human Rights Watch, *Egypt New Chill on Rights Groups, NGOs Banned, Activists Harassed,* New York, June 2003. Available at: https://www.hrw.org/news/2003/06/20/egypts-new-chill-rights-groups
[593] Human Rights Watch, *Human Rights Watch Honors Egyptian Anti-Torture Activists,* 3 Novembre 2003. Retrieved at: https://www.hrw.org/news/2003/11/03/human-rights-watch-honors-egyptian-anti-torture-activist
[594] It must be noted that El Nadeem Centre, after the decision of the Administrative Court of Cairo to rescind all the charges against the centre, will be reopened later in 2021. Information Retrieved at: https://www.frontlinedefenders.org/en/case/order-closure-against-el-nadeem-centre
[595] Amnesty International, *Egypt: "Officially, you do not exist" Disappeared and Tortured in the Name of Counter-Terrorism"*, 13 July 2016, Index number: MDE 12/4368/2016. Retrieved at: https://www.amnesty.org/en/documents/mde12/4368/2016/en/
[596] Case N°3856, Zagazig felonies, session of 17 March, 1987.

to have been dismissed by the governmental security bodies. It must be noted that with the entry into force of the Egyptian Constitution[597], there were the articles introduced in order to safeguard people from the use of torture. From article 51[598], declaring the inviolability of dignity as a right to every human being, to article 55[599] which states that in case of arrest or in case of restriction of freedom a person should be treated respecting his or her dignity, torture was condemned. The condemnation of the use of torture is reiterated by article 126 of the Egyptian Penal Code, which states that in case the use of torture is proved to have been implemented by officials representing the governmental authorities, the perpetrator would be punished with up to 10 years in jail[600]. In light of this framework of laws, which proved how the use of torture is prohibited by the law, the previously mentioned analysis over the nongovernmental organization which were targeted by the government action, is essential.

The first case is related to the Egyptian Association Against Torture's activity which in 2003 was defined by the government as violating article 11 of the Law n° 84 of 2002. In this regard, the Ministry of Insurance and Social Affairs opposed to the objectives of this association, which mainly related to the eradication of torture and the promotion of Egypt's national and international commitment against torture as a way to raise awareness on the public opinion and hopefully, drive the government into the respect of laws[601]. The other case is related to the El Nadeem Center for the Psychological Rehabilitation of Torture Victims. Notwithstanding the fact that the Centre was registered under the Ministry of Health[602] and played an essential role in supporting both physically and mentally people who have suffered from tortures in the past, it[603] became the target of the governmental authorities – the National Security Agency and the Ministry of Insurance

[597] The Egyptian Constitution, after several modification throught years, was officially adopted in 2014.
[598] Article 51 of the Egyptian Constitution of 2014.
[599] Article 55 of the Egyptian Constitution of 2014.
[600] Amnesty International, *Egypt: "Officially, you do not exist" Disappeared and Tortured in the Name of Counter-Terrorism"*, cit. p.59.
[601] Human Rights Watch, *Egypt: Margin of Repression, State Limits on Nongovernmental Organization Activims,* Volume 17, N°8 (E), September 2004. Retrieved at: https://www.hrw.org/reports/2005/egypt0705/egypt0705.pdf
[602] The Centre was registered under the Ministry of Health according to the Law 51/1981.
[603] The Centre was closed in 2017 by the authorities. Information retrieved at: https://www.frontlinedefenders.org/en/case/order-closure-against-el-nadeem-centre#case-update-id-5132

and Social Affairs under several accusations which entailed: the publication of reports without permit, the contact with foreign organizations and the lack of medical and security tools[604]. The work carried out by these nongovernmental organizations, which opposed the use of torture and provided cure and assistance to people who claimed to have suffered from tortures, is a clear evidence that torture is a common practice within the country, notwithstanding the national and international mandatory commitments which should prevent the government from resorting to its application.

The unrestricted human rights violations in Egypt exacerbated after the the protests of 2011. Protests which led President Hosni Mubarak to resign after having guided the country, by means of human rights violations[605] for thirty years. Protests, which burst under the slogan "We all are Khaled Said"[606] on 25th January 2016, succeeded in putting an end to an undemocratic regime, paving the way to a democratically elected government guided by Muhamad Morsi, the leader of the Muslim Brotherhood[607], a political party that existed since 1928 but had never had the chance to compete in the ballot box before. It is with this unprecedented victory that the yet unsteady situation of Egypt fall dramatically. The power of the military forces, which have always enjoyed countless privileges, began to be threatened by the new-elected President reforms. While the clash of titans took place, mass protests of civilians arose in the country.[608] As a consequence to this, military forces under the order of General Abdel Fattah al-Sisi took the power of the country, removing the democratically elected president Morsi and violently repressing people's protests in blood[609]. After a period of democratic transition leaded by Adli Mansur, in 2014 elections were won by General Abdel Fattah al-Sisi.

---

[604] Human Rights Watch, *Egypt: Margin of Repression, State Limits on Nongovernmental Organization Activism,* cit., p. 37.

[605] Declich, L., *Giulio Regeni le verità ignorate. La dittatura di al-Sisi e i rapporti tra Italia ed Egitto, Roma, Alegre, 2016.* p. 15.

[606] Alsaleh, A., *Voices of the Arab Spring: Personal Stories from the Arab Revolution Columbia* University Press, 2015, p.7.

[607] Al-Anani, K., "Upended Path: The Rise and Fall of Egypt's Muslim Brotherhood", in *Middle East Journal*, Vol.69, No.4, Autumn 2015, pp.527-543. Retrieved at: https://www.jstor.org/stable/43698286?seq=1#metadata_info_tab_contents

[608] Ibid., p.31.

[609] One of the most violent protest that took place in 2013, was the Rab'a al-Adawiya massacre, which caused the death of 2.000 people and many more injured.

Whilst elections were called and won by al-Sisi, Mohamad Morsi was, together with his supporters, sent to prison and his political party declared as a terroristic organization[610]. Since May 2014, hidden behind the necessity to apply emergency laws in order to fight the Islamic terrorism, severe human rights violations are perpetrated on a daily basis. Since May 2014, an era that one of the most influent Egyptian writers defined as *"worse than Mubarak"*[611] began.

As a consequence, the situation of human rights and the condition of nongovernmental organization worsened, especially after the entry into force of the Law n° 70 of 2017, which legalizes stricter rules limiting organizations field of action and allows authorities to freeze and seize their funds as well as to prosecute activists on the basis of vague and unproved facts[612]. The entry into force of the Law n° 70 was preceded by Law n°94 of 2015, essentially the new counter- terrorism Law approved by President Abdel Fattah-al Sisi. This law was formally implemented as a consequence to the high-level of risk of terrorism, although it represents a further crackdown on human rights violations among civilians. According to this new legislation, governmental officials are entitled to arrest and imprison people on the basis of suspect of having committed terroristic activity[613] - even without real evidence. Notwithstanding the fact that article 280 of the Penal Code punish the arbitrary arrest, it appears that the entry into force of this law empowered the government to further cross the line of human rights violations. The issue of terrorism, which according to the law is again, defined very vaguely[614], seems to be used as a smokescreen to exacerbate people's rights and freedoms. Enforced disappearances[615], tortures and killings after the entry into force of the Law n°94, became even more

---

[610] Dedlich, L., *Giulio Regeni le verità ignorate. La dittatura di al-Sisi e i rapporti tra Italia ed Egitto*, cit. p.32.

[611], Qualey M.L., *Egypt shuts down novelist Alaa al-Aswany's public event and media work – State security forbids high-profile critics of President al-Sisi from holding public seminar, after censoring his writing and media appearances,* The Guardian, 11 December 2015. Retrieved at: https://www.theguardian.com/books/2015/dec/11/egypt-shuts-down-novelist-alaa-al-aswanys-public-event-and-media-work

[612] Amnesty International, *Egypt: Gross Human Rights Violations Under President Al-Sisi Amnesty International Submission For The UN Universal Periodic Review 34th Session of the UPR Working Group, November 2019,* March 2019. Retrieved at: https://www.amnesty.org/en/documents/mde12/0253/2019/en/

[613] Law n°94 of 2015, articles 40, 41.

[614] Law n°94 of 2015, article 1.

[615] It must be noted that Egypt did not ratify the International Convention for the Protection of All Persons from Enforced Disappearances.

common[616]. Moreover, restriction over freedom of expression, assembly and associations also exacerbated.

Providing a general framework over the Egyptian legal context in which human rights are placed, is believed to be necessary in order to deeply understand the internal legal dynamics of this country. If on the one hand Egypt signed and ratified international covenants, declarations and treaties protecting human rights, claiming at article 93 of the Constitution that: *« The State shall be bound by the international human rights agreements, covenants and conventions ratified by Egypt, and which shall have the force of law after publication in accordance with the prescribed conditions»*[617], on the other, with the entry into force of internal emergency laws, it systematically violates both international agreements and internal constitutional laws, depriving its citizens from the most basic rights upon which democracies are based.

Egypt signed and ratified the majority of covenants and treaties which aims at safeguarding international human rights, although it never welcomed any inspection of the United Nations Human Rights Council[618]. Egypt established the National Council for Human Rights, despite this mechanism lack of any democratic principle and powers which could condemn human rights violations[619]. Egyptian citizens continue to be systematically arrested, tortured and imprisoned on the basis of their will to assert their constitutional rights. Activists are treated as *terrorists.* People like Gasser[620], Karim[621],

---

[616] Amnesty International, Egypt: *Investigative allegations of disappearances, torture and extrajudicial execution of four men* (Press release, 6 July 2017): https://www.amnesty.org/en/latest/news/2017/07/egypt-investigate-allegations-of-disappearance-torture-and-extrajudicial-execution-of-four-men/

[617] Egypt's Constitution of 2014, art. 93 *International agreements and conventions.*

[618] OHCHR, View Country visits of Special Procedures of the Human Rights Council since 1998. Information Retrieved at: https://spinternet.ohchr.org/ViewCountryVisits.aspx?visitType=all&Lang=en

[619] Yesfet, B. *The politics of Human Rights in Egypt and Jordan*, cit.

[620] Gasser Abdel Razek is one of the director of the Egyptian Initiative for Personal Rights, one of the most important nongovernmental organization for human rights protection in Egypt. He was imprisoned later in November this year with the accuse of terrorism. He was released the 3rd of December 2020. Information retrieved at: Mefreh, A., *Gli attivisti presi in ostaggio dal regime egiziano,* Middle East Eye, UK, Internazionale, n°1338 anno 28 (the original transcript can be found at pp.22-23); Masr, M. *Una campagna repressiva,* Internazionale, n°1338 anno 28Egitto (the original transcript can be found at p.23).

[621] Karim Ennarah is one of the director of the Egyptian Initiative for Personal Rights and was charged with the same accuse as Gasser Abdel Razek (See note 620 above).

Mohamed[622], Patrick[623] or Giulio are the ones that the Egyptian Government of Abdel Fattah al-Sisi defines as the perpetrators of *« […] criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury or taking of hostages, with the purpose to provoke a state of terror in the general public »*[624] and as such, treated as terrorists according to what is stated by the anti-terrorism law.

2. GIULIO REGENI: FROM FIUMICELLO TO EL CAIRO

«Claudio: "The 27 of January at 14:30, I was working in my office at home while I received a phone call. It was the Italian consul[625] from El Cairo telling me that Giulio didn't show up at a meeting he would have had the night of the 25th with a friend of his and, from that moment, no one knew where he was."[626]»

«Paola: "I was around. It was the 27, a special day. I had been at the Shoah memorial in Trieste the whole morning. It was precisely for this reason that Claudio did not call me right after hearing from the consul. He actually called me but didn't say anything. Nevertheless, his voice was so strange that I realized something was wrong."[627]»

Claudio Regeni and Paola Deffendi are the parents of Giulio Regeni, an Italian student brutally tortured and murdered in El Cairo at the beginning of 2016. Born in Fiumicello, a little village in the north-east of Italy, Giulio Regeni has been described by his family as an eager to learn since the very young age[628]. This characteristic, who Giulio

[622] Mohamed Basheer is one of the director of the Egyptian Initiative for Personal Rights and was charged with the same accuse as Gasser Abdel Razek (See note 620 above).
[623] Patrick Zaki is 29-year old student at the University of Bologna, previously researcher at the Egyptian Initiative for Personal Rights on the field of gender studies, who was arrested back in February 2020 for having spread fake news, promoting non-authorized protests. These charges are still to be proved whilst Patrick is still in jail. Information retrieved at: Masr, M. *Una campagna repressiva,* Internazionale, n°1338 anno 28, Egitto.
[624] On the basis of the Chapter VII of the Charter of the United Nations, United Nation Security Council Resolution 1566, 2004.
[625] At that time of Giulio's disappearance, the Italian consul in Egypt was Alessandra Tognonato.
[626] Deffendi P., Regeni C., *Giulio fa cose*, con Alessandra Ballerini, Milano, Feltrinelli, 2020. The original transcript of the interview can be found at page 27.
[627] The transcript reported outlines the exact words and thoughts that Giulio's parents expressed when informed of his disappearance. Information retrieved at: Deffendi P., Regeni C., *Giulio fa cose*, cit. (The original transcript of the interview can be found at page 27.)
[628] *« […] Giulio understood clearly […] that the only cure to fear was knowledge».* Information retrieved at: Deffendi P., Regeni C., *Giulio fa cose,* cit. p. 18 (The original transcript of the

maintained throughout his adolescence, took him to the hallways of the United World College in New Mexico, where he studied and graduated. It was throughout this experience that he turned his attention towards inequalities and the importance of universal human rights, which later will take him to begin his research program in Egypt[629].

Although Giulio graduated in the United States, as his parents underlined, he has always possessed a deep attachment to Europe and his status of European citizen, based on the concept of being part of a community in which a wider set of democratic values, including equality and solidarity, were ensured[630]. This belief brought Giulio to complete his academic studies first at the University of Leeds- where he graduated in Arabic and politics - and subsequently to Cambridge, where he continued his academic career with a doctorate in Development Studies[631]. As part of his doctorate, Giulio left the United Kingdom for El Cairo in order to develop a research project guided by Maha Abdelrahman,[632] his teacher supervisor. Giulio's field of interest was directly related to Egypt's independent trade unions, established right after the Arab spring in 2011[633]. Independent trade unions were perceived as the only element in the Egyptian political structure that could, according to Giulio's and his supervisor's theory, lead the country towards a real democratization process[634]. In order to develop the research project on the

interview can be found at page 18); *«Giulio never stopped. He did not want to cease to improve his knowledge».* Information retrieved at: Deffendi P., Regeni C., *Giulio fa cose,* cit. p. 10. (The original transcript of the interview can be found at page 10); *« […] to Giulio, the idea of contamination was very clear. The constant need of questioning ourselves in order to become better people, better citizens».* Information retrieved at: Deffendi P., Regeni C., *Giulio fa cose,* cit. p.16 (The original transcript of the interview can be found at page 16).

[629] Deffendi P., Regeni C., *Giulio fa cose*, cit. p. 21 (The original transcript of the interview can be found at page 21).

[630]The transcript reported outlines the exact words and thoughts that Giulio's parents expressed when describing Giulio's beliefs about Europe and being European: *«[…] Giulio often said: I am European. We believe he said so, because he truly trusted solidarity and equality, values which, at least originally, where at the heart of Europe».* Deffendi P., Regeni C., *Giulio fa cose*, cit., p.18 (The original transcript of the interview can be found at page 18).

[631] Deffendi P., Regeni C., *Giulio fa cose*, cit., p.25.

[632] Maha Abdelrahman is a member of the Centre of Development Studies in Cambridge, also working as Professor of Sociology at the American University of El Cairo. Abdelrahman has also conducted research for organisations such as UNICEF or OXFAM. Information Retrieved at: https://www.polis.cam.ac.uk/Staff_and_Students/dr-maha-abdelrahman

[633] Walsh D., *Why was an Italian Graduates Student Tortured and Murdered in Egypt*, The New York Times, August 15, 2017.

[634] Ibid.

Egyptian trade unions, Giulio moved to El Cairo in 2015, but it must be underlined that this was not the first time that he went to Egypt. Yet in 2013, when protests against the president Mohamed Morsi spread within the country, Giulio was completing an internship project on industrial development at the United Nations[635].

The day of his disappearance, Giulio was going to a birthday party with some friends.

It was the 5th anniversary of the Egyptian Revolution[636] and the atmosphere was tense in the city, since the National Security was patrolling extensively the area, in order to avoid any possible forthcoming protest[637]. Giulio should have met Gennaro Gervasio[638] at the *Gad*, a cafè in *Tahrir* Square before going to the party[639]. Gennaro waited for Giulio, but he never reached the cafè in which they should have met that evening. After several attempts to contact Giulio at the phone but without success, Gennaro decided to warn the Italian Embassy about his disappearance. The reason for which Mr. Gervasio decided to directly contact the Embassy, was mainly related to the confession that Giulio had made him some weeks earlier. Giulio claimed of having been photographed by a woman the previous month[640], whilst attending a trade-union activists meeting[641] and after that day, he confessed to have started fearing for his own security.

One week after the day in which Giulio disappeared, the Italian Foreign Ministry published an official statement in relation to Giulio's unknown conditions:

---

[635] Deffendi P., Regeni C., *Giulio fa cose*, cit. p. 25.

[636] The Egyptian Revolution was characterized by a wave of protests that took place in the country. This uprising in Egypt was part of a wider set of protests globally known as the Arab Spring. Protests broke as a consequence of decades of political stagnation, repressive regimes and citizens demand for social justice and universal human rights recognition. (Yafet, B. The politics of Human Rights in Egypt and Jordan, 2015, London, Lynne Rienner Publishers).

[637] Bonini C., Foschini G., 2016, *Giulio, i giorni della paura e la verità del testimone: "Preso da agenti in borghese proprio davanti alla metro",* Repubblica. Retrieved at: https://www.repubblica.it/esteri/2016/02/12/news/giulio_i_giorni_della_paura_e_la_verita_del_testimone_preso_da_agenti_in_borghese_proprio_davanti_alla_metro_-133248679/

[638] Gennaro Gervasio was an italian friend of Giulio's who was teaching at the British University in El Cairo.

[639] The transcript of the message that Giulio sent to Gennaro before meeting him is the following: *«Hi Gennaro. I'm leaving home now. See you at Gad in Tahrir Square around 8 pm. Then we'll take a cab together».* (The original transcript of the message can be found within the article). Information retrieved at: Bonini C., Foschini G., *Giulio, i giorni della paura e la verità del testimone: "Preso da agenti in borghese proprio davanti alla metro",* cit.

[640] Ibid.

[641] Walsh D., *Why was an Italian Graduates Student Tortured and Murdered in Egypt,* cit.

« The Italian Embassy in El Cairo and the Foreign Ministry are closely following with great concern the fate of Giulio Regeni, a 28-year-old student who has mysteriously disappeared on the evening of 25 January in the centre of the Egyptian capital.

Foreign Minister Paolo Gentiloni recently had a telephone conversation with his Egyptian counterpart Sameh Shoukry, to whom he asked to do his utmost to trace the Italian student and provide any possible information on his condition.

The Embassy in El Cairo immediately activated direct communication channels from the very first hours after his disappearance and coordinated activities with all the competent Egyptian Authorities. It is now awaiting information on the dynamic of the disappearance. The Embassy and the Ministry are keeping close contacts with Giulio's parents. » [642]

The disappearance of Giulio soon developed an international resonance which triggered the mobilization of all of his friends by means of a social media campaign to find him or at least retrieve any information about his conditions with the hashtag "#whereisgiulio[643]".

The 25th of January Giulio Regeni was taken at the entrance of the *Doqqi* underground, tortured for days and then brutally murdered. The dead body of Giulio was found on the 3rd of February, along the Alexandria Desert Highway, "the desert road", in western Cairo. As his parents as well as the Italian and international press reported, the proofs that Giulio had been tortured before dying were unquestionable[644]. Paola, Giulio's mother, after seeing her son's martyred body, declared: *«I've recognized him from the tip of his*

[642] Official Statement, Italian Foreign Minister, *Egypt: Italian Giulio Regeni mysteriously vanished in Cairo*, 31/01/2016. Retrieved at: https://www.esteri.it/mae/it/sala_stampa/archivionotizie/comunicati/2016/01/vicenda-del-connazionale-giulio.html

[643] The ANSA online website, 02/02/2016. Retrieved at: https://twitter.com/Ansa_Fvg/status/694457507591356416

[644] Bonini C., Foschini G., *Nove Giorni al Cairo: tortura e omicidio di Giulio Regeni,* 2017, Episode 3, min. 1.13 – 1.37 and min. 2.30 – 2.33. Retrieved at: https://www.amnesty.it/campagne/verita-giulio-regeni/ ; Bonini C., Foschini G., *Giulio, i giorni della paura e la verità del testimone: "Preso da agenti in borghese proprio davanti alla metro"*, cit.

nose, I don't want to tell you what they have done to him. I've seen the whole world's evil on his face. Giulio wasn't on war he was just a researcher and they tortured him »[645].
Notwithstanding the evident signs of tortures, which made Giulio not easy to be recognized, and the fact that he did not have any documents proving his identity when he was found dead[646], the Egyptian authorities succeeded in recognizing his body once found, reason for which they were able to directly inform the Italian Ambassador[647] of the tragic discovery.
After Giulio was found dead, the Egyptian National Security officers stated that the young Italian researcher had died in a car crush. Nevertheless, this statement did not convince the Italian Government, which, as a consequence, decided to open an investigation for murder against unknow persons, whilst in the following days the Egyptian Minister of Interior Affairs, Magdy Abd El Ghaffar, declared[648] that the Egyptian Government had no responsibility whatsoever in relation to the death of Giulio Regeni.
From the moment in which the body of Giulio was found, the pursuit of truth will be nothing but fair; rather, it will be winding and hampered by misdirected investigation which long after Giulio's tragic death, will perhaps take the direction towards justice.

3. THE REACTIONS AND DIPLOMATIC ACTIONS IMPLEMENTED BY THE ITALIAN GOVERNMENT AGAINST THE EGYPTIAN STATE IN RELATION TO THE CASE OF GIULIO REGENI

Nine days after Giulio Regeni's disappearance, his body was found behind a wall which divides the road that, through the desert, takes from El Cairo to Alexandria. It was the 3rd of February 2016. The day after this tragic discovery, the Rome Public Prosecutor decided

[645] Deffendi P., Regeni C., *Giulio fa cose*, cit., p 148 (The original transcript of the interview can be found at page 148).
[646] Ibid., p 146. (The original transcript of the interview can be found at page 146).
[647] At the time of the murder of Giulio Regeni, the Italian Ambassador was Maurizio Massari.
[648] The transcript of the statement made by the Ministry of Interior Affairs is the following: *«The Egyptian Government does not have any responsibility in relation to Regeni's death. Regeni has never been arrested and never has been the target of any investigation. There is no connection with the Egyptian National Security».* Information retrieved at: Deffendi P., Regeni C. *Giulio fa cose*, cit., p 148 (The original transcript of the interview can be found at page 148.).

to initiate a long and complicated inquiry directed by the assistant district attorney, Sergio Colaiocco and Giuseppe Pignatone, the prosecutor[649].

This, can be considered as the the first legal action taken by the Italian Government on behalf of Giulio Regeni on the basis of the international customary right guaranteed to a State to act, whenever its citizen is abducted, tortured and eventually murdered in a foreign country, as in this case[650]. If on the one hand the Italian police was willing to collaborate with the Egyptian National Security[651]in order to find the truth, on the other the hostility and perpetrated misdirection were the main strategies applied by the local security service in order to find the "truth"[652]. Hostility towards collaboration and misdirection were the reasons for which the Italian Government decided to call back the ambassador[653] from El Cairo the 8th of April 2016. Suspending diplomatic relations with Egypt, was the first diplomatic action that the Italian Government took with the aim of finding the real truth.

As previously advanced, the Egyptian National Security tried to build the truth in order to close the case of Giulio as fast as possible. It must be noted that the first attempt of misdirect the investigation, was revealed by the autopsy made by the forensic in Rome, which contrary to what had previously been established by the Egyptian counterpart, stating that Giulio did not die as a consequence to a car crush, but for a spinal cord injury instead[654].

---

[649] Deffendi P., Regeni C., *Giulio fa cose*, cit. p.147.

[650] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del procuratore della Repubblica f.f. presso il Tribunale di Roma, Michele Prestipino Giarritta, e del sostituto procuratore presso il Tribunale di Roma, Sergio Colaiocco*, Seduta n.1 di Martedì 17 dicembre 2019, Resoconto Stenografico, p.3.

[651] The Italian team of agents left for El Cairo the 5th of February.

[652] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del procuratore della Repubblica f.f. presso il Tribunale di Roma, Michele Prestipino Giarritta, e del sostituto procuratore presso il Tribunale di Roma, Sergio Colaiocco*, cit., pp. 10-20.

[653]A State could decide to call back the ambassador in a foreign country whereas victim of illicit perpetrated by the foreign State in which the Embassy is located. This unilateral act can be defined as a reprisal, inovoked as a consequence to the illicit suffered. Information Retrieve at: Curti Gialdino, C., *Lineamenti di diritto diplomatico e consolare*, Torino, Giappichelli, 2015, pp.73-79.

[654] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del procuratore della Repubblica f.f. presso il Tribunale di Roma, Michele Prestipino Giarritta, e del sostituto procuratore presso il Tribunale di Roma, Sergio Colaiocco*, cit., p. 9.

The second attempt made by the Egyptian authorities to misdirect the investigation, was related to the declaration of an Egyptian engineer who bore false witness, stating that he had seen a fight between Giulio and an unidentified foreigner[655] behind the Italian Embassy on January 24th. This declaration was verified and defined as false by the Italian counterpart after the analysis of Giulio's phone records. However, what can be considered as the worst attempt to build a wrong truth and which encouraged the Italian Government to temporarily suspend diplomatic relations with Egypt, was related to the murder of five people after a gunfighting with the National Security[656]. The alleged connection with Giulio was found once the Egyptian security searched the victims' domains, in which documents and credit cards of Giulio were found[657]. Notwithstanding the acknowledgements of the facts, the Italian prosecution team decided to further analyse the elements gathered by the National Security investigation and in the end, they proved the groundlessness of the Egyptian *mise-en-scène.* Further proof of the *mise-en-scène*, was the decision taken by the Egyptian prosecution to charge, a year later, two agents that took part in the firefighting for murder, although a trial in order to punish them will never be initiated[658].

On the ground of the perpetrated unlawful behaviour of the Egyptian National Security body, the Italian Government decided to call the Italian ambassador in El Cairo back to Italy. Nevertheless, as stated by Sergio Colaiocco, after the decision of the Italian Government to temporarily suspend any diplomatic relation, the Egyptian authorities would be more willing to cooperate in order to find the truth[659]. However, in 2017[660]the new ambassador, Giampaolo Cantini[661] took office in the Italian Embassy of El Cairo. The reason for which the Italian Government decided to restore diplomatic relations with Egypt, was mainly due to the necessity to find the truth, although this choice was actually perceived by the Cairene authorities as a restoration of relations, with the aim of loosening tensions among the two countries. As stated by the district attorney Sergio Colaiocco,

[655] Ibid., p. 15.
[656] Ibid., p.16.
[657] Ibid.
[658] Ibid., p17.
[659] Ibid.
[660] The Italian Ambassador will return to El Cairo the 14th of August 2017.
[661] Giampaolo Cantini was named as the new Italian Ambassador in Egypt the 11th of May 2016.

from that time on, no further relevant information will be given by the Egyptian Government in order to find the real truth[662].

Relevant for the investigation was the action taken by the Italian Government as a consequence to the Egyptian reluctancy to cooperate: the *"Emendamento Regeni",* approved by the Parliament the 30th of July 2016[663]. According to this decision, the Italian Government committed not to provide Egypt with any F-16 replacement – tools considered as essential for the Egyptian military Air Force[664]. Critics emerged within the members of the Italian parliament[665], defining the decision as unreasonable. Moreover, the entry into force of the *"Emendamento Regeni"* was also harshly criticised by the Egyptian Minister of Foreign Affairs, who defined this decision as damaging for the economic relations between the two countries.[666] Decision which was instead welcomed by the supporters of the pursuit of truth in relation to the murder of Giulio[667].

It must be noted that Egypt and Italy have always had very strict economic relations.[668]In point of fact, the same can be argued in relation to the military connection, which saw the Italian counterpart being a major exporter of weapons in Egypt at least since 2015[669]. The

---

[662] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del procuratore della Repubblica f.f. presso il Tribunale di Roma, Michele Prestipino Giarritta, e del sostituto procuratore presso il Tribunale di Roma, Sergio Colaiocco*, cit. p. 29

[663] Esposito, M., *Mossa del Senato su caso Regeni, stop ricambi F-16 a Egitto,* 29 Giungo 2016, ANSA. Retrieved at: https://www.ansa.it/sito/notizie/politica/2016/06/29/ansa-mossa-senato-su-caso-regeni-stop-ricambi-f-16-a-egitto_31d49338-5019-4538-b2a6-aa3e73f53a18.html

[664] Deffendi, P., Regeni, C., *Giulio fa cose*, cit., p.156.

[665] La Repubblica, *Emendamento Regeni, l'Egitto avverte l'Italia:"Impatti negativi nella cooperazione fra i due paesi"*, 06 Luglio 2016. Retrieved at: https://www.repubblica.it/esteri/2016/07/06/news/egitto_italia_ricambi_f16-143578700/ ; Il sole 24 ore, *Emendamento Regeni, l'Egitto risponde all'Italia: «Insoddisfatti per decisione su forniture F16»*, 30 giungo 2016, Retrieved at: https://st.ilsole24ore.com/art/notizie/2016-06-30/egitto-emendamento-regeni-insoddisfatti-la-decisione-senato-ricambi-f16--181812.shtml?uuid=AD3Ay8l&refresh_ce=1; Esposito M., *Mossa del Senato su caso Regeni, stop ricambi F-16 a Egitto,* ANSA, 29 June 2016. Retrieved at: https://www.ansa.it/sito/notizie/politica/2016/06/29/ansa-mossa-senato-su-caso-regeni-stop-ricambi-f-16-a-egitto_31d49338-5019-4538-b2a6-aa3e73f53a18.html ; Esposito M., *Mossa del Senato su caso Regeni, stop ricambi F-16 a Egitto,* cit.

[666] La Repubblica, *Emendamento Regeni, l'Egitto avverte l'Italia:"Impatti negativi nella cooperazione fra i due paesi"*, cit.

[667] Deffendi P., Regeni C., *Giulio fa cose*, cit., p.156.

[668] Information Retrieved at: https://www.infomercatiesteri.it/scambi_commerciali.php?id_paesi=101

[669] Declich, L. *Giulio Regeni le verità ignorate. La dittatura di al-Sisi e i rapporti tra Italia ed Egitto,* cit. p.103-4.

decision to approve the *"Emendamento Regeni"* did have an impact on the Egyptian Government, although not so relevant as the Italian Government whished it would be.

Two years will pass before Italy decide to take a further diplomatic step against the Egyptian lack of cooperation. As a matter of fact, at the end of November 2018[670], the Italian President of the Chamber of Deputies, Roberto Fico decided, once more, to temporarily suspend any contact or relation with Egypt. In an interview at Rai 1, the Italian national television, he stated that: *«with great regret, the Chamber of Deputies will suspend diplomatic relations with the Egyptian Parliament until significant steps in the investigation will be taken […] ».*[671] The inconclusive official visits between Italian political figures and Egyptian members of the parliament, which took place throughout the whole year, triggered the Italian Government to make this decision. Consequently, the day after the interruption of the formal relation with Egypt, the Italian Foreign Minister[672] met the Egyptian ambassador[673] in Rome, with the aim of encouraging the Egyptian Government to improve the cooperation with the Italian counterpart[674].

A crucial move made by the Italian Government in order to find the truth about Giulio's tragic murder consisted in the establishment of the Italian Parliamentary Commission of Inquiry on the death of Giulio Regeni. With 379 positive votes against 54 abstained, the Chamber of Deputies approved[675] the proposals[676] of establishing a Commission in order to investigate and urge the institutions to work relentlessly. Moreover, the establishment of the Commission also aimed at sending an indirect message related to the Italian relentlessness towards the pursuit of the truth.

---

[670] Deffendi, P., Regeni, C., *Giulio fa cose*, cit., p.186. (the original transcript can be found at p.186)

[671] Ibid.

[672] At the time, the Italian Foreign Minister was Enzo Moavero Milanesi.

[673] The Egyptian Ambassdor in Rome at the time was Hisham Badr.

[674] Ibid.

[675] Camera dei Deputati, Archivio di Prima Pagina, *Approvata la proposta di Istituzione di un Commissione parlamentare di inchiesta sulla morte di Giulio Regeni,* 30 Aprile 2019. Available at: https://www.camera.it/leg18/1132?shadow_primapagina=8953

[676] Camera dei Deputati, Proposta di Inchiesta Parlamentare, 25 Febbraio 2019, Doc. XXII, n.36. Retrieved at: https://www.camera.it/leg18/491?idLegislatura=18&categoria=022&tipologiaDoc=documento&numero=036&doc=intero ; Camera dei Deputati, Proposta di Inchiesta Parlamentare, 28 Maggio 2018, Doc. XXII, n.17. Retrieved at: https://documenti.camera.it/_dati/leg18/lavori/documentiparlamentari/IndiceETesti/022/017/INTERO.pdf

While the analysis that has been carried out so far is strictly related to the actions taken by the Italian Government after the discovery of Giulio's barbaric murder, it must be noted that the activities carried out by Italian diplomats working at the Italian Embassy in El Cairo are also to be considered as actions perpetrated by the Italian Government and for this reason, needs to be reported here.

In the week that preceeded the discovery of Giulio's death, the Italian Embassy implemented consular and diplomatic actions in order to provide assistance to an Italian citizen in danger abroad. Maurizio Massari, the Italian Ambassador in El Cairo from 2013 to April 2016, when informed of Giulio's disappearance, tried to contact the Ministry of Foreign Affairs[677] as well as the Ministry of Military Production of the Arab Republic of Egypt[678], with whom he had, in previous circumstances, established a rather strict diplomatic relation[679]. No information was ever retrieved by the Ambassador because of the reluctancy and complete deniability showed by the Egyptian institutions since the first hours of Giulio's disappearance[680]. Reporting to the local police Giulio's disappearance as well as looking for him in any hospital or morgue, was part of the effort of the Italian diplomatic system to provide assistance to a foreigner in danger[681].

Notwithstanding the fact that the whole Egyptian security body[682] denied any implication with Giulio's disappearance, the governmental institutions procrastinated any direct contact with the Ambassador until the 2nd of February, when he succeeded in meeting the Ministry of Internal Affairs[683], just a day before Giulio was found. If on the one hand the reluctancy to cooperate perpetrated by the Egyptian authorities was rather undeniable, on the other it can be underlined how essential it was the effort of the Italian diplomatic

[677] The Ministry of Foreign Affairs to whom we refer is Sameh Shoukry.
[678] The Ministry of Military Production Arab Republic of Egypt to whom we refer is Sedki Sohby.
[679] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del Rappresentante permanente d'Italia presso L'Unione europea, già Ambasciatore d'Italia al Cairo dal 2013 al 2016, Maurizio Massari,* Seduta n.5 di Giovedì 27 febbraio 2020, Resoconto Stenografico, p.5
[680] Ibid.
[681] Ibid.
[682] There are three different security agencies in Egypt: the National Security Agency, the police and the Military Intelligence. Declich, L. *Giulio Regeni le verità ignorate. La dittatura di al-Sisi e i rapporti tra Italia ed Egitto,* cit. p 6.
[683] Ibid., p8.; The Ministry of Internal Affairs at the time was Magdy Abd El Ghafar.

members in El Cairo; diplomatic effort that, in other circumstances, succeeded in saving lives of Italian citizens threatened by the Egyptian regime[684].

The crucial work of the Italian ambassador in El Cairo was, as previously underlined, suspended in 2016 as a consequence of the Egyptian Government uncooperative behaviour. Nevertheless, it was in August 2017 that Ambassador Cantini took office in El-Cairo, despite the several critics over the Government's decision to restore diplomatic relations with El Cairo[685]. Although to some extent criticism can be understood, it must be noted that the effort of Ambassador Cantini has to be considered as essential. The presence of a diplomatic representative in Egypt was crucial in order to acquire reports of several interviews made by the Egyptian authorities and CCTV footage of the underground in which Giulio was presumably kidnapped – although damaged and incomplete.[686] The importance of diplomacy, especially in relation to consular and diplomatic activities was essential, and still is a key element in relation to the investigation. Notwithstanding the critics over the Government decision to restore relations with Egypt by sending the Ambassador back to El Cairo, it must be recalled that, as stated by Elisabetta Belloni, the Secretary General of the Ministry of Foreign Affairs and International Cooperation: *«Whenever the communication is interrupted, it is difficult to continue. This is the nature of diplomacy»*[687].

The efforts made by the Italian diplomatic agents in Egypt and by the Italian detectives have been essential, but it must be noted that the Italian Government has barely taken a position in relation to the severe illicit suffered. As a matter of fact, the Italian counterpart

---

[684] David Sansonetti is an Italian journalist arrested by the Egyptian police in 2014 and charged with espionage. Il Manifesto, *David Sansonetti: "Così sono stato arrestato e accusato di spionaggio al Cairo" – Egitto. La disavventura di un giornalista freelance italiano durante le manifestazioni contro il regime militare nell'anniversario della "rivoluzione" di piazza Tahrir,* 4 Febbraio 2014. Retrieved at: https://ilmanifesto.it/david-sansonetti-cosi-sono-stato-arrestato-e-accusato-di-spionaggio-al-cairo/ . D.G. is an Italian guy who was arbitrarily arrested for 27 days in Egypt. Vio E., *Egitto: cosa ho visto nei miei 27 giorni di prigionia,* 7 March 2016, Vice. Information Retrieved at: https://www.vice.com/it/article/3kmazw/italiano-egitto-carceri-abusi-regeni

[685] Deffendi, P., Regeni, C., *Giulio fa cose*, cit., p.165.

[686] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione dell'Ambasciatore d'Italia al Cairo, Giampaolo Cantini,* Seduta n.7 di Giovedì 5 marzo 2020, Resoconto Stenografico.

[687] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del Segretario generale del Ministero degli affari esteri e della cooperazione internazionale, ambasciatrice Elisabetta Belloni,* Seduta n.4 di Martedì 18 febbraio 2020. Resoconto Stenografico, p.24.

has never formally invoked Egypt international responsibility for the illicit perpetrated against an Italian citizen abroad, nor has ever asked for any compensation as a consequence of the illicit[688]. After 5 long years of misdirection, lack of cooperation and inefficiency by the Egyptian institutions, it seems that the path to justice has barely started yet.

4. THE EUROPEAN UNION – EGYPT RELATION: EUROPEAN PARLIAMENT RESOLUTIONS AS A CONSEQUENCE OF EGYPT'S HUMAN RIGHTS VIOLATIONS

The barbaric murder of Giulio had, as stated in the previous subchapter, attracted global attention: from the international press to nongovernmental organizations and international institutions. Petitions, articles, hashtags and resolutions were, and still are, some of the means globally applied in order to pressure the Egyptian Government to investigate fairly on the murder of Giulio as well as to raise awareness over the human rights violations that Egyptian citizens have been suffering every single day at least since 2014[689].

The European Union is, among many institutional bodies, one of the most influential and has, with Egypt, a long-lasting bond. Several are the economic agreements[690]and financial policies that bind the European Union to Egypt, such as the Association Agreement[691] – in force since 2004[692] – and the European Neighbourhood Policy – which has, among its

---

[688] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale,* cit. p.13.

[689]Report of the Working Group on the Universal Periodic Review, Egypt, A/HRC/28/16 and Addendum. Retrieved at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/040/55/PDF/G1504055.pdf?OpenElement

[690] European Commission official Website. Information Retrieved at: https://ec.europa.eu/trade/policy/countries-and-regions/countries/egypt/

[691] Council of the European Union, *Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part,* O.J.L304/38, 21 April 2004, 2004/635/EC. Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2004.304.01.0038.01.ENG&toc=OJ%3AL%3A2004%3A304%3ATOC#L_2004304EN.01003901

[692] It must be noted that the Association Agreement between the European Union and Egypt has an essential role in stabilizing the relationships between the counterparts. As stated at article 2: *«Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human right has set out in the*

aims, the implementation of democracy and human rights in developing countries. The European Union, at least since 2013, has been considering Egypt as *« […] a pivotal country in the southern Mediterranean, an important trade partner of the EU and a major recipient of EU aid»*[693] despite having recognized the several human rights violations perpetrated by the Egyptian authorities. As a matter of fact, in order to limit any internal repression against Egyptian citizen, the European Union with a resolution approved in 2013[694], decided to suspend any export license of equipment that could be used by the Egyptian security forces in order to implement internal repressions.

Since the Government of Abdel Fattah al-Sisi was established in 2014, the European Union on the one hand outlined the importance of Egypt as an international actor, whilst on the other expressed concerns for the severe human rights violations perpetrated within the country. The support expressed by the European Institutions towards the newly established Egyptian Government in 2013, and the good wishes for a democratic transition with reforms and human rights implementations[695] , seemed to have diminished as a consequence to the deterioration of democratic principles which had never been concretely applied. Nevertheless, the European Union has denounced the undemocratic methods applied by the Egyptian Government by means of yearly resolutions, reminding to the Cairene authorities their national and international commitments. In point of fact, concern was expressed by the European authorities in 2015, soliciting Egypt to respect international and domestic obligations as well as cooperating with the United Nations human rights mechanisms, welcoming the Special Rapporteurs still pending visits.[696]

The tragic murder of Giulio Regeni in Egypt was condemned by the European Parliament which, in a resolution issued in 2016, stated that: *«The European Parliament […] Strongly condemns the torture and assassination under suspicious circumstances of EU citizen Giulio Regeni, […] Calls on the Egyptian authorities to provide the Italian*

Universal Declaration on Human Rights, which guides their internal and international policy and constitutes an essential element of this Agreement».

[693] European Parliament, *Resolution of 12 September 2013 on the situation of Egypt*, (2013/2820 (RSP))

[694] European Parliament, *Resolution of 4 July 2013 on arms exports: implementation of Council Common Position 2008/944/CFSP*, (2013/2657(RSP)).

[695] European Parliament, *Resolution of 12 September 2013 on the situation in Egypt* cit.

[696] European Parliament, *Resolution of 15 January 2015 on the situation in Egypt*, (2014/3017 (RSP)).

authorities with all the documents and information necessary […] »[697]In the present resolution, strong emphasis was placed on reiterating the commitments of Egypt on respecting human rights - principles enshrined within the Egyptian Constitutions – and again, great concern was expressed in relation to the unceasing disappearances, tortures practices and arbitrarily detentions.[698]

Egypt, only last year executed – by applying the death penalty about 110 people with at least 39 at risk of being executed anytime soon.[699]The Egyptian Government censorship campaign on nongovernmental organizations promoting human rights has increased since 2013, with the closure of many of them and the arrest of thousands of activists.[700] Moreover, it must be noted that since 2013, after the abolition of the democratically elected Government of Mohamed Morsi, around 3.000 people have been included in the terrorists list, 60.000 have been detained and about 3.000 have been sentenced to death[701]. In relation to the murder of Giulio Regeni, it must be underlined that the European Parliament cannot apply any strict or binding measure in order to oblige Egypt to find the truth, although it could underline how, especially in light of the aforementioned Association Agreement, democratic principles and respect of fundamental human rights should be at the basis of the European Union Member States and Egypt[702]. Moreover, the European Union institutions can distance from the Egyptian authorities' uncooperative behaviour and solicit other member states to urge Egypt to cooperate with the Italian authorities in order to guarantee justice[703].

---

[697] European Parliament, *Resolution of 10 March 2016 on Egypt, notably the case of Giulio Regeni*, (2016/2608 (RSP)).
[698] Ibid.
[699] European Parliament, *Resolution of 18 December 2020 on the deteriorating situation of human rights in Egypt, in particular the case of the activists of the Egyptian Initiative of Personal Rights (EIPR)*, cit.
[700] Ibid.
[701] European Palriament*, Resolution of 18 December 2020 on the deteriorating situation of human rights in Egypt, in particular the case of te activists of the Egyptian Initiative for Personal Rights (EIPR)*, (2020/2912(RSP)).
[702] Council of the European Union, *Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, cit.* art.2.
[703] European Parliament, *Resolution of 18 December 2020 on the deteriorating situation of human rights in Egypt, in particular the case of the activists of the Egyptian Initiative for Personal Right*s, cit.

In point of fact, as it happened in 2013, resolutions limiting the economic relations between a third country and the European Union could be applied, as a consequence to the relevant violations of human rights mandatory principles.

Nowadays the European Union plays a key role in monitoring the political, social and economic conditions of Egypt and as a consequence should continue monitoring and soliciting the Cairene authorities to investigate, in order to give justice to the mercilessly murder of a European citizen, since *« […] the search for the truth about the kidnapping, torture and murder of a European citizen does not belong to the family alone, but that it is an imperative duty for national and EU institutions […] »*[704]

5. THE INTERNATIONAL RESPONSIBILITY OF EGYPT FOR THE HUMAN RIGHTS VIOLATIONS IN RELATION TO THE MURDER OF GIULIO REGENI: POTENTIAL SCENARIOS AVAILABLE TO THE ITALIAN GOVERNMENT IN ORDER TO IMPLEMENT THE MECHANISM OF DIPLOMATIC PROTECTION

The analysis of the circumstances in which the Italian researcher Giulio Regeni was murdered in 2016, has been essential in order to understand the general framework within which the crime occurred. As a matter of fact, providing a general framework has been necessary in order to take the analysis further, through the study of the possible legal scenarios that could be undertaken in order to find the truth. Accordingly, the first option that will be outlined, is related to the criminal procedure that the Rome Public Prosecutor could initiate against the individuals responsible for Giulio's death[705]. The second possible option is instead related to the international procedure that could be carried out by the Italian Government against the Egyptian State, beginning with a negotiation and ending, in case of reluctancy showed by the Egyptian State to collaborate in order to solve

[704] Ibid.

[705] Mazzeschi, R.P., *Il caso Regeni: alcuni profili di diritto Internazionale,* 2018. Retrieved at: http://romatrepress.uniroma3.it/repository/0/pdf/cd9f0a40-d162-450c-9a41-9952024f9dd1.pdf ; Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione di Maria Buscemi e Federica Violi, esperte di diritto internazionale,* Seduta n.10 di Martedì 19 maggio 2020 ; Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale,* Seduta n. 23 di Martedì 1 dicembre 2020.

the case, with the recourse to the International Court of Justice[706]. The last legal procedure available is instead related to the civil trial that could be initiated by the family of Giulio Regeni. In fact, Giulio Regeni's family could appeal to the Italian Courts against the Egyptian Government for the illicit suffered. However, it must be pointed out that this last option could be more difficult to implement as a consequence to the immunity that the Egyptian State could invoke in front of the Italian jurisdiction[707].

It is undeniable that the Egyptian State in relation to the case in point violated two essential principles of the international customary law: the duty to protect any foreigner within the country from any offence or threat[708] and the protection of human rights, precisely the *jus cogens* principles against torture and arbitrary deprivation of life[709]. In relation to the violation of the principle which prohibits the resort to torture, it must be noted that Egypt signed and ratified international treaties that prohibit the resort to this practice, such as: the International Covenant on Civil and Political Rights, which at article 7 establish the prohibition of torture, and the African Charter of Human and Peoples' Rights, which contains the same principle at article 4.

Notwithstanding the importance of these international treaties – which, as stated by article 93 of the Egyptian Constitution are to be considered as part of the internal law of the country - the one at which we mostly make reference in this precise circumstance, is instead the Convention Against Torture,[710] signed and ratified by both Egypt and Italy. In relation to the Regeni's case, it has been proved that before dying, Giulio Regeni had in fact been brutally tortured[711]. In relation to the violation of the international law against torture, two different circumstances could then be considered: the first one would be case

---

[706] Ibid; Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, art. 30 (1).

[707] Ibid.

[708] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale,* cit. p.5.

[709] Mazzeschi, R.P., *Il caso Regeni: alcuni profili di diritto Internazionale*, cit.

[710] Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, cit.

[711] Bonini C., Foschini G., *Giulio, i giorni della paura e la verità del testimone: "Preso da agenti in borghese proprio davanti alla metro",* cit.; Bonini C., Foschini G., *Nove Giorni al Cairo: tortura e omicidio di Giulio Regeni,* 2017, Episode 2, La Repubblica, min. 3.30 – 3.37. Retrieved at: https://www.amnesty.it/campagne/verita-giulio-regeni/ ; Bonini C., Foschini G *Nove Giorni al Cairo: tortura e omicidio di Giulio Regeni,* cit. Episode 3, min. 1.13 – 1.37 and min. 2.30 – 2.33.

in which the violation had been carried out directly by Egyptian States' organs, whilst the second would be related to the case in which the violation had been perpetrated by private entities[712]. In relation to the first potential circumstance, as stated by article 4 (1) of the International Law Commission Responsibility of States for International Wrongful Acts: *«The conduct of any State organ shall be considered an act of that State under international law [...] »[713];* therefore, the Egyptian State will be held directly responsible for the act of torture. The State will be defined as directly responsible even in the case in which the organs: *«exceeds its authority or contravenes instructions»*[714]. Moreover, the conduct of an individual or group of people should be considered as an act of a State also whether *«the person or group of persons is acting under the direction or control of the State»[715]* or *«the person or group of persons is exercising elements of the governmental authority in the absence of default of the official authorities»[716].*

In the case in which the violation of the law against torture had been perpetrated by private entities, the State would be held internationally responsible for not having implemented its duty to prevent any act of torture against individuals. With regard to this circumstance, article 2 (1) of the Convention Against Torture states that State parties of the Convention have the obligation to establish effective measures, aiming at preventing any act of torture or violation of human rights in general within the Country's borders[717]. Furthermore, the Convention Against Torture established that whenever a case of torture takes place, the State has the duty[718] to open a prompt, effective and impartial investigation.[719] It must be noted that in case the victim of the torture is a foreigner, the State within which the illicit

[712] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione di Maria Buscemi e Federica Violi, esperte di diritto internazionale,* cit. pp. 5-6.
[713] United Nations General Assembly, Resolution A/56/59 (Vol.I) / Corr. 4, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 12 December 2001, art. 4 (1).
[714] United Nations General Assembly resolution 56/83 of 12 December 2001 corrected by document A/56/49 (Vol.I)/Corr.4, International Law Commission, *Responsibility of States for International Wrongful Acts*, art.7.
[715] Ibid., art. 8.
[716] Ibid., art. 9.
[717] Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, cit, art.2 (1).
[718] In relation to the duty of investigate whenever a violation of international human rights treaties happend, see also: Bestagno, *Diritti umani e impunità: Obblighi positivi degli Stati in materia penale*, Milano, Vita e Pensiero, 2003.
[719] Ibid., art. 12.

takes place has the duty to cooperate by providing assistance in the investigation process[720].On the basis of the elements given, the international responsibility of the Egyptian State for the illicit acts committed, whether it had been carried out by State organs or not, is undeniable.

The fact that after 5 years from the murder of Giulio still no individual responsible has been found, triggers a further responsibility over the Egyptian State: the lack of cooperation. As a matter of fact, the article contained in the Convention Against Torture, which define the legal obligation of cooperation as well as the legal obligation of conducting a prompt and effective investigation, can easily be defined as violated by the Egyptian counterpart[721]. In relation to this conclusion, two important clarifications must be made. The first one is related to the right to invoke the Egyptian international responsibility for having committed the illicit. It must be noted that, having the country violated two principles part of *jus cogens*, any State at international level, on the basis of the violations suffered, could appeal to the right to initiate a legal procedure against Egypt[722]. The second element that needs to be clarified, is related to the current stage of the investigation. Despite the fact that so far there has not been any trial in relation to the murder of Giulio Regeni, it must be noted that according to the preliminary investigations, five agents of the Egyptian National Security are suspected of being responsible for the acts of tortures and for the murder of Giulio[723]. Although it is true that no trial has been carried out, what emerged from the preliminary investigations – based on proved evidence - underlines the likeliness of a direct responsibility of the Egyptian State[724]. Moreover, in case the agents of the National Security accused to be responsible for the acts of torture inflicted to Giulio resulted not to be responsible, the fact that Giulio was secretly controlled by the Egyptian police and that in the day in which he was kidnapped

[720] Ibid., art. 9.
[721] Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, cit, art.9 and art.12.
[722] Mazzeschi, R.P., *Il caso Regeni: alcuni profili di diritto Internazionale*, cit. p.226.
[723] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del Procuratore della Repubblica presso il Tribunale di Roma, Michele Prestipino Giarritta, e del Sostituto Procuratore, Sergio Colaiocco,* Seduta n.24 di Giovedì 10 dicembre 2020, Resoconto Stenografico, p. 4-5.
[724] Ibid.

the police was patrolling intensively every corner of El Cairo, prevention to the acts of torture had and could be implemented, meaning that article 2 (a) was also violated.[725]

Considering the proved international wrongful acts perpetrated by the Egyptian Government against an Italian citizen, it could be argued that Italy, as a sovereign State was, and still is, entitled to invoke the mechanism of diplomatic protection. Resorting to this method would mean to formally accuse the Egyptian counterpart of being internationally responsible of having committed an illicit.

Before deepening the analysis in relation to the legal scenarios that the Italian Government could undertake in order to implement the mechanism of diplomatic protection, I believe it is essential to understand whether Italy has the duty to invoke diplomatic protection on behalf of its citizen murdered abroad, especially as a consequence of severe human rights violations suffered[726]. Despite the evolution that this mechanism is undergoing[727], it still applies to the will of the State. However, it must be observed that the already cited International Law Commission Draft Articles on Diplomatic Protection of 2006, at article 19 (a) clearly stated that: *« […] diplomatic protection […] should: give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred »*[728].

According to this statement, it is worth reporting here the Italian proposal in relation to this article[729]. In 2006, while the Draft Articles on Diplomatic Protection was being written, several Governments members of the United Nations gave their propositions

[725] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione di Maria Buscemi e Federica Violi, esperte di diritto internazionale,* cit, p. 8; Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura*, Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale,* cit., p. 7.

[726] Mazzeschi, R.P., *Il caso Regeni: alcuni profili di diritto Internazionale*, cit. p.229.

[727] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale*, cit., p. 14.

[728] United Nations General Assembly, *International Law Commission, Draft Articles on Diplomatic Protection*, Supplement No. 10, A/61/10, vol. II, 2006, art. 19 (a).

[729] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale*, cit., p.16; Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione di Maria Buscemi e Federica Violi, esperte di diritto internazionale*, cit., p.17.

about the contents of the project[730]. Accordingly, the Italian Government proposed a rather revolutionary disposal in relation to the invocation of the mechanism of diplomatic protection, which contained a duty to act on behalf of the citizen injured abroad in case of grave breach suffered. Among the examples of grave breach, there were references to the practices of torture and to the deprivation of the right to life[731]. Moreover, the Italian Government underlined how, in case the citizen injured would have been unable to bring a claim to an international court, its State of nationality would have been obliged to provide the enforcement of the mechanism of diplomatic protection on his or her behalf[732].

On the ground of what has been analysed so far, we can assert that the approach of the Italian Government, at least in 2006, was definitely oriented towards an extensive interpretation of the mechanism of diplomatic protection as a right that could become a duty, in specific circumstances, for States, whenever the individual interests would be severely violated[733]. The Italian approach to the resort to diplomatic protection, at least since the day in which Giulio Regeni was brutally murdered, seems not to follow the same principle expressed in 2006. Nevertheless, a legal obligation has never been introduced in the Draft Articles, allowing States to decide whether to implement diplomatic protection or not. In light of this, the Italian Government can still choose whether to act by means of diplomatic protection or not.

Implementing diplomatic protection does not mean to destroy any diplomatic relation between the two countries for, as stated by article 33 of the Charter of the United Nations*: « The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice […] »*[734]. As a matter of fact, the Italian Government could try to solve the international

[730] United Nations, International Law Commission, General Documents, A/CN.4/561 + Add.1-2, *Diplomatic Protection: Comments and observations received from Governments,* 2006.
[731] Ibid.
[732] Ibid.
[733] Mazzeschi, R.P., *Il caso Regeni: alcuni profili di diritto Internazionale*, cit. pp. 229-30.
[734] United Nations General Assembly, *Charter of the United Nations*, singed and ratified on 26 June 1945, in San Francisco and entered into force on 24 October 1945, art 33.

dispute with Egypt towards the invocation of peaceful means[735], although this path, provided by article 33 of the Charter of the United Nations could potentially be less effective in the quest of finding the truth.

5.1 THE LEGAL SCENARIO PROVIDED BY THE INVOCATION OF ARTICLE 30 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

As previously stated, both Italy and Egypt are member states of the Convention Against Torture and, as a consequence, both could appeal to the Convention's mechanism available to States whereas individuals had suffered from severe violations of the principles enshrined. The mechanism to which we are referring to, is contained within article 30 of the Convention Against Torture and, resorting to it, would entail the possibility to apply three different procedures in order to solve the dispute[736]: negotiation, arbitration and eventually, the resort to the International Court of Justice[737] whenever an act of torture has been inflicted to an individual.

The procedure that a State begins, once it has invoked article 30 of the Convention Against Torture sees, as first scenario, a round of negotiations between the States involved[738]. The aim of the negotiation process is basically focused on allowing the counterparts to communicate and, possibly, to establish an independent body entitled to conduct an investigation so to analyse the evidence gathered, and eventually make a decision. The body which could be established is the Independent International

[735] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, Seduta n.10 di Martedì 19 maggio 2020, cit. p. 11.
[736] Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea, *Sull'attualità e l'importanza degli obblighi derivanti dalla Convenzione delle Nazioni Unite contro la tortura del 1984,* Roma, 16 dicembre 2020. Information retrieved at: http://www.sidi-isil.org/wp-content/uploads/2020/12/Sull-attualita-e-importanza-obblighi-Convenzione-ONU-contro-la-tortura-del-1984.Cons_.Dir_.SIDI_.16.12.pdf
[737] Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, cit., art. 30 (1).
[738] Ibid.

Commission of Inquiry[739]. The investigation that will be carried out by the Commission will consist in resolutions and guidelines aiming at providing non-binding recommendations in order to find the truth. It has to be considered that, especially in relation to the reluctancy and obstructive behaviour that has been perpetrated by the Egyptian counterpart so far, it could be rather unlikely that openness to negotiate and to establish a Commission of Inquiry would be shown by the Cairene authorities. In this case in point, the Italian counterpart could, as stated by the second paragraph of article 30 aforementioned, submit the case to arbitration. The arbitration judgement - unlike the Independent International Commission of Inquiry- will have a binding effect on both the counterparts[740]. However, if unsurprisingly the counterpart sued – Egypt in this case – should again show reluctancy in agreeing on submitting the dispute to arbitration, both States would have the possibility to have access to the last option provided by article 30 of the Convention Against Torture: the resort to the International Court of Justice[741]. It must be noted that in this last step of the procedure, the defendant State could not object[742] to the international procedure and will be obliged to submit to the Court judgement[743]. Moreover, the judgement of the Court – which will decide in relation to the direct responsibility of the State sued -, will be binding for both counterparts.

---

[739] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale*, cit. pp. 14-25; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entered into force 26 June 1987, art.30.

[740] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entered into force 26 June 1987, art.30 (1).

[741] Ibid.

[742] It must be noted that Egyptian Government, according to the declaration made on the 22nd July 1957 by the Ministry of the Foreign Affairs of the Republic of Egypt at the time, in accordance with the article 36 (2) of the Statute of the International Court of Justice, the Government of Egypt declared to accept as compulsory ipso facto the jurisdiction of the International Court in all legal disputes. For what concerns the Italian Government, on 25th November 2014 the Minister of Foreign Affairs and International Cooperation at the time, declared that in accordance with the article 36 (2) of the Statute of the International Court of Justice, the Italian Government accepted as compulsory ipso facto the jurisdiction of the International Court of Justice. See article 35 (1) of the Statute of the International Court of justice and article 93 (1) of the Charter of the United Nations. Information Retrieved at: https://www.icj-cij.org/en/states-entitled-to-appear

[743] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione di Maria Buscemi e Federica Violi, esperte di diritto internazionale*, cit. p. 14.

Invoking article 30 of the Convention Against Torture in order to implement the mechanism of diplomatic protection, seems to be the most effective option that could be implemented by the Italian counterpart in order to punish the individuals responsible for the murder of Giulio Regeni[744]. However, it must be noted that, as explained in the previous chapter,[745] when referring to the preconditions necessary to implement diplomatic protection, two elements have to be previously fulfilled in order to allow the Italian Government to appeal to the International Court of Justice: the nationality of the victim has to be the one of the State invoking diplomatic protection – which in this case will be perpetrated by appealing to the International Court of Justice - and the principle of the prior exhaustion of local remedies has to be respected.

If on the one hand, for what concerns the first precondition related to the nationality of the individual, we can certainly argue that the principle has been respected, on the other the same cannot be argued in relation to the respect of the principle of the exhaustion of local remedies which, since it will entail the need to resort to the Egyptian courts, will instead not be fulfilled[746]. On this regard it must be argued that exceptions to the principle of the exhaustion of local remedies are listed[747] at article 15 of the International Law Commission Draft Articles on Diplomatic Protection. In relation to the case of Giulio's murder, it must be noted that applying the principle of local remedies will be ineffective since Egypt's local courts will be unlikely to provide a reasonable and effective redress[748] to the case and, especially after 5 years of inconclusive investigation, an undue delay in the remedial process[749] could not be excluded.

Although the invocation of article 30 of the Convention Against Torture appears to be the most effective method available to the Italian Government by means of diplomatic protection, it must be noted that other legal scenarios are equally possible.

---

[744] Ibid.

[745] See subchapters 2.1 at pp.20-28. available at pp.39-54 and 2.4 available at pg.

[746] Ibid.; Mazzeschi, P.R., *Esaurimento dei ricorsi interni e diritti umani,* Torino, 2004, pp. 139 – 146 and 171-194.

[747] United Nations General Assembly, *International Law Commission, Draft Articles on Diplomatic Protection*, 2006 cit., art. 15.

[748] United Nations General Assembly, International Law Commission, Draft Articles on Diplomatic Protection, Supplement No. 10, A/61/10, vol. II, 2006, art. 15 (a).

[749] Ibid., art. 15 (b).

5.2 ITALIAN DOMESTIC REMEDIES AVAILABLE TO PUNISH THE HUMAN RIGHTS VIOLATION PERPETRATED AGAINST GIULIO REGENI

If on the previous subchapter the legal scenario provided by article 30 of the Convention Against Torture has been described, in the following section a series of remedies contained within the Italian domestic legislation in order to solve the dispute will be provided.

The first mechanism that will be analysed is related to the criminal procedure that the Rome Public Prosecutor could initiate against the individuals believed to be responsible for the tortures and the murder of Giulio Regeni[750]. It must be underlined that: if on the one hand the establishment of a legal action by the Rome public prosecutor could be defined as an effective method in order to provide justice and potentially solve the case, on the other it must be noted how the presence of several obstacles, especially in relation to the absentia of the defendants and to the invocation of immunity[751] by the Egyptian individuals held responsible of the illicit whereas a trial will be initiated, characterize this option and could, possibly, prevent the procedure to be implemented.

By analysing the issue related to the immunity, - the *ratione materiae* immunity in this case[752]- which is guaranteed to State officers in relation to the actions perpetrated while on duty, it must be argued that it will prevent State officers from being subjected to a foreign jurisdiction for illicit acts perpetrated in their country while on duty[753]. However, exceptions to the principle of immunity could be accepted whereas, as in this case, it will be proved that State officers had committed severe violations of principles part of the

[750] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale*, cit., p. 10.

[751] Dinstein, Y., *Diplomatic Immunity from Jurisdiction Ratione Materiae*, in International and Comparative Law Quarterly, 1966, p. 79; Keitner, C., *Foreign Official Immunity and the Baseline Problem*, in Fordham Law Review, 2011, Vol. 80, p. 605-621.

[752] Foakes, J., *The Position of Heads of State and Senior Officials in International Law,* Oxford International Law Library, 2014.

[753] Simonetti, A., Ciclo XXIX, A.A.2013/2016, *L'immunità funzionale degli organi statali della giurisdizione straniera,* Dottorato di ricerca in scienze giuridiche, Università di Firenze, p.25

international customary law[754]. Consequently, it must be argued that, in the case in which it will be proved that the individuals responsible for the acts of tortures inflicted to an Italian citizen - which eventually led to his death - were carried out by officers part of the Egyptian State, two chances are left to the defendant counterpart: the extradition of the individual held responsible of the illicit towards the Italian State, in order to be subjected to trial, or the invocation of the *aut dedere aut iudicare*[755] clause, which will entail the inapplicability of the *ratione materiae* immunity, with a further initiation of a trial within the Egyptian courts[756].

It is essential to highlight how the preliminary investigation [757] that has been conducted so far by the Rome Public Prosecutor, shed light over several questions related to the case and provided important proofs and evidence that could be defined as crucial in order to find the individuals responsible of Giulio's murder. New testimonies, facts and names emerged, strengthening the argument that has always been supported by the Italian detectives: the direct involvement of the Egyptian security body[758]. General Tariq Sabir, Colonel Usham Helmi, Army Major Magdi Sharif and Colonel Athar Kamel are the four officers that the Italian detectives believe to be directly involved with the abduction, tortures and murder of Giulio[759]. The declarations of five new witnesses have been essential in order to add new pieces to a puzzle that has always been perceived as rather impossible to solve.

---

[754] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale*, cit., p. 12.

[755] This clause is part of the customary international law and contained in international treaties, such as: The Geneva Conventions of 1949, at Annex I and in the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, cit., art. 7.

[756] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione di Maria Buscemi e Federica Violi, esperte di diritto internazionale*, cit. p. 10.

[757] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del Procuratore della Repubblica presso il Tribunale di Roma, Michele Prestipino Giarritta, e del Sostituto Procuratore, Sergio Colaiocco,* Seduta n.24 di Giovedì 10 dicembre 2020, Resoconto Stenografico, p. 4. Moreover, it must be outlined that the preliminary investigation began the 5th of February 2016 and ended the 10thof December 2020.

[758] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del procuratore della Repubblica f.f. presso il Tribunale di Roma, Michele Prestipino Giarritta, e del sostituto procuratore presso il Tribunale di Roma, Sergio Colaiocco*, cit.

[759] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del Procuratore della Repubblica presso il Tribunale di Roma, Michele Prestipino Giarritta, e del Sostituto Procuratore, Sergio Colaiocco,* Seduta n. 24, cit, p. 11; Arcuri C., *Giulio Regeni ricatto di Stato,* Castelvecchi, Roma, 2020, p. 122.

The new testimonies reported the involvement of Giulio's flatmate, the attorney El Sayed[760]who, as stated by a witness, was contacted by some agents of the Egyptian security services whom, whilst Giulio flied back to Italy for Christmas holidays, searched his room with the collaboration of El Sayed, who never informed Giulio about this event[761]. It was also stated that El Sayed from that moment on, began to inform the Egyptian security services about Giulio's moves[762]. These additional elements, added to the investigation, could prove that Giulio was well known to the Egyptian police, dismantling the declarations made by both the Ministry of the Interior, Magdy Abd El Ghafar, and by the Ministry of Foreign Affairs, Sameh Shoukry,[763] some days later the discovery of Giulio's dead body. Consequently, this circumstance could endorse the analysis that has been carried out in the previous subchapter, proving as existent the violation of article 9 of the Convention Against Torture, which entails the duty of cooperation of the country in which tortures has been carried out. The denial of cooperation from the Egyptian counterpart and the fact that the Cairene authorities knew who Giulio was, is proved by the spy net that developed around Giulio while he was living in El Cairo, which included: his flatmate, a friend from Cambridge[764] and the trade unionist with whom Giulio spent most of the time[765], in order to retrieve essential information for his research programme.

Further testimonies gathered by the Italian detectives, strengthen the hypothesis of the Egyptian security body involvement within the case. In point of fact, during the preliminary investigation, a witness reported to the Italian authorities of having heard a conversation between an officer of the Egyptian National Security and an agent of the Kenya Security Service[766] later in August 2017. During this meeting, the officer of the National Security was recognized as Army Major Sharif, who was talking about the case of Giulio. The officer gave to the agent many details about Giulio, declaring that the

---

[760] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del Procuratore della Repubblica presso il Tribunale di Roma, Michele Prestipino Giarritta, e del Sostituto Procuratore, Sergio Colaiocco,* Seduta n. 24, pp. 18-19.
[761] Ibid.
[762] Ibid.
[763] Deffendi, P., Regeni, C., *Giulio fa cose,* cit. pp. 148-149.
[764] The friend from Cambridge to whom we refer is Noura Wahby.
[765] Arcuri C., *Giulio Regeni ricatto di Stato,* cit., p. 23 and p.35.
[766] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del Procuratore della Repubblica presso il Tribunale di Roma, Michele Prestipino Giarritta, e del Sostituto Procuratore, Sergio Colaiocco,* Seduta n. 24, cit., pp. 19-21.

Egyptian Security service believed he could be a spy, reason for which he was kidnapped, tortured and murdered[767]. As for the previous declaration, this last one endorses an even more direct responsibility and involvement of the Egyptian Government in this tragic case.

Nevertheless, the further elements discovered by the Italian detectives that prove both the involvement of the Egyptian security body and the tortures inflicted to Giulio Regeni, could be defined as essential in case the Italian Government would act by means of diplomatic protection claiming the Egyptian international responsibility.

As a matter of fact, two further testimonies were gathered, which appears to be astonishing: the testimony of a man who was arrested at the *Doqqi* police station whilst Giulio arrived, and the testimony of another man who used to work in the place in which Giulio was tortured and murdered[768].

In relation to the first declaration, the witness - whose name has not been reported in order to safeguard his life- declared to have seen a young man in his mid-twenties, wearing the same clothes that Giulio had in the picture given to the news, who apparently was asking for help in a foreign language, possibly in Italian[769]. The declaration continues by adding that a person there, who had been arrested as Giulio, tried to help him to translate what Giulio was saying, but was hit by an officer who claimed that Giulio spoke Arabic[770]. This element has to be considered as essential since it proves, once more, the fact that Giulio was controlled by the Egyptian security services. As a matter of fact, the only proof of Giulio talking Arabic was the recording of his meeting with Mohammed Abdallah, the trade unionist who reported Giulio to the police[771].

The last declaration that has been gathered by the Italian detectives throughout the preliminary investigation, is related to Lazougly, the place in which Giulio passed the last days of his life. Lazougly is the headquarter of the National Security, and it is located

[767] Ibid.; Arcuri, C., *Giulio Regeni ricatto di Stato,* cit., p. 123.
[768] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del Procuratore della Repubblica presso il Tribunale di Roma, Michele Prestipino Giarritta, e del Sostituto Procuratore, Sergio Colaiocco,* Seduta n. 24, cit., pp., pp.21-22.
[769] Ibid.
[770] Ibid.
[771] Deffendi, P., Regeni, C., *Giulio fa cose,* cit. pp. 158-159.

within the Ministry of Interior[772]. This is the place in which foreigners suspected of perpetrating illegal activities in the country – which for the Egyptian jurisdiction could simply consist in being part of a nongovernmental organization, as already explained in the previous chapters – are generally taken and questioned[773]. The several methods of questioning followed though, are all connected by one element: torture. The witness declared to have seen in the office 13 of the headquarter of the Ministry of the Interior the iron chains used to handcuff the half-naked body of Giulio, who in the meantime was babbling something in Italian after having been hit several times[774].

Notwithstanding the fact that proofs are still missing due to the reluctancy to cooperate perpetrated by the Egyptian authorities still, after 5 years,[775] it can be asserted that the Italian Government, owning a consistent number of proofs, could act on behalf of a citizen murdered abroad, although the chances to succeed on developing a trial within the Italian courts against the individuals responsible is to be considered as difficult, on the basis of the potential issues related to the absentia of the defendants in front of the courts as well as the refusal of the Egyptian Government to concede the extradition of its citizens.

The second remedy enshrined within the domestic Italian legislation that will be outlined, concerns with the civil trial that the family of Giulio Regeni could undertake in front of the Italian national courts against the Egyptian State[776]. Consequently, the civil trial could be a potential option to be taken, although it would be aimed at receiving a reparation for the loss suffered by the family, rather than prosecute the responsible[777]. Nevertheless, it could be, in any case, an incentive for the pursuit of truth, despite the several obstacles that it would entail.

---

[772] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del Procuratore della Repubblica presso il Tribunale di Roma, Michele Prestipino Giarritta, e del Sostituto Procuratore, Sergio Colaiocco,* Seduta n. 24, cit., p. 22.

[773] Ibid.

[774] Ibid.

[775] It must be noted that in the hearing of the *Commissione Parlamentare d'Inchiesta* on 10 December 2020 p. 14 cited above, the assistant district attorney Sergio Colaiocco stated that the Italian authorities presented 4 letters rogatory containing 64 questions and only 25 of which have been answered by the counterpart. On the contrary, the Italian authorities recieved 2 letters rogatory containing 11 questions which were all answered by the Italian counterpart.

[776] Mazzeschi, R.P., *Il caso Regeni: alcuni profili di diritto Internazionale*, cit. p 230.

[777] Ibid.

The first obstruction to the development of this domestic legal procedure relates to the immunity that the Egyptian State could invoke in front of the Italian jurisdiction[778], on the basis of the *par in parem non habet iudicium*[779] principle enshrined by the international customary law[780]. In relation to this issue, the Italian judges' expertise to judge the illicit committed by the Egyptian counterpart will also be questioned. In relation to the Italian judges' knowledge to judge the illicit, reference to the Bruxelles Convention of 1968[781] should be made, in order to prove the competence of the Italian prosecutors on judging the case. However, in case the wrongful actions perpetrated by the Egyptian State organs would be proved to be carried out within full institutional authority, the Convention could not be applied[782]. A further solution to the issue of the Italian judge's expertise in providing a right sentence could be solved by invoking article 5 (3) of the Bruxelles Convention of 1968, which states the right to conduct the trial *« […] in the courts for the place where the harmful event occurred* »[783]. Considering that the harmful event had direct consequences in Italy, having the tragic death of Giulio dramatically affected his family, applying this article could be reasonable[784], although such an extensive interpretation could not be easily supported by the Italian[785] and European[786] jurisdictions. As far as the invocation of the State immunity is concerned, this right could be overruled by proving that the Egyptian counterpart had violated two jus cogens

[778] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale*, cit., p. 12;
[779] Sinagra, A., Bargiacchi, P., *Lezioni di diritto internazionale pubblico,* Milano, Giuffré, 2019.
[780] Principle which importance have been reaffirmed in the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 at article 5 which states that: *«A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention».* Nevertheless, it must be recalled that the Convention has not enetered into force yet.
[781] *1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, Consolidated Version CF 498Y0126(01), O.J.L. 299, 31/12/1972 P. 0032 – 0042, sections 2,3,4 Title II.
[782] Mazzeschi, R.P., *Il caso Regeni: alcuni profili di diritto Internazionale*, cit. p 231.
[783] *1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, cit. art. 5(3).
[784] Ibid., 232.
[785] See Italian Courts judgements: Cass., sezioni unite, 28 ottobre 2015, n.21946 and Cass., sezioni unite, 28 ottobre 2015, n.21947.
[786] See European Courts judgements: European Court of Justice, 16 January 2014, judgement (Fourth Chamber), C-45/13, *Kainz c. Pantherwerke A.G.*

principles[787]. In this regard, the Italian jurisdiction could also use the *Ferrini judgement*[788] as an example to state that immunity from the legal trial procedure of a country could not be guaranteed in case of severe violations of human rights perpetrated by a foreign State[789].

5.3 A MENTION TO ARTICLE 21 OF THE ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONAL WRONGFUL ACTS AND AN OVERVIEW OF THE INTERNATIONAL SCENARIOS THAT CANNOT BE IMPLEMENTED IN ORDER TO PROVIDE JUSTICE TO GIULIO REGENI

Before concluding the analysis of the potential scenarios available to provide justice to the case of Giulio, a mention to the last legal option needs to be made.
The option just mentioned relates to article 21 of the Draft Articles on Responsibility of States for International Wrongful Acts[790]. This article enshrines the right of a State, victim of an international wrongful act, to take a countermeasure against the State responsible. Furthermore, as a consequence to the unlawful act suffered, there are several forms of reparations[791] that will be guaranteed to the counterpart – which in this precise circumstance will be represented by the Italian Government - by the international law, such as: a formal apology[792], a monetary compensation[793] or even the permanent

[787] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale*, cit., p. 13; Mazzeschi R.P., *Il caso Regeni: alcuni profili di diritto Internazionale*, cit. p 227; Ronzitti N., *Caso Regeni, le vie del diritto per ottenere giustizia,* Affarinternazionali, 18 febbraio 2016;
[788] Cost. 22 ottobre 2014. n. 238
[789] Mazzeschi, R.P., *Il caso Regeni: alcuni profili di diritto Internazionale*, cit. p 233.
[790] United Nations General Assembly, *Draft Articles on Responsibility of States for internationally Wrongful Acts*, 2001, fifty-third session, (2001 YB, vol II, part two). Text corrected by document A/56/49 (vol. I) /Corr. 4.
[791] Ibid., art. 34.
[792] Which is contained in article 37 (2) of the hereabove mentioned *Draft Articles on Responsibility of States for internationally Wrongful Acts*, cit.
[793] Which is contained in article 36 of the hereabove mentioned *Draft Articles on Responsibility of States for internationally Wrongful Acts*, cit.

withdrawal of any diplomatic and economic relations[794] with the State responsible of the illicit. Nevertheless, in case the Italian Government would decide to invoke one of the hereabove cited forms of reparations, the objective to solve the case of Giulio and sentence the individuals responsible for his death could hardly be achieved. As a consequence, if on the one hand invoking article 21 would be important for Italy, as it would at least point out and denounce the Egyptian responsibility for having committed a wrongful act, on the other the individuals responsible for the murder of Giulio will never be persecuted.

Despite the many legal procedures that the Italian Government could undertake – both at a domestic and international level -, there are legal scenarios that must be excluded on the basis of the lack of legal recognition within the Egyptian jurisdiction. As a consequence, no resort to the regional courts, such as the European Court of Human Rights[795] nor to the African Court on Human and Peoples' Rights[796] could be implemented. Moreover, whereas the family of Giulio would decide to undertake a legal action against the Egyptian Government for the severe human rights violations suffered by their son, no resort to the Committee Against Torture[797] nor to the United Nations Human Rights Committee[798]could be made since, as previously outlined, Egypt did not recognize those two institutions within its legislation[799].

Before concluding the research of the remedies available in order to provide justice to Giulio Regeni, it must be argued how, to find the truth, the Italian Government should

---

[794] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale*, cit., p. 13; Mazzeschi R.P., *Il caso Regeni: alcuni profili di diritto Internazionale*, cit. p 227.

[795] Egypt is not part of the European Convention on Human Rights which, at article 19 establishes the European Court of Human Rights.

[796] Egypt did not ratify the Protocol on the Establishment of an African Court on Human and Peoples' Rights, adopted in Burkina Faso on 9 June 1998, which entered into force on 25 January 2004. Information retrieved at: https://www.african-court.org/wpafc/basic-information/

[797] Egypt did not sign nor ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which would allow the creation of of an independent international monitoring mechanim which which will prevent torture to be implemented by State organs, such as the Committee Against Torture. Information retrieve at: https://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx

[798] Egypt did not sign nor ratify the First Optional Protocol to the International Covenants on Civil and Political Rights, which establishes the right of individual complaint to the United Nations Human Rights Committee.

[799] Ibid., p. 234.

concretely act at an international level, as, for instance, did the Netherlands against Syria[800] for the severe human rights violations perpetrated by the latter. It must be noted that no international dispute has yet been implemented[801]and, undoubtedly, this reluctancy in taking a position shown by the Italian Government makes it even harder to initiate a procedure in order to guarantee justice.

Ultimately, it must be remembered that, although the absence of a bilateral agreement between Italy and Egypt regulating this circumstance could be perceived as an obstacle, the very fact that neither laws nor guidelines in case of dispute have never been established, the article 9 of the Convention Against Torture, imposing cooperation between States whenever a case of severe violation of the Convention happens, could definitely solve the *impasse*[802].

The analysis that has been carried out so far summarizes the whole series of judicial procedures that the Italian Government could apply in order to give justice to the inexplicable reasons for which an Italian young researcher was tortured and murdered at the beginning of 2016. It must be underlined that the pursuit of truth has not been easy or unhindered so far, and it could possibly become even more hampered in the future. However, this should not stop our government and legal entities from wanting to shed light over this case[803]. Being persistent in wanting to find the truth in relation to the case of Giulio could also be a turning point for thousands of Egyptians that every single day disappear, suffer from torture and are eventually murdered in complete silence as a consequence to the unlimited power of the Egyptian State officers.

---

[800] Jarrah, B., *The Netherlands' Action Against Syria: A New Path to Justice,* 22 September 2020, Human Rights Watch website. Retrieved at: https://www.hrw.org/news/2020/09/22/netherlands-action-against-syria-new-path-justice

[801] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale*, cit., p. 19.

[802] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione di Maria Buscemi e Federica Violi, esperte di diritto internazionale*, cit. p. 9.

[803] Arcuri, C., *Giulio Regeni ricatto di Stato,* cit., p. 122.

6. GIULIO REGENI: FIVE YEARS AFTER HIS DEATH

"Verità per Giulio Regeni"[804]. Truth is what Giulio's family is asking for. Truth is what Giulio's friends are asking for. Truth is what students, professors, scholars, and the whole society from Italy to Europe – and perhaps, from many other countries of the world - is asking for. After four years, five at the present date, some steps forward have been made, especially in relation to the investigation of the Rome public prosecutor, which started in El Cairo in February 2016.[805]

Although the Italian Government managed to move some steps forward in the pursuit of truth, it must be said that, from an international standpoint, governments positions and actions in relation to this tragic event have been very ambiguous, especially if we consider the fact that Egypt violated principles and laws that are shared by the international community, hitting to the core the basic principles that has shaped the international doctrine, especially in relation to human rights. For instance, in the case of the United Kingdom, it must be noted that no relevant support has ever been given by the University of Cambridge or the British Government authorities in relation to the investigation over Giulio's murder, starting from the detachment and uncooperative behaviour of Giulio's supervisor, Maha Abdelrahman, who, especially during the first stage of the investigation, was very unwilling to collaborate with the Italian detectives,[806] to the delegation of eleven British universities that in 2018 were sent to El Cairo in order to establish international campus to develop research programs in collaboration with Egypt[807], on the ground that : *« […] The British Council has 80 years of experience developing education partnerships with the government of Egypt, working to build ties between organisations here and in the UK to provide international opportunities for young people."»*[808]. Whether this should

[804] "Verità per Giulio Regeni" is the campaign launched by Amnesty International in order to find the truth about the murder of Giulio. Information retrieved at: https://www.amnesty.it/campagne/verita-giulio-regeni/

[805] Ibid.

[806] Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, *Audizione del procuratore della Repubblica f.f. presso il Tribunale di Roma, Michele Prestipino Giarritta, e del sostituto procuratore presso il Tribunale di Roma, Sergio Colaiocco,* cit, p. 14. and pp. 25-26.

[807] Universities Uk, *Uk Universities welcomed to Egypt,* 25 June 2018. Information retrieved at: https://www.universitiesuk.ac.uk/International/news/Pages/uk-universities-welcomed-to-Egypt.aspx (access date: 24/02/2021).

[808] Ibid.

be considered as a misstep[809] or not, what is clear is the little support and solidarity from the country in which Giulio was studying and for which was conducting a research. Nevertheless, the British Government is not the only one that seems to show little interest in relation to the human rights violations perpetrated by the Cairene authorities and to the case of Giulio. During the G7 in Biarritz, at which also the President Abdel Fattah al-Sisi took part, [810] an alliance with the French President Emmanuel Macron was established. Alliance that, at the end of last year, was strengthened by the Grand Cross of the Legion of Honor[811], provided to the Egyptian leader by the French President. The position taken by the French President over the human rights severe incessant violations perpetrated by the country of al-Sisi, seemed not so firm and definitely questionable, especially if we think about the case of Eric Lang, a French professor who in 2013 was beaten to death in an Egyptian prison after having been arrested under unclear circumstances and without any real evidence[812]. Despite the official Cairene reports stated that Lang died as a consequence of a fight with other prisoners, it must be noted that the mortal blow was proved to be given with an iron bar – tool that usually prisoners do not have access to[813]. The lack of a clear, firm and strong position from States' part of the international community against the severe human rights violations perpetrated by Egypt, can be perceived, to some extent, as a green light to keep with the same behaviour or at least, as a matter of no such severity. This can only result in the perpetration of a "dysfunctional" behaviour in relation to the commitments made in order to respect the principles that shaped the human rights regime. However, it must be reported that on 12 of March of this year in Geneva, 31 States[814] part of the United Nations have signed a joint declaration in

[809] Quinn, B., 2018, *British Universities criticised over pursuit of Egyptian links*, 22 August 2018, The Guardian. Retrieved at: https://www.theguardian.com/education/2018/aug/22/uk-colleges-accused-of-ignoring-human-rights-abuse-in-egypt
[810] Arcuri C., *Giulio Regeni ricatto di Stato,* cit., p. 128.
[811] Montefiori S., *Egitto, Al Sisi incassa anche la Legion d'Onore da Macron. La cerimonia «nascosta» dall'Eliseo,* 10 Dicembre 2020, Il Corriere della Sera. Retrieved at: https://www.corriere.it/esteri/20_dicembre_10/egitto-sisi-incassa-anche-legion-d-onore-cerimonia-nascosta-eliseo-17b0b558-3abc-11eb-a316-193bd0f16dd1.shtml (access date: 24/02/2021).
[812] Arcuri, C., *Giulio Regeni ricatto di Stato,* cit., p. 73; Kingsley P., *Egypt: Frenchman dies in police custody amid rising tide of xenofobia,* 18 September 2013, The Guardian. Retrieved at: https://www.theguardian.com/world/2013/sep/18/egypt-frenchman-dies-syria-morsi (access date: 24/02/2021)
[813] Arcuri, C., *Giulio Regeni ricatto di Stato,* cit., p. 73
[814] Finland, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Costa Rica, Czech Republic, Denmark, Estonia, France, Germany, Iceland, Ireland, Italy, Latvia,

which severe human rights violations perpetrated by the Egyptian Government have been reported and condemned[815]. This declaration[816] aims at denouncing the several restrictions on the right of freedom of expression and peaceful assembly. Moreover, the declaration denounces the violated rights, which should be guaranteed to civil society and political opposition as well as the use of anti-terrorism laws used to punish human rights activists[817]. This joint declaration, which follows the last one signed by 26 countries in 2014[818], can be considered as an essential step for the recognition of the severe violations perpetrated by the Cairene authorities.

Since the day in which the government of al-Sisi was established in 2014 to the present date, there has been at least 60.000 people – children included - arrested for having expressed an idea that could potentially be defined as threatening the stability of the regime[819]. Being arrested in Egypt means being kidnapped whilst walking on the street, or worse, from home, in the middle of the night by plainclothes police officers with no charges or search warrant whatsoever[820]. It also means to be unofficially taken to unknown locations in which no access to family or lawyers is allowed, and eventually being tortured[821]. This is what happened to Ibrahim Metwaly, a lawyer and activist who was arrested at the El Cairo airport before boarding for Geneva, where he should have met the United Nations Working Group on Enforced or Involuntary Disappearances to report the Egyptian situation in relation to this internationally condemned practice.[822]. He

---

Liechtenstein, Lithuania, Luxembourg, Montenegro, the Netherlands, North Macedonia, New Zealand, Norway, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, the United States of America.

[815] Human Rights Watch, *Condemnation of Egypt's Abuses at UN Rights Body,* 12 March 2021. Retrieved at: https://www.hrw.org/news/2021/03/12/condemnation-egypts-abuses-un-rights-body.

[816] United Nations Human Rights Council, 47th session, *General Debate Item 4: Human Rights Situations that require the Council's attention – Joint Statement on Egypt,* 21 March 2021. Retrieved at: https://cihrs.org/wp-content/uploads/2021/03/HRC46-JST-on-Egypt-item-4.pdf

[817] Ibid.

[818] Human Rights Watch, *UN Human Rights Council: Egypt Rights Abuses in Spotlight*, 7 March 2014. Retrieved at: https://www.refworld.org/docid/531f0f5b4.html

[819] Human Rights Watch, *Egypt: Torture Epidemic May Be Crime Against Humanity,* 6 September 2017. Retrieved at: https://www.hrw.org/news/2017/09/06/egypt-torture-epidemic-may-be-crime-against-humanity (access date: 25/02/2021)

[820] Arcuri C., *Giulio Regeni ricatto di Stato,* cit., p. 120.

[821] Ibid.

[822] Amnesty International, *Ibrahim Metwaly dev'essere rilasciato!,* Retrieved at: https://www.amnesty.it/appelli/lavvocato-diritti-umani-ibrahim-metwaly-devessere-rilasciato/ (access date: 25/02/2021).

was arrested, taken in one of the many unknown locations and tortured. Some weeks later, Ibrahim was charged with conspiracy against the Egyptian State but in the end released[823]. A very similar case is that of Ahmed Abdallah[824], the lawyer who follows the case of Giulio along with other advisors in Egypt[825]. Again, the case of Mohamed Lofty, leader of the nongovernmental organization Egyptian Commission for Rights and Freedom – joined by the lawyers of Giulio's family in Egypt – who was arrested in the middle of the night with his wife and children of 3 years old[826].

Arbitrary detention, which goes against the law and the protection of human rights, can be perpetrated for days, weeks or months in Egypt. It must be noted that according to the Egyptian jurisdiction, arbitrary detention is punished by the article 54 of the Egyptian Constitution as well as by article 40 of the Penal Code, with the only exception whereas the person will get caught while perpetrating the wrongful act. Nevertheless, article 40 and 41 of the new Counter-terrorism Law[827] allows officers to arrest people without any judicial warrant if suspected of having committed or planning to commit terroristic acts,[828] with the further possibility of pre-trial periods which can reach months or years[829]. Arbitrary detention is punished by the law, but it is also allowed at the same time, in order to prevent from terrorism and terrorists, although the definitions of what does terrorism and terrorist mean are vague and general. Arbitrary detention can, at worst, end with the disappearance of the person arrested. As a matter of fact, the phenomenon of enforced disappearances has become a common practice in the modern Egypt, with at least 2000 victims– mainly young adults[830]- since its beginning. Although this inhuman practice is nothing but unknown to the United Nations institutions, as since 2013 has been trying - in vain - to send special rapporteurs in order to verify the conditions of the country for

[823] Arcuri, C., *Giulio Regeni ricatto di Stato,* cit., p. 47.
[824] Il sole 24 ore, *Famiglia Regeni: arrestato nostro consulente in Egitto,* 26 aprile 2016. Retrieved at: https://st.ilsole24ore.com/art/mondo/2016-04-26/famiglia-regeni-arrestato-nostro-consulente-egitto-152808.shtml?uuid=ACFh3jFD (access date 25/02/2021).
[825] Arcuri, C., *Giulio Regeni ricatto di Stato,* cit., p. 47.
[826] Ibid.
[827] Law No. 94 of 2015.
[828] Amnesty International, *Egypt: "Officially, you do not exist" Disappeared and Tortured in the Name of Counter-Terrorism"* cit. p.57.
[829] Amnesty International, *Egypt: Gross Human Rights Violations Under President Al-Sisi Amnesty International Submission For The UN Universal Periodic Review 34th Session of the UPR Working Group, November 2019,* cit. pp. 10-11
[830] Ibid., p.94.

what concerns human rights, the Egyptian Government has always denied and continue to deny the existence of enforced disappearances, claiming that it was "an invention of the Muslim Brotherhood"[831].

Egypt, as previously stated, is a country that has a pivotal role for what concerns the management of migrations and the fight to Islamic terrorism, elements that are very sensitive to the Western societies, especially to the European Governments[832]. Europe, which since years has been the main target of terroristic attacks and migrations weaves. Nevertheless, Egypt has also to be considered as a strategic economic partner for the whole Europe, and especially, for countries like Italy and France, which business of weapons[833], energy[834] and software[835] is a great opportunity for their economies. On the basis of these extremely relevant elements, it comes naturally to think that being the bond between Europe and Egypt so strong and tested, finding a solution which would provide justice is necessary, for the good of all. For the good of people whose rights have been walked over, and for human rights which importance is essential, and which respect needs to be mandatory, as the treaties and covenants have stated.

The fact that, the path to provide justice to the case of Giulio will be hindered in the future, is undeniable, especially if the Italian Government will decide to declare Egypt as internationally responsible for the wrongful acts committed. It is also undeniable though that, the path for justice is in the hands of our government, which actions could give peace to Giulio, a young man, respectful of the world and of its diversities, who made of culture one of the pillars of his life. Whether Italy will act internationally against Egypt is all to

---

[831] Amnesty International, *Ibrahim Metwaly dev'essere rilasciato!,* cit.

[832] Arcuri, C., *Giulio Regeni ricatto di Stato,* cit., p. 116.

[833] It must be noted that notwithstanding the European Parliament Resolution of 4 July 2013 on arms exports: implementation of Council Common Position 2008/944/CFSP, (2013/2657(RSP)), which aimed at limiting the export of any weapon that could be used for internal repressions, both Italy and France continued to export tools that could be used for repression. Arcuri C., *Giulio Regeni ricatto di Stato,* cit., p. 75; Declich, L.*, Giulio Regeni le verità ignorate,* cit., p.104; *Presa Diretta*, (Riccardo Iacona, "La dittatura delle armi", Rai 3, 22 Marzo 2021); Francavilla, C., *Italy Should Stop Arms Transfer to Egypt – Deal Contravenes EU Pledge, Risks Facilitating Further Abuses,* Human Rights Watch, 16 June 2020. Retrieved at: https://www.hrw.org/news/2020/06/16/italy-should-stop-arms-transfer-egypt

[834] Eni, which is working in Egypt since 1954, in 2015 has discovered the biggest natural gas well of the Mediterranean which could, potentially, become the greatest source of gas at a global level. Declich L.*, Giulio Regeni le verità ignorate,* cit., pp. 86- 94.

[835] The French Government has been exporting technologies towards the Egyptian government which entails systems for telephone tapping and surveillance. Arcuri C., *Giulio Regeni ricatto di Stato,* cit., pp.75-77.

be seen, although chances to act do exist. To act will mean to value Giulio's tragic loss, Eric's murder, Patrick's arbitrary detention and thousands of Egyptians' lives sacrificed. To act will mean to respect the importance of universal human rights enshrined by several international documents and domestic jurisdictions. To act, will also mean to recall a primitive relationship of cause and effect, which in this precise circumstance will materialise into the rising of consequences whereas an illicit has been perpetrated.

CONCLUSIONS

When I first read about the story of Giulio Regeni, I recall asking myself one single question: why? I also remember of having felt the necessity to knew more about the story of Giulio Regeni, the reasons for which he was in Egypt as well as the reasons for which he had been kidnapped and later found dead. The necessity to talk about his story also emerged from the attachment that I felt to the way in which he looked at the world, to the necessity of being contaminated[836] by the unknown, which on the one hand frightens and on the other excites, and to the thirst for knowledge that allows us to discover new parts of ourselves, characteristic that shaped Giulio since his earliest years[837]. I remember that right after his disappearance, Giulio's name was everywhere in the news. Nevertheless, day by day, month by month, reading or hearing of his name became an occasional event, as if suddenly nothing has ever happened. But since something happened, something that cannot be forgotten, I felt the need to investigate, research and spread light over the murder of a young man whose sin lied within his curiosity and will to know, in order to be able to understand dynamics far from his own. Researching over an unsolved case of murder of an Italian citizen in a foreign country, made me understand that this dissertation would have had as main objective the study of the case of Giulio Regeni, but would have clearly began elsewhere. International law has, in fact, been the starting point of this project, with a narrow focus on one of the mechanisms that it provides: diplomatic protection.

Diplomatic protection is one of the milestones upon which the international legal system and international relations among States are based. This mechanism, which is well rooted in the past[838], allows a State whose citizen has been victim of an illicit abroad, to act on his behalf. The study of diplomatic protection began from its historical roots, with a clear reference to the legal aspects regulated by the international legal framework whereas an illicit is perpetrated by a State against another. While understanding which actions are considered as illegal within the international legal jurisdiction and as such, potentially

[836] Deffendi P., Regeni C., *Giulio fa cose*, con Alessandra Ballerini, Feltrinelli, 2020, p.16.
[837] Ibid., p.10.
[838] Verosta S., *History of the Law of Nations* from*, 1648 to 1815*, Oxford University Press, June 2007, p. 181; Amerasinghe C.F., The Historical Development of Internaitonal Law – Universal Aspects, Mohr Siebeck GmbH & Co. KG, 2001.

unleashing an international dispute between two sovereign States, preconditions necessary to invoke diplomatic protection has been included in the study. The principle of nationality of a State as well as the principle of the prior exhaustion of local remedies, are the necessary conditions for diplomatic protection to be applied. As a matter of fact, while analysing these two elements, an evolutionary character which affects both the preconditions has been detected. While according to the principle of nationality a more inclusive idea has been developed throughout the years, widening the range of action of diplomatic protection and enlarging the degree of safeguard guaranteed to the individuals, for what concerns the principle of the prior exhaustion of local remedies, a wide range of exceptions to its mandatory character have been approved by the international legal institutes, improving the degree of protection assured to people's victim of the illicit. From a first assessment over diplomatic protection, the guideline that drives the application of this tool seems to be the evolutionary character, which aims at providing the individual with a higher degree of protection and safeguard whenever suffering from an illicit abroad. This character is even more evident if we take into account the effect that the internal human rights regime's creation has had on diplomatic protection, which contributed to reconsider its orientation from a state-centric approach towards a more individual-centric one.

Moving to the second part of the dissertation, it can be underlined how it has been crucial the study of the international human rights regime, whose existence was formally recognized in 1948 with the establishment of the Universal Human Rights Declaration[839]. While on the one hand the recognition of the universal human rights regime influenced the mechanism of diplomatic protection, which existence began to be questioned, on the other it reinforced diplomatic protection's path towards a new individual-centric approach. Questioning the importance and necessity of diplomatic protection while other mechanisms - which can be directly accessed by individual whereas they have suffered from a severe illicit – exist, is an understandable consequence of the evolution of the international jurisdiction. Nevertheless, it has been proved that diplomatic protection is still a milestone of the international doctrine and as such, not to be considered as obsolete

[839] United Nations General Assembly, *Universal Human Rights Declaration,* signed in Paris on 10 December 1948, RES 217/A.

or less effective than other mechanisms. As a matter of fact, being the State, at the present date, still the most relevant institution in the international panorama, diplomatic protection must be considered as relevant as it used to be.

Providing a general framework over the functioning of this mechanism, together with the universal human rights regime has been necessary, in order to understand which tools had to be applied to provide a complete and deep analysis over the case of Giulio Regeni. In point of fact, diplomatic protection together with the international treaties and covenants safeguarding universal human rights, are to be considered as tools to be used in order to understand the context in which the murder of Giulio was carried out. The analysis conducted over international treaties and covenants has also been essential in order to understand which internationally regulated scenarios could be undertaken in order to provide justice to the memory of Giulio, to the memory of his family and friends and to the Italian State, which have been deprived from a bright, skilled and competent young man.

The overview of the conditions of human rights within the Middles East and more precisely, within Egypt, have characterized the opening lines of the last part of the dissertation, which highlighted how Egypt, notwithstanding its formal commitment to the respect of several treaties and conventions which should guarantee the protection of individuals' universal rights, continues to perpetrate a high degree of inconsistency within the internal legislation. Essentially, it has been proved that whilst internationally Egypt is obliged to respect human rights, at a domestic level, by means of emergency laws, it systematically violates the most basic set of rules that should be guaranteed to its citizens, to people. This analysis has been essential in order to understand the context in which the murder of Giulio Regeni took place: a context marked by human rights violations perpetrated by the Egyptian security bodies' power abuses, which can include arbitrary detention, practices of torture and enforced disappearances. Violations which, as it has

been reported, exacerbated since 2014[840] and had a severe escalation in 2015[841], as a consequence to the emergency Law n° 94 established by the Government of al-Sisi. The Government harsh action perpetrated in the last decade in Egypt has severely restricted, if not almost erased, the freedom of thought, expression and association.

This is the framework within which the murder of a young researcher has to be placed and, in light of this, in light of the severe violations perpetrated by a country which signed, ratified and included in its brand-new Constitution[842] human rights principles whilst continuing, day by day, to violate them under the eyes of the ostensible powerless international community, action should be taken. Action should, and actually could be taken by any State of the international community as well as by the Government directly affected. As a matter of fact, it has been noted that States part of the international community could rise a claim against Egypt for the *jus cogens* violations perpetrated, since these violations affected not only the State of nationality of the victim, but rather the international community as a whole. However, several are the juridical actions that could be taken by the Italian Government which, apart from an exceptional investigation which lasted five years, still have not acted in a significant way.

Diplomatic protection in relation to the case of Giulio Regeni is an option, perhaps the only one, that could guarantee a right judgement over the illicit committed in Egypt, whether it had been perpetrated by private civilians or by State officers. However, providing justice is in the hands of the Italian Government.

Is providing justice, in this specific circumstance in which severe human rights violations has been perpetrated, to be considered as a duty of the State or a right which could be either exercised or not?

As outlined in the dissertation, it is technically not to be considered as a duty, although the provisions contained in article 19 of the International Law Commission Draft Articles on Diplomatic Protection, enshrined several recommendations directed to States, which

---

[840] Report of the Working Group on the Universal Periodic Review, Egypt, A/HRC/28/16 and Addendum. Retrieved at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/040/55/PDF/G1504055.pdf?OpenElement ; Human Rights Watch, *UN Human Rights Council: Egypt Rights Abuses in Spotlight*, 7 March 2014. Retrieved at: https://www.refworld.org/docid/531f0f5b4.html

[841] Amnesty International, *Egypt: "Officially, you do not exist" Disappeared and Tortured in the Name of Counter-Terrorism"*, 13 July 2016, Index number: MDE 12/4368/2016. Retrieved at: https://www.amnesty.org/en/documents/mde12/4368/2016/en/

[842] The current Egyptian Constitution entered into force in 2014.

should: *« […] give consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred»*[843] together with the duty to: *« take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection […] »*[844]. Nonetheless, to analyse the case extensively and then act diplomatically whenever a severe violation has been perpetrated against one of its citizens abroad, it should be considered as a duty of the State. This is especially true for what concerns the position expressed by the Italian Government back in 2006, when governments part of the United Nations were asked to express their point over the Draft Articles on Diplomatic Protection of 2006. According to the proposal made by the Italian Government, a State should have had legal duty to protect the citizen injured abroad whereas the illicit suffered came from a grave breach of international laws[845]. The legal duty was defined as even more imperative, in the case in which the injured person was not able to resort to international courts or tribunals[846].

The reasons for which Giulio was killed are still unknown, although we all can draw some conclusions on the basis of the facts reported. The investigation carried out by the Italian security body has just reached the preliminary section but still, although facts do exist, the Government has not showed any will to take an international decisive step. The path to justice is still very long, hindered and unknown. What can certainly be argued is that action, although feeble, has been taken, but still seems not to be enough in order to provide justice to the murder of a young Italian man, and to the thousands of young women and men that everyday are victims of the Cairene authorities abuses of power in the name of the fight against terrorism.

[843] United Nations General Assembly, International Law Commission, Draft Articles on Diplomatic Protection, Supplement No. 10, A/61/10, vol. II, 2006.
[844] Ibid, art 19.
[845] International Law Commission, General Documents, A/CN.4/561 + Add.1-2, *Diplomatic Protection: Comments and observations received from Governments,* january 27, april 3 and april 12, 2006.
[846] Ibid.

BIBLIOGRAPHY

Al-Anani, K., "Upended Path: The Rise and Fall of Egypt's Muslim Brotherhood", in *Middle East Journal,* Vol.69, No.4, Autumn 2015, pp.527-543. Available at: https://www.jstor.org/stable/43698286?seq=1#metadata_info_tab_contents

Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, Oxford, Clarendon Press, 1996, p. 45

Alfredsson G. S.& Eide A., *The Universal Declaration of Human Rights,* Netherlands, Koniklijke, Brill, 1999.

Alsaleh, A., *Voices of the Arab Spring: Personal Stories from the Arab Revolution* New York, Columbia University Press, 2015*,* p.7.

Alston, P., Crawford, J., *The future of Human Right Treaty Monitoring,* Cambridge, Cambridge University Press, 2000.

Alwyn Freeman V., *The American Journal of International Law*, January 1946, Vol 40, No.1., Cambridge University, p.121.

Amerasinghe C.F., *Diplomatic Protection,* Oxford, Oxford University Press, 2008, pp. 8-10.

Amerasinghe, C.F*., Local Remedies in International Law*, 2nd edition, Cambridge, Cambridge University Press, 2004.

Amerasinghe C.F., *The Historical Development of Internaitonal Law* – Universal Aspects, Mohr Siebeck GmbH & Co. KG, 2001.

Amnesty International Report, *Egypt Muzzling Society,* September 2000, Al Index: MDE 12/21/00. Retrieved at: https://www.amnesty.org/en/documents/MDE12/021/2000/en/

Amnesty International, *Egypt: "Officially, you do not exist" Disappeared and Tortured in the Name of Counter-Terrorism"*, 13 July 2016, Index number: MDE 12/4368/2016. Retrieved at: https://www.amnesty.org/en/documents/mde12/4368/2016/en/

Amnesty International, *Egypt: Gross Human Rights Violations Under President Al-Sisi Amnesty International Submission For The UN Universal Periodic Review 34th Session of the UPR Working Group, November 2019,* March 2019. Retrieved at: https://www.amnesty.org/en/documents/mde12/0253/2019/en/

Amnesty International, Egypt: *Investigative allegations of disappearances, torture and extrajudicial execution of four men* (Press release, 6 July 2017): https://www.amnesty.org/en/latest/news/2017/07/egypt-investigate-allegations-of-disappearance-torture-and-extrajudicial-execution-of-four-men/

Amnesty International, *Ibrahim Metwaly dev'essere rilasciato!*. Retrieved at: https://www.amnesty.it/appelli/lavvocato-diritti-umani-ibrahim-metwaly-devessere-rilasciato/

Amnesty International, *Sei anni di al-Sisi in Egitto: repression senza precedent,* 3 July 2019. Retrieved at: https://www.amnesty.it/sei-anni-di-al-sisi-in-egitto-repressione-senza-precedenti/ (11/03/2021)

Amnesty International, *Universal Declaration of Human Rights.* Available at: https://www.amnesty.org/en/what-we-do/universal-declaration-of-human-rights/

Amro. A., *Giulio Regeni e gli italiani in Egitto che denunciano il regime,* in Internazionale, da Mada Masr, 7 Aprile 2016. Available at: https://www.internazionale.it/opinione/amro-ali/2016/04/07/giulio-regeni-egitto-regime

Anghie A., *Imperialism, Sovereignty and the Making of International Law,* Cambridge, Cambridge University Press, 2004.

ANSA, *Studente scomparso Cairo, per ministero non è arrestato,* 2 Febbraio 2016. Available at: https://www.ansa.it/friuliveneziagiulia/notizie/2016/02/02/studente-scomparso-cairo-per-ministero-non-e-arrestato_7080eecc-ff99-4b12-8291-2cbc63dc4dd4.html

Anzilotti D., *Corso di Diritto Internazionale,* Padova, Cedam, 1955.

Arangio-Ruiz, G., *Gli enti soggetti dell'ordinamento internazionale, Vol.1,* Milano, Giuffré, 1951.

Arcuri C., *Giulio Regeni ricatto di Stato,* Castelvecchi, Roma, 2020, p. 122.

Baderin M. A. & Ssenyonjo M., *International Human Rights Law,* London, Routledge, 2010.

Balladore - Pallieri G., "La determinazione internazionale della cittadinanza ai fini dell'esercizio della protezione diplomatica", in *Studi T. Perassi,* 1957, II, p.113.

Balladore-Pallieri, G., *Diritto Internazionale Pubblico,* Milano, Giuffré, 1962.

Bar-Yaacov, B., *Dual Nationality,* London, Stevens & Son, 1961, p.150-52.

Bariatti. S., *L'azione internazionale dello Stato a tutela dei non cittadini,* Milano, Giuffré, 1993.

Bassu, A., *La rilevanza dell'interesse individuale nell'istituto della protezione diplomatica*, Milano, Giuffrè, 2008.

Bassiouni M.C., *The Statute of International Criminal Court: a documentary history,* Ardsley, New York, 1998.

Battaglia F. e Perrini F., 'La Regola della continuità della cittadinanza' in L. Panella (eds.), *La Protezione Diplomatica Sviluppi e Prospettive,* Torino, Giappichelli, 2009.

Battaglini G., *La protezione diplomatica delle società*, Padova, CEDAM, 1957.
Bestagno, *Diritti umani e impunità: Obblighi positivi degli Stati in materia penale*, Milano, Vita e Pensiero, 2003.

Beccaria A., Marcucci G., *Morire al Cairo. I misteri dell'uccisione di Giulio Regeni,* Roma, Castelvecchi, 2016.

Bin, R., Pitruzzella G., *Diritto Pubblico,* Torino, Giappichelli, 2009.

Bluntschli J.C., *Das Moderne Völkerrecht der Civilisierten Staaten als Rechts buch Dargesteldz*, Berlin, 1878, p. 261.

Bobbitt P., *The Shield of Achilles: War, Peace and the Course of History,* New York, Anchor Books*,* 2002.

Bonini C., Foschini G., 2016, *Giulio, i giorni della paura e la verità del testimone: "Preso da agenti in borghese proprio davanti alla metro",* Repubblica. Retrieved at: https://www.repubblica.it/esteri/2016/02/12/news/giulio_i_giorni_della_paura_e_la_verita_del_testimone_preso_da_agenti_in_borghese_proprio_davanti_alla_metro_-133248679/

Bonini C., Foschini G., *Il muro di sabbia: la battaglia per la verità su Giulio Regeni,* La Repubblica, 26 Aprile 2017. Retrieved at: https://www.repubblica.it/cronaca/2017/04/26/news/il_muro_di_sabbia_la_battaglia_per_la_verita_su_giulio_regeni-163950142/

Bonini C., Foschini G., *Nove Giorni al Cairo: tortura e omicidio di Giulio Regeni,* 2017, Episode 1 to 5, La Repubblica, Retrieved at: https://www.amnesty.it/campagne/verita-giulio-regeni/

Borchard E.M.., *Diplomatic Protection of Citizens Abroad,* New York, Banks Law Publishing,1919.

Brierly, *Règles gènèral du droit de la paix*, in Recueil des Cours, 1936.

Brown W., *Egypt must look into all reports of torture, not just the death of Giulio Regeni,* 8 February 2016, The Guardian. Retrieved at: https://www.theguardian.com/world/2016/feb/08/egypt-must-look-into-all-reports-of-torture-not-just-the-death-of-giulio-regeni

Brownlie I., *International Law and the Use of Force by States,* Cambrisge, Cambridge University Press, 1963.

Brownlie I., *Principles of Public International Law*, Oxford, OUP Oxford, 2003, pp. 218-220.

Brower C. N., and Brueschke J. D., *The Iran-United State Claims Tribunal*, Cambridge, Cambridge University Press, 1998, pp. 76-80.

Caflisch, L., *La Protection des sociétés commerciales et des intérêts indirects en droit international public*, La Haye, M. Nijhoff, 1969.

Calvo C., *Le Droit International Théorique Et Pratique*: *Précédé D'un Exposé Historique Des Progrès de la Science Du Droit Des Gens*, A. Rousseau, 1896, Vol. III, par. 1280, p. 142.

Camera dei Deputati, Proposta di Inchiesta Parlamentare, 28 Maggio 2018, Doc. XXII, n.17. Retrieved at: https://documenti.camera.it/_dati/leg18/lavori/documentiparlamentari/IndiceETesti/022/017/INTERO.pdf

Camera dei Deputati, Archivio di Prima Pagina, *Approvata la proposta di Istituzione di un Commissione parlamentare di inchiesta sulla morte di Giulio Regeni,* 30 Aprile 2019. Available at: https://www.camera.it/leg18/1132?shadow_primapagina=8953

Camera dei Deputati, Proposta di Inchiesta Parlamentare, 25 Febbraio 2019, Doc. XXII, n.36. Retrieved at: https://www.camera.it/leg18/491?idLegislatura=18&categoria=022&tipologiaDoc=documento&numero=036&doc=intero

Cappon L., *Giulio Regeni: chi è Maha Abdelrahman, la tutor di Cambridge che seguiva le sue ricerche in Egitto,* 2 Novembre 2017, Il Fatto Quotidiano. Retrieved at: https://www.ilfattoquotidiano.it/2017/11/02/giulio-regeni-chi-e-maha-abdelrahman-la-tutor-di-cambridge-che-seguiva-le-sue-ricerche-in-egitto/3952816/

Cardenas S., Flibbert A., "National Human Rights Institutions in the Middle East", *Middle East Journal*, 2005.

Carreau D., Marrella, F. *Diritto internazionale*, Torino, Giuffrè Editore, 2018.

Cassese A., *International Law in a divided world*, Oxford, Oxford Clarendon Press, 1986.

Cassese A., *The Human Dimension of International Law: Selected Papers of Antonio Cassese,* Oxford, OUP Oxford, 2008.

Castor H.P. Law, *The Local Remedies Rule in International Law*, Geneva, Droz, 1961.

Chappez J., *La régle de l'épuisement des voises de recours internes*, Paris, Editions Pedone, 1972.

Cheng B., *General Principles of Law as Applied by International Courts and Tribunals,* Cambridge, Cambridge University Press, 1953.

Clapham A., *The Role of the Individual in International Law,* The European Journal of International Law Vol. 21 no.1, 2010.

Clerici. R, "Italian Nationality and the Situation of Immigrants", in Ferrari V., *Citizenship and Immigration*, Torino, Giuffrè, 1998, pp.45- 60.

Chesterman, in Goodwin-Gill & Talmon, *The Reality of International Law,* Oxford, OUP Oxford, 1999.

Cole J.V.R., *The African Court on Human and Peoples' Rights: will political stereotypes form an obstacle to the enforcement of its decisions?,* in "The Comparative and International Law Journal of Southern Africa, March 2010, Vol.43, No.1, pp. 23-45, Institute of Foreign and Comparative Law. Retrieved at: https://www.jstor.org/stable/pdf/23253141.pdf?refreqid=excelsior%3A9b8cb8c621a423701e4bc11c9eb82eb1

Colamartino, R., *La Rivoluzione in Egitto*, Roma, Manifestolibri, 1996.

Commission on Human Rights, *Question of the human rights of all persons subjected to ay form of detention or imprisonment – Promotion and protection of the right to freedom of opinion and expression – Report of the Special Rapporteur, Mr. Abid Hussain, submitted pursuant to Commission on Human Rights resolution 1997/26,* 28 January 1998, E/CN.41998/40.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, Seduta n.1 di Martedì 17 dicembre 2019, *Audizione del procuratore della Repubblica f.f. presso il Tribunale di Roma, Michele Prestipino Giarritta, e del sostituto procuratore presso il Tribunale di Roma, Sergio Colaiocco*, Resoconto Stenografico, p.3.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, Seduta n.4 di Martedì 18 febbraio 2020, *Audizione del Segretario generale del Ministero degli affari esteri e della cooperazione internazionale, ambasciatrice Elisabetta Belloni,* Resoconto Stenografico, p.24

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, Seduta n.5 di Giovedì 27 febbraio 2020, *Audizione del Rappresentante permanente d'Italia presso L'Unione europea, già Ambasciatore d'Italia al Cairo dal 2013 al 2016, Maurizio Massari,* Resoconto Stenografico, p.5

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regene, XVIII Legislatura, Seduta n.6 di Martedì 3 marzo 2020, *Audizione del direttore dell'Autorità nazionale UAMA (Unità per le autorizzazioni dei materiali d'armamento), Alberto Cutillo,* Resoconto Stenografico.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, Seduta n.7 di Giovedì 5 marzo 2020, *Audizione dell'Ambasciatore d'Italia al Cairo, Giampaolo Cantini,* Resoconto Stenografico.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regene, XVIII Legislatura, Seduta n.8 di Mercoledì 6 maggio 2020, *Audizione di rappresentanti di Amnesty International Italia,* Resoconto Stenografico.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regene, XVIII Legislatura, Seduta n. 9 di Mercoledì 13 maggio 2020, *Audizione di rappresentanti della Società per gli studi sul Medio Oriente (SeSaMo),* Resoconto Stenografico.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regene, XVIII Legislatura, Seduta n.11 di Giovedì 18 giugno 2020, *Audizione del Presidente del Consiglio dei ministry, Giuseppe Conte.* Resoconto Stenografico.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regene, XVIII Legislatura, Seduta n.13 di Giovedì 16 luglio 2020, *Audizione del Ministro degli affair esteri e della cooperazione internazionale, Luigi Di Maio,* Resoconto Stenografico.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regene, XVIII Legislatura, Seduta n.14 di Mercoledì 22 Luglio 2020, *Audizione del professor Enzo Moavero Milanesi, già Ministro degli affari esteri e della cooperazione internazionale (Governo Conte I),* Resoconto Stenografico.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regene, XVIII Legislatura, Seduta n.15 di Giovedì 23 Luglio 2020, *Audizione dell'avvocato Angelino Alfano, già Ministro degli affari esteri e della cooperazione internazionale (Governo Gentiloni),* Resoconto Stenografico.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regene, XVIII Legislatura, Seduta n.16 di Martedì 28 Luglio 2020, *Audizione del Ministro della Difesa, Lorenzo Guerini,* Resoconto Stenografico.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regene, XVIII Legislatura, Seduta n.19 di Mercoledì 14 Ottobre 2020, *Audizione del professor Maurizio Tira, delegato della Conferenza dei rettori delle università italiane (CRUI) per gli affari internazionali,* Resoconto Stenografico.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, Seduta n.23 di Martedì 1 dicembre 2020, *Audizione, in videoconferenza, di Riccardo Pisillo Mazzeschi e Sergio Marchisio, docenti di diritto internazionale,* Resoconto Stenografico, p.13

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, Seduta n.10 di Martedì 19 maggio 2020, *Audizione di Maria Buscemi e Federica Violi, esperte di diritto internazionale,* Resoconto Stenografico, pp. 5-6.

Commissione Parlamentare d'Inchiesta sulla morte di Giulio Regeni, XVIII Legislatura, Seduta n.24 di Giovedì 10 dicembre 2020, *Audizione del Procuratore della Repubblica presso il Tribunale di Roma, Michele Prestipino Giarritta, e del Sostituto Procuratore, Sergio Colaiocco,* Resoconto Stenografico, p. 4-5.

Constantinou A., *The Right to Self-Defence under Customary International Law and Article 51 of the UN Charter,* Bruxelles, Bruylant, 2000.

Craven M., *The International Covenant on Economic, Social and Cultural Rights,* Oxford, Oxford Clarendon Press, 1995.

Crawford J., *Brownlie's Principles of public international law*, Oxford, Oxford University Press, 1966.

Crawford J. & Grant T., *Exhaustion of local remedies*, Oxford, Oxford University Press, 2000.

Crespo Navarro E., *La Jurisprudencia del TJCE en Materia de Ciudadanìa de la Unìon: una Interpretaciòn Generosa basada en la Remisiòn al Derecho Nacional y en el Principio de No Discriminaciòn por razòn de la Nacionalidad*, in Revista de Derecho Comunitario Europeo, 2007, p. 910.

Curti Gialdino, C., *Lineamenti di diritto diplomatico e consolare,* Torino, Giappichelli, 2015.

D'Ascoli Silvia, Scherr, Kathrin Maria, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection,* EUI Working Paper LAW No. 2007/02.

d'Oliveria, J., "Union Citizenship: pie in the sky?", in Rosas & Anatola*, A Citizens' Europe: In search of a new order*, London, Sage, 1995.

De Francesco, F., *Chi era Regeni: ragazzo d'oro, determinato e solidale,* 6 Aprile 2016, ANSA. Available at: https://www.ansa.it/sito/notizie/cronaca/2016/02/04/ansa-profilo-regeni-un-ragazzo-dorodeterminato-e-solidale_4ce77b73-24c2-46c8-9982-ab9d9a0f3d9a.html

De Gregorio, A., *Caso Regeni e le foto del cadavere torturato. La mamma: «Pronti a mostrarle se non arriva la verità»* 30 Marzo 2016, Corriere della Sera. Available at: https://www.corriere.it/esteri/16_marzo_30/caso-regeni-foto-cadavere-torturato-mamma-pronti-mostrarle-se-non-arriva-verita-aea028f4-f64c-11e5-b728-3bdfea23c73f.shtml

De Hochepied J.p.*, La Protection diplomatique des societés et des actionnaries*, A. Paris, Pedone, 1965.

De Mauro, G., *Silenzio,* 18 Febbraio 2016, Internazionale. Available at: https://www.internazionale.it/opinione/giovanni-de-mauro/2016/02/18/silenzio-giulio-regeni

De Visscher, *Notes sur la responsabilitè*, Revue de droit international et de legislation comparé, 1927.

Declich, L., *Giulio Regeni le verità ignorate. La dittatura di al-Sisi e i rapporti tra Italia ed Egitto,* Roma, Alegre, 2016. p. 15

Deffendi P., Regeni C., *Giulio fa cose,* con Alessandra Ballerini, Feltrinelli, 2020. p.27

Dinstein Y., *Diplomatic Immunity from Jurisdiction Ratione Materiae*, in International and Comparative Law Quarterly, 1966, p. 79

Dinstein Y., *War, Aggression and Self-Defence,* Cambridge, Cambridge University Press, 2012.

Donnely, J., *International Human Rights,* Boulder, Westview, 1998, pp. 3-17.

Donnely J., in "The Relative Universality of Human Rights", *Human Rights Quarterly 29*, May 2007, pp. 298-301.

Downes, in Bellamy & Warleigh, *Citizenship, Democracy and Justice in the New Europe,* Routledge, 1997.

Downes, in Bellamy & Warleigh, *Citizenship and Governance in the European Union,* Continum Intl Pub Group, 2001.

Dugard, J., First Report on Diplomatic Protection, by Mr. John Dugard, Special Rapporteur, International Law Commission, United Nations, Document A/CN.4/506 and Add.1

Dugard, J., *Third Report to the ILC on Diplomatic Protection, Addendum*, 2002, UN Doc A/CN.4/523/Add.1.

Dugard, J., *Sixth Report on Diplomatic Protection*, *by Mr. John Dugard, Special Rapporteur*, United Nations, International Law Commission2005, Doc A/CN 4/546, 5.

Donnely J., *International Human Rights,* Boulder, CO :Westview, 1998.

Dunn F.S., *The Diplomatic Protection of American in Mexico*, New York, Columbia University Press, 1933.

Durand, *Revue gènèrale de droit Intrnational public*, 1931.

Evans M. & Murray R., *The African Charter on Human and People's Rights: the System in Practice 1986-2006,* Cambridge University Press, 2008.

Everson, in Shaw & Moore, *The New Dynamics of European Unio*n, Oxford, Clarendon Press, 1995.

Esposito M., *Mossa del Senato su caso Regeni, stop ricambi F-16 a Egitto,* ANSA, 29 June 2016. Retrieved at: https://www.ansa.it/sito/notizie/politica/2016/06/29/ansa-mossa-senato-su-caso-regeni-stop-ricambi-f-16-a-egitto_31d49338-5019-4538-b2a6-aa3e73f53a18.html

Fachiri A.P., *The Local Remedies Rule in the Light of the Finnish Ships Arbitration*, 17 Brit. Y.B. Int'l L.19, 1936.

Falk R. A., *Human Rights Horizons: The Pursuit of Justice in a Globalizing World,* London, Routledge, 2000.

Fanara, *Gestione di affari e arricchimento senza causa nel diritto internazionale,* Milano, 1966.

Filiu, J.P., *Le supplice de Giulio Regeni, une affaire d'Etat pour l'Egypte et l'Europe,* 23 February 2016, Le Monde. Available at: https://www.lemonde.fr/blog/filiu/2016/02/23/le-supplice-de-giulio-regeni-une-affaire-detat-pour-legypte-et-leurope/

Fitzmaurice, "The General Principle of International Law Considered from the Standpoint of the Rule of Law", 92 Hague Recueil, 1957.

Foschini, G., *Regeni, l'ultima beffa del Cairo "Nei video non si vede Giulio",* 28 Giugno 2018, La Repubblica. Available at: https://ricerca.repubblica.it/repubblica/archivio/repubblica/2018/06/28/regeni-lultima-beffa-del-cairo-nei-video-non-si-vede-giulio18.html?ref=search

Foakes, J., *The Position of Heads of State and Senior Officials in International Law,* Oxford, Oxford International Law Library, 2014.

Francavilla, C., *Italy Should Stop Arms Transfer to Egypt – Deal Contravenes EU Pledge, Risks Facilitating Further Abuses,* Human Rights Watch, 16 June 2020. Available at: https://www.hrw.org/news/2020/06/16/italy-should-stop-arms-transfer-egypt (13/03/2021).

Freeman, A.V., *Recent Aspects of the Calvo Doctrine and the challenge to International Law,* The American Journal of International Law,Vol. 40. No.1, Cambridge, Cambridge University Press, 1946. Source Retrived at: https://www.jstor.org/stable/2193897

Galal No'M., "The Arab Draft Charter for Human Rights" in, *Human Rights: Egypt and the Arab World,* 1994.

Gaja, G., *L'esaurimento dei ricorsi interni nel diritto internazionale,* Milano, Giuffré, 1967.

Gaja, G., *The Position of Individuals in International Law: An ILC Perspective,* The European Journal of International Law Vol. 21 no.1, 2010.

Garcia-Mora M.R., *The Calvo Clause in Latin American Constitutions and International Law,* Law Review, 1950.

Garcia Amador, "Third Report on State Responsibility", YBILC, 1958, vol 2, p. 93; Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, The Banks Law Publishing Company, 1915.

García-Amador F.V., *8th session of the International Law Commission, Report of the Special Rapporteur*, 1956, pp. 223–5

Garcìa Amador, *State Responsibility Some New Problems,* Yearbook of the International Law Commission, Vol. II, 1958, DOC. A/CN.4/106, Hague Recueil 421.

Gray C., *International Use of force,*Oxford, Oxford University Press, 2008.

Grotius, *De Jure belli et pacis libri tres*, Forgotten Books, reprinted in 2018.

Grunert A., "Loss of Guiding Values and Support, September 11, and the Isolation of Human Rights Organizations in Egypt", in Annette Junemann, *Euro-Mediterranean Relations After September 11: International, Regional, and Domestic Dynamics,* 2004.

Hafez, B., "Egypt NGOs: Coming Into Their Own.", *Human Rights Defenders,* pp. 15-21 March 2004.

Hafner-Burton E. M., *Human Rights in a Globalizing World: The Paradox of Empty Promises,* University of Chicago, Vol. 110, No.5, March 2005, p.1373-1411.

HLS, "Research in International Law II. Responsibility of States", 1929, 23 AJIL, 1929.

Hoijer, *La responsabilità internazionale des Etats*, Paris, 1939, p172-186.

Human Rights Watch, *The State of Egypt vs. Free Expression: The Ibn Khaldun Trial,* 1 Juanuary 2002. Retrieved at: https://www.hrw.org/report/2002/01/01/state-egypt-vs-free-expression/ibn-khaldun-trial

Human Rights Watch, *Egypt New Chill on Rights Groups, NGOs Banned, Activists Harassed,* New York, June 2003. Available at: https://www.hrw.org/news/2003/06/20/egypts-new-chill-rights-groups

Human Rights Watch, *Human Rights Watch Honors Egyptian Anti-Torture Activists,* 3 Novembre 2003. Retrieved at: https://www.hrw.org/news/2003/11/03/human-rights-watch-honors-egyptian-anti-torture-activist

Human Rights Watch, *Egypt: Margin of Repression, State Limits on Nongovernmental Organization Activims,* Volume 17, N°8 (E), September 2004. Retrieved at: https://www.hrw.org/reports/2005/egypt0705/egypt0705.pdf

Human Rights Watch, *World Report 2011:Egypt – Events of 2010.* Retrieved at: https://www.hrw.org/world-report/2011/country-chapters/egypt.

Human Rights Watch, *UN Human Rights Council: Egypt Rights Abuses in Spotlight*, 7 March 2014. Retrieved at:: https://www.refworld.org/docid/531f0f5b4.html

Human Rights Watch, *Egypt: Year of Abuses Under al-Sisi – President Gets Western Support While Erasing Human Rights Gains,* 8 June 2015. Retrieved at: https://www.hrw.org/news/2015/06/08/egypt-year-abuses-under-al-sisi

Human Rights Watch, *Egypt: Torture Epidemic May Be Crime Against Humanity,* 6 September 2017. Retrieved at: https://www.hrw.org/news/2017/09/06/egypt-torture-epidemic-may-be-crime-against-humanity

Human Rights Watch, *Egypt: Al-Sisi Should End Rights Abuses. Allies Should Push for Reform in Second Term,* 10 April 2018. Available at: https://www.hrw.org/news/2018/04/10/egypt-al-sisi-should-end-rights-abuses (11/03/2021).

Human Rights Watch, *Egypt Events of 2020.* Retrieved at: https://www.hrw.org/world-report/2021/country-chapters/egypt

Hynek, S., *Human Rights in Egypt: five years after the revolution,* Arab Transformation Project, 2016. Available at: https://www.jstor.org/stable/resrep14089?seq=1#metadata_info_tab_contents

Il Manifesto, *David Sansonetti: "Così sono stato arrestato e accusato di spionaggio al Cairo" – Egitto. La disavventura di un giornalista freelance italiano durante le manifestazioni contro il regime militare nell'anniversario della "rivoluzione" di piazza Tahrir,* 4 Febbraio 2014. Retrieved at: https://ilmanifesto.it/david-sansonetti-cosi-sono-stato-arrestato-e-accusato-di-spionaggio-al-cairo/

Il sole 24 ore, *Famiglia Regeni: arrestato nostro consulente in Egitto,* 26 aprile 2016. Retrieved at: https://st.ilsole24ore.com/art/mondo/2016-04-26/famiglia-regeni-arrestato-nostro-consulente-egitto-152808.shtml?uuid=ACFh3jFD

Il sole 24 ore, *Emendamento Regeni, l'Egitto risponde all'Italia: «Insoddisfatti per decisione su forniture F16»,* 30 giungo 2016, Retrieved at: https://st.ilsole24ore.com/art/notizie/2016-06-30/egitto-emendamento-regeni-insoddisfatti-la-decisione-senato-ricambi-f16--181812.shtml?uuid=AD3Ay8l&refresh_ce=1

Institut de Droit International, *The National Character of an International Claim Presented by a State for Injury Suffered by an individual*, 1965, art. 4.

International Federation for Human Rights, *Egypt – Counter-terrorism against the background of an endless state of emergency,* January 2010 N°534°. Available at: https://www.fidh.org/IMG/pdf/Egypt_Antiterro_EN.pdf

Jacobs, White & Ovey, *The European Convention on Human Rights,* Oxford, OUP Oxford, 2010.

Jaichand V. & Suksi M., *Sixty Years of the Universal Declaration of Human Rights in Europe,* Intersentia Publishers, 2009.

Jayyusi S.K., *Human Rights in Arab Thought: A Reader: Ethical Universalism and the Arab Tradition,* I.B. Tauris, 2008.

Jarrah B., *The Netherlands' Action Against Syria: A New Path to Justice,* 22 September 2020, Human Rights Watch website. Retrieved at: https://www.hrw.org/news/2020/09/22/netherlands-action-against-syria-new-path-justice

Jessup, *A Modern Law of Nations,* New York, London, The Macmillan Company, 1948.

Jimenez de Aréchaga, International Responsibility, in Sørensen, *Manual of Public International Law,* New York, St. Martin's Press, 1968.

Joseph S., Schultz J. & Castan M., *International Covenant on Civil and Political Rights*, Oxford, OUP Oxford, 2004.

Keane J., *Violence and Democracy,* Cambridge, Cambridge University Press, 2004.

Keitner C., *Foreign Official Immunity and the Baseline Problem*, in Fordham Law Review, 2011, Vol. 80, p. 605-621.

Khadduri M., *War and Peace in the Law of Islam*, Baltimora, John Hopkins Press, 1955.

Kingsley P., *Egypt: Frenchman dies in police custody amid rising tide of xenofobia,* 18 September 2013, The Guardian. Retrieved at: https://www.theguardian.com/world/2013/sep/18/egypt-frenchman-dies-syria-morsi

Knop K., *Diversity and Self-Determination in International Law,* Cambridge, Cambridge University Press, 2002.

Kokott J., Interim Report on "The Exhaustion of Local Remedies" ILA Report of the Sixty-ninth Conference, 2000, 606-30.

Kostakopoulou D., *European Union Citizenship: Writing the Future*, European Law Journal, 6 August 2007, pp. 624-5

Kymlicka W., Norman W., *Return of the Citizen: A Survey of Recent Work on Citizenship Theory,* The University of Chicago Press, 1994.

La Repubblica, *Emendamento Regeni, l'Egitto avverte l'Italia:"Impatti negativi nella cooperazione fra i due paesi"*, 06 Luglio 2016. Retrieved at: https://www.repubblica.it/esteri/2016/07/06/news/egitto_italia_ricambi_f16-143578700/

Lattanzi, F., *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, Milano, Giuffré, 1963.

Lehning, in Lehning P.B. & Weale A., *Citizenship, Democracy and Justice in the New Europe,* London, Routldge, 1997.

Lewis B., *Islam in History: Ideas, People and Events in the Middle East,* Open Court, 1993.

Lillich R.B., *Lillich on the Forcible Protection of Nationals Abroad: In Memory of Professor Richard B. Lillic*, Naval War College Pr, 2002.

Lillich, R.B., *The Current Status of the Law of State Responsibility for Injuries to Aliens,* American Society of International Law – Cambridge University Press, 26-28 April 1979, Vol. 73, pp.244-249. Available at: https://www.jstor.org/stable/25658007?seq=1#metadata_info_tab_contents

Lipstein K., *The Place of the Calvo Clause in International Law*, 22 BYIL, 1945, p. 130.

Mahdi, R., *The Arab Spring in Egypt: Revolution and Beyond,* Cairo, American University in Cairo Press, 2012.

Martinelli, L., *Egitto, il caso Regeni risveglia quello irrisolto del francese Eric Lang ucciso al Cairo nel 2013,* 16 Febbraio 2016, Il Fatto Quotidiano. Available at: https://www.ilfattoquotidiano.it/2016/02/16/egitto-il-caso-regeni-risveglia-quello-irrisolto-del-francese-eric-lang-ucciso-al-cairo-nel-2013/2468173/ (11/03/2021).

Mada Masr, *Italian FM sends letter to Shoukry requesting legal residence of 5 Egyptian security officials to start Regeni trial in absentia,* 19 June 2020. Available at: https://www.madamasr.com/en/2020/06/19/feature/politics/italian-fm-sends-letter-to-shoukry-requesting-legal-residences-of-5-egyptian-security-officials-to-start-regeni-trial-in-absentia/ (13/03/2020).

Mada Masr, *Una campagna repressiva,* Internazionale, n°1338 anno 28, 11-17 Dicembre 2020.

Mazzeschi P. R., *Esaurimento dei ricorsi interni e diritti umani*, Torino, Giappichelli, 2004.

Mazzeschi R.P., *Il caso Regeni: alcuni profili di diritto Internazionale,* 2018. Retrieved at: http://romatrepress.uniroma3.it/repository/0/pdf/cd9f0a40-d162-450c-9a41-9952024f9dd1.pdf

McKean W., *Equality and Discrimination under International Law,* Oxford, Oxford University Press, 1983.

Mc Nair, *International Law Opinions*, Cambridge, 1956.

Mefreh, A., *Gli attivisti presi in ostaggio dal regime egiziano,* Middle East Eye, UK, Internazionale, n°1338 anno 28.

Montefiori S., *Egitto, Al Sisi incassa anche la Legion d'Onore da Macron. La cerimonia «nascosta» dall'Eliseo,* 10 Dicembre 2020, Il Corriere della Sera. Retrieved at: https://www.corriere.it/esteri/20_dicembre_10/egitto-sisi-incassa-anche-legion-d-onore-cerimonia-nascosta-eliseo-17b0b558-3abc-11eb-a316-193bd0f16dd1.shtml

Moore J.B., *A Digest of International Law*, Cambridge, Cambridge University Press, 1907.

Moore J.B., *International Adjudications ancient and modern: History and documents*, Oxford, Oxford University Press, 1929.

Mungo D., A.A. 2012/2013, *Tendenze Evolutive dell'Istituto di Protezione Diplomatica,* Prova finale in Giurisprudenza, Università degli studi di Pisa.

Murray R., *The African Commission on Human and People's Rights in International Law,* Hart Publishing, 2000.

Naldi G., *The African Charter on Human and People's Rights: The System in Practice, 1986-2000,* Cambridge, Cambridge University Press, 2002.

Nanda, "The validity of the United States Intervention in Panama Under International Law", American Journal of International Law, Volume 84, Issue 2, April 1990.

Neff C., *War on the Law of Nations,* Cambridge, Cambridge University Press, 2005.

Nmehielle O.V., *Development of the African Human Rights System in the Last Decade,* American University Washington College of Law, 2004.

Nowak M., *UN Convention on Civil and Political Rights,* Engel Publishers, 2005.

O'Boyle H. & Warbrick, *Law of the European Convention on Human Rights,* Oxford, OUP Oxford, 2009.

Official Statement, Italian Foreign Minister, "Egypt: Italian Giulio Regeni mysteriously vanished in Cairo", 31/01/2016. Available at:

https://www.esteri.it/mae/it/sala_stampa/archivionotizie/comunicati/2016/01/vicenda-del-connazionale-giulio.html

OHCHR, View Country visits of Special Procedures of the Human Rights Council since 1998. Information Retrieved at: https://spinternet.ohchr.org/ViewCountryVisits.aspx?visitType=all&Lang=en

Olsen D.H., *The origins of European citizenship in the first two decades of European inegration*, 2008, Journal of European Public Policy, p.40.

Oraa J., *Human Rights in States of Emergency in International Law,* Oxford, Clarendon Press, 1992.

Ott, L., *Enforced Disappearance in International Law,* Intersentia, 2011.

Papa, M.I., *Protezione diplomatica, diritti umani e obblighi erga omnes,* Rivista di Diritto Internazionale No.91, 2008, pp.702-705.

Pastorino, L., AA 2017/2018, *Il Caso Regeni nell'Egitto di al-Sisi: ricadute nazionali e internazionali,* Prova finale in Lingue, Economie e Istituzioni dell'Asia e dell'Africa Mediterranea, Università Cà Foscari di Venezia.

Phillipson C., *The International Law and Custom of Ancient Greece and Rome*, London, MacMillan Editions, 1979.

Poljarevic, E. (2009). "Egypt, Revolution of 1952", in *The International Encyclopedia of Revolution and Protest*, I. Ness (Ed.). Available at: https://onlinelibrary.wiley.com/doi/abs/10.1002/9781405198073.wbierp0501

Pratt N., "Bringing Politics Back in: Examining the Link Between Globalization and Democratization", *Review of International Political Economy,* 2004.

Pratt, N., "Hegemony and Counter-Hegemony in Egypt: Advocacy NGOs, Civil Society, and the State" in Sarah Ben Nefissa in, *NGOs and Governance in the Arab World,* New York, American University in Cairo Press, 2005, p.47.

Presa Diretta, (Riccardo Iacona, "La dittatura delle armi", Rai 3, 22 Marzo 2021).

Przetacznik, *The Protection of Individual Persons in Traditional Interntional Law (diplomatic and consular protection),* OZOR, 1971.

Quadri R., *Diritto Internazionale Pubblico*, Napoli, Liguori, 1989, p. 651.

Qualey M.L., *Egypt shuts down novelist Alaa al-Aswany's public event and media work – State security forbids high-profile critics of President al-Sisi from holding public seminar, after censoring his writing and media* appearances, The Guardian, 11 December 2015. Retrieved at: https://www.theguardian.com/books/2015/dec/11/egypt-shuts-down-novelist-alaa-al-aswanys-public-event-and-media-work

Quinn B., 2018*, British Universities criticised over pursuit of Egyptian links*, 22 August 2018, The Guardian. Retrieved at: https://www.theguardian.com/education/2018/aug/22/uk-colleges-accused-of-ignoring-human-rights-abuse-in-egypt

Reale P., *Lo Statuto della Corte penale internazionale,* Padova, 1999.

Risse T., Sikkink K., "The Socialization of International Human Rights Norms Into Domestic Practice: Introduction," in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, Cambridge University Press, 1999.

Rodley, in Krause & Scheinin, *International Protection of Human Rights: A textbook,* Åbo Akademi University, 2009.

Roniger, L., "A Discourse on Trial: The Promotion of Human Rights in Egypt and Jordan," an article 1, *Journal of Human Rights* 5:2, 2006.

Ronzitti, N., *Introduzione al diritto internazionale,* Torino, Giappichelli, 2007.

Ronzitti N., *Caso Regeni, le vie del diritto per ottenere giustizia,* Affarinternazionali, 18 febbraio 2016.

Rostovtzeff M., *International Relations in the Ancient World*, in E.A. Walsh (ed.) New York, 1922.

Rubenstein, K., "Globalization and Citizenship and Nationality" in *Jurisprudence for an Interconnected Globe,* Dauvergne C., 2003.

Russell R. B., *History of the United Nations Charter,* The Brookings Institution, 1958.
Ruys T., *"Armed Attack"and Article 51 of the UN Charter,* Cambridge, Cambridge University Press, 2010.

Sayyid- al, M.K., "State, Society, and Violations of Human Rights in Egypt", in *Human Rights,* p.51.

Scammell R., Michaelson R., *Italian student found dead in Cairo "killed by violent blow to the head",* 7 February 2016, The Guardian. Retrieved at: https://www.theguardian.com/world/2016/feb/07/italian-student-giulio-regeni-dead-cairo-killed-violent-blow-head (11/03/2021).

Scelle G. on slavery: *Le traite négreière aux Indes de Castille: Contrats et traitès d'asiento – Etude de droite public et d'histoire diplomatique puisèe aux sources originales et accompagnée de plusieurs documents inédits*, 2 vols, Paris, Sirey, 1906.

Scelle, G., *Précis de droit des gens*, Paris, Sirey, 1934.

Schabas W.A., *The Universal Declaration of Human Rights,* Cambridge, Cambridge University Press, 2013.

Schwarzenberger G., *International Law*, Vol I, Stevens,1957, p. 366.

Schwarzenberger G., *Manual of International Law*, Stevens & Sons Ltd, 1967, p. 366.

Seidl-Hohenveldern I., *Corporations in and under International Law*, Cambridge, 1987.

Sereni A.P., *Diritto Internazionale*, vol. 1, Milano, 1956.

Senato Italiano official youtube channel, *Conferenza stampa sulla vicenda di Giulio Regeni,* 29 Marzo 2016. Available at: https://www.youtube.com/watch?v=CQaUQ4n6UQc

Shapovalov, A., "Should a requirement of clean-hands be a prerequisite to the exercise of diplomatic protection? Human rights implications of the International Law Commission's debate", American University International Law Review, 2004, pp.829-866.

Shaw J., *The Transformation of Citizenship in the European Union*, Cambridge, Cambridge University Press, 2007.

Shea D. R, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy*, University of Minnesota Press, 1955.

Shelton D., *Regional Protection on Human Rights,* George Washington University Law School Legal Studies Research Paper Series, 2008.

Simma B., Khan E.D., Nolte G., Paulus A., *The Charter of the United Nations,* Oxford University Press, 2002.

Simonetti A., Ciclo XXIX, A.A.2013/2016, *L'immunità funzionale degli organi statali della giurisdizione straniera,* Dottorato di ricerca in scienze giuridiche, Università di Firenze, p.25

Sinagra A., Bargiacchi P., *Lezioni di diritto internazionale pubblico,* Milano, Giuffré, 2019.

Società Italiana di Diritto Internazionale e di Diritto dell'Unione Europea, *Sull'attualità e l'importanza degli obblighi derivanti dalla Convenzione delle Nazioni Unite contro la tortura del 1984,* Roma, 16 dicembre 2020. Information available at: http://www.sidi-isil.org/wp-content/uploads/2020/12/Sull-attualita-e-importanza-obblighi-Convenzione-ONU-contro-la-tortura-del-1984.Cons_.Dir_.SIDI_.16.12.pdf

Sorensen M., *Principes de droit International public,* in *Recueil des Cours,* Leyde: Académie de droit international,1960, III.

Spiro, J.P., "Embracing dual nationality" in Hansen R. and Weil P. (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe: The Reinvention of Citizenship,* Berghan Books, New York, pp.19-33.

Spiro, J.P., *A New International Law of Citizenship,* The American Journal of International Law, Vol. 105, No.4, Cambridge, Cambridge University Press, October 2011, pp.694-746. Available at: https://www.jstor.org/stable/10.5305/amerjintelaw.105.4.0694?seq=1#metadata_info_tab_contents

Stork, J., *Human Rights in Transition,* Social Research, SUMMER 2012, Vol. 79, No.2, The Johns Hopkins University Press. Available at: https://www.jstor.org/stable/23350073?seq=1#metadata_info_tab_contents

Suarez F., *De Legibus, Ac Deo Legislatore,* Oxford, Clarendon Press, translated by Williams G.L., reprinted in 1944.

Sudre F., *Droit européen et international des droits de l'homme,* Paris, Presses Universitaires de France – P.UF., 2005.

Summers L.M., *The Calvo Clause*, Virginia Law Review, 1933, Vol. 19, No. 5, pp. 459-484.

Talmon S., *Recognition of Governments in International Law,* Oxford, Oxford University Press, 1996.

The American Journal of International Law*, The Law of Responsibility of States for Damage Done in Their Territory to the Persons or Property of Foreigners,* Vol. 23, No.2, Supplement: Codification of International Law (April., 1929), pp. 131-239. Retrieved at: https://www.jstor.org/stable/2212862?seq=1#metadata_info_tab_contents

Thornberry P., *International Law and Rights of Minorities,* Oxford, Clarendon Press, 1991.

The Egyptian Commission for Rights and Freedoms, *Trial Monitoring Report – Case No.1 of 2018, Emergency State Security Crimes Courts, AKA "Detainees Of The Hangout Case",*

United Nations Human Rights Council, 47th session, *General Debate Item 4: Human Rights Situations that require the Council's attention – Joint Statement on Egypt,* 21 March 2021. Available at: https://cihrs.org/wp-content/uploads/2021/03/HRC46-JST-on-Egypt-item-4.pdf

Universities Uk, *Uk Universities welcomed to Egypt,* 25 June 2018. Information retrieved at: https://www.universitiesuk.ac.uk/International/news/Pages/uk-universities-welcomed-to-Egypt.aspx

Valentino, P., *L'Ambasciatore al Cairo: "Ho visto i segni delle sevizie sul corpo Giulio,* 16 Febbraio 2016, Il Corriere della Sera. Available at: https://www.corriere.it/esteri/16_febbraio_06/ambasciatore-cairo-ho-visto-segni-sevizie-corpo-giulio-0f20dcb0-cc44-11e5-9a08-fa096d82f9d2.shtml

Van Panhuys H.F., *The Role of Nationality in International Law: An Outline,* Cambridge, Cambridge University Press, 1959, pp. 59 - 73.

Vattel E., de, *Le droit des gens ou les principes de la loi naturelle*, translated into *The Law of Nations, or the Principles of Natural Law*, 1758, Book II, Chapter VI: see 3 Classics of International Law, reprint 1916, p. 136.

Vermeer-Kunzli A.M.H, 2007. *The Protection of Individuals by means of Diplomatic Protection. Diplomatic Protection as a Human Right Instrument*. Phd Law Thesis, University of Leiden, p. 127

Verosta S., *History of the Law of Nations* from*, 1648 to 1815*, Oxford, Oxford University Press, June 2007, p. 181

Vigni P., *Diplomatic and Consular Protection in EU Law: Misleading Combination or Creative Solution,* European University Institute, Department of Law, Florence, Working Paper 2011, p. 2-4.

Vio E., *Egitto: cosa ho visto nei miei 27 giorni di prigionia,* 7 March 2016, Vice. Information Retrieved at: https://www.vice.com/it/article/3kmazw/italiano-egitto-carceri-abusi-regeni

Vogt, A., *Italian Cambridge PhD student suffered "inhuman, animal-like" violence before his death in Egypt,* 7 February 2016. Available at: https://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/12145257/Italian-Cambridge-PhD-student-suffered-inhuman-animal-like-violence-before-his-death-in-Egypt.html

Walsh D., *Why was an Italian Graduates Student Tortured and Murdered in Egypt,* The New York Times, August 15, 2017.

Waltz S., "Universal Human Rights: The contribution of Muslim States," *Human Rights Quarterly,* 26, 2004.

Waltz S. H., *Human Rights and Reform: Changing the Face of African Politics,* University of California Press, 1995.

Warbrick, C., "Diplomatic representations and diplomatic protection", 51, *International & Comparative Law Quarterly*, 2002, pp. 723-744.

Ward R., *An Enquiry into the Foundation and History of the Law of Nations in Europe from the Time of the Greeks and Romans to the Age of Grotius*, Gale Ecco Print Editions, 2018.

Watts, A., *The International Law Commission 1949-1998: Volume Three: Final Draft Articles of the Materials,* Oxford, Clarendon Press, 2000.

Weis, *Nationality and Statelessness in International Law*, 2nd edition, Netherlands, BRILL 1979, p. 99.

Wilson R. A., "Human Rights: Culture and Context – An Introduction," in Wilson A Richard, *Human Rights: Culture and Context – Anthropological Perspectives,* London, Pluto, 1996, pp. 1-27.

Witenberg, *La recevabilité des réclamations devant les jurisdictions iternationales,* in RCDI, 1932-III.

Wortley, B.A, *The Mexican Oil Dispute 1938-46*, Cambridge, Cambridge University Press, 1957.

Yesfet B., *The politics of Human Rights in Egypt and Jordan,* Lynne Rienner Publishers, 2015. p.10

Zagato L., *Introduzione ai diritti di cittadinanza*, Venezia, Cafoscarina, 2007. p.11

COUNCIL OF EUROPE

Council of Europe, Treaty Series No.194, European Convention on Human Rights, 1948, Art.2. Protocol No. 14 (CETS No. 194).

Council of Europe, *Human Rights activism and the role of NGOs*. Retrieved at: https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos

EUROPEAN UNION: TREATIES, SECONDARY LEGISLATION, REPORTS AND DOCUMENTS

Treaty on European Union, O.J. 29 July 1992, n°191.

Treaty on European Union, in Common Market Law Review, 1992, p. 1151.

Commission of the European Communities, 21 December 1993, Brussels. COM (93) 702, final, p.8.

Decision 95/553/CE: *Decision of the Representatives of the Government of the Memeber of the States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular represenations*, O.J.L. 314, 28.12.1995, p.73-76.

Treaty establishing the European Community, O. J. C 340, 10/11/1997 P. 0173 - Consolidated version. Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT

Council Decision O.J.L. 297/7, *Establishing a Community mechanism to facilitate reinforced cooperation in civil protection assistance interventions,* 23 October 2001.

2004/635/EC, Council of the European Union, *Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part,* O.J.L304/38, 21 April 2004,. Retrieved at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2004.304.01.0038.01.ENG&toc=OJ%3AL%3A2004%3A304%3ATOC#L_2004304EN.01003901

Directive 2004/38/EC *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*, O.J.L. 158 of 30 April 2004

Commission of the European Communities, 28 November 2006, Brussels. COM (2006) 712, final, *Green Paper – Diplomatic and consular protection of Union citizens in third countries*, p.3.

15646/05 Council document, *on Presidency diplomatic representation in third countries*, 12 December 2005.

2007/C 161/21, *European Economic and Social Committee on the Green Paper on diplomatic and consular protection of Union citizens in third countries*, in O.J. 2007, C 161, 13-7-2007.

European Commission official Website. Information Retrieved at: https://ec.europa.eu/trade/policy/countries-and-regions/countries/egypt/

2013/2820 – RSP, *Resolution of 12 September 2013 on the situation of Egypt*,

2013/2657 - RSP, *Resolution of 4 July 2013 on arms exports: implementation of Council Common Position 2008/944/CFSP*.

2014/3017 - RSP, *Resolution of 15 Januray 2015 on the situation in Egypt*,

2016/2608 - RSP, *Resolution of 10 March 2016 on Egypt, notably the case of Giulio Regeni*,

Treaty on the Functioning of the European Union, O.J. C 202/56 – 7 June 2016, art. 20 (a).

2020/2912 - RSP*, Resolution of 18 December 2020 on the deteriorating situation of human rights in Egypt, in particular the case of te activists of the Egyptian Initiative for Personal Rights (EIPR)*,

EUROPEAN COURT OF HUMAN RIGHTS

European Court of Human Rights *Ciulla v. Italy*, judgement of 22 February 1989, case 9/1987/132/183.

European Court of Human Rights, Grand Chamber Decision As to Admissibility, 71412/01 & 78166/01, p. 1402007, *Behrami and Behrami v. France; Saramati v France, Germany & Norway*. Available at: https://www.tjsl.edu/slomansonb/3.1_UN_attrib.pdf

EUROPEAN COURT OF JUSTICE

European Court of Justice, 16 January 2014, judgement (Fourth Chamber), C-45/13, *Kainz c.Pantherwerke A.G.* Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0045

EGYPTIAN LEGISLATION

Law No.162 of 1958.

Law No. 32 of Civil Associations and Institutions, 1964.

Law No. 51 of 1981.

Law No.53 on Civil Associations and Institutions, 1999.

Law No. 84 of 2002.

Egypt's Constitution of 2014

Law No. 94 of 2015

Egyptian Criminal Procedure Code, article 126. Available at: https://sherloc.unodc.org/cld/uploads/res/document/criminal_code_of_egypt_english_html/Egypt_Criminal_Code_English.pdf

INTERNATIONAL ARBITRARL AWARDS

Reports of International Arbitral Awards, *Case of the Enterprise v. United Kingdom (United States v. United Kingdom*), Mixed Commission established under the Convention of 8 February 1853 between the United States of America and Great Britain, Vol.XXIX, pp. 26-53.

Reports of International Arbitral Awards, *Case of the Enterprise v. Great Britain (United States of America v. Great Britain),* 23 December 1854, Vol. XXIX, pp.26-53.

Reports of Intenational Arbitral Awards, *Decision of the Claims Commissions*, Volume 4, 1926, (USA v Mexico) 87.

Reports of International Arbitral Awards, *North American Dredging Company of Texas (USA) v. United Mexican States*, 31 March 1926, Volume IV pp.26-35, United Nations.

Reports of Intenational Arbitral Awards, *C. W. Parrish (U.S.A.) v. United Mexican States,* 1927.

Reports of International Arbitral Awards, Decision No.55 of 18 June 1931, *El Oro Mining and Railway Co Case (Great Britain v. United Mexican States)* – Volume V, pp. 191-199.

Reports of International Arbitral Awards, 29 March 1933, *Forest of Central Rhodope Case,* (Greece v. Bulgaria), p. 1405.

Reports of International Arbitral Awards, 9 May 1934, *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war (Finland, Great Britain),* Volume III, pp.1479-1550.

Reports of International Arbitral Awards, *Dickson Car Wheel Company (USA) v. United Mexican States, Decision of July*, vol IV (Sales NO.1951,V.1), pp. 669- 668.

Reports of International Arbitral Awards, 10 June 1955, *Mergè Case – Decision No.55*

Reports of International Arbitral Awards, *Case concerning the differences between New Zeland and France arising from the Rainbow Warrior affair,* Ruling of 6 July 1986, Volume XIX, pp 199-221.

INTERNATIONAL COURT OF JUSTICE

International Court of Justice, judgement 25 March 1948, *Corfu Channel (UK vs Albania)*, pp. 4 - 23.

International Court of Justice, judgment 21 March I959*, Interhandel (Switzerland v. United States of America)*, p. 6.

International Court of Justice, judgement of 24 July 1964, *Barcelona Traction, Light and Power Company Limited*.

International Court of Justice, judgement 24 May 1980, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, p.3.

International Court of Justice, judgement 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* p. 392.

International Court of Justice, judgement 6 April 1995, *Nottebohm, Lichtenstein v. Guatemala,* (second phase).

International Court of Justice, judgement 30 June 1995, *East Timor (Portugal v Australia), Judgement,* pp. 90-102.

International Court of Justice, judgement 11 July 1996, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* (*Bosnia and Herzegovina v Serbia and Montenegro*), pp. 595-616;

International Court of Justice, judgement 12 December 1996, Preliminary Objection, *Oil Platforms (Islamic Republic of Iran v. United States of America*), p. 803.

International Court of Justice, *The Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights Opinion*, 1999 Reports 87,

para. 62, referring to the Draft Articles on State Responsibility, Article 6, now reflected in Article 4.

International Court of Justice, judgement 27 June 2001, *LaGrand (Germany v. United States of America*), p. 466

International Court of Justice, *LaGrand (Germany v. United States of America), Overview of the case.* Retrieved at: https://www.icj-cij.org/en/case/104

International Court of Justice, judgment 14 February 2002, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, p. 3.

International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 pp. 136-199.

International Court of Justice, judgment 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America),* p. 12

International Court of Justice, preliminary objections, 24 May 2007, *Ahmadou Sadio Diallo, Republic of Guinea v. Democratic Republic of Congo*, para. 39.

INTERNATIONAL LAW TREATIES AND JURISPRUDENCE

The Treaty of Westphalia, signed and ratified on 24 October 1648.

Treaty of Paris, signed and ratified on 30 May 1814.

Limitation of Employment of Force for Recovery of Contract Debts, Convention signed at The Hague, 36 Stat. 2241; Treaty Series 537, 18 October 1907. Retrieved at: https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0607.pdf

Convention on the Certain Questions relating to the Conflict of Nationality Laws, League of Nations, 13 April 1930, Treaty Series, vol 179, p. 89, No.4137, art. 3. Retrieved at: https://www.refworld.org/docid/3ae6b3b00.html

The Covenant Of the League of Nations, League of Nations, Including Amendments in Force, February 1, 1938

Charter of the United Nations, singed and ratified on 26 June 1945, in San Francisco and entered into force on 24 October 1945.

Treaty of Peace with Italy – February 10, 1947, Paris, Part VII, Property, Rights and Interests, art.78 (4) a . Retrieved at: https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0311.pdf

Universal Human Rights Declaration, signed in Paris on 10 December 1948, RES 217/A

Convention Relating to the Status of Refugees, 28 July 1951, United Nations General Assembly, A/CONF.2/108.

Convention Relating to the Status of Stateless Persons, 28 September 1954, UNTS, vol. 360.

Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961, entered into force on 24 April 1964. United Nations Treaty Series, vol. 500, p.95. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf

Optional Protocol concerning the Acquisition of Nationality, April 18 1961, 500 UNTS 223

Optional Protocol concerning the Compulsory Settlement of Disputes, 18 April 1961, 500 UNTS 241.

Convention on the Reduction of Statelessness, 30 August 1961, United Nations General Assembly, Treaty Series, vol. 989.

Convention on the settlement of investment disputes between States and nationals of other States, signed in March 1965 and entered into force the 17 October 1966, n. 8356.

International Covenant on Civil and Political Rights, 19 December 1966 entered into force 23 March 1976, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 enered into force 23 March 1976. Available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 and entered into force on 27 July 1980. UNTS vol. 1155, p.331.

International Covenant on Economic, Social, and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, enered into force 3 January 1976. Available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

Convention on Special Missions, Adopted on 8 December 1969 and entered into force on 21 June 1985, Vol.1400, p.231. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf

International Convetion on the Suppression and Punishments of the Crime of Apartheid, General Assembly Resolution No. 3068 (XXVIII), Document A/9030 (1974), 1015, UNTS 243, entered into force 18 July, 1976.

1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. Consolidated Version CF 498Y0126(01), O.J.L. 299, 31/12/1972 P. 0032 – 0042, sections 2,3,4 Title II.

American Convention on Human Rights "Pact of San Josè, Costa Rica", B-32, 22 November 1969, art 46. Retrieved at: https://www.refworld.org/docid/3ae6b36510.html

Convention on the Prevention and Punishment and Crimes against Internationally Protected Persons, including Diplomatic Agents, UNTS, vol. 1035, p.167, signed on 14 December 1973 and entered into force on 20 February 1977. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entered into force 26 June 1987. Available at: https://www.ohchr.org/en/professionalinterest/pages/cat.aspx

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, United Nations Human Rights Office of the High Commissioner, Resolution 45/158, 18 December 1990.

Committee on Diplomatic Protection of Persons and Property, New Delhi Conference 2002, Second Report, p.32.

Draft articles on the responsibility of international organizations, 2011, Yearbook of the International Law Commission, A/66/10, para. 87, vol.II, part two.

ITALIAN COURTS JUDGEMENTS

Cass., sezioni unite, 28 ottobre 2015, n.21946

Cass., sezioni unite, 28 ottobre 2015, n.21947.

PERMANENT COURT OF ARBITRATION

Permanent Court of Arbitration, judgement 3 May 1912, *Canevaro claim, Italy v. Perù,* pp. 328-333.

PERMANENT COURT OF INTERNATIONAL JUSTICE

Permanent Court of International Justice, *The Mavrommatis Palestine Concessions, (Greece v. Great Britain)*, Ser. A No 2, 1924.

Permanent Court of International Justice, *Factory at Chorzow (Germ. v. Pol.)*, Ser. A No. 17, 47 Sept. 13, 1928. Retrieved at: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf

Permanent Court of International Justice, judgement 23 February 1939, *The Panevezys-Saldutiskis Railway Case*, *Estonia v. Lithuania*, General list n.76, p 16.

UNITED ACTS AND DOCUMENTS

Doc. S/PV, United Nations Security Council, 1941, para. 77-81.

A/CN.4/246 and Add.1-3, *Third Report on State responsibility, by Mr. Roberto Ago, Special Rapporteur, the internationally wrongful act of the State, source of international responsibility*, 1971, vol II. (1),

A/RES/40/144, *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live: resolution / adopted by the General Assembly*, 13 December 1985.

S/RES/687 (1991), Security Council Resolution, 3 April 1991.

A/CN.4/SER.A/1998, Yearbook of the Intenational Law Commission, Vol. 1 1998.

A/CN.4/484, *Preliminary Report on Diplomatic Protection by Mr. Mohamed BENNOUNA, Special Rapporteur*, 1998.

A/RES/53/144, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 8 March 1999.

Resolution 1244 (1999), United Nations Security Council, 10 June 1999.

A/CN.4/506 and Add.1, *First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur*, 2000.

A/56/49 (vol. I) /Corr. 4, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, fifty-third session, (2001 YB, vol II, part two). Text corrected by document.

A/57/303, Annex, United Nations General Assembly, ICISS, 2001.

A/56/59 (Vol.I) / Corr. 4, *International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 12 December 2001, art. 23.

S/RES/1566 (2004), Adopted by the Security Council at its 5053rd meeting, on 8 October 2004.

A/60/10 Supplement No. 10*, Report of the International Law Commission - Fifty-seventh session,* 2005*,* p110- 116.

A/61/10 *Draft Articles on Diplomatic Protection*, vol. II, Supplement, International Law Commission, 2006, No. 10.

A/CN.4/561 + Add.1-2, *Diplomatic Protection: Comments and observations received from Governments,* 2006.

A/61/10, *Report of the International Law Commission – Fifty-eight session*, No.10 p. 80.

A/63/677, *Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related fields - Follow-up to the outcome of the Millennium Summit*,12 January 2009.

WORLD TRADE ORGANIZATION

World Trade Organization, *Canada – Dairy (25.5 II)*, WTO Doc WT/DS103/AB/RW2, 20 December 2002, 95 – 6.

OTHER INTERNATIONAL RESOLUTIONS AND DOCUMENTS

United States Supreme Court, *United States v. Lovett,* 328 U.S. 303, 1946.

Secretaría de Relaciones Exteriores del Gobierno de Mexico, *United Nations General Assembly Approvs Resolution on ICJ Ruling on Avena and Other Mexican Nationals*, 20 December 2018. Retrieved at: https://www.gob.mx/sre/prensa/un-general-assembly-approves-resolution-on-icj-ruling-on-avena-and-other-mexican-nationals

African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), No. 26363, entered into force 21 October 1986, articles from 45 to 59.

African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.

Constitutive Act of African Union, Thirty-sixth session, 11 July, 2000. Retrieved at https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf

Court of Appeals for the D.C. Circuit, judgement 23 December 1992, *Hugo Princz v. Federal Republic of Germany*, judgement, 813 F. Supp. 22.

Second International Conference of American States, SEN. Doc. 330, 57th Congress, 1st Session, p.228.

Ringraziamenti

Oggi scrivo l'ultima pagina di questo libro, anzi, di questa piccola enciclopedia della vita che mi ha cambiata davvero nel profondo. L'Università è stata fondamentale per migliorare e migliorarmi, per confrontare le mie conoscenze e confrontarmi con persone diverse, provenienti da paesi diversi e da mondi diversi rispetto al mio. L'Università è stata un luogo di contaminazione intellettuale fondamentale, ed un mezzo che mi ha permesso di capire molte dinamiche, da quelle più visibili a quelle meno palesi. Mi ha permesso di imparare ad analizzare i fatti da altre angolazioni, e mi ha insegnato a chiedermi il perché, facendomi capire che la risposta che più si avvicina alla realtà solitamente è fonte di ricerca e di impegno, e dunque non è mai quella nella quale ci si imbatte in prima istanza.
Benché io non sia avvezza alle cerimonie, alle convezioni ed ai rituali, tengo molto a quest'ultima parte, ai ringraziamenti. Ci tengo e credo sia importante ringraziare uno ad uno, coloro i quali hanno creduto in me e mi hanno, ognuno nel proprio modo, dato qualcosa, insegnato qualcosa e accompagnato in questi anni.

In primis, vorrei ringraziare la Professoressa De Vido, per avermi sempre spronata a fare di più e a migliorare questo progetto in cui ho creduto e credo, davvero molto. Un grazie speciale va anche a Sara Dal Monico, il cui aiuto è stato prezioso per far sì che questo percorso potesse concludersi nel migliore dei modi.

Il secondo grande ringraziamento è indirizzato a due persone che da sempre, in modo silenzioso e a volte apparentemente distaccato, hanno creduto che potessi scalare qualsiasi montagna. Mamma e Papa', Graziella e Massimo, in modi diametralmente opposti ma caratterizzati dallo stesso amore, rappresentano la mia stessa essenza, e questo traguardo è anche loro (e della piccola Rose, assistente allo studio da un anno o poco più).

Il terzo è per lo zio Micky, per la sua pazienza, per la sua costante presenza e per essere sempre stato un esempio per me. Grazie per avermi fatto scoprire gli Articolo 31 quando

forse non sapevo nemmeno scrivere, e per avermi sempre teso la mano quando ero a terra (soprattutto dopo una caduta memorabile in uno dei negozi più affollati del centro città).

E poi grazie ad Alessia, che per un caso fortuito e totalmente casuale (o forse no?) ho incontrato proprio tra le aule di Cà Foscari. Dai pranzi intorno al pozzo di Cà Bernardo, alle colline di Valpolicella passando per Firenze, ogni incontro è per me un'avventura speciale e proprio per questo non smetterò mai di ringraziare il corso di Global History e la presentazione sul silver trade. Grazie anche Silvia, e alle risate di cuore che ci facciamo ogni qual volta ci confidiamo sventure e peripezie che pochi hanno potuto provare nella vita. E a Camilla, che con i suoi consigli razionali e contenuti riesce sempre in qualche modo a calmare le mie sfuriate incontenibili. Grazie alla mia compagna di maratone Mame, alle corse a perdifiato tra stazione, biblioteca e qualche aula remota dell'Università in costante ritardo (per non parlare dei buoni propositi!). E poi un grazie va ad Anna e Luca, per lo splendido tirocinio tra le colline del Prosecco che ricordo sempre con grande affetto (e nostalgia!).

Infine, un grazie allo zio Gianpa e ad Elisa, per la pazienza e dolcezza che hanno con me che ahimè, spesso, non li so ricambiare come vorrei. Un grazie a Marta, che ammiro molto e che da sempre guardo come un modello a cui ispirarmi per diventare la miglior versione di me. Un grazie a Bianca e Luca, i quali sono la porta d'ingresso ad un altro mondo, un'altra splendida dimensione. E poi i nonni, Carmela, Giorgio e Luigina che, a modo loro, mi hanno insegnato cosa sia la caparbietà, la perseveranza e l'importanza della prontezza di spirito.