Abstract

In July 2021, the Italian Chamber of Deputies passed a motion concerning certain actions to be taken in favor of Mr Zaki, an Egyptian activist and a student at the University of Bologna, who – until December 2021 – was arbitrarily detained in inhuman conditions in Egypt. Notably, the motion urged the Government to take all the necessary measures to naturalize the activist. Against this background, the present comment aims at analyzing the consequences of a possible attribution of citizenship, assessing its feasibility under international law as well as what Italy could do to uphold Mr Zaki’s human rights.

Keywords


1 Introduction*

Patrick Zaki is a 30-year-old Egyptian human rights activist, who at the relevant time had spent almost six months in Italy as a student at the University

* The present comment has been written before the decision of the Egyptian judge to revoke the pre-trial detention and order the release of Mr Patrick Zaki in December 2021, at the time when the issue of the Italian Review of International and Comparative Law was already under preparation. Accordingly, only some additions have been made to take into account the developments occurred.
of Bologna. On 7 February 2020, upon his arrival in Cairo, he was arrested by domestic authorities and disappeared for several hours. According to the available information, the student was threatened, tortured, and questioned about his work and activism. A few hours later, Mr Zaki was brought before a public prosecutor who ordered his remand detention on charges including dissemination of subversive propaganda, incitement to protest, and instigation to terrorism. Until his release in December 2021, he was then arbitrarily detained in the infamous Tora prison: his pre-trial detention was renewed every 45 days, thus preventing him from having the case heard before a judge. The unfolding of these events generated strong protests by the European Union and its Member States, which have repeatedly demanded the release of the young activist, while also requesting that Egypt respects democratic values and human rights. In particular, his story caused a huge stir in Italy, since the case dramatically resembles that of the murder of the Italian researcher Giulio Regeni, who disappeared in Egypt in 2016.

In light of the repeated extensions as well as the inhuman conditions of his pre-trial detention, civil society mobilization started in Italy to push the Italian Government to intervene for Mr Zaki’s release. To this end, in July 2021 the Chamber of Deputies, following the steps of the Senate, passed by vast majority a motion concerning certain initiatives to be taken in favor of

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Mr Zaki. Notably, it urged the Government to take all the measures within its competence in order to confer Italian nationality to the activist and to continue advocating for his release.

This comment focuses on the legal consequences stemming from a prospective citizenship attribution to Mr Zaki, questioning its effectiveness. To this end, it briefly considers three relevant issues, namely: i) how conferral of citizenship by Italy could take place in accordance with international law and the status of dual nationality; ii) the possibility for Italy to provide Mr Zaki with consular assistance or to exercise diplomatic protection in order to vindicate his rights; iii) the opportunity to invoke Egypt’s responsibility for the breach of its obligations under international law.

2 Citizenship Attribution and Dual Nationality under International Law

In assessing whether Italy might confer its nationality to Mr Zaki, it is necessary to consider two issues: first, how nationality can be acquired in accordance with Italian law and, second, what international law prescribes in this case. As regards the former, the matter is regulated by Law No. 91 of 15 February 1992, according to which Italian nationality can be acquired “inter alia, by virtue of jus sanguinis [...], marriage or other family relationship [...] and [as regards particular categories,] jus soli.” Furthermore, naturalization – i.e., “the conferment of nationality onto an alien by a formal individual act with the consent of [...] the person concerned” – is possible in cases of residence on the Italian soil, adult adoption or work within public administration. Since the status of Mr Zaki does not fall within any of these hypotheses, the only option would be represented by the exceptional provision enshrined in Article 9(2) of Law No. 91, according to which “by decree of the President of the Republic [...], citizenship can be granted to foreigners [...], when there is an exceptional interest of the State.” In the case at hand, such an exceptional interest – the

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6 The official text of the motion passed by the Chamber of Deputies is available at: <https://www.camera.it/leg8/995?sezione=documenti&tipoDoc=assemblea_allegato_odg&idlegislatura=18&anno=2021&mese=07&giorno=06>.
8 Dörr, “Nationality”, Max Planck Encyclopedia of Public International Law, 2019, para. 18.
ascertainment of which is essentially left to the discretion of the different constitutional organs involved in the procedure\textsuperscript{10} – could be arguably identified in the need to safeguard the life of the young activist and, more generally, to uphold human rights.

Having ascertained the availability of such an option, it could be asked what international law might say in respect of acquiring nationality and if it imposes any limitation. In 1923, the Permanent Court of International Justice in its \textit{Nationality Decrees Advisory Opinion} stressed that “questions of nationality are, in the opinion of the Court, in principle within [the] reserved domain [of States]”;\textsuperscript{11} thus implying that, as a general rule, each State is free to determine who are its own nationals.\textsuperscript{12} Such an interpretation is supported by Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Law (“Hague Nationality Convention”) and Article 3(1) of the European Convention on Nationality.\textsuperscript{13} Similarly, the International Law Commission (“ILC”) in its commentary to the Draft Articles on Diplomatic Protection (“DADP”) identified the following principle: “it is for the State of nationality to determine, in accordance with its municipal law, who is to qualify for its nationality.”\textsuperscript{14}

Nevertheless, international law limits States’ discretion, but these constraints “mostly do not affect the legal validity of conferment of nationality under national law, but simply its acceptance on the international plane, i.e. the consequences of nationality vis-à-vis other States”.\textsuperscript{15} The existence of such limitations is recognized by the above-mentioned conventions, according to which the relevant law of the State “shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.”\textsuperscript{16}

\textsuperscript{10} Discretion does not amount to arbitrariness. In this respect, see \textit{Tribunale Amministrativo Regionale del Lazio (Sez. I), Borshi Nermin v. Ministero dell’Interno}, 4 March 2013, No. 2289, confirming a decision of the public administration which found that the requirements ex Art. 9(2) were not met.

\textsuperscript{11} \textit{Nationality Decrees Issued in Tunis and Morocco (French Zone), Advisory Opinion of 7 February 1923}, PCIJ Reports, Series B, No. 4, p. 6 ff., p. 24.


\textsuperscript{13} Convention on Certain Questions relating to the Conflict of Nationality Laws, 12 April 1930, entered into force 1 July 1937, Art. 1: “It is for each State to determine under its own law who are its nationals”; European Convention on Nationality, 6 November 1997, entered into force 1 March 2000, Art. 3(1): “Each State shall determine under its own law who are its nationals”.

\textsuperscript{14} Draft articles on Diplomatic Protection with commentaries, 2001, Commentary on Art. 4, para. 1.

\textsuperscript{15} \textit{Dörr, cit. supra} note 8, para. 4.

\textsuperscript{16} Art. 1 Hague Nationality Convention; see also Art. 3(2) European Convention on Nationality.
“the acquisition of nationality must not be inconsistent with international law”.17 Indeed, “[a]lthough a State has the right to decide who are its nationals, this right is not absolute”.18 More problematic, however, is to interpret these provisions in order to identify which are in concreto these limits. Once again, the works of the ILC might provide some indications in this respect. Indeed, the Commission stressed that “[t]oday, conventions, particularly in the field of human rights, require States to comply with international standards in the granting of nationality” and identified one of these limitations in Article 9(1) of the Convention on the Elimination of All Forms of Discrimination Against Women.19 According to this provision, indeed, States Parties shall ensure that neither marriage nor change of nationality by the husband will automatically change the nationality of the woman or force her to take his nationality.20 Similarly, Article 5(d)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination requires that States Parties do not racially discriminate anyone in the enjoyment of, inter alia, the right to nationality.21

What seems to stem from these references is that the international community is interested in protecting individuals from a forceful or discriminatory change of their nationality. In other words, the compatibility of the granting or removal of nationality must be primarily assessed in light of the protection of the rights of individuals. This point was also made by the Inter-American Court of Human Rights, according to which:

“It [is] necessary to reconcile the principle that the conferral and regulation of nationality fall within the jurisdiction of the state [...] with the further principle that international law imposes certain limits on the state’s power, which limits are linked to the demands imposed by the international system for the protection of human rights.”22

17 Draft articles on Diplomatic Protection, cit. supra note 14, Art. 4.
18 Ibid., Commentary on Art. 4, para. 6.
19 Ibid.
In this respect, it seems reasonable to conclude that the conferral of nationality to Mr Zaki would not clash with Italy’s human rights obligations. That is because Article 9(2) of Law No. 91, read in light of the principles of the Italian legal order, would require the prospective citizen to freely consent to the naturalization, while taking an oath to be faithful to the Republic and its Constitution pursuant to Article 10 of Law No. 91.

A different and more complex question might arise as to whether the naturalization of the activist clashes with other international law rules. In this respect, some scholars have argued that “a grant of nationality may be disregarded [...] or treated as a nullity, if it has been made in excess of jurisdictional limits placed by international law, such as the extension of nationality laws to foreigners who owe no allegiance to the State granting nationality”.23 From this perspective, therefore, “nationality will be invalid if it has been acquired mala fide, or on the basis of a tenuous connection”.24 As a way of example, it has been authoritatively argued that a collective naturalization of non-residents could represent an internationally wrongful act if a State uses such conferment as a means of coercion.25 A conferral to Mr Zaki would not fall in the latter hypothesis. However, since the connection with Italy is tenuous, considering the little time he spent in the country, the citizenship attribution might not be accepted on the international plane.

Leaving aside the uncertainties surrounding the compatibility of a nationality conferral to Mr Zaki with the rules of international law, it is nonetheless worth considering the consequences of such a course of action. In greater detail, one may question what would be the status of the activist after naturalization. This is a relevant issue since nationality lies at the very heart of two international law procedures to which Italy could resort to protect Mr Zaki: consular assistance and diplomatic protection. As a general rule, individuals may well have multiple nationalities.26 In this respect, international law remits to each State the regulation of this phenomenon. Against this background, while some States require naturalized individuals to renounce their other nationality, others allow aliens to acquire their nationality without renouncing the original one.27 In this respect, while under Italian law the procedure of naturalization...

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24 Ibid.
27 For an overview of State practice on the matter, see Boll, cit. supra note 26, p. 309 ff.
does not require the applicant to renounce his original nationality, Egyptian legislation appears to be more problematic. That is because it requires that the Government pre-approves any renunciations to Egyptian nationality by their citizens. This is considered a legitimate policy choice inasmuch as “there seems to be no rule in general international law which would oblige States to provide for the possibility of renunciation in their national legal systems”.28 As a consequence, if a citizen fails to obtain such a permission, he or she will have dual nationality by default. This might represent a major hurdle for Italy in exercising any protection of Mr Zaki, as we will try to highlight in the following section.

3 Consular Assistance and Diplomatic Protection of Dual Nationals

Having considered the procedure through which Italy could confer its nationality to Mr Zaki and the related drawbacks, it is necessary to assess the usefulness of naturalization by considering how this might represent a step forward for the protection and vindication of Mr Zaki’s rights. In this respect, it is necessary to make a distinction between the political and the legal planes. As regards the first, the conferral of Italian nationality to Mr Zaki cannot but be seen as an additional way of putting pressure on the Egyptian authorities so as to uphold the rights of the activist. Such a course of action by the Italian Government, indeed, should convey the message that Italy will stand by Mr Zaki to assure that his rights will not be further violated. This holds true even after his release, inasmuch as the Egyptian Government has not (yet) dropped the charges against him. As for the legal plane, it is necessary to consider the relevant international law procedures that Italy could resort to with the aim of ensuring or vindicating the rights of a prospective citizen. While a comprehensive account is beyond the scope of this comment, we will focus on consular assistance and diplomatic protection.

Article 5 of the Vienna Convention on Consular Relations (“vccr”) lists consular functions, providing that they consist, inter alia, in “helping and assisting nationals […] of the sending State”.29 Within the framework of help and assistance to nationals, “[a] major protective function of consuls is to communicate with nationals who are in pre-trial detention on a criminal charge”.30 In order to make this function effective, Article 36 vccr provides for a duty

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28 DÖRR, cit. supra note 8, para. 34.
of the receiving State to inform consular posts in the event that a national of the sending State is arrested, and the right of the consular personnel to freely communicate with and have access to their nationals. In such a way, consular personnel are able to ascertain if the national is in good health, provide the person with the necessary legal assistance, and monitor judicial proceedings. However, dual nationals could encounter difficulties when detained in one of their States of nationality. Indeed, some States do not recognize to their own citizens the right to consular services by States of second nationality. From this perspective, therefore, Italian consular personnel could have been refused any communication with or access to Mr Zaki inasmuch as the latter, when detained, was still an Egyptian national.

The same holds even truer, mutatis mutandis, with regard to diplomatic protection. The latter

“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 [...] person that is a national of the former State with a view to the implementation of such responsibility.”

In other words, diplomatic protection “is the procedure employed by the State of nationality of the injured person to secure protection of that person, and to obtain reparation for the internationally wrongful act inflicted”. Diplomatic protection is strictly intertwined with nationality: indeed, Article 44 of the ILC Articles on the Responsibility of State for Internationally Wrongful Acts (“ARSIWA”) provides that the international responsibility of a State cannot be invoked if the claim is not brought in accordance with any applicable rule concerning nationality of claims.


32 Draft articles on Diplomatic Protection, cit. supra note 14, Commentary on Art. 1, para. 6. As for the basic features of this procedure, see Amerasinghe, Diplomatic Protection, Oxford-New York, 2008, pp. 21–27.


Leaving aside the unsettled question as to whether a State has to prove a genuine link between itself and the national – as stated by the International Court of Justice (“ICJ”) in the famous *Nottebohm* case\(^{35}\) – one might wonder which are the consequences of the fact that: i) Mr Zaki, at the time he was allegedly subjected to torture, was not an Italian citizen; ii) the arbitrary and inhuman detention of Mr Zaki started and terminated before his (prospective) naturalization; iii) Mr Zaki would hold dual nationality. As for the first issue, the answer seems straightforward. According to the well-established rule of “continuous nationality”, “[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 presentation of the claim”.\(^{36}\) As it is easy to ascertain, this is not the case for Mr Zaki. Therefore, no “retroactive” protection of his rights might be granted by Italy through diplomatic protection.

Moving to the second issue, the answer could seem already provided with regard to the “continuous nationality rule”. However, it is relevant to stress that the arbitrary detention and the inhuman conditions in which he was detained did represent a breach of an international obligation by an act having a continuing character pursuant to Article 14 ARIWA. Thus, Italy could have tried to argue that any exercise of diplomatic protection was only meant to cover the part of the violation taking place after the naturalization of Mr Zaki. However, as is apparent from the facts, the release of the young activist put an end to the breach we are referring to well before any (if ever) citizenship attribution. Accordingly, taking into account the events of December 2021 and unless any further development, no espousal of the claim can possibly be made by Italy.

In any case, turning to the final issue, this possibility could have been likewise ruled out by the fact that Mr Zaki would have still retained his Egyptian citizenship. Indeed, “the traditional practice was that a state would not exercise diplomatic protection against another state which considered the injured person to be its own national”.\(^{37}\) In this respect, however, Article 7 DADP provides that “a State of nationality of the claimant may [...] exercise protection against another State of nationality if the nationality of the former was predominant at the date of injury and of the claim”.\(^{38}\) Such a provision seems to preclude any chance of success of a claim by Italy through diplomatic protection. Indeed, to conclude that the Italian nationality was (at the date of injury) and would

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\(^{36}\) Draft articles on Diplomatic Protection, *cit. supra* note 14, Art. 5 (emphasis added).


\(^{38}\) Emphasis added.
be (at the date of the claim) predominant on the Egyptian one sounds hard to maintain.

In light of the foregoing, the naturalization of Mr Zaki could not enable Italy to provide him with consular assistance or to espouse his claim through diplomatic protection.

4 The UN Convention Against Torture: The Way Forward?

In the previous section, it has been argued that even if Italy were to naturalize Mr Zaki, this could nevertheless turn out to be unfruitful. Indeed, unless Egypt approves a renunciation of nationality by the activist, the Italian Government would find itself facing obstacles that are difficult to overcome. Against this background, one could wonder whether Italy, in an attempt to protect Mr. Zaki’s human rights, could not resort to other instruments that the international legal order makes available to it. In this respect, it is relevant to mention the so-called erga omnes partes obligations, i.e. those obligations owed by any State Party to a convention towards all other Contracting Parties. According to the ICJ, when referring to erga omnes partes obligations, “each State Party has an interest in compliance with them in any given case”. Accordingly, “each State Party to the Convention [is entitled] to make a claim concerning the cessation of an alleged breach by another State Party”.

Against this background, there is a fundamental instrument which Italy could invoke in order to uphold the rights of Mr Zaki: the United Nations Convention against Torture (“CAT”). In the famous Belgium v. Senegal case, the ICJ came to the conclusion that the Convention creates erga omnes partes obligations and, thus, “any State Party to the Convention may invoke the responsibility of another State Party with a view to ascertaining the alleged failure to comply with its obligations [...] and to bring that failure to an end”.

In this respect, it is relevant to point out that both Italy and Egypt are parties to the Convention which, in Article 30, enshrines a compromissory clause in order to settle any dispute concerning its interpretation and application. It is worth noting that, as opposed to other human rights treaties, Egypt has

39 Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012, ICJ Reports, 2012, p. 422 ff., para. 68.
40 Ibid., para. 39.
41 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, entered into force 26 June 1987.
not made any reservation to the compulsory dispute settlement mechanism provided for in Article 30. Therefore, Italy could bring a case before the ICJ in order to ascertain the violations of both the substantial and procedural obligations enshrined in the Convention with regard to the torture and inhuman treatment of Mr Zaki.

5 Conclusions

In this comment, we looked at the case of Mr Zaki through the lens of the initiative to confer Italian nationality upon him. In greater detail, it has been shown that – despite some legal uncertainties – Italy could naturalize the young activist in accordance with international law. Nevertheless, the usefulness of Italian citizenship attribution is questionable since, from a legal point of view, such conferral could hardly produce any beneficial effect. Indeed, the Italian Government would arguably be precluded from protecting Mr Zaki through consular assistance or diplomatic protection.

Contrariwise, a more effective remedy seems viable: in the face of repeated violations of and refusals to cooperate in accordance with the CAT, Italy could resort to the procedure enshrined in Article 30. This would allow Italy to bring the case before the most authoritative forum in international legal order to invoke Egyptian responsibility for the torture and inhuman treatment of Mr Zaki.

What is actually most surprising, however, is the apparent dualism of the Italian Government: on the one hand, it has repeatedly affirmed the need to promote and protect human rights; on the other hand, it has not resorted to the dispute settlement mechanism provided in the CAT, much as it has not done so in the past for Giulio Regeni. Against this background, while the release of Mr Zaki in December 2021 cannot but be considered as a welcome development in light of the diplomatic efforts made by Italy, much remains to be done in order to upheld human rights in Egypt.