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STATE IMMUNITY FOR INTERNATIONAL CRIMES: THE CASSAZIONE'S SOLITARY BREAKAWAY HAS COME TO AN END (JUDGMENT 32139/2012).

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In August, the First Criminal section of the *Cassazione*, the Italian Supreme Court (ISC), annulled (without re-trial) a decision of 2011, whereby the Military Court of Appeal had condemned Germany to pay reparation to the Italian victims of some Nazi officers, who had been found guilty of war crimes perpetrated in Italy during the ending phase of World War II. The challenge before the ISC was brought by the German State against the tort-related section of the *dispositif*, and did not touch upon the criminal conviction of the defendants.

In this judgment, the Italian judges had to perform a forced (and awkward) turnabout on the issue of State immunity from civil foreign jurisdiction in the case of crimes against humanity, in the wake of the International Court of Justice (ICJ)'s judgment of February 2012. Indeed, earlier the same year, the ICJ had upheld Germany's claim that Italy had breached the international custom providing States with immunity from foreign civil jurisdiction for acts committed in the exercise of sovereign prerogatives (*acta jure imperii*). Indeed, Italian courts had since 2004 started to award damages to Italian plaintiffs suing Germany for WWII-

related crimes, and had dismissed Germany's invocations of State immunity, based on a long-standing rule of customary law.

The ungrateful task of the ISC was to implement the ICJ's *dictum* and to put an end to the unsuccessful campaign launched by the *Cassazione* itself, aiming at the creation/recognition of an exception to the general principle of State immunity. This doctrine was first heralded in the *Ferrini* judgment (5044/2004), it was later confirmed in the 2008 orders (see e.g. order 14201/2008 *Mantelli*) and it was generally accepted and applied by several courts of first instance and appeal, up until very recently.

Italy's position in The Hague replicated the reasons provided by the ISC in the *Ferrini* case-law: although there certainly is a custom that confers upon States immunity from the civil jurisdiction of other States, especially if acts *jure imperii* are in question, there also are rules of higher status prohibiting the commission of international crimes. The effective implementation of these higher rules cannot be frustrated by the rules of immunity, especially when the conduct examined has taken place in the State of the forum.

A similar argument had been used by the Military Court of Appeal in the judgment later challenged before the ISC. It had referred to the evolutionary status of international customs and to the necessity to strike a balance between the purpose of State immunity (a safeguard for State sovereignty) and the paramount interest to indemnify the victims of the most heinous violations of human rights. Somewhat apart from the hierarchical argument (a *jus cogens* prohibition must trump a rule of custom), the Military Court of Appeal also declared that a new custom had indeed solidified, which was capable of derogating from the general one of State immunity. As a consequence, since German international crimes in Italy in 1944 were not committed on the initiative of single commanders but in the execution of a centralised plan, Germany was liable for damages.

After perusing the ICJ's decision, the judges of Piazza Cavour felt the need to recapitulate the phases of the legal vicissitude described above, also to justify before the eyes of the plaintiffs the spectacular *revirement* they

were about to include in the operative part of the decision.

The ISC took note of the main point of the ICJ's reasoning that led to the rejection of Italy's position: the *jus cogens* rank of the material norms prohibiting international crimes does not affect the rules on State immunity, which are of procedural nature and apply regardless of the gravity of the conduct. In other words, the peremptory character of the rules of behavior cannot trump the principles of State immunity, despite of their concededly lower rank. This is because there is no conflict between them in the first place: stating the contrary would be tantamount to ignore "the distinction that must be drawn between the substantive primary rule and the secondary rules that come into play once a violation has occurred" (para. 120 of the ICJ's decision).

The ISC seised the occasion to question the correctness of such distinction, stating that

Appare indebitamente riduttivo confinare la categoria dello jus cogens alla sua sola protata sostanziale, ignorando che la sua effettività concreta si misura proprio alla stregua delle conseguenza giuridiche che derivano dalla violazione delle norme imperative.

The Italian judges, in addition, noted that this distinction ends up promoting impunity and attracting crimes against humanity in the category of acts *jure imperii*, providing them with undeserved protection. This notwithstanding, the ISC acknowledged the undisputed authoritativeness of the ICJ's decision, and the isolation of its own position in Europe. It took cognisance that the rationale of State immunity is to preserve sovereignty, and that – as of now – no act whatsoever can be considered serious enough to put this preservation into doubt.

Before admitting defeat, the ISC also took the chance to provide a "friendlier" reading of the ICJ's judgment. According to this interpretation, the ICJ itself, far from disavowing the convincingness of the principles declared in the 2004 and 2008 decisions of the ISC, limited itself to register the lack of agreement thereon, and acknowledged that the ISC was legitimately bringing a contribution to "to the emergence of a rule

shaping the immunity of the foreign State" in international law. The Italian decisions were therefore seen as an attempt to bring about a change in the law, which was "inspired by the principles of legal civilization". However, the lack of consensus surrounding the Italian position could only lead to the discontinuation of the case-law it had generated.

As for the impact of the ICJ's decision on the proceedings at hand, the ISC noted that Italy had incurred international responsibility for the acts of its judiciary, and had been ordered to restore the *status quo antea*, regardless of the means chosen to that aim, and irrespective of the finality of the domestic judgments already delivered.

The Court, with a slight and involuntary comic effect, declared that it had no direct obligation to follow the ICJ's decision, but it would agree to do so spontaneously, not to aggravate Italy's position at the international level, and to issue a judgment "reflecting the current status of international law". It also conceded that it would not be a problem for Italy to implement the ICJ's decision through the adoption of a statute. It had been argued that such statute might be unconstitutional *ab origine*, because it would be at variance with the international custom limiting State immunity from civil jurisdiction in the case of crimes against humanity – and international customs enjoy a quasi-constitutional rank in the domestic order (under Art. 10 of the Constitution). However, since it had been conclusively clarified that such international custom, in fact, does not (yet?) exist, the question of constitutionality could not arise in the first place.

The ISC, net of all the *dicta* aimed at explaining why it still believed to be sort-of-right, has displayed a remarkable degree of deference to the authority of the ICJ, on an issue of considerable political weight. In so doing, it had to swallow its pride and grant immunity to Germany, but the result is uplifting: Italy is a good citizen of the international community, and its State organs are aware of the obligations it has entered in. Far from creating a schizophrenic situation like those of the *Avena* and *LaGrand* cases (if you don't remember the details, I recommend this article), the Italian judiciary acted responsibly and spared Italy from

further troubles at the international level.