

# IMMUNITY OF STATES AND THEIR ORGANS: THE CONTRIBUTION OF ITALIAN JURISPRUDENCE OVER THE PAST TEN YEARS

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## 1. THE IMPORTANT ROLE OF ITALIAN JURISPRUDENCE ON MATTERS OF JURISDICTIONAL IMMUNITIES OF THE STATE

Italian case law on jurisdictional immunities of foreign States is historically considered to be at the centre of the development of international customary law. It is enough to highlight that the theory of restrictive immunity was introduced towards the end of the XIX century by Italian and Belgian courts.

According to the customary rules in force at that time, a State could never be sued before the courts of a foreign country, on the basis of the general principle *par in parem non habet iurisdictionem*. The private party who wished to judicially enforce its right toward a foreign State was obliged to litigate within the latter's boundaries, unless the foreign State itself relinquished its right to immunity. In other words, the jurisdictional immunity of the foreign State was absolute.

Italian courts managed to restrict the scope of application of existing international norms by granting immunity to foreign States only with regard to controversies involving the exercise of sovereign functions. This restriction was not the result of applying an existing customary norm. Rather, the shift from absolute immunity to restrictive immunity came about through an accurate interpretation of the principle *par in parem non habet iurisdictionem*. According to Italian judges, if the aim of this principle was to protect the sovereignty of a State, then immunity should not be granted in cases where the State acted as a private entity.

The courts of other countries started to follow the Italian and Belgian trend, developing a general practice able to create a new customary norm, according to which State immunity was limited to the so-called *acta jure imperii*. Moreover, Italian insight paved the way for applying the restrictive immunity theory to the jurisdiction to execute. Still, with regard to proper interpretation of the principle *par in parem non habet iurisdictionem*, Italian judges stated that the properties of a foreign State could not be executed only if they were used for the exercise of sovereign functions. Once again, the restriction of immunity was obtained through logical reasoning rather than through the application of existing customary norms. Only when the courts of other countries decided to adopt the Italian position did a new international norm come into existence, cancelling the concept of absolute immunity.

In view of the above, it is evident that if international law today provides for restrictive immunity of a foreign State, with respect to both adjudicative jurisdic-

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tion and execution, most of the credit should go to Italian jurisprudence, which, by correctly applying the principles of international law in force at that time, created the necessary framework for later developments of customary law in this regard.

## 2. ITALIAN CASE LAW OF THE PAST TEN YEARS AND THE *JUS COGENS* EXCEPTION

The past ten years have seen an important contribution made by Italian jurisprudence to international customary law, either by consolidating certain principles of law or by introducing new elements for reflection. *Inter alia*, this has been made possible through the absence of State legislation on the matter,<sup>1</sup> which implies the direct application of the international rules by Italian judges, without the filter of national norms. Moreover, regarding the jurisdiction to execute, a significant step in this direction was the abolition of the national legislation envisaging prior authorization of the Ministry of Justice for executing the properties of the foreign State.<sup>2</sup> Thus, Italian courts deal directly with international law on matters of immunity, with respect to both adjudicative jurisdiction and execution.

There is no doubt that the most interesting novelty of the past ten years is the *Ferrini* case.<sup>3</sup> *Ferrini* is an Italian citizen who initiated a civil action for liability in tort against the Federal Republic of Germany in relation to war crimes committed against him by Nazi military forces during the Second World War. In ascertaining its jurisdiction over the case, the Italian Supreme Court abandoned the traditional distinction between *acta jure imperii* and *acta jure gestionis* and denied immunity to Germany, since the unlawful acts under consideration consisted of the violation of peremptory norms of international law. And since the norms of *jus cogens* prevail over customary rules (*lex superior*), State immunity could not be granted.

This principle was confirmed by the Italian Supreme Court, albeit in an *obiter dictum*, in *Borri*,<sup>4</sup> and then directly applied in other cases similar to *Ferrini*, namely

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<sup>1</sup> Few States have adopted national legislation regarding jurisdictional immunities of foreign States: e.g. USA, United Kingdom, Pakistan, South Africa and Canada.

<sup>2</sup> Ministry of Justice authorization was established by Law No. 1263 of 15 July 1926 and declared unconstitutional by the Constitutional Court with decision of 15 July 1992, No. 329.

<sup>3</sup> *Corte di Cassazione (Sez. Unite civili), Ferrini v. Federal Republic of Germany*, 11 May 2004, No. 5044, RDI, 2004, p. 539 ff. See GIANELLI, "Crimini internazionali ed immunità degli Stati dalla giurisdizione nella sentenza Ferrini", RDI, 2004, p. 643 ff. and IOVANE, "The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights", IYIL, Vol. XIV, 2004, p. 165 ff.

<sup>4</sup> *Corte di Cassazione (Sez. Unite civili), Borri v. Argentina*, 27 May 2005, No. 11225, RDIPP, 2005, p. 1091 ff.

in twelve decisions rendered on 29 May 2008<sup>5</sup> and in *Milde*.<sup>6</sup> The latter case concerned criminal proceedings brought against a Nazi officer who took part in the massacre of Civitella (an Italian town near Arezzo). The German officer was condemned by the Military Tribunal of La Spezia.<sup>7</sup> The judgment was then confirmed both by the Court of Appeals and the Court of Cassation. The Civitella victims' heirs received one million euros each in compensation. The Federal Republic of Germany was also condemned to pay compensation because of its joint liability and lack of jurisdictional immunity. The Court of Cassation affirmed once again the *jus cogens* exception in a decision rendered on 25 February 2009,<sup>8</sup> but did not apply it, since allocating nuclear weapons in a military base, on the basis of treaty obligations, was not considered as an international crime.

The *jus cogens* exception was also applied by the Italian judges in proceedings for the recognition of foreign judgments. This issue will be dealt with in more detail below.

The *Ferrini* case and the introduction of the *jus cogens* exception had a relevant international impact. Before *Ferrini*, the *jus cogens* exception had been affirmed by the Greek Supreme Court (*Areios Pagos*) in the *Distomo* case,<sup>9</sup> but was then disallowed in *Margellos*.<sup>10</sup> In the *Jones* case,<sup>11</sup> the House of Lords adopted a very critical approach toward the position taken by the Italian Supreme Court, whose line was considered not in conformity with international law. The question is currently pending before the International Court of Justice (ICJ),<sup>12</sup> on an application from the Federal Republic of Germany, whereby the latter invokes the responsibility of Italy for violations of international customary law on matters of foreign State immunity. Notwithstanding, Italian case law has so far consistently upheld the position taken by

<sup>5</sup> *Corte di Cassazione (Sez. Unite civili)*, 29 May 2008, Nos. 14201 to 14212.

<sup>6</sup> *Corte di Cassazione (Sez. I penale)*, *Criminal Proceedings against Josef Max Milde*, 13 January 2009, No. 1072, IYIL, Vol. XVIII, 2008, p. 325 ff. (commentary by IOVANE). Regarding the development of Italian case law from *Ferrini* to *Milde*, see PAVONI and BEAULAC, "L'immunité des États et le *jus cogens* en droit international. Étude croisée Italie/Canada", *Revue juridique Thémis*, 2009, p. 491 ff.

<sup>7</sup> *Tribunale Militare di La Spezia*, 13 January 2006.

<sup>8</sup> *Corte di Cassazione (Sez. Unite civili)*, *United States v. Tissino*, 25 February 2009, No. 4461, RDI, 2009, p. 856 ff., commentary by FEOLA, *infra* in this *Yearbook*, Judicial Decisions.

<sup>9</sup> *Areios Pagos, Prefecture of Voiotia v. Federal Republic of Germany*, 4 May 2000, No. 11, discussed by GAVOUNELI and BANTEKAS, *AJIL*, 2001, p. 198 ff.

<sup>10</sup> *Areios Pagos, Federal Republic of Germany v. Margellos*, 17 September 2002, No. 6, English excerpts and commentary by GAVOUNELI, *International Law in Domestic Courts*, ILDC 87 (GR 2002).

<sup>11</sup> House of Lords, *Jones et al. v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) et al.*, 14 June 2006, ILM, 2006, Vol. 45, p. 992 ff. with comment by FERENCZ. Actually, the House of Lords followed the same trend as the German *Bundesgerichtshof* (judgment of 26 June 2003) and the French Court of Cassation (judgment of 16 December 2003).

<sup>12</sup> Application submitted by Germany on 23 December 2008.

the Supreme Court, as demonstrated by a recent judgment of the Tribunal of Turin (decision of 19 May 2010) that confirmed the *Ferrini* principle in a similar case.

International law specialists are divided on the *Ferrini* case. Many writers expressed their appreciation of the position of the Italian Court of Cassation, but others are critical, since customary norms do not provide for an exception to immunity in relation to international crimes. In actual fact, the *jus cogens* exception may be justified on different grounds.<sup>13</sup>

On the one hand, it could be argued that committing international crimes implies a relinquishing of jurisdictional immunity, but in view of the rigorous criteria established by international rules for a valid waiver, this position does not seem acceptable. According to Article 7 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI), opened for signature in New York in January 2005, consent to the exercise of foreign jurisdiction must be expressed by an international agreement or in a written contract or even by a declaration before the court. Italian jurisprudence is in line with this provision by establishing that not even a jurisdictional clause included in a contract with a private party may have the effect of excluding the immunity of the State. Moreover, the implied waiver thesis has been rejected in the *Princz* case.<sup>14</sup> On the other hand, the denial of immunity could be justified as a countermeasure of the injured State against the State that committed the crime. It must be stressed that this reasoning risks broadening the field of application of the exception also beyond *jus cogens* violations and it is a problem for countries in which the denial of immunity is usually decided by the courts rather than by governments.

Moreover, it may be argued that the *jus cogens* exception is established by an existing international customary norm, but this position can easily be contested on the basis of the UNCSI, which is silent on the issue and on the lack of uniform conduct by States in this regard. Finally, denial of immunity may be considered the result of the impossibility of recognizing the consequences of the *jus cogens* violation as well as of the hierarchical superiority of *jus cogens* over customary law.

Italian case law has used the latter reasoning, displaying a will to deny the immunity of foreign States on the basis of logical juridical reasons and through a systematic application of existing international rules, in view of the *lex superior* principle. In *Ferrini* and later similar cases, the Supreme Court did not state that the *jus cogens* exception is established by a customary rule. Rather, in the aforesaid twelve decisions of May 2008, it stated the contrary. Therefore, it is quite evident that general international law does not envisage a *jus cogens* exception. Nevertheless,

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<sup>13</sup> On this issue see RONZITTI, "L'eccezione dello *ius cogens* alla regola dell'immunità degli Stati dalla giurisdizione è compatibile con la Convenzione delle Nazioni Unite del 2005?", in FRANCONI, GESTRI, RONZITTI and SCOVAZZI (eds.), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*, Milano, 2008, p. 45 ff.

<sup>14</sup> US Court of Appeals (D.C. Col.), *Federal Republic of Germany v. Princz*, 26 F.3d 1166 (1994).

since it is undeniable that the norms of *jus cogens* prevail over customary rules, the denial of immunity in controversies concerning international crimes does not seem to be at odds with international law. However, according to some authors, the principle of *lex superior* is not applicable in these cases since the norms of *jus cogens* and the customary rule concerning immunity have a different field of application.<sup>15</sup> The former are substantive rules while the latter is procedural in nature. Consequently, there would be no conflict to settle.

In my view, this argument is not very convincing. In every legal system the procedural norms are not separated from the substantive rules by an impassable clear-cut line. If one considers for example the principle of equality, as protected within national legal orders, one notes that even though it is a principle of a substantive nature, it also produces legal effects at the trial level. The question of parliamentary immunities is a clear example of this. Also, a resolution of the *Institut de Droit International*, adopted on 10 September 2009, recognizes the existence of a “conflict between immunity from jurisdiction of States and their agents and claims arising from international crimes”.<sup>16</sup> And, in my opinion, if a conflict does really exist, it can be settled only by applying the *lex superior* principle. Moreover, if States cannot recognize the consequences stemming from *jus cogens* violations, another reason would lead me to uphold the Italian courts’ jurisprudence. As a matter of fact, if immunity were granted in cases analogous to *Ferrini*, then such a principle would be *de facto* compromised.

It seems to me that, for its origins and potential effects, the recent trend of Italian case law recalls the path followed by Italian courts at the end of the XIX century, when the concept of restrictive immunity was introduced.

As for its origins, the restrictive immunity theory was initially drafted through the proper interpretation of the principle *par in parem non habet iurisdictionem*. And only when courts of other countries started to share the same idea did the theory of restrictive immunity become a customary norm. However, this does not mean that the first Italian judgments on the matter were in violation of international law. On the contrary, they provided a correct application of existing rules. The same happened more or less in *Ferrini* and later in similar cases. The Italian Supreme Court did not apply the existing customary rules, but this does not mean that it violated international law. The *jus cogens* exception is rather the result of a rational and systematic application of the relevant international norms, in view of the criteria of prevalence established by international law itself.

As for its potential effects, the Italian trend of the end of the XIX century paved the way for the further development of a customary rule concerning the restrictive

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<sup>15</sup> See GATTINI, “War Crimes and State Immunity in the *Ferrini* Decision, JICJ, 2005, p. 224 ff., p. 236 ff.

<sup>16</sup> INSTITUT DE DROIT INTERNATIONAL (Third Commission – Rapporteur: FOX), *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes*, Naples, 10 September 2009.

immunity of foreign States. The principle was also applied to the jurisdiction to execute, with the subsequent consolidation of another norm. In the last decade, Italian jurisprudence has laid the foundations for new developments of international customary law. A practice of States in this regard is still not uniform, and the *jus cogens* exception is not even envisaged by the UNCSI. Nevertheless, further developments of international customary law, also in light of Article 12 of the UNCSI,<sup>17</sup> may not be ruled out. The judgment of the International Court of Justice will be of great importance in this regard.

However, to say that the recent Italian trend runs counter to international law would mean repudiating the coordination criteria established for conflicts of international norms. This means that, to be valid, the *jus cogens* exception does not really need the consolidation of a new customary norm. Nevertheless, further developments of international law in this direction would have the merit of making the position of the Italian Court of Cassation in the *Ferrini* case incontestable, albeit partly so.

By analyzing international practice in recent years, Article 12 of the UNCSI, the *Jones* case and the judgment rendered by the European Court of Human Rights in the *Al-Adsani* case,<sup>18</sup> it seems that the *jus cogens* exception could be considered applicable only when the international crime was committed within the territory of the State of the forum. The *Al-Adsani* and the *Jones* cases regarded international crimes committed outside the State of the forum, while in *Ferrini* and *Distomo* the unlawful facts occurred, at least in part, within the latter's territory. Moreover, Article 12 of the UNCSI denies immunity when a tortuous act occurs in the State of the forum. Thus, it seems that further developments of international customary law may uphold the *jus cogens* exception only for crimes committed in the State of the forum. By contrast, in the view of Italian courts, the *locus commissi delicti* criterion would have no importance with regard to the granting of immunity. It could only bar the court's proceedings as a general criterion of jurisdictional competence.

Diametrically opposed, instead, are the considerations to be made regarding the principle of *tempus regit actum*.

In the cases analyzed by Italian and Greek jurisprudence, the German crimes were committed during the Second World War, i.e. when *jus cogens* did not exist. According to the Italian Supreme Court, the exclusion of immunity is obtained thanks to the prevalence of *jus cogens* over customary rules. Consequently, no exclusion of immunity may be determined if the unlawful act did not consist of a violation of *jus cogens* at the time it occurred. The fact that the norms regarding immunity are procedural in nature does not imply that they find application regardless

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<sup>17</sup> On this issue, see RONZITTI and VENTURINI, "La Convenzione delle Nazioni Unite del 17 gennaio 2005 sulle immunità giurisdizionali degli Stati e dei loro beni", in RONZITTI and VENTURINI, *Le immunità giurisdizionali degli Stati e degli altri enti internazionali*, Padova, 2008, p. 1 ff.

<sup>18</sup> *Al-Adsani v. United Kingdom*, Application No. 35763/97, 21 November 2001.

of the time in which the unlawful act took place. Considering that the *jus cogens* exception is due to the relationship between international norms, and because of the superiority of *jus cogens* over customary rules, the absence of the norms of *jus cogens* at the time of the unlawful act implies the impossibility of applying such reasoning and thus the impossibility of excluding jurisdictional immunity.

Nevertheless, the Italian trend seems to be indifferent toward the *tempus regit actum* principle in matters of immunity. Thus, should the position of the Italian Supreme Court be shared by other States, the eventual new customary rule would allow the applicability of the *jus cogens* exception also in relation to unlawful acts committed when *jus cogens* did not exist. This is unlikely, but there is some possibility in light of the Italian view.

Therefore, by justifying the *jus cogens* exception on logical juridical grounds, its field of application may be limited *ratione temporis*, but not *ratione loci*. On the other hand, possible developments in international customary law may limit the *jus cogens* exception *ratione loci*, but not *ratione temporis*.

### 3. THE DISTINCTION BETWEEN *ACTA JURE IMPERII* AND *ACTA JURE GESTIONIS*: VARIOUS CONFIRMATIONS AND NEW TENDENCIES

If the *Ferrini* and later similar cases constitute the most significant novelty of the past ten years, the last decade of Italian jurisprudence has also been useful for the consolidation of some principles of international law.

Regarding immunity from jurisdiction, in order to distinguish between *acta jure imperii* and *acta jure gestionis*, Italian courts have continued to show their preference for the criterion of the *nature* of the State act rather than for that of its *purpose*. Therefore, they continue to consider as *acta jure imperii* the acts committed by the State in the exercise of its sovereign power, while its activities performed as a private entity are considered as *acta jure gestionis*. No relevance is given to the purpose for which these activities are carried out. This trend is consolidated and clearly explained in a decision of the Court of Appeal of Genova dated 7 May 1994. The Court excluded the immunity of Iraq in a controversy deriving from a contract for the supply of warships concluded with the Italian corporation Fincantieri. Although the contract was evidently executed for public purposes, the immunity from jurisdiction of Iraq was denied, since supply contracts are private in nature. This principle has also been affirmed in many other cases by the Italian Supreme Court which recognizes, either expressly or implicitly, the irrelevance of the purpose pursued by the States.<sup>19</sup>

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<sup>19</sup> See *Corte di Cassazione (Sez. Unite civili), Consorzio Agrario della Tripolitania v. Federazione Italiana Consorzi Agrari et al.*, 5 December 1966, No. 2830, RDIPP, 1967, p. 602 ff.; *Corte di Cassazione (Sez. Unite civili), Repubblica di Guinea v. Trovato et al.*, 18 October 1993, No. 10294, RDIPP, 1994, p. 620 ff., with comment by TORIELLO; *Corte di Cassazione (Sez. Unite civili), Ghana Airways Corp. v. INA*, 15 July 1987, No. 6171, RDIPP, 1989, p. 106

Thus, it is the nature criterion that Italian judges refer to in order to affirm or exclude their jurisdiction over the foreign State.

A preference for the nature criterion was also expressed by the Italian government in its comments on the draft of the UNCSI,<sup>20</sup> the final text of which, adopted by the UN General Assembly, recognizes the prevalence of this criterion over the criterion of purpose. Indeed, in order to qualify a State transaction as commercial, and thus as not covered by immunity, Article 2(2) of the UNCSI indicates the criterion of nature as a general criterion. The criterion of purpose may be used only if chosen by the parties or if used in the practice of the State of the forum. Therefore, it is an exception to a general rule, subject to a different will of the parties or to the development of a different practice in the State of the forum.

To get an idea of the activities considered as private by Italian jurisprudence, it must be stressed that courts usually deny immunity from jurisdiction in controversies regarding the supply of commodities or services,<sup>21</sup> the rent or sale of properties,<sup>22</sup> loans and financial transactions,<sup>23</sup> regardless of any public purpose pursued by the State. On the other hand, measures pertaining to nationalization,<sup>24</sup>

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ff.; *Corte di Appello di Roma, Ambasciata del Regno del Marocco v. Soc. Immobiliare Corte Barchetto*, 12 September 1979, *Foro It.*, 1980, I, p. 807 ff. More recently, see *Corte di Cassazione (Sez. Unite civili), Repubblica del Perù v. L.M.C. e INPS*, 10 July 2006, No. 15620, *Diritto e Giustizia*, 2006, p. 42 ff.; *Corte di Cassazione (Sez. Unite civili), Ambasciata dello Stato del Kuwait v. Abd El Gail*, 10 July 2006, No. 15626, *Giustizia Civile Massimario*, 2006, p. 7 ff.; *Corte di Cassazione (Sez. Unite civili), Consolato della Repubblica della Tunisia v. Ayed*, 10 July 2006, No. 15628, *Giustizia Civile Massimario*, 2006, p. 7 ff.; *Corte di Cassazione (Sez. Unite civili), M.E. v. Ambasciata in Italia dello Stato degli Emirabi Arabi Uniti*, 9 January 2007, No. 118, *Rivista critica di diritto del lavoro*, 2007, p. 299 ff., with comment by TESTA; *Corte di Cassazione (Sez. Unite civili), Ambasciata della Repubblica di Corea v. Bucciarelli*, 17 January 2007, No. 880, *Giustizia Civile Massimario*, 2007, p. 1 ff. See also LUZZATTO, *Stati stranieri e giurisdizione nazionale*, Milano, 1972, p. 170.

<sup>20</sup> UN Doc. A/56/291/Add. 1.

<sup>21</sup> *Corte di Appello di Genova, Fincantieri-Cantieri Navali S.p.a. et al. v. Ministry of Defence, Armament and General Directorate of Iraq*, 7 May 1994, *Nuova Giurisprudenza Civile Commentata*, 1995, I, p. 667 ff., with comment by TORIELLO; *Tribunale di Palermo, Fall S.p.a. Maniglia Costruzioni v. Arabia Saudita*, 16 November 1993, *Diritto fallimentare*, 1994, II, p. 379 ff.

<sup>22</sup> *Corte di Cassazione (Sez. Unite civili), Immobiliare Villa ai Pini S.r.l. v. Repubblica Popolare Cinese*, 19 July 2006, No. 16461; *Corte di Appello di Roma, Immobiliare Villa ai Pini S.r.l. v. Repubblica Popolare Cinese*, 5 April 2007, No. 1634 (but reversed by the Supreme Court; this case will be taken up later).

<sup>23</sup> See *infra* note 28.

<sup>24</sup> The last decision regarding measures of nationalization was *Corte di Cassazione (Sez. Unite civili), S.p.a. Imprese marittime Frassinetti v. Repubblica Araba di Libia*, 26 May 1979, No. 3062, *Foro It.*, 1979, I, p. 1714 ff.

judicial and police activities,<sup>25</sup> and military training activities<sup>26</sup> are considered *iure imperii*.

In view of the above, the foreign State should not enjoy immunity in controversies connected to the issuance of bonds. Nevertheless, in the aforesaid *Borri* case, the Italian Court of Cassation granted immunity from jurisdiction to the Republic of Argentina, in a suit brought by an Italian citizen, who purchased some Argentinean bonds and did not receive the promised repayments after the default of the State. It could be argued that Italian courts applied the criterion of purpose, but in actual fact the conclusions reached by the Supreme Court are based on a different reasoning. According to the Court, even though the issuance of bonds is a private activity,<sup>27</sup> the measures taken by Argentina to face its financial crisis were adopted by law. And since the enactment of law is a public activity, Argentina had the right to invoke its immunity.

A similar reasoning was partially followed in *S.r.l. Immobiliare Villa ai Pini v. The Republic of China*. The jurisdictional immunity of the People's Republic of China was recognized despite the fact that the controversy derived from a contract of sale. Once again, it seems that the Supreme Court applied the criterion of purpose but, here too, the holding of the Court was justified on a different basis. Since the case is rather complex, a brief summary of the facts is needed.

With a contract of sale dated 3 December 1983, the firm *Immobiliare Villa ai Pini* sold a real estate complex to the People's Republic of China, which the latter intended to use as a secondary seat of its embassy. The buyer obtained possession of the property by paying the agreed price of 3,000,000,000 Italian Lira. According to Article 2, the contract would have been effective only after the obtainment of the authorization of the President of the Republic, then established by Article 17 of the Italian Civil Code for the purchase of immovable property by legal persons. Because this authorization was never granted, the Tribunal of Rome declared the contract ineffective and ruled that China had to return the real estate complex (Judgment of 3 February 1999). Notwithstanding the judgment of the Tribunal of Rome, China did not release the building. *Immobiliare Villa ai Pini* sued the Republic of China once again before the Tribunal of Rome, asking for a ruling to make China pay damages to the amount of 31,500,000,000 Italian Lira. China invoked its immunity from jurisdiction, but it was denied by both the judge of first instance and the Court of Appeals.<sup>28</sup> In particular, the Court of Appeals of Rome highlighted the private nature of the sales contract and the irrelevance of the purpose pursued by

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<sup>25</sup> *Corte di Cassazione (Sez. Unite civili), Kuna – Kuwait News Agency v. Gitan Musa*, 12 June 1999, No. 331, RDIPP, 2000, p. 728 ff.

<sup>26</sup> *Corte di Cassazione (Sez. Unite civili), Pres. CdM v. Federazione Italiana Lavoratori Trasporti*, 3 August 2000, No. 530, RDI, 2000, p. 1155 ff.

<sup>27</sup> See also *Corte di Cassazione*, judgments Nos. 15620, 15626, 15628, 118, and 880, *cit. supra* note 19.

<sup>28</sup> *Corte di Appello di Roma*, 5 April 2007, No. 1634, *cit. supra* note 22.

China through its execution. The decision of the judge of second instance was then impugned by the Italian Ministry of Foreign Affairs before the Court of Cassation, which granted immunity. According to the Court, the controversy did not stem from the contract of sale executed by the parties, but from the occupation of the complex by the Republic of China. And since the Chinese occupation was related to the exercise of diplomatic functions, immunity had to be recognized.<sup>29</sup>

This reasoning is unconvincing not least because in parallel proceedings between the same parties and regarding the same building, the Supreme Court denied immunity to China.<sup>30</sup> The proceedings concerned the payment of taxes – regarding the complex – that China was under an obligation to pay since it was in possession of the building. And although the claim concerned occupation of the real estate complex, Italian jurisdiction was affirmed.

However, from the two aforesaid judgments, *Borri* and *Villa ai Pini*, it emerges that Italian judges continue to adopt the criterion of nature although, in recent years, there is a tendency to take into account not the nature of the action that confers the contested right to the injured party, but the action by which the State faces the breach of its obligations. In *Borri*, the Court did not consider the nature of the contract for the sale of bonds, but the nature of the measure taken by Argentina in order to face its financial crisis. The same happened in *Villa ai Pini*, where the right of the Italian firm derived from the ineffectiveness of the private-law contract was not considered the critical element of the dispute. Indeed, the Supreme Court took into consideration the nature of the Chinese occupation of the building, which was in violation of a previous definitive judgment.

I think that this trend should be criticized because it undermines the principle of the certainty of law. Furthermore, it allows the foreign State to find a safe shelter from the consequences of its breach of obligations since, by simply adopting subsequent public measures, it deprives the injured party of its right to compensation. It is perhaps also for this reason that this line of jurisprudence does not seem to be generally followed by the courts of other countries.

#### 4. STATE IMMUNITY AND EMPLOYMENT DISPUTES

The defense of the sovereignty of international subjects is perceived in a peculiar way in controversies relating to employment contracts. On the one hand, Italian courts tend to affirm their jurisdiction when the employee of a foreign State performs activities not connected to its sovereign functions. In this respect, the decision to recognize or deny immunity follows the traditional distinction between *acta jure imperii* and *jure gestionis*. On the other hand, if the judge is required to

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<sup>29</sup> *Corte di Cassazione (Sez. Unite civili), Ministero degli affari esteri v. Immobiliare Villa ai Pini S.r.l. and Repubblica Popolare Cinese*, 17 July 2008, No. 19600.

<sup>30</sup> *Corte di Cassazione*, 19 July 2006, No. 16461, *cit. supra* note 22.

grant pecuniary remedies only, State immunity is usually denied also when the plaintiff is entrusted with sovereign activities. Indeed, according to Italian courts, in such cases there is no interference with the exercise of public powers on the part of a foreign State.

This trend began in the late 1980s, with a judgment of the Supreme Court rendered on 15 May 1989,<sup>31</sup> and it has been confirmed over the last decade.<sup>32</sup> The Italian Court of Cassation has also specified that, even if the plaintiff's judicial request (*petitum*) is merely economic, State immunity cannot be denied if the decision of the judge implies a previous evaluation of incidental non-economic issues.<sup>33</sup> On the basis of this ruling, the Italian Supreme Court denied its jurisdiction over claims for compensation deriving from unlawful dismissal of employees, since in such cases an investigation of the reasons for dismissal is required.<sup>34</sup> The rationale is evident: to avoid the interference of the territorial State in the exercise of the power of self-organization of the foreign State.

Although Italian case law shows a tendency to uphold a double kind of exemption from the jurisdiction of the territorial State, based either on the nature of the employee's functions, or on the *petitum* of the claim, it is possible to highlight that the *petitum* criterion has assumed greater importance in recent years. In some cases, the Court of Cassation has even hypothesized the substitution of the nature criterion with that of the *petitum*.<sup>35</sup> Nevertheless, both exemptions seem to be still in vogue. In fact, in such cases, the duties of the employee were not material or ancillary. Thus, the subsistence of the Italian jurisdiction had to be verified on the basis of the judicial *petitum* only. The Supreme Court stressed such an issue because it needed to do so, but without meaning to theorize the unique and absolute importance of the *petitum*. Indeed, in a judgment rendered on 9 January 2007, the nature criterion has been once again sustained by the Court of Cassation.

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<sup>31</sup> *Corte di Cassazione (Sez. Unite civili), Consolato Generale Britannico in Napoli v. Toggia*, 15 May 1989, No. 2329, Foro It., 1989, I, p. 2464 ff. For an analysis of Italian jurisprudence on matters of State immunity in labour disputes, see PAVONI, "L'immunità degli Stati nelle controversie di lavoro", in RONZITTI and VENTURINI, *cit. supra* note 17, p. 29 ff.

<sup>32</sup> *Corte di Cassazione (Sez. Unite civili), Consolato generale dell'Ecuador v. Marchetti*, 1 February 1999, No. 18, Giustizia Civile Massimario, 1999, p. 216 ff.; *Corte di Cassazione (Sez. Unite civili), Ambasciata Emirati Arabi v. Montanari*, 12 February 1999, No. 59, RDIPP, 2000, p. 119 ff.; *Corte di Cassazione (Sez. Unite civili), Arabia Saudita v. Al Bayaty Khalil*, 15 July 1999, No. 395, RDIPP, 2000, p. 757 ff.; *Corte di Cassazione (Sez. Unite civili), Vespignani v. Bianchi*, 22 July 2004, No. 13711, Foro It., 2005, I, p. 428 ff.

<sup>33</sup> *Corte di Cassazione (Sez. Unite civili), Consolato Britannico in Milano v. Papa*, 27 May 1999, No. 313, RDIPP, 1999, p. 628 ff.; *Corte di Cassazione*, 12 June 1999, No. 331, *cit. supra* note 25.

<sup>34</sup> See *Corte di Cassazione*, judgments Nos. 313 and 331, *ibid.*, and Nos. 15620, 15626, 15628, *cit. supra* note 19.

<sup>35</sup> *Corte di Cassazione (Sez. lavoro), Cargnello v. Repubblica Italiana*, 20 June 2005, No. 13175, Impresa, 2005, p. 1444 ff.; *Corte di Cassazione*, judgments Nos. 15620, 15626, 15628, and 880, *cit. supra* note 19.

What must be said here is that, by applying such criteria, Italian judges claim to apply international customary rules on matters of immunity, but, in comparing the Italian trend with international practice, it can easily be seen how international law is more conservative.

In fact, taking into account Article 11 of the UNCSI, State immunity is excluded only if several conditions are jointly met. In particular, when the employee does not perform particular functions in the exercise of governmental authority; does not enjoy diplomatic immunity; is not a national of the employer State at the time the proceeding is instituted unless he/she does not have permanent residence in the State of the forum; the subject-matter of the claim is not dismissal or termination of employment, recruitment, renewal or reinstatement.

At first sight, the Italian trend and the UNCSI seem to be very distant. Firstly, because of the total irrelevance of the employee's nationality in Italian case law. But if one considers that according to the UNCSI the individual's nationality is not significant when he/she has permanent residence in the State of the forum, then one notes that the highlighted difference is more of a formal nature. Usually, when the employee sues the employer State before a foreign judge, the judge involved is that of the State in which the contract of employment has to be performed. Consequently, the employee usually has permanent residence in the State of the forum. When Italian courts have been involved in labor disputes, the question of the employee's nationality was not dealt with, because the employee was performing his/her duties within the Italian territory, where he/she needed to have permanent residence. Therefore, the Italian trend, at least in this respect, is concretely not at odds with the UNCSI. The difference is more formal than substantive and is due to the different perspective of a multilateral Convention which, like the UNCSI, has to provide for a general rule accepted by all UN Members, while the perspective of national courts is usually to take a decision on a case-by-case basis.

The only real and very significant difference between the Italian jurisprudence and the UNCSI is that, while according to Italian courts State immunity is excluded in controversies either related to material duties of the employee or to economic *petita*, both conditions must be jointly satisfied according to the UNCSI. In this respect, international practice seems to be much more conservative in comparison with Italian case law.

Two final cases are worth mentioning. Recently, the Supreme Court denied the immunity of Kuwait in relation to a claim for compensation for damage arising from oppressive behaviors of the employer.<sup>36</sup> In doing so, the Supreme Court left an open door for the institution of mobbing claims against foreign States. A consolidated practice is still missing, but a development of international law in this sense deserves to be upheld. In fact, in adjudging these kinds of disputes, courts do not interfere with a State's exercise of self-organizational power, since the judicial

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<sup>36</sup> *Corte di Cassazione*, 10 July 2006, No. 15626, *cit. supra* note 19.

investigations concern the employee's harassment and employer's behavior, and not the State organization.

Moreover, on the basis of Article 11 of the UNCSI, some claims cannot be judged by the territorial State for reasons of their subject-matter. It is interesting to note that harassment and mobbing are not included among these claims.

Finally, in a judgment dated 13 September 2005, the Supreme Court denied State immunity since the employment contract was governed by Italian law. This is an isolated case that does not deserve particular consideration and is at odds with Article 11(2) of the UNCSI. As is usually the case in civil law countries, applicable law and jurisdiction are considered as separate issues, incapable of any real interaction. Thus, except for the aforesaid case, Italian case law is in line with Article 11(2) of the UNCSI when it does not consider the issue of applicable law as a relevant element to be taken into account in verifying the existence of jurisdiction.

## 5. STATE IMMUNITY FROM EXECUTION: PRE- AND POST-JUDGMENT MEASURES

With respect to Italian jurisprudence on matters of immunity from execution, over the past ten years the case law has been sporadic and quite uninteresting, although a possible new perspective must be analyzed in light of the *jus cogens* exception. In fact, it cannot be ruled out that the *jus cogens* exception will be applied by Italian courts also in respect of the jurisdiction to execute, as occurred with the restrictive immunity theory, which was introduced in order to limit immunity from adjudicative jurisdiction and then applied to immunity from execution. This would mean that the properties of a State, even though *jure imperii*, could be executed if the judgment ascertains the commission of international crimes. Of course, execution would be possible only if these properties are not protected by other forms of immunity. Just to be clear, it is difficult to think about the registration of judicial mortgages on a foreign embassy.

The first indications of such a development may once again be found in the two judgments of the Court of Appeals of Florence and of the Supreme Court, which recognized the Greek judgment rendered in *Distomo*, although at first in the part that condemned the Federal Republic of Germany to pay the trial expenses.<sup>37</sup> The Court of Appeals of Florence also recognized the decision awarding damage to the victims' heirs, and the question is now pending before the Supreme Court. On the basis of such recognition, a procedure of execution has been initiated, with the registration of a judicial mortgage on Villa Vigoni, a German real estate property situated on Lake Como. The Federal Republic of Germany affirms that Villa Vigoni is a

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<sup>37</sup> *Corte di Appello di Firenze, Repubblica Federale di Germania v. Amministrazione Regionale della Vojotia – Grecia*, 6 February 2007, No. 486; *Corte di Cassazione (Sez. Unite civili), Repubblica Federale di Germania v. Amministrazione Regionale della Vojotia – Grecia*, 29 May 2008, No. 14199.

*jure imperii* property exempted from execution, but the question is at the very least doubtful. According to the victims, Villa Vigoni was rented to a private association and must therefore be considered *jure gestionis*. The matter is being examined and is part of the application introduced by Germany before the International Court of Justice. Nevertheless, if Villa Vigoni were to be considered as a *jure imperii* property, one would see the application of the *jus cogens* exception to immunity from execution.

Such a development within Italian jurisprudence has been temporarily set at naught by recent legislation passed by the Italian Government and Parliament, i.e. Decree-Law No. 63 of 28 April 2010,<sup>38</sup> as converted into law with amendments by Law No. 98 of 23 June 2010.<sup>39</sup> According to the Decree, the executive force of the judgments rendered against a foreign State or an international organization is suspended if such a State or international organization files a complaint against Italy – on matters relating to its immunity – before the International Court of Justice. This suspension regards enforcement proceedings as well, and may be declared *ex officio* by the judge. Suspension comes to an end once the decision of the ICJ has been rendered. Hence, while ICJ proceedings are pending, no execution is possible in Italy. Of course, the Decree has been adopted in order to stop the enforcement proceedings pending before the Italian courts against Germany, but it is not limited to such cases. Thus, any foreign State that is denied immunity by an Italian court (or by a foreign court the judgment of which has been enforced in Italy) may stop execution against its assets in Italy by simply filing a complaint before the ICJ.

As already highlighted, the Decree has been converted into law by Parliament, through the introduction of two significant amendments. First, all the references to international organizations have been erased from the text of the Decree since, as it is widely known, international organizations do not have *locus standi* before the ICJ in contentious cases. Consequently, the law is now only applicable to States. Second, an important time-limit has been provided for, according to which suspension of judgments and enforcement proceedings will last until 31 December 2011. Although the intervention of the Italian Parliament is appreciable – being manifestly aimed at qualifying the limits that the law imposed on the right of access to justice of the individual<sup>40</sup> – it is at odds with the aforementioned provision of the law, on the basis of which suspension comes to an end once the ICJ has rendered its

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<sup>38</sup> Decree-Law No. 63 of 28 April 2010, *Disposizioni urgenti in tema di immunità di Stati esteri dalla giurisdizione italiana e di elezioni degli organismi rappresentativi degli italiani all'estero* (GU No. 99 of 29 April 2010).

<sup>39</sup> GU No. 147 of 26 June 2010.

<sup>40</sup> See RONZITTI, “La prescrizione rischia di mettere in forse l’accesso alla giustizia da parte dei cittadini”, Guida al diritto-Il Sole 24 Ore, 2010, No. 20, p. 29 ff. Many of Professor Ronzitti’s suggestions, aimed at modifying the content of the decree during its conversion into law, have been approved by the Italian Parliament, after a hearing with him in the Foreign Affairs Commission of the Chamber of Deputies (*Camera dei Deputati*) on 12 May 2010.

judgment. Thus, what will it happen if the ICJ has not adjudicated the claim at the date of 31 December 2011?

Certainly, the amendments approved by the Italian Parliament go in the right direction, but the main problem, i.e. the restriction of the right of access to justice of the individual, still remains. The individual who obtained a judgment against a foreign State cannot enforce its right, if such a State has sued Italy before the ICJ, and this is regardless of the existence of the ICJ jurisdiction and of the ground upon which the claim before the Court is based. Such a restriction of the right of access to justice has been justified by commentators by reference to Articles 11 and 80 of the Italian Constitution. In particular, reference has been made to the obligation that, on the basis of Article 11, Italy has to cooperate with the ICJ and to the importance which Article 80 attaches to judicial means of international dispute settlement.<sup>41</sup> However, since suspension also operates if the ICJ does not have jurisdiction, thus simply as an automatic consequence of the institution of proceedings, the restriction of the right of access to justice cannot be justified on this basis. In fact, no cooperation is requested if the ICJ jurisdiction does not exist and no deference to international judicial dispute settlement may come to mind when a claim is manifestly groundless.<sup>42</sup> It would have been more reasonable to adopt the amendment proposed by Fiamma Nirenstein (Vice Chairman of the Foreign Affairs Commission of the Chamber of Deputies), according to which suspension of the execution proceedings against foreign States would be operative only if and when the ICJ adopts provisional measures to this effect. Unfortunately, this amendment has not been approved.

Regarding other aspects of immunity from execution, in the past ten years Italian judges had the chance to give their contribution in several cases relating to the request for pre-judgment measures against the Republic of Argentina. In all these cases, Italian case law confirmed some principles of law universally accepted. In particular, it has been confirmed that if State immunity from jurisdiction exists, then immunity from execution must also be granted. During the Argentinean crisis, many purchasers of Argentinean bonds asked for the adoption of such measures and the Italian courts actually tended to reject these requests.<sup>43</sup> Only the Tribunal of Rome excluded the immunity of Argentina and adopted the required pre-judgment

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<sup>41</sup> See SALERNO, "Esecuzione in Italia su beni di Stati stranieri: il decreto-legge 28 aprile 2010, n. 63", available at: <[http://www.sidi-isil.org/wp-content/uploads/2010/02/Salerno-Decreto-legge-28-aprile-2010-1\\_.pdf](http://www.sidi-isil.org/wp-content/uploads/2010/02/Salerno-Decreto-legge-28-aprile-2010-1_.pdf)>.

<sup>42</sup> Regarding this issue, see ATTERITANO, "Il DL 63/2010 compromette il diritto dell'individuo a una tutela giurisdizionale effettiva", available at: <<http://www.sidi-isil.org/wp-content/uploads/2010/02/Atteritano-DL-Immunit%C3%A0-definitivo1.pdf>>.

<sup>43</sup> *Tribunale di Milano, Goldoni et al. v. Repubblica Argentina*, 11 March 2003; *Tribunale di Roma, Gallo v. Repubblica Argentina*, 31 March 2003; *Tribunale di Roma, Calorosi v. Repubblica Argentina*, 19 June 2003; *Tribunale di Roma, Bennati et al. v. Repubblica Argentina*, 16 July 2003; *Tribunale di Vicenza, Rubin v. Repubblica Argentina*, 11 December 2003 (all of these judgments are published in RDIPP, 2005, p. 1102 ff.).

measure,<sup>44</sup> but after the *Borri* decision the measure was revoked for lack of jurisdiction. There is nothing new in such a ruling, and the principle is clearly part of international customary law.

The same could be said with regard to the view that if immunity from jurisdiction depends on the nature of the defendant, immunity from execution depends on the characteristics of the executed property.<sup>45</sup> This view has also been shared by international practice and by the UNCSI, the title of which talks about jurisdictional immunities of States *and their properties*. This conception is especially important for the distinction between *jure imperii* and *jure gestionis* properties, over and beyond a great many procedural issues.<sup>46</sup> In fact, to assess whether certain property can be executed, the judge does not analyze the owner's *status*, but the purpose of the properties. Therefore, if the property is used or intended to be used for public purposes, State immunity from execution must be granted. In this respect, Italian jurisprudence is not far removed from international practice, as the UNCSI confirms.

## 6. THE JURISDICTIONAL IMMUNITY OF STATE ORGANS: GENERAL ISSUES

There is a common understanding among international and domestic courts, as well as among the specialists of international law, that international customary law provides for the immunity of some categories of organs of the foreign State. Undoubtedly, Heads of State, Heads of Government and Ministers of Foreign Affairs, defined as the "senior members of central government",<sup>47</sup> have a right to immunity from foreign jurisdictions, for acts committed either in the exercise of their public functions or as private persons. In the first case, immunity continues to stand even after the functions of the organ have come to end. In the second case, it expires with the end of the public functions. According to most authors,<sup>48</sup> when the State organ operates in the exercise of public functions, its conduct must be consid-

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<sup>44</sup> *Tribunale di Roma, Mauri v. Repubblica Argentina*, 22 July 2002, RDIPP, 2003, p. 174 ff.

<sup>45</sup> *Corte di Cassazione (Sez. Unite civili), Ambasciata degli Emirati Arabi Uniti v. Pinto*, 12 February 1999, No. 52, RDIPP, 2000, p. 119 ff.; *Corte di Cassazione (Sez. Unite civili), Consolato generale della Repubblica Araba d'Egitto v. Refaat Armia*, 26 May 1999, No. 64, RDIPP, 2000, p. 494 ff.; *Tribunale di Roma (Sez. IV civile), Cittadini statunitensi v. Repubblica Islamica Iran et al.*, 17 January 2006.

<sup>46</sup> See IZZO, "Le immunità giurisdizionali: questioni di carattere processuale", in RONZITTI and VENTURINI, *cit. supra* note 17, p. 291 ff.

<sup>47</sup> FOX, *The Law of State Immunity*, 2nd ed., Oxford, 2008, p. 666 ff., recalled by CONFORTI, "In tema di immunità funzionale degli organi statali stranieri", RDI, 2010, p. 5 ff.

<sup>48</sup> See MORELLI, *Diritto processuale civile internazionale*, Padova, 1938, p. 176 ff.; NIBOYET, "Immunité de jurisdiction et incompetence d'attribution", RGDIP, 1950, p. 139 ff.; BRIGGS, *The Law of Nations*, New York, 1952, p. 782.

ered as the conduct of the State. The right to immunity stems from the imputation of the organ's conduct towards the State, and thus continues to exist (organic or functional immunity). On the other hand, immunity for private conduct is established in order to allow regular performance of public activities of the State organ. As a result, it expires once the organ ceases to exercise such public functions (personal immunity). Immunity concerns both criminal and civil jurisdiction. A codification of these rules, albeit only in relation to diplomatic agents, is established by Article 39 of the Vienna Convention on Diplomatic Relations of 1961.

Even consular officers enjoy immunity from foreign jurisdiction, but only in relation to acts committed in the exercise of their functions. Moreover, according to Article 41 of the Vienna Convention on Consular Relations of 1963, “[c]onsular officers shall 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”. Thus, in case of grave crimes, consular officers may be arrested or detained. Of course, this norm concerns the inviolability of consular officers, but since arrest implies a decision made by the competent judicial authority, it seems logical to affirm that immunity from jurisdiction falls jointly with inviolability. In the criminal case *Abu Omar* – a Muslim cleric suspected of international terrorism who was kidnapped by some American agents in Milan during 2003 – the Tribunal of Milan followed this approach.<sup>49</sup>

The criminal proceedings deal with an extraordinary rendition that took place in Italy, in which some US diplomat and consular officers appeared to be implicated. The Tribunal of Milan recognized immunity from jurisdiction of the three US diplomats involved, but affirmed its jurisdiction over two US consular officers. According to the Tribunal, the diplomatic agents were acting in the exercise of their public functions, as specified by the Vienna Convention of 1961. Therefore, they were covered by functional immunity. In contrast, the consular officers could not enjoy functional immunity, on the basis of the aforementioned Article 41 of the Vienna Convention of 1963, since the crime committed was a grave crime. For the qualification of “grave crime”, the Tribunal took into account Article 3 of the Italian Law 804/67, the law executing the Vienna Convention, which defined grave as any crime punishable with at least five years of imprisonment. The crime committed against Abu Omar may be punished with 10 years of imprisonment.

In other words, according to the judge, the activity carried out by the American agents in the Abu Omar extraordinary rendition falls within their mandate of diplomats and consular officers. Thus, it is in principle covered by functional immunity. Nevertheless, Italian jurisdiction subsists over consular officers, on the basis of Article 41 of the Vienna Convention of 1963, which provides for an exception to immunity not applicable to diplomats. In my view, the functions performed by the US agents are doubtfully within their diplomatic mandate. On the other hand, how-

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<sup>49</sup> *Tribunale di Milano (Sez. IV penale), Adler et al.*, 1 February 2010, No. 12428.

ever, the clandestine nature of the activity concerned could have brought the judge to deny immunity also for the US diplomats. We will deal with this last issue later.

According to most authors<sup>50</sup> immunity from jurisdiction is also enjoyed by military troops abroad, but the content of international customary law is uncertain on the issue. On the basis of the jurisprudence of several national courts, and especially the Supreme Court of the United States, the territorial State should not extend its jurisdiction over military troops. However, according to a different view, the territorial State is not obliged to grant such immunity. Usually, the identification of the competent jurisdiction is made on the basis of international agreements regulating the status of military forces abroad (SOFA). But when a SOFA is not concluded or is inapplicable, it becomes necessary to assess the content of customary norms on the matter. The Italian Supreme Court was involved in such an inquiry in the well-known *Lozano* case, which will be analyzed later.

Italian case law is in line with the aforementioned rules. Certainly, in order to claim immunity from a foreign jurisdiction, two conditions must be met. Firstly, the individual must be an organ of the foreign State. Secondly, the entity on behalf of which the organ operates must be a State, and thus an entity with a territory, a population and an effective government authority. These conditions must be satisfied in relation to either functional or personal immunity since, also in the latter case, the right to immunity is always established in order to protect an interest of the State, i.e. the regular performance of the public functions of its organs.

In a judgment of 2005,<sup>51</sup> the Italian Court of Cassation denied personal immunity to an organ of a foreign State since the person concerned did not have the *status* of diplomatic agent, but the *status* of consular officer. And since consular officers do not enjoy personal immunity, Italian jurisdiction was affirmed. The case concerned a crime of fraud and the accused invoked personal immunity from Italian jurisdiction as a diplomat. In order to prove his diplomatic status, his defense file included a declaration by the sending State communicating such status to the Italian Ministry of Foreign Affairs. However, according to the Supreme Court, since diplomatic status is only enjoyed after formal notification of the sending State to the receiving State, personal immunity had to be denied. The Court of Cassation applied Article 39 of the Vienna Convention on Diplomatic Relations, considered as a codification of an existing customary rule, also on the basis of a previous judgment.<sup>52</sup> In another judgment of 2008,<sup>53</sup> the Italian Court of Cassation denied personal immunity to a foreigner who claimed to be a diplomat of a foreign State, but who was unable to prove such status during the trial.

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<sup>50</sup> On this issue see RONZITTI, *Introduzione al diritto internazionale*, Torino, 2009, p. 142 ff.

<sup>51</sup> *Corte di Cassazione (Sez. II penale)*, S.M., 2 February 2005, No. 3679.

<sup>52</sup> *Corte di Cassazione*, 9 April 2003 [Ced. 224377].

<sup>53</sup> *Corte di Cassazione (Sez. Unite civili)*, *Papavassilopoulos S. v. Barone V.*, 13 November 2008, No. 27044.

On the other hand, in the *Djukanovic* case, the Supreme Court denied immunity to the Head of Government of Montenegro since, at that time, Montenegro was not an independent State, but simply a unit of the Federal Republic of Yugoslavia. Developing an accurate evaluation of the documentation of the Italian Ministry of Foreign Affairs and of the Constitution of the Union of Serbia-Montenegro, the Court of Cassation concluded that the immunity of the State organ can be accorded only when the individual is an organ of an independent State. And since members of a federal State do not have such independence in the development of foreign relations, no right of immunity can be recognized to its organs.<sup>54</sup> Moreover, in changing its position from a previous decision,<sup>55</sup> the Court specified that the right to immunity of the State and of the State organs depends solely on the effectiveness of the State. Thus, even a State that Italy did not recognize has the right to immunity, as does its organs. The ruling of the Court of Cassation is in line with the judgment rendered on 28 June 1985 in the case concerning *Yasser Arafat*, mentioned by the Supreme Court in *Djukanovic* in order to justify the ruling. Nevertheless, it is important to highlight the differences between the two cases: Arafat was the head of a non-territorial entity, while Djukanovic was the Head of a State, albeit a member of a federal union. Moreover, Djukanovic was accused of a crime not committed in the exercise of his public functions. Thus, the Supreme Court could have affirmed its own jurisdiction over the case by simply denying personal immunity, leaving aside the issue of functional immunity and avoiding confusion between immunity of heads of federate States and immunity of leaders of national liberation movements.

With respect to the origins of the norm on the immunity of State organs, various theses have been developed. According to some authors, this kind of immunity stems from the need to respect the sovereignty of the foreign State or its power of self-organization.<sup>56</sup> According to others,<sup>57</sup> it is the content of an autonomous norm of customary international law. Moreover, in common law systems, the immunity of the State organ is considered as an extension of the norm regarding the immunity of the State itself.<sup>58</sup> The Italian Supreme Court adopted the former view

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<sup>54</sup> *Corte di Cassazione (Sez. III penale), Re: Djukanovic*, 17 September 2004, No. 49666, IYIL, Vol. XVIII, 2004, p. 341 ff. (commented by PALOMBINO).

<sup>55</sup> A different view which subordinates the right to immunity to recognition of the State had been expressed in *Corte di Cassazione, Baccelli*, 16 July 1980, and *Corte di Cassazione (Sez. III penale), Ghiotti*, 17 March 1997, No. 1011.

<sup>56</sup> See MORELLI, *Nozioni di diritto internazionale*, Padova, 1967, p. 215 ff.; RONZITTI, "L'immunità funzionale degli organi stranieri dalla giurisdizione penale: il caso *Calipari*", RDI, 2008, p. 1033 ff.

<sup>57</sup> See BALLADORE PALLIERI, *Diritto internazionale pubblico*, Milano 1962, p. 371 ff.; VAN ALEBEEK, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford, 2008, p. 132 ff.

<sup>58</sup> See the *Jones* case, *cit. supra* note 11. See also FOX, *cit. supra* note 47, p. 353. For an accurate analysis of the different thesis concerning the origins of State organ immunity, see DE

in the *Lozano* case, considering the immunity of the organ of the foreign State as originating from the need to respect its power of self-organization.<sup>59</sup> However, this common origin does not preclude the possibility of considering the norm on the immunity of the State organ as an autonomous norm, the content of which may be different.

## 7. THE JURISDICTIONAL IMMUNITY OF MILITARY TROOPS ABROAD: THE *LOZANO* CASE

As stated above, the issue of the immunity of military troops abroad is usually governed by SOFAs. For instance, in the aforementioned *Abu Omar* case, a US military officer was also involved, and the Tribunal of Milan affirmed its jurisdiction over him on the basis of Article VII(2) of the SOFA NATO of 1951, which provides for the exclusive jurisdiction of the territorial State when the event is considered a crime according to its law – but not according to the law of the sending State. And since extraordinary renditions are criminally sanctioned in Italy but not in the US, Italian jurisdiction had been affirmed. When a SOFA does not exist, or is not applicable, then the problem arises, a problem which the Italian Supreme Court faced in the above-mentioned *Lozano* case.

Lozano was a US soldier. On 4 March 2005 he was on duty at a mobile checkpoint in Baghdad, where he killed Nicola Calipari, an Italian official of the SISMI. Calipari was working for the Italian Government in order to free a kidnapped Italian journalist, Giuliana Sgrena, who had been in Iraq for a news inquiry. The mission was successful. But that night, while Giuliana Sgrena, Nicola Calipari and Andrea Carpani were driving towards Bagdad Airport in a Toyota Corolla, an accident occurred: Lozano, fearing a terrorist attack, opened fire and killed Nicola Calipari. Criminal proceedings began in Italy against Lozano, but immunity was granted both by the judge of first instance and by the Italian Supreme Court, although for different reasons. According to the *Corte di Assise di Roma*,<sup>60</sup> Lozano was immune on the basis of the principle of the law of the flag, while in the opinion of the Supreme Court, immunity had to be recognized since Lozano enjoyed functional immunity as a US soldier.

The principle of the law of the flag – according to which military troops are exclusively subject to the jurisdiction of the sending State – was rejected by the

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SENA, *Diritto internazionale e immunità funzionale degli organi statali*, Milano, 1996.

<sup>59</sup> *Corte di Cassazione (Sez. I penale)*, *Re: Lozano*, 24 July 2008, No. 31171, RDI, 2008, p. 1223 ff., IYIL, Vol. XVIII, 2008, p. 346 ff. (commentary by SERRA).

<sup>60</sup> *Corte d'Assise di Roma*, *Re: Lozano*, 3 January 2008, No. 21, RDI, 2008, p. 558 ff., IYIL, Vol. XVII, 2007, p. 287 ff. (commentary by SERRA). On this judgment, see RONZITTI, “Bisogna stipulare accordi specifici per i rapporti interni alle coalizioni”, *Guida al diritto-II Sole 24 Ore*, 2008, No. 6, p. 52 ff.

Italian Supreme Court, in light of international practice developed after the Second World War, with the creation of military bases abroad and the conclusion of SOFAs, which usually govern problems concerning concurrent jurisdiction between the sending and receiving State. Regarding Iraq, the SOFA concluded between the United States and Iraq was attached to Security Council Resolution 1546 (2004). But since it concerned the concurrent jurisdiction between the sending States and Iraq, it was not applicable in the *Lozano* case as it involved the jurisdiction of two sending States (Italy and the US).

Because of the lack of an international treaty norm, the Italian Supreme Court had to solve the question of the existence of Italian jurisdiction according to customary law. The Court concluded that Lozano, as a US soldier, enjoyed organic immunity from foreign jurisdiction on the basis of a consolidated customary norm and, in order to uphold its conclusions, it cited the well-known *McLeod* case and the judgment of the ICJ in the case *Djibouti v. France*.<sup>61</sup> In actual fact, in this case, the ICJ did not accept the view of *Djibouti*, according to which the proceedings initiated in France against its General Prosecutor and its Head of National Security violated the norm on the immunity of the State organ. Yet this happened for purely procedural reasons: *Djibouti* initially invoked the personal immunity of its organs but introduced the question of functional immunity when the proceedings were already started. Thus, the ICJ did not state anything concerning the functional immunity of *Djibouti*'s organs, but denied their personal immunity.

In view of the above, there is no doubt that military troops do not enjoy personal immunity from foreign jurisdiction, while the existence of a norm granting them functional immunity is still under debate. This is so especially when such immunity is invoked before the court of another sending State. Indeed, according to Professor Conforti, even though military troops were exempted from the jurisdiction of the territorial State, this exemption would not necessarily work in relation to the jurisdiction of third States. There is no international practice that can confirm the existence of an international customary norm in this respect. Consequently, military troops can have immunity from the criminal jurisdiction of a third State only through the so-called *analogia legis*.

In actual fact, it is quite difficult to apply the *analogia legis* in these cases since, in many national legal systems, criminal or "exceptional norms" cannot be interpreted and applied in an extensive way. It is true that, on the basis of the *favor rei* principle, analogy may be used in relation to criminal rules which are *in bonam partem*, like those regarding immunity. Nevertheless, norms providing for immunity are "exceptional rules". Therefore, although *in bonam partem*, they cannot be interpreted extensively. Perhaps it is also for this reason that, in the *Lozano* case,

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<sup>61</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, ICJ Reports, 2008, p. 177.

the Italian Supreme Court granted immunity to the US military, not by relying on an *analogia legis*, but by claiming the existence of a specific international customary norm – a norm that limits the scope of immunity to the official activities of the State organ. In this perspective, the judge’s task is to verify, on a case by case basis, if the organ involved in the trial acted in its capacity as organ or as an individual. The Court did not deal with the international practice regarding the immunity of military troops abroad, which usually concerns the relationship between the jurisdiction of the sending State and of the territorial State. In addition, even if it is true that such a norm is usually applied in cases of concurrent jurisdiction between the sending and territorial State, it is also true that functional immunity is a right strictly connected to State organ status and is established to protect the interests of the State itself. Thus, it seems to me that, although the norm has usually been applied before the courts of the territorial State, its field of application goes beyond this as it depends on the characteristics of the State and its organs and not on the type of relationship existing between the State of the organ and the State required to exercise its jurisdiction.

This also seems to be the position implicitly adopted by the Italian Supreme Court. The *Lozano* case surely strengthens the opinion of many authors<sup>62</sup> and courts which recognized the functional immunity of military troops abroad (see the *Blaskic* case decided by the International Criminal Tribunal for the Former Yugoslavia). As stated before, there is no agreement among authors on this issue.<sup>63</sup> However the judgment rendered in *Lozano* surely goes towards the consolidation of an international customary norm in this respect.

## 8. THE IMMUNITY OF STATE ORGANS: EXCEPTIONS

Although State organs enjoy immunity from foreign jurisdiction, there are some exceptions in international law.

Regarding civil jurisdiction, diplomats are traditionally subject to the territorial jurisdiction in case of: (1) a real action relating to private immovable property situated in the territory of the receiving State, unless he/she holds it on behalf of the sending State for the purposes of the mission; (2) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (3) an action relating to

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<sup>62</sup> Condorelli in his pleadings in the case of *Djibouti v. France* (*ibid.*) mentioned Kelsen, Fox, Morelli, Quadri, Dahm, Bothe, Akehurst, Cassese, CR 2008/3, para. 24 (public sitting held on Tuesday 22 January 2008).

<sup>63</sup> See for instance, BARBERINI, “Una decisione discutibile”, *Cassazione penale*, 2009, p. 1899 ff. The author also raises issues of constitutionality of the judgment of the Supreme Court in relation to Article 25 of the Italian Constitution.

any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

These exceptions are established in Article 31 of the Vienna Convention on Diplomatic Relations of 1961, and the Italian Supreme Court made reference to this Article in relation to the judgment rendered in 2008.<sup>64</sup> Although the Court denied immunity to the defendant because he did not demonstrate his diplomatic status, and although this was sufficient to dismiss the case, the Court stated that a diplomat does not enjoy immunity in actions related to professional or commercial activities. It must be noted that this case concerned a procedure of execution relating to an injunction of payment issued by the Tribunal of Milan. The supposed diplomatic agent did not pay for the services rendered to him by an Italian professional. The Supreme Court specified that Article 31(1)(c) of the Vienna Convention also applies to cases in which the foreign diplomat is simply the beneficiary of the professional activity. Thus, Italian jurisdiction has to be affirmed even when the action regards professional activities of private persons in favour of diplomatic agents.

Certainly, the Supreme Court went beyond the wording of Article 31 which provides for the exclusion of diplomatic immunity only for actions related to professional activities exercised by the diplomatic agent, not in his favour. Nevertheless, there are good reasons of substantive justice for interpreting the norm in the sense indicated by the Italian Court of Cassation. Otherwise, the diplomatic agent could perform a professional activity and engage professionals of the territorial State, and could find an easy shelter from the juridical consequences of an unlawful act committed in relation to his own professional activity.

Regarding criminal jurisdiction, there is a certain common understanding among authors regarding the impossibility of granting a State organ immunity when the organ commits an international crime or carries out clandestine activities in a foreign State.

In the aforementioned case of *Abu Omar*, the Italian judge responsible for preliminary investigations of the Tribunal of Milan denied immunity to the US officials implicated, since the extraordinary rendition operation carried out in Italy was a clandestine activity.<sup>65</sup> Nevertheless, as already highlighted, the judge finally granted functional immunity to three US diplomats and did not consider the issue of the clandestine nature of the activity concerned. In some respects, the analysis made by this judge seems flawed.

The exception regarding the commission of international crimes is more problematic. The origin of this exception must be sought in the experience of the war crimes trials of Nuremberg and Tokyo, whose Statutes provided for the impossibility of invoking the status of State organ to avoid trial. A similar norm was also introduced into the Statutes of the two *ad hoc* international tribunals for Rwanda and

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<sup>64</sup> *Corte di Cassazione*, 13 November 2008, No. 27044, *cit. supra* note 53.

<sup>65</sup> See GAETA, “*Extraordinary renditions* e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso *Abu Omar*”, RDI, 2006, p. 126 ff.

the former Yugoslavia and in Article 27 of the Rome Statute of the International Criminal Court.<sup>66</sup> Thus, there is so far a significant practice that leads to excluding State organ immunity before an international court, when the organ committed an international crime. Beyond this, in recent practice, some national courts have affirmed the absence of State organ immunity also with regard to criminal domestic jurisdiction when an international crime comes into consideration.<sup>67</sup> In the case *Congo v. Belgium*,<sup>68</sup> even though in an *obiter dictum*, the ICJ affirmed the existence of an international customary norm excluding immunity of State organs in relation to international crimes only before international tribunals. Thus, the existence of a general rule enabling the exercise of territorial jurisdiction over an organ of a foreign State for an international crime is still under debate.

Some authors justified the exclusion of immunity in such cases, considering it as a countermeasure.<sup>69</sup>

In the light of the reasoning rendered in the *Ferrini* case, Italian jurisprudence seems to be moving towards excluding State organ immunity in cases where international norms of *jus cogens* have been violated. In the *Lozano* case, the Supreme Court recognized the immunity of the US soldier only because the killing of Nicola Calipari was not an international crime.<sup>70</sup> Moreover, in the judgment relating to the already mentioned *Milde* case, the Court of Cassation condemned a Nazi officer considered responsible for the crimes committed in Civitella. In actual fact, condemnation of the Nazi officer was decided by the Military Court of Appeals, but since the impugnation of the judgment before the Court of Cassation regarded only the civil part of the decision of the Court of Appeals, the criminal condemnation against the German organ became final and definitive, as well as the recognition of Italian jurisdiction over him. In light of Italian jurisprudence of recent years, it follows that in cases concerning international crimes, civil or criminal as they may be, immunity is precluded both for the State and for the organ of the State. This happens on the basis of a systematic interpretation of international norms, according to those international principles that govern coordination among conflicting rules and, in particular, according to the principle of *lex superior*. Thus, the existence of an international customary norm in this respect is not necessary in the opinion of Italian courts.

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<sup>66</sup> See FRULLI, *Immunità e crimini internazionali*, Torino, 2007, p. 112 ff.

<sup>67</sup> *Ibid.*, p. 143 ff.

<sup>68</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports, 2002, p. 3 ff.

<sup>69</sup> See LATTANZI, *Garanzie dei diritti dell'uomo nel diritto internazionale generale*, Milano, 1983, *passim*.

<sup>70</sup> This opinion is upheld by RONZITTI, *cit. supra* note 56, but contested by CASSESE, "The Italian Court of Cassation Misapprehends the Notion of War Crimes: The *Lozano* Case", JICJ, 2008, p. 1077 ff.