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Corte Internazionale di Giustizia

Germania c. Italia
[3 febbraio 2012]

2012 – 1.2

Fogli di lavoro
per il Diritto Internazionale

Direzione scientifica: *Rosario Sapienza*
Coordinamento redazionale: *Elisabetta Mottese*
Redazione: *Adriana Di Stefano, Federica Antonietta Gentile*, *Giuseppe Matarazzo*

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Cattedra di Diritto Internazionale
Via Gallo, 24 - 95124 Catania
E-mail: risorseinternazionali@lex.unict.it
Redazione: foglidilavoro@lex.unict.it
Tel: 095 230857 - Fax 095 230489

Il 3 febbraio 2012 la Corte internazionale di Giustizia ha deciso che l'Italia ha violato il diritto internazionale negando l'immunità dalla giurisdizione alla Germania nelle azioni avviate da parenti delle vittime di deportazioni durante la seconda guerra mondiale e dichiarando l'esecutività di una sentenza greca su beni tedeschi in Italia.

La Germania si era rivolta alla Corte depositando un ricorso il 23 dicembre 2008 poiché sosteneva che l'Italia non aveva rispettato la regola di diritto internazionale in materia di immunità degli Stati dalla giurisdizione a causa di una prassi giurisprudenziale, avviata con il caso Ferrini e proseguita con la sentenza della Corte di cassazione n. 1072 del 21 ottobre 2008 con la quale era stata affermata la responsabilità civile della Germania, condannata altresì al risarcimento dei danni ad alcune vittime deportate durante la seconda guerra mondiale.

La Corte ha ritenuto operante il principio della immunità degli Stati dalla giurisdizione di altri Stati anche quando gli atti iure imperii dei quali è causa abbiano costituito una violazione di norme sui diritti dell'uomo che la giurisprudenza italiana aveva ritenuto prevalenti sul principio dell'immunità degli Stati in quanto norme di diritto cogente.

Pubblichiamo qui un ampio stralcio della decisione, quello in cui la Corte argomenta proprio su questo profilo.

La redazione

(omissis)

B. The relationship between jus cogens *and the rule of State immunity*

92. The Court now turns to the second strand in Italy's argument, which emphasizes the *jus cogens* status of the rules which were violated by Germany during the period 1943-1945. This strand of the argument rests on the premise that there is a conflict between *jus cogens* rules forming part of the law of armed conflict and according immunity to Germany. Since *jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument runs, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the contemporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 above). For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.

94. In the present case, the violation of the rules prohibiting murder, deportation and slave labour took place in the period 1943-1945. The illegality of these acts is openly acknowledged by all concerned. The application of rules of State immunity to determine whether or not the Italian courts have jurisdiction to hear claims arising out of those violations cannot involve any conflict with the rules which were violated. Nor is the argument strengthened by focusing upon the duty of the wrongdoing State to make reparation, rather than upon the original wrongful act. The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.

95. To the extent that it is argued that no rule which is not of the status of jus cogens may be applied if to do so would hinder the enforcement of a jus cogens rule, even in the absence of a direct conflict, the Court sees no basis for such a proposition. A jus cogens rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess jus cogens status, nor is there anything inherent in the concept of jus cogens which would require their modification or would displace their application. The Court has taken that approach in two cases, notwithstanding that the effect was that a means by which a jus cogens rule might be enforced was rendered unavailable. In Armed Activities, it held that the fact that a rule has the status of jus cogens does not confer upon the Court a jurisdiction which it would not otherwise possess *(Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Judgment, I.C.J. Reports 2006, p. 32, para. 64, and p. 52, para. 125). In *Arrest Warrant*, the Court held, albeit without express reference to the concept of jus cogens, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which undoubtedly possess the character of jus cogens did not deprive the

Democratic Republic of the Congo of the entitlement which it possessed as a matter of customary international law to demand immunity on his behalf *(Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Judgment, I.C.J. Reports 2002, p. 24, para. 58, and p. 33, para. 78). The Court considers that the same reasoning is applicable to the application of the customary international law regarding the immunity of one State from proceedings in the courts of another.

96. In addition, this argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of the United Kingdom (*Jones* v. *Saudi Arabia*, House of Lords, [2007] 1 *AC* 270 ; *ILR*, Vol. 129, p. 629), Canada (*Bouzari* v. *Islamic Republic of Iran*, Court of Appeal of Ontario, *DLR*, 4th Series, Vol. 243, p. 406 ; *ILR*, Vol. 128, p. 586), Poland (*Natoniewski*, Supreme Court, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia), New Zealand (*Fang* v. *Jiang*, High Court, [2007] *NZAR*, p. 420 ; *ILR*, Vol. 141, p. 702) and Greece (*Margellos*, Special Supreme Court, *ILR*, Vol. 129, p. 525), as well as by the European Court of Human Rights in *Al-Adsani* v. *United Kingdom* and *Kalogeropoulou and Others* v. *Greece and Germany* (which are discussed in paragraph 90 above), in each case after careful consideration. The Court does not consider the judgment of the French *Cour de cassation* of 9 March 2011 in *La Réunion aérienne* v. *Libyan Arab Jamahiriya* (case No. 09-14743, 9 March 2011, *Bull. civ.*, March 2011, No. 49, p. 49) as supporting a different conclusion. The *Cour de cassation* in that case stated only that, even if a *jus cogens* norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case. It follows, therefore, that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy's second argument is based. Moreover, none of the national legislation on State immunity considered in paragraphs 70-71 above, has limited immunity in cases where violations of *jus cogens* are alleged.

97. Accordingly, the Court concludes that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected.