Supreme Court, United Sections No 5044/04, filed on 11.03.2004 Published in Law and Justice, 16.03.04

Supreme Court - United Civil Sections - Judgment No 5044 of 6 November 2003-11 March 2004

President Carbone - Martial Rapporteur
Pm Marziale - non-compatible - applicant Ferrini - counterclaimant Federal Republic of Germany

Process

1. by document served on 23 September 1998, Mr Luigi Ferrini brought an action before the Court of Arezzo before the Federal Republic of Germany, seeking an order that the Federal Republic of Germany pay compensation for the damage, both financial and non-financial, suffered as a result of being captured in the province of Arezzo on 4 August 1944 by German military forces and, therefore, deported to Germany for use by German undertakings as a 'forced labourer'. The actor added that his stay in an extermination camp in Kahla, where Reimagh Werke (Reich Marschall Hermann Goring Werke) and Messerschimitt built airplanes, missiles and other weapons of war, had lasted until 20 April 1945.
The defendant objected to the lack of jurisdiction of the Italian judicial authorities and declared that it did not accept the contradictory procedure on the merits of the case.
1.1. The Court, with a ruling of 3 November 2000, declared the lack of jurisdiction of the Italian judge, on the point that the claim made by the plaintiff was based on facts carried out by a foreign State in the exercise of its sovereignty and that, therefore, the dispute was not subject to the knowledge of the territorial State on the basis of the principle of the so-called Restricted Immunity based on customary international law.
1.2. The Court of Appeal of Florence rejected Ferrini's appeal, reiterating what had already been stated by the Court and observing, in particular, that the recognition of the jurisdiction of the Italian judge in the dispute in question could not be founded:
- in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed in Brussels on 27 June 1968 (hereinafter: Convention), matters relating to the exercise of public authority by State authorities being excluded from its scope, in accordance with the Court of Justice's consistent approach;
- nor in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations, since its provisions are addressed (not to individuals, but) to States and have no immediate preceptive value.

1.3. Ferrini asks for the cassation of this judgment with four grounds of appeal, illustrated by the memorandum.
The Federal Republic of Germany resists.

Grounds for the decision

2. By its first ground of appeal, the appellant - alleging infringement and misapplication of Articles 1, 5(3) and 57 of the Convention on Jurisdiction in Civil and Commercial Matters signed in Brussels on 27 September 1968 (hereinafter 'the Convention') - criticises the judgment under appeal for denying the jurisdiction of the Italian court without considering that the criteria for determining jurisdiction laid down in that Convention were applicable in

the present case, given that the criteria for determining jurisdiction laid down in that Convention were not applicable in the present case:
- the dispute arises between a person domiciled in a Contracting State (Italy) and another Contracting State (the Federal Republic of Germany) and, therefore, by definition located within the territorial scope of the Convention;
- that the claim for damages is based on facts occurring in Italian territory;
- that, under Italian and German law, claims for damages brought against a public body are also of a "civil" nature;
- that the provisions contained in the Convention take precedence over customary international rules of law and, therefore, also over the principle on which immunity from the jurisdiction of foreign States is based;
- that, according to the criterion laid down in Article 5(3), 'in matters relating to tort, delict or quasi-delict', a defendant domiciled in another Contracting State may be sued in the courts of the State where the harmful event occurred, even if it is in a Contracting State other than that in which the defendant is domiciled.
2.1. The censorship in these terms is manifestly unfounded.
Indeed, the Convention (the contents of which are now absorbed, except in the case of Denmark, by Regulation (EC) No 44/01 issued on 22 December 2000 by the Council of the European Union) is not applicable to disputes relating to activities which are an expression of the sovereignty of individual States, as has been made clear on several occasions by the Court of Justice, with regard to the liability of the Public Administration, that the claim for compensation of the injured party takes on a "civil" character (and therefore falls within the scope of application of the Convention) only if it is based on facts that were not committed by the Public Administration "in the exercise of its power of empire" (judgement of 21 April 1993, c. 171/91; c. 814/79, 16 December 1980; 14 October
1976, c. 29/76).
3. The unfoundedness, for the reasons set out in the preceding paragraph, of the complaint in the first plea in law, leads to the conclusion that the third plea in law, by which the applicant - alleging infringement of Articles 2 and 3 of the Additional Protocol to the Convention - regrets that the Territorial Court did not refer to the Court of Justice the question of interpretation intended to clarify whether or not the claim for compensation brought against Germany in the action falls within the scope of the Convention.
Indeed, even when the referral of the matter to the Court of Justice is mandatory (but this was not the case here, since the Court of Appeal was not called upon to decide which court of last instance and the conditions for applying the principle laid down in the last paragraph of Article 234 of the EC Treaty were not therefore met), it must still be considered that the mandatory nature of the referral is not absolute, in so far as it meets the need to ensure the correct and uniform application of Community law in all the Member States and the court (even if of last resort) may therefore legitimately refrain from submitting the question of interpretation to the Court of Justice whenever its answer is so clearly required that there is no reasonable doubt (Court of Justice, EC of 6 October 1982, c. 283/81; 16 January 1974, c. 166/73; 27 March 1963, Joined Cases 28-30/62; Supreme Court of Cassation of 22 November 1996
10359.
4. By the second and fourth pleas in law, which are closely connected, the applicant - alleging infringement of Articles 10 and 24 of the Staff Regulations. - Appeal against the judgment under appeal on the ground that it held:
- that the principle of the immunity of foreign States from jurisdiction has the nature and value of a general principle of customary international law;
- that that principle can operate even in the presence of an infringement of the rules of jus cogens and, in the event of a breach of the rules of jus cogens, in

Particularly those relating to respect for human dignity and the inviolable rights of the person.
5. Contrary to what the appellant shows to believe, the existence of a customary rule of international law which imposes on States the obligation to refrain from exercising

jurisdictional power with regard to foreign States and its operation, in our system, by virtue of the provisions of article 10, first paragraph, Costit, which can be revoked in doubt, even if it must be recognized, as will be said shortly, that the scope of this principle (which once had an absolute character, in the sense that it granted the foreign State total immunity, whatever the nature and object of the dispute, with respect to the jurisdiction of the territorial State) has been progressively narrowing (Cassation, SU 3 agoisto 2000 n. 530/SU; 3 February 1996 n. 919; see also, below, § 10.1).

The censorship is therefore, in this respect, clearly unfounded.

6. Its examination, on the other hand, requires a longer discourse.

With the aforementioned judgment no. 530/SU of 2000, this Court - called upon to rule on the 'harmfulness' to the physical safety and health of the residents, of the activity of training aircraft for war, in defensive function, carried out on the basis of the provisions of the Treaty NATO of the United States of America on Italian territory - after reaffirming that immunity from civil jurisdiction can be recognised only in respect of activities which constitute an 'immediate and direct extrinsic exercise' of the sovereignty of a foreign State, denied that the 'potential negative impact' of such activities 'on fundamental human rights' could have 'a discriminatory value and scope' in terms of their being attributable 'to the sphere of public law' and their suitability 'for the achievement of the institutional aims of the State', stating that 'that fact' would have made it possible only to affirm that they were potentially harmful in the above respects, but would not have made it possible to rule out the possibility that they were sovereign activities, removed, as such, from the power of jurisdiction of the territorial State. This is because the war training activity of the armed force in defensive function "represents an essential public purpose...of the State" and, therefore, an activity "indefectibly and ontologically iure imperit".

6.1. The judgment of 15 December 1995 by the Supreme Court of Ireland in the McElhinney case seems to be along the same lines.

England had been sued by a citizen of the Republic of Ireland before the Irish courts to answer for damages suffered as a result of 'post-traumatic shock' caused by an English soldier serving on the border between the Republic of Ireland and Northern Ireland. When the border was crossed, Mr McElhinney's car had hit the soldier, who had reacted by chasing him across the border and exploding a number of gunshots, three of them on Irish territory.

After reaching him, the military had pointed the gun at him, pulling the trigger, but it jammed.

The court found that England could benefit from immunity from jurisdiction, noting that the military had acted in the exercise of power inherent in the exercise of control over the borderline, which as such can be traced back to the exercise of the sovereignty of the agreed state.

This approach was taken up by the European Court of Human Rights in its judgment of 21 November 2001 in McElhinney v. Ireland (to which the plaintiff appealed on the assumption that the Republic of Ireland, by declining its jurisdiction, had precluded him from judicial protection of his right, in breach of Article 6.1 of the Convention on Human Rights), but on the basis of considerations which, as will be explained below, cannot be shared (§ 10.1).

7. The problem that is considered in this judgment is profoundly different.

That the acts carried out by Germany in its time, on which Ferrini's claim is rooted, were an expression of its empire's power, is not in fact revocable in doubt, since they are acts carried out in the course of war operations. The problem which arises, in fact, is that of ascertaining whether immunity from jurisdiction can operate even in the presence of conduct which, in the presence of

Unlike those considered in the previous paragraph, they take on extremely serious connotations, taking shape, by virtue of customary norms of international law, as international crimes, since they are detrimental to universal values that transcend the interests of individual state communities (see below, § 9).

7.1. The circumstance that such behaviour was part of the conduct of war operations raises a preliminary question.

With order no. 8157 of 5 June 2002, these SU have in fact ruled that the acts carried out by the State in the conduct of war hostilities are not subject to any jurisdictional union, constituting an expression of a "political direction" function, with respect to which "it is not possible to configure a situation of protected interest in whether or not the acts in which this function is manifested assume a certain content". In application of this principle, it was declared that there was a lack of jurisdiction over a claim brought against the Presidency of the Council and the Ministry of Defence of Italy for the destruction, during NATO operations against the Federal Republic of Yugoslavia, of a non-military target and the consequent death of some civilians.

It is easy to observe, however, on the one hand, that the unquestionable nature of the way in which the activities of supreme management of public affairs are carried out does not prevent the ascertainment of any crimes committed during their exercise and the consequent responsibilities, both criminal and civil (Articles 90 and 96 of the Constitution; Article 15.1 of the Constitution). 11 March 1953 no. 1; article 30, Law no. 25 January 1962. 20); on the other hand, that, by virtue of the principle of adaptation sanctioned by Article 10, first paragraph, of our Constitutional Charter, the norms of international law "generally recognized" that protect the freedom and dignity of the human person as fundamental values and configure as "international crimes" the conduct that most seriously attacks the integrity of such values, have become "automatically" an integral part of our system and are, therefore, fully suitable to assume the role of parameter of the injustice of the damage caused by a malicious or culpable "fact" of others.

It is therefore clear that the principles contained in that ruling cannot be taken into account in the present case.

7.2. As referred to above (retro, § 1), the facts underlying the applicant's claim for compensation took the form of his capture and deportation to Germany in order to be used as 'involuntary labour' in the service of German undertakings.

In accordance with Resolution 95-I of 11 December 1946, by which the General Assembly of the United Nations "confirmed" the principles of international law of the Statute and the judgment of the International Military Court of Nuremberg, both the deportation and the subjection to forced labour were to be counted among the "war crimes" and, therefore, among the crimes of international law.

In the Statute, signed in London on 8 August 1945, it was specified, in fact, that the category of "war crimes" also includes "deportation for forced labour" (Article 6(b)).

In the judgment delivered by the Court of Nuremberg on 30 September 1946, it was pointed out that such conduct constituted a "flagrant" violation of the Convention on the Laws and Customs of Land Warfare, signed in The Hague on 18 October 1907, whose annexed Regulation provided that services to "inhabitants" could be imposed on the civilian population (only) for the needs of the exercise of employment" (Article 52), thus excluding that such services could be required for other purposes. The applicability of the latter provision had been challenged by the defence of the defendants, who referred to Article 2 of the Convention, pointing out that the Convention had not been signed by certain belligerent States. The objection was overcome by the Court, however, observing that in 1939 (and, therefore, before the beginning of the conflict) the "rules" established by it were recognized and accepted by all civilized nations and had therefore assumed the force and value of customary rules.

7.3. The configuration as an 'international crime' of the deportation and subjugation of

deported to forced labour is confirmed both in the Principles of International Law adopted in June 1950 by the United Nations Commission on International Law (Principle VI) and in the United Nations Security Council Resolutions of 25 May 1993, 927/93 and 8 November 1994 n. 955/94, which adopted, respectively, the Statute of the International Criminal Tribunal for the former Yugoslavia (Articles 2 and 5) and the Statute of the International Criminal Tribunal for Rwanda (Article 3); and the Convention establishing the International Criminal Court, signed in Rome on 17 July 1998 by 139 States (120 ratifying States) and entered into force on 1 July 2002 (Articles 7 and 8).

7.4. Even without prejudice to what is stated in the judgment referred to in the previous paragraph, there can be no doubt that a rule of customary law of general application for all members of the international community has been established in this respect.
The seriousness of those crimes was, moreover, recognised by Germany itself which, noting the suffering inflicted by the Nazi State on those who were deported and subjected to 'forced labour' and bearing the relevant political and moral responsibility, set up, with the help of the German companies which had benefited from those 'non-voluntary' services, a Foundation, called "Memory, responsibility and future", in order to keep the recourse to the event alive and to ensure compensation to the victims (Law of 2 August 2000, BGBI 2000, I, 1263), also making the identification of "entitled persons" subject to the occurrence of certain requirements (therein, Article 11).
The latter law is also relevant from a further point of view, in that it confirms that the facts put forward by the plaintiff as the basis of his claim did not constitute isolated incidents, but responded to a precise strategy pursued at the time, with firm determination, by the German State.
8. The Supreme Court of Greece ruled out the possibility that a foreign State (in that case, too, it was Germany) could benefit from immunity from civil jurisdiction in connection with a case brought by Greek citizens to obtain compensation for damage suffered as a result of acts seriously damaging to human rights (approximately 200 people had been killed in retaliation who had no direct or indirect connection with military operations) carried out on Greek territory by its occupying troops during the Second World War (judgment No 11 of 4 May 2000, Prefecture of Voiotia c. Federal Republic of Germany).
The Court first of all had recourse to Article 11 of the European Convention on the Immunity of States, concluded on 16 May 1972, which denies that the State can invoke immunity from civil jurisdiction when it is sued before the judicial authorities of a foreign State with a claim for compensation based on an offence committed in the territory subject to its sovereignty.
According to what is stated in the judgment in question, that rule would also apply to offences committed in the exercise of an empire and would be an expression of a principle of a customary nature, effective, as such, even in relation to countries which, like Greece, have not signed the Convention.
8.1. However, the reference to this provision was not considered conclusive, since the courts took up the objection that could be drawn from Article 31, which states that the scope of the Convention does not extend to situations that may arise in the event of armed conflict. And they considered that they could overcome it by stating that the violation of mandatory rules for the protection of the fundamental rights of the human person implies the waiver of the benefits (and privileges) granted by international law, and that it should therefore be considered that Germany, by being responsible for those crimes, had implicitly waived immunity.
8.2. But it is easy to reply that there is no act which necessarily presupposes a certain will. A waiver cannot therefore be assumed in the abstract, but only found in practice, if the facts established make it possible to classify a particular act as 'abdicated'. Moreover, it seems unlikely that a person who is guilty of such serious violations intends to renounce to the

benefit derived from immunity from legal proceedings, since this is a prerogative which (if not entirely precluded) certainly makes it more difficult to establish his liability.
8.3. While the argument put forward cannot therefore be said to be fully persuasive, the conclusion reached by the Greek Court deserves full support, albeit for reasons other than those set out above.
9. There is a recurrent claim that international crimes 'threaten the whole of humanity and undermine the very foundations of international coexistence' (e.g. Constitutional Court of Hungary, 13 October 1993, No 53). These are, in fact, crimes that take the form of violations, particularly serious for their intensity or systematicity (arg. Article 40, second paragraph, of the Project on the international responsibility of States, adopted in August 2001 by the UN Commission on International Law), of the fundamental rights of the human person, the protection of which is entrusted to mandatory rules that are at the top of the international

order, prevailing over all other rules, both conventional and customary (Criminal Tribunal for the former Yugoslavia, 10 December 1998, Furunduzija, 153-155; 14 January 2000, Kupreskic, 520; European Court of Human Rights, 21 November 2001, Al-Adsani c. United Kingdom, 61) and, therefore, also on immunity.
For this reason, their ineligibility has been established (UN Convention of 26 November 1968; Council of Europe Convention of 25 January 1974) and it has been recognized that any State can repress them, regardless of where they were committed, according to the principles of universal jurisdiction (Furundzija judgment, 155 and 156): in some cases their repression has even been provided for as mandatory (so, in particular, Article 146 of the IV Geneva Convention, concerning the protection of civilian persons in time of war). For the same reason, there is no doubt that the principle of the university of jurisdiction also applies to civil trials arising from such offences.
There is also a growing conviction that such serious violations must lead to a qualitatively different (and more severe) response from other offences, even in relation to States. In line with this tendency, in the last mentioned judgment, it is stated that States which have not been involved in the offence have a duty not to recognize the situations determined by its commission (therein, 155). And, again in this perspective, the Project on the international responsibility of States, cited above, "prohibits" States from providing any aid or assistance to the maintenance of the situations originating from the violation and "obliges" them to contribute, by legitimate means, to the cessation of the illegal activity (Article 41).
9.1. The recognition of immunity from jurisdiction in favour of States that have been responsible for such misdeeds is in clear conflict with the regulatory data just mentioned, since such recognition, far from being favourable, hinders the protection of values, the protection of which, on the other hand, must be considered essential for the entire international community, in the most serious cases, so much so as to justify even compulsory forms of reaction. And there can be no doubt that the antinomy must be resolved by giving precedence to the rules of higher rank, as pointed out in the dissident opinions expressed by the minority judges (eight against nine) annexed to the Al-Adsani judgment (retro, § 9): therefore, excluding that, in such cases, the State can benefit from the immunity of the foreign jurisdiction. In this perspective, the Furunduzija judgment (loc.ult. cit.) seems to be placed in this perspective, which counts among the effects of the violation of rules of this type, operating "at an interstate level", the possibility, for the victims, of "bringing a civil action for compensation before the Courts of a foreign State".
9.2. It is not valid to argue that such an exception to the principle of immunity is not expressly provided for in any rule (e.g., beyond the judgment, Al-Adsani, 61; Superior Court of Justice - Ontario (Canada), 1 May 2002, Houshang Bouzari + 3 v. Islamic Republic of Iran, 63).
Respect for the inviolable rights of the human person has, by now, taken on the value of a fundamental principle of the international order (in this sense, in addition to the judgements already mentioned, International Court of Justice, 9 April 1949, United Kingdom c. Albania, 27 June 1986, Military and paramilitary activities in and against Nicaragua, 219). And the emergence of this principle cannot

not to reflect on the scope of the other principles to which that system is traditionally inspired and, in particular, that of the "sovereign equality" of States, to which the recognition of State immunity from foreign civil jurisdiction is linked.
In fact, the legal rules should not be interpreted separately from each other, since they complement and integrate each other, conditioning each other in their application (Al-Adsani, cit. 55; McElhinney, cit. 36). These decisions make specific reference to conventional norms. But there is no doubt that similar criteria apply to the interpretation of the customary ones, which, not unlike the others, are included in a system and can, therefore, be correctly understood only if they are placed in relation to the other norms that are an integral part of the same legal order (e.g., Universal Declaration of Human Rights, adopted by the UN Assembly on 10 December 1948, article 30).

10. This Court is aware that, even recently, it has been affirmed that States have the right to avail themselves of immunity from jurisdiction even in the case of claims for damages arising from the commission of international crimes. These decisions, however, concern cases in which the offence was committed in a State other than that of the forum (so, in particular, beyond the judgments in the Al-Adsani and Houshang Bouzari cases, retro,
§9.2., the judgment of the House of Lords of March 24, 1999, in Regina v. Bow Street Metropolitan Stripendiary Magistrate and others, ex parte Pinochet; with particular reference to the opinion expressed by Lord Hutton, who incidentally noted (the judgment concerned a natural person: General Pinochet) that Chile, even if it had to hold itself responsible on an international level for the crimes committed during its regime, could have opposed immunity if the claim for compensation had been brought before an English judge) and, therefore, not fully coinciding with the situation that is taken into consideration in the present judgment, characterized, as has already been pointed out, by the fact that the criminal action had begun in the country where the judgment was established and had been configured, already in that territorial area, as an international crime (retro, §§ 1, 6. 2, 6.3.).
The considerations contained in these judgments are not such as to affect the validity of the conclusions set out in §§ 9.1 and 9.2. They are summarised in the assumption (implicitly reaffirmed by the Strasbourg Court also in its decision of 12 December 2002, Kalogeropoulou and Others
c. Greece and Germany, which, moreover, had specific reference to the immunity of the enforceable jurisdiction, therefore different from that which is being considered in the present case) that only an express legal provision could justify a derogation from the principle of immunity from jurisdiction, but this assertion, so far as it has been said, cannot be accepted.
10.1. The opinion set out in the preceding paragraphs must therefore be maintained.
All the more so since, in terms of liability for unlawful acts, practice is evolving towards the adoption of a different criterion from that based on the distinction between iure imperii and iure gestionis, the inadequacy of which has, moreover, been pointed out in doctrine.
This emerges clearly from the judgments in the Al-Adsani and Houshang Bouzari cases, delivered in England and Canada respectively (retro, § 9, 9.2.). From them, in fact, it is deduced that the judges, even in the presence of torture committed by police officers and police officers on persons translated into prison (and, as such, ascribable to the exercise of the power of empire), attributed decisive importance, for the purposes of the recognition of immunity from jurisdiction in favour of the foreign State, to the circumstance that in both cases the offence had been committed in a different state from that in which the trial had been established.
In fact, under the rules in force in both England and Canada, the enforceability of immunity from civil jurisdiction by the foreign state, in relation to disputes involving claims for damages for personal injury or property damage, is governed by this different criterion.
The sect. 5 of the State Immunity Act of 1978, excludes, in fact, that immunity can be opposed for damages "caused by an act or omission in the United Kingdom". Similar is the approach of the

State Immunity Act of Canada, which also denies the benefit of immunity when the claim for damages relates to 'that occurs in Canada' (section 6). It is important to note that the European Convention on the Immunity of States, cit. (retro, § 8), which entered into force on June 11, 1976 and has been ratified so far by eight States, including England itself; and the domestic laws of some countries, including, in addition to Canada, the United States of America (Foreign Sovereign Immunities Act of 1976, sect. 1605.5), South Africa (Foreign States Immunity Act of 1981, sect. 3), Australia (Foreign States Immunity Act of 1985), which have not signed that Convention; and, finally, Article 12 of the Draft Convention on the Immunity of States and their Property, drawn up by the UN Commission on International Law.
Contrary to what is stated in the judgment of 21 November 2001 of the European Court of Human Rights in the McElhinney case, the orientation expressed by the rules reviewed does not only concern damage resulting from acts outside the exercise of the sovereignty of the foreign State. The Court based its view on a passage in the Explanatory Report of the

Commission on International Law to the Draft UN Convention on Immunities, which states that Article 12 refers "essentially" to "insurable" damage, i.e. damage resulting from the ordinary movement of vehicles (judgement ul. cit. 38). But this statement, as is highlighted in the "dissident opinion" of Judges Caflisch, Cabral, Barreto and Vajic is inserted in a wider context, in which it is specified that the exception to the principle of immunity, established by the rule in question, also covers "intentional" damages and those resulting from crime, not excluding murder and political assassination, adding (and the clarification, for the purposes that are relevant here, is conclusive) that the distinction between acts committed iure imperii and acts carried out iure gestionis does not assume any value with respect to claims for compensation arising from "attacks on the physical integrity of a person", or the loss or injury of a "corporal" good.
These provisions, as is also recognised by the defence of the respondent (counter-argument, p. 9), thus indicate a tendency to go beyond the theory of restricted immunity. On the contrary, according to what is stated in the Voiotia judgment the criterion expressed by them has by now assumed the value of a customary rule (retro, § 7). It is in any case certain that their presence prevents the criterion based on the nature of the infringing act from still being considered to be of general application.
10.2. Further evidence of the progressive attenuation of the relevance of this criterion with respect to disputes concerning claims for damages based on torts can be found (as noted in the Report drawn up on 6 July 1999 by the Working Group of the Commission on International Law on the Immunities of States (therein, Appendices, §§ 9-10) in the amendment made in 1996 to the US Foreign Sovereign Immunites Act. It, in fact, adds a further case of exclusion of the immunity from the jurisdiction of the foreign States, to those already contemplated by sect. 1605 of the FSIA, concerning the claims directed to obtain compensation for damages suffered due to personal injury or death caused by "torture, assassination, sabotage of aircraft, hostage-taking" (sect. 221, Anti-Terrorism and Effective Death Penalty Act).
The scope of this amendment is limited, as the exception applies only to states identified by the U.S. Department of State as "sponsors" of terrorism. Precisely for this reason, reservations have been expressed with regard to its introduction, on the observation that the creation of a category of States without recognized prerogatives in favour of all the other components of the international community (and, moreover, on unilateral determination of a single Country) does not seem to be reconciled with the principle of "sovereign equality" of the States, which implies that they are legally equal and can operate in their mutual relations on a perfectly equal footing, enjoying all the rights inherent in their "full sovereignty" (UN Declaration on friendly relations and cooperation between States, approved by the UN Assembly on 24 October 1970).
It is not difficult, however, to grasp in such a norm a confirmation of the priority importance that, in the presence of

of criminal activities of particular gravity, is now attributed to the protection of the fundamental rights of the human person with respect to the protection of the interest of the State in the recognition of its own immunity from foreign jurisdiction also in the country, like the U.S.A., tenacious assailants, until a recent past, of the theory of absolute immunity. All the more significant when one considers that the principle stated in it has already been the basis of numerous decisions: at the end of 2001, there were at least twelve sentences pronounced by U.S.A. Courts against foreign States (Alejandre v. Republic of Cuba, of 17 December 1997; Flatow v. Islamic Republic of Iran, of 11 March 1998; Cicippio v. Islamic Republic of Iran, of 27 August 1998; Anderson v.
Islamic Republic of Iran, 24 March 2000; Eisenfeld v. Islamic Republic of Iran, 11 July 2000; Higgins v. Islamic Republic of Iran, 21 September 2000; Sutherland v. Islamic Republic of Iran, 25 June 2001; Polhill v. Islamic Republic of Iran, 23 August 2001; Wagner v. Islamic Republic of Iran, 6 November 2001; Mousa v. Islamic Republic of Iran, 19 September 2001; Jenco v. Islamic Republic of Iran, 2001; Da Liberti v. Islamic Republic of Iraq of 5 December 2001), three of which date from before the date of the present judgment (23 September 1998). To these judgements must be added the ordinances pronounced, on February 26, 1998, by the

District Court of New York and, on December 15, 1998, by the Court of Appeal of the 2nd Circuit, which, again in application of the same principle, affirmed the jurisdiction of the American judges in relation to the Rein v. Libya case, relative to the Lockerbie attack.

11. A final consideration. It is now clear that, in the presence of international crimes, the functional immunity of foreign state bodies cannot be invoked.

Conventional law is, in this respect, equivocal (thus, finally, Article 27 of the Statute of the International Criminal Court, which reaffirms a principle already present in the Statute of the Nuremberg Tribunal and those of the Criminal Tribunals for the former Yugoslavia and Rwanda, retro

§ 6.3.). As far as judicial practice is concerned, it is sufficient to recall the judgment of the Israeli Supreme Court of May 29, 1962, on the Eichmann case, those pronounced in the U.S.A., May 30, 1980, by the Federal Court of Appeal of the Second Circuit in the case Filartiga v. Pena-Irala, April 12, 1995 by the District Court of Massachusetts in the case Xuncax v. Gramajo and April 18, 1998 by the District Court of New York in the case Cabiri v. Assasie Gymah, all agree that this immunity may not be relevant when international crimes have been committed.

Functional immunity, according to the prevailing opinion, is a specification of that which is the responsibility of States, since it meets the need to prevent the prohibition to sue the foreign State from being frustrated by acting against the person through whom its activity has been outsourced. But if the relief is correct, as it seems to this Court, then it must agree with those who say that if functional immunity cannot be applied, because the act performed is an international crime, there is no valid reason to maintain the immunity of the State and to deny, consequently, that its liability can be asserted before the judicial authority of a foreign State.

12. All this confirms that the Federal Republic of Germany does not have the right to be recognised, in the present dispute, as being immune from the jurisdiction of the Italian courts, whose jurisdiction must therefore be declared. And that this situation, at the normative level, was already determined when the present judgment was instituted (23 September 1998).

It was pointed out that the facts on which the application was based also occurred in Italy. But it is hardly the case that, since they can be qualified as international crimes, jurisdiction should in any case be identified according to the principles of universal jurisdiction (retro, § 9).

Any question relating to the existence of the right asserted by the applicant and to the proponibility of the claim remains naturally unaffected (article 386 of the Code of Civil Procedure).

The appeal must therefore be upheld and the contested judgment set aside, with consequent referral to the Court of Arezzo, which will also pay the costs of this phase.

P.Q.M.

The Court of Cassation, in SU, upheld the appeal and declared the jurisdiction of the Italian judge. Cassa la sentenza impugnata e rimanda rimanda, anche per le spese, al Tribunale di Arezzo