DIPLOMATIC AND CONSULAR IMMUNITY UNDER ITALIAN LAW

by Valeria Eboli

1. The legal framework

In Italy the protection of diplomatic agents is not specifically mentioned in the framework of the Constitution.

Nevertheless Italy is a contracting party of both the 1961 Vienna Convention on Diplomatic Relations[1] and the 1963 Vienna Convention on Consular Relations[2].

Furthermore the norms contained therein may be deemed also as correspondent to customary international law norms[3]. After their introduction in the Italian legal system, such international rules became a part of it[4].

According to the 1961 Vienna Convention on Diplomatic Relations the ordinary exemption of foreign diplomats from local jurisdiction, can be qualified as diplomatic immunity *ratione personae* due to the fact that it applies to the diplomatic agents

[1] The 1961 Vienna Convention on Diplomatic Relations was adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on 18 April 1961 and entered into force on 24 April 1964. (500 UNTS 95 ['VCDR' or 'Vienna Convention'] See Dinstein Yoram, Diplomatic immunity from jurisdiction ratione materiae in the International and Comparative Law Quarterly, vol. 15, no. 1 (jan., 1966), Cambridge University Press on behalf of the British institute of international and comparative law, pp.76-89, at 76. Stable url: https://www.jstor.org/stable/757285

[2] Vienna Convention on Consular Relations, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967). 109 See Article 1(b) of Law No. 804/1967 (published in Gazzetta Ufficiale No. 235 of 19 September 1967, Suppl. Ordinario n. 2350, p. 2, entered into force 4 October 1967).

[3] See *infra*.

[4] See *infra.*

irrespective of the nature of the kind of the acts which are the subject of legal proceedings[5].

The immunity *ratione materiae* is related to an act that is *official,* and *performed in the exercise of diplomatic functions*. So the immunity *ratione materiae*, or functional immunity, is restricted to official acts performed to fulfill diplomatic duties. According to the 1961 Vienna Convention Article 39 the duration of such immunity is indefinite and survives the tenure of office of diplomatic officers in so far as regards acts performed in the exercise of his functions as a member of the mission.

An act is official if it is performed by an organ of a State in his official capacity. This happens only when a diplomatic agent acts as an arm the sending State. In this case the act can be imputed to the State and regarded as an act of State[6].

So the diplomatic immunity is strictly related to the immunity of the sovereign State and it is a consequence of it[7]. It can be affirmed that diplomatic immunity *ratione materiae* emanates from the nature of the acts to which it relates as acts of State[8].

According to the doctrine, it is peaceful that some state organs enjoy an immunity *ratione materiae* for the acts performed in their official capacity. They are the

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[5] Ibidem. See also Denza Eileen, Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations (3rd edn, OUP 2008) 1-3.

[6] The International Law Commission (ILC), in its Second Report on Immunity of State Official from Foreign Criminal Jurisdiction, stated "in order for acts of an official to be deemed … official acts, they must clearly have been performed in this capacity or 'under the colour of authority." See Second Report on the Immunity of State officials from Foreign Criminal Jurisdiction, ILC, 62nd Sess, UN Doc A/CN.4/L.631 (2010) at 27. In its Fourth Report on the Immunity of State officials from Foreign Criminal Jurisdiction, the ILC noted that "the concept 'elements of a governmental authority' must be understood in a broad sense to include the exercise of legislative, judicial and executive prerogatives." See Fourth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction, ILC, 67th Sess, UN Doc A/CN.4/686 (2015) [4th ILC Report]. at 83; In Djibouti v. France, the ICJ described official acts as "acts within the scope of duties [of State officials] as organs of the State." See Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), [2008] ICJ Rep 177 [Crim. Matters] at 191.

[7] See Denza Eileen, Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations (n 9) 13; The legal basis of immunities in the Vienna Conventions can be found in the preamble, which explains that 'the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.'

[8] According to the International Court of Justice (ICJ) " There is no more fundamental prerequisite for the conduct of relations between States […] than the inviolability of diplomatic envoys and embassies, so that throughout history nations of al1 creeds and cultures have observed reciprocal obligations for that purpose […]. The institution of diplomacy, has proved to be "an instrument essential for effective cooperation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means." United States and Diplomatic and Consular Staff in Teheran (US v Iran) [Judgment of 24 May 1980] [91].

diplomatic agents[9], the heads of State and Government and the Ministers of Foreign Affairs.[10]Additionally their private acts are also protected, during their mandate, by a personal immunity.

According to many Scholars, another category of organs protected by an immunity *ratione personae* are the crews of the warships abroad and the troops in a foreign territory during peacetime, on the basis of a customary law norm [11]. The immunity of the troops abroad nowadays is also regulated by some international multilateral or bilateral agreements. The main multilateral agreement on the topic in the NATO SOFA of 1951. It provides for the concurrent jurisdiction of the sending State and the receiving State or, in cases such as that of the peacekeeping or peacebuilding operations authorized by the UN Security Council the exclusive jurisdiction of the sending State.

As it has been pointed out by Dinstein , "Official diplomatic acts -and none but them- enjoy permanent exemption from the jurisdiction of local courts because they are imputed to the foreign State, and that State is entitled to immunity in respect of its own acts regardless of the duration of the assignment of the person who happened to perform them on its behalf."[12]

The immunity *ratione personae* is complementary to it .

The personal immunity comes to an end with the termination of the functions of the diplomatic agent, when she/he leaves the country to which he is accredited.

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[9] According to Article 1(e) of the 1961 Vienna Convention on Diplomatic Relations, 'A "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission.' There are also other categories of diplomatic personnel who, if involved in a rights abuse cases, would possess immunity to a certain extent. For instance, as far a other embassy personnel is concerned, a more limited immunity rule applies to them. The administrative and technical personnel employed by the mission for instance possess the same immunity as the diplomatic agents with respect to criminal jurisdiction. However, they enjoy limited immunity with respect to civil jurisdiction to acts performed within the course of their duties, as set forth by Article 37(2) VCDR. The category service staff responsible for domestic service (Article 1(g) VCDR) is only immune for acts performed in the course of their domestic duties (Article 37(3) VCDR). The final category is the private servants, not employed by the sending State but who provide domestic service for the members of the mission. This category only enjoys privileges and immunities only to the extent admitted by the receiving State with the requirement that the receiving State exercises its jurisdiction over private servants in such a manner as not to interfere unduly with the performance of the functions of the mission (Article 37(4) VCDR).

[10] See CONFORTI Benedetto, La Corte Costituzionale e i diritti umani misconosciuti sul piano internazionale (Nota a Corte Costituzionale , 22 ottobre 2014, n.238), in Giurisprudenza costituzionale, fasc.5, 2014, pag. 3885d

[11] See CONFORTI Benedetto, ibidem

[12] Sic Dinstein., p.83

This notion of survival and subsistence of the immunity *rationae materiae* means that such functional immunity exists together with immunity *ratione personae*[13]. Instead for the consuls a functional immunity is granted by International law, but it is not complemented by a personal immunity.

So during the crucial period when the diplomatic agent is still operating, diplomatic immunity *ratione personae,* also described as "exemption from jurisdiction", and *ratione materiae,* also described as "non-liability for official acts", overlap and coexist[14].

According to some doctrine, the distinction lies in the fact that in the case of private acts, the local law would be applicable in principle but the foreign agents are transitorily exempted from judicial process[15]. On the contrary, in case of official acts, it would be a hypothesis of a permanent substantive immunity from the applicability of local law. Nevertheless, according to another theory, it cannot be denied that when a foreign diplomat violates local criminal law in his official diplomatic capacity, a crime is committed[16]. So the diplomatic immunity *ratione materiae* just avoids any prosecution even after the completion of his mission, but however a crime is committed. In fact, also according to Article 41 (1) of the same Convention all persons enjoying such privileges and immunities are obliged to respect the laws and regulations of the receiving State.

Therefore the consequence is that also diplomatic immunity *ratione materiae* enshrines an exemption from local jurisdiction[17], and not from local liability. Such view can be supported by the provision that the sending State may decide to waive immunity and allow the trial. This demonstrates that there is an assumption that a crime has been committed, because otherwise any trial would be possible.

In order to understand what role such norms on immunity play in the Italian legal system, it is important to preliminarily clarify two aspects: one is related to the

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13 Sic Dinstein p. 79

14 Ibidem

15 See BARBERINI, Roberta, Una decisione discutibile (Nota a Cassazione penale , 19 giugno 2008, n.31171, sez. I), in Cass. Pen., fasc.5, 2009, pag. 1899

16 See BARBERINI, Roberta, Una decisione discutibile (Nota a Cassazione penale , 19 giugno 2008, n.31171, sez. I), in Cass. Pen., fasc.5, 2009, pag. 1899

17 Article 31 (1) VCDR: 'A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction […]'.

correspondence of the treaty norms on immunities to customary law norms and the other is about the rank given to international law norms in the Italian legal order.

First of all, the issue on how far the norm of the Vienna Convention which recognizes an exemption from civil and criminal jurisdiction may be deemed as correspondent to a customary law norm has to be analysed. It is relevant also because as far as the norms can be qualified as belonging to general international law, Article 10 of the Italian Constitution becomes relevant as well. In fact such article encompasses a permanent adaptor of Italian law to general international law[18].

According to the first Commentators, the 1961 Vienna Convention on Diplomatic Relations codifies rules of international law on diplomatic intercourse, privileges, and immunities[19].

The Italian doctrine is of the same opinion, even if there are at least two different theories[20] differing on the reasons why the customary nature of the norm can be affirmed[21].

According to a certain School, the immunity reflects a basic principle of the international legal order, such as the substantial parity of all the States whose officials need to be protected. So the rationale of the immunity is the protection of the State officials as organs of the State.[22]

According of another theory, the norm enshrining the immunity of the State agents is an autonomous norm, not derived from that of the immunity of the State[23].

In our opinion the theory stressing the correspondence of the diplomatic immunity with the State immunity is sharable, bearing in mind that the interest protected is the same in both cases.

In relation to the functional immunity, in the Lozano case, the Cassation Court retained that immunity *ratione materiae* of the organs of a foreign State is the subject of

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18 According to it "The Italian legal system conforms to the generally recognised principles of international law.". The text of the Italian Constitution in English is available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>

19 See Dinstein Yoram, Diplomatic immunity from jurisdiction ratione materiae in the International and Comparative Law Quarterly, p. 76

20 Conforti Benedetto, In tema di immunità funzionale degli organi statali stranieri, in Riv. Dir. Internaz., fasc.1, 2010, pag. 5

21 De Sena, Diritto internazionale e immunità funzionale degli organi statali, Milano, 1996, p. 6 ss

22 V. MORELLI G., Diritto processuale civile internazionale, Padova, 1954, p. 201, CONFORTI Benedetto, In tema di immunità funzionale degli organi statali stranieri, pag. 5

23 BALLADORE Pallieri, Diritto internazionale pubblico, Milano 1962, p. 371

a customary law norm and it is also a part of the Italian legal order on the basis of Article 10 alinea 1 of the Constitution[24].

The theory accepted is that of the relationship between the immunity of the State and that of the organ, which is deemed as an emanation of it.

The Italian Cassation Court hold that the rule on immunity *ratione materiae* was a corollary of the international rule establishing the immunity of a State from the jurisdiction State in relation to *acta iure imperii* of its organs.

The Court explained that in application of the customary international law principle of 'functional immunity' or immunity *ratione materiae* of the individual, acting as an organ of the foreign State, the any individual-organ is exempted from the criminal jurisdiction of another State, due to acts carried out *iure imperii* in the exercise of the duties and functions ascribed to him or her[25].

The Italian Court considered the rule of immunity *ratione materiae* as the logical extension of State immunity. Accordingly, it upheld the distinction between *acta jure imperii* and *acta jure gestionis* applicable in State immunity to immunity of State organs[26].

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[24] Court of Cassation, Section I, No. 31171 of 19 June-24 July 2008, Lozano case. The case was about the troop Lozano, convicted for the murder of a civilian who was acting on behalf of the Italian Government in Iraq. On 4 March 2005, a US solider, at a checkpoint outside Baghdad airport, killed an Italian intelligence Italian nationals. Italian prosecutors charged him with both voluntary homicide. Mr Lozano claimed he was entitled to immunity because, duties, he was an 'organ' of the United States.

The first instance Assise Court held that the law of the flag and the dal SOFA (*Status of Forces Agreement*) between the Member of the Multinational Force and the Iraqi Government in 2004 were applicable. An exchange of notes between the Interim Iraqi Government Premier and the US Secretary of State Colin Powell, on behalf of the Multinational Force was qualified as the relevant SOFA.

The content was repealing that of the Bremer Order n. 17 of 2003 and according to it all the personnel of the coalition is solely subject to the criminal, civil and administrative jurisdiction of his/her State.

The decision was appealed. Therefore the Court of Cassation had to judge whether a member of the coalition could be subject to the criminal jurisdiction of another State (the local State or another member of the coalition).

[25] Nevertheless the Court specified that the principle can be departed from when a 'grave violation' of international humanitarian law occur and the acts committed amount to a 'crime against humanity' or 'war crime'.

[26] Anyway such argument has been criticised by some doctrine because it has been observed that the immunity of the organ is an exemption from the local criminal jurisdiction while the State as such can never be convicted for any criminal offence. The counter argument can be that the relationship between the immunity of the state and the immunity of the organ is not on grounds of typology of offences, but it is related to the nature of the act for which the immunity is enjoyed. If it is an official act performed to accomplish diplomatic duties, therefore it can be considered as an act of State and therefore the diplomat agent acted as an arm of the State and her/his act could be finally attributable to the State itself. See BARBERINI, Roberta, Una decisione discutibile (Nota a Cassazione penale , 19 giugno 2008, n.31171, sez. I), in Cass. Pen., fasc.5, 2009, pag. 1899

Once affirmed the customary nature of the norm about diplomatic immunity, it can be inferred that the principles enshrined in such international law norm may be considered a part of municipal law, being automatically incorporated by Article 10 of the Italian Constitution.

As for the rank of the norms so incorporated in the hierarchy of the sources of law of the Italian legal order, some observations are needed.

Bearing in mind that, on the basis of the largely shared dualistic theory[27], international law cannot be applied in municipal law unless and until the internal legislator has transformed the international law norm into a norm of municipal law, Article 10 of the Italian constitution represents a general introduction method[28]. According to Article 10 of the Italian Constitution, rules of customary international law enter into the Italian legal system automatically when they come to existence. Article 10, however, makes no mention of the rank of such rules.

This is based on the assumption that unwritten rules cannot be transformed by a piece of legislation, also considering that remain moving along the time.

So it is clear that such question is closely related to another sensitive issue, concerning the rank of norms of general international law and their rank when implemented into the Italian legal system.

So in the first case, based on a more formal determination, the internal rank of the norms of general international law should be a Constitutional one, as they are introduced through Article 10 of the Constitution.

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[27] The concepts of monism and dualism are related ot the relationship between internal and international legal orders. For monistic explanations, municipal law and international law are part of a single greater legal order.

The consequence is that international law is automatically part of the internal legal order and can be applied by all its organs without any further activity finalized to its reception. On the other hand dualistic conceptions consider International and municipal law as different and autonomous legal orders, so that each legal order determines for itself its legal acts in complete independence from the other. The consequence is that the transfer of the norms of one to another needs some activity of "reception" by the State whose legal order is concerned.

See KOLB Robert, The relationship between the international and the municipal legal order: reflections on the decision no 238/2014 of the Italian Constitutional Court QIL, Zoom out II (2014), 5-16

[28] On the contrary the 'special introduction' model, is a system based on a case by case introduction, so that the legislator decides what rules of international law shall apply, and how, in internal law. In Italy this system is that used to receive the international treaties into municipal law.

General introduction and special introduction systems are both allowed international law. International law thus recognizes the constitutional autonomy of States. In Italy the former has been adopted to receive the treaties, the latter for the introduction of the norms of general international law.

Instead, in the latter case, the higher is the value of the interests protected by customary law norms, the higher is also the rank they get into the domestic legal system.

The Constitutional Court has stressed in its jurisprudence that once introduced in the Italian legal system through Article 10 of the Constitution, international customary law represents a terms of reference for the review of constitutionality[29].

It was affirmed in its decision 67/1961[30], when the Court accepted to review the constitutionality of an act making reference to Article 10 of the Constitution. In the decision 15/1996, the constitutional rank of international customary law was reaffirmed[31]

Nevertheless according to the Court, international customs subsequent to the entry into force of the Constitution could even derogate to the Constitution itself [32].

The doctrine is quite critical as regards this point of view of the Court, especially on the basis of the fact that the formation of an international custom is external to the domestic legal system and would then infringe the sovereignty of the State[33].

Anyway, even though the Constitutional Court admitted in several decisions the constitutional rank of the international customs introduced through its Article 10, it also stressed that some supreme Constitutional principle prevail [34].

Recently, the Italian Constitutional Court, in its decision no 238/2014[35], hold that for an international law norm to produce its effects into the internal legal order, it is not enough that it has been formally introduced in the municipal legal order but it has also to be not contrary to a series of *material* principles of the constitution as interpreted by the Court itself. According to such point of view, a norm of international law will then

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[29] See LA PERGOLA A., L'art. 10, 1° comma, Cost. ed i controlli di costituzionalità, in Giurisprudenza italiana, 1962, 777 ff., M. SICLARI, Le "norme interposte" nel giudizio di costituzionalità, 1992, 23 ff.

[30] Text available at <http://www.giurcost.org/decisioni/1961/0067s-61.html>

[31] Text available at <http://www.giurcost.org/decisioni/1996/0015s-96.htm>

[32] See E. CANNIZZARO, *Trattati internazionali e giudizio di costituzionalità*, 1991, 283-284.

[33] V. F. PIERANDREI, *La Corte Costituzionale e le modificazioni tacite della Costituzione*, in *Foro padano*, 1951, IV, 185 ff., G. CARELLA, *Il diritto internazionale nella giurisprudenza della Corte Costituzionale*, in L. DANIELE (a cura di), *Cinquant'anni di Corte Costituzionale*. *La dimensione internazionale ed europea del diritto nell'esperienza della Corte Costituzionale*, 2006, 8-10

[34] Decision 48/1979, text available at http://www.giurcost.org/decisioni/1979/0048s-79.html. See L. CONDORELLI, *Le immunità diplomatiche e i principi fondamentali della Costituzione*, in *Giurisprudenza costituzionale*, 1979, 455 ff.

[35] Judgment no 238 – Year 2014, English translation provided by the Italian Constitutional Court, <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/ S238_2013_en.pdf>

become a part of domestic law not only if it is transformed, but also if it complies with a series of material norms of the internal legal order[36].

In particular, in this case the Court affirmed that the customary international law on the immunity of a foreign State is not unconditional but has to be aligned to the fundamental principle of supremacy of fundamental rights and human dignity. According to the Italian judges when tension exists between sovereignty on the one hand and the protection of fundamental rights on the other hand, the latter prevails.

The view expressed but the Constitutional Court in the Decision 238/2014 seems a recognition of the supreme and constitutional legal rank of the norms that guarantee fundamental human rights to which the norms on state immunity[37] are subordinated. The approach followed by the Italian jurisprudence on these issues testifies the Italian view on the core values of the international community that, going beyond a certain traditional and formal state-centric view, recognizes a growing role of the individual.

So, as far as the rank of the norms of general international law in the internal legal system is concerned, such decisions support the view according to which the norms of general international law may be given a different rank in the domestic legal system in relation to their content.

Differently, international treaties get the rank of the act of reception, as the Constitutional Court clearly stated in its decision 323/1989[38]. Nevertheless according to some doctrine they may be deemed as particularly "resistant" in the light of Article 117 of the Italian Constitution, recognizing the importance to give priority to the international obligations of the State[39]

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[36] Of course, in the light of international law, if a State gives priority to its municipal law and does not implement the international law norm, it assumes international responsibility for the breach of international law a norm is not implemented. See KOLB, The relationship between the international and the municipal legal order: reflections on the decision no 238/2014 of the Italian Constitutional Court

[37] The decision is relevant in order to understand the rank of the general international law norms in the internal legal system, even is in the specific case, it was related to an issue of State immunity.

[38] Text available at < http://www.giurcost.org/decisioni/1989/0323s-89.html>. See G. CARELLA, Il diritto internazionale nella giurisprudenza della Corte Costituzionale, in L. DANIELE (a cura di), Cinquant'anni di Corte Costituzionale. La dimensione internazionale ed europea del diritto nell'esperienza della Corte Costituzionale, 2006, 10 ff.

[39] See LAMARQUE Elisabetta, Il vincolo alle leggi statali e regionali derivante dagli obblighi internazionali nella giurisprudenza comune, at https://www.cortecostituzionale.it/documenti/convegni_seminari/lamarque_definitivo_6112009.pdf , G. GEMMA, Rispetto dei trattati internazionali: un nuovo obbligo del legislatore statale, in Quad. cost., 2002, 605 ss.; E. CANNIZZARO, La riforma "federalista" della Costituzione e gli obblighi internazionali, in Riv. dir. internaz., 2001, 921 ss. e L.S. ROSSI, Gli obblighi internazionali e comunitari nella riforma del titolo V della Costituzione, in www.forumcostituzionale.it.

As far as the norms regarding the diplomatic immunity are concerned, on the one hand, one can consider that when a customary law norm is correspondent to a treaty law norm it seems that "multilateral treaties take the forefront and eclipse the unwritten rules (in the case of diplomatic law, the multilateral treaty applying is the Vienna Convention on diplomatic relations of 1961)"[40].

On the other hand, one can take into account the decision 238/2008 where the Italian Constitutional Court affirms that the customary international law norm on the immunity of a foreign State is not unconditional but it has to be aligned to the fundamental principle of supremacy of fundamental rights.

In any case, it seems that such norm cannot be considered as prevailing on higher Constitutional principles in the Italian legal system.

Such perspective arising from the Italian practice seems to be different compared to the view expressed by the International Court of Justice[41].

In the Arrest Warrant case the ICJ ruled that there is no exception to the immunity for international crimes[42]. According to such judgment , diplomatic immunity concerns all possible minor offences as well as grave crimes, such as the crimes against humanity, so that the immunity from the criminal jurisdiction of the receiving State would have an absolute character without any exception.

According to the Court there was not enough practice to deduce that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to State organs [43], where they are suspected of having committed war crimes or crimes against humanity[44].

The issue related to the compatibility of international customary law norms on diplomatic immunities with the Italian Constitution has also been raised.

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[40] See KOLB, ibidem

[41] See also Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), ICJ Reports, 3 febbraio 2012 (http://www.icj-cij.org/en); *contra* Court of Cassation, Ferrini Case, sezioni unite Decision no. 5044/04, of 11.03.2004

[42] Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) ICJ, 41 ILM 536.

[43] The case was about Ministers of foreign Affairs. Anyway although, in this case the ICJ was dealing with the immunity of a minister of foreign affairs, the outcome has direct consequence for diplomatic immunity as the protection of the functioning of the office is at the basis of both of them.

[44] See also Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), ICJ Reports, 3 febbraio 2012 (http://www.icj-cij.org/en); *contra* Court of Cassation, Ferrini Case, sezioni unite Decision no. 5044/04, of 11.03.2004

Some concern arose in particular in relation to Article 25 of the Italian Constitution. It states that "No punishment may be inflicted except by virtue of a law in force at the time the offence was committed. No restriction may be placed on a person's liberty save for as provided by law."[45]

Therefore the customary law norms are supposed to be introduced through a law whenever they aim at producing effects in the field of criminal law. [46]

According to the principle affirmed by the Constitutional Court [47] that customary law norms cannot be in contrast with the main Constitutional principles, it could be inferred that some exemptions from the criminal jurisdiction should be provided by law.

Other doubts related to the reception of customary international law norms in penal mattes could arise from the fact that customary law is lacking a certain degree of certainty generally required for the penal law rules, as it is an unwritten source of law and it is the fruit of a progressive formation [48].

So, according to some doctrine, the provision of an exemption from criminal jurisdiction in the absence of a specific internal norm arising from the legislative power could be questionable[49].

2. The national case law

2.1 Case-law on the exemption from criminal jurisdiction

One of the landmark cases on immunities has been decided in relation to some Extraordinary Renditions Cases[50].

The landmark case is that of Abu Omar[51]. The case took origin from the abduction of a suspected terrorist, Abu Omar, which took place in Milan in 2003, in the

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[45] Text in English available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>

See BARBERINI Roberta, Una decisione discutibile (Nota a Cassazione penale , 19 giugno 2008, n.31171, sez. I), in Cass. Pen., fasc.5, 2009, pag. 1899

[47] C. cost., Decision of 12 June 1979, n. 48, in Giur. cost., 1979

[48] See BARBERINI Roberta, Una decisione discutibile (Nota a Cassazione penale , 19 giugno 2008, n.31171, sez. I), in Cass. Pen., fasc.5, 2009, pag. 1899

[49] Sic BARBERINI, p. 3/4

[50] Extraordinary renditions (Cass. Pen. sez. V - 11/03/2014, n. 39788)

[51] It gave raise to several judicial decisions: Trib. Milano, 4.11.2009 (SENT.), (CASO ABU OMAR), at https://www.penalecontemporaneo.it/d/147; C. App. Milano, sez. III, 15.12.10 (dep. 15.3.11), at https://www.penalecontemporaneo.it/d/774; Cass. pen., sez. V, 19 settembre 2012 (dep.

framework of an extraordinary rendition operation[52] conducted jointly by the US Central Intelligence Agency (CIA) and the Italian Intelligence Agency called "Servizio informazioni e sicurezza militare » (SISMI). The case gave rise to a conflict of competences between the Court of Milan, which had commenced a criminal proceeding against the accused, and the Italian government, which invoked State secrecy with regard to its agents involved.

The conflict was resolved in the Constitutional Court, according to which the State secrecy and the exercise of jurisdiction, prerogatives respectively of the executive and the judiciary, had to be balanced.

So, the judiciary was not prevented from exercising jurisdiction, but without relying on certain documents and evidence.

As a result of this decision, the Court of Milan sentenced 23 CIA agents for Abu Omar's abduction (who were prosecuted in absentia), in 2009. On the contrary all the proceedings against the SISMI officers were dismissed.

The Court of Appeal of Milan confirmed these conclusions in 2011.

Such decision was to then appealed before the Supreme Court of Cassation.

The Tribunal of Milan recognised the immunity *ratione materiae* to the defendants, because they were working at the embassy. The judges did not mention their immunity *ratione personae*.

According to the Tribunal of Milan the activity of the extraordinary renditions belongs to the acts *iure imperii* of the State due to its links to the war on terrorism. So such activity was clearly deployed in order to realize a national political will[53]. According to Article 3, para 1, sub c), of the 1961 Vienna Convention on diplomatic relations such activity, being functional to an interest of the State, does not imply the conviction of the diplomatic agent. Differently arguing and invoking the personal

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29 novembre 2012), n. 46340,at https://www.penalecontemporaneo.it/d/1911; Cass. pen., sez. I, 24 febbraio 2014 (dep. 16 maggio 2014), n. 20447, at https://www.penalecontemporaneo.it/d/3086

[52] GAETA, Extraordinary renditions e immunità dalla giurisdizione penale degli agenti di Stati esteri: il caso Abu Omar, ivi, 2006, p. 126 ss.; SCOVAZZI, Tortura e formalismi giuridici di basso profilo, ivi, 2006, p. 905 ss.; WEISSBRODT e BERGQUIST, Extraordinary Rendition: a Human Rights Analysis, Harvard Human Rights Journal, 2006, p. 123 ss.; SANDS, International Rule of Law: Extraordinary Rendition, Complicity and its Consequences, European Human Rights Law Review, 2006, p. 408 ss.;

[53] Also the Supreme Court has mentioned the 'Omnibus Counterterrorism Act' and the 'Antiterrorism Amendment Act', both of 1995, and the 'Comprehensive Terrorism Prevention Act' of 24 September 2001. See Decision No. 46340 of 19 September 2012

immunity the State agents could be subject to the penal jurisdiction after the end of their mandate.

Nevertheless the aforementioned Article 3 states that the activity has to be performed in the limits of international law. In this case they were accused of fundamental violations of human rights, including torture. So the individual responsibility of the diplomatic agents cannot be excluded for such type of crimes, in the reasoning of the Tribunal.

It is a case of duality, when both the State and the individual can be held both responsible, respectively for an international wrongful act related to the violation of human rights and for an individual crime[54].

Grave and systematic violations of the "basic rights of human person" give raise to such duality of responsibility, so that the individual-organ can be prosecuted[55].

In this case, the prevailing norms are those of *ius cogens*, which cannot be derogated and limit the extent of customary international law norms on immunity[56].

The principal submission of the two defendants who were in charge of consular functions at the relevant time (Mr Lady and Ms de Sousa) was, in turn, that in proceeding against them, the Italian Courts had violated the immunities which consular officers enjoyed under international law[57].

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[54] On the duality of responsibility see Pillitu Paola Anna, Crimini internazionali, immunità diplomatiche e Segreto di stato nella sentenza del tribunale di Milano nel caso abu omar in riv. Dir. Internaz., fasc.3, 2010, pag. 666. See also International Court Of Justice, Judgment Of 26 February 2007 On The Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia And Herzegovina V. Serbia And Montenegro) , available At https://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf paras 172-173. The ICJ states that "The Court is mindful of the fact that the famous sentence in the Nuremberg Judgment that "[c]rimes against international law are committed by men, not by abstract entities . . ." (Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, Offi- cial Documents, Vol. 1, p. 223) might be invoked in support of the proposition that only individuals can breach the obligations set out in Article III. But the Court notes that that Tribunal was answering the argument that "international law is concerned with the actions of sovereign States, and provides no punishment for individuals" (Judgment of the International Military Tribunal, op. cit., p. 222), and that thus States alone were responsible under international law. The Tribunal rejected that argument in the following terms: "[t]hat international law imposes duties and liabilities upon individuals as well as upon States has long been recognized" (ibid., p. 223; the phrase "as well as upon States" is missing in the French text of the Judgment).

173. The Court observes that that duality of responsibility continues to be a constant feature of international law. This feature is reflected in Article 25, paragraph 4, of the Rome Statute for the International Criminal Court (…)".

[55] see Pillitu Paola Anna, Crimini internazionali, immunità diplomatiche e Segreto di stato nella sentenza del tribunale di Milano nel caso abu omar in riv. Dir. Internaz., fasc.3, 2010,p. 666

[56] see Pillitu Paola Anna, Crimini internazionali, immunità diplomatiche e Segreto di stato nella sentenza del tribunale di Milano nel caso abu omar in riv. Dir. Internaz., fasc.3, 2010, 666

[57] see Court of Cassation, Fifth Section, Decision No. 46340 of 19 September 2012, pp. 100–110.

In this regard the relevant principles have been codified by the 1963 Vienna Convention on Consular Relations, which Italy ratified through Law No. 804 of 9 August 1967[58]. The 1963 Vienna Convention does not allow arrest and detention pending trial of consular officers, except 'in the case of a grave crime and pursuant to a decision by the competent judicial authorities' (Article 41.1).

According to the Court of Cassation (2012 decision), the arrest and detention of the applicants was justified because the crime of 'kidnapping' is included in the concept of 'grave crime' as defined for the purposes of the Vienna Convention, by Law No. 804/1967.

In so far as the argument of the exemption of the consular officers from the jurisdiction of the receiving State is concerned, the Court pointed out that under international law, this exemption is limited to acts done in the performance of official duties (Article 43, Vienna Convention). One of the applicants' arguments was that the abduction of Abu Omar was directed to protect fundamental interests of the US and which was giving execution to the CIA anti-terrorism program, so that such conduct had to be regarded as an act done in the performance of consular functions.

After recalling the concept of 'consular functions' under the Vienna Convention, mentioning also Article 5.m, which allows consular officers to perform 'any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State', the Court held that the kidnapping of an individual and his forcible transfer in a place where he has been subjected to interrogation with violent methods or torture could not be included in the concept of 'consular functions'.

Furthermore such conduct expressly prohibited by the law of the receiving State and therefore cannot fall under the exemption granted by the aforementioned 1963 Vienna Convention provision.

Another argument of the defendant was that State officials were not liable because only States bear responsibility for extraordinary rendition operations so the abduction of Abu Omar should be exempted from the jurisdiction of Italy, in relation to the principle of par in *parem non habet iudicium*.

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[58] Vienna Convention on Consular Relations, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967). 109 See Article 1(b) of Law No. 804/1967 (published in Gazzetta Ufficiale No. 235 of 19 September 1967, p. 2, entered into force 4 October 1967).

The CIA agents involved should have been regarded by the Italian Courts as being the members of a US special mission, and should have enjoyed functional immunity. The Court rejected this argument[59]. For the Court, it was required to ascertain whether a norm preventing domestic courts from exercising criminal jurisdiction against officials of foreign States existed in customary international law. It concluded that State practice shows that the issue of exempting State officials from foreign criminal jurisdiction is still controversial in international law, and that no general principle exists on the matter. On such grounds it concluded that the submission of the applicants was unfounded.

The Court of Cassation (2014 decision) explicitly excluded that the CIA agents could be qualified as members of the diplomatic mission and therefore they could not enjoy any diplomatic immunity[60].

The Court examined also the possible qualification of the abduction of Abu Omar as a violation of international humanitarian law, which could be envisaged as a derogation from the functional immunity principle.

The purpose of the abduction of Abu Omar was transferring him in Egypt, a country where interrogation with torture is permitted, and where Abu Omar was actually tortured, as has been ascertained by the competent Courts. So it implies that the conduct of the defendants may be described as a violation of humanitarian law, and human rights law[61].

About Consular immunities, a remarkable decision has been given by the Supreme Court in 2003[62]. The Court of Cassation, after making a clear distinction between diplomatic immunity and consular immunity, specified that a consul cannot be considered as a diplomatic agent and he/she just enjoys functional immunity. So, the

[59] Decision No. 46304/2012, p. 106-108

[60] See https://www.academia.edu/15227365/Abu_Omar_Case_and_Diplomatic_Immunity

[61] For instance torture is prohibited by European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953). the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), the UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[62] Court of Cassation, Decision No. 16659/03 of 9 April 2003, available at http://www.dirittoegiustizia.it/allegati/15/0000012188/sezione_quinta_sentenza_n_16659_03_depositata_il_9_aprile.htm.

consul may be subject to the criminal jurisdiction of the state for whatever crime committed outside the exercise of his/her specific public functions[63].

2.2 Case-law on the exemption from civil jurisdiction

Another interesting decision about diplomatic immunities has been delivered by the Supreme Court of Cassation in 2008.

The Supreme Court of Cassation, in its decision No. 27044/08, held that the immunity from civilian jurisdiction is excluded when the diplomatic agent is the "passive subject" ("*soggetto passivo*") in a *iure privatorum*" dispute[64].

The Supreme Court affirmed that the immunity from civilian jurisdiction is excluded both for the case where the diplomatic agent is the active or the passive subject in a controversy related to a professional activity exercised outside its official functions.

In this case an Italian citizen, lawyer, sued a diplomatic agent who had been his client claiming the payment of his honorary fee.

The Court makes reference to the concept of activities *iure privatorum* to designate all those activities that do not fall within the official functions. So such notion is apt to include all the professional, commericial or employment activities. According to this view, the diplomatic agent is subject to the Italian jurisdiction in all civil as well as execution proceedings.

The Supreme Court of Cassation interpreted extensively Article 31, para.1, sub c), of the 1961 Vienna Convention aaccording to which "An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions"[65]

Therefore the jurisdictional immunity cannot be operating for those activities for which the diplomatic agent is exactly in the same position than an Italian citizen.

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[63] See MILLER Arcibaldo, Le immunità diplomatiche e consolari nel diritto penale. Ambito natura giuridica e presupposti delle guarentigie (Nota a Cassazione penale , 19 marzo 2003, n.16659, sez. V) in deg - dir. E giust., fasc.18, 2003, pag. 71.

[64] Supreme Court of Cassation, 'Sezioni unite civili', Decision n. 27044/08, *Papavassilopoulos S. v. Barone V.*,, 13 November 2008 at http://www.costituzionale.unige.it/lara.trucco/liberta/Cass-consuetudine.pdf

[65] Text available at < http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf>

In the course of the proceeding the defendant claimed to be exempted from civil jurisdiction in his position as diplomatic agent at the Greek Embassy and that no measure of execution could be executed in his regard.

The first instance judge rejected such claim. Then the defendant appealed to the Appeals Court of Milan, which stressed that Mr Papavassilopoulos had not proved in a formally correct way his status of diplomatic agent, as he had just provided a copy of the document stating his role of diplomat at the Greek Embassy.

According to the Court as it was a document coming from a foreign Authority it was lacking the formal requisites provided by the Italian law for this kind of acts (Article 33 Decree of the President of the Republic 445/2000). Furthermore according to the Court the showing of the diplomatic passport (in copy) was not enough to prove his status. Finally, the Appeals Court hold that even if his quality had been proved, he could not be exempted from the civil jurisdiction of the State according to Article 31, para. 3, sub c) of the 1961 Vienna Convention.
The Appeal Court explained that such alinea had too be interpreted as making reference not only to the cases where the diplomatic agent was acting as a professional but also to the case where he/she was the client of a professional.

Such decision was appealed by Papavassilopoulos who submitted to the attention of the Cassation Court both the formal issue of the value as evidence of his documents on copy and the extensive interpretation of Article 31 of the 1961 Vienna Convention.

The Supreme Court confirmed the decision of the Appeals Court of Milan. On the point of the interpretation of Article 31 para. 1 sub c) the Court stated that even if it had never before examined the issue at stake, nevertheless had always preferred a restrictive interpretation of the causes of exemption from the territorial jurisdiction of the foreign diplomatic agent. The reason is that an activity *iure privatorum* cannot exempt the State from the jurisdiction, so all the more reason it cannot exempt its agent acting without representing the State.

relation to the jurisdictional immunity of the consuls, it has to be mentioned a previous decision of the Supreme Court No. 11357/1990[66] In.

According to it the immunity provided for by Article 43 of the 1963 Vienna Convention can be related to all those acts, also if formally based on private law such as

[66] Court of Cassation, "Sezioni Unite", No. 11357/1990, quoted at <http://www.costituzionale.unige.it/lara.trucco/liberta/Cass-consuetudine.pdf>

contracts, done in the exercise of official functions. On the contrary all the acts performed as private citizens are not exempted from the local jurisdiction. So in this case the civil jurisdiction of the Italian Courts was affirmed in relation to a dispute concerning the employment of a domestic worker of the family of the consul.

3. Conclusions

The protection of immunities in the Italian legal system is mainly based on the norms arising from its international law obligations. In particular both the Conventions on diplomatic immunities and consular immunities have been ratified and are applicable into the Italian legal order.

Such norms may be deemed as also correspondent to customary law norms.

The doctrine agrees to qualify such norms as customary, even though according to some Authors it is a consequence of the customary nature of the norm on the State immunity. According to others it is an autonomous custom. In our view, the diplomatic immunity is strictly related to the State immunity, so that the former reconstruction is more convincing.

Once affirmed the customary nature of the norm, it can be retained that, even before the entry into force of the relevant treaties they had already been introduced in the domestic system through Article 10 of the Constitution. Such Article works as a valve that allows the entry of general international law norms in the domestic legal order as soon as they come into existence in the international legal order.

As for the rank, different approaches were discussed. In Italy the introduction of international customs and treaties is based on different methods. For the formers a general introduction model is provided by art. 10 of the Constitution. For the latter a special introduction model is used with a specific act of reception for any single agreement.

It is also discussed which is the rank such norms have in the Italian legal system once introduced.

There is some case law of the Constitutional Court, according to which international customary law norms need to be conform to higher constitutional principles, even if they may get a constitutional rank.

For the treaties, they usually get the same rank of the act of reception, that can be a law, a constitutional law, a regulation etc., according to the subject.

Nevertheless, bearing in mind article 117 of the Constitution, they are supposed to have a special rank, higher than that of other laws in order to ensure the compliance of the international legal obligations of the State.

In our view also for the introduced customs, the rank should be ascertained on a case by case basis, going beyond the formal datum that the provision concerning their introduction into the legal system is inserted in the Constitution (the mentioned Article 10). In this case also they should be given the same rank of the norms that regulate the same matter in the domestic legal order. So it would be more suitable to look at the content than at the form, in order to better place them in the hierarchy of the norms.

As far as, in particular the norms on the immunity are concerned, they are supposed to be placed in an intermediate rank between the higher constitutional principles, such as those protecting the fundamental rights of the individual, and the ordinary law, bearing in mind the approach of the Italian Constitutional Court.

Some recent decisions concerning the possible exemptions of immunity were worth noting.

First, in the case of Abu Omar, the Supreme Court of cassation stated that the functional immunity of a diplomatic or consular agent does not work when a serious international crime has to be judged, so that it affirmed the jurisdiction of the Italian Courts in such hypothesis.

Another recent and significant case worth mentioning is that concerning the immunity from civil jurisdiction, that was denied for private acts, stressing that the activites *iure privatorum* performed in the personal interest cannot be protected by any functional immunity.

To sum up the position of the Italian judges with reference to the immunity from criminal jurisdiction seems to be quite restrictive, in the sense that the immunity finds a limitation in all those cases where the protection of human rights is at stake. Bearing in mind that the protection of fundamental rights is one of the supreme interests of both the international and the municipal communities, in our opinion such position may be sharable.

In the case of the exemptions from civil jurisdiction, in our view the position of the judges looks like well founded as far as it gives priority to substantial aspects to the formal features of the act. The fact that an act is based on private law is not enough to qualify it as private, but it has to be taken info due account its aim to qualify it as such.

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