> "Montenegro cannot be qualified as a sovereign State, i.e. an autonomous and independent subject of international law. As a consequence, Djukanovic [...] does not enjoy the immunity from criminal jurisdiction recognised by a special provision of customary international law [...], only for Heads of State, Prime Ministers and Foreign Ministers".

Two main arguments were used by the Court to justify this conclusion.

First, the Court recalled that several advisory opinions have been issued by the Italian Foreign Office, unanimously affirming that Mr Djukanovic is not entitled to immunity from criminal jurisdiction due to a lack of international personality for the Republic of Montenegro.

Second, the Constitutional Charter of the State Union of Serbia and Montenegro (Art. 14) expressly states that:

> "Serbia and Montenegro shall be a single personality in international law and member of international global and regional organizations that set international personality as a requirement for membership. The member States may be members of international global and regional organizations which do not set international personality as a requirement for membership".

Articles 15 and 19 of the Charter have similar content.

The second argument used by the Court appears to be particularly decisive. Indeed, as correctly observed in legal doctrine, the question of the personality of the component units of a federation has to be determined in light of the constitution of the State in question (SHAW, *International Law*, 5th ed., Cambridge, 2003, p. 196).

The judgment of the Court is even more commendable, given that it definitively clarifies the conditions under which an entity may be considered a sovereign one. It is also worth noting that the Court, following the opinion of several authors (see *inter alia* CONFORTI, *Diritto internazionale*, 6th ed., Napoli, 2002, p. 17 ff.), has definitely abandoned the constitutive recognition theory, by highlighting that such an act has an exclusively political and declaratory nature. (The Italian text of the decision has not yet been published).

FULVIO MARIA PALOMBINO

Sovereign immunity from jurisdiction – Order of Malta – Subjects of international law – Jurisdiction over disputes concerning patrimonial aspects of labour relations

Corte di Cassazione (Sezioni Unite), 12 November 2003, No. 17087 (order)

Association of Italian Knights of the Sovereign Military Order of Malta v. Spatini

The order under review confirms the traditional tendency of Italian case-law to acknowledge that the Order of Malta is an international subject, generally entitled to sovereign immunity (from Italian jurisdiction). However, the order also confirms the more recent and welcome trend toward restricting this immunity and, in particular, affirms Italian jurisdiction over disputes concerning the patrimonial aspects of labour relations.

Mr. Spatini, a member of the Military Corps of the Association of Italian Knights of the Sovereign Military Order of Malta, had petitioned a civil judge, asking for the payment of extra wages which he claimed he was entitled to. The Association, in turn, invoked a lack of jurisdiction and applied to the *Corte di Cassazione* for a preliminary ruling on the issue.

In the first part of the ruling the Court recognised that the Order of Malta is a subject of international law: "The case-law of this Court is consistent in recognising the position held by the Sovereign Order of Malta as a subject of international law in the Italian legal system".

This opinion is in line with well-established practice in Italian case-law (see, for all, *Cassazione*, 14 July 1953, No. 2281, reproduced in Giur. It., 1954, I, 1, p. 462 ff.; 6 June 1974, No. 1653, *ibidem*, 1975, I, 1, p. 489 ff.; 18 March 1999, No. 150, reproduced in Giustizia civile, 1999-I, p. 3353 ff.), recently also confirmed by the Italian Parliament, which authorised the ratification and ordered the execution of an international treaty concluded with the Order concerning the management of its hospitals in Italy (see Law No. 157 of 9 June 2003 concerning the execution of the Treaty of 21 December 2000).

However, the above-mentioned tendency has been heavily criticised by international law scholars, as one without support in the principles of international law. The opinion is commonly shared that this practice is the source of an absolutely unjustified situation of privilege (see, among others, BERNARDINI, "Ordine di Malta e diritto internazionale", RDI, 1967, p. 497 ff.; PAONE, "Ordine di Malta e sistema giuridico internazionale", *ibid.*, 1979, p. 233 ff.; LARGER and MONIN, "A propos du protocole d'accord du 5 septembre 1983 entre les 'Services Gouvernementaux Français' et la 'Représentation officielle en France de l'Ordre de Malte' : quelques observations sur la nature juridique de l'Ordre de Malte", AFDI, 1983, pp. 229-239; CONFORTI, "Sui privilegi e le immunità dell'Ordine di Malta", Foro It., 1990, I, p. 2597 ff.).

In light of these opinions, the judgment invites criticism when it claims that: "[T]he theory that the Order of Malta enjoys sovereign privileges is unanimously shared by legal scholars".

As the Order was considered an international subject, the Court applied, to the Italian Association, the principles on jurisdictional immunity in employment disputes that have been developed by Italian tribunals with regard to foreign States. The Court affirmed that:

> "[C]oncerning labour relations with foreign States, no immunity from jurisdiction shall be recognised when the dispute involves the per-

formance of peripheral activities that have no bearing on the institutional functions of the State in question. Similarly, a plea of immunity will also be dismissed when the dispute concerns activities performed by white-collar employees who participate in the sovereign functions of that State, provided that the claim involves exclusively financial matters. In fact, a decision on this kind of claim is incapable of interfering with the above-mentioned functions of a foreign State".

On this ground – given that the dispute concerned only financial matters – the Court affirmed Italian jurisdiction over the case. With regard to State immunity, a distinction between the "economic" and "organisational" aspects of employment relationships had been introduced by the Court in judgment No. 2329 of 15 May 1989, and confirmed on several occasions (see orders No. 5941 of 18 May 1992, reproduced in RDI, 1992, p. 402 ff., No. 9657 of 24 September 1993, *ibid.*, 1993, p. 812 ff.).

The Court's conclusion here is in line with a trend in the *Corte di Cassazione* toward reducing the immunity attributed to the Order on other grounds (see, for example, the reference to waiver of immunity in judgments No. 3374 of 19 July 1989, reproduced in Foro It., 1990, I, p. 2595 ff., and, *mutatis mutandis*, No. 960 of 18 February 1989, *ibid.*, 1989, I, p. 677 ff.; the significance attributed to the private nature of the activity carried out in judgment No. 1073 of 3 February 1988, reproduced in RDI, 1988, p. 905 ff.; or the relevance attributed to the financial character of the dispute in order No. 374 of 14 January 1992, reproduced in Diritto ecclesiastico, 1992-II, p. 3 ff.). This trend, strengthened by the findings of the Court in the present case, gives greater respect to the individual right of action guaranteed by the Italian Constitution and in human rights instruments and, for this reason, should be welcomed. Nevertheless – as has been said on several occasions in this *Yearbook* (see Vol. II, 1976, p. 328 ff.; Vol. VIII, 1988-1992, p. 38; Vol. IX, 1999, p. 154 ff.) – it would be preferable and more consistent with international law principles to abandon the theory of the Order's international personality altogether. (The Italian text of the order has been published in RDIPP, 2004, pp. 1034-1036).

FRANCESCA DE VITTOR

X. TREATMENT OF ALIENS AND NATIONALITY

Alien – Public housing – Allocation of housing – Classification list – Additional points to Italian citizens – Discrimination based on race

Tribunale di Milano, 21 March 2002

Alien – Building consortium – Articles of association – Members – Exclusion of non-EC citizens – Discrimination based on race