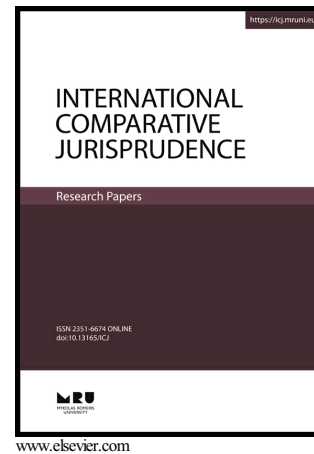


Author's Accepted Manuscript

Civil actions for damages caused by war crimes vs. State immunity from jurisdiction and the political act doctrine: ECtHR, ICJ and Italian courts

Francesco De Santis di Nicola



PII: S2351-6674(17)30004-5
DOI: <http://dx.doi.org/10.1016/j.icj.2017.02.002>
Reference: ICJ30

To appear in: *International Comparative Jurisprudence*

Cite this article as: Francesco De Santis di Nicola, Civil actions for damage caused by war crimes vs. State immunity from jurisdiction and the political act doctrine: ECtHR, ICJ and Italian courts, *International Comparative Jurisprudence*, <http://dx.doi.org/10.1016/j.icj.2017.02.002>

This is a PDF file of an unedited manuscript that has been accepted for publication. As a service to our customers we are providing this early version of the manuscript. The manuscript will undergo copyediting, typesetting, and a review of the resulting galley proof before it is published in its final citable form. Please note that during the production process errors may be discovered which could affect the content, and all legal disclaimers that apply to the journal pertain.

Civil actions for damages caused by war crimes vs. State immunity from jurisdiction and the political act doctrine: ECtHR, ICJ and Italian courts

Francesco De Santis di Nicola*

University of Naples Federico II, Department of Law, Italy

*Corresponding author. francesco.desantis@unina.it

ABSTRACT

Civil actions for war crimes serve the purposes of obtaining a public acknowledgment of the tort and that of reaffirming the legal binding force of the rules protecting fundamental human rights. However, two main obstacles arise before such actions since the defendant is a State: immunity from jurisdiction and the political act doctrine. The interaction between the Italian Supreme Courts (Corte di Cassazione and Corte Costituzionale), the European Court of Human Rights and the International Court of Justice provides clear examples of the achievements and the remaining challenges in this field, where the right of access to a court and the right to an effective remedy should not be excluded in the name of an absolute sovereignty or of an unaccountable *raison d'État*.

Keywords: State immunity; political act doctrine; damages

1. Introduction

In the past two decades, national courts have examined several types of civil actions concerning serious violations of human rights originating in war crimes. These actions generally concerned a request by the victims or by the victims' heirs, seeking award of compensation for the damages suffered as a result of such violations perpetrated by a State or by its agents. One would ask why are these kind of civil actions important?

According to Dinah Shelton, '[t]he primary function of corrective or remedial justice is to rectify the wrong done to a victim, that is, to correct injustice <...> Even if human rights violations and money are not commensurable, damages are still justified because an award of damages serves to affirm a public respect for the victim and give public recognition of the wrongdoer's fault in failing to respect basic rights.' (Shelton, 2006, pp. 10, 292). In this context, civil actions against the wrongdoer State for war crimes serve, among others, the purposes of obtaining a public acknowledgment of the tort and that of reaffirming the legal binding force of the rules protecting fundamental human rights. In other words, the control by an independent body, which takes on the point of view of the victims can be considered as necessary in order to implement the protection of human rights. Human rights law is legally binding and enforceable and is not a mere declaration of principles. This applies even in times of war or in times of emergency: a democracy has to be able to fight against its enemies without denying – at least – the hard-core of human rights.

The most common scenario in consideration is the following: an individual brings civil action against a State before a national court alleging that the defendant State committed a

Download English Version:

<https://daneshyari.com/en/article/7531871>

Download Persian Version:

<https://daneshyari.com/article/7531871>

[Daneshyari.com](https://daneshyari.com)