



INSIGHT

## A EUROPEAN WAY TO APPROACH (AND LIMIT) THE LAW ON STATE IMMUNITY? THE COURT OF JUSTICE IN THE *RINA* CASE

ANDREA SPAGNOLO\*

**ABSTRACT:** The present *Insight* offers an analysis of the judgment of the Court of Justice in the so-called RINA case (judgment of 7 May 2020, case C-641/18, *LG and Others v. Rina and Ente Registro Navale*), which deals with the (non) automatic extension of State immunity to private actors entrusted with some public functions. Building on the opinion of AG Szpunar and on the Court of Justice' judgment, the *Insight* argues that the decision will have an impact on the evolution of the law on State immunity towards a more limited scope of application. It also constitutes evidence of how the EU might contribute with its own practice to this end.

**KEYWORDS:** RINA – SOLAS Convention – State immunity – private actors – recognized organizations – flag State.

### I. INTRODUCTION

On the 7<sup>th</sup> of May the Court of Justice delivered its preliminary ruling in the *LG and Others v. Rina and Ente Registro Navale* case (the RINA case).<sup>1</sup> The Court answered to the questions presented by the referring court – the District Court of Genoa – on the relationship between the rules on State immunity and the activities of private corporations entrusted by flag States to perform classification and certification of ships.

The Court of Justice ruled that those corporations do not enjoy immunity from proceedings before domestic courts because their activities cannot be characterized as an expression of public powers akin to that normally exercised by States.

It appears immediately that the ruling of the Court “might contribute to the development of international law in general”, to borrow the words of AG Szpunar, who deliv-

\* Assistant Professor of International Law, University of Turin, andrea.spagnolo@unito.it.

<sup>1</sup> Court of Justice, judgment of 7 May 2020, case C-641/18, *LG and Others v. Rina and Ente Registro Navale*.



ered the opinion in the case at hand.<sup>2</sup> Indeed, the legal conundrum that the Court was asked to untangle was largely related to the extension of State immunity to private actors delegated to perform public functions. In this regard, the judgment in the RINA case adds to a growing case law of the Court of Justice on State immunity, well represented by the *Mahamdia v. People's Democratic Republic of Algeria* case,<sup>3</sup> which tends to narrow down the scope of one of the most debated rules in international law.<sup>4</sup>

For this reason, the present *Insight*, after a presentation of the facts of the case and the questions presented before the Court of Justice (Section II) and an analysis of the AG Opinion and of the Court's ruling (Section III), focuses on the international law issues arising from the case (Section IV) and offers a look at possible future implications of the judgment (Section V).

## II. FRAMING THE REQUEST FOR THE PRELIMINARY RULING

The preliminary ruling in the RINA case originates in the context of a dispute before the District Court of Genoa (Italy) initiated by the requests for reparation brought by the relatives of the victims of the sinking of the ship *Al-Salaam Boccaccio '98* against the companies *Rina Spa, Ente Registro Navale* (RINA companies) that have their seat in Genoa. According to the applicants, the dramatic event, which cost the lives of more than one thousand people, was attributable to the defendants because they should have noticed – in their capacity as certification companies – that the ship was unable to sail due to technical problems. In the applicants' plea, the sinking was the direct consequence of the failure of the certification companies to notice the technical damages/imperfections of the *Al-Salaam Boccaccio '98*.

The RINA companies challenged the jurisdiction of the District Court, and more in general of Italian courts, because they were acting as delegates of the State of Panama, under whose flag the ship was sailing. The plea of jurisdictional immunity of the defendants built on the argument that naval certification and classification activities of ships are a manifestation of the flag States' sovereignty as they correspond to the fulfilment by those States of certain international law duties.

The RINA companies more specifically contended that they acted as delegated entities of the State of Panama for the purposes of complying with the obligation enshrined

<sup>2</sup> Opinion of AG Szpunar delivered on 14 January 2020, case C-641/18, *LG and Others v. Rina and Ente Registro Navale*, para. 4. For an early comment on the opinion see P. DE PASQUALE, *Immunità degli Stati dalla giurisdizione civile e diritto dell'Unione europea: le conclusioni dell'avvocato generale nel caso RINA*, in *Il diritto dell'Unione europea – Osservatorio europeo*, 20 February 2020, [www.dirittounioneeuropea.eu](http://www.dirittounioneeuropea.eu).

<sup>3</sup> Court of Justice, judgment of 19 July 2012, case C-154/11, *Ahmed Mahamdia v. People's Democratic Republic of Algeria*.

<sup>4</sup> On the existence of a trend in EU law towards a strict interpretation of State immunity see M. NINO, *State Immunity from Civil Jurisdiction in Labor Disputes: Evolution in International and National Law and Practice*, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 845-846.

in Art. 94 of the United Nations Convention on the Law of the Sea (UNCLOS), which imposes on flag States a duty to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”.<sup>5</sup> Such a generic legal obligation is complemented by the International Convention for the Safety of Life at Sea (SOLAS Convention), which on one side requires States to strictly abide by a rigid procedure of review of ships sailing under their flags; on the other side, it allows States to entrust “recognized organizations” (ROs) with carrying out inspections and surveys.<sup>6</sup>

The RINA companies are ROs and in the case at hand acted as ROs on behalf of Panama to issue the statutory and class certificates with respect to the shipowner of the *Al-Salaam Boccaccio '98*.

The first category of certificate is issued when the ship complies with the technical and safety standards enshrined in international conventions such as the SOLAS, which should also be incorporated in the flag State legal order.<sup>7</sup> Class certificates are granted to the shipowner according to the private standard imposed by the RO itself.

Statutory certificates are troublesome from the perspective of the law of State immunity as they are issued by the delegated private RO, which must verify compliance with international conventions ratified by the delegating flag State. The complexity of the case lies in the dual role of ROs: while they are delegated to fulfil international obligations of the flag State, they also entertain a contractual relationship with the shipowner, which pays for the certification.<sup>8</sup>

It is precisely this issue that led the District court of Genoa to request the Court of Justice a preliminary ruling. The question presented to the Court refers to the interpretation of Arts 1 and 2 of Regulation 44/2001, and in particular to the notion of “civil and commercial matters”.<sup>9</sup> The applicants before the referring Court argued that an action for damages presented against a RO falls within the scope of application of said regulation even if it is performed on behalf of a State, because RO are of a private nature and their relationship with the shipowners is a contractual one.

As anticipated in the introduction, the judgment of the Court of Justice is more far reaching and has important and practical international law implications.

<sup>5</sup> United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, Art. 94.

<sup>6</sup> International Convention for the Safety of Life at Sea (SOLAS), adopted 1<sup>st</sup> November 1974, entered into force 25 May 1980, Chapter I, Regulation 6.

<sup>7</sup> On the duties of flag States see R. BARNES, *Flag States*, in D. ROTHWELL, A. OUDE ELFERINK, K. SCOTT, T. STEPHENS (eds), *The Oxford Handbook on the Law of the Sea*, Oxford: Oxford University Press, 2015; J.N.K. MANSELL, *Flag State Responsibility. Historical Development and Contemporary Issue*, Berlin-Heidelberg: Springer, 2009.

<sup>8</sup> See broadly N. LAGONI, *The Liability of Classification Societies*, Berlin-Heidelberg: Springer, 2007, p. 26.

<sup>9</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

This is demonstrated by a ruling delivered by the same District Court (Genoa) as a consequence of a “sister” application brought in 2012 by other relatives of the victims of the sinking of the *Al-Salaam Boccaccio '98* against the same defendants: the *Abdel Naby Hussein Mabrouk Aly and Others v. RINA Spa* case.<sup>10</sup> In that proceeding, the judges of first instance decided that RINA companies enjoyed immunity from jurisdiction before Italian domestic courts. The reasoning of the District Court of Genoa in that judgment well exemplifies how the question presented before the Court of Justice might have significant practical implications. Indeed, the District Court construed its argumentation and reached its conclusions moving from a dogmatic point of view: it acknowledged that a correct application in the Italian domestic legal order of the international customary rule on State immunity, as defined by the International Court of Justice in the *Jurisdictional Immunities* case,<sup>11</sup> entails an automatic extension of immunity to all activities that can be qualified as *acta iure imperii* even if they are performed by private actors.<sup>12</sup> Accordingly, the District Court did not exercise jurisdiction over RINA Companies and the applicants were left without any alternative remedies available.

Against this background, it appears clear that the legal conundrum lying in the background of the question presented to the Court of Justice touch upon several open issues in international law that go well beyond the main proceedings. What was at stake in the two cases presented before the District Court of Genoa, first, and before the Court of Justice, then, is the application of the principles and rules on State immunity to private actors that have been delegated the discharge of duties under international law by sovereign States. In particular, the core question is whether the mere act of delegation allows regarding the conduct of private actors as covered by the same immunity enjoyed by the delegating State. It goes without saying that the practical consequence of the answer provided by the Court of Justice relates to the availability of remedies to the victims of events similar to the sinking of the *Al-Salaam Boccaccio '98*. More in general, the case as a whole questions the possibility of private actors acting on behalf of the State to shield beyond State immunity when their actions have an impact on the life of individuals and on the interrelated right to access to a court and to claim reparation.

It is not surprising, then, that AG Szpunar, in his opinion, immediately pointed at this aspect of the dispute. He recognized that there is a lack of clarity on the scope of the rule

<sup>10</sup> District Court of Genoa, judgment no. 8-III-2012 of 8 March 2012, *Abdel Naby Hussein Mabrouk Aly and Others v. RINA Spa*.

<sup>11</sup> *Ibid.*, p. 19 *et seq.* The District Court of Genoa referred to International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012, paras 77, 83-84, 91.

<sup>12</sup> On this case see I. QUEIROLO, S. DOMINELLI, *Statutory certificates e immunità funzionale del registro italiano navale*, in *Il diritto marittimo*, 2013, p. 152 *et seq.*, A. SPAGNOLO, *Società private delegate di pubbliche funzioni e immunità statale: tendenze e problemi*, in *Questione giustizia*, 28 December 2015, [www.questionegiustizia.it](http://www.questionegiustizia.it).

on State immunity, and in particular on the difficulty of distinguishing between *acta iure imperii* and *acta iure gestionis*, when States' action is "to some degree privatised".<sup>13</sup> As we will see in the next section, the answer to this question relies on a complex reasoning.

### III. THE AG OPINION AND THE COURT OF JUSTICE'S JUDGMENT

The methodology chosen by the AG reflects the need to offer an answer to the question presented by the referring court through a two-step analysis. Interestingly, while acknowledging that the EU is "bound to observe international law in its entirety, including customary international law",<sup>14</sup> the AG stated "there is nothing to prevent the legislature from adopting rules of jurisdiction that apply *ratione materiae* to disputes in which one of the parties may rely on immunity from jurisdiction".<sup>15</sup> Against this, the AG decided to disregard any equivalence between the scope of application of Regulation 44/2001 and the negative scope of jurisdictional immunity.<sup>16</sup>

As a result, the AG distinguished between the analysis of the scope of said regulation, namely, the notion of "civil and commercial matters", and the effect of the customary rule on State immunity on the application of the same regulation in the concrete case at hand. Consequently, he affirmed that to perform the first step of the analysis the Court of Justice should adopt criteria autonomous from international law.<sup>17</sup> Accordingly, the discussion on immunity must necessarily follow and should be oriented to understand if domestic courts are *in concreto* barred from exercising their jurisdiction.

#### III.1. THE SCOPE OF APPLICATION OF REGULATION 44/2001 FROM THE VIEWPOINT OF PUBLIC INTERNATIONAL LAW

As regards the first step of his analysis, it is worth noting here that the AG concluded that, in the light of the case law of the Court of Justice "the mere fact that the defendants carried out the acts at issue upon delegation from a State does not in itself mean that the dispute in which liability for those acts is alleged falls outside the scope *ratione materiae* of Regulation No 44/2001",<sup>18</sup> because the operations performed by RINA Companies "cannot be regarded as proceeding from the exercise of public powers".<sup>19</sup> Therefore, in principle, an action for damages brought against a private actors falls

<sup>13</sup> Opinion of AG Szpunar, *LG and Others v. Rina and Ente Registro Navale*, cit., para. 37.

<sup>14</sup> *Ibid.*, para. 40.

<sup>15</sup> *Ibid.*, para. 41.

<sup>16</sup> *Ibid.*, paras 42 and 45.

<sup>17</sup> *Ibid.*, para. 46.

<sup>18</sup> *Ibid.*, para. 99.

<sup>19</sup> *Ibid.*, para. 100.

within the concept of “civil and commercial matters” even if those actors act upon delegation by a sovereign State.<sup>20</sup>

With regard to the first step of the analysis of AG Szpunar, the Court of Justice upheld his Opinion. In particular, it is interesting to highlight the passages of both the AG Opinion and the Court’s judgment in which that abstract finding is applied to the dispute, which unavoidably regards international law issues.

In essence, the AG opined and the Court confirmed that the conduct of RINA Companies must be considered of a “technical nature”, and, accordingly, they cannot be considered as performed in the exercise of public powers.<sup>21</sup> In that respect, the elements considered by both the AG and the Court of Justice were essentially linked to the role of RO such as the RINA Companies, which are simply required, through a commercial contract, to apply the pre-defined legislation. Moreover, the Court noted, in accordance with the AG, that if “a ship is no longer able to sail, that is because of the sanction which as the Rina companies admitted at the hearing, is imposed by law”.<sup>22</sup> Indeed, the Court also recognized that even according to international law, in particular the SOLAS Convention, the task of the RO is limited to notify the authorities of the delegating States, which remain responsible for authorizing the use of its flag.<sup>23</sup>

### III.2. THE IMMUNITY ISSUE

Having clarified that the dispute falls within the scope of Regulation 44/2001, the AG and the Court of Justice addressed the potential impact of State immunity on the exercise of jurisdiction by domestic courts *in concreto*. In this regard, the AG Opinion and the Court’s judgment present some differences, therefore they will be addressed separately.

The AG findings, in particular, are interesting from the perspective of international law because they offer an interpretation of the customary international rules on immunity. They build on the assumption that on the basis of the sources available it is impossible to conclude that there exists a precise customary or treaty rule that extends States’ immunity to entities legally separated from States.<sup>24</sup> As an evidence of this assumption, the AG recalled Art. 2 of the United Nations Convention on Jurisdictional Immunities of States and their Property (New York Convention), which extends the notion of “State” to “agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State”.<sup>25</sup>

<sup>20</sup> *Ibid.*, para. 101.

<sup>21</sup> *Ibid.*, paras 90-98, in partic. para. 94; *LG and Others v. Rina and Ente Registro Navale*, cit., paras 43-47.

<sup>22</sup> *LG and Others v. Rina and Ente Registro Navale*, cit., para. 47.

<sup>23</sup> *Ibid.*, para. 48.

<sup>24</sup> Opinion of AG Szpunar, *LG and Others v. Rina and Ente Registro Navale*, cit., paras 109-110.

<sup>25</sup> *Ibid.*, para. 114. See United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted 2 December 2004, not yet in force, Art. 2.

It appears from the words of the AG that the condition posed by the New York Convention to the extension of State immunity to delegated private entities implies that no specific rule applies to the latter subjects. Against this, the whole analysis of the AG concerns the interpretation of the scope of the rule on State immunity.<sup>26</sup>

In the performance of his hermeneutic task, the AG moved to interpret one of the most contentious issue before Italian domestic Courts between the applicants and the defendants in both cases concerning the sinking of the *Al-Salaam Boccaccio '98*: recital no. 16 of Directive 2009/15, which states that “When a recognised organisation, its inspectors, or its technical staff issue the relevant certificates on behalf of the administration, Member States should consider enabling them, as regards these delegated activities, to be subject to proportionate legal safeguards and judicial protection, including the exercise of appropriate rights of defence, apart from immunity, which is a prerogative that can only be invoked by Member States as an inseparable right of sovereignty and therefore that cannot be delegated”.<sup>27</sup>

The main contention regarding that recital concerned its role in the interpretation of the rule on State immunity. According to the applicants before the District Court of Genoa it demonstrates that State immunity does not extend to ROs, while the defendants pleaded to the contrary on the ground that the recital, which has no binding force and is applicable only to EU Member States could not have been used as evidence of practice or *opinion juris* to interpret the rule on immunity.

The AG Opinion tackled firstly this last argument. In this regard, the steps of the analysis that deserve to be mentioned relate more broadly to the ability of the EU to provide an interpretation of customary international law having recourse to its own practice (namely: recital no. 16). Building on the assumption that the practice of international organizations might contribute to the formation or to the expression of a customary rule if the matters fall within that organization mandate, the AG opined that the EU has authority to interpret the immunity rule due to the adoption of Directive 2009/15, which brought under EU competences the implementation of international law obligations related to maritime security and in particular the rule that regulate the relationship between Member States and ROs.<sup>28</sup> Furthermore, and interestingly, the AG stressed that the interpretive role of the Court of Justice is not limited to EU Member States because courts and jurisdictions of any State are not prevented “from contributing to the formation or expression of customary international law, which, leaving aside regional customs, must be consistent globally and contain no notable contradic-

<sup>26</sup> Opinion of AG Szpunar, *LG and Others v. Rina and Ente Registro Navale*, cit., para. 104.

<sup>27</sup> Recital no. 16 of Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations.

<sup>28</sup> Opinion of AG Szpunar, *LG and Others v. Rina and Ente Registro Navale*, cit., paras 123-124.

tions".<sup>29</sup> To sum up, the AG asserted with great clarity the role of the Court of Justice in the development of customary international law.

Following this line of reasoning and moving to the substance of the rule, the AG considered recital no 16 as an evidence of the non-extension to private actors of the State immunity rule. In developing this argument, the AG made recourse to the findings on the scope of Regulation 44/2001, revealing, therefore, an unavoidable connection between the two steps of his analysis. Indeed, the exclusion of immunity set forth in recital no 16 is coherent with the non-classification of Rina Companies' conducts as *acta iure imperii* for the purposes of Regulation 44/2001, which is derived from the Court of Justice's jurisprudence. Interestingly, the two steps of the analysis found a point of juncture here, where the AG presented and asserted the position of the EU on the interpretation of the customary rule on States' immunity when the position of ROs is considered.<sup>30</sup>

Although, as I wrote before, the judgment of the Court of Justice is nothing but a remand to the AG's Opinion, it is worth recalling how the Court stressed the importance of recital no 16, which "bears out the EU legislature's intention to give a limited scope to its interpretation of the customary international law principle of immunity from jurisdiction with regard to classification and certification of ships".<sup>31</sup>

The last point addressed by the AG regards the balancing between the immunity rule and the right to access to a court, enshrined both in Art. 47 of the Charter of Fundamental Rights of the European Union and in Art. 6 of the European Convention of Human Rights (ECHR). In that respect, the findings of the AG and those of the Court of Justice are slightly different. The AG, after having stressed the legal obligation of domestic courts to take into account the right to access to a court, concluded that in the main proceedings such a right has not been violated due to the fact that the relatives of the victims could have brought a claim before Panama's jurisdictions.<sup>32</sup> The Court of Justice was more cautious and simply affirmed that

"a national court implementing EU law in applying Regulation No 44/2001 must comply with the requirements flowing from Article 47 of the Charter [...]. Consequently, in the present case, the referring court must satisfy itself that, if it upheld the plea relating to immunity from jurisdiction, LG and Others would not be deprived of their right of access to the courts, which is one of the elements of the right to effective judicial protection in Article 47 of the Charter".

<sup>29</sup> *Ibid.*, para. 125.

<sup>30</sup> *Ibid.*, para. 127: "Regardless of the nature of the interpretation of customary international law that one may identify in recital 16 of Directive 2009/15, that recital is not an incidental expression of the position adopted by the European Union with regard to the characterisation of classification and certification operations carried out by a private-law body as operations which do not proceed from the exercise of public powers" (*emphasis added*).

<sup>31</sup> *LG and Others v. Rina and Ente Registro Navale*, cit., para. 59.

<sup>32</sup> Opinion of AG Szpunar, *LG and Others v. Rina and Ente Registro Navale*, cit., para. 153.

Despite this difference, it clearly emerges from both the AG's Opinion and the Court judgment that the State immunity rule is no longer impermeable to the influence of human rights and this is not only limited to cases where international crimes are committed. This last argument will be developed in the concluding section of this *Insight*.

#### IV. THE IMPACT OF THE RINA CASE ON PUBLIC INTERNATIONAL LAW

The judgment of the Court of Justice, read in the light of AG's Spzunar opinion, might have significant implications for the evolution of the law on State immunity. The present section of this *Insight* aims at investigating two issues that emerge from the above analysis: 1) the methodology that lead to the identification of the customary rule on State immunity; 2) the scope of that rule, in particular when the conduct of private actors and the distinction between *acta iure imperii* and *acta iure gestionis* are concerned.

##### IV.1. THE METHODOLOGY THAT LEAD TO THE IDENTIFICATION OF THE CUSTOMARY RULE ON STATE IMMUNITY

As seen in sub-section III.2 AG Spzunar performed an inquiry into the legal value of recital no. 16 of Directive 2009/15 and its contribution to the formation, identification and subsequent application on the customary rule on State immunity.

The position of the AG on the suitability of that recital to be considered akin to "practice" of an international organization and/or *opinio juris* needs to be put in the context of the broader debate on the role of international organizations for the purposes of the identification of customary international law.

It is generally accepted that international organizations, as international law subjects, can contribute to the identification of customary rules;<sup>33</sup> this is also acknowledged in the draft conclusions of the International Law Commission (ILC) on this topic.<sup>34</sup>

Precisely, the ILC included a reference to the practice of international organizations in the commentary to draft conclusion no. 4 as one of the "requirements of practice". Para. 2 of that conclusion postulates that "In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law".<sup>35</sup> In the commentary to the paragraph just mentioned, the ILC speci-

<sup>33</sup> See *ex multis* T. TREVES, *Customary law*, in R. WOLFRUM (ed.), *Encyclopedia of Public International Law*, 2012, para. 51. See also International Law Association, Committee on the formation of customary international law, Final report of the Committee, *Statement of principles applicable to the formation of customary international law*, 2000, p. 9, [www.ila-hq.org](http://www.ila-hq.org).

<sup>34</sup> International Law Commission, Draft Conclusions on identification of customary international law, UN Doc. A/73/10, para. 65. See accordingly N. BLOKKER, *International Organizations and Customary International Law. Is the International Law Commission Taking International Organizations Seriously?*, in *International Organizations Law Review*, 2017, p. 4.

<sup>35</sup> International Law Commission, Draft Conclusions on identification of customary international law, cit., Conclusion 4, para. 2.

fies that the expression “in certain cases” applies “where member States have transferred exclusive competences to the international organization, so that the latter exercises some of the public powers of its member States and hence the practice of the organization may be equated with the practice of those States”.<sup>36</sup> The EU clearly falls into this category, as the same commentary punctually observes.<sup>37</sup>

This notwithstanding, the ILC codification effort does not clarify what the meaning of “practice of international organizations” is. This appears to be in line with the whole approach of the ILC toward the role of international organizations in the identification of customary international law. Whereas four draft conclusions – from 5 to 8 – explain the forms and the characteristics that States’ practice may assume, there are no similar indications with regard to the practice of international organizations.<sup>38</sup>

To understand this expression it is useful to read the Third Report presented by the Special Rapporteur, Sir Michael Wood, where he limited the relevant practice of international organizations to the so-called “external practice”, namely the “conduct of the organization in its relations with States, international organizations and others”.<sup>39</sup> It was mainly the EU to criticize the approach followed by the Special Rapporteur. According to the representative of the European Commission at the UN General Assembly 6<sup>th</sup> Committee, the ILC should have stated clearly that all the draft conclusions related to States’ practice should apply *mutatis mutandis*, to the conduct of an international organization in so far as the organization exercised its executive, legislative, judicial or other functions on the basis of competences conferred on it by its member States in a founding treaty.<sup>40</sup>

Although it is clear that the EU represents an *unicum* in the panorama of international organizations,<sup>41</sup> the comment provided by the Commission on the codification work of the ILC is reasonable insofar as it acknowledged that the ILC fell short of catching the whole range of possibilities through which the EU might contribute to the identification of customary international law.<sup>42</sup>

Against this background, it is easier to understand the importance of AG Spzunar’s Opinion in the part in which he considered recital 16 of Directive 2009/15 as an element of the practice of international organization. Indeed, recital 16 could hardly be regarded as

<sup>36</sup> *Ibid.*, Commentary, para. 6.

<sup>37</sup> *Ibid.*

<sup>38</sup> See again N. BLOKKER, *International Organizations and Customary International Law*, cit., pp. 7-8.

<sup>39</sup> Third report on identification of customary international law by Michael Wood, Special Rapporteur, UN Doc. A/CN.4/682 of 27 March 2015, para. 72.

<sup>40</sup> United Nations General Assembly, 6<sup>th</sup> Committee, Summary record of the 19<sup>th</sup> meeting, UN Doc. A/C.6/70/SR.19 of 20 November 2015, para. 86.

<sup>41</sup> See accordingly S.D. MURPHY, *Identification of Customary International Law and Other Topics: The Sixty-Seventh Session of the International Law Commission*, in *American Journal of International Law*, 2017, p. 825.

<sup>42</sup> J. ODERMATT, *The Development of Customary International Law by International Organizations*, in *International and Comparative Law Quarterly*, 2017, p. 501.

“external practice” in the meaning offered by the Special Rapporteur in his Third Report because it is part of a legislative act of the EU applicable in the relation with Member States.

However, both the directive and the recital are also hardly conceivable as deprived of any external effects. On one side, Directive 2009/15 “establishes measures to be followed by the Member States in their relationship with organisations entrusted with the inspection, survey and certification of ships *for compliance with the international conventions on safety at sea and prevention of marine pollution*”,<sup>43</sup> which means that the Directive implements all the international conventions related to maritime security referred to in section II of this *Insight* and it ultimately represents the exercise by the (then) EC of its competence, which undoubtedly has external implications. On the other side, recital no. 16, despite its non-binding nature, sets forth the position of the EU as far as the recognition of immunity to RO is concerned, therefore it inevitably impacts on the law on State immunity, thus having an external impact.

Although the AG bluntly regarded recital no. 16 as practice of the organizations akin to the definition provided by the ILC without further elaborating on its suitability, his opinion and the specific case at hand demonstrate that the critics to the ILC’s narrow approach to the “practice of international organizations” were well-founded, in particular when the practice of the EU is considered. If one considers the whole range of competences conferred by Member States to the EU and the external effects that the exercise of those competence implies, in particular when they implement and supplement obligations imposed by international law, it appears that there are no reasons to adopt a formalistic approach to the “external practice of international organizations”.<sup>44</sup>

In broader terms, the RINA case will inevitably contribute to fuel the debate on the role of international organizations as such – and not as catalysts of States’ practice – in the formation of customary international law. Under this perspective, the judgement of the Court of Justice might contribute to the development of international law as it represents one of the fewest – if not the only – case in which practice of international organizations was scrutinized by an international court.<sup>45</sup>

<sup>43</sup> Directive 2009/15, cit., Art. 1.

<sup>44</sup> On the complexity of the EU as an actor in the international arena see E. CANNIZZARO, *Fragmented Sovereignty? The European Union and its Member States in the International Arena*, in *The Italian Yearbook of International Law*, 2003, p. 35 *et seq.*

<sup>45</sup> S.D. MURPHY, *Identification of Customary International Law and Other Topics*, cit., p. 824, and J. ODERMATT, *The Development of Customary International Law by International Organizations*, cit., p. 500 noted that the approach of the ILC was probably influenced by the lack of judicial practice that could have helped to define the ‘practice of international organizations.’ On the potential of the Court of Justice to contribute to international law-making see F. CASOLARI, *L’incorporazione del diritto internazionale nel diritto dell’Unione europea*, Milano: Giuffrè, 2008, p. 84-108 and p. 165; see also A. GIANELLI, *Unione Europa e diritto internazionale consuetudinario*, Torino: Giappichelli, 2004, p. 119 *et seq.*

IV.2. THE SCOPE OF THAT RULE, IN PARTICULAR WHEN THE CONDUCT OF PRIVATE ACTORS AND THE DISTINCTION BETWEEN *ACTA IURE IMPERII* AND *ACTA IURE GESTIONIS* ARE CONCERNED

The second issue that deserves close attention from the standpoint of international law is the classification of an act as an expression of the sovereign authority of a State for the purposes of defining the scope of application of the rule on State immunity. In this regard, one may argue whether the Court of Justice's judgment and the AG Spzunar's opinion reflect the current state of the art in the international law of State immunity or contribute to its development.

In this respect, AG Spzunar's applies to the case at hand the law on State immunity disregarding the doctrine of functional immunity, which the District Court of Genoa upheld in the already mentioned judgment in the *Abdel Naby Hussein Mabrouk Aly and Others v. RINA Spa* case.<sup>46</sup> This approach appears in line with international law: Art. 2 of the New York Convention employs the term State to refer also to "other entities", which include private ones;<sup>47</sup> moreover, the doctrine of functional immunity commonly applies to individual persons who are State organs and normally entails immunity from individual criminal jurisdiction.<sup>48</sup>

Moving to the substance of State immunity, it is necessary to recall that the commentary to Art. 2 clearly states that private entities are immune from the jurisdiction of foreign States "only to the extent that they are entitled to perform acts in the exercise of *prerogative de la puissance publique*"<sup>49</sup> and that the same private entities thus "are presumed not to be entitled to perform governmental functions, and accordingly, as a rule, are not entitled to invoke immunity from jurisdiction of the courts of another State".<sup>50</sup>

The New York Convention, therefore, seems to indicate that a presumption exists in favor of the non-automatic extension of State immunity to private entities. It is worth noting that such a presumption reflects the drafting history of Art. 2: in a first draft of the rule, the term "other entities" did not appear as it was introduced at a later stage to

<sup>46</sup> See *supra*, Section II. In particular, see District Court of Genoa, cit., p. 31.

<sup>47</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, cit., Art. 2, para. 1, let. b), sub-let. iv).

<sup>48</sup> See accordingly I. QUEIROLO, S. DOMINELLI, *Statutory certificates e immunità funzionale del registro italiano navale*, cit., p. 164; A. SPAGNOLO, *Società private delegate di pubbliche funzioni e immunità statale*, cit., p. 7. But see *contra* P. DE PASQUALE, *La sentenza della Corte di giustizia nel caso RINA: ancora sull'immunità degli Stati dalla giurisdizione civile*, in *Il diritto dell'Unione europea. Osservatorio europeo*, 28 May 2020, p. 8, [www.dirittounioneuropea.eu](http://www.dirittounioneuropea.eu); M. BORREANI, *Tutela internazionale delle funzioni sovrane delegate ad enti stranieri: tra vecchie e nuove aporie*, in *Il diritto del commercio internazionale*, 2018, p. 748 et seq.

<sup>49</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, cit., Commentary to Art. 2, para. 1, let. b), sub-let. iv), para. 14.

<sup>50</sup> *Ibid.*, para. 15.

cover specific situations such as commercial banks entrusted by sovereign States with import-export licensing powers.<sup>51</sup>

The presumption of non-application of State immunity to private entities is also present in UK legislation, while US legislation adopts the opposite approach.<sup>52</sup> Domestic judicial practice of States that do not adopt the “list method” seems to confirm that once it is established that an act is attributable to an entity separated from the State it is necessary to inquire into the quality of the act itself to ascertain if immunity should be granted.<sup>53</sup>

The approach of the AG and of the Court of Justice appears therefore to be in line with the New York Convention and finds confirmation in the vast majority of domestic judicial and statutory practice. The Court of Justice simply re-affirmed the principle that when private entities are entrusted by States to perform public duties, it is on them to demonstrate that they are exercising sovereign powers.

This finding of the Court of Justice however does not yet solve the final, but fundamental, issue, namely the characterization of the wrongdoing of RINA Companies as a manifestation of sovereign powers of the State of Panama.

Leaving aside for a moment the delegation of powers to private entities, in general terms it is far from easy to draw a line in the sand to distinguish between the State acting as a private person and the State acting in the exercise of its sovereign powers, in particular when it comes to define the elements that a domestic court should take into account to affirm or to deny its jurisdiction.<sup>54</sup>

The New York Convention excludes the application of State immunity when States are engaged in commercial transactions, but even this assertion does not reveal much on the scope of the rule.<sup>55</sup> During the negotiations of the Convention, many States defended the idea that some commercial transactions are performed for public purposes and therefore must not be subject to the judgment of a foreign court;<sup>56</sup> while others – Italy included – argued that a more objective approach, based on the nature of the act, would have been

<sup>51</sup> *Ibid.* See accordingly T. GRANT, *Commentary to Article 2(1)(a) and (b)*, in R. O'KEEFE, C.J. TAMS (eds), *The United Nations Convention on Jurisdictional Immunities of States and their Properties, A Commentary*, Oxford: Oxford University Press, 2013, p. 41; H. FOX, P. WEBB, *The Law of State Immunity*, Oxford: Oxford University Press, 2013, p. 292.

<sup>52</sup> X. YANG, *State immunity in international law*, Cambridge: Cambridge University Press, 2012, p. 232 *et seq.*

<sup>53</sup> An analysis of the jurisprudence can be found in X. YANG, *ibid.*, p. 230-296. A recent discussion on this jurisprudence can be found in A. ODDENINO, D. BONETTO, *The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law*, in *Global Jurist*, 2020, p. 4-6.

<sup>54</sup> See accordingly J. FINKE, *Sovereign immunity: Rule, comity or something else?*, in *European Journal of International Law*, 2010, p. 859.

<sup>55</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, *cit.*, Art. 10.

<sup>56</sup> International Law Commission, *Jurisdictional Immunities of States and Their Property*. Comments and Observations Received from Governments, UN Doc. A/CN.4/410 and Add 1-5, YILC, 1988, Vol. II, Part One, p. 45 *et seq.*

preferable.<sup>57</sup> The fierce debate among States probably explains why the New York Convention proposes a two-pronged approach in defining a commercial transaction. Accordingly, a court must first look at the nature of an act but can also rely on its purpose, as a subsidiary means.<sup>58</sup> Indeed, while the “nature test” is surely the prevalent one in domestic jurisprudence, it was noted that the “purpose test” has not at all vanished.<sup>59</sup>

Things get more complicated where disputes concern so-called ‘mixed-activities’ of States, namely activities that are composed of private and public acts, which usually happens in the field of investments. Here again an analysis of domestic jurisprudence reveals that the “nature test” is the main point of departure of the analysis of domestic courts and that courts tend to rely on the original relationship between the plaintiff and the respondent State.<sup>60</sup>

Turning back to the RINA case and to peculiarities of the main proceedings, it is necessary to highlight and to stress that the original domestic dispute – and also the above-mentioned “sister” cases – did not involve any third State, namely the State of Panama was not involved in the dispute. This means that the original dispute is one between private persons.

Therefore, in cases such as RINA, it is not about demonstrating that a State is acting as a private person; it is about proving that a private entity is acting like a State. Consequently, it is reasonable to opine that if the “nature test” is the preferable one to be adopted to determine if an act is *iure imperii* or *iure privatorum* when States are part to a dispute, then it should be the preferable one also when the dispute involves only private actors.

In light of this, the reasoning and the findings of the Court of Justice – the AG’s Opinion included – simply follows a logical path: once it is proven that under customary international law ROs are not entitled to sovereign immunity and, accordingly, a presumption of non-application of State immunity exists, then the nature of the legal relationship between the parties of the dispute must be scrutinized to determine if the act is nonetheless *iure imperii*.

In this regard, it was already stressed that ROs have a dual role as they perform flag States’ duties and entertain a contractual relationship with the shipowner at the same time.<sup>61</sup> The Court of Justice, building on the AG’s Opinion, gave relevance to the latter

<sup>57</sup> *Ibid.*, p. 73, para. 5.

<sup>58</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, cit., commentary to Art. 2, para. 26.

<sup>59</sup> See accordingly H. FOX, P. WEBB, *The Law of State Immunity*, cit., p. 292; X. YANG, *State immunity in international law*, cit., p. 108

<sup>60</sup> For a review of jurisprudence see B.I. BONAFÈ, *State Immunity And The Protection Of Private Investors: The Argentine Bonds Case Before Italian Courts*, in *The Italian Yearbook of International Law*, 2006, p. 170 et seq.; see also E.K. BANKAS, *The State Immunity Controversy in International Law*, Berlin-Heidelberg, Springer, 2005, p. 224-230.

<sup>61</sup> See *supra*, section II.

relationship, thus endorsing once again the “nature test” in the application of the State immunity role.

In the case at hand, the Court also explained that such a relationship is purely private as RINA Companies were simply tasked to perform technical inspections and surveys under remuneration from the shipowner. Under this perspective, the Court of Justice also contributes to clarify the scope of the relationship between the flag State and the RO in the performance of the duties arising out of Art. 94 of the UNCLOS. Indeed, when the Court and the AG affirm that RO only performs technical duties, they seem to rely on a narrow interpretation of Regulation 6 of Chapter I of the SOLAS, which indicates that flag States are not allowed to delegate to RO all their duties, but only those related to inspection and surveys as they must retain the responsibility related to the exercise of jurisdiction and control over the ship and ultimately to the use of the flag.<sup>62</sup>

To sum up, ROs cannot claim immunity from jurisdiction for their wrongdoings because their actions or inactions do not represent exercise of sovereign authority of the flag States, but only a technical portion of a process that leads to the decision of those States to concede to a shipowner to sail under its flag.

In this respect, it must not be underestimated that the State of Panama could even argue that it could not be held responsible for the specific conducts of RINA Companies because in the agreement signed in 1999, the ROs were simply tasked with technical duties, while the Government retained any decision regarding the applicable standard and the final concession of the flag.<sup>63</sup> Interestingly, such an interpretation by the State of Panama would be in line with the commentary to Art. 5 of the Articles on the responsibility of States for internationally wrongful act, which calls for a narrow interpretation of “governmental authority”.<sup>64</sup>

In light of this, the judgment of the Court on this point is a bold statement that might help to prevent that the delegation of responsibilities from the flag States to the RO ends up in avoiding responsibility under international law.<sup>65</sup>

## V. CONCLUDING REMARKS

As seen in this *Insight* the RINA case indicates that exists a trend towards limiting the scope of application of State immunity which seems to be evolving in the jurisprudence of the Court of Justice.

The judgment of the Court of Justice follows the already mentioned preliminary ruling in the *Mahamdia v. People's Democratic Republic of Algeria (Mahamdia case)* case,

<sup>62</sup> See accordingly J.N.K. MANSELL, *Flag State Responsibility*, cit., p. 182-183.

<sup>63</sup> Opinion of AG Szpunar, *LG and Others v. Rina and Ente Registro Navale*, cit., para. 94.

<sup>64</sup> International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts of 3 August 2001, UN Doc. A/56/10, commentary to Art. 5, para. 7.

<sup>65</sup> J.N.K. MANSELL, *Flag State Responsibility*, cit., p. 183.

where the Court ruled that the respondent State in the main proceedings did not enjoy immunity from jurisdiction in a contractual dispute concerning an employee of the Algerian embassy in Berlin to the extent that “the functions carried out by the employee do not fall within the exercise of public powers”.<sup>66</sup>

The interest of *Mahamdia* case lies in the opinion delivered by AG Mengozzi, who affirmed, in broader terms that

“The modern State has become a polymorphous actor in law and may act and enter into legal relations without, however, exercising its sovereignty or its public authority in doing so: I am thinking in particular of the State as a trader, but also, of course, the State as an employer. Because these different facets of the State’s legal activity are not systematically accompanied by the exercise of powers as a public authority, they tend no longer to justify the automatic recognition of immunity from jurisdiction”.<sup>67</sup>

Both the judgment of the Court of Justice and AG’s Opinion in the RINA case go precisely in the direction indicated by AG Mengozzi and even a step further.

In fact, whereas the *Mahamdia* case was limited to define the scope of State immunity in labour-related disputes,<sup>68</sup> the preliminary ruling in the RINA case has a broader reach in that it states clearly that private actors do not enjoy automatic immunity simply because they are delegated by States to perform international obligations.<sup>69</sup> Accordingly, the Court of Justice is sending a message to domestic courts to perform a deeper scrutiny into the nature of the activities of private actors, in order to avoid that immunity “destroys any legal action”.<sup>70</sup>

The confirmation of such a trend towards a strict interpretation on the law on State immunity might contribute to the evolution of international law *in subiecta materia*, especially if one considers the argument of AG’s Szpunar that EU practice as such can contribute to the identification of customary international law.<sup>71</sup> In this perspective, the RINA case goes well beyond the identification of the limits to the application of interna-

<sup>66</sup> *Ahmed Mahamdia v. People’s Democratic Republic of Algeria*, cit., para. 57.

<sup>67</sup> Opinion of AG Mengozzi delivered on 24 May 2012, case C-154/11, *Ahmed Mahamdia v. People’s Democratic Republic of Algeria*, para. 21.

<sup>68</sup> On the importance of the *Mahamdia* case see M. NINO, *State Immunity from Civil Jurisdiction in Labor Disputes*, cit., pp. 838-846; R. GARNETT, *State and Diplomatic Immunity and Employment Rights: European Law to the Rescue?*, in *International and Comparative Law Quarterly*, 2015, p. 814-815; P. WEBB, *The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?*, in *European Journal of International Law*, 2016, p. 754.

<sup>69</sup> See *supra*, section IV, sub-section IV.2.

<sup>70</sup> Opinion of AG Mengozzi, *Ahmed Mahamdia v. People’s Democratic Republic of Algeria*, cit., para. 22.

<sup>71</sup> See *supra*, section IV, sub-section IV.1.

tional law into the EU legal order,<sup>72</sup> and might help identifying the criteria for the application of the customary law on State immunity in general.

By way of conclusion, it is important not to forget the impact that the preliminary ruling might have before the referring court in Genoa. Before the judgment of the Court, the relatives of the victims were bounced between the responsibility of the flag State and that of the RINA companies. After the ruling, at least they know that they can have access to a remedy before the court of the legal seat of the RO which performed the inspection of the ship.

<sup>72</sup> As suggested by M. NINO (*State Immunity from Civil Jurisdiction in Labor Disputes*, cit., p. 846) with regard to the *Mahamdia* case.

