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Publicato in A.Cassese et al. (eds.), The Oxford Companion to International Criminal Justice, Oxford University Press, uscito nel febbraio 2009 (pp.632-633), accettato per la pubblicazione e in corso di stampa al momento del bando

FIDEL CASTRO

(Spain, *Audiencia Nacional*, Order (Auto), 4 march 1999 (n° 1999/2723), available in Spanish in EL DERECHO, CD Rom, 2002, decision not available in English)

In October 1998 a criminal complaint was filed against Fidel Castro, incumbent President of the Republic of Cuba, before the Spanish judiciary for acts of genocide and terrorism. Judge Ismael Moreno rejected the complaint stating that it was not appropriate to turn national tribunals into organs responsible of passing judgments on foreign governments' activities.

A few months later, on 4 March 1999, the Criminal Chamber of the *Audiencia Nacional* affirmed the previous judgment holding that Spanish Courts could not exercise their criminal jurisdiction over a serving foreign head of state, even if he allegedly committed one of the serious crimes provided for in Article 23 of the Organic Law on the Judicial Power (amongst which the crimes of genocide and terrorism, see Article 23 (4) Ley Orgánica 6/1985, dl Poder Judicial.) The judges noted that the Organic Law itself envisages an exception to the exercise of jurisdiction in cases where immunity from jurisdiction is provided for by public international law rules (Article 21 (2): “2. Se exceptúan los supuestos de inmunidad de jurisdicción y de ejecución establecidos por las normas del derecho internacional público.”).

It is commonly acknowledged that incumbent heads of state enjoy, while in office, personal immunity from foreign jurisdiction, whose modern rationale is identified in the so-called “functional necessity”: the need to preserve their absolute freedom to perform their crucial functions for the sake of viable international relations.

Assuming this point of view, it is somehow surprising that the *Audiencia Nacional* emphasized that Spanish courts could not exercise jurisdiction in order to respect the sovereignty of the Cuban people, enshrined in the incumbent head of state (Si España reconoce la soberanía del pueblo cubano y mantiene con dicho país relaciones diplomáticas, la jurisdicción penal Española no puede atribuirse el conocimiento de los hechos supuestamente delictivos (sean o non genocidio), en cuanto que uno de los

querrelaods es el excelentísimo señor Fidel Castro, que representa, frente a España la soberanía del pueblo cubano).

The conclusion reached by the Spanish Supreme Court is in line with current state practice, that allows an exception to personal immunities enjoyed by diplomatic agents, heads of state, heads of governments and foreign ministers only before international criminal tribunals and not before domestic courts. However, its legal reasoning seems to partially confuse state immunity and head-of-state-immunity, blurring the borders between two different notions, or at least going back to a very old and traditional concept of head-of state-immunity.

According to press reports, an almost identical complaint was filed in Spain against Fidel Castro in October 2005. The complaint was rejected on the ground that Fidel Castro was still an acting head of state and thus immune from foreign criminal jurisdiction. (*El Mundo*, 4 November 2005, Audiencia Nacional's decision not available).

Micaela Frulli