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INTERNATIONAL LAW FUNDAMENTALS OF JUDICIAL STATE IMMUNITY IN THE CONTEXT OF WARFARE

Abstract. *The purpose of the article* is to study international law approaches which determine both restrictions and opportunities concerning legal and legitimate overcoming of the states' absolute immunity barrier in warfare.

Research methods. The article is grounded on inductive reasoning: its epistemological capabilities were supplemented, and cognitive limitations were balanced by applying a set of methods of studying judicial immunity phenomenon, i. e., system analysis, comparative law, trends extrapolation.

Results. Attention is focused on key aspects of the Supreme Court's Opinion regarding judicial immunity of the foreign state in the civil case of compensation for damage caused to the natural person and her children in connection with the death of her husband and the father of children as a result of such state armed forces' actions. Its provisions and conclusions determined the advisability of studying the relevant rules related to the immunity of the states and actions of its armed forces of the European Convention on State Immunity (1972), commentary of the International Law Commission to the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), long-term disputes between Italy and Germany concerning compensation for damage caused by army's actions during World War II and the appropriate 2012 International Court of Justice decision as well as gaps and imperfection of the Ukrainian legislation in terms of immunity of states and their property.

Conclusions. Ensuring a proper level of natural persons rights and legitimate interests protection violated by armed forces of the foreign state is challenging within both its absolute judicial immunity and restrictive immunity in some civil proceedings. It is necessary to consider the degree of freedom to exercise sovereign rights by a foreign state in the broader context of fundamental principles, peremptory norms of international law (*jus cogens*). Deliberate violation of them may result in denial or restriction of its rights, incl. to judicial immunity, lawfully. Applying of the foreign state's immunity "ignoring" concept is quit non-standard approach for overcoming the legal barrier of its absolute judicial immunity in the civil case of compensation for damage caused to the natural person in the context of armed forces' actions and delicti exception.

Key words: judicial immunity, foreign state, compensation for damage.

1. Introduction

In the context of prolonged hostilities maintained by the armed forces of two or more states, the scale of the socially significant issue of the legal protection of the fundamental personal non-property right – the right to life of both civilians and the military, is increasing

every day. Consequently, the pre-existing problems become aggravated, and emerging ones are actualized in terms of international public and private international laws. They concern the jurisdictional immunity of states in general and its integral component – judicial immunity – in particular.

The above necessitates the statement of the article's purpose, which is the review of international law approaches that determine restrictions and opportunities for the legal and legitimate overcoming of the barrier of absolute immunity of states in the context of hostilities.

To achieve the purpose, it is advisable to refer to the conventions on immunities of states and their property developed by international organizations, the relevant laws of Ukraine, the decisions of the courts of Ukraine and the International Court of Justice, as well as scientific publications of domestic and foreign lawyers, such as Yu.V. Cherniak, D.O. Koval, B.A. Boczek.

2. Interstate disputes between Ukraine and Russia within institutional and *ad hoc* arbitration

Along with the military actions in Ukraine, there are ensuing legal processes with the need to resolve organically related issues of state sovereignty and jurisdiction. They are taking place between Ukraine and Russia (hereinafter referred to as "the foreign state") in line with legal processes within both institutional and *ad hoc* arbitration. Thus, in 2019, the WTO Dispute Settlement Body decided to prohibit the transit of goods from Ukraine across the territory of the foreign state. At the same time, for the first time in interstate disputes, it applied sub-clause III clause b of Art. XXI GATT which provides that nothing in the agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.

Therefore, on February 21, 2020, the *ad hoc* Tribunal, established under Annex VII to the 1982 United Nations Convention on the Law of the Sea, delivered a judgment that started a new chapter in the judicial confrontation between Ukraine and the Russian Federation regarding jurisdiction in the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Koval, 2021, p. 7).

It is interesting to note that these disputes were adjudicated between legally equal, sovereign subjects of international law. At the same time, one of the issues on the agenda of the state and society is the availability of viable legal opportunities for private law entities to file lawsuits against the foreign state in the courts of Ukraine following consequences of the actions of the latter's army, which led to the death of citizens of Ukraine, personal injuries, and destruction or damage to property.

3. Judgement of the Supreme Court on the foreign state's judicial immunity

On April 14, 2022 the Civil Court of Cassation, as part of the Supreme Court, adopted

a ruling in case № 308/9708/19, which deserves attention in terms of the implemented conceptual and legal approaches to the issue of state judicial immunity.

The materials published on the official website of the Supreme Court set out the essence of the case where the plaintiff, acting in her own interests and on behalf of young children, appealed to the Ukrainian court with a claim to the foreign state for compensation for moral damage caused to her and her children in connection with the death of her husband and father of her children as a result of the armed aggression of the foreign state on the territory of Ukraine (Supreme Court, 2022).

The court of cassation adopted such a decision because the court of original jurisdiction and the court of appeals had issued a ruling based on established legal fundamentals regarding the absolute nature of the judicial immunity of the foreign state. This approach is enshrined in part 1 of Art. 79 of the Law of Ukraine "On Private International Law" dated June 23, 2005 № 2709-IV, which, at the same time, provides for narrowing the scope of absolute judicial immunity of a sovereign state in view of the norms of an international treaty or the law of Ukraine.

Justifying its opinion, the Supreme Court referred to the European Convention on State Immunity, adopted by the Council of Europe on May 16, 1972 (Council of Europe, 1972) and the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the UN General Assembly resolution 59/38 on December 2, 2004 (not yet in force as of May 2022) (United Nations, 2004). However, Ukraine is not a party to any of these conventions, but they reflect, in the opinion of the Supreme Court, "a trend in the development of international law regarding the recognition of certain limits within which a foreign state is entitled to invoke immunity in civil proceedings" (Supreme Court, 2022). In addition, the resolution contains a potentially constructive generalization for the citizens of Ukraine that both conventions "provide that a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to injury to the person, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission. (Supreme Court, 2022).

4. Conceptual and legal approaches to international treaties on state immunity

In this context, specific conceptual and legal aspects are worth discussing to understand whether there may be counter-arguments that are capable of criticizing the reasoning and con-

clusions of the Supreme Court. Thus, the overall interpretation of the norms of the 1972 European Convention does not allow ignoring its 31st article, the disposition of which links the immunity of a contracting state and actions of its army that is completely correlated with the essence of the court case. Consequently, this article clearly states the preservation of immunity by a contracting state regardless of any actions of its armed forces when on the territory of another Contracting State (Council of Europe, 1972).

Given the lack of a similar norm in the 2004 UN Convention, the military aspect can be considered to be present latently and closely related to the new, at that time, conceptual approaches in international law. In particular, the report of the 1990 International Law Commission to the UN General Assembly on personal injuries and damage to property (initially – Art. 13) referred to the introduction of the concept of a “non-profit civil offence” and the responsibility of a State to pay pecuniary compensation for damage caused by acts or omissions attributable to that State (United Nations, 1993).

In addition, the commentary of the International Law Commission of 1991 to the draft article highlights the same issue as an exception to the general rule on State immunity in the field of civil liability for acts that caused bodily harm (article 12 “Personal injuries and damage to property”). The determining principle of this exception is territoriality, which:

a) locates *the locus delicti commissi* and the presence of the author of the act or omission within the territory of the State of the forum, which acquires court jurisdiction. While immunity has been maintained for acts *jure imperii*, it has been rejected for acts *jure gestionis*;

b) excludes cross-border delicts from the scope of art. 12; furthermore, as stated in paragraph 7 of the commentary, it is clear that cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict are excluded from the areas covered by article 12. The above provision could become actual within the theoretical and legal model of filing lawsuits by domestic subjects of private law against Belarus, from the territory of which the shelling of the territory of Ukraine was carried out. Following para. 3 of the commentary, since the damaging act or omission has occurred in the territory of the State of the forum, the applicable law is clearly the *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed. On the one hand, such an approach emphasizes the private-law

nature of relations with a foreign element, which are covered by the scope of art. 12 and mainly concern death as a result of an accident, personal injuries or damage to property as a result of a traffic accident. On the other hand, the scope of this article was intended to be sufficiently broad to cover intentional physical harm or even murder (United Nations, 1994).

Both above conventions are designed to unify legal norms on functional or limited immunity of a state in the legal relations where it enters not as a sovereign subject of international law, which is equal with other states (*par in parem non habet imperium*), but as a participant in private relations with a foreign element (in particular, commercial, investment) which are axiomatically based on the legal equality of the parties, free will, and property independence.

5. Gaps and shortcomings of the legislation of Ukraine

Given the importance of the institute of functional immunity and the fact that Ukraine is not a party to any of the mentioned conventions, the adoption of a law to ensure the rights and interests of the Ukrainian state and its citizens could be a theoretically logical step in law-making. The use in the previous statement of “theoretically” and conditional “could” means that such the relevant law is still not available in the legislation of Ukraine.

There was an uncertain attempt in 2015, but the draft Law of Ukraine “On jurisdictional immunities and liability of foreign states”, dated March 16, 2015 № 2380, was not even included in the agenda of the Parliament. As the explanatory note stressed, the draft law was intended “to regulate the liability of foreign states, enterprises, institutions and organizations owned by foreign states directly or indirectly, including for cases of damage to property and/or health of citizens of Ukraine, as well as legal entities – residents of Ukraine” (Petrenko, 2015).

Without a systematic, legally verified approach, the domestic legislator takes fragmentary measures, which result in the consolidation of erroneous norms in the laws of Ukraine. In particular, Art. 32 of the Law of Ukraine “On Production Sharing Agreements” enshrined that the agreements with the participation of a foreign investor provide for the waiver by the state of judicial immunity, immunity from provisional remedy, and enforcement of the court decision. Two years after the law’s entry into force, the Constitutional Court of Ukraine approved a decision the quintessence of which is that the state is entitled to waive immunity in civil relations, including foreign economic and business. At the same time, a waiver of the immu-

nity, judicial as well, by the state, which is fixed in art. 32 and obligatorily enshrined in production-sharing agreements, should be recognized as unconstitutional (Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the People's Deputies of Ukraine on the compliance of the first part of Article 5, part three of Article 6, Article 32 of the Law of Ukraine "On production sharing agreements" to the Constitution of Ukraine (case on production sharing agreements) in the case № 17-пн/2001 of December 6, 2001 (Constitutional Court of Ukraine, 2001)).

6. Judgments of the International Court of Justice and disputes between Italy and Germany concerning post-war reparations

In the development of the above, the issue of the availability of alternative provisions, which would act as a legal and legitimate basis for the courts of Ukraine to overcome the barrier of absolute immunity of the foreign state, emerges full-blown. An analysis of some decisions of the International Court of Justice and the European Court of Human Rights allowed Supreme Court Judge Yu.V. Cherniak to conclude that "there is currently no recognition of the fact of limiting the immunity of a foreign state in the case of its serious violation of human rights and commission of an international crime in the state of the forum" (Cherniak, 2022).

Having posted a photo of the Nazi massacre of civilians in Italy in 1944 on the last day of April 2022, Deutsche Welle again turns to the problem of a long-running dispute between Germany and Italy over WWII reparations. Consequently, despite the judgment of the International Court of Justice, the Italian courts still accept civil claims of the German Reich's violation of the rules of international humanitarian law from 1943 to 1945 and render judgment in favor of the plaintiffs, ignoring the judicial immunity of Germany (Deutsche Welle, 2022).

The proceedings before the International Court of Justice in the case of Germany v. Italy and the 2012 judgment covered a set of issues with regard to judicial immunity, compulsory measures against German property, recognition court decisions of a third State, namely Greece, as compulsory in the territory of Italy. As for the latter point, it clearly enough that Germany justified its jurisdictional immunity to make it impossible for "Greek citizens to attempt to enforce in Italy the judgment rendered by the Greek court on the massacres committed by German military units during their withdrawal in 1944" (General Assembly of United Nations, 2013).

An important conceptual and legal emphasis in this decision is to separate two issues:

the nature of the state's actions, which became the basis for the claim, and the judicial immunity of the state – the principles and rules on immunity do not take into account the nature of the State's actions, even illegal, obviously criminal.

The quintessence of the opinion of the Supreme Court is that a dispute between a citizen of Ukraine and a foreign state (at the same time, the Supreme Court uses the concept of "a foreign country") can be considered and resolved by the court of Ukraine as a proper and competent court in the case of a tortious exception (Supreme Court, 2022). At the same time, the court of Ukraine, in considering the case where a foreign state is identified as the defendant, has the right to ignore the immunity of this country and consider cases on compensation for damage caused to an individual as a result of its armed aggression on a lawsuit filed against this foreign country (Supreme Court, 2022).

By relying on this formulation, on the one hand, there is recognition of the immunity of a foreign state and, on the other hand, the application of the procedural and legal concept of its "ignoring", which is the basis for resolving the issue of international jurisdiction of the case that combines factual and legal aspects of compensation for moral damage, tort exception, and actions of the army of a foreign state.

7. Peremptory norms of international law and State immunity

Seizing room for extrapolating the conceptual principles of other areas of international law to the article scope, one can refer to the law of treaties. In the well-known Vienna Convention of 1969, it is worth paying attention to articles 52 and 53. They state that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations and if it conflicts with a peremptory norm of general international law.

The standpoint of the Polish specialist in international law remains relevant to this day. He emphasizes that, in case of the state's violation of peremptory norms *jus cogens*, it may be denied the exercise of rights, in particular, to recognition, reservations to treaties, and extradition (Boczek, 2005, p. 19). The universally recognized values underlying the modern international legal order include: sovereign equality of states, waiver of force or threats of force against, inter alia, political independence, inviolability of state borders, territorial integrity, non-interference in internal affairs, respect for human rights and fundamental freedoms – this list is not exhaustive.

8. Conclusions

Summarizing the above, we can make a generalization: it is challenging to ensure an adequate level of protection of the rights and legitimate interests of citizens violated by the armed forces of a foreign state by litigation within the institutions of both its absolute jurisdictional, incl. judicial, and functional or limited immunity.

Ignoring the right of a specific subject, within the scope of this article – the foreign state, to judicial immunity, which emerges from the international legal principles of sovereignty, may seem a debatable conceptual approach. At the same time, the degree of freedom to exercise such a right by a foreign state is theoretically possible and also should be practically addressed in the broader context of fundamental principles and peremptory norms of international law (*jus cogens*). Consequently, a conceptual approach to the refusal or restriction of the power

of a foreign state to exercise the right to judicial immunity in the case of a deliberate violation of the mentioned fundamental principles, peremptory norms of international law (*jus cogens*) enshrined, in particular, in the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States of 1970, the Helsinki Final Act of 1975, seems legally justified.

One needs hardly apply the methodology of legal forecasting to obtain an answer to the question whether there are prospects for obtaining the consent of a foreign state to take measures by domestic courts to provide claims and further enforcement of court decisions in civil cases on claims for violation of personal non-property and property rights and interests of peaceful citizens. It leaves these issues open and intensifies the necessity to conduct further research.

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МІЖНАРОДНО-ПРАВОВІ ЗАСАДИ СУДОВОГО ІМУНІТЕТУ ДЕРЖАВ У КОНТЕКСТІ ВІЙСЬКОВИХ ДІЙ

Анотація. *Метою статті* є розкриття міжнародно-правових підходів, що зумовлюють як обмеження, так і можливості для легального й легітимного подолання бар'єру абсолютного імунітету держав у контексті військових дій.

Методи дослідження. В основу статті покладено індуктивний метод пізнання, його гносеологічні можливості доповнено, а пізнавальні обмеження компенсовано шляхом застосування сукупності методів дослідження правового феномену судового імунітету, зокрема системного аналізу, порівняльно-правового методу, екстраполяції трендів.

Результати. Увагу сфокусовано на ключових аспектах постанови Верховного Суду щодо судового імунітету іноземної держави в цивільній справі про відшкодування шкоди, завданої фізичній особі та її дітям у зв'язку із загибеллю її чоловіка й батька дітей унаслідок дій армії такої держави. Її положення та висновки зумовили доцільність дослідження норм щодо імунітету держав і дій їхніх збройних сил, релевантних Європейській конвенції про імунітет держав 1972 р., коментарів Комісії з міжнародного права до Конвенції ООН про юрисдикційні імунітети держав та їх власність, багаторічних спорів між Німеччиною та Італією щодо відшкодування шкоди, завданої діями армії у Другій світовій війні, та відповідного рішення Міжнародного Суду 2012 р., а також прогалин і недоліків законодавства України з питань імунітету держав та їх власності.

Висновки. Забезпечення належного рівня захисту порушених збройними силами іноземної держави прав і законних інтересів фізичних осіб у цивільному процесі в межах інститутів її як абсолютного судового, так і функціонального чи обмеженого імунітету є проблематичним. Ступінь свободи на реалізацію іноземною державою суверенних прав необхідно розглядати в більш широкому контексті фундаментальних принципів, імперативних норм міжнародного права (*jus cogens*). Їх свідоме порушення може мати наслідком правомірну відмову або обмеження її прав, зокрема й на судовий імунітет. Застосування концепції «ігнорування» імунітету іноземної держави в цивільній справі про відшкодування шкоди, завданої фізичній особі, у контексті дій збройних сил та деліктного винятку є досить нестандартним підходом для подолання правового бар'єру абсолютного судового імунітету.

Ключові слова: судовий імунітет, іноземна держава, відшкодування шкоди.

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