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Note from the Field

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TERRITORIAL TORT EXCEPTION? THE UKRAINIAN SUPREME COURT HELD THAT THE RUSSIAN FEDERATION COULD NOT PLEAD IMMUNITY WITH REGARD TO TORT CLAIMS BROUGHT BY THE VICTIMS OF THE RUSSIA-UKRAINE WAR

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ABSTRACT

Background. *The jurisdictional immunity of a state means that the state cannot be involved as a defendant in a case considered by a foreign court. In Ukraine, the rule on the jurisdictional immunity of a foreign state is enshrined in Art. 79 of the Law of Ukraine 'On Private International Law'. Until 14 April 2022, the Ukrainian Supreme Court rigidly applied the provisions of the said article and recognised the Russian Federation's immunity with regard to claims brought by Ukrainian citizens seeking compensation for harm caused by the armed conflict that commenced in 2014. Yet shortly after 24 February 2022, when Russia's aggression against Ukraine entered a new phase, i.e., the phase of full-scale war, the Supreme Court changed its mind.*

Methods. *This note addresses the ruling of the Ukrainian Supreme Court of 14 April 2022 in case no. 308/9708/19, where the Court held that the Russian Federation could not plead immunity with regard to tort claims brought by the victims of the Russia-Ukraine war. In reaching this conclusion, the Court relied on the territorial tort exception enshrined in the European Convention on State Immunity (Basel, 16 May 1972) and the UN Convention on Jurisdictional Immunities of States and Their Property. Though neither of the two conventions has been ratified by either Ukraine or the Russian Federation, the Court found that these conventions indicate a general tendency in international customary law towards limiting the jurisdictional immunity of the states.*

The reasoning of the Supreme Court is examined by scrutinising the authorities the Court adduced in support of its ruling, as well as by putting the ruling in the broader context of the jurisprudence of the International Court of Justice (ICJ) and European Court of Human Rights (ECtHR).

Results and Conclusions. *It is concluded that what the Supreme Court utilised is not the territorial tort exception but rather the 'human rights/*jus cogens*' exception. Further, the case before the Ukrainian Supreme Court is distinguishable from the ICJ and the ECtHR cases, where it was held that notwithstanding gross violations of human rights, the respondent state should nevertheless enjoy immunity. Unlike those cases, the Ukrainian case was tried amid the ongoing war, when no reparation agreements had been concluded, the legitimate aim of 'promoting comity and good relations between states' had been frustrated, and it was no longer possible to justify the restriction of the plaintiff's right of access to a fair trial.*

1 INTRODUCTION

The jurisdictional immunity of a state means that the state cannot be involved as a defendant in a case considered by a foreign court. Otherwise, the foreign court would have to judge the actions of the state, and afterwards, within the execution proceedings, the foreign authorities would have to take coercive measures against the state, thereby exercising power over the latter. It would contradict the principle of sovereignty and equality of the states since *par in parem non habet imperium*.

In Ukraine, the rule on the jurisdictional immunity of a foreign state is enshrined in Art. 79 of the Law of Ukraine 'On Private International Law'. The article precludes filing a claim against a foreign state, involving a foreign state in a case as a defendant or a third party, seizing property that belongs to a foreign state and is located on the territory of Ukraine, or applying other means of securing a claim in respect of such property and recovering such property. The article provides for two exceptions to the rule of immunity. The first is when a foreign state (represented by the competent authorities) assents to be involved in

the litigation. The second exception is retorsion measures, i.e., denying the immunity of the foreign state in response to the fact that the latter state – in violation of international law ± does not accord immunity to Ukraine within its own jurisdiction. Retorsion measures, according to the article, are implemented by the Cabinet of Ministers of Ukraine.

Until recently, the Supreme Court rigidly applied the provisions of the said article and recognised the Russian Federation's immunity with regard to claims brought by Ukrainian citizens seeking compensation for harm caused by the armed conflict that commenced in 2014. In most of these cases,[2] the plaintiffs sought compensation for internal displacement resulting from the occupation of Ukrainian territory by Russian-backed separatists. Even if their housing was not physically destroyed, the plaintiffs lost the opportunity to use it, as well as suffered pecuniary and moral damage due to the need to relocate and the severing of social ties. One case concerned the harm caused by the death of the plaintiff's husband.[3] The claims were filed against the aggressor state.

In all these cases, the Supreme Court, referring to Art. 79 of the Law 'On Private International Law', concluded that in the absence of consent from the Russian Federation's diplomatic mission, such cases could not be considered by Ukrainian courts. The Supreme Court repeatedly emphasised that 'every sovereign state can be a defendant in the courts of another state only if there is an express or tacit assent to this effect conveyed by the authorized officials'.[4] Therefore,

> having obtained the statement of the claim, the judge at the stage of preparation of the case for trial must find out whether there is the consent from the diplomatic mission… to the dispute being considered by the courts of Ukraine. <…> If such consent is not obtained, the embassy may not acquire the procedural status of a defendant in civil proceedings.[5]

When plaintiffs attempted to shatter the Supreme Court's approach and insisted on the need to overturn the said position, the Supreme Court emphasised that the position was 'constant and settled'.[6] Yet shortly after 24 February 2022, when Russia's aggression against Ukraine entered a new phase, i.e., the phase of full-scale war, the Supreme Court changed its mind.

2 THE MILESTONE CASE: PROCEDURAL HISTORY AND THE SUPREME COURT'S RULING

In case no. 308/9708/19,[7] the widow of the army sergeant, acting in her own interests and on behalf of two minor children, filed a lawsuit against the Russian Federation claiming compensation for non-pecuniary damage caused by the death of her husband. He served in the Armed Forces of Ukraine and, in 2014, took part in the defence of the Luhansk region. The man received deadly shrapnel injuries when the Luhansk Airport was shelled

2 Case No 265/7703/19 (Judgment of the Supreme Court, 9 June 2021); Case No 280/1380/19-ц (Judgment of the Supreme Court, 4 November 2020); Case No 711/17/19 (Judgment of the Supreme Court, 13 May 2020); Case No 613/924/19 (Judgment of the Supreme Court, 3 November 2021); Case No 943/1741/19 (Judgment of the Supreme Court, 22 October 2021); Case No 712/10119/20-ц (Judgment of the Supreme Court, 22 September 2021).

3 Case No 357/13182/18 (Judgment of the Supreme Court, 3 June 2020).

4 See n 1 and n 2.

5 Ibid.

6 Case No 280/1380/19-ц (Judgment of the Supreme Court, 4 November 2020); Case No 265/7703/19 (Judgment of the Supreme Court, 9 June 2021).

7 Case No 308/9708/19 (Judgment of the Supreme Court, 14 April 2022).

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by Russian-backed separatists using the 'Grad' system. As the war against Ukraine is waged by Russian troops, as well as by military formations created, sponsored, and managed by the Russian Federation, the woman claimed compensation from the Russian Federation.

The court of first instance, in line with the Supreme Court's case law relevant at the time, dismissed the claim on the ground of the Russian Federation's jurisdictional immunity. The court decision states:

> In resolving this case, the court considers that in accordance with the norms and principles of international law and current legislation of Ukraine there is no doubt that the Russian Federation is an aggressor state *vis-a-vis* Ukraine, and that its armed aggression entailed temporary occupation of the part of Ukraine, and that these circumstances may indeed cause moral damage to the people of Ukraine. <…> However, the fact that the temporary occupation of Ukraine was due to the armed aggression of the Russian Federation does not change the fact that the Russian Federation, as a state enjoying sovereignty, cannot be involved in a case before a court of general jurisdiction of Ukraine without its explicit or tacit consent expressed through its authorized bodies or officials'.[8]

In accordance with the requirements of procedural law,[9] a copy of the statement of claim with all the annexes, as well as the court's decision to initiate proceedings and the summonses, were sent to the Embassy of the Russian Federation and received by the addressee. However, the Embassy never responded. Hence, the court concluded that the Embassy did not consent to the case being heard and, on this ground, dismissed the claim.

The plaintiff lodged an appeal. The appellate court agreed that without the consent of the Russian Federation, the case could not be heard by Ukrainian courts, but it noted that this consent should be obtained in a particular way, namely, by applying to the Ministry of Justice, which, in turn, should instruct the Ministry of Foreign Affairs to contact the Embassy of the Russian Federation. Hence, following the regular procedures on defendant notification was not sufficient in this case. Therefore, the Court of Appeal held to apply to the Ministry of Justice and suspend the proceedings until a response was received or until a reasonable amount of time had passed.[10]

The plaintiff challenged this decision before the Supreme Court. And this time, in the judgment[11] delivered on 14 April 2022, the Supreme Court ruled that the Russian Federation could not invoke immunity. This conclusion is based on the provisions of two international conventions: the European Convention on State Immunity (Basel, 16 May 1972) (Basel Convention) and the UN Convention on Jurisdictional Immunities of States and Their Property (UN Convention). Both conventions[12] contain a rule known as the 'territorial tort exception'. Under this rule, immunity does not apply in a tort case where the plaintiff seeks compensation for death or injury to a person or damage to or loss of tangible property, as long as the harmful act or omission occurred in the territory of the state of the court and the tortfeasor was present there while committing the harmful act or omission.

Although neither of the two conventions has been ratified by either Ukraine or the Russian Federation, the Court has found that these conventions indicate a general tendency in international law towards limiting the jurisdictional immunity of states. The Supreme Court effectively implied that these conventions are resorted to not because they are binding on

8 Case No 308/9708/19 (Judgment of the Uzhgorod City-District Court, 2 February 2021).

9 See Arts 128, 177(1) and 187(5) Civil Procedure Code of Ukraine.

10 Case No 308/9708/19 (Decision of the Zakarpatskyi Appellate Court, 1 September 2021).

11 Case No 308/9708/19 (Judgment of the Supreme Court, 14 April 2022).

12 See Art 11 Basel Convention and Art 12 UN Convention.

the two states involved but rather because they prove the existence of a particular rule in customary international law, which, in turn, applies regardless of whether states participate in the conventions or not.

In coming to that conclusion, the Supreme Court relied on two cases of the European Court of Human Rights (ECtHR), namely *Cudak v. Lithuania*[13] and *Oleynikov v. Russia,*[14] where the ECtHR recognised that the UN Convention, embodying the rules of customary international law, applies even to states that have not ratified it. Of particular importance is the case of *Oleynikov v. Russia*. In this case, the ECtHR not only confirmed the customary nature of the UN Convention provisions in general but also cited documents from the Russian authorities (letters of the President, ruling of the Constitutional Court, information letter of the Supreme Commercial Court) indicating that Russia itself endorses the idea of limiting jurisdictional immunity of a state.[15]

The Supreme Court identified six requirements that must be met for the territorial tort exception to apply: (1) the harmful act or omission must take place in the territory of the state of the court; (2) the author of the harmful act or omission (i.e., the state's agent or public official) must be present in the territory of the state of the court at the time the act or omission was committed; (3) the harmful act or omission may be attributed to the state; (4) liability for such an act or omission is provided for by the *lex fori*; (5) the harm consists in death, physical injury, damage, destruction, or loss of property; (6) there is a causal link between the act or omission and the relevant harm.

Since all the six requirements were satisfied in the present case, the Supreme Court held that the case should be considered regardless of whether the Russian Federation consented. The decision states that

> in determining whether jurisdictional immunity applies to the Russian Federation in the case under review, the Supreme Court takes into account the following:
> - the object of the claim is compensation for non-pecuniary damage caused to individuals, Ukrainian citizens, as a result of the death of another Ukrainian citizen;
> - the place of damage infliction is the territory of the sovereign state of Ukraine;
> - the damage was allegedly caused by the agents of the Russian Federation who violated the principles and goals enshrined in the UN Charter concerning the prohibition of military aggression against another state, viz Ukraine;
> - committing the acts of military aggression by a foreign state does not qualify as the exercise of its sovereign rights, but indicates a violation of the obligation to respect the sovereignty and territorial integrity of another state, viz Ukraine, as this obligation is enshrined in the UN Charter;
> - the national legislation of Ukraine is based on the idea, that as a blanket rule, damage caused in Ukraine to an individual as a result of wrongful actions of any other person (entity) may be compensated under the Ukrainian court judgment (so called principle of "general delict").[16]

13 *Cudak v Lithuania* App no 15869/02 (ECtHR, 23 March 2010) https://hudoc.echr.coe.int/eng?i=001-97879 accessed 02 May 2022.

14 *Oleynikov v Russia* App no 36703/04 (ECtHR, 14 March 2013) https://hudoc.echr.coe.int/eng?i=001-117124 accessed 02 May 2022.

15 Ibid paras 21-32 and 67.

16 Case No 308/9708/19 (Judgment of the Supreme Court, 14 April 2022). On the concept of 'general delict' in Ukrainian law, see B Karnaukh, 'Ukraine: The Untapped Potential of Tort Law' in E Aristova, U Grusic (eds), Civil remedies and human rights in flux: Key legal developments in selected jurisdictions (Hart Publishing 2022) 333-340.

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As a result, the Supreme Court overturned the appellate court's decision to suspend the proceedings and sent a request to the Ministry of Justice. Now, the case must be considered by the Ukrainian courts on the merits.

3 THE SUPREME COURT'S RULING IN A BROADER CONTEXT: WHAT THE SUPREME COURT DID NOT SAY (EXPLICITLY)

Theoretically and historically, there are two distinct concepts of jurisdictional immunity of the state – absolute immunity and restrictive immunity.[17] Absolute immunity means that acts of the state (no matter what kind of acts are considered) can never be tried by a foreign court. In contrast, according to the concept of restrictive immunity, a distinction should be made between the acts falling within the domain of public law through which the state exerts its sovereign power (*acta jure imperii*) and the acts falling within the domain of private law through which the state participates in commercial transactions and other relations on par with the private persons or entities (*acta jure gestionis*). Under the concept of restrictive immunity, only the acts of the former kind shall be shielded from the jurisdiction of a foreign court (immunity); meanwhile, the actions of the latter kind may be tried by a foreign court (no immunity).

The tendency the Supreme Court was referring to in its judgment was the shift in international law from absolute immunity to restrictive immunity to the extent that the concept of absolute immunity has become obsolete. Thus, in order to decide whether a court has jurisdiction to adjudicate an action brought against a foreign state, it is necessary to ascertain whether the contested acts constituted an *acta jure imperii* (in which case immunity applies) or *acta jure gestionis* (in which case immunity may not be invoked).

In this context, the circumstances of the two ECtHR cases cited by the Supreme Court deserve closer scrutiny. In *Cudak v. Lithuania,*[18] the applicant worked at the Polish Embassy in Vilnius as a secretary and switchboard operator. Shortly after she reported sexual harassment by a colleague of the diplomatic mission to the Equal Opportunities Ombudsman, she was fired. She brought an action before the Vilnius Regional Court seeking compensation for wrongful dismissal. But when the Polish Foreign Minister pleaded immunity, the court closed the case. This decision was later upheld by the Court of Appeal and the Supreme Court of Lithuania.

The Supreme Court of Lithuania noted that the key issue in the case was to determine whether the relationship between the Republic of Poland and the applicant was of a public or private nature. Although the Lithuanian Supreme Court was unable to obtain information on the exact range of the applicant's duties, it concluded that judging by the job title, relations between the applicant and the Republic of Poland were governed by public law.

The ECtHR disagreed and found for the applicant, stating that her right of access to a court guaranteed by Art. 6 of the ECHR was violated. The ECtHR noted that the applicant 'did not perform any particular functions closely related to the exercise of governmental authority. In addition, she was not a diplomatic agent or consular officer, nor was she a national of the employer state'.[19] The Court also emphasised that the mere fact that she could have had access to certain documents or could have been aware of the content of telephone conversations

17 Also known as 'relative' or 'limited'.

18 Cudak case n 12.

19 Cudak case, n 12 para 69.

was not sufficient.[20] And lastly, it should not be forgotten that the dismissal ensued after she alleged sexual harassment.[21] On these grounds, the ECtHR concluded that Poland could not invoke immunity under the circumstances, and hence the applicant had been unlawfully denied access to court.

The case of *Sabeh El Leil v. France,*[22] though not mentioned in the Supreme Court's judgment, concerned similar facts. The case also involved the dismissal, but this time of a man who worked as an accountant at the Kuwaiti embassy in Paris. Here too, the discussion revolved over whether the applicant's job responsibilities indicated that his relationship with the embassy was of a public nature. And since the French courts did not pay due attention to this issue, hastily concluding that immunity applied, the ECtHR found a violation of the applicant's right of access to a court.

In *Oleynikov v. Russia,*[23] a citizen of the Russian Federation lent money to the Khabarovsk Office of the Trade Counsellor of the Embassy of the Democratic People's Republic of Korea (DPRK). As the money was not repaid in due time, Mr Oleynikov brought an action before the Khabarovsk Industrialniy District Court seeking to collect the money from the DPRK. However, the court returned his claim without consideration because of state immunity. The decision was upheld by higher courts. The ECtHR, having examined the Russian jurisprudence and the letters of the President of the Russian Federation, concluded that the respondent state itself embraced the concept of restrictive immunity.[24] Moreover, there were indications that Russia embraced it even before signing the UN Convention.[25] In view of this, the ECtHR found a violation of the applicant's right of access to a court due to the Russian courts' failure to carefully assess the nature of the transaction between the applicant and the Korean Embassy.

The two ECtHR cases referred to by the Supreme Court are distinguishable from the case before it. The ECtHR judgments do support the conclusion that absolute immunity has succumbed to restrictive immunity and that the two mentioned conventions on immunity apply even to the states that have not ratified them. At the same time, both ECtHR cases concern relations of a private law nature (an employment relationship in one case and a contractual obligation in the other). Therefore, these cases are not helpful in deciding if the aggressive war waged by the Russian Federation against Ukraine is *acta jure imperii* or *acta jure gestionis.*

The plaintiff in the Ukrainian case actually contended that Russia's war against Ukraine could not be considered an act of sovereign power. The Supreme Court agreed. However, it is worth noting that the justification and breadth of this contention in the plaintiff's interpretation and in the interpretation of the Supreme Court differ significantly. In the plaintiff's interpretation, the argument was premised on the fact that until 24 February 2022, the Russian Federation steadfastly denied the presence of its troops in Ukraine.[26] And since

20 Ibid para 72.

21 Ibid.

22 *Sabeh El Leil v France* App no 34869/05 (ECtHR, 29 June 2011) https://hudoc.echr.coe.int/eng?i=001-105378 accessed 02 May 2022.

23 Oleynikov case n 13.

24 Oleynikov case n 13 para 21-32.

25 Ibid para 67.

26 G Baczynska, 'Russia says no proof it sent troops, arms to east Ukraine' (*Reuters*, 21 January 2015) https://www.reuters.com/article/us-ukraine-crisis-lavrov-idUSKBN0KU12Y20150121 accessed 02 May 2022; P Engel, 'Putin: "I will say this clearly: There are no Russian troops in Ukraine"' (*Insider*, 16 April 2015) https://www.businessinsider.com/putin-i-will-say-this-clearly-there-are-no-russian-troops-in-ukraine-2015-4 accessed 25 May 2022; 'Putin reiterated the absence of the Russian army in the Donbass' (*Interfax*, 14 December 2017) https://interfax.com.ua/news/general/469917.html accessed 02 May 2022; S Walker, 'Putin admits Russian military presence in Ukraine for first time' (The Guardian, 17 December 2015) https://www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine accessed 02 May 2022. Yet, on the actual state of

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her husband died in 2014, the plaintiff insisted that the actions of the Russian Federation could not be considered *acta jure imperii* precisely because Russia's actions were 'non-public': Russia used its own weaponry and military units without any identification and completely denied its involvement. This interpretation is akin to the principle of inconsistent behaviour prohibition, implying that a state cannot invoke immunity on the basis of *acta jure imperii* whenever the state itself does not consider its acts to constitute *acta jure imperii*.

In the interpretation of the Supreme Court, the argument obtained new reasoning and, as a result, a broader scope of application. The judgment reads:

> The Supreme Court proceeds from the fact that the aggressor state acted not within its sovereign right to self-defence, but, on the contrary, treacherously intruded the sovereign rights of Ukraine, acting on its territory, and therefore certainly no longer enjoys jurisdictional immunity in this category of cases. <…> committing the acts of military aggression by a foreign state does not constitute the exercise of its sovereign rights, but rather indicates a violation of the obligation to respect the sovereignty and territorial integrity of another state...'[27]

So, while the plaintiff maintained that Russia should not enjoy immunity because it acted in a stealthy manner, the Court held that Russia should not enjoy immunity because it acted in violation of international law. Under the plaintiff's interpretation, Russia would be devoid of immunity only with regard to events that took place before 24 February 2022; under the Supreme Court's interpretation, Russia would be devoid of immunity with regard to all the hostilities no matter whether they were stealthy or manifest.

But why even ask the question of whether Russia's invasion is *acta jure imperii* or *acta jure gestionis* when the two conventions provide for a territorial tort exception, and the requirements for the exception to apply are satisfied? The reason is that these conventions are not applicable as such but rather as documents proving the existence of a certain rule in customary international law. In particular, they prove the established tendency in international law towards limiting the immunity principle, according to which tendency a state can act in two guises, and only one of them shields it from the foreign court jurisdiction. Thus, the provisions of the two conventions should not be taken at face value; instead, they are applicable only inasmuch as they embody the restrictive immunity concept as established in customary international law.

With regard to the territorial tort exception specifically, it means that the exception applies *unless* the harmful act of the state amounts to *acta jure imperii*. In other words, the territorial tort exception implies only 'private law' torts (if they can be called so) – that is, torts that are not related to the exercise by the tortfeasor state of its sovereign powers; torts that, in principle, could have been committed by any private actor as well.

It is worth noting that Art. 31 of the Basel Convention explicitly provides that it does not apply to the actions of the armed forces of a state when in the territory of another state. This proviso apparently imposes restrictions on the range of application of the territorial tort exception. Although there is no similar proviso in the UN Convention, in the commentaries to it, the International Law Commission noted that Art. 12 does not apply to armed conflict.[28]

affairs, Global Rights Compliance, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (13 February 2022) https://globalrightscompliance.com/wp-content/uploads/2022/05/International-Law-and-Russia-Involvement-in-Crimea-and-Donbas.pdf?fbclid=IwAR10X5oKd4-YcVtiTGaZC8m0Le9_MxchdQ2wTKeNFNcazaoWw6F7NP0YToc accessed 02 May 2022.

27 Case No 357/13182/18 n 9.

28 Document A/46/10: Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991) (1991) II(2) Yearbook of International Law Commission 1, 46, para 10.

Similarly, the Chairman of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property also pointed out that the UN Convention as a whole does not cover military activities.[29]

The same conclusion was reached by the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*.[30] Having scrutinised the legislation and case law of a number of states, the ICJ held that 'customary international law continues to require that a state be accorded immunity in proceedings for torts allegedly committed on the territory of another state by its armed forces and other organs of state in the course of conducting an armed conflict'.[31] This case deserves closer attention, as it addresses another important aspect of the problem that was not explicitly articulated in the Supreme Court's decision.

The case originated from the fact that Italian courts adjudicated lawsuits brought by Italian citizens seeking compensation from Germany for the damage caused by the atrocities committed by the Third Reich during World War II. There were three categories of lawsuits: those concerning mass executions of civilians in June 1944 in Civitella, Cornia, and San Pancrazio; those concerning deportation for forced labour to Germany; and those concerning the refusal to recognise members of the Italian armed forces as prisoners of war. Germany instituted proceedings in the International Court of Justice, alleging that Italy violated international law by neglecting the principle of state immunity in the relevant cases.

In this case, the ICJ thoroughly substantiated the customary nature of the rules on state immunity, elaborated on the concept of restrictive immunity, and distinguished between the two incarnations in which a state can act. In addition, the ICJ clarified that the status of a state's acts as *acta jure imperii* does not depend on whether those acts are lawful or wrongful[32] (contrary to what the Supreme Court was implying, stating that 'the acts of military aggression by a foreign state does not qualify as the exercise of its sovereign rights'). The criterion instead consists in asking on the basis of which law – public or private – one can assess the lawfulness or wrongfulness of the relevant acts. If, to assess the lawfulness of the relevant state's acts, one should resort to the rules of public law, then such acts are *acta jure imperii*; if the assessment is based on the rules of private law, then the acts are *acta jure gestionis*. According to the ICJ, neither the gravity of the violations committed by the state affects the determination of which of the two incarnations the state acted in.[33]

However, Italy's case involved yet another strand of argument. It emphasised that the norms violated by the Third Reich possessed the status of *jus cogens*, or peremptory norms, which sit at the very summit of the international law hierarchy. They bind all the states unconditionally and regardless of any formalities (such as ratification of any instruments) and preclude the application of any other contradicting norms no matter the source of the latter (whether it is binding instruments or customary law). Thus, Italy contended that the prohibition on murdering civilians, as well as the prohibition on deporting people to forced labour, are *jus cogens* norms. And since the rule of state immunity contradicts these norms, it should not apply, having been overridden by the norms of a greater force.

29 United Nations doc. A/C.6/59/SR.13 (2005) UN General Assembly Fifty-ninth Session Official Records 1, 6, para 36.

30 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, ICJ Reports 2012, p 99, paras 64-79.

31 Ibid para 78.

32 Ibid para 60

33 Ibid paras 81-91.

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Yet, the ICJ rejected the argument.[34] The ICJ held that there could not be any contradiction between the norms of *jus cogens* Italy invoked and the norms on state immunity since they belong to two 'parallel' planes that do not intersect: the former belong to substantial law, while the latter belong to procedural law (determining the jurisdiction of the court to adjudicate particular case). As long as the relevant norms address different subjects, they cannot relate to each other as contradicting. On this ground, the ICJ concluded 'that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on state immunity was not affected'.[35]

To support its findings, the ICJ cited[36] similar case law from the courts of the United Kingdom, Canada, Poland, Slovenia, New Zealand, and Greece, as well as two ECtHR cases, viz *Al-Adsani v. the United Kingdom* and *Kalogeropoulou and Others v. Greece and Germany*. In *Al-Adsani,*[37] the applicant brought an action in an English court against the sheikh and the state of Kuwait, claiming compensation for damage caused by illegal detention and torture that he sustained in Kuwait. The English courts refused to adjudicate the case because of state immunity. In proceedings before the Court of Appeal, the applicant maintained, *inter alia*, that the prohibition of torture is a *jus cogens* rule and should therefore take precedence over the state immunity rule. The Court of Appeal rejected the argument.[38]

The applicant appealed to the ECtHR, alleging a violation of his right of access to a court. Though the ECtHR agreed that the prohibition of torture is a *jus cogens* rule, the ECtHR held that it did not follow from it that the state immunity could be disregarded. The ECtHR admitted that some national courts are sympathetic to the idea of lifting the immunity in cases concerning gross violations of human rights, which may qualify as violations of *jus cogens*. However, according to the ECtHR, this approach has not garnered enough recognition to be considered an established international law.[39] On this basis, the ECtHR, by nine votes to eight, ruled that there was no violation of the applicant's right under Art. 6 ECHR.

In *Kalogeropoulou and Others v. Greece and Germany,*[40] Greek citizens filed lawsuits in Greek courts against Germany. The plaintiffs were relatives of the victims of the massacres perpetrated by the Nazis in Distomo in June 1944. Greek courts adjudicated the cases and ruled for the plaintiffs. However, when it came to the enforcement proceedings, the Court of Cassation held that Germany enjoyed immunity and the decisions, therefore, could not be enforced. The applicants in this case also emphasised that the atrocities committed by the Nazis in Distomo amounted to crimes against humanity and *jus cogens* violations, and therefore, in their view, the immunity should be denied. Yet, the ECtHR, echoing *Al-Adsani,* stated that rejecting immunity because of *jus cogens* violation was not a universally recognised principle.

It should be noted, however, that the approach followed by the ICJ and the ECtHR (that *jus cogens* violation does not affect the immunity) is disputable. It is evidenced by dissenting

34 Ibid para 93.

35 Ibid para 97.

36 Ibid para 96.

37 *Al-Adsani v The United Kingdom* App no 35763/97 (ECtHR, 21 November 2001) https://hudoc.echr.coe.int/eng?i=001-59885 accessed 02 May 2022.

38 *Al-Adsani v Government* of *Kuwait* and Others (No 2) [1996] 2 LRC 344.

39 Al-Adsani v The United Kingdom paras 62 and 66.

40 *Kalogeropoulou and Others v Greece and Germany* App no 59021/00 (dec) (ECtHR, 12 December 2002) https://hudoc.echr.coe.int/eng?i=001-23539 accessed 02 May 2022.

opinions both in the case of *Jurisdictional Immunities*[41] and in the *Al-Adsani* case.[42] There are two main counterarguments. The first is the different accounts of how *jus cogens* and the immunity rule relate to each other.[43] In this regard, it is noted that it is unacceptably formalistic to think that those two are not interconnected merely because the former is substantial while the latter is procedural. After all, a procedural rule that blocks access to a remedy effectively deprives the substantive rule of any practical meaning. Therefore, to separate the right as such from the remedies safeguarding would be equal to defying the idea that rights shall be 'practical and effective, not theoretical or illusory' (in the ECtHR's parlance).[44] The ECtHR was reproached for conducting the proportionality test in a superficial manner without carefully weighing the respective values of immunity rule and human rights.[45] In this vein, one can discern a case for a distinct exception to the immunity principle, which may be called the 'human rights/*jus cogens*' exception. The second counterargument boils down to drawing parallels with criminal law,[46] where universal jurisdiction is recognised with regard to war crimes and crimes against humanity. Why not recognise universal jurisdiction over tort claims concerning harm caused by those same crimes?

4 INSTEAD OF A CONCLUSION: DID THE SUPREME COURT RULE CORRECTLY?

As we have noted above, the case before the Supreme Court is distinguishable from *Cudak* and *Oleynikov*, which the Supreme Court adduced to support its ruling. Yet, the case is also distinguishable from *Jurisdictional Immunities, Al-Adsani,* and *Kalogeropoulou.* The distinctive criteria are different yet interrelated.

In the case of *Jurisdictional Immunities,* Germany had already paid reparations to Italy by the time the proceedings were instituted in 2008. The ICJ noted that 'Germany has taken significant steps to ensure that a measure of reparation was made to Italian victims of war crimes and crimes against humanity'.[47] And although Italy insisted that the reparations had

41 Dissenting opinion of Judge Cançado Trindade in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) Judgment, ICJ Reports 2012, 179; Dissenting opinion of Judge Yusuf in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) Judgment, ICJ Reports 2012, 291; Dissenting opinion of Judge ad hoc Gaja in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) Judgment, ICJ Reports 2012, 309.

42 Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001); Dissenting Opinion of Judge Ferrari Bravo in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001); Dissenting Opinion of Judge Loucaides in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001).

43 Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in Sabeh El Leil v France App no 34869/05 (ECtHR, 29 June 2011); Dissenting Opinion of Judge Ferrari Bravo in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001); Dissenting Opinion of Judge Loucaides in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001); Dissenting opinion of Judge Cançado Trindade in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) Judgment, ICJ Reports 2012, 179, paras 288-299.

44 *Zubac v Croatia* App no 40160/12, §77 (ECtHR, 5 April 2018) https://hudoc.echr.coe.int/eng?i=001-181821 accessed 02 May 2022.

45 F De Santis di Nicola, 'Civil Actions for Damages Caused by War Crimes vs. State Immunity from Jurisdiction and the Political Act Doctrine: ECtHR, ICJ and Italian Courts' (2016) 2 International Comparative Jurisprudence 107, 112 with accompanying citations.

46 Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001); De Santis di Nicola n 46, 107, 114.

47 Jurisdictional Immunities case n 26 para 99.

not compensated for all the damage (particularly the damage that constituted the subject matter of litigation in the Italian courts), the ICJ held that this fact could not justify lifting the immunity.[48] Otherwise, courts considering civil claims of individuals would have to continually re-assess intergovernmental agreements and inquire whether those agreements encompassed all types of damage inflicted. Secondly, the state accountable for the damage would have significantly fewer incentives to participate in intergovernmental reparation agreements if we suppose that even having paid reparations under those agreements, the state would continue to be subject to a potentially unlimited number of claims from individuals.

In contrast, the Ukrainian case has been considered amid the ongoing war, when reparation agreements have not been signed (and, naturally, no reparation payments have been rendered). From the law and economics standpoint (under which tort law rules are seen as creating economic incentives for certain choices), the case for denying immunity could go as follows: as a result of denying Russia's immunity, Russia would face the protracted menace of hundreds of thousands of lawsuits, which could serve as an impetus for Russia to seek a settlement on reparations through negotiations and the conclusion of a bilateral agreement with Ukraine.

In the *Al-Adsani* and *Kalogeropoulou* cases, the issue of jurisdictional immunity was examined through the prism of the applicants' right to a fair trial, as provided for in Art. 6 ECHR.[49] And since the right to a fair trial is not absolute,[50] only some restrictions of this right are contrary to the ECHR. To decide on whether there is a violation, the ECtHR conducts three consequent inquiries: (1) whether the restriction was provided for by law; (2) whether the law providing for this restriction pursued a legitimate aim; and (3) whether the restriction is proportionate to the legitimate aim pursued. If the answers to all the three questions are affirmative, then the restriction is compatible with the ECHR; and if at least one of the answers is negative, then there is a violation of the ECHR.[51]

Undoubtedly, jurisdictional immunity is provided for by Ukrainian law (see Art. 79 the Law 'On Private International Law'). But the ECtHR formulates the legitimate aim of this kind of law as follows: 'The Court considers that the grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between states'.[52]

'Comity and good relations' were undeniably legitimate aims to be pursued for Italy and Germany in 2012 (when the ICJ ruled in *Jurisdictional Immunities*), for Kuwait and the United Kingdom in 2001 (when the *Al-Adsani* case was decided), or for Greece and Germany in 2002 (when *Kalogeropoulou* case was decided). But this is not so for Ukraine and Russia in the spring of 2022.

Given the state of war, the goal of ensuring 'comity and good relations' with the aggressor can no longer be considered a realistic or reasonable aspiration and therefore can no longer justify restricting the rights of the state's own citizens. In contract law parlance, this is called frustration of purpose. Therefore, under the given circumstances, the answer to the second question of the ECtHR test appears to be negative.

48 Jurisdictional Immunities case n 26 paras 101-104.

49 However, F De Santis di Nicola suggests that analysing the cases from the perspective of the right to an effective remedy (Art. 13 of the ECHR) would prove to be more appropriate angle. See De Santis di Nicola n 46, 107, 112, 113.

50 Oleynikov case n 13 para 55; Cudak case, n 12 para 55; Al-Adsani case n 33 para 53.

51 See T Tsuvina, 'Right of Access to a Court: Approach of the ECtHR' (2020) 4 Entrepreneurship, Economy and Law 60.

52 Al-Adsani case n 33 para 54; Cudak case, n 12 para 60; Sabeh El Leil case n 21 para 52; Oleynikov case n 13 para 60.

At the end of the day, the analysis above suggests that what the Supreme Court utilised is not the territorial tort exception but rather the 'human rights/*jus cogens*' exception.

5 EPILOGUE

In its judgments, the ECtHR emphasised that it ruled on the basis of law 'as is', i.e., as it *was* at that moment; the ECtHR did not rule out the possibility of the law evolving in the future. And now, we may be seeing this very future unfolding before our eyes. Perhaps the Russia-Ukraine war will cause the world to revisit the limits of jurisdictional immunity of the state so that the balance between sovereignty and human rights will shift further towards the latter.

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