PROCEDURAL ASPECTS OF OVERCOMING SOVEREIGN IMMUNITY: RELEVANCE FOR UKRAINE AND THE INTERNATIONAL LEGAL ORDER (SDG’S)

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ABSTRACT

Objective: The object of this research article is the procedural domestic and international aspects of overcoming the sovereign immunity of a State that has committed military aggression, violating international humanitarian law and human rights law, with a focus on compensation for the damage caused by such actions.

Method: The method of study involves a critical analysis of the approaches taken by the Supreme Court of Ukraine to overcome jurisdictional immunity, in light of international law norms. The authors employ a combination of legal analysis, case law examination, and comparative analysis of international practices to evaluate the compliance of the court’s decisions with conventional provisions on compensation for damages.

Results: This research article analyses the procedural domestic and international aspects of overcoming the sovereign immunity of a State whose military aggression has violated international humanitarian law and human rights law, and on this basis raises the issue of compensation for the damage caused by such actions. Special attention is paid to the approaches to overcoming jurisdictional immunity by the Supreme Court of Ukraine. Taking into account the norms of international law, the author critically analyses the court's compliance with the conventional provisions establishing the procedure for consideration of cases on compensation for damages. The aggressor State's disregard for the norms and principles of international law, sovereignty of other States, and international good faith does not give rise to a disregard for the norms of international law based on the principle of reciprocity. The author emphasises that compliance with the rules on court proceedings must comply with the conventional requirements, and this should be the basis for national case law on school compensation. The authors analyses legal immunities and jurisdictional immunity of the State in particular in the context of ensuring justice, which, according to international standards, is the basis for fair treatment of victims of armed aggression and ensuring access to justice.

Contribution: It is noted that the application of the rules of jurisdictional immunity is the basis for limiting the right to a trial, which should be proportionate. The authors identifies the prospects for the development of international practice of interpreting the areas of ensuring the right to a fair trial, in particular, based on the practice of international courts. The author summarises the directions of changing approaches to the validity of the application of absolute immunity, and the dynamic interpretation of the legitimate purpose of limiting the right to a court, which is necessary and permissible provided that the essence of this right is preserved.

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The author emphasises the importance of the effectiveness of reparations as a principle and its significance for the development and provision of transitional justice in Ukraine.

**Keywords:** right to trial, fairness, proportionality, legal immunities, reparations, civil proceedings, immunities in international law, sustainable development goals (SDGs).

### 1 INTRODUCTION

The current global challenges facing the international community are related to the cessation of the armed aggression of the Russian Federation, its violation of international humanitarian and human rights law, appropriate reparations to Ukraine, and the restoration of victims' rights. The solution of the relevant problems has prompted various studies of legal immunities at the international and national levels. For Ukraine, the solution to these issues is related to determining the legal means of fulfilling the tasks of the judicial process, within which everyone should expect the right to a fair trial, as well as building the concept of transitional justice in Ukraine, taking into account international experience and accepted and tested ways of fair treatment of victims of armed aggression. These provisions define the criteria for adherence to the rule of law, protection of private interests in their balance with other interests that must be ensured. In particular, reparations and the means of obtaining them must be reasonably balanced within the principles and guidelines summarised by the UN. Institutional changes and reparations as necessary components of transitional justice should work simultaneously with its other elements create new challenges for the state and legal scholars. The international community, civil law and procedural sciences have faced new challenges in identifying and ensuring effective legal means of restoring the rights of victims of human rights violations and violations of international humanitarian law: effective compensation for harm (reparations), equal and effective access to justice.
The sovereign immunity of the aggressor state has become one of the main obstacles to the restoration of rights by effective means at the international and domestic levels. Defining the essence of legal immunities is of great practical importance for the application of the norms and principles of international law, understanding the importance of international courtesy, the grounds for applying countermeasures from the perspective of fair treatment of victims, and, in particular, the prospects for obtaining reparations. Accordingly, the theoretical and practical aspects of immunities determine the fairness of a particular judicial procedure. In particular, according to the Istanbul Convention, reparations are made by way of compensation from the state if not covered by the offender and from other sources that do not exist systematically, which indicates the lack of effective remedies. This underlines the challenges faced by victims in securing justice and compensation. The Istanbul Convention emphasizes that states are obliged to provide adequate and prompt reparation to victims of crimes, ensuring that they are not left without recourse in the event that the perpetrator is unable or unwilling to compensate them.

However, when sovereign immunity is invoked, it can prevent victims from obtaining reparations directly from the state responsible for their suffering. This necessitates the exploration of alternative mechanisms for compensation, such as international funds or compensation schemes supported by multiple countries or international organizations. The involvement of these entities can provide a more reliable and systematic source of reparations, thereby addressing the gaps left by sovereign immunity.

2 THEORETICAL FRAMEWORK

Moreover, the international community must consider the balance between respecting state sovereignty and ensuring justice for victims. This involves ongoing dialogue and negotiation to create frameworks that can override or limit sovereign immunity in cases of severe human rights violations or breaches of international humanitarian law. Developing such frameworks
requires a deep understanding of both legal principles and the practical realities faced by victims seeking justice.

In conclusion, the concept of sovereign immunity poses significant challenges to the effective restoration of rights at both the international and domestic levels. Addressing these challenges involves a nuanced approach that respects international norms while prioritizing the rights and needs of victims (CAVALIERI, 2023). This may include reforming existing legal frameworks, creating new international mechanisms for compensation, and fostering international cooperation to ensure that justice and reparations are accessible to all those affected by state-perpetrated violations.

The scientific and practical analysis of the problems of overcoming sovereign, in particular, jurisdictional immunity has been carried out by domestic lawyers, among whom we can mention O. Vodiannikov, Y. Zhornokuy, M. Medvedeva, O. Marchenko, B. Karnaukh, T. Stepanenko, Y. Cherniak and other scholars. Their current research on the status and prospects of application of the jurisdictional immunity of the Russian Federation contributes to the actualisation of scientific discussion and interpretation of domestic and international law, taking into account a dynamic approach to the right to a fair trial and the rule of law in general. At the same time, the very establishment of a comprehensive theoretical and practical basis for the rule of law, which will proportionately take into account international courtesy and respect for sovereignty, as well as major risks and threats to peace and human rights, requires further detailed study of the grounds for the application of limited immunity of states, taking into account a reasonable balance of fundamental civilisational values.

At the same time, the very establishment of a comprehensive theoretical and practical basis for the rule of law, which will proportionately take into account international courtesy and respect for sovereignty, as well as major risks and threats to peace and human rights, requires further detailed study of the grounds for the application of limited immunity of states, taking into account a reasonable balance of fundamental civilisational values. This necessitates a multidisciplinary approach, involving insights from international
law, political science, human rights, and conflict resolution to create a robust framework that addresses the complexities of jurisdictional immunity.

Moreover, these scholars emphasize the importance of evolving legal interpretations to reflect contemporary realities and challenges. The ongoing conflict and its implications for international legal norms underscore the need for adaptive legal mechanisms that can effectively respond to unprecedented situations (Corneau, 2023). By critically examining the application of jurisdictional immunity in the context of current global dynamics, these legal experts contribute to the development of more nuanced and effective legal principles that can better serve justice and human rights.

Their work highlights the necessity for a balanced approach that respects state sovereignty while ensuring accountability for violations of international law. This balance is crucial for maintaining international order and upholding the principles of justice and fairness. Future research should continue to explore innovative legal solutions that reconcile these sometimes-conflicting imperatives, ensuring that the legal system remains responsive and effective in protecting human rights and promoting global peace.

Their research not only fosters academic discourse but also has practical implications for policy-making and the implementation of legal norms. As the international community grapples with the challenges posed by state sovereignty and accountability, the insights provided by these experts will be instrumental in shaping a more just and equitable global legal order.

3 METHODOLOGY

The methodology used in this study was chosen taking into account the complex problems associated with a just order in international relations, ensuring human rights, in particular, the right to fair treatment for victims of armed aggression, and proportionate restrictions on the right to a trial. The applied methodological approach is comprehensive, including hermeneutical, dialectical, formal and logical, and structural and functional. The study uses the structural-functional approach to deconstruct the elements and functions of immunities and their correlation with the right to a fair trial under martial
law. By studying the interaction between legal principles and norms and their implementation, the author aims to identify the optimally balanced means of overcoming the problems of people's continued disadvantage due to armed aggression, violations of law and their ineffective restoration, which led to the hermeneutic approach.

The systematic approach is used to determine the rules of the current legal regulation of the procedure for applying jurisdictional immunity and the prospects for the enforcement of judgments against the Russian Federation at the international and national levels in the current conditions of war in Ukraine, which is a system-forming factor in the construction of the study. The methods of systematic analysis and synthesis allowed us to gradually identify the normative and practical issues relevant to fair treatment for victims, which includes material (in particular, reparations) and procedural (access to justice and effective procedural means) aspects.

Taking into account the hermeneutical approach and dynamic trends in the changing interpretation of sovereign immunity, the author analyses the approaches in case law, which allowed to identify discrepancies and inconsistencies in the interpretation and application of the rules on immunities in the context of modern challenges. The author uses special legal methods of interpretation of legal provisions which define the concept and functioning of judicial procedures. The author analyses the international norms that determine the procedure for consideration of civil cases. Using formal, logical and hermeneutical analysis, the author obtains results and formulates coherent conclusions and recommendations related to Ukraine's implementation of international law for the effectiveness of reparations.

4 RESULTS AND DISCUSSION

Legal immunities of individuals, states and their officials, international institutions and their agents have a single legal nature, exempting a person from certain legal obligations, jurisdiction or a special procedure for bringing to legal liability. This results in a special legal status designed to ensure public, sovereign interests. In particular, sovereign immunity is applied in public legal
relations, and contributes to the maintenance of the state’s functions, its independence and the independence of its representatives. Relevant circumstances may determine the legitimate purpose of sovereign immunity, which, given the new challenges to the legal order established more than half a century ago due to armed aggression, should be assessed for fairness and balance of interests, proportionality of their restriction at the national or international law enforcement level.

Restrictions on the right to a fair trial, in particular those related to jurisdictional immunities, may be permissible subject to the balance of legal possibilities, which is determined by the rule of proportionality, which is the embodiment of procedural justice. Since sovereign immunity is a legal means of protecting an interest that is of greater importance in the context of the relevant legal relations, it determines the legitimate purpose of restricting the right to a court, the necessity, suitability of the means to achieve the purpose, and the availability of alternative effective legal remedies. This defines proportionality in the narrow sense and confirms the fact that the very essence of the right to a court is not lost. At the same time, paying attention to the historical conditions of formation of the legal order within which the current norms and principles of international law were established and implemented, we should emphasise the significant difference between those conditions and those in which, in particular, the judgments of the International Court of Justice were made.

Most modern approaches to legal immunities, in particular state immunities, are based on the legal order that emerged after the Second World War, with the Convention for the Protection of Human Rights and Fundamental Freedoms adopted in 1950. The international legal order of that time was applied for peacetime, and the member states of the Council of Europe aimed to maintain friendly relations, and the principles of international courtesy determined political and legal decisions. In particular, lawyers noted that the European Court of Human Rights did not properly apply the proportionality test, did not thoroughly balance the values that determine the rules on immunity and human rights law, while the European Court of Human Rights itself notes that the sovereign immunity of a State in civil proceedings has a legitimate
purpose, which is to comply with international law in order to maintain mutual
courtesy and good relations between States (KARNAUKH B., 2022). In general,
the current position of the European Court of Human Rights is that immunities
are permissible if they have a legitimate purpose.

The jurisdictional immunities of states and their property are relevant
scientific issues, in particular, in connection with the need to compensate for
damage caused to life by the death of an individual, health and property of
individuals, legal entities and the state as a result of the armed aggression of
the Russian Federation. Compensation for such damage is possible through
domestic and international administrative (compensation) and judicial
mechanisms. According to Article 79 of the Law of Ukraine "On Private
International Law", the absolute jurisdictional immunity of foreign states is
based on their sovereign equality, according to which an equal has no power or
jurisdiction over equals, which formally restricts national courts from
considering any claims against the Russian Federation without its consent and
makes it impossible to ensure effective protection of violated rights.

The respective approach to the unlimited jurisdictional immunity was
laid down in the international legal order, which, due to the current challenges,
must change, as confirmed by the Supreme Court of Ukraine and adopted
resolutions formulating the legal position on this issue: ignoring the immunity
of this country and considering cases of compensation for damage caused to an
individual as a result of the armed aggression of the Russian Federation, in a
lawsuit filed against this particular foreign country; the Russian Federation
should not invoke immunity to avoid liability for damage to property.

At the same time, scientific discussions on the sovereign immunities of
states and the grounds for overcoming them remain and are gaining relevance
in various fields of legal knowledge and judicial practice. The participants in
the discussions pay attention to the approach to argumentation, the
consequences of interpreting the grounds for depriving a state of jurisdictional
immunity (ATAMANOVA YU., TSIRAT G., 2022). These and other approaches are
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These and other approaches are generally based on substantive or
procedural grounds. Supporting the position of lawyers on the insufficiency of
tort grounds, we will analyse the procedural requirements for court hearings related to the application of the rules on jurisdictional immunity of the State, which, along with the grounds for depriving a foreign State of jurisdictional immunity, affect the possibility of actual enforcement of court decisions outside Ukraine by way of foreclosure on the assets of the aggressor State (KOROL V. I., 2022).

At the international level, the European Convention on the Immunity of States of 1972 (European Convention and the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (UN Convention) are aimed at regulating the issues of jurisdictional immunities of states and their property. The European Convention has been ratified only by all member states of the Council of Europe, and the UN Convention has not entered into force, but their provisions are applied by courts at the international (ECHR, International Court of Justice) and national levels as rules of customary international law even if there are doubts about the status of the UN Convention, and by national courts. Thus, the rules on limitation of immunity in the international and national legal orders are applied on the basis of international custom and through the application of decisions of international courts.

The UN Convention and the European Convention reflect the concept of limited jurisdictional immunity of a state. However, in addition to the form in which immunity may be waived and the types of cases where a state does not have immunity in a court of another state, the conventional rules provide for special rules for the consideration of cases in court, for example, the obligation to inform a foreign state of a lawsuit filed against it and the results of the consideration of the relevant case. In particular, Article 16 of the European Convention provides that the competent authorities of the state in which the court case is being considered shall transmit the original or a copy of the documents on the basis of which the case was initiated, a copy of the court decision made against the defendant state in case of its failure to appear, by diplomatic means to the Ministry of Foreign Affairs of the defendant state for transmission, if necessary, to the competent authority. If necessary and appropriate, the documents shall be accompanied by a translation into the
official language of the respondent state. The court order or notification of documents is duly executed if received by the Ministry of Foreign Affairs of the defendant state. The time limit for appearing in court or appealing against a judgement starts to run two months after the date of receipt by the Ministry of Foreign Affairs of the document on the opening of the case or a copy of the judgement. If the relevant time limits are specified by the court, they may not be less than the said two months. If the defendant state fails to appear at the trial, a judgment in absentia may be rendered against it only if it is established that the foreign state was served with the document on the opening of the court case and that the court complied with the relevant requirements. Inadequate notification of the defendant state means that there is no obligation to execute the judgment.

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Moreover, these conventions highlight the importance of diplomatic communication in the judicial process, reinforcing the principle that states
must respect the legal proceedings of other nations. The conventions also emphasize the need for translations of legal documents to facilitate understanding and compliance, thereby promoting fairness and transparency in international legal matters. Such procedural rigor is crucial for upholding the rule of law and ensuring that justice is not only done but seen to be done on an international scale.

Pursuant to Article 22 of the UN Convention, the procedure for service of documents on the commencement of proceedings against a state is carried out in accordance with any international convention or special agreement between the plaintiff and the state concerned, unless this is excluded by the law of the forum state. In the absence of such rules, service is made through diplomatic channels through the ministries of foreign affairs of the respective states. With regard to the consideration by Ukrainian courts of cases for compensation for damage caused by the armed aggression of the Russian Federation, the question arises of the existence of diplomatic ties and the means to overcome their absence or ineffectiveness.

Thus, according to the rules of customary international law, if the jurisdictional immunity of the foreign defendant state is not applied, one of the mandatory conditions for the court to consider a claim against the foreign defendant is to duly notify the foreign defendant of the claims brought against it and the results of the court proceedings. In turn, the enforcement of Ukrainian court decisions in foreign countries is carried out either on the basis of international treaties or on the principle of reciprocity in the absence of such a treaty. Failure to comply with the above provisions may result in certain legal obstacles in other states that hold assets (property) of the aggressor state and may be subject to recovery, as provided for by the following rules.

Pursuant to Article 7(1)(a) of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, recognition or enforcement may be refused if the document that initiated the proceedings or an equivalent document that includes a statement of the essential elements of the claim was not communicated to the defendant in a timely manner and in a manner that would enable the defendant to organise its defence. These rules do not apply if the defendant fails to appear and present his case without
contesting the service in the court of origin, provided that the law of the state permits contested service of origin or the defendant was served in the requested state in a manner that is contrary to the basic principles of the requested state on service of documents.

According to Article 55(b) of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, recognition of judgments and issuance of enforcement permits may be refused in cases where the defendant has not participated in the proceedings due to the fact that he or she or his or her authorised representative was not timely and properly served with a summons. Ukraine has severed diplomatic relations with the Russian Federation, and until 2022, the Russian Federation had been systematically acting in bad faith in similar court cases. However, the requirement to notify the aggressor state as a defendant and to give the defendant a time limit for filing a statement must be met in order to have grounds for Ukraine's good faith behaviour as a participant in international relations. Given the ambiguity of transmitting messages through diplomatic channels, the norm of international courtesy can be observed through digital tools in legal proceedings. The blocking of Russia's access to Ukraine's official websites also creates obstacles to the execution of a summons or notification in a proper manner. Therefore, the relevant notices can also be sent by the plaintiff or the court by email, by post from another country, in particular, through the Russian diplomatic mission in another country.

The ongoing full-scale armed aggression of the Russian Federation against Ukraine poses new political and legal challenges related to the multifaceted restoration of society and the adoption of measures to prevent the recurrence of tragic large-scale events. Countries that faced totalitarian regimes and armed conflicts in the 20th and early 21st centuries overcame the consequences of armed conflicts in the following areas: peacebuilding; security sector reform; disarmament, demobilisation and reintegration of former combatants; confidence-building measures; and transitional justice. The identified approaches were only partially implemented in Ukraine by 2022, and the Transitional Justice Roadmap was announced, but there was no holistic vision of how to implement reparations and reintegration processes. The
relevant concept was discussed mainly at the level of human rights organisations and civil society, but after the full-scale invasion of the Russian Federation, it lost its relevance due to a significant change in circumstances.

One of the most relevant aspects of overcoming the consequences of armed aggression and preventing its recurrence, including the distortion of truth and history, given the current state of the institutional framework, is individual full reparations, the search for funds, which will be more successful by means of foreclosure on the property of the aggressor state or sanctioned persons and partnership programmes, which, in turn, will be more systematic, provided that there are intentions and implementation of minimal institutional changes in public policy. The relevant tasks facing Ukrainian society within the framework of the legal reality require transformations at all levels and comprehensive approaches to the formation of transitional justice.

Related to the fairness of reparations and procedures for obtaining them is the type of immunity such as amnesties, which may be relevant in the future in the case of criminal liability of persons suspected of war crimes. These legal remedies are common and acceptable in many legal orders, but in circumstances of massive violations of human rights and international humanitarian law, their use is a conflictogenic factor. They are interlinked with the effectiveness of reparations and the goals of transitional justice in general and should be introduced and applied proportionately. Legal immunities derived from state sovereignty can affect reparations by providing protection from legal liability or exemptions from prosecution to those involved in transitional justice. This may complicate the process of establishing truth, justice, and reparations for conflict-affected persons.

It is therefore important to ensure that immunities do not impede the process of reparations as justice for victims. This may include conducting comprehensive research into incidents, establishing the responsibility of persons with immunity, and developing special procedures for adjudicating and accessing reparations cases. Additionally, there should be mechanisms in place to review and possibly revoke such immunities if they are found to obstruct justice.
It should also be borne in mind that immunities can be used as a political compromise or as a means of supporting reconciliation during the transition to stability after conflict. However, it is necessary to ensure that these compromises do not violate the principles of justice and fairness in reparations cases. To this end, international guidelines and oversight may be required to balance the need for political stability with the imperatives of justice and human rights. This approach would help in maintaining the integrity of the reparations process and in building trust among the affected populations, thereby facilitating a more sustainable and just transition.

The Human Rights Committee defines the obligation of states to ensure that persons suspected of gross human rights violations and war crimes are punished regardless of their status or any domestic legislation on immunities.

5 FINAL CONSIDERATIONS

The effectiveness of judicial protection of human rights violated by the armed aggression of the Russian Federation is linked to the possibility of actual enforcement of decisions of national courts. These provisions determine the importance of observance of the right to a court and approaches to its dynamic interpretation in the modern context. For a court judgement to be recognised and enforced outside Ukraine, it must meet substantive and procedural requirements, one of the key ones being proper notification of the defendant state in the case or responsible, good faith behaviour of the court state in the interests of the victims. The absence of the need to request consent to involve the aggressor state as a defendant in the case may occur, but it does not mean that the international law on proper notification of the defendant is neglected, which can be carried out not only by the court through diplomatic channels of other countries, but also directly by the plaintiff by sending notifications to an e-mail address, by sending postal messages from another country, etc. with further reflection in the decision.

In the context of formulating the concept and updating the implementation of the transitional justice strategy in general and for the victim reparations notification procedures, it is important to involve third country
institutions and Ukraine's international initiative to create special, mixed, international institutions, including judicial mechanisms. Such an approach is aimed at promoting respect for and compliance with international principles and norms, procedural requirements for court consideration of cases related to limitation of jurisdictional immunity and overcoming property immunity of a foreign state, will ensure the possibility of recognition and enforcement of a decision in foreign countries, which, along with other grounds for granting the petition, will indicate that Ukraine has fulfilled its obligations under the Association Agreement between Ukraine and the European Union to comply with the rule of law, regardless of the context.

Furthermore, the effectiveness of these judicial mechanisms will largely depend on the international community's support and cooperation. The integration of such mechanisms into the broader framework of international law will not only enhance the enforcement of judicial decisions but also strengthen the overall international legal order. It is imperative that the global community remains vigilant and proactive in ensuring that the principles of justice and human rights are upheld, particularly in the face of aggression and violations by powerful state actors.

In conclusion, the enforcement of national court decisions in the context of armed aggression necessitates a multifaceted approach involving both national and international legal instruments. By ensuring proper notification and adhering to international legal standards, Ukraine can better protect the rights of its citizens and fulfill its international obligations. This strategy will also contribute to the global effort to uphold the rule of law and provide a robust framework for the protection of human rights in the face of armed conflict.


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