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# **The art of legal warfare:** how to deprive the aggressor state of jurisdictional immunities. evidence from Ukraine*

# A arte da guerra jurídica: como privar o Estado agressor de imunidades jurisdicionais. Evidências da Ucrânia

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## Abstract

States often refuse to enforce foreign court judgments relying on immunities guaranteed to each country by the UN Charter. However, when it comes to violations of jus cogens, a relevant question arises: can a state hide behind its own immunities, in the face of a blatant violation of international law? The question applys very well to the situation on the territory of Ukraine. The purpose of the article is to analyze the issue of sovereign immunities of states and current issues related to the deprivation of such immunities. In addition, the relevance of this issue on the example of the war in Ukraine will be examined. The four measures that the international community should take to punish the aggressor and prevent acts of aggression in the future, whether by Russia or any other state, will be suggested.

**Keywords:** Russia-Ukraine war; state sovereignty; state immunity; russian aggression; responsibility for violation of international law.

## Resumo

A questão da responsabilidade do Estado é relevante há muito tempo. Muitas vezes, os Estados recusam-se a executar decisões de tribunais estrangeiros com base nas suas imunidades garantidas a cada país pela Carta das Nações Unidas. No entanto, quando se trata de violações do jus cogens, surge uma questão relevante: pode um Estado esconder-se atrás das suas próprias imunidades face a uma violação flagrante do direito internacional e de violações dos direitos humanos? A questão da punição da Rússia pelos crimes cometidos no território da Ucrânia e pelas violações do direito internacional em geral é atualmente relevante. Além disso, a guerra na Ucrânia demonstrou a falta de funcionamento de muitas áreas do direito internacional. Assim, o mecanismo de punição da Rússia é importante não só para este caso específico, mas também para prevenir atos semelhantes no futuro. A pedido de 39 Estados-Membros, o Tribunal Penal Internacional lançou uma investigação sobre a guerra na Ucrânia. Outros tribunais também estão a considerar as queixas da Ucrânia na sequência da invasão russa. Neste artigo, o autor descreve a sua própria visão da razão pela qual as imunidades

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da Rússia não são absolutas e por que os tribunais nacionais deveriam negar imunidades à Rússia em pedidos de indemnização por danos causados pela agressão armada na Ucrânia, incluindo a ocupação da Crimeia e do Donbass. O autor também se refere à jurisprudência de outros países e da Ucrânia para compreender as abordagens dos tribunais estrangeiros à questão das imunidades no contexto da agressão armada e para comparar as suas abordagens com os processos judiciais ucranianos. Por fim, o autor também propõe alterações à legislação ucraniana para recuperar de forma mais eficaz os danos causados pela Rússia. Além disso, o autor propõe quatro medidas que a comunidade internacional deve tomar para punir o agressor e prevenir atos de agressão no passado, seja por parte da Rússia ou de qualquer outro Estado. O objetivo do artigo é analisar a questão das imunidades soberanas dos Estados e questões atuais relacionadas à privação de tais imunidades. Além disso, o autor examina a relevância desta questão a partir do exemplo da guerra na Ucrânia. O artigo também pretende destacar as medidas que a Ucrânia e a comunidade internacional podem tomar para punir a Rússia pelos seus crimes e violações do direito internacional. O principal método científico utilizado pelo autor no estudo é o método de análise e síntese. O autor utilizou este método para analisar a prática existente no direito internacional, a fim de compreender o papel das imunidades estatais nas relações internacionais. Este método também foi utilizado para encontrar formas de resolver o problema de responsabilizar a Rússia por um ato de agressão e violação do jus cogens.

**Palavras chave:** guerra entre a Rússia e a Ucrânia, soberania do Estado, imunidade do Estado, agressão russa, responsabilidade pela violação do direito internacional.

## 1 Introduction

The issue of state immunity in international law has been relevant for many years because the conceptions of the rule of law vary in differentsovereign states from ancient times. The general rule of state immunity is that equal to equal has no power or jurisdiction. That is, State A cannot judge State B without its consent. With the development of trade activities between states, a more limited approach to state immunity has been established: acts of a sovereign nature (acta jure imperii) and acts of a commercial nature (acta jure gestionis) are distinguished. Immunity does not apply to the latter, since it is believed that in such cases the state does not fulfill its sovereign functions, but rather acts as a private person[1].

However, at some point, theories began to emerge that it was necessary to distinguish between the activities of the state as a holder of sovereign power and those cases when it acts as a private person, i.e. within the framework of private law. The latter actions were judged in accordance with the law of the place of the court deciding the case, and thus the state's immunity ceased to be absolute. The principle of state immunity emerged as a customary norm in international law. Gradually, it began to be implemented in court practice, international treaties and domestic legislation. Opinions on the method of legal regulation of state immunity are varied[2].

The principle of non-subordination of one sovereign state to the legislation of another or the removal of a state and its organs from the jurisdiction of another state originated in embassy law and has become generally recognized today. Legislation and doctrine have always tried to define its essence and codify the rules on immunity in separate general (universal) conventions[3]. However, it should be emphasized that unlawful acts prohibited by international law (in particular, issues of aggression, war crimes, crimes against humanity and genocide) do not fall under the category of commercial acts. And in general, the use of armed forces is an act of a sovereign state, which, as a general rule, is subject to immunity.

With the outbreak of a full-scale war in Ukraine in February 2022, the Ukrainian authorities have been actively pursuing the issue of bringing Russia to justice. Russia has so far violated all ten principles of international law that must be inviolable. It has also committed a huge number of crimes against Ukraine and

[1] HRYSHKO, V. Compensation for human rights violations and state immunity: will ukrainian courts be able to judge Russia? *Dejure Foundation*, 2023. Available at: https://dejure.foundation/tpost/vmnoy46hu1-vdshkoduvannya-shkodi-za-porushennya-pra. Access on: 23 Feb. 2023.

[2] VEDKAL, V. State immunity, its types and concepts of realization. *Legal Scientific Electronic Journal,* v. 9, p. 296-298, 2021.

[3] SARDAK, S.; BRITCHENKO, I.; VAZOV, R.; KRUPSKYI, O. P. Life cycle: formation, structure, management. *Ikonomicheski Izsledvania*, v. 30 n. 6, p. 126-142, 2021.

Ukrainians[4]. Taking this into account, Ukraine is developing options for bringing Russia to justice. However, it should be taken into account that state immunities stand in the way of bringing the aggressor countries to justice. One of the main obstacles to lawsuits against Russia for compensation for damage caused by armed aggression in Ukraine is that under customary international law, any state and its property are protected by immunity from the jurisdiction of foreign courts and immunity from the enforcement of judgments. Simply put, when Ukrainians file lawsuits against Russia in the national courts of Ukraine or other states, Russia will claim that foreign courts have no jurisdiction to hear such claims because it has absolute immunity, even if the actions of that country's army in Ukraine are unlawful.

The same response will be expected when Ukrainians try to seize Russia's foreign property and force the sale of such property in Ukraine or other countries to enforce court decisions against Russia. Russia will argue that its property is protected by absolute immunity from execution and cannot be seized or sold without Russia's consent.

However, can the aggressor country really use such justifications for its actions? In this article, the peculiarities of the State's immunity, its problematic issues will be identified, and means to bring the aggressor to justice will be determined. In addition, the relevance of this issue is significant. After all, bringing Russia to justice will be an important factor for the development of international law in general. Firstly, it will be an incredibly important precedent for bringing to justice any country that will commit violations of international law in the future. That is, international law will have a sanction and the possibility of real responsibility for violations. This leads to the second reason: the creation and practical implementation of this mechanism will be an important deterrent to aggression by other countries and will create real protection against violations of international law. States will realize that they will be held accountable for their actions under the existing procedure, which has already been implemented in Russia. Finally, it will provide Ukraine with the opportunity to partially begin to rebuild the destroyed cities, provide assistance to the victims, and restore its economy. Thus, the issue is extremely relevant for both Ukraine and the world.

## 2 Materials and methods

The main method used for the study is the analysis and synthesis method. Its application provided reliable results in many areas of research. This method includes a set of techniques, operations and actions to separate objects into components, elements, properties (analysis) and combine them into a single whole (synthesis) in the course of solving a cognitive task. First of all, this method was applied when analyzing the existing practice in international law in order to understand the role of State immunities in international relations[5]. In addition, the method of analysis is used to describe the general features of immunities in international law and the problems that arise in the context of their application. This method was used by the author when reviewing the case law on immunities. Among other things, this method was used to find ways to solve the problem of bringing Russia to justice for an act of aggression and violation of jus cogens.

The historical method of research permitted to study the issues of formation of the State's immunities and analysis of certain international legal acts adopted in the last century. This method is based on the study of the emergence, formation and development of objects in chronological order. The use of the historical method allows for an in-depth understanding of the essence of the problem and makes it possible to formulate more reasonable recommendations for a new object. This method in combination with the analysis made it possible the author to generate a hypothesis that the current concept of state immunities was outdated and needed to be revised and updated. In addition, the author used the historical method to analyze the historical retrospective of the trials that were held. The historical analysis of the tribunals is very important in terms of analyzing their impact on the future trial against Russian war criminals. The principles and procedures that

[4] OSIEJEWICZ, J.; SHAPOVALOVA, O. V.; IVANII, O. M.; KOLYSHKIN , O. V.; GVOZDETSKA, S. V. Poland: national regulation on processing data for scientific research purposes and biobanking activities. *Global Biosecurity,* v. 5 n. 1, 2023. DOI: https://doi.org/10.31646/gbio.214.

[5] BRITCHENKO, I.; SAVCHENKO, L.; NAIDA, I.; TREGUBOV, O. Areas and means of formation of transport regional complexes and mechanisms for managing their competitiveness in Ukraine. *Ikonomicheski Izsledvania*, v. 29 n. 3, p. 61-82, 2020.

were laid down in the implementation of those trials of war criminals could be used in the future. In combination with modern legal methods, an effective system of justice and punishment of Russia war criminals in the International Court of Justice can be created.

The formal legal method was also used. This method involves the study of legal facts and legal texts, their interpretation in a logical sequence using special legal terms and constructions. This method is the basis for the study of international legal acts regulating state immunities. It was also used to analyze the drafts and plans created by Ukraine to punish war crimes. In addition, the formal legal method was used to analyze international law and national legislation in terms of recognizing Russia as a threat to Europe and recognizing it as a terrorist state.

The systemic approach is a branch of research methodology that consists in studying an object as an integral set of elements in a set of relations and connections between them, i.e., considering the object as a model of a system. This method was mainly used in systematizing the information received and identifying steps to punish Russia. this method was used to describe the model of deprivation of immunities for violation of jus cogens. The systematic method was also used to describe the steps that should be taken by the international community and Ukraine to punish the aggressor and compensate for the damage. In addition, these steps are important in preventing acts of aggression in the future. It is the scientific achievements using the systematic method that are mainly reflected in the conclusions to the article[6].

## 3 Results

### 3.1 Theoretical and legal approaches to understanding sovereign immunities

First of all, we note that the term immunity in Latin means exemption from something. State immunity in its broadest application is the principle that a state or its bodies cannot be sued in a foreign court without its consent. Sovereign immunities are the removal of a foreign state and its property from the jurisdiction of a national court. This means that it is impossible to file a lawsuit against a foreign state, apply interim measures to such a state and its property, or foreclose on its funds and property[7]. In international law, this principle is formulated as par in parem non habet imperium that mean equal has no power over equal.

Article 2 of the Charter of the United Nations, 1945 states that ...the Organization is founded on the principle of sovereign equality of all its Members...[8]. The essence of immunities is disclosed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970 According to the Declaration, the concept of sovereign equality, in particular, includes the following elements a) states are legally equal; b) each state enjoys the rights inherent in full sovereignty; c) each state is obliged to respect the legal personality of other states; d) the territorial integrity and political independence of a state are inviolable; e) each state has the right to freely choose its political, social and cultural systems; f) each state is obliged to fulfill its international obligations in full and in good faith and to live in peace with other states[9].

The issue of state immunities is partially regulated in the following acts: Vienna Convention on Diplomatic Relations, 1961[10]; Vienna Convention on Consular Relations, 1963[11]; Convention on Special Missions 1969[12]; Vienna Convention on the Representation of States in their Relations with International Organizations of a

[6] OSIEJEWICZ, J. Judicial review of EU legislation as an instrument to ensure consistency of national and EU Law. *Ius Gentium,* v. 61, p. 361–375, 2017.

[7] SUPREME COURT. Topical issues of limiting the judicial immunity of the aggressor state: the practice of the Supreme Court. The principle of state immunity from the jurisdiction of any foreign state. *Liga 360*, 10 Oct. 2022. Available at: https://ips.ligazakon.net/document/VSS00962. Access on: 23 Feb. 2023.

[8] UNITED NATIONS. *Charter of The United Nations*. 1945. Available at: https://www.un.org/en/about-us/un-charter/chapter-1. Access on: 23 Feb. 2023.

[9] UNITED NATIONS. *Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations*. 1971. Available at: https://digitallibrary.un.org/record/202170. Access on: 23 Feb. 2023.

[10] UNITED NATIONS. *Vienna convention on diplomatic relations*. 1961. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf. Access on: 23 Feb. 2023.

[11] UNITED NATIONS. *Vienna convention on consular relations*. 1963. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf. Access on: 23 Feb. 2023.

[12] UNITED NATIONS. *Convention on special missions*. 2005. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/9_3_1969.pdf. Access on: 23 Feb. 2023.

Universal Character, 1975[13]. These agreements regulate many issues related to the representation of states in international communication, in particular, the use of immunity from civil jurisdiction by a diplomatic agent, except for the filing of claims in equity with respect to private real property located in the territory of the host state, unless the agent has immunity on behalf of the accrediting state for the purpose of representation; inheritance claims, if the agent is to be an executor of a will, take care of inherited property, an heir or a disclaimer as a private person and not on behalf of the accrediting state.

Trade agreements may also provide for provisions on consent to the jurisdiction of the courts of the contracting state in a certain category of cases. Such rules are usually formulated in annexes to treaties on the legal status of trade missions in that state. Ukraine's international treaties may also contain jurisdictional provisions. International conventions, legislation, practice and doctrine of states define such concepts as the essence and types of immunity in different ways. Immunity differs from non-subordination to the laws of another state. As noted above, state immunity can be understood as the exemption of a state and its bodies from the jurisdiction of another state. In the theory and practice of states, several types of immunity are distinguished: judicial; from preliminary injunctive relief; from enforcement of a court decision; property (property).

Judicial immunity means that a state is not subject to the jurisdiction of the courts of another state without its consent. The reasons for prosecution are irrelevant. As a rule, states cannot be sued in foreign courts unless they have voluntarily submitted themselves to the jurisdiction of foreign courts. This applies to claims brought directly against foreign states and indirect claims, such as claims in rem against a vessel owned by a foreign state[14].[15]

Immunity from preliminary injunctive relief means that no coercive measures may be taken against a state's property without the consent of the state. Immunity from enforcement means that without the consent of the state, no enforcement of a judgment rendered against it by a court of another state can be carried out.

Along with the above, a more general concept is used - property immunity. The question of this type of immunity may arise, for example, in connection with a particular case in court. The application of immunity does not mean denial of justice. A lawsuit against a state may be filed in the courts of the same state. And in the courts of another state - only with its explicit or tacit consent. There are different ways to express consent. First, through authorized persons. Secondly, such consent may be expressed by states on a mutual and voluntary basis in a customary or conventional rule of public international law, in particular, in a multilateral or bilateral trade agreement, etc. An example of conventional norms on immunity from jurisdiction is the European (Basel) Convention on Immunity of States, 1972 (currently ratified by only 8 countries). The Convention distinguishes between public law and private law actions of the state. It contains a list of cases in which the state does not enjoy immunity (disputes over labor contracts, protection of trademark patents, real estate, compensation for damage, etc.) Immunity does not apply to contracts that must be enforced in the country of the court hearing the case; to the enforcement of commercial, financial, and professional agreements. Immunity is not recognized if the state has a commercial establishment in the country of the court considering the case. However, the immunity will be preserved if at least one of the following conditions is met: the other party to the dispute is also a state; the parties have specifically agreed in writing to recognize immunity; the non-commercial agreement was concluded in the territory of a foreign state and is subject to its administrative law[16].

It is worth noting that the application of immunity does not equal denial of justice[17]. A lawsuit against a

[13] UNITED NATIONS. *Vienna convention on the representation of states in their relations with international organizations of a universal character*. 1975. Available at: https://legal.un.org/ilc/texts/instruments/english/conventions/5_1_1975.pdf. Access on: 23 feb. 2023.

[14] STOLL, P. T. State Immunity. *Oxford Public International Law*, Apr. 2011. Available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1106. Access on: 23 Feb. 2023.

[15] LEVCHENKO, I.; LOSONCZI, P.; BRITCHENKO, I.; VAZOV, R.; ZAIATS, O.; VOLODAVCHYK, V.; HUMENIUK, I.; SHUMILO, O. Development of a method for targeted financing of economy sectors through capital investment in the innovative development. *Eastern-European Journal of Enterprise Technologies,* v. 5, p. 6-13, 2021. DOI: 10.15587/1729-4061.2021.243235.

[16] COUNCIL OF EUROPE. *European convention on the immunity of states*. 1972. Available at: https://rm.coe.int/16800730b1. Access on: 23 Feb. 2023.

[17] TSYPKO, V.; ALIEKSIEIEVA, K. I.; VENGER, I. A.; TAVOLZHANSKYI, O. V.; GALUNETS, N. I.; KLYUCHNIK, A. V. Information policy of the enterprise as the basis for the reproduction of human potential in the structure of public social interaction. *Journal of Advanced Research in Law and Economics*, v. 10 n. 6, p. 1664-

state may be brought in the courts of that state, and in the courts of another state - only with its tacit or explicit consent. There are the following ways of expressing consent:

a) through authorized persons;

b) consent can be expressed by states on a mutual and voluntary basis in a customary or conventional rule of international law, for example, in a multilateral or bilateral treaty on trade relations, etc;

c) the consent may be expressed in a written contract, i.e., a document signed by individuals or legal entities or concluded by means of an exchange of letters, messages by teletype, telegraph or other electronic communication devices that guarantee the fixation of the contract, or by means of an exchange of a statement of claim and a statement of defense, in which one party declares the existence of an agreement and the other party does not raise any objections to it;

d) if there is no such consent, the contracting party may apply to its state for its entry into diplomatic relations with another state[18].

In state practice, there is no unified approach to determining the scope of such immunities: both absolute jurisdictional immunities, such as those introduced in Ukraine, and limited (functional) immunities of foreign states are applied. Limited immunity means that in the case of private law transactions, labor disputes and tort liability for damage caused in the territory of the forum state (primarily road accidents), a foreign state cannot avoid liability and the national court has the right to hear the case with its participation. In other cases, when the state acts as a sovereign and exercises its sovereign powers, the national court is not entitled to exercise jurisdiction over it.

The choice of this or that model of sovereign immunities is a rather sensitive political decision, since the principle of reciprocity in international relations has not been canceled. Therefore, states that are actively and directly involved in foreign economic activity, as was the case in the former USSR and the countries of the socialist camp, are usually adherents of absolute immunities. Ukraine, by the way, inherited this approach from the USSR. Limited immunities, in turn, were chosen by developed countries in response to the active direct involvement of states in international trade, a process that became quite widespread after World War II not only thanks to the countries of the socialist camp, but primarily to new countries that emerged in the process of decolonization[19]. The following legal documents are based on the theory of functional (limited) immunity: Foreign Sovereign Immunities Act[20] (USA, 1976), State Immunity Act[21] (United Kingdom, 1978), State Immunity Act[22] (Singapore, 1979), State Immunity Ordinance[23] (Pakistan, 1981), Foreign State Immunities[24] (South Africa, 1981), State Immunity Act[25] (Canada, 1985), Foreign States Immunities Act[26] (Australia, 1985). The theory of limited immunity is applied in practice by the courts of Austria, France, Italy, Switzerland, Belgium, Greece, Denmark, Norway, and Finland.

Thus, the immunity of states is based on their legal equality and sovereignty. Although states do not yet have a unified concept of its implementation in international legal relations, most of the world's leading countries adhere to the theory of limited immunity[27]. While preserving the principle of sovereign equality of states, it distinguishes between their public law and private law actions and helps to prevent inequality in legal relations,

1672, 2019.

18 KULCHIY, O.; LIAKHIVNENKO, S. *Private International Law*. Poltava: PUET, 2016.

19 VODIANNIKOV, O. Aggressive immunities and the immune aggressor: between the legislator and the judge. *LB*, 26 Aug. 2022. Available at: https://lb.ua/blog/oleksandr_vodennikov/527485_agresivni_imuniteti_i_imunniy.html. Access on: 23 Feb. 2023.

20 UNITED STATES. *Foreign sovereign immunities act*. 2023. Available at: https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process/Foreign-Sovereign-Immunities-Act.html. Access on: 23 Feb. 2023.

21 UNITED KINGDOM. *State immunity act of 1978*. Available at: https://www.legislation.gov.uk/ukpga/1978/33. Access on: 23 Feb. 2023.

22 SINGAPORE. *State immunity act of 1979*. Available at: https://sso.agc.gov.sg/Act/SIA1979. Access on: 23 Feb. 2023.

23 PAKISTAN. *State immunity ordinance of 1981*. Available at: https://pakistancode.gov.pk/pdffiles/administratore76fcf01a8103c67d-13c638ef9545317.pdf. Access on: 23 Feb. 2023.

24 SOUTH AFRICA. *Foreign state immunities of 1981*. Available at: https://www.gov.za/sites/default/files/gcis_document/201503/act-87-1981.pdf. Access on: 23 Feb. 2023.

25 CANADA. *State immunity act of 1985*. Available at: https://laws-lois.justice.gc.ca/eng/acts/s-18/FullText.html. Access on: 23 Feb. 2023.

26 AUSTRALIA. *Foreign states immunities act of 1985*. Available at: https://www.legislation.gov.au/Series/C2004A03235. Access on: 23 Feb. 2023.

27 BONDARENKO, S.; LIGANENKO, I.; KALAMAN, O.; NIEKRASOVA, L. Comparison of methods for determining the competitiveness of enterprises to determine market strategy. *International Journal of Civil Engineering and Technology*, v. 9, n. 13, p. 890-898, 2018.

for example, between the state and a private contractor. This theory is better suited to modern realities, and thus it is likely that most countries, including Ukraine, will soon join it.

### 3.2 State immunities: judicial practice

Since the issue of state immunities and state responsibility is highly topical, it is not surprising that it has been considered in court practice. As far back as 1928, the Permanent Court of International Justice (the predecessor of the International Court of Justice) in the Chorzów Factory case (Merits) stated: "It is a principle of international law, even a general understanding of the law, that any breach of an obligation entails an obligation of reparation... Reparation is an integral component of a breach of a convention and there is no need for it to be expressly stated in the convention text"[28]. By denying sovereign immunities to the aggressor state, the court will apply such an integral component of an international legal obligation as compensation for the damage caused by the violation and restoration of the legal situation that existed before the violation of the international law. And the overall purpose of such a countermeasure should be to protect the effectiveness of the peremptory norm on the prohibition of the use of force or threat of force enshrined in Article 2(4) of the UN Charter[29].

However, the practice of national courts is quite interesting. One of the most famous examples is a series of lawsuits filed by Italians against Germany for compensation for damage caused by Nazi Germany during World War II. Initially, the Italian courts of first instance dismissed them, citing Germany's judicial immunity. Until in 2004, the Court of Cassation, reviewing one of the cases, ruled that Germany does not have immunity when it comes to international crimes. This became a precedent that other Italian plaintiffs began to refer to en masse[30].

Based on this, Germany filed a case with the International Court of Justice in 2012[31]. The detailed circumstances of this case will be discussed in the next section of the article. However, it should be noted that the ICJ ruled that Italy and Italian courts had violated Germany's jurisdictional immunity. The Italian government and parliament agreed and passed a law recognizing Germany's immunity[32]. However, the Italian Constitutional Court ruled that such an execution of the decision did not comply with the Italian Constitution, as it would deny the right to access to justice, and therefore denied the aggressor state immunity, explaining that it was protecting the right of Italians to a fair trial[33].

Another example is the Greek case of Prefecture of Voiotia v. Federal Republic of Germany No. 137/1997, in which the Greek courts denied Germany immunity for claims for damages caused by the actions of the Third Reich in Greece during World War II, in particular, the killing of civilians and destruction of property in the territory of the Prefecture of Voiotia in southern Greece. The Greek courts, among other things, explained their decision by reasoning that although immunity from jurisdiction is a sovereign right of Germany, it should not be abused by Germany[34].

It should be understood that the courts of Italy and Greece were not the only ones to challenge the immunity of the state when considering serious human rights violations. A number of court decisions in the United States have been made regarding human rights violations by state sponsors of terrorism. This became possible due to the application of the terrorism exception under the Foreign Sovereign Immunities Act (the same exception is available in Canadian law). In addition, as

[28] INTERNATIONAL COURT OF JUSTICE. *Chorzów Factory Case* (merits). 1928. Available at: https://jusmundi.com/en/document/decision/en-factory-at-chorzow-merits-judgment-thursday-13th-september-1928. Access on: 23 Feb. 2023.

[29] A SPECIAL tribunal for the leadership of the russian federation: kuleba names five key parameters. *Analytical portal "Word and Action",* 14 July 2022. Available at: https://www.slovoidilo.ua/2022/07/14/novyna/pravo/specztrybunal-kerivnycztva-rf-kuleba-nazvav-pyat-osnovnyx-parametriv. Access on: 23 Feb. 2023.

[30] TERZIEVA, V. State immunity and victims rights to access to court, reparation, and the truth. *International Criminal Law Review,* v. 22, n. 4, p. 780-804, 2022.

[31] CRAWFORD, J. Will Russia's leaders be brought to justice for Ukraine War Crimes? *SWI*, 10 Mar. 2022. Available at: https://www.swissinfo.ch/eng/politics/will-russia-s-leaders-be-brought-to-justice-for-ukraine-war-crimes--/47416668. Access on: 23 Feb. 2023.

[32] SUPREME COURT AREIOS PAGOS. *Prefecture of Voiotia v. Federal Republic of Germany n. 137/1997, 4 May 2000*. Available at: https://www.internationalcrimesdatabase.org/case/3247. Access on: 23 Feb. 2023.

[33] THE CONSTITUTIONAL COURT. *Judgment n. 238, 2014*. Available at: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf. Access on: 23 Feb. 2023.

[34] SUPREME COURT AREIOS PAGOS. *Prefecture of Voiotia v. Federal Republic of Germany n. 137/1997, 4 May 2000*. Available at: https://www.internationalcrimesdatabase.org/case/3247. Access on: 23 Feb. 2023.

early as 1992, the District Court of the District of Columbia in Princz v. Federal Republic of Germany noted that immunity could not be applied to a lawsuit against Germany by a Holocaust survivor who had been a concentration camp survivor, because such acts were barbaric and violated fundamental human rights. Although this conclusion was later overturned on appeal, the reasoning of the first instance court itself demonstrates the controversy of applying immunities to cases involving serious human rights violations[35].

In January 2021, the Central District Court in Seoul, South Korea, ordered the Japanese government to compensate 12 South Korean victims for sexual slavery committed by members of the Japanese Army during World War II (the Comfort Women case). The court noted that the doctrine of state immunity is not permanent or static, and it was not created to allow states that have violated peremptory norms and caused serious harm to individuals of other states to evade reparations and compensation[36].

In September 2021, the Brazilian Supreme Court ruled that a state's jurisdictional immunity ceases to function if it commits illegal acts related to human rights violations. The case concerned compensation to the relatives of 10 deceased sailors of the Changri-La, which was sunk by a German submarine near Rio de Janeiro in 1943. The court concluded that unlawful acts committed by foreign states in violation of human rights do not enjoy immunity from jurisdiction. It is noteworthy that the Brazilian court referred, in particular, to the decision of the Seoul Court[37]. The Federal Supreme Court of Brazil was the first and only court to recognize that the application of state immunity in such circumstances was incompatible with the right of victims to truth so far[38].

Finally, the practice of the Supreme Court of Ukraine is worth noting. In April and May 2022, the Supreme Court issued two interesting and important decisions. In its ruling of April 14, 2022 in case No. 308/9708/19, the Court stated that in cases of compensation for damage caused to an individual, his or her property, health, life as a result of Russia's armed aggression, the foreign defendant state does not enjoy judicial immunity against the consideration of such cases by the courts of Ukraine. The second important aspect of this position of the Court, by which it overturned the previous practice, is that since 2014, there is no need to send requests to the Russian Embassy in Ukraine for Russia's consent to be a defendant in cases of compensation for damage in connection with the Russian Federation's armed aggression against Ukraine and its disregard for the sovereignty and territorial integrity of the Ukrainian state. And starting from February 24, 2022, such a request is also impossible due to the severance of diplomatic relations between Ukraine and Russia[39].

On May 18, 2022, the Supreme Court of Ukraine adopted Resolution No. 760/17232/20 in the case on jurisdictional immunities, where it set out the rationale for denying immunities in a more structured manner. According to this position, the Court denied Russia's jurisdictional immunity because: upholding Russia's jurisdictional immunity would deprive the plaintiff of effective access to court, which is incompatible with the provisions of paragraph 1 of Art. 6 of the ECHR; the judicial immunity of the Russian Federation does not apply in view of customary international law codified in the UN Convention on Jurisdictional Immunities of States and Their Property, 2004; maintaining Russia's immunity is incompatible with Ukraine's international legal obligations in the field of counter-terrorism; Russia's judicial immunity is not applicable in view of the violation of Ukraine's state sovereignty by this country, and therefore is not an exercise by Russia of its sovereign rights protected by judicial immunity. Based on the foregoing, the Supreme Court concluded that Russia has no right to further invoke its judicial immunity, thereby denying the jurisdiction of Ukrainian

[35] UNITED STATES DISTRICT COURT. District of Columbia. *Princz v. Federal Republic of Germany, 23 Dec. 1992*. Available at: https://law.justia.com/cases/federal/district-courts/FSupp/813/22/1807808/. Access on: 23 Feb. 2023.

[36] SOUTH KOREA. Seoul Central District Court. *Joint Case n. 2016/505092, 2021*. Available at: http://lbox.kr/detail/%EC%84%9C%EC%9A%B8%EC%A4%91%EC%95%99%EC%A7%80%EB%B0%A9%EB%B2%95%EC%9B%90/2016%EA%B0%80%ED%95%A9505092. Access on: 23 Feb. 2023.

[37] BRAZIL. Supremo Tribunal Federal. *Recurso Extraordinário com Agravo 954.858*. Rio de Janeiro, 23 Aug. 2021. Available at: https://portal.stf.jus.br/processos/downloadPeca.asp?id=15347973404&ext=.pdf. Access on: 23 Feb. 2023.

[38] TERZIEVA, V. State immunity and victims rights to access to court, reparation, and the truth. *International Criminal Law Review,* v. 22, n. 4, p. 780-804, 2022.

[39] UKRAINE. The Supreme Court of Ukraine. *Resolution n. 308/9708/19, 14 Apr. 2022*. Available at: https://supreme.court.gov.ua/supreme/pres-centr/news/1270169/. Access on: 23 Feb. 2023.

courts to consider and resolve cases on compensation for damage caused by such acts of aggression[40].

Thus, the case law of Ukrainian courts has recognized the absence of Russia's immunities for crimes committed as a result of armed aggression on the territory of Ukraine and the legitimacy of bringing them to justice. In addition, in general, the case law reviewed above shows that the approach of inviolability of state immunities is outdated and requires revision and updating in light of the current situation.

### 3.3 Ukraine's actions to deprive the aggressor country of its immunities

From the very beginning of Russia's aggression, Ukraine launched a powerful offensive on the legal front. This includes proceedings before the International Court of Justice and the European Court of Human Rights, cooperation with the International Criminal Court, appeals to the OSCE Moscow Mechanism, and consultations on the establishment of a special criminal tribunal for crimes committed on the territory of Ukraine. Having analyzed the situation in the international community, we note that many countries have imposed a record number of sanctions in the first days of the war, including the "blocking" of a significant number of assets belonging to the aggressor state, including the assets of the Central Bank of Russia, as well as the assets and property of Russian oligarchs, corporations, and banks. General estimates of the size of such assets vary. However, the blocked reserves of the Central Bank alone amount to $415 billion[41]. However, the blocking of assets does not mean their automatic transfer to Ukraine.

The National Council for the Recovery of Ukraine from the Consequences of the War, established by the President of Ukraine in April 2022, presented a Recovery Plan for Ukraine. Among many points, the Plan addresses the lack of a national and international mechanism for compensation for damage caused by Russia's aggression[42]. To do this, it is proposed to: introduce national legislation to limit the sovereign immunity of foreign states, which will be consistent with the international law of important jurisdictions; create an international compensation mechanism based on a multilateral treaty that will ensure the confiscation of Russian assets of Russians/other designated categories of persons in order to redirect them to compensate for the damage caused to Ukraine.

In order to recover compensation from Russia for the damage caused, it is necessary to overcome both immunities: jurisdictional and enforcement. This is a difficult but achievable task. Such practice also exists.[43] Courts in Italy, Greece, and South Korea have already denied immunity to aggressor states: Germany and Japan. The courts of these countries motivated their decisions, among other things, by the fact that states cannot abuse sovereign rights and that recognizing immunity would lead to injustice and denial of justice. Ukraine has already followed this path in its lawsuits against the aggressor Russia. Most of the decisions to deny sovereign immunity to the aggressor state (Russia) have been made by Ukrainian courts. So far, in at least 83 decisions and rulings on claims against Russia for compensation for damage from armed aggression in Ukraine, Ukrainian courts have seized Russian property and denied it immunity.

It should be noted that neither the law of important jurisdictions nor general international law contains exceptions to the abolition of sovereign immunities of states in cases of damage caused on the territory of another state by the armed forces and other organs of the state during an armed conflict. The International Court of Justice also believes that states enjoy sovereign immunities in cases of damage caused during an armed conflict. Here is a brief summary of the case. In 2008, Germany filed a lawsuit against Italy, demanding that the Court recognize that Italy did not respect the jurisdictional immunity that Germany enjoys under international law. This arose as a result of Italy's allowing civil claims against Germany to be brought in Italian courts

[40] UKRAINE. The Supreme Court of Ukraine. *Resolution n. 760/17232/20, 18 May 2022*. Available at: https://supreme.court.gov.ua/supreme/pres-centr/news/1282788/. Access on: 23 Feb. 2023.

[41] VODIANNIKOV, O. The art of legal warfare: how to deprive the aggressor state of jurisdictional immunities. *LB*, 26 Aug. 2022. Available at: https://lb.ua/blog/oleksandr_vodennikov/523500_mistetstvo_yuridichnoi_viyni_yak.html. Access on: 23 Feb. 2023.

[42] A PLAN for the recovery of Ukraine. *Ukraine Recovery Conference*, 2022. Available at: https://ua.urc2022.com/plan-vidnovlennya-ukrayini. Access on: 23 Feb. 2023.

[43] BAZALUK, O.; YATSENKO, O.; ZAKHARCHUK, O.; OVCHARENKO, A.; KHRYSTENKO, O.; NITSENKO, V. Dynamic development of the global organic food market and opportunities for ukraine. *Sustainability,* Switzerland, v. 12, n. 17, 2020. DOI: 10.3390/SU12176963.

to compensate for damage caused by violations of international humanitarian law committed during World War II. In its 2012 judgment in the case of jurisdictional immunities of a state (Germany v. Italy), the International Court of Justice recognized that customary international law continues to require that a state be granted immunity in the case of torts allegedly committed in the territory of another state by the armed forces and other organs of the state during an armed conflict. The Court also noted that, assuming that the rules of the law of armed conflict prohibiting murder, deportation and slave labor were jus cogens, there was no conflict between these rules and the rules on state immunity. The two sets of rules dealt with different issues. The rules of state immunity were limited to determining whether the courts of one state could exercise jurisdiction over another state. They did not address the question of whether the conduct in question was lawful or unlawful[44]. Despite this practice, it cannot be argued that its revision is impossible. In addition, the court should also take into account new circumstances that have arisen in connection with the current conflict. For example, the case between Germany and Italy concerned a conflict that took place before the creation of the UN and the adoption of almost all current international law. The current conflict has different features. In addition, the approaches of states to this issue have changed. In the end, international law simply needs new, bolder and tougher actions to make the international law system work. Thus, we believe that in the context of stripping Russia of its immunities, the judgment in Germany v. Italy as the only correct option. New measures should be taken to abolish state immunity in violation of jus cogens.

In addition, from a legal point of view, Ukraine is currently in a state of individual self-defense within the meaning of Article 51 of the UN Charter. The right of a state to individual self-defense is recognized by the same Article 51 of the UN Charter as an inalienable right of every state. Therefore, it recognizes the right of a state that has become a victim of the use of force (and in our case, internationally wrongful aggression) to take all lawful measures for self-defense, including derogation from international legal norms and obligations (except for peremptory norms). Such derogation is legitimate during the entire period of individual self-defense[45]. These rules were codified in the Articles on the Responsibility of States for Internationally Wrongful Acts of 2001, approved by the UN General Assembly[46]. In other words, Article 51 of the UN Charter is the basis for derogation from the international legal obligations of the state vis-à-vis the aggressor state, as well as for the application of countermeasures in response.

The application of Article 51 of the UN Charter in judicial practice should eliminate the problem of retroactive effect of legislative restrictions on sovereign immunities, as the courts will apply the rule that already exists at the time of the damage caused by the aggression against Ukraine. This approach also gives the Ukrainian court the right not to apply the rule on absolute immunity provided for in Article 79 of the Law of Ukraine On Private International Law", which has not been repealed and remains in force, but to apply the rule of higher legal force - the provisions of the UN Charter, i.e. an international treaty[47].

The state can and should assist Ukrainian citizens and businesses affected by the armed aggression in obtaining compensation from Russia in court. For this purpose, a law should be adopted that would deprive Russia of immunities for claims related to armed aggression. In addition, it is advisable for Ukraine to introduce new mechanisms at the legislative level to help plaintiffs more effectively seek compensation from Russia in court. Ukrainian procedural law should provide for the right of courts to order the seizure of Russian property around the world.

This is, of course, not a complete list of legislative changes that the Ukrainian legal system needs to effectively prosecute Russia. But it is very important that allied states change their legislation at the same time.

It is worth noting that war crimes and crimes against humanity have no statute of limitations, and the pro-

[44] INTERNATIONAL COURT OF JUSTICE. *Jurisdictional immunities of the state*: Germany v. Italy: greece intervening. 2012. Available at: https://www.icj-cij.org/en/case/143. Access on: 23 Feb. 2023.

[45] UNITED NATIONS. *Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations*. 1971. Available at: https://digitallibrary.un.org/record/202170. Access on: 23 Feb. 2023.

[46] UNITED NATIONS. *Responsibility of states for internationally wrongful acts*. 2001. Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf. Access on: 23 Feb. 2023.

[47] UKRAINE. *Law "On Private International Law", Document n. 2709-IV, 2005*. Available at: https://zakon.rada.gov.ua/laws/show/2709-15#Text. Access on: 23 Feb. 2023.

cess of prosecuting crimes committed during the war in Ukraine is likely to take years. Any efforts to prosecute and conduct trials will require sustained political will and financial resources for many years to come. States should increase their financial support to the International Criminal Court in all areas to enable it to be as effective as possible[48].

It should be emphasized that the decisions of the International Criminal Court against Russia are important for the whole world. J. Goldston, Executive Director of the Open Society Justice Initiative, expressed an interesting opinion on this issue, emphasizing that the hasty prosecution of egregious war crimes in Ukraine and the crime of aggression may make it difficult for states to ignore calls for accountability the next time a powerful actor like Russia crosses international rules. The international community's response to the atrocities in Ukraine should include not only the means to ensure justice in this case, but also a renewed commitment to the values and mechanisms of international justice that are reliable, fair, and serve those affected by crimes wherever they occur[49]. So, let us emphasize once again that Ukraine's victory and the punishment of the Russian Federation is important for the entire international community. We believe that a qualitatively new stage in the development of international law has now begun, which should create a solid foundation for the peaceful existence of countries, put an end to acts of aggression, and finally create a mechanism of sanctions for states that violate international law.

## 4 Discussion

In general, among scientific studies, there are certain scientific works relating to the issue of state immunities, which the author relied on in his own analysis. For example, the general theoretical issues of state immunities are considered in the work of the Ukrainian scholar V. Vedkal. His article describes the essence and peculiarities of the principle of state immunity, which is universally recognized. The researcher relies on the dispositive nature of its character and the existence of the right to use it. At the same time, the researcher refers to the retrospective of the emergence of state immunity and the way it has evolved from a customary norm to a recognized principle. V. Vedkal examines the peculiarities of the application of the types of immunity: judicial immunity, state immunity from preliminary injunctive relief, state immunity from enforcement of decisions and state property immunity, as well as their characteristic features. The Ukrainian researcher also analyzes two main approaches to the application of state immunity: absolute immunity, based on the sovereign equality of states; functional immunity (limited), in which the state, acting as a sovereign, always enjoys immunity. The theoretical approaches to the description of immunities and the conclusions drawn by V. Vedkal in the article, were also used by the author of this article when writing it[50].

The issue of judicial practice in the context of state immunities was revealed in the work of the researcher from the Netherlands V. Terzieva. In her article, the author thoroughly reviewed several court cases concerning the issue of state immunities. Based on her analysis, she concluded that "foreign states do not enjoy jurisdictional immunity for claims based on violations of international jus cogens law committed on the territory of the forum state". In the article, she examines the readiness of the international community to adopt a new approach to state immunities, which has replaced the outdated understanding of state responsibility. The author examines whether such a potential exception has any basis in the previous case law on the application of the rule to claims arising from acts that can be qualified as international crimes in the forum state. International courts have not specifically addressed the question of whether the rule of state immunity applies to acts that can be characterized as jus cogens violations or international crimes committed within the territorial state, unless there were alternative mechanisms for the victims to exercise their right of access to a court. Recognition by the responsible state of an individual right to claim compensation for serious violations of international law during armed conflict could provide victims with reparation in the form of satisfaction. The conclusions of V. Terzieva suggest that it is high time for states to

[48] BRITCHENKO, I.; SAVCHENKO, L.; NAIDA, I.; TREGUBOV, O. Areas and means of formation of transport regional complexes and mechanisms for managing their competitiveness in Ukraine. *Ikonomicheski Izsledvania*, v. 29, n. 3, p. 61-82, 2020.

[49] GOLDSTON, J. How to hold Russia accountable for war crimes in Ukraine. *Open Society Foundation*, July 2022. Available at: https://www.opensocietyfoundations.org/explainers/how-to-hold-russia-accountable-for-war-crimes-in-ukraine. Access on: 23 Feb. 2023.

[50] VEDKAL, V. State immunity, its types and concepts of realization. *Legal Scientific Electronic Journal,* v. 9, p. 296-298, 2021.

agree on new approaches to understanding immunities and sanctions for state violations of key norms of international law[51].

In this context, it is worth noting another Ukrainian author, O. Marchenko. The main idea of his work points to the imperfection of the procedure for the enforcement of decisions of international judicial institutions. He describes interesting thoughts on the existing judicial practice and options for a possible solution to the situation based on the existing practice of different states. He also provides some suggestions for possible punishment of Russia[52].

The issue of bringing Russia to justice has also been addressed in the works of several scholars. For example, we can take into account the scientific works of the Ukrainian researcher O. Vodiannikov. He has written several scientific papers in which he has raised topical issues of state immunities and their application in the context of punishing Russia. The author of this article also cites some excerpts from his work. O. Vodiannikov emphasizes that the cost of war for the Ukrainian economy, infrastructure and population is growing every day. He emphasizes that the existing mechanisms are imperfect, and many of the ideas voiced by officials have no procedural justification. Thus, the international community will have to take additional measures to bring Russia to criminal responsibility, impose economic sanctions, and collect reparations. To achieve this, the existing issue of state immunities must first be reconsidered. Wie also emphasizes that there is no uniform approach in the practice of states to determining the scope of such immunities. In addition, he outlines the shortcomings of current proposals to bring the aggressor to justice. For example, O. Vodiannikov notes that the proposal to limit immunity in accordance with the international law of important jurisdictions is reasonable and long overdue for the reform of Ukrainian legislation. However, it is helpless for the purposes of holding the aggressor liable for the damage caused in a Ukrainian court. In general, the scholar provides a significant number of good ideas and comments, which the author of this article also draws attention to[53].

Another work that reveals the peculiarities of Russian responsibility is the work of the English author J. Crawford. She also emphasizes the need for a judicial procedure to bring Russia to justice, in particular through the International Criminal Court. She emphasizes that there is hundreds of evidence of Russia's crimes against humanity, human rights violations, use of prohibited weapons, etc. With this in mind, J. Crawford emphasizes that despite Russia's open statements about not recognizing court cases against it and condoning international law, it will still have to answer to the International Criminal Court[54].

Nevertheless, despite the fact that this issue has been partially addressed in academic research, it is very relevant in the current circumstances. The issue of state responsibility has many problematic aspects that have remained unresolved for a long time, and the war in Ukraine has clearly proved this. This necessitates the creation of specific measures to bring Russia to justice and prevent similar situations in the past. Moreover, preventive and deterrent measures will apply not only to Russia, but also to other countries that dare to violate international law.

First of all, it is worth noting that the violations committed by Russia are not just certain shortcomings in its activities as a party to certain private law agreements. This is a huge disrespect for international law in general and a violation of all the basic jus cogens and erga omnes. Therefore, we will consider the deprivation of immunities and prosecution of the state in the context of violation of jus cogens.

Therefore, we believe that in order to create an effective mechanism to counter violations of international law and punish violations of fundamental norms, we need to be guided by four components: international non-recognition; demilitarization; criminal punishment; and economic compensation.

[51] TERZIEVA, V. State immunity and victims rights to access to court, reparation, and the truth. *International Criminal Law Review,* v. 22, n. 4, p. 780-804, 2022.

[52] MARCHENKO, O. An Aggressor with undermined immunity: how courts direct Russia's money to compensate for war losses. *Yevropeiska Pravda,* 8 June 2022. Available at: https://www.eurointegration.com.ua/articles/2022/06/8/7140806/. Access on: 23 Feb. 2023.

[53] VODIANNIKOV, O. The art of legal warfare: how to deprive the aggressor state of jurisdictional immunities. *LB*, 26 Aug. 2022. Available at: https://lb.ua/blog/oleksandr_vodennikov/523500_mistetstvo_yuridichnoi_viyni_yak.html. Access on: 23 Feb. 2023.

[54] CRAWFORD, J. Will Russia's leaders be brought to justice for Ukraine War Crimes? *SWI*, 10 Mar. 2022. Available at: https://www.swissinfo.ch/eng/politics/will-russia-s-leaders-be-brought-to-justice-for-ukraine-war-crimes--/47416668. Access on: 23 Feb. 2023.

With regard to international non-recognition, everything is more or less clear. It may include: economic sanctions; refusal to cooperate; prohibition of participation in any economic, political, cultural, sports international events; severance of diplomatic relations; termination of trade relations; termination of logistics and supply; prohibition of entry into the territory of other states; termination of residence permits and visas, etc. In the modern world of globalization, it is very important for a state to be able to exist under conditions of complete total blockade. However, there is always an open question about some countries that, despite being blocked by the whole world, continue to cooperate with the aggressor. In this case, such countries should be subject to similar punishment.

In addition, speaking about the actions of the international community, we should not miss the moment of countering force with another force. Any military invasions and acts of aggression should be immediately punished with similar collective forceful responses. Only then can there be an effective deterrent.

The second component identified by the author is demilitarization. Violating states must be fully demilitarized. If a country has violated international law in the context of the use of force and has endangered the territorial integrity and sovereignty of another state, it must definitely be demilitarized. This is necessary in order to prevent any acts of aggression on its part in the future, including any revanchism. The absence of punishment for crimes leads to the fact that such a country feels impunity. It may be willing to repeat it in the future if it has the military power and potential to do so. With this in mind, the aggressor state must be demilitarized. In order to take appropriate action, all states must express unity.

In order for militarization measures to be applied in practice, there must be a court decision. The existing UN court is not suitable for this, as its competence extends only to states that have given their consent. Therefore, an ad hoc tribunal should be created within the framework of this process, which would have the authority to issue orders for the demilitarization of the aggressor. In addition, along with the tribunal, a body should be established to implement the measures and to monitor that the state against which the measures were taken does not build up new military capabilities.

In our opinion, a big problem is the lack of a mechanism to influence the offending state, which is a permanent member of the UN Security Council and has the right to veto. Current events in Ukraine have shown that the system of international law must be completely revised. A mechanism of effective deterrence and punishment must be created.

The third component is criminal penalties. Persons guilty of executing criminal orders, violating the laws and customs of war, violating human rights, etc. must be punished. History already knows about war crimes tribunals. Among the most famous tribunals is the Nuremberg Tribunal. It was the first and worked from November 1945 to October 1946. This international process set a precedent for the international legal competence of humanity over the criminal regime of a single country. It was a trial of a criminal regime, not of a country and its people.

The Nuremberg Tribunal tried criminals from European countries, so the International Tribunal for the Far East was created for criminals from Japan. Also worth mentioning is the International Criminal Tribunal for the former Yugoslavia, established by a UN Security Council resolution in 1993. It investigated war crimes during the wars in the former Yugoslav republics in 1991-2001. Similar independent civilian tribunals have been established: The 1973 Tribunal for Latin America; the 1974-1976 Tribunal for Chile (held in Rome); the 2001 Tribunal for Human Rights Violations in the Field of Psychiatry (held in Berlin); the 2004 Tribunal for Iraq (held in Brussels); the 2009-2012 Tribunal for Palestine (held in Barcelona, London, Cape Town, and New York)[55]. Therefore, there is already a precedent in international law for holding criminals accountable for their crimes. Thus, there is no need to create a separate procedure when establishing the Tribunal for Russian criminals. It is known and tested in practice.

An international tribunal is a court of universal jurisdiction operating under international law, which is constantly changing and improving during the course of such a tribunal. An international tribunal is created to assess the situation of war according to specially de-

[55] LATYSHEVA, O.; ROVENSKA, V.; SMYRNOVA, I.; NITSENKO, V.; BALEZENTIS, T.; STREIMIKIENE, D. Management of the sustainable development of machine-building enterprises: a sustainable development space approach. *Journal of Enterprise Information Management*, v. 34, n. 1, p. 328-342, 2020. DOI: 10.1108/JEIM-12-2019-0419.

veloped principles, rules and procedures, which then become precedents. Despite all the criticism of international tribunals, their most important function is not to punish those responsible for mass crimes, but to self-evaluate the bestial nature of humanity, which sometimes wakes up and leads to the loss of humanity. That is why Ukraine, when promoting the idea of an international tribunal for Russia, should proceed from the principles of international tribunals formulated by Ukrainian philosopher Datsiuk [56].

It is worth noting that some states and international organizations have already called for the establishment of tribunals for Russia. The idea of a tribunal was proposed by the Council of Europe to investigate and prosecute the crime of aggression committed by the political and military leadership of the Russian Federation. According to the Council of Europe's proposal, the tribunal should also have the power to issue international arrest warrants and not be limited by state immunity or the immunity of heads of state and government and other public officials[57]. In November 2022, the NATO Parliamentary Assembly recognized the Russian Federation as a terrorist state and called on the international community to take collective action to establish an international tribunal to prosecute the crime of aggression committed by Russia during its war against Ukraine[58]. At the same time, the European Commission stated that the EU would work to establish a special criminal tribunal to investigate and prosecute the crime of Russian aggression, and the European Parliament called Russia a terrorist state[59].

In addition, the following countries have already supported the idea of establishing a tribunal for Russia: Canada, the United Kingdom, Estonia, Turkey, Poland, Latvia, Greece, Lithuania, France, the Netherlands, the Czech Republic, Italy, and Germany.

According to the Minister of Foreign Affairs of Ukraine D. Kuleba, Ukraine proposes to base the future special tribunal on five main parameters:

a) The special tribunal will be based on the rules and approaches applied by the International Criminal Court and set forth in its Rome Statute. It will investigate and prosecute crimes of aggression against Ukraine committed on its territory, as defined in Article 8 bis of the Rome Statute.

b) The Special Tribunal's jurisdiction will cover all events since February 2014, the beginning of Russia's armed aggression against Ukraine.

c) The Special Tribunal will have jurisdiction over individuals who exercise effective control over or directly direct the political or military actions of the state.

d) The official status of the defendant, such as the status of the head of state or the official status of another official, will not exempt such a person from individual criminal liability or mitigate the punishment.

e) The special tribunal will consider only crimes of aggression against Ukraine and will be established as an international criminal ad hoc tribunal[60].

Ukraine has already had court verdicts against Russian war criminals. For example, in May 2022, the Solomianskyi Court of Kyiv sentenced a Russian soldier who killed an elderly civilian man in Sumy region in February 2022. Also in January 2023, the Chernihiv District Court handed down a 12-year sentence to three Russian soldiers who tortured and killed civilians in the village of Yahidne, Chernihiv region. Trials of other war criminals are ongoing.

Thus, the author believes that a tribunal and criminal punishment is an integral part that should be applied to all those involved in the Russian aggression in Ukraine. It is also extremely important not only to punish the

[56] DATSIUK, O. International tribunals as tools of humanity. *Ukraiinska Pravda*, 31 July 2015. Available at: https://blogs.pravda.com.ua/authors/datsuk/55bb216c36b7e/. Access on: 23 Feb. 2023.

[57] COUNCIL OF EUROPE. Pace calls for an ad hoc international criminal tribunal to hold to account perpetrators of the crime of aggression against Ukraine. *Council of Europe*, 28 Apr. 2022. Available at: https://www.coe.int/en/web/portal/-/pace-calls-for-an-ad-hoc-international-criminal-tribunal-to-investigate-war-crimes-in-ukraine. Access on: 23 Feb. 2023.

[58] NATO PARLIAMENRARY ASSEMBLY. *NATO post-madrid summit*: fit for purpose in the new strategic era: resolution 479. 22 Nov. 2022. Available at: https://www.nato-pa.int/download-file?filename=/sites/default/files/2022-11/RESOLUTION%20479%20-%20%20NATO%20POST%20MADRID%20.pdf. Access on: 23 Feb. 2023.

[59] FIEDLER, T. EU proposes setting up specialized court to try Russian war crimes, *Politico,* 30 Nov. 2022. Available at: https://www.politico.eu/article/eu-ursula-von-der-leyen-propose-set-up-court-russia-war-crime-ukraine/. Access on: 23 Feb. 2023.

[60] A SPECIAL tribunal for the leadership of the russian federation: kuleba names five key parameters. *Analytical portal "Word and Action",* 14 July 2022. Available at: https://www.slovoidilo.ua/2022/07/14/novyna/pravo/specztrybunal-kerivnycztva-rf-kuleba-nazvav-pyat-osnovnyx-parametriv. Access on: 23 Feb. 2023.

criminals. It is also important to show all countries that crimes and acts of aggression, as well as violations of international law and human rights, will be punished. This will be an important deterrent for countries in the future.

The fourth component is economic compensation. Before we get to it, it is worth paying attention to the unprecedented actions that took place in the United States. U.S. President Joe Biden in late 2022 signed a law allowing the U.S. Department of Justice to transfer some forfeited assets to the State Department to aid Ukraine. On 02 February 2023 a U.S. court ordered the forfeiture of 5.4 million dollars belonging to sanctioned Russian businessman Konstantin Malofeev. The ruling by District Court Judge Paul Gardef in federal court in Manhattan was the first order to confiscate the Russian oligarch's assets since the Justice Department created a KleptoCapture interagency task force in 2022 to enforce sanctions imposed by the United States and its allies in response to Russia's invasion of Ukraine.

Malofeev, who denies funding the separatists, was placed under Washington sanctions the same year and charged with violating them in 2022. Late last year, prosecutors said in court that they had the right to confiscate the money in Malofeev's account at Sunflower Bank in Denver because he tried to transfer it to a business partner in violation of US sanctions. Since the oligarch did not challenge the confiscation request, prosecutors said that the funds should be confiscated by default, and the court approved the decision. The court's decision opens the way for the possible use of confiscated funds to rebuild war-torn Ukraine[61].

This is a specific practical case. Thus, on the one hand, the seizure of a particular person's assets from the Russian Federation may at first glance appear to be a violation of his or her rights. However, if we consider this issue in detail, based in particular on the case law of the ECHR, we can state that a restriction on certain human freedoms are permissible if their implementation poses a risk to other people, violates their safety, threatens national security and territorial integrity, etc.[62] From this perspective, we can see that the confiscation of assets of a person who actively supports a criminal regime that violates jus cogens, any norms of international law and commits outright crimes against humanity can be considered legitimate. Moreover, this court verdict is a precedent that will allow the assets of other participants who support the aggressor country or participate in violations of international law to be confiscated in the same way. Money, property and other assets may be confiscated in similar procedures in different countries. A similar procedure can be applied to state assets and assets of legal entities from Russia associated with the criminal regime and violation of international law. Thus, persons who openly supported the violation of international law should be punished accordingly, including economic punishment. Based on all of the above, we believe that the confiscation of assets in this case is justified and lawful.

In other words, in order to confiscate and transfer assets to Ukraine, it is necessary to:

a) The state in which the financial assets (money, real estate, property, etc.) are located adopts a law that allows the competent authority of that state to confiscate the assets and transfer them to Ukraine. Such a transfer can be made either by creating a separate body or by direct coordination between the competent authority of that state and Ukraine.

b) The prosecutor's office or other authorized investigative authorities shall conduct an investigation to identify such assets and establish the facts of the violation.

c) Based on the investigation materials, the court of the state issues a verdict on the confiscation of assets and their transfer to Ukraine.

This procedure may be applied in the future. The transfer of assets to Ukraine will set a precedent and help harmonize all legal and procedural issues. In the future, the same procedure can be applied to any aggressor state.

There is only one issue that remains open - the immunity of the state when it comes to state assets. In order to finally overcome the unresolved approaches to state immunities in the context of violation of jus cogens, we believe that it is necessary to resolve this

[61] COHEN, L. Russian oligarch ordered to forfeit $5.4 mln to U.S.: Ukraine may get funds. *Reuters,* 2 Feb. 2023. Available at: https://www.reuters.com/world/europe/russian-oligarch-ordered-forfeit-54-mln-us-ukraine-may-get-funds-2023-02-02/. Access on: 23 Feb. 2023.

[62] OSIEJEWICZ, J. Judicial review of EU legislation as an instrument to ensure consistency of national and EU Law. *Ius Gentium,* v. 61, p. 361–375, 2017.

issue at the international level. For example, by adopting a UN General Assembly Resolution. If we refer to the provisions of paragraph 2 of Article 11 of the UN Charter, the UN General Assembly is authorized to adopt resolutions on general principles of cooperation in the maintenance of international peace and security submitted to it by any UN Member State or the UN Security Council or by a non-member state[63]. Thus, at the level of the UN General Assembly, it is possible to adopt a resolution on the revocation of any immunities of a state that has committed acts of aggression and violated fundamental norms of international law. Thus, we believe that the current approach to immunity is outdated and does not meet the requirements of the present. The international community should revoke the immunities of any state that has clearly violated jus cogens and collectively take practical steps to prevent such actions by any state. The problem of the absence of a sanctions mechanism in international law clearly demonstrates the imperfection of the system, which must be corrected.

## 5 Conclusion

Thus, it should be noted that the consequence of sovereign immunities is the removal of a foreign state and its property from the jurisdiction of a national court. This means that it is impossible to file a lawsuit against a foreign state, apply interim measures to such a state and its property, or foreclose on its funds and property. This is a state right guaranteed by the UN Charter and a number of international treaties. In the practice of states, there is no single approach to determining the scope of such immunities: both absolute jurisdictional immunities, such as those introduced in Ukraine, and limited (functional) immunities of foreign states are applied.

Despite the fact that the practice of international courts tells us that state immunities are inviolable, the practice of national courts of individual states shows a completely different picture. We believe that this practice of states is evidence that the issue of state immunities and the impossibility of limiting them should be reconsidered.

The current situation is the beginning of a new stage in the development of international law. It proves once again that the policy of appeasement of the aggressor has never been effective. The Second World War showed us this. This is also demonstrated by Russian aggression. Therefore, in order to prevent such a situation from happening again in the future, states, led by Ukraine, must create an effective mechanism for depriving the aggressor state of its immunities. In addition, Russia should be held accountable for its crimes and a mechanism should be created to bring any offending state to justice in the future. In addition, the existence of a mechanism of specific sanctions for violations of international jus cogens law will be a significant deterrent and prevent such crimes from happening again in the future.

In order to punish Russia for its acts of aggression, the international community needs to take the following measures: international non-recognition; demilitarization; criminal punishment; economic compensation.

The analysis shows that the issue of bringing the aggressor country to justice is not limited to Russia and Ukraine. The problem lies much deeper. Russia's aggression against another sovereign state is only an identifier that has revealed a long-standing problem. This problem lies in the improper use of state immunities, the lack of mechanisms for punishing violations of fundamental international legal norms, and the absence of procedural aspects of compensation for economic damage. Therefore, the conclusions drawn by the author in this article can serve not only to punish Russia and compensate for certain losses to Ukraine, but also to further develop a mechanism of punishment for violations of international law. An effective sanctions mechanism has long been lacking in international law.

Returning to the issue of legislative restriction of the sovereign immunity of foreign states, it should be recognized that such a restriction is long overdue. Its introduction is actually dictated not so much by the war as by the introduction of Council of Europe standards and, globally, by the harmonization of Ukraine's legal order with the main approaches of the legal orders of our allies in this war. Unfortunately, the legislator has wasted time to properly and effectively introduce countermeasures in the form of depriving the aggressor sta-

[63] UNITED NATIONS. *Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations*. 1971. Available at: https://digitallibrary.un.org/record/202170. Access on: 23 Feb. 2023.

te of its sovereign immunities. This can be remedied by the courts by applying Article 51 of the UN Charter as a basis for refusing to recognize the aggressor's immunities in respect of any damage caused during the aggression against Ukraine.

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