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Foreign state immunity in the context of Russia's full-scale aggression against Ukraine

Імунітет іноземної держави в умовах повномасштабної агресії РФ проти України

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Abstract

The article aimed to find ways to restrict Russia's right to State immunity legitimately. However, the study of international legal acts and national legislation of Ukraine using the methods of systematic analysis and formal legal and comparative legal methods proved the difficulty in solving this task. Thus, in Russia's aggression against Ukraine, the latter is not obliged to comply with the doctrine of State immunity to Russia. This is due to economic and social expediency, the principle of mirroring international relations, and the inevitability of punishment for war crimes against another State and for violating international criminal law. Therefore, the article proposes legitimate restriction of Russia's State immunity for Ukraine and third countries. For Ukraine, the solution to this problem lies in the legislative consolidation of a direct exception to the doctrine of State immunity to any aggressor state, including Russia. For any third country, the solution to this problem is either changing national legislation or concluding bilateral agreements with Ukraine. This will allow for recovery of damages at the expense of property in third countries and owned by Russia itself, its authorities and officials, or legal entities

Анотація

Метою дослідження стало пошук шляхів легітимного обмеження права суверенного імунітету РФ. Але дослідження міжнародно-правових актів та національного законодавства України за допомогою методів системного аналізу, формально-юридичного та порівняльно-правового методів, демонструє складність у вирішення поставленої задачі. Зроблені висновки стосовно того, що в умовах агресії РФ проти України, остання не зобов'язана дотримуватись правила суверенного імунітету по відношенню до РФ. Це обумовлюється економічною та суспільною доцільністю, принципом дзеркальності міжнародних зносин, а також невідворотності покарання за порушення міжнародного кримінального права та скоєння воєнних злочинів проти іншої держави. Тому були запропоновані напрямки легітимізації обмеження імунітету РФ, як для України, так і для третіх держав. Для України вирішення цієї проблеми лежить у законодавчому закріпленні прямого виключення у застосуванні принципу імунітету держави по відношенню до будь-якої держави-агресора. в том числі і РФ. Для будь-якої третьої країни, вирішення цієї проблеми лежить

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and individuals recognised as involved in the war against Ukraine.

Keywords: compensation for damage, international legal acts, national courts, state immunity, war crimes.

або через зміну національного законодавства, або шляхом укладення двосторонніх угод з Україною. Це дасть змогу звернути стягнення за рахунок майн, яке знаходиться в третіх країнах та належить або власне РФ, або її органам влади та посадовим особам, чи юридичним і фізичним особам, які визнані причетними до війни проти України.

Ключові слова: військові злочини, відшкодування збитків, імунітет держави, міжнародно-правові акти, національні суди.

Introduction

The sovereignty of any state determines its international legal personality, i.e. the ability to independently resolve issues related to achieving its goals of civilisation development in relations with other states. Its recognition by the international community guarantees any State's freedom of participation in international affairs. This right is enshrined in the relevant international legal acts and is defined as the main principle of global development introduced after World War II. Faced with global challenges related to the aggression of some states against others, the victorious states developed, in their opinion, an effective architecture of the new world in which peace and mutual respect of States as equal subjects of international relations should prevail.

The new system of global legal order required the creation of an effective method of guarantees for the practical realisation by all States of their international legal personality. One of these guarantees is State immunity, governed by the principle of "*par in parem non habet imperium*" – an equal has no power over an equal.

Its value is reflected in the guarantees enshrined in international legal acts concerning the non-extension of the judicial jurisdiction of one State to another. That is, the immunity of a State does not allow, without the consent of that State, to initiate legal proceedings in the courts of other States, both those relating to direct claims – in personam (i.e. directly against the State) and indirect legal actions – in rem (in which the claim is related to the activities of the authorities of a foreign State or to property belonging to it). Thus, the modern system of international law excludes the possibility of any country's sole decision to initiate cases against another state in its courts, including its authorities and official institutions.

The significance and actualisation of this principle are vital in the context of Russia's armed aggression against Ukraine. Damage, crimes against humanity, war crimes, and the genocide of the Ukrainian people are all modern realities of Russia's manifestation of its international legal personality. In such circumstances and taking into account the principle of "*par in parem non habet imperium*", Ukraine is significantly limited in its ability to demand reparations and compensation for losses caused by Russia by recovering property, including money and other valuables placed by Russia, both in Ukraine and in third countries, for the benefit of the state of Ukraine. And while the issue of Russian assets on the territory of Ukraine can be resolved politically through the introduction of a system of sanctions with subsequent enforcement of all property of Russia located on the territory or in institutions subject to Ukraine's sovereignty, there is no such solution for other States. For them, the violation of the doctrine of State immunity, even in relation to Russia, remains an imperative prohibition on using more active and effective means of countering Russia's armed aggression against Ukraine.

Therefore, the aim of our study is as follows: to establish the possibility of changing the existing doctrine of State immunity about those countries that have committed an act of aggression against third countries, commit war crimes against the population of that country and use the mechanisms of hybrid warfare directed against specific countries, against regional or global security.

Research objectives:

- to define the essence and content of the principle of State immunity in international law;
- to establish the main features of State immunity and its international legal consolidation;

– find ways to apply exceptions to the doctrine of State immunity to countries that commit war crimes, genocide and acts of aggression against third countries.

Therefore, it is necessary to find an international legal way to punish Russia for crimes of aggression and other war crimes against the Ukrainian people committed during the large-scale invasion of Ukraine.

Literature review

The doctrine of State immunity and the principle of "*par in parem non habet imperium*" is a frequent topic of scientific research by the international scientific community, experts in international law, diplomats, international lawyers, etc.

For example, Sanger (2013) refers to practical cases of implementing the principle of "*par in parem non habet imperium*" through its components, such as immunity of special missions, high-ranking officials and State immunity. He considers whether state officials accused of international crimes (including war crimes) can invoke *ratione materiae* immunity from the criminal jurisdiction of a foreign state.

Van Alebeek (2018) explores potential exceptions to the doctrine of State immunity and tries to resolve it by removing restrictions on applying functional immunity when officials are accused of committing international crimes.

Zongwe (2019), using the example of the war in Namibia, demonstrates that even if States have officially declared that they recognise or consent to the jurisdiction of an international or domestic court, one of the parties to the dispute may prevent that court from effectively exercising jurisdiction by filing an objection that this party enjoys immunity. According to him, the issue of immunity arises before national courts more often than any other issue of international law in connection with war crimes and acts of aggression. But the scholar also concludes that it cannot be resolved without developing an effective international legal mechanism and creating a system of global coercive measures to bring the guilty party to justice.

Murphy (2018) notes the attempts of the UN International Law Commission to develop an exception to the doctrine of State immunity by introducing six elements of crimes under international law in respect of which "*ration e materia*" immunity does not apply. Among these crimes, the researcher mentions genocide; crimes against humanity; war crimes; apartheid; torture; and enforced disappearances. However, according to the scholar, all this applies only to individual state officials but should also apply to the State since compensation for damage at the expense of its property has much greater prospects than compensation for damage at the cost of the property of the person held liable.

Matter (2019) from the American Society of International Law try to revise the doctrine of State immunity and offer to start with the baseline of immunity as a matter of customary international law and then try to identify state practice and "*opinio juris*" in support of exceptions to it.

The doctrine of foreign State immunity arose from the principle of diplomatic immunity, in which States treated foreign diplomats as if they were not present in the State's territory and were outside the scope of judicial jurisdiction based on territorial presence. The 2012 ICJ Court judgment in "Germany v. Italy" provides that States are immune from each other's jurisdiction and then considers possible exceptions under customary international law. In other words, considering the traditional nature of the doctrine of State immunity, scholars propose to introduce exceptions to this rule similarly through precedent. This situation is of extreme utilitarian importance for Ukraine. It is due to the need to initiate appropriate legal proceedings against Russia due to the political will of third states.

Possible exceptions to the doctrine of State immunity are extremely relevant and have been raised by the UN Security Council in its appeal to the International Criminal Court (Galand, 2019). The crux of the matter is how exactly the immunity of a State can be limited about its official representative, in respect of whom the International Criminal Court (from now on – the ICC) has issued a warrant. The relevance of this appeal is due to the question raised in it: "Whether a State official from a State not party to the Rome Statute is entitled to invoke its immunity before the ICC when the latter exercises jurisdiction under Article 13 (b)."

Given that Russia can arbitrarily "level" the effect of any internationally recognised conventions and jurisdictions of courts by its acts, the ICC's response to this question is important. Moreover, Russia has already "levelled" the judgments of the European Court of Human Rights (from now on – the ECHR).

Curran (2019) analyses the Foreign Sovereign Immunities Act (from now on – FSIA), passed by Congress and covers all cases where foreign States have immunity from suit in US courts, as well as when the immunity of foreign States should be limited. The researcher considers the expropriation of foreign State property in case of violations of international law by the example of the US courts and notes that today there are clear cases and possibilities of applying the expropriation mechanism in cases of genocide committed by foreign States. However, this practice must be finalised in determining what exactly should be considered a violation of international law.

Perot Bissell and Schottenfeld (2018) examine the issue of international immunity on the example of the lawsuits filed by victims of the September 11 attacks who sued Iran in the Southern District of New York for aiding and abetting al-Qaeda in committing the attacks. Researchers use the court's decision to award Iran $1.8 billion in damages as an international judicial precedent.

According to Ukrainian researchers Bilousov et al., (2021), this US practice is effective and applicable to Ukraine. Congress wanted to ensure plaintiffs could use ordinary state law causes of action to sue foreign States. This approach is not directly relevant to the situation in Ukraine. Still, in recent years, plaintiffs have filed various cases that represent "classic" applications of exceptions to non-commercial torts and those that expand the scope of the classical understanding of non-commercial torts.

According to Atamanova and Kobets (2022), Russia's full-scale aggression against Ukraine gives a new impetus to discussions and resolving fundamental issues regarding the limitation of jurisdictional immunity. Current events prove the need for Ukraine to move from the doctrine of full immunity to the concept of limited immunity as a law that would comprehensively regulate all pressing issues.

The position of Ukraine, supported by other states, can contribute to forming a new customary norm (Atamanova & Kobets, 2022). Vodyannikov (2022) also claims that Ukraine is not in an ordinary situation – from a legal point of view, Ukraine is in a state of individual self-defence within the meaning of Article 51 of the UN Charter.

A State's inherent right to individual self-defence is recognised by Article 51 of the UN Charter as an inalienable right. It identifies the right of a State that has become a victim of the use of force (in our case – of the wrongful act of aggression) to take all lawful measures for self-defence, including derogation from international legal norms and obligations (except for peremptory norms). In other words, Article 51 of the UN Charter is the basis for derogation from the international legal obligations of a state vis-à-vis the aggressor state and for using countermeasures in response.

So, scholars have different opinions regarding the integrity of the doctrine of State immunity. Still, almost all of them agree that it should be limited in cases of direct aggression of one State against another.

Methods and materials

The research methodology aims to determine the possibilities of bringing Russia to justice for aggression and war crimes against Ukraine and the Ukrainian people.

This study proposes the following logical scheme of methodological cognition of the essence of the problem (Figure 1).

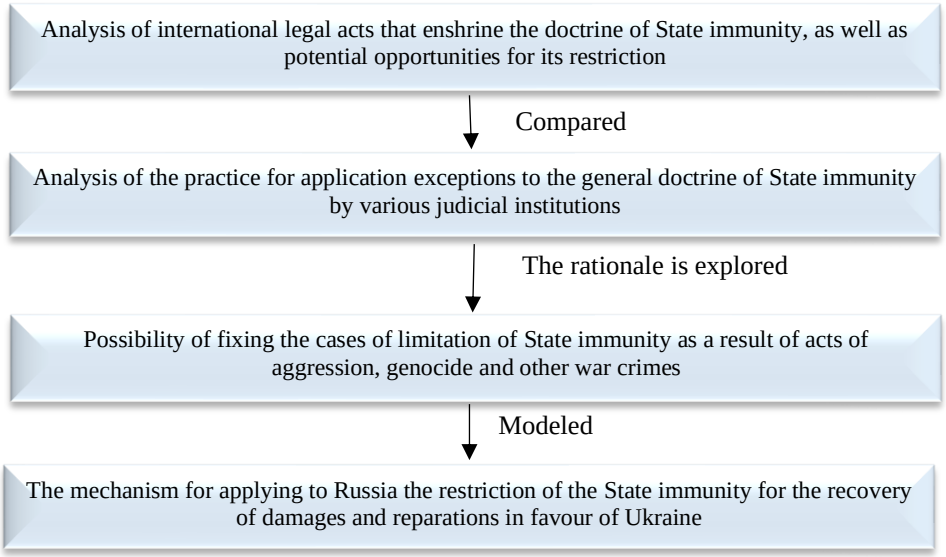

Figure 1. Algorithm for implementing the research methodology.

The study of State immunity is always internationally oriented, which means that the issue of bringing Russia to justice by applying the jurisdiction of third-country courts to it should be resolved at the international level. Restrictions on the right of Russia to State immunity should be utilitarian and therefore universal, i.e., acceptable to the international community.

To this end, this article actively uses a group of methods to systematically analyse the provisions of international legal acts and certain acts of national legislation of some countries. In particular, using the formal legal method made it possible to reveal the essence and limits of applying the doctrine of State immunity in international law.

Systemic analysis and the comparative legal method allow the introduction of restrictions on State immunity. Using the hermeneutic approach, it became possible to determine how to enshrine certain aspects of restrictive State immunity.

In particular, the authors critically analysed Article 51 of the UN Charter; the provisions of the Rome Statute; the ICC's application of the doctrine of State immunity; the ECHR's practice; individual ICC decisions, in particular, the 2012 Judgment of the International Court of Justice (ICJ) in the case of "Germany v. Italy"; the US Foreign Sovereign Immunities Act, etc.

The article discusses the opinion of Ukrainian experts on how to practically apply exceptions to the doctrine of State immunity about Russia by third countries in whose territory the property of the aggressor country is located.

As part of an active expert discussion in the Verkhovna Rada Committee on International Relations and the National Institute for Strategic Studies, it was determined that most experts are inclined to a political solution to the problem of limiting the immunity of Russia in the jurisdictions of third-country courts. However, other opinions on the international legal framework for such a restriction regarding Russia were also considered, which became one of the foundations of this study.

Results

The doctrine of State immunity protects any State from the jurisdiction of any national courts of a third State. In the case of Russia, for Ukraine, the State immunity of the aggressor country means removing its property from the jurisdiction of Ukrainian courts.

At the same time, State immunity does not apply to specific individuals, particularly to all citizens of Russia, by international legal acts. Such international legal acts are the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of March 14, 1975, the Vienna Convention on Consular Relations of April 24, 1963, the Vienna Convention on Diplomatic Relations of April 18, 1961, and the Convention on Special Missions of 1969.

In other words, the jurisdiction of Ukrainian courts extends to the citizens of Russia under the

said exception, which makes it possible to bring them to all types of liability, including criminal and civil liability (compensation for damage, losses) for committing war crimes and crimes against the Ukrainian people. This is the first caveat we should remember when discussing developing an effective mechanism for applying exceptions to the doctrine of State immunity.

State immunity is enshrined in two international legal acts:

- The UN Convention on Jurisdictional Immunities of States and Their Property, adopted by General Assembly resolution 59/38 on December 2, 2004. Moreover, this type of immunity is applied by national courts as a codified set of customary international law; that is, States do not have an imperative to apply this immunity but use it through international custom (Effective Regulation Platform, 2004);
- The European Convention on State Immunity adopted by the Council of Europe on May 16, 1972. This Convention contains the concept of limited State immunity, defines the form in which a State may waive its immunity, and sets out a list of categories of cases in which a State does not enjoy immunity in the court of another State Party (Sivash & Sherstyuk, 2022).

Both Conventions enshrine the State immunity. However, the national courts are not limited when resolving compensation for damage and losses caused by bodily injury or other impact on a person's health.

However, State immunity is limited to the national courts of a State in cases involving harm to the life and health of its citizens. It is mainly used in civil or commercial disputes, but in the context of Russia's attack on Ukraine, we can expand the cases of its application significantly.

The problem is that if we talk about prosecuting specific criminals, we personalise them and separate them from the State. In other words, charging any Russian war criminal by the national courts of Ukraine limits the possibility of recovering damages at the expense of his property alone.

At the same time, the property of the Russian State is not subject to the substantive influence of the national courts of Ukraine. And it is precisely this problem – establishing a clear link between war criminals and acts of aggression, genocide and war crimes of the Russian Federation – that needs to be addressed in a way that would be internationally universalised in limiting Russia's State immunity.

The solution to this problem may be as follows.

First, Ukraine is not a party to any of the above conventions, and therefore it is not obliged to comply with the doctrine of State immunity. However, Article 79 of the Law of Ukraine, "On Private International Law", does enshrine this immunity. In addition, there are also reservations regarding its limitation, set forth in part 4 of the article (Document № 2709-IV, 2022).

Cases of its limitation are determined by mirroring the requirement for other countries to respect Ukraine's State immunity. However, if third countries violate it, Ukraine may also break it about the property or bodies of that country that operate in the territory of Ukraine (representative offices, consulates, etc.).

Secondly, an analysis of the provisions of the above Conventions shows that in case of non-accession to them, the State may decide on applying State immunity based on customary international law. This means that the national courts of Ukraine may use the practice of international courts or even national courts of other States in matters of limitation the State immunity.

Here we should refer to the provisions of Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property, which is the basis for limiting the judicial immunity of a foreign State as a result of physical harm to a person or damage to property, the so-called "tort exception" (Effective Regulation Platform, 2004).

In the decision of the International Court of Justice (ICJ) in the case Jurisdictional Immunities of the State ("Germany v. Italy: Greece intervening") of February 03, 2012, the court expressly established that the possibility of non-application of the immunity of a foreign State to non-payment of compensation for serious human rights violations during an armed conflict committed by the responsible State, especially in the absence of other means of payment, is not a violation of the sovereign rights of another State.

The ECHR reaches a similar conclusion. The ECHR's legal position on the limitation of jurisdictional immunity is reflected in the judgment of March 14, 2013, in the case of

"Oleynikov v. Russia", where the Court made a decision that the State immunity may be limited "by customary international law, even if that State has not ratified it", and the Court must take this fact into account (Sanger, 2013).

Therefore, Ukraine can and should limit Russia's State immunity, especially given the acts of aggression, genocide and ongoing war crimes committed against Ukraine and the Ukrainian people.

Since 2014, the practice of Ukrainian courts, including the Supreme Court, in resolving cases involving claims of Ukrainian citizens against Russia for compensation for damage caused by the armed aggression of Russia is that given the provisions of Article 79 of the Law of Ukraine "On Private International Law", before deciding whether to initiate proceedings in such a case, the Ukrainian court had to find out whether the diplomatic mission of Russia as the competent authority of the State had consented to the consideration of the case in the courts of Ukraine (Document №2709-IV, 2022).

The Supreme Court's case law on the judicial immunity of Russia of the Civil Court of Cassation of the Supreme Court of April 14, 2022, in case No. 308/9708/19, claims that "the court of Ukraine, when considering a case where Russia is the defendant, has the right to ignore the State immunity of this country and consider cases on compensation for damage caused to an individual as a result of the armed aggression, in a lawsuit filed against this particular foreign country" (Case No. 308/9708/19, 2022).

Hence, a foreign State's commission of acts of armed aggression is not an exercise of its sovereign rights but a violation of the obligation to respect the sovereignty and territorial integrity of another State – Ukraine, as enshrined in the UN Charter. This conclusion should form the basis for limiting Russia's State immunity, including through the influence of national courts of third countries on Russia using withdrawal of property of Russia located in the territory of that country in favour of Ukraine as compensation for damages caused by acts of aggression, genocide and other war crimes committed against Ukraine.

Both our conclusion and the above statement are consistent with the Law of Ukraine "On Private International Law" and the practice of other States, as the implementation of the limitation of Russia's State immunity in Ukraine is impossible according to the classical rules set forth in the above Conventions: subject to the consent of another state (Document № 2709-IV, 2022).

Due to Russia's full-scale invasion of the territory of Ukraine on February 24, 2022, Ukraine broke off diplomatic relations with Russia, making it impossible to send various inquiries and letters to the Embassy of Russia in Ukraine since it ceased operating.

According to the legal position of the Supreme Court outlined in the Resolution of the Grand Chamber of the Supreme Court of May 12, 2022, in case No. 635/6172/17, plaintiffs in cases for compensation for damages caused by Russia as a result of military aggression against Ukraine, are paid at the expense of the property of Russia, as well as its legal entities and individuals, who are included in the sanction lists, both national and international (Case No. 635/6172/17, 2022).

Therefore, this rule should become the basis for applying the limitation of Russia's State immunity in the national courts of Ukraine and third countries regarding the recovery of compensation for damages caused by Russia to Ukraine since 2014 due to its aggression and other war crimes.

This rule should be implemented primarily through Ukraine's diplomatic efforts and by concluding bilateral interstate agreements between Ukraine and other countries, the subject of which should be introducing the said rule into the national legislation of such country.

Discussion

The application of the doctrine of State immunity and the grounds for its limitation is one of the most controversial in the context of Russia's aggression against Ukraine. For example, Bellinger et al., (2021) claim that the doctrine of State immunity itself was developed mainly due to the consideration of cases by national courts in proceedings against foreign states.

The right to State immunity is primarily a law developed by a court, which means that court decisions become a source of international law in terms of State immunity, and the doctrine of State immunity itself is not indisputable (Bellinger et al., 2021). According to scholars, it means the possibility and necessity of limiting State immunity to those countries that exert unlawful influence on third countries in violation of international law.

In this context, Yang (2019) draws attention to the Decision of the Supreme Court of Austria of May 10, 1950, in the case of "Dralle v. Republic of Czechoslovakia", which is the starting point in the final formation of the theory of limited State immunity about commercial activities. He also highlights the State Immunity Act of 1978 of Nigeria, which, already at the national level, establishes a limitation of the State's immunity in case of aggressive and unfair policies towards Nigeria (Yang, 2019).

Fox and Webb (2020) draw attention to the legal practice of the United States, which has been changing since 2014 due to Ukrainian realities since the terrorism committed by Russia against Ukraine is a crime of an international nature. Therefore, effective measures are needed to counter it.

But the quintessence, according to Ravenell and Ross III (2022), is the development by the US Congress of the draft law "Ukrainian Sovereignty Act" (H.R. 7205 "Ukrainian Sovereignty Act of 2022"), which proposes to provide that a foreign State shall not be immune from the jurisdiction of the United States courts in any case where monetary damages are sought against a foreign State for bodily injury, including death, property damage, or loss of property, caused by the invasion of another sovereign State located in Europe if such an invasion occurs.

This fully confirms our conclusion regarding the need to introduce limitations on Russia's State immunity in the legislation of third countries due to the aggression against Ukraine.

Some Ukrainian scholars emphasise the need to distinguish between the State's public and private legal interests and the appropriate application of State immunity. For instance, Vedkal and Hadirli (2021) exclude the restriction of Ukraine's State immunity about third states by consolidating this imperative in national legislation. Borshchevska (2021) points out that Ukraine's compliance with this doctrine is its international legal obligation; therefore, applying exceptions to the State's sovereignty is unacceptable.

Kulchii and Lyakhivnenko (2016) bypass the imperative use of this doctrine through the principle of expediency and mirroring of measures taken by states in their international bilateral relations. That is, if Russia, ignoring international law, wages an aggressive war against Ukraine, Russia has abandoned the norms of international law, and Ukraine should not adhere to the rule of State immunity about Russia. Forteau (2018) also stand for the unequivocal removal (deprivation) of any international State immunities of the aggressor State, which is necessary for the seizure of property belonging to this State, for making payments to victims from such property, especially its state property, property of state legal entities, etc.

Authors believes that at the international level, there is a need to establish limits on State immunity and a reasonable balance between the protection of sovereign equality and the fight against impunity in the case of international crimes (Hammers, 2018). It is precisely this impunity that Ukraine must overcome to hold Russia accountable for the damage caused by military aggression.

Conclusions

We define the doctrine of State immunity, which is used in customary international law, as one of the obstacles to bringing the aggressor State of Russia to justice for crimes committed against Ukraine. The essence and content of State immunity is that a State cannot be subject to the jurisdiction of any national court of another state without consent.

This implies a voluntary waiver of immunity by the state. However, such behaviour is not inherent in a country that disregards international law and commits an act of aggression against another independent state. Therefore, by its actions, Russia delegitimises the norms of international law and thus deprives another country of the obligation to observe them about the Russian Federation. The selective application of international law is excluded, as it would collapse the entire global legal order. Therefore, Ukraine should not follow the doctrine of State immunity against Russia and has the full right to recover for the damage caused by Russia due to its military actions. Such recovery is envisaged at the expense of property located on the territory of Ukraine and owned by Russia, as well as the property of Russian legal entities and residents who have been included in any sanctions lists for their role in the aggression against Ukraine.

This imperative, which the judicial system of Ukraine has already developed, is proposed to be enshrined in Part 5 of Article 79 of the Law of Ukraine "On Private International Law". The legal provision we offer to implement should indicate the need to limit the aggressor State's

right to State immunity for committing international criminal offences.

Third countries should apply the same limitation to Russia for its aggression against Ukraine, which should be achieved by concluding bilateral agreements between the States. The subject of these agreements should be a clear provision on extending the jurisdiction of national courts of third countries over Russia, its property, and the property of its legal entities and citizens.

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