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Denial of Russia's Sovereign Immunity in Tort Claims by IDPs in National Courts of Georgian

ABSTRACT:

The occupation of the Abkhazia and Tskhinvali regions by the Russian Federation in 1992-1993 was followed by a complete occupation of 20% of Georgia as a result of the 2008 Russia-Georgia war, when the Russian Federation committed egregious crimes, the genocide of the Georgian people and destruction of their property. By the international community it was recognized as one of the most malicious human rights violations resulting in 300,000 internally displaced persons continuously suffering from material and moral damage due to the ongoing occupation. They are in need of a full and fair restoration of their rights. Therefore, according to international and national law standards, they may be entitled to demand compensation from the Russian Federation for the damages caused by illegal actions in Georgian courts, especially in the conditions when Russia has been expelled from the Council of Europe since March 2022. The European Court of Human Rights (ECtHR) no longer has jurisdiction over new disputes with this country's involvement since September 17, 2022. Therefore, it will not hear such cases as the only means of compensating the IDPs being lodging with national courts.

This research uses a comparative analysis method. The judicial topic is scrutinized by examining decisions of international and foreign courts about the identified problem. The study encompasses an in-depth review of articles focused on this subject, including an exploration of divergent opinions provided in each source.

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Furthermore, the author presents a perspective on resolving the issue, offering a synthesized viewpoint that enriches the ongoing discourse.

Keywords: State Sovereign Immunity, Genocide, National/Domestic Proceedings, Internally Displaced Persons (IDPs), Jus cogens, Peremptory Norms, Egregious Violations of Human Rights, compensate pecuniary and non-pecuniary damages.

I. Introduction

The main obstacle to the above-mentioned proceedings is the principle of state sovereign immunity, profoundly rooted in international law protecting the state from foreign adjudications. According to the sovereign immunity doctrine, the forum state does not possess or possess, but does not extend its own judicial, legislative and executive jurisdiction over the foreign country.[1]

We can trace the beginning of sovereign immunity back to the feudal era. That was the time when kings ruled states. The doctrine of state sovereignty was formed in the 19th century when independent states abundantly in the world. One of the earliest legal depictions of state immunity by the US Supreme Court was the case titled "Schooner Exchange v. M'Faddon." At that time, states were considered equal international players. Thus, exercising jurisdiction over a foreign state was a violation of state dignity and equality. Naturally, this attitude was expressed by the Latin formula appealing to the maximum independence of the sovereign state: par in param non habet imperium (equal has no right to equal).[2]

However, the subsequent change of time led to the thinking modification. The "divine right of kings" was rejected and the sovereignty content changed. Therefore, sovereign immunity was defined differently, i.e., not absolutely but in a somehow

[1] რუხაძე ნ., სამოქალაქო მართლმსაჯულების იურისდიქციისგან სახელმწიფო იმუნიტეტის პრინციპისა და ადამიანის უფლებების ურთიერთმიმართება საერთაშორისო და ეროვნული სასამართლო პრაქტიკის მიხედვით, სადისერტაციო ნაშრომი სამართლის დოქტორის აკადემიური ხარისხის მოსაპოვებლად, ივანე ჯავახიშვილის სახელობის თბილისის სახელმწიფო უნივერსიტეტი, თბილისი, 2012, 12 [rukhadze n., samokalako martlmsajulebis iurisdiktsiisgan sakhelmts'ipo imuniťet'is p'rintsip'isa da adamianis uplebebis urtiertmimarteba saertashoriso da erovnuli sasamartlo p'rakt'ik'is mikhedvit, sadisert'atsio nashromi samartlis dokt'oris ak'ademiuri khariskhis mosap'oveblad, ivane javakhishvilis sakhelobis tbilisis sakhelmts'ipo universit'et'i, tbilisi, 2012].

[2] Belsky A.C., Merva M., Roth-Arriaza N., Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, California Law Review, Vol. 77, 1989, 377-379.

restricted way. In the 20th century, one of the main reasons for the denial of absolute immunity was the participation of governments in commercial relations and the growing number of state trade bodies. That is the performance of non-public functions by states.[3]

II. State Sovereign Immunity in Historical Context

The classical international law system, first compiled by the Dutch humanist Hugo Grotius, set the norms limiting independence of sovereign states with the motive of peaceful coexistence. As Grotius says, there are three types of law: divine, natural, and customary. It is these last two conditions that lead to a different kind of international law. First, it is the required law for nations and states deriving from natural law, while the second is positive, established law obtained via agreements and customs. The essential law of states comprises principles of fundamental importance for a civilized society. As they are derived from natural law, states do not have the power to abolish or modify these rules through their agreements. The law that binds sovereign states is not an outcome of the expression of the governing actors' will, but expresses the sources by which positive law should be evaluated.[4]

Grotius pointed to the conditions to be met by a state to become an equal member of the world community. In his opinion, the war of conquest, which is to acquire property and enslave others, is unjust. This war violates the natural law requirements. Therefore, the one, initiating a war of conquest is responsible for the damage caused by this war and must compensate for it.[5]

The Grotiusian system of natural law regulating international relations was pushed into the background by the ideas of Thomas Hobbes, who influenced the positivism of the 19th century. According to Hobbes, power, not moral principles, determines the limits of human rights. The man seizes his freedom and surrenders this right to the state. Thus, the will of the state becomes the source of every right[6] and not, as Grotius refers to those natural rights outside the state as immutable values.

[3] Cooper C. G., Act of State and Sovereign Immunity: A Further Inquiry, Loyola University Chicago Law Journal, Vol. 12, No. 2, Art.2, 1980, 199–200.

[4] Belsky A.C., Merva M., Roth-Arriaza N., Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, California Law Review, Vol. 77, 1989, 382.

[5] გარიშვილი მ., შესავალი სამართლის ფილოსოფიაში, ლექციების კურსი, თბილისი, 2010, 77 [garishvili m., shesavali samartlis pilosopiashi, lektsiebis k'ursi, tbilisi, 2010, 77].

[6] Hobbes T., Leviathan, London, 1651, xiv.

The first half of the 20th century was a period of world wars that undermined philosophical thinking of positivism. The experience of the first and WWIIs forced international community to reconsider the principles and norms regulating relations. The unheard and unprecedented crimes committed by the Nazi regime were a clear example that the principle established by positivism, sounding "the law is the law," was to be replaced by a more humane principle to reduce a risk of violation of fundamental human rights coming from totalitarian states. The Nuremberg process represents the conditional event that brought the legal order back into the circle of natural law dominance. In this respect, after seeing the crimes of Nazism, German philosopher of law, Minister of Justice of the Weimar Republic – Gustav Radbruch – deviated from positivism and moved his theory of law to the rails of natural law.[7] In "Statutory Lawlessness and Supraq-Statuto-ry Law," Radbruch asks how the justice and legal security conflict can be resolved giving an answer to define the central thesis of his late work: "The dispute between justice and legal security can be resolved as follows: positive law, ensured by legislation and power is superior even if it includes provisions that are unjust and less useful to the people except when the law and dispute between justice reach such an intolerable degree that the law as "deficient justice" must give way to justice... When there is not even an attempt to strive for justice when equality as the essence (core) of justice is deliberately neglected in the development of positive law, the law is not only "defective" but illegal by its very nature. Law, including positive law, cannot be defined otherwise, but the system and institution, with the primary purpose of serving justice...[8]

Therefore, the Nuremberg process practically applies the Radbruch formula, recognizing fundamental principles. These immutable and supreme human values are not subject to their abrogation or change by states.

III. Weakening of State Sovereign Immunity from Absolute to Restricted

The legacy of the Nuremberg Tribunal and its emphasis on individual responsibility put the values of humanity rather than state sovereignty at the center of international law.

[7] Radbruch G., Statutory Lawlessness and Supra-Statutory Law, B. Litschewski Paulson and S. L. Paulson, Oxford Journal of Legal Studies, Vol. 26, No. 1, 2006, 4-5.

[8] Ibid., 5.

As already mentioned, state sovereign immunity was initially formed as absolute immunity, which meant that the states enjoyed immunity before foreign courts about any legal matter regardless of the nature of the legal relationship and proceedings. Whether actions are governmental (Jure imperii) or non-governmental (Jure Gestionis), the state could not be a defendant before a foreign court without its consent.[9]

However, in the 20th century, governments' participation in commercial relations and a growing number of state trade bodies, that is the performance of non-public functions by states, became one of the main reasons for the denial of absolute immunity. A restricted immunity replaced it. It was distinguished from acts of the states (acta jure imperii), i.e., acts of sovereign power, including the acts of the government armed forces, public, state, and non-governmental, i.e., commercial, or private (acta jure gestionis) actions and states were generally granted immunity only in cases related to the second type of actions. As international law on state immunity was developed mainly by national courts balancing important values and public interests to exempt foreign states from local jurisdiction, the replacement of absolute immunity with restricted one was first initiated by Belgian and Italian courts in the late 19th century.[10]

IV. Continuing Erosion of State Sovereign Immunity in Favor of Human Rights

The continuing erosion of the state sovereign immunity primarily concerns changes in international law, which, due to the recognition of imperative norms

[9] Bankas E. K., The State Immunity Controversy in International Law, Private Suits Against Sovereign States in Domestic Courts, 2nd Edition, Springer, 2022, 37-38.

[10] See: Document A/46/10: Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991), Yearbook of the International Law Commission, Report of the Commission to the General Assembly on the Work of Its Forty-Third Session, Vol. II, part 2, 1991, 36, Footnote 111–113; Cf.: Germany v. Italy: The Right to Deny State Immunity When Victims Have No Other Recourse, Amnesty International Publications, 2011, 1-23; Wyrozumska A., Can Human Rights Overcome State Immunity? National Courts at the Crossroads, in: Sovereign Immunity Under Pressure: Norms, Values and Interests, edited by R. Bismuth, V. Rusinova, V. Starzhenetskiy and G. Ulfstein, Springer, 2022, 211. Subsequently, the doctrine of limited immunity was codified into national law by the United States in 1976 with the FSIA (Foreign Sovereign Immunity Act), which went into effect on January 19, 1977, and was ruled by the U.S. Supreme Court to be retroactive, that is, to apply prior to its enactment. The United Kingdom in 1978, Singapore in 1979, Pakistan in 1981, South Africa in 1981, Canada in 1982, Australia in 1985, and Argentina in 1995 adopted restrictive state immunity acts. The Council of Europe also adopted the Basel Convention on State Immunity in 1972 and the United Nations in 2004 which has not entered into force.

(Jus Cogens, Peremptory norms) and development of human rights protection, is no longer understood as only the law of obligations between states. In international law, a specific category of duties was established, saying that states are considered to have them before all members of the international community. These are erga omnes obligations."[11]

In contemporary scenarios, instances of the jus cogens norms in international law include acts like genocide, crimes against humanity, slave trade, unauthorized use of force, egregious human rights violations, piracy, racial discrimination and treaties breaching the rules of war and self-determination principles.[12]

1. Italy's Pioneering Efforts to Erode State Sovereign Immunity Once Again

On the issue of sovereign immunity, more specifically on public, state (Jure imperii) acts of sovereign power in the context of military occupation and aggression, the most extensive saga was caused by the German-Italian dispute in ICJ where Germany won as a claimant.[13]

The dispute's initiation hinges, firstly, on the Italian national courts overcoming Germany's sovereign immunity in civil claims by Italian citizens seeking compensation for the atrocities committed by Nazi Germany during WWII (deportation for forced labor to Germany, the refusal to recognize members of the Italian armed forces as prisoners of war, massive execution of civilians in June 1944 in Civitella, Cornia and San Pancrazio). Concurrently, the trend began with the recognition and enforcement in Italy of decisions by Greek courts against Germany in analogous proceedings,[14] marking the commencement of the enforcement trend. Luigi Ferrini's lawsuit in 2004 marked the inception of this legal process and the subsequent scholarly discourse on this trend was symbolically named after Ferrini's jurisprudence.[15]

[11] Case Concerning the Barcelona Traction, Light and Power Company, Limited, ICJ, 1970, para. 33.

[12] Bankas E. K., The State Immunity Controversy in International Law, Private Suits Against Sovereign States in Domestic Courts, Springer, 2005, 266.

[13] Germany v. Italy: Greece intervening [ICJ], Jurisdictional Immunities of the State, Judgment, 3 February 2012, ICJ Reports, 2012.

[14] A German state property known as "Villa Vigoni" near Lake Como in Italy has been mortgaged by the Italian Supreme Court to enforce a Greek court's decision on damages related to Nazi Germany's extermination of 300 inhabitants of Distomo and the destruction of their property during World War II.

[15] See: De Sena P., De Vittor F., State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case, The European Journal of International Law, Vol. 16, No. 1, 2005.

In the groundbreaking Ferrini case, the Supreme Court of Italy adeptly navigated the delicate balance between sovereign immunity, crucial for maintaining stability in international relations and the jus cogens norms, designed to prevent particularly egregious crimes and hold perpetrators accountable. The court accorded priority to the latter, recognizing its imperative international legal character. In tandem with the Jus Cogens argument, the court gave significant importance to the "tort exception,"[16] asserting that national courts possess the authority to extend jurisdiction over wrongful acts committed in their territory, even when carried out by a foreign state under the guise of "jure imperii."[17]

ICJ's 2012 decision does not reflect a concerted effort to fairly and rationally balance crucial principles of international law.

ICJ highlighted that state immunity underscores a tension between the foundational principles of state equality and territorial sovereignty. The Court acknowledged that exceptions to state immunity deviate from the principle of sovereign equality, while also noting that immunity itself may depart from the principle of territorial sovereignty and the jurisdiction derived from it (paragraph 57). The court further indicated that there is no exception to state immunity solely based on the allegation of a serious violation of International Humanitarian Law or International Human Rights Law (paragraph 90), the entitlement to immunity remains unaffected by the existence or availability of an alternative remedy for redress (paragraph 101-102). As immunity is maintained, there is no need to scrutinize inquiries regarding a direct entitlement of individuals to compensation for breaches of International Humanitarian Law (IHL) and the validity of states waiving claims on behalf of their nationals in such instances (paragraph 108), there is no contradiction between a substantive rule proscribing specific conduct recognized as jus cogens and procedural rule establishing state immunity. Consequently, there is no override of immunity by jus cogens principles (paragraph 93).[18]

[16] The 'territorial tort exception' is a provision found in both the European Convention on State Immunity (Basel, 1972) and the U.N. Convention on Jurisdictional Immunities of States and Their Property (New York, 2004). This rule stipulates that immunity does not extend to tort cases where the plaintiff seeks redress for death or injury to a person, or damage to or loss of tangible property, provided that the harmful act or omission took place within the territory of the court's state. The exception applies if the tortfeasor was physically present in that territory while committing the said harmful act or omission.

[17] Cf.: Fontanelli F., I know it's wrong but I just can't do right: First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court, October 27, 2014. <https://shorturl.at/eBV12> [20.10.2023].

[18] Milanovic M., Germany v. Italy: Germany Wins, EJIL: Talk!, Blog of the European Journal of International Law, <https://www.ejiltalk.org/germany-v-italy-germany-wins/> [20.10.2023].

The court observed that state acts, even if unlawful, could still be qualified as acts jure imperii (paragraph 60). Its rationale for supporting immunity for Germany did not hinge on simply categorizing Nazi acts as sovereign. Instead, the court relied on the settled practice and opinio juris among national courts of various countries at that time. Considering that by 2012, the Italian court was in the minority opposing immunity denial for former torts committed by a foreign state in the forum country during armed conflict (ICJ applied the approach of the Italian courts to the decisions of the courts of Poland, Belgium, Serbia, Canada, Slovenia, New Zealand, United Kingdom, USA, Brazil, Germany and France and two decisions of the European Court of Human Rights – Al-Adsani v. the United Kingdom and Kalogeropoulou and Others v. Greece and Germany). The court concluded that customary international law dictates granting immunity to a State in proceedings involving torts allegedly committed in another state's area by its armed forces during an armed conflict (paragraph 77-78). The court's reasoning did not suggest that had it found a body of case law and opinio juris against immunity, including widespread exceptions to the immunity rule, it would have granted sovereign immunity for Germany in such cases. Ultimately, ICJ sought and found state practice and opinio juris supporting immunity from civil suits by a foreign state in the forum state for acts of armed forces during an armed conflict.[19]

Despite not directly stemming from this perspective, certain authors rightfully assert that ICJ exhibited a selective and biased conservative approach. Simultaneously, the Court seemingly overlooked broader precedent, omitting several decisions opposing granting sovereign immunity to those responsible for damages in cases involving serious human rights violations, especially when there is no alternative remedy for damages.[20] Nevertheless, the Court selectively incorporated or overlooked relevant practices of the US courts, with approximately half of the cited decisions originating from the US legal domain. The omission of crucial decisions addressing legal impediments like serious violations of the jus cogens norms, international humanitarian law, "normative hierarchy theory" and tort exception (Tort Exception) in relation to the application of "Jure Imperii" raises suspicions of deliberate exclusion. This skepticism arises because the broader US jurisprudence does not uniformly

[19] Dodge W. S., Why Terrorism Exceptions to State Immunity Do Not Violate International Law, August 10, 2023, <https://shorturl.at/qvNY0> [20.10.2023].

[20] See: Conforti B., The Judgement of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity, The Italian Yearbook of International Law Online, Vol. 21, 2011, 138-142.

support the notion that states engaging in severe violations of fundamental human rights are entitled to sovereign immunity in proceedings initiated by another country (under FSIA), a stance also observed in Canada (SIA).[21]

It should be noted that the ICJ decision was accompanied by different opinions.[22] Significantly, we should note Judge Cançado Trindade's exceptional 88-page opinion, emphasizing the primacy of the jus cogens norms over the claims of immunity.

As for ICJ's argument that there exists no contradiction between a substantive rule proscribing specific conduct recognized as jus cogens and a procedural rule establishing state immunity. Consequently, there is no override of immunity by jus cogens principles, a procedural norm hindering access to redress, renders the underlying substantive rule practically meaningless. Consequently, divorcing the inherent right from the protective remedies would defy the principle, meaning that rights must be pragmatic and efficacious, not merely theoretical or illusory.[23]

"There is not an atom of sovereignty in the occupant's authority.[24]" One appellate Court held that violations of the jus cogens norms cannot be considered "official acts" (Jure Imperii) for immunity.[25] When a state acts contrary to the jus cogens norms goes beyond the framework of permissible sovereign action, it implicitly waives the right to grant immunity.[26]

Despite the seemingly binding nature of ICJ's decision, in 2014, the Italian Constitutional Court, with its historic decision 238/2014, declared it unconstitutional for it could not be automatically integrated into the Italian legal order and sacrificed the

[21] See: Pavoni R., An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State, Italian Yearbook of International Law, Vol. XXI, 2012.

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

[23] Zubac v. Croatia [ECtHR], Judgement, App. No. 40160/12, April 5, 2018, May 2, 2022, para. 77.

[24] Oppenheim L, The Legal Relations Between an Occupying Power and the Inhabitants, Law Quarterly Review, Vol. 33, No. 4, 1917, 363, 364-65; Dennis M. J., Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation, The American Journal of International Law, Vol. 99, No. 1, 2005, 131.

[25] Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012); Keitner I. C., Sovereignty, Humanity, and Justice: Reflections on U.S. Law of Foreign Sovereign Immunity, in: Sovereign Immunity Under Pressure: Norms, Values and Interests, edited by R. Bismuth, V. Rusinova, V. Starzhenetskiy and G. Ulfstein, Springer, 2022, 19.

[26] Zouapet A.K., Sovereignty, Too Hard-Won to be Wasted... Sovereignty, Immunities, and Values: A (Sub-Saharan) African Perspective, in: Sovereign Immunity Under Pressure: Norms, Values and Interests, edited by R. Bismuth, V. Rusinova, V. Starzhenetskiy and G. Ulfstein, Springer, 2022, 102.

victims' right to a fair trial for the violation of peremptory norms recognized in international Law (Jus Cogens). The sovereign immunity concept should have stayed the same, especially when recourse to national courts was the last resort.[27]

Italian practice had come full circle on the issue of the exclusion of immunity for serious human rights violations that have the status of jus cogens when the act complained of was committed under jure imperii.[28]

In the meantime, Italy became a party to the United Nations Convention on Jurisdictional Immunities of States and Their Property (United et al. on Jurisdictional Immunities of States and Their Property) adopted by the UN General Assembly on December 2, 2004, by resolution N59/38 (Germany is not a party to this Convention).

Enforcement began in some cases.[29] Several German properties were seized in Rome for sale. Because of this, on April 29, 2022, Germany applied to the Hague Court with applications to initiate a case based on Italy's non-compliance with the 2012 decision of this Court and request temporary measures.[30] According to this application, by April 2022, the number of cases in Italy on claims against Germany for the actions of the Reich during the WWII totalled more than 25 cases. Minimum 15 of them were ruled. Germany requested Italy to cease such legal acts to immediately take adequate measures and prevent such cases in the future as well as damages for violating the sovereign immunity and temporary measure to stop such sales.[31]

Perhaps, the outcome of the temporary measure was predictable at this stage, but of course, we cannot say the same about the longevity and results of the trial

[27] See: De Sena P., The Judgment of the Italian Constitutional Court on State Immunity in Cases of Severe Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law, Questions of International Law, Vol. I, 2014, <https://shorturl.at/acinT> [20.10.2023]; Pinelli C., Decision no. 238/2014 of the Constitutional Court: Between Undue Fiction and Respect for Constitutional Principles, Vol. I, 2014, <http://www.qil-qdi.org/prova-2-4/> [20.10.2023]; Pavoni R., Simoncioni v. Germany, The American Journal of International Law, Vol. 109, No. 2, 2015, 400-406.

[28] Walker L. C., Foreign State Immunity & Foreign Official Immunity: The Human Rights Dimension, A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy, University of Sydney, 2018, 179.

[29] Giorgio v. Germany, Judgment of the Court of Bologna No. 2892/2011; Judgment of the Appellate Court of Bologna No. 2120/2018; Cavallina v. Germany, Judgment of the Appellate Court of Rome No. 5446/2020.

[30] Germany Institutes Proceedings Against Italy for Allegedly Failing to Respect Its Jurisdictional Immunity as a Sovereign State, Unofficial Press Release No. 2022/16 of April 29, 2022, International Court of Justice.

[31] Application Instituting Proceedings Containing a Request for Provisional Measures Filed in the Registry of the Court on 29 April 2022, Questions of Jurisdictional Immunities of the State and Measures of Constraint Against State-Owned Property (Germany v. Italy), International Court of Justice.

itself. The decisions of the Constitutional and General Courts put the International Court in a very awkward position. It faced a new, significant problem. In particular, it should discuss the scope of jurisdiction of local (state) courts and, most importantly, their independence. The latter is of fundamental importance in international law. Besides, it is problematic to overcome the decision of the Italian Constitutional Court both from the status of this Court and from the essence of the decision. However, the situation changed rapidly. The dispute ended with the states' agreement in the International Court of Justice. Italy undertook to satisfy the victims and Germany made an application.

The content of the diplomatic negotiations is unknown, but it is conceivable that several circumstances caused such a move by Italy:

- The assumption that the International Court of Justice and Italian Constitutional Court would remain faithful to the earlier decision;
- Based on the previous practice of inter-state disputes underway for 20 years, one more decade would likely be necessary. The results would not have changed the situation substantially;
- In this situation, the satisfaction of the immediate victims would be highly illusory;
- The Italian state approached the issue of protecting the interests of its citizens not formally due to endless continuation of disputes but based on democratic standards of taking care and being responsible for them;
- We make a prudent assumption that this responsibility was also for Italy being an ally of Germany during the WWII.

These quick measures included the following:

On April 30, 2022, the Italian President issued Decree-Law №36 on further emergency measures to implement the National Recovery and Resilience Plan.[32] Notably, the decree was signed on April 16, almost a week before Germany submitted its application to the International Court of Justice, indicating that the Italian authorities acted in good faith, unilaterally, with the motives mentioned earlier. However, in such a case, it needs to be clarified why Germany hastened submitting the application when the diplomatic negotiations preceded and Italy conducted these talks constructively.

[32] See: Testo coordinato del decreto-legge 30 aprile 2022, No. 36, <https://shorturl.at/mqKQ5> [20.10.2023].

Under Article 43 of the Decree, a fund was established for Italian citizens. Between September 1, 1939 and May 8, 1945 they were victims of military and crimes against humanity committed in Italy or, in any case, due to violations of their integrity by the Third Reich forces to compensate for the damage. A total of 55,424,000 EUR is expected to be accumulated in the fund by 2023-2026, while the Italian government finances it. The fund is available to those having received a final decision that has determined and assessed their right to compensation. The final decision must be rendered within the framework of proceedings launched before the the Decree Law enforcement (i.e., May 1, 2022) or within 30 days after the law's enforcement. No new enforcement proceedings may be instituted. The ongoing ones, in turn, will be terminated.

Thus, we have a specific settlement between the parties, which, in general, cannot resolve the legal problem. The same applies to our research issue, the decision of which, due to this precedent, remains postponed indefinitely. Although certain conclusions from the point of view of such disputes' outcome (consideration, enforcement) and specifically perspective of the Italian legal position are already sufficiently clear:

- The decree is not the final act. It still needs to be approved by the Italian Parliament;
- The decision No. 238/2014 of the Italian Constitutional Court is valid and will not be changed. In any case, there are no preconditions for its revision in the near or distant future;
- Litigation continues. Italian courts will continue receiving lawsuits, make decisions on them, effective enforcement and, accordingly, the satisfaction of the victim is ensured;
- Germany is the defendant in the already accepted decisions of the Italian courts and it will be the same in future lawsuits as well. Italy has only undertaken to compensate for the damage, which is the prerequisite for applying to the fund. Accordingly, Germany's sovereign immunity in civil damage cases in Italian courts has been defeated and will remain so. Moreover, within the framework of the decree, a settlement is possible between the claimant and the German state, which must be conducted under the condition of non-immunity in the Italian court system;
- Germany's demand for Italian guarantees non-repetition of the actions that looked weak. Following the Constitutional Court decision, giving such guar-

> antees by representatives of other branches of government is impossible and absurd. No one can infringe on the independence of the judiciary. To support such a demand on the part of democratic Germany would put it in a very uncomfortable position in the trial;

The case situation fails to prevent it. On the contrary, it helps the plaintiffs and Italian justice to overcome the sovereign immunity of Germany or another country. In other matters of jus cogens, claims may be granted. Besides, enforcement may be launched and carried out.

2. Ukraine – a New Beginning, Continuation of Jurisprudence Initiated by Italy in 2004

Building upon the Ferrini jurisprudence (2004) set by the Italian courts, Ukrainian courts extended the precedent by rejecting Russian sovereign immunity in the context of civil tort claims filed by Ukrainians. This development comes in the aftermath of Russia's military aggression against Ukraine in February 2022. Notably, several leading authorities have recognized Russia's actions in Ukraine as constituting genocide.[33]

Against Russia's military occupation of Ukrainian territories since 2014 and current war, the Ukrainian courts overcame Russia's sovereign immunity in several cases. According to authoritative sources, Ukrainian first instance courts issued minimum eight decisions on compensation for damage caused by the military aggression of the Russian Federation. The most prominent claim totalls UAH 154 million. The aggressor country was obliged to pay 173 million hryvnia for damage caused to Ukrainians. In the beginning of 2023, 209 cases remained pending before the national courts on the Russian compensation for property and moral damage to Ukrainian people and companies. More often, citizens having lost their property for the armed aggression of the Russian Federation go to the Court. There are many such cases in the courts. As of January 30, 2023 a total 154,7 of them are already in the appealing phase. Only 55 claims of damages by the aggressor are submitted by businesses. According to a study by the Russia Will Pay project KSE Institute experts, at least 109 large and medium-sized enterprises suffered direct losses for

[33] See: Musiienko O., The Evolution of Russia's Genocide against the Ukrainian People, Analytical Report, Kyiv, 2022, 39.

the full-scale Russian invasion in 2022.[34] The Russian invasion caused more than $97 billion in direct damage to Ukraine through June 1 alone.[35] Most appealed cases were pending before the full-scale invasion. Their claims were met. However, the courts fully satisfy almost all claims filed after February 24, 2022, provided that the amount of property and moral damage was proven.

The landmark decision by the Supreme Court of Ukraine on April 14, 2022 set the precedent for bypassing Russia's sovereign immunity in Ukrainian courts. The court ruled that since the harm occurred in Ukraine's sovereign territory, invoking the territorial tort exception in the 1972 Basel European Convention and the UN Convention on Jurisdictional Immunities is warranted. The damage, attributed to Russian agents violating the UN Charter principles against military aggression, negates sovereign immunity. The act of military aggression violates its obligations to respect Ukraine's sovereignty, rendering Russia ineligible for jurisdictional immunity. Under the Ukrainian principle of "general delict," any damage in Ukraine due to wrongful actions can be compensated through court judgments.[36]

As mentioned above, the courts, which overcame the sovereign immunity of the respondent states, relied on the opinion of the jus cogens norms as maxims hierarchically above immunity. Besides, the concept that such norms' violation does not occur only before the citizens of a particular state. Besides, their protection obligation is the responsibility of the responding state before the entire humanity. The international community considers the jus cogens norms to be war crimes. It also assesses them as crimes against humanity, including the genocide prevention, which also implies the prevention of massive destruction of property.

3. Georgia's Opportunity to Follow the Courageous Legal Path of Italy and Ukraine

The Law of Georgia on Occupied Territories states the international crime – armed aggression and military occupation committed by the Russian Federation in the sov-

[34] Over 173 million UAH in compensation already awarded by Ukrainian courts to Russia, <https://opendatabot.ua/en/analytics/courts-ua-russia> [01.03.2024].

[35] Shalal A., Rebuilding Ukraine after Russian Invasion May Cost $350 Bln, Experts Say, Reuters, September 9, 2022, <https://shorturl.at/dfzS9> [01.03.2024].

[36] See: Karnaukh B., Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with Regard to Tort Claims Brought by the Victims of the Russia-Ukraine War, Access to Justice in Eastern Europe, Vol. 5, No. 3, 2022, 165-177.

ereign territory of Georgia, Abkhazia and Tskhinvali region. In accordance with international legal norms and principles, the law holds the Russian Federation accountable for both material and moral damages suffered by displaced persons, recognizing it as a violator of universally recognized human rights within occupied territories.[37]

The Law of Georgia on internally displaced persons from occupied territories establishes the status of a victim – an internally displaced person.[38] Simultaneously, the law clearly describes the reasons for forced displacement, which also represents a massive, outrageous violation of the fundamental norms and principles of international law.[39]

Apart of illegal military aggression and occupation, subsequent events indicate that Russia is taking actions for the complete annexation of Abkhazia in a gross violation of the international law principles. For example, on August 26, 2008 it recognized independence of Abkhazia by presidential decree № 1260.[40] In 2009-2020 Russia's direct transfer to the so-called Abkhazia budget totalled 63.2 billion Ruble, while in 2022-2023 it equalled 18 billion.[41]

The Russian aggression, genocide[42]/ethnic cleansing in Abkhazia's territory is mentioned in the legal acts of the Parliament of Georgia.[43]

[37] See. Article 1 and 7 of the Law of Georgia "On Internally Displaced Persons from the Occupied Territories of Georgia." See also: Georgia v. Russia (II) [ECtHR] Judgment, App. No. 38263/08, 21 January 2021, and Mamasakhlisi and Others v. Georgia and Russia [ECtHR], Judgment, App. No. 29999/04 and 41424/04, 7 March 2023.

[38] Article 6 of the Law of Georgia "On Internally Displaced Persons from the Occupied Territories of Georgia."

[39] Ibid.

[40] See: Указ Президента Российской Федерации от 26.08.2008 г. № 1260, <http://www.kremlin.ru/acts/bank/27957> [01.03.2024].

[41] <https://shorturl.at/quCEL> [20.10.2023].

[42] See: Shankar P., Before Bucha in Ukraine, There Was Abkhazia in Georgia, <https://shorturl.at/kBHO9> [20.10.2023].

[43] See for example: Resolution of the Parliament of Georgia "On the Russian Military Units on the Territory of Abkhazia", February 25, 1993; Resolution of the Parliament of Georgia "On Withdrawal of Military Units of the Russian Federation from the Conflict Zone of Abkhazia", April 27, 1993; Resolution of the Parliament of Georgia "On Apartheid and Racist Legislative Practices in the Autonomous Republic of Abkhazia", March 10, 1994; Resolution of the Parliament of Georgia "On the Supreme Authority of the Autonomous Republic of Abkhazia", of February 24, 1995; Resolution of the Parliament of Georgia "On Measures to Settle Conflicts in Abkhazia", April 17, 1996; Statement of the Parliament of Georgia "Regarding the Work of the Inter-Factional Conciliation Group", March 20, 1997; Resolution of the Parliament of Georgia "On Measures to Ensure Implementation of Chapter VII of the UN Charter in Abkhazia", March 30, 2002; Resolution of the Parliament of Georgia "On Gross Violation of Human Rights in Abkhazia and Tskhinvali Region Occupied by the Russian Federation and "Otkhozoria-Tatunashvili List", March 21, 2018.

Several international legal acts[44] are essential for the qualification the Russian aggression outcomes and occupation of Georgia's territories, with the genocide, ethnic cleansing and crimes against humanity:

It was first indicated in the declaration of the OSCE Budapest summit on December 6, 1994. The following was noted: "The participating states expressed deep concern about the ethnic cleansing" and expulsion of the population – mainly Georgian – from their places of residence and the death of a large number of innocent citizens."

The declaration of the OSCE Lisbon summit of December 3, 1996, says: "We reaffirm our full support for the sovereignty and territorial integrity of Georgia within its internationally recognized borders." We condemn the "ethnic cleansing" which resulted in the mass destruction and forced expulsion of mainly Georgian population of Abkhazia."

The OSCE summit declaration of Istanbul dated January 17-18, 1999, says: "We reiterate as set out in the documents of the high-level meetings in Budapest and Lisbon that we resolutely condemn the ethnic cleansing that led to the physical destruction and violent expulsion of the mainly Georgian population from Abkhazia, Georgia, and Acts of violence of 1998 in Gali region."[45]

The declarations of the OSCE Budapest, Lisbon and Istanbul summits appear in the UN Security Council's periodic resolutions.

The case of Georgian IDPs is severe. Unlike the Nazi regime, which ended and Germany condemned the worst crimes committed by its predecessors, the Russian occupation lasted more than 30 years.

In addition, it is crucial that, in general, domestic and international law does not remain frozen. It is a living organism develop according to time, circumstances and views. The doctrine of the "evolutionary definition"[46] and "living instrument" (established in the legal practice of the European Court since 1978 – Tyrer v. United Kingdom, 1978) is the fundamental pillar of all modern legal systems. It provides the fundamental legal basis of all international and high-ranking domestic treaties and

[44] See also: Georgia v. Russia (II) [ECtHR] Judgment, App. No. 38263/08, 21 January 2021, and Mamasakhlisi and Others v. Georgia and Russia [ECtHR], Judgment, App. No. 29999/04 and 41424/04, 7 March 2023.

[45] Istanbul Summit Declaration, para 17 in: Istanbul Document 1999, OSCE, Istanbul, 2000, 49.

[46] See: Evolutionary Interpretation and International Law, edited by G. Abi-Saab, K. Keith, G. Marceau and C. Marquet, Hart Publishing, 2019.

ensures the act's flexibility, viability and effectiveness (constitution, etc.). This is the general trend of international law. In the US it is called a "living constitution" and in Canada – a "living tree."

"The Convention is a living instrument which, as the Commission properly pointed out, must be understood in the light of current conditions."[47] This classic definition is invariably transferred from case to case. "The Convention is a living instrument, which must be interpreted in the light of current conditions and ideas that prevail today in democratic states."[48]

Therefore, the "evolutionary development" principle applies to court definitions and decisions and a general understanding of human rights. This is a broad concept of human rights, the main characteristic of which is the development of collective guarantees for the protection of human rights and freedoms and the establishment of increasingly high standards of rights protection.

The Vienna Convention on the Law of Treaties of the United Nations (May 23, 1969, enforced in Georgia on 08/07/1995) contains several elements that separately and together indicate the use of "evolutionary interpretation" in interpreting an international agreement.[49]

The unmistakable sign of "evolutionary definition" in this norm is:

- The terms "in good faith" and "ordinary meaning" of the "object and purposes of the contract" (Article 1);
- Any subsequent practice of the contract application, based on the parties' agreement on its interpretation (Article 31.3 b);
- Any relevant norms of international law applicable in the relations between the parties (Article 31.3 c).
- The possibility of applying the definitions of the European Court of Human Rights and Fundamental Freedoms (Article 31(3) (b) and (c)).

Another circumstance, namely Article 32, should also be noted. It indicates that "referring to the preparation materials and the circumstances of its laying" is only a secondary source of the definition. In addition, the UN Court of Justice applies this principle.[50]

[47] Tyrer v. The United Kingdom [ECtHR], judgement, App. No. 5856/72, 25 April 1978.

[48] Bayatyan v. Armenia [ECtHR], judgement, App. No. 23459/03, 7 July 2011.

[49] The Vienna Convention on the Law of Treaties of the United Nations, Article 31.

[50] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, Judgment of 16 December, I.C.J. Reports 2015., Pauwelyn J., Elsig M., The Politics of Treaty Interpretation:

While the Italian Constitutional Court's decision is present, it will be complicated for the UN Justice court to overcome this decision during alleged retrials against Italy or another country, for it is difficult to avoiding conflict with the principle of independence of local courts and solve the case against this one. Besides, it is difficult to imagine that the Ukrainian courts will stop the flood of overcoming the sovereign immunity of Russia.

In the case "Jones v. Saudi Arabia," British judge Lord Birmingham criticized Italy's decision to waive sovereign immunity for Saudi Arabia in the first decision.[51] As mentioned earlier by the Court, which led to the UN Court of Justice's consideration of the German claim ironically saying that "one swallow cannot bring about a rule of international law." However, in the same legal literature, an elegant answer was given to this after the decisions mentioned above of the Italian Constitutional Court and the General Courts: it is no longer "one swallow" creating justice but several decisions during the year.[52] From our side, we say that the actions already taken by the leading states for the war between Russia and Ukraine, the accompanying legal definitions will bring spring for the Ukrainian victims and Georgian IDPs as well. Current general unification against Russia, the flood of international sanctions against it, including property confiscations based on specific events (Russia's invasion of Ukraine, the genocide of the Ukrainian people, and the occupation of territories) emphasize the need of intensified protection of their rights during the most severe massive human right violations. Therefore, sacrificing the right of the displaced persons to a fair trial and granting sovereign immunity to a country not recognizing Georgia's sovereignty and territorial integrity contradicts the fundamental values of international law and causes a legal vacuum.

In light of the perpetration of genocide, military aggression, war crimes, crimes against humanity and the continuing occupation of Georgian territories, Russia is found to be in breach of its obligations to uphold Georgia's sovereignty. As a result of this violations, Russia forfeits its entitlement to jurisdictional immunity,

Variations and Explanations Across International Tribunals, <http://ssrn.com/abstract=1938618> [20.10.2023].

51 Ferrini v. Federal Republic of Germany, Court of Cassation, judgment No 5044 of 6 Nov. 2003, registered 11 Mar. 2004.

52 Walker L. C., Foreign State Immunity & Foreign Official Immunity: The Human Rights Dimension, A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy, University of Sydney, 2018, 180.

particularly given its expulsion from the Council of Europe since March 2022. The European Court of Human Rights ceased to have jurisdiction over new disputes involving Russia as of September 17, 2022.[53] Consequently, the recourse of Internally Displaced Persons (IDPs) to Georgian National courts stands as the last resort for seeking redress, given the prevailing circumstances. This assertion aligns with the stipulations of Article 992 of the Civil Code of Georgia, specifically outlined in Section Three, Torts, Chapter One, General Provisions. The said article establishes that an individual who, whether unlawfully, intentionally, or negligently, inflicts harm upon another party is obligated to compensate for the resulting damage incurred by the aggrieved party. In the context of the ongoing infringements of rights suffered by Internally Displaced Persons (IDPs), they maintain the legal entitlement to seek restitution for damages directly from the Russian state through the avenues provided by national courts.

V. Conclusion

The Nuremberg process stands as a pivotal moment, reintegrating legal order within the realm of natural law dominance. The enduring legacy of the Nuremberg Tribunal, with its pronounced emphasis on individual responsibility, has successfully repositioned the core values of humanity above the traditional sovereignty of states within the framework of international law. Notably, Italian courts have consistently exhibited a practice aimed at circumventing sovereign immunity in cases against Germany, holding Nazi Germany accountable for egregious human rights violations that deeply offend the collective conscience of humanity.

Drawing a parallel, the current practice of Ukrainian courts offers a compelling precedent. This practice is grounded in the context of the February 2022 invasion of Ukraine by Russia, marking the initiation of a large-scale war against Ukraine. Significantly, numerous authoritative sources have acknowledged Russia's activities in Ukraine as meeting the criteria for genocide.

This robust legal precedent established by Ukrainian courts provides a compelling argument for Georgian Internally Displaced Persons (IDPs) to pursue analogous legal proceedings before Georgian courts. In light of the historical resonance of the

[53] European Court of Human Rights, The Russian Federation ceases to be a Party to the European Convention on Human Rights, Press Release issued by the Registrar of the Court, ECtHR 286 (2022), 16.09.2022.

Nuremberg principles and the consistent trajectory of Italian and Ukrainian legal practices, Georgian IDPs have a strong foundation to seek justice in Georgian courts for the violations they have endured.

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