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Суд

# PRACTICE OF THE SUPREME COURT IN CASES RELATED TO THE WAR IN UKRAINE

Vitalii Urkevych

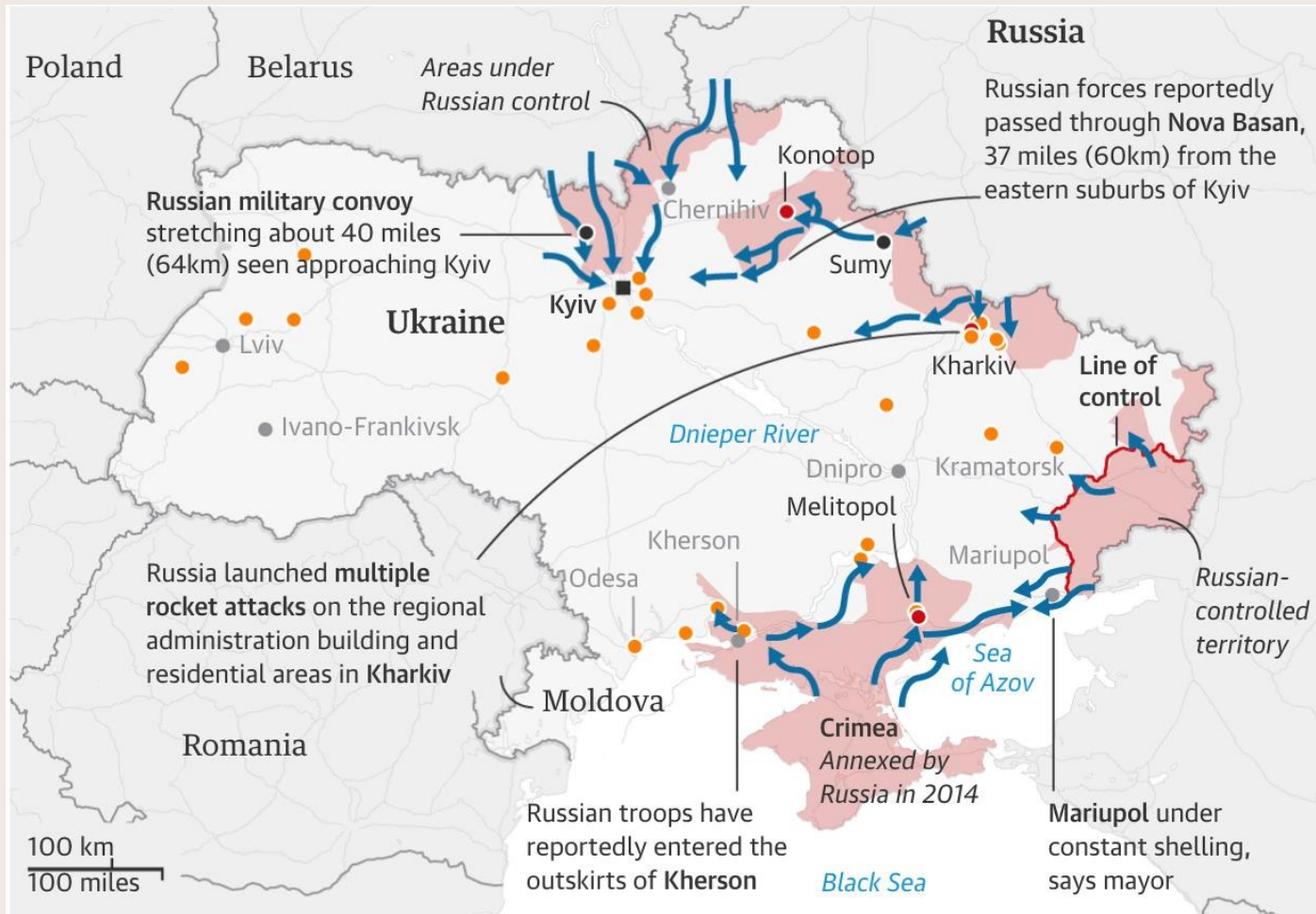
LL.D., Professor,

Secretary of the Grand Chamber of the Supreme Court

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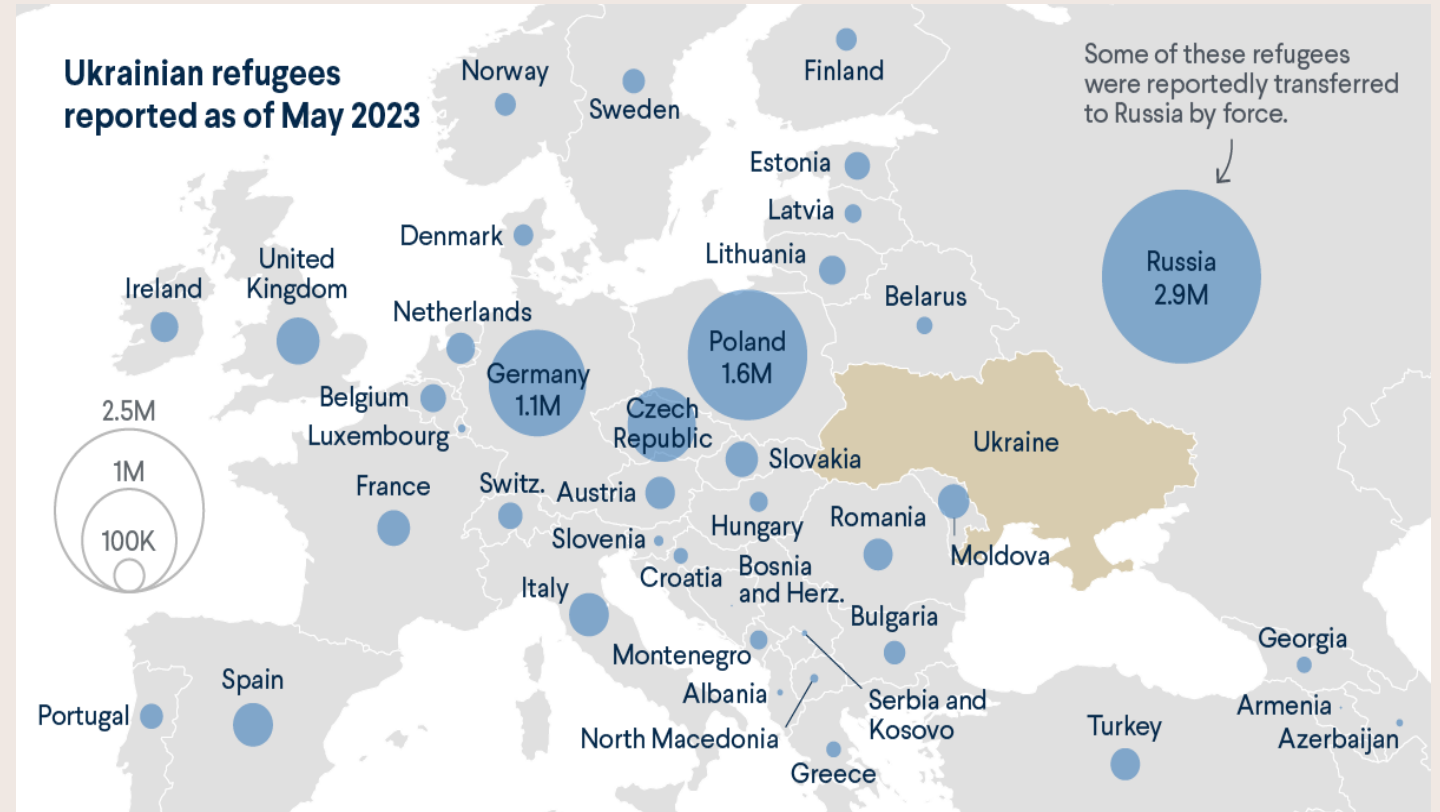
# ARMED AGGRESSION OF RUSSIA AGAINST UKRAINE



- The invasion of the Russian Federation into the territory of Ukraine began at the end of February 2014
- Full-scale war was launched by the aggressor state on February 24, 2022, when an offensive began at 5 a.m. from several directions

# IMPACT OF THE WAR ON UKRAINIANS

- the war affected every Ukrainian, all spheres of our lives
- about 4.5 million citizens of Ukraine received temporary protection in European countries, some of them are in the United Kingdom
- property damage caused by the Russian Federation as a result of hostilities is estimated at 500 billion euros



# FUNCTIONING OF THE JUDICIAL SYSTEM DURING THE WAR

Military actions have a negative impact on the functioning of the judicial system of Ukraine due to:

- constant air alarms
- lack of energy supply
- dismissal of judges
- shortage of court staff
- destruction of court premises by rocket fire
- courts falling under occupation
- capture of judges



# OPINIONS OF THE SUPREME COURT IN CASES RELATED TO WAR (I)

Regarding the person liable for committing the crime of planning, preparing, unleashing and waging an aggressive war:

- such persons must have relevant powers, resources in the fields of international relations, domestic politics, defence, industry, economy, finance, or such a social position that allows them to influence the adoption of relevant decisions by authorized persons
- these persons can outline the general course of state development, implement it; represent the state in international relations; influence its rule-making activity; form state policy; form a national ideology and ensure its implementation through mass influence on public opinion; approve the composition and command of the armed forces subordinate to the state, as well as illegal paramilitary or armed formations; determine strategic tasks for the economy and industry (including those aimed at serving military purposes); provide financing for military activities; manage the material and technical support for the implementation of these measures
- these are the heads of states and governments; members of parliament; leaders of political parties; diplomats; heads of special services; military commanders; heads of executive bodies, etc (*Judgement of the Grand Chamber of the Supreme Court of February 28, 2024 in the case No. 415/2182/20*)

## OPINIONS OF THE SUPREME COURT IN CASES RELATED TO WAR (II)

Regarding the procedure for receiving compensation for forcibly expropriated (mobilized) property in the conditions of the legal regime of martial law:

- compensation for material and moral damage caused to the state of Ukraine, legal entities, public associations, citizens of Ukraine, foreigners and stateless persons (as a result of the temporary occupation) fully relies on the Russian Federation as the occupying state (*Judgement of the Grand Chamber of the Supreme Court of September 13, 2023 in the case No. 757/64569/16*);

# OPINIONS OF THE SUPREME COURT IN CASES RELATED TO WAR (III)

Regarding the establishment of the fact of living in the same family without marriage with a deceased military serviceman for the purpose of receiving monetary payments:

- cases establishing such a fact are subject to consideration in civil proceedings, regardless of the purpose of the appeal to the court, in particular, confirmation of social status for the appointment and payment of a one-time cash benefit to the family of the military serviceman (*Judgement of the Grand Chamber of the Supreme Court of January 18, 2024 in the case No. 560/17953/21*)

# OPINIONS OF THE SUPREME COURT IN CASES RELATED TO WAR (IV)

Regarding the impossibility of suspending the proceedings in the case due to the plaintiff's stay in the Armed Forces of Ukraine, if he insists on continuing the proceedings:

- the proceedings in the case are subject to suspension only in the event of the existence of circumstances that prevent its consideration
- the plaintiff, who has been called up for military service, took an active part in the proceedings, insisted on the completion of the proceedings
- the actions of the defendant, who requested to suspend the proceedings in the case of appellate review of the judgment adopted not in his favor, do not correspond to the principle of good faith (*Judgement of the Supreme Court of August 15, 2023 in the case No. 174/760/21*)



# OPINIONS OF THE SUPREME COURT IN CASES RELATED TO WAR (V)

Regarding the determination of the child's place of residence and the return of children who left abroad after beginning of a full-scale invasion:

- the possibility of resolution of a dispute on the determination of a child's residence place, who is abroad, by Ukrainian courts (*Judgement of the Supreme Court of December 11, 2023 in the case No. 607/20787/19*)
- the security for a claim on the determination of a child's residence place, who has moved abroad with one of the parents, by ensuring communication with the child by means of telephone and Internet communication (*Judgement of Supreme Court of November 15, 2023 in the case No. 467/403/22*)
- the possibility of filing a claim on the removal of the child and his/her return to the previous place of residence in the event that one of the parents does not comply with the judgment on determining the child's residence place with the other parent (*Judgement of the Supreme Court of March 25, 2024 in the case No. 183/1464/22*)

# JUDICIAL IMMUNITY OF THE AGGRESSOR STATE (I)

Legal position of the Supreme Court regarding the judicial immunity of the aggressor state (*Judgement of the Supreme Court of April 14, 2022 in the case No. 308/9708/19*):

- in case of application of the "tort exception", any dispute arising on its territory for a citizen of Ukraine, even with a foreign country, in particular the Russian Federation, may be considered and resolved by a court of Ukraine as a proper and authorized court
- after beginning of the war in Ukraine in 2014, the court of Ukraine, considering a case where the Russian Federation is the defendant, has the right to ignore the immunity of this country and consider cases on compensation for damage caused to an individual as a result of the armed aggression of the Russian Federation
- after the full-scale invasion of the Russian Federation into the territory of Ukraine on February 24, 2022, Ukraine severed diplomatic relations with Russia, which makes it impossible to send various requests and letters to the Embassy of the Russian Federation in Ukraine from that date, due to the termination of its work on the territory of Ukraine

## JUDICIAL IMMUNITY OF THE AGGRESSOR STATE (II)

The Supreme Court's additional arguments regarding the non-application of judicial immunity of the Russian Federation:

- maintaining the jurisdictional immunity of the Russian Federation will deprive the plaintiff of effective access to the court to protect his/her rights, which is incompatible with the provisions of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms
- judicial immunity of the Russian Federation does not apply due to customary international law codified in the UN Convention on Jurisdictional Immunities of States and Their Property (2004)
- maintaining the immunity of the Russian Federation is incompatible with Ukraine's international legal obligations in the field of combating terrorism

## JUDICIAL IMMUNITY OF THE AGGRESSOR STATE (III)

Judicial immunity may not prevent citizens of Ukraine from the right to access the court in disputes related to compensation for damage caused by aggression

The Supreme Court removed the legal barrier in bringing the Russian Federation to liability for armed aggression against Ukraine and its citizens

# THE RIGHT TO ACCESS TO COURT AND STATE IMMUNITY (I)

Modern international law leans in favour of the theory of functional (limited) state immunity:

- the principle of state immunity applies only to the state's activities that have a sovereign nature (*acta iure imperii*);
- it does not apply to activities not related to the state's performance of sovereign functions, in the field of economic and trade relations (*acta iure gestionis*)

In the Ferrini case the Joint Chamber of the Italian Court of Cassation emphasized that deportation and forced labour are war crimes prohibited by the mandatory norm of general international law (*jus cogens*)

If human rights violations are crimes against humanity and war crimes, they are violations of *jus cogens*, and therefore the rule of jurisdictional immunity must be excluded

Norms of *jus cogens* prevail over any other norm, whether customary or generally accepted, and hence they also prevail over the principle of sovereign immunity (*Corte di Cassazione (Sezioni Unite civili), 2004*)

## THE RIGHT TO ACCESS TO COURT AND STATE IMMUNITY (II)

In return, there is an opinion that state immunity is a procedural norm that belongs to the jurisdiction of a national court. It does not apply to substantive law; it does not contradict the prohibition contained in the norm of *jus cogens*, but only establishes another way of dealing with any violation of this principle

In the case upon a claim to English courts by victims of torture in Saudi Arabia with claims for damages, the House of Lords expressed a critical position on the judgment in the Ferrini case, having noted that *jus cogens* prohibition of torture does not entail an exception to the rule of jurisdictional immunity of the state (*Case of Jones, Mitchell and Others v. Saudi Arabia, 2006*)

The International Court of Justice of the United Nations recognized that the discussed facts of gross violations of human rights constituted serious violations of the norms of international humanitarian law. But at the same time according to customary international law, the state is not deprived of immunity due to the fact that it is accused of serious violations of the norms of international law regarding the protection of human rights or international law regarding the settlement of armed conflicts (*Case on Jurisdictional Immunities of the State, 2012*)

## THE RIGHT TO ACCESS TO COURT AND STATE IMMUNITY (III)

The ECtHR noted that by granting jurisdictional immunity to Kuwait, English courts did not violate Article 6 (1) of the Convention. This is justified by the fact that jurisdictional immunity is considered a limitation of the right of access to a court that pursues a legitimate goal (promoting goodwill and good relations between states), and such a limitation may not be considered disproportionate, as it reflects a generally recognized norm of public international law (*Al-Adsani v. the United Kingdom, 2001*)

In the case *Jones and Others v. the United Kingdom*, the ECtHR noted that there was no need to review such an approach and emphasized that the judgment of the International Court of Justice of the United Nations in the case *Germany v. Italy* clearly established that by February 2012 no *jus cogens* exception to state immunity had yet been crystallized (*Jones and Others v. the United Kingdom, 2014*).

# CONCLUSIONS

The time has come to change approaches in international law to the discussed concept, as it has already happened at the beginning of the 19th century, when the absolute customary international law regarding the jurisdictional immunity of the state underwent a gradual evolution due to the development of national jurisprudence to the definition of *acta jure gestionis*

The application of jurisdictional immunity of the state and the rejection of any exception to it regarding human rights can lead to the fact that victims of war crimes or other gross violations of human rights will be deprived of the possibility to go to court and receive adequate compensation

The national courts of Ukraine have a unique chance to contribute to the changing international legal approaches regarding the judicial immunity of the state by resolving lawsuits related to the war in Ukraine unleashed by the Russian Federation





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Thank you for your attention!