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Does Putin have immunity from criminal liability before Ukrainian court?

Czy Putin posiada immunitet karny przed ukraińskim sądem?

Обладает ли Путин иммунитетом от уголовного преследования перед украинским судом?

Чи має Путін імунітет від кримінальної відповідальності перед українським судом?

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Summary: The question about criminal liability for waging this cruel war has been actualized since the beginning of the Russian-Ukrainian war in 2014, and especially since the large-scale Russian invasion of Ukraine in 2022. It is commonly recognized that such acts are crimes according to international criminal law and that liability must come under international judiciary bodies. By the same token, Ukrainian national legislation also provides for liability for those acts. At the same time, there are attempts to prove the fact that Putin and other senior officials are not liable under Ukrainian criminal law since allegedly they have functional immunity and ordinary perpetrators of the aggression are not personally liable under Ukrainian law due to the so-called functional immunity.

The publication aims to prove the wrongfulness of the statement that the abovementioned immunity status prevents criminal prosecution in Ukraine, as in the state against which the aggression was committed. The arguments of "immunity theory" supporters are analyzed and counter-arguments are presented that such immunity is not valid in Ukraine and does not prevent prosecution under Ukrainian law.

It is concluded that, regarding the aggressive war in Ukraine, the functional immunity of senior officials of the Russian Federation does not have any moral, social or legal grounds and the individuals who allegedly have such immunities are criminally liable not only under international criminal law but also Ukrainian law as well.
Key words: criminal liability, immunity, head of state, aggression

Streszczenie: Kwestia odpowiedzialności karnej za prowadzenie trwającego, okrutnego konfliktu jest aktualna od początku wojny rosyjsko-ukraińskiej rozpoczętej w 2014 r., a zwłaszcza od 2022 r., czyli od inwazji na Ukrainę na pełną skalę. Zgodnie z międzynarodowym prawem karnym takie czyny stanowią zbrodnie prawa międzynarodowego i podlegają jurysdykcji międzynarodowych organów sądowych. Ukraińskie ustawodawstwo krajowe również przewiduje odpowiedzialność karną za rzeczone czyny. Jednocześnie podejmowane są próby udowodnienia, że Putin i inni wysocy urzędnicy nie podlegają orzecznictwu sądów ukraińskich na mocy ukraińskiego prawa karnego, ponieważ rzekomo posiadają immunitet funkcjonalny, a zwykli uczestnicy agresji zbrojnej również nie ponoszą osobistej odpowiedzialności na mocy prawa ukraińskiego z powodu posiadania immunitetu funkcjonalnego.

Celem publikacji jest udowodnienie niesłuszności twierdzenia, że wyżej wymienione immunitety uniemożliwiają pociągnięcie takich osób do odpowiedzialności karnej przez sądy w Ukrainie, czyli państwie, przeciwko któremu rozpoczęto agresję zbrojną. Przeanalizowano zarówno argumenty zwolenników „teorii immunitetu", jak i przedstawiono argumenty przemawiające za tym, że wskazane kategorie osób nie posiadają immunitetu na terytorium Ukrainy, a zatem możliwe jest ich ściganie na mocy prawa ukraińskiego.

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Stwierdzono, że w odniesieniu do agresji zbrojnej przeciwko Ukrainie immunitet funkcjonalny wyższych urzędników Federacji Rosyjskiej nie ma żadnych podstaw moralnych, społecznych i prawnych, a wymienione osoby, które rzekomo posiadają taki immunitet, ponoszą odpowiedzialność karną nie tylko na mocy międzynarodowego prawa karnego, lecz także prawa ukraińskiego.
Słowa kluczowe: odpowiedzialność karna, immunitet, głowa państwa, agresja

Резюме: Вопрос об уголовной ответственности за ведение непрекращающегося жестокого конфликта актуален с начала российско-украинской войны, начавшейся в 2014 году, и особенно после полномасштабного вторжения в Украину в 2022 году. Согласно международному уголовному праву, такие действия являются преступлениями по международному праву и подпадают под юрисдикцию международных судебных органов. Внутреннее законодательство Украины также предусматривает уголовную ответственность за указанные деяния. В то же время предпринимаются попытки доказать, что Путин и другие высшие должностные лица не подпадают под юрисдикцию украинских судов в силу украинского уголовного законодательства, поскольку якобы обладают функциональным иммунитетом, а рядовые участники вооруженной агрессии также не несут персональной ответственности в силу украинского законодательства, поскольку обладают функциональным иммунитетом.

Цель статьи – доказать ошибочность утверждения о том, что вышеуказанные иммунитеты не позволяют привлекать таких лиц к уголовной ответственности в судах Украины – государства, против которого была совершена вооруженная агрессия. Были проанализированы аргументы сторонников «теории иммунитета» и приведены аргументы в пользу того, что указанные категории лиц не обладают иммунитетом на территории Украины, а значит, их можно привлечь к ответственности в силу законодательства Украины.

Сделан вывод о том, что применительно к вооруженной агрессии против Украины функциональный иммунитет высших должностных лиц Российской Федерации не имеет моральных, общественных и правовых оснований, а названные лица, якобы обладающие таким иммунитетом, несут уголовную ответственность не только в силу международного уголовного права, но и по украинскому законодательству.
Ключевые слова: уголовная ответственность, иммунитет, глава государства, агрессия

Резюме: Питання кримінальної відповідальності за розв'язання та ведення агресивної війни актуальне від початку російсько-української війни у 2014 році, а, особливо, від 2022 році, коли відбулося повномасштабне вторгнення в Україну. Відповідно до міжнародного кримінального права такі діяння є міжнародними злочинами та підлягають юрисдикції міжнародних судових органів. Українське законодавство також передбачає кримінальну відповідальність за вказані діяння. Водночас є спроби довести, що Путін та інші вищі керівники російської федерації не підлягають кримінальній відповідальності за українським кримінальним правом, оскільки ніби-то наділені функціональним імунітетом.

Метою цієї публікації є доведення помилковості тези про те, що вказаний імунітет перешкоджає притягненню до кримінальної відповідальності в Україні як державі, проти якої вчинена агресія.

Розглянуті доводи прихильників «теорії імунітету» та наведені аргументи щодо того, що він не діє в Україні щодо вищих керівників держави-агресора та не перешкоджає притягненню їх до відповідальності за українським кримінальним правом.

Зроблений висновок, що щодо агресивної війни в Україні функціональний імунітет вищих керівників російської федерації не має моральних, соціальних та юридичних підстав, а вказані особи підлягають кримінальній відповідальності не лише за міжнародним кримінальним правом, але й за правом України.
Ключові слова: кримінальна відповідальність, імунітет, керівник держави, агресія

Introduction

The question about the liability of people who waged this aggressive war and took part in it has been raised since the beginning of the Russian-Ukrainian war in 2014.

Unfortunately, it was not discussed extensively enough in Ukrainian literature – almost all Ukrainian scholars believed that it would not be resolved in the near future, and even if it was, liability would arise under international criminal law and before international justice bodies. Foreign scholars did not emphasize this problem either.

Since the beginning of the full-scale war on 24 February 2022, the issue of liability of Russian war criminals has been actualized and has become a practical issue. In this case, there are several approaches to solving it. Among them, two are the most common. The proponents of the first argue that organizers and leaders of military aggression against Ukraine are immune from criminal liability and are not subject to criminal prosecution under Ukrainian criminal law and before Ukrainian criminal justice bodies. The proponents of the second approach argue that these immunities do not limit the usage of national criminal law even if it exists in international criminal law, so leaders of aggression against Ukraine are criminally liable under Ukrainian criminal law and before Ukrainian courts for crimes committed against Ukraine. In accordance with the principle of universal jurisdiction, those people can be liable under the law of any state which practices the rule of law and principle of justice.

This publication is aimed at analyzing the positions described above and proving that bringing Putin and other senior leaders of the Russian Federation to criminal liability under Ukrainian legislation and by Ukrainian criminal justice authorities is not only possible but also a priority because:

- international judicial bodies will not be physically able to look into the cases of thousands of Russian war criminals. Therefore, the main burden of investigating and prosecuting crimes committed in the course of Russia's aggression against Ukraine will fall on the Ukrainian judicial authorities;
- the actions of Putin and other senior leaders of the Russian Federation are crimes under both international and national criminal law. However, some acts are considered to be crimes under the criminal law of Ukraine, but not under international criminal law (in particular, the International Criminal Court does not currently exercise jurisdiction[1] over the crime of aggression in accordance with Part 2 of Article 5 of its Statute, but it is punishable under Article 437 of the Criminal Code of Ukraine – hereinafter: CC of Ukraine[2]). At the same time,

1 The Rome Statute of the International Criminal Court, https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf [access: 16.11.2023].

2 The Criminal Code of Ukraine, https://zakon.rada.gov.ua/laws/show/2341-14#n2405 [access: 16.11.2023].

there are no acts that constitute crimes under international criminal law and are not seen as such by Ukrainian criminal law;

- international and national criminal law are not competitors, but partners in prosecuting Russian war criminals. Under the principle of complementarity, international criminal law is applied when a state is unwilling or unable to use national criminal law – Article 17 (a) of the Statute of the International Criminal Court provides that a case is accepted by the Court when a state is unwilling or unable to properly conduct an investigation or prosecution. Accordingly, when the state seeks to prosecute the perpetrators of offences against its interests and is able to do so, international jurisdictional bodies do not intervene in the case, but leave it to the jurisdiction of national authorities;
- criminal liability of senior Russian leaders for aggression against Ukraine may occur either in the event of their detention or in in absentia proceedings. Under Ukrainian law, in absentia proceedings can be conducted[3] but the Statute of the International Criminal Court does not provide for this;[4]
- domestic legislation does not provide grounds for a state to fail to fulfil its obligations under international law. At the same time, international criminal law may not restrict the application of national criminal law to a greater extent than is directly provided for in international agreements that Ukraine or another state has ratified or acceded to. After all, the absence of relevant provisions in an international agreement or its non-ratification means the absence of relevant international legal obligations.

This publication is not intended to analyze the criminal liability immunity of state representatives and officials from the perspective of international criminal law, including issues related to the number of persons who may benefit from such immunity, the grounds for overcoming it, etc. The research aim is limited to finding out whether such immunity, based on international legal provisions, can pose an obstacle to the prosecution of senior leaders of a foreign state under the national criminal law of another state that has been the object of aggression. Specifically, the article deals with the situation in Ukraine. The article puts forward the hypothesis that the international legal immunity of Russian state representatives does not extend to the scope of application of Ukrainian criminal law, and, accordingly, that

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3 Articles 297-1 to 297-5 of the Criminal Procedure Code of Ukraine, https://zakon.rada.gov.ua/laws/show/4651-17#n5118 [access: 16.11.2023].

4 Part 1 of Article 63 of the Rome Statute of the International Criminal Court: "Trial in the Presence of the Accused" of the Statute of the International Criminal Court expressly states that the accused must be present at the trial.

they may be held criminally liable for aggression against Ukraine under the criminal law of this state.

The research methods are determined by the purpose stated above. The article provides a dogmatic analysis of the national legislation of Ukraine, including the relevant constitutional provisions, acts determining the scope of international agreements of Ukraine and the Ukrainian criminal law. Using the comparative method, the article assesses which sources of international law are applicable in Ukraine. The arguments put forward by the opponents of the position argued in this article were also systematically examined. At the same time, the author does not refer to or analyze the publications of experts in the field of international criminal law on the immunity of state representatives. Among them, there are such authors as Watts (1994), N. Kofele-Kale (1995), A. Cassese (2002), N. Fox (2002), R. van Alebeek (2008) and R. O'Keefe (2015). With all respect to the authors and their positions, it needs to be stated that their publications were primarily published at a time when the issue of criminal liability of Putin as the head of the Russian state, the head of the Russian government and the Minister of Foreign Affairs of this state was not acute and that these works do not directly address the issue of liability before the national court of a state that has become a victim of aggression. They are mainly devoted to clearly identifying the range of persons covered by such immunity and the grounds and procedure for overcoming it in international law. This also applies to the most recent paper published in 2023,[5] which also covers the issue of immunity of senior Russian officials before the International Criminal Court or a potential special tribunal. Moreover, these publications consider the immunity of senior officials as an element of normal international relations and a means of ensuring good neighbourliness, which is the exact opposite of current Russian-Ukrainian relations. Therefore, well-known publications referred to above cannot be used to solve the problem at stake.

The methodology used to prepare this article includes an assessment of Ukraine's law enforcement practices and demonstrates that it is unacceptable to rely on precedents of criminal prosecution of state representatives in other national and international cases which differ from the current situation in Ukraine with Russian aggression due to specific factual circumstances and legal grounds. At the same time, given the peculiarity of the conditions of the Russian-Ukrainian war that began in 2014 and their significant difference from the conditions in which other wars were

5 R. van Alebeek, L. van den Herik, C. Ryngaer, *Prosecuting Russian Officials for the Crime of Aggression: What About Immunities?*, European Convention on Human Rights Law Review 2023, no. 4, https://brill.com/view/journals/eclr/4/2/article-p115_002.xml [access: 16.11.2023].

waged and whose organizers were brought to justice, the author considers it inappropriate to use the historical method. Sociological methods were also not used. The author considers it inappropriate at this stage to conduct a survey to identify supporters and opponents of a particular solution, given the lack of clear legislative regulation, established practice and insufficient awareness of the arguments among possible respondents, as well as the acute emotional charge that the issue carries for respondents from Ukraine. Such a survey is possible in the future, in particular, after the end of the war, when emotional tension subsides and the level of awareness increases among respondents.

The main material

As already noted, in Ukraine it is commonly believed that the current leaders of the Russian Federation are not subject to criminal liability under the criminal law of Ukraine due to the existence of immunity from criminal liability granted under the provisions of international law.

It is noteworthy that the position is expressed not in publications, but in oral speeches and discussions. In particular, in his speech to the students of the OSCE-organized school for young criminal law teachers in 2016, Mykola Hnatovskyi (an associate professor at the Shevchenko National University of Kyiv at that point, and now a judge of the European Court of Human Rights), expressed a view opposed to the present author's opinion that Putin's actions regarding the annexation of Crimea should be assessed as crimes under Articles 437 and 438 of the Criminal Code of Ukraine. He referred to the fact that there is a custom in international criminal law not to prosecute a sitting head of state.

The position of Ukrainian law enforcement authorities as to their practice on the issue of liability of senior Russian officials has not been formulated – no relevant criminal proceedings have been opened so far. In the legally homogeneous issue of the liability of Russian military personnel, this practice is at least controversial. Since the beginning of Russia's full-scale aggression on 24 February 2022, and until mid-March 2022, more than 9 000 proceedings have been opened against Russian servicemen and on their commission of acts under the Criminal Code of Ukraine under articles on murder, illegal crossing of the state border of Ukraine with the use of weapons, smuggling, etc. However, on 17 March 2022, the Office of the Prosecutor General of Ukraine sent an act entitled "Letter of guidance on the application of the provisions of international humanitarian law on the treatment of prisoners

of war and the specifics of qualification of their actions under the Criminal Code of Ukraine" to the regional prosecutors of Ukraine, which contained an instruction to close all such proceedings on the obviously far-fetched ground that the actions of such persons did not constitute a crime.[6] Although such an instruction is clearly illegal and groundless, it is being implemented – previously initiated criminal proceedings have been closed and no new ones have been started. As a result, case law simply cannot be formed, as the relevant materials are not submitted to the court for consideration on the merits.

Thus, opponents of the prosecution of the leaders of Russia's military aggression against Ukraine put forward essentially the same argument against criminal prosecution under Ukrainian criminal law. In their opinion, there are customs in international criminal law that do not allow for criminal liability as the current head of state and other senior leaders of the state have immunity (unless their immunity is lifted by an international court).

In their opinion, international legal customs prevent the application of the provisions of national criminal law.

There is also an approach (also expressed in oral statements and discussions) according to which the custom of granting immunity from criminal liability of senior leaders of a foreign aggressor state in Ukraine is justified by references to the United Nations Charter. Indeed, part 2 of Article 105 of the Charter states: "Representatives of Members of the Organization and its officials shall also enjoy the privileges and immunities necessary for the independent exercise of their functions in connection with the activities of the Organization."[7] However, it does not follow from this passage that this immunity is absolute and applies to any activity of persons authorized to represent the state, which would make it identical to a medieval indulgence. After all, the quoted provision directly and unambiguously refers to such immunities as are necessary for the performance of functions related to the activities of the UN. The activities of the United Nations, as expressly stated in the Preamble to the UN Charter, Section I of this Charter, which sets out the purposes and principles of the Organization, are aimed at maintaining peace and international security, resolving international conflicts, and developing friendly relations among nations. Part 4 of Article 2 of the said Charter provides for the obligation of the members of

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6 Office of the Prosecutor General of Ukraine, Letter of guidance on the application of the provisions of international humanitarian law on the treatment of prisoners of war and the specifics of qualifying their actions under the Criminal Code of Ukraine, 17.03.2022, https://drive.google.com/file/d/1Mlp-7zfpiVzdoir2YCWyyYkPL2gimwLP/view [access: 16.11.2023].

7 The Charter of the United Nations, https://www.un.org/en/about-us/un-charter/full-text/ [access: 16.11.2023].

the Organization to refrain from the threat or use of force in international relations. The actions of the senior leaders of the Russian Federation, which raise the question of their criminal liability under Ukrainian criminal law, are undoubtedly not only unrelated to the performance of UN functions but, on the contrary, directly contradict the goals of the Organization.

Therefore, the reference to the UN Charter, which in the analyzed situation allegedly provides for the immunity of the president of the Russian Federation, the head of the Russian government, the minister of foreign affairs or other officials of the Russian Federation, is absolutely unacceptable. In fact, the UN Charter does not establish such an immunity for preparing for, starting, and waging an aggressive war.

Neither directly nor indirectly does any applicable international treaty provide for such immunity. At least, the author of this article is not aware of any such treaty ratified by Ukraine that would provide for the relevant obligations to establish and maintain the respective immunity of a state representative.

Without relying on international treaties in force and binding on Ukraine, supporters of the concept that the head of the Russian state, the head of the Russian government and the minister of foreign affairs of the state are not subject to criminal liability under Ukrainian law and before a Ukrainian court put forward primarily formal arguments. They refer to the existence of a legal custom according to which such persons are immune from criminal liability for acts committed in connection with their office. They also refer to the positions of foreign scholars who substantiate the existence and necessity of taking such immunity into account, as well as to certain examples from foreign law enforcement practice.

This approach does not seem convincing.

First of all, there is no legal custom in Ukraine related to granting criminal liability immunity to representatives of foreign states for acts committed during their tenure. Ukrainian law enforcement agencies have simply not considered such cases.

The case of former Georgian President Saakashvili, who was granted asylum and even acquired Ukrainian citizenship at the same time as his criminal prosecution in absentia was taking place in Georgia, has some similarities to the matter discussed. However, the actual circumstances of Saakashvili's case are fundamentally different from those of Putin and other senior Russian leaders. After all, Saakashvili was charged and convicted in Georgia, he was charged with actions committed while he was President of that country. He did not commit any offences against the interests of Ukraine or the rights and freedoms of Ukrainian citizens. The Ukrainian criminal justice authorities did not consider the issue of Mr Saakashvili's liability at all. The law enforcement situation analyzed in this publication concerns

encroachments against Ukraine and its citizens and the acceptability of assessing such acts and bringing their perpetrators to justice under Ukrainian law.

The legal customs of other states which have resolved the issues of criminal liability of state leaders under national law are, of course, interesting and instructive, and can be taken into account in the aspect of *de lege ferenda*. However, they are not a source of law in Ukraine and cannot be taken into account in the course of law enforcement. This fact does not require proof, as it is as obvious as the existence of state sovereignty, which includes the functioning of its own, and not a foreign, legal system.

If one considers the international legal custom of granting immunity from criminal liability to persons who, at the time of committing the incriminated acts, were acting as representatives or officials of a foreign state, it is also not applicable in Ukraine.

One of the principles in the legislation of Ukraine, like in legislations of other countries, is the primacy of international law over national law. This is enshrined in the Ukrainian Constitution and several legislative acts. However, certain reservations do exist. At least in the Constitution of Ukraine[8] (part 1, Article 9), the Criminal Code of Ukraine (part 5, Article 3) and special laws on the effect of international legal acts,[9] it is clearly stated that the following sources of law are binding upon Ukraine: a) international treaties ratified by Ukraine and b) the case law of the European Court of Human Rights. No other sources of international criminal law, such as memoranda, protocols of intent, customs, precedents, etc. are binding. There is a clear explanation for this: national sovereignty implies that a state waives its rights or assumes additional responsibilities only within the limits defined when ratifying relevant international treaties or in other clearly defined cases (such as the case law of the European Court of Human Rights). Ukraine has not signed any treaty that would provide for the waiver of criminal prosecution under its national legislation of the organizers and participants of Russian aggression.

Thus, international legal customs, including the custom of granting immunity from criminal prosecution, can and should be applied where they have been established – in international law and international jurisdictional bodies. At the

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8 The Constitution of Ukraine, Law of Ukraine of 28.06.1996, no. 254к/96-BP (Revision as of 1.01.2020), https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text [access: 16.11.2023].

9 On International Treaties of Ukraine, Law of Ukraine of 29.06.2004, no. 1906-IV (as of 15.02.2022), https://zakon.rada.gov.ua/laws/show/1906-15#Text [access: 16.11.2023]; On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights (Article 17), Law of Ukraine of 23.02.2006, no. 3477-IV (as of 2.12.2012), https://zakon.rada.gov.ua/laws/show/3477-15#Text [access: 16.11.2023].

same time, they should not be extended to include the national system. At least for Ukraine, which has not committed itself to taking such immunity into account. This legal custom, which is not inherent in the national legal system, is alien to it, contrary to the requirements of the state legislation, and cannot be implemented by force of pressure. In particular, by those who believe that "there is no need to provoke Putin," that he should be given the opportunity to "save face," etc. Article 2 of the UN Charter provides that in order to achieve its purposes, the Organization and its Members shall act in accordance with certain principles, one of which is formulated in part 7 of the said article and prescribes that the UN shall not interfere in matters within the domestic jurisdiction of any state. The grounds for criminal liability, its limits, and the competence of criminal justice authorities are precisely within the domestic competence of the state and are the subject of its sovereignty. Sovereignty, in turn, can be limited only with the consent of the state, expressed in the signing and ratification of international treaties.

From the above, it seems to follow that neither national (those of other states) nor international legal customs, including those related to granting immunity from criminal prosecution, should be taken into account as a mandatory source when deciding on criminal liability under national criminal law. At least in Ukraine, where the legislation explicitly specifies which international legal instruments are binding for its legal system.

Another argument of the supporters of the theory of immunity from criminal liability is to refer to the positions set forth by other authors. There is no shortage of publications in the literature concerning the theory of immunity of senior state officials from criminal liability for acts committed during their tenure. Their number is increasing with every new case related to the relevant situation. However, all of the publications known to the author on the immunity of state representatives and officials who have committed offences during and in connection with the use of the powers vested in them are written from the perspective of international criminal law and are related to the possibility of liability before international jurisdictional bodies and based on international legal acts. Therefore, despite the expertise of the authors of such publications and the weight of their arguments in favour of certain positions (ultimately, the application or non-application of criminal liability immunity to specific individuals and in specific cases), the approaches expressed in the literature are not directly related to the issue covered in this article, which relates purely to the field of national criminal law. Therefore, the points of view already expressed in the literature on the solution of the problem of immunities in international criminal law are deliberately not analyzed here. Similarly, the author deliberately does not stop on the provisions set out in a special study, which

is a memorandum of the International Law Commission of the Secretariat of the United Nations "Immunity of State officials from foreign criminal jurisdiction," adopted at the sixtieth session of this body, held on 5–6 May, 6 June and 8 July 2008 in Geneva.[10] This voluminous and multifaceted document contains considerations related to the solution of the analyzed issue in international criminal law and does not cover provisions related to national law.

Therefore, reference to the positions expressed in publications on the problem of another branch of law cannot be a convincing argument as to whether the relevant immunity exists in national criminal law.

Finally, another argument of the supporters of the theory of immunity as an institution of national criminal law is the provision of examples of its application in specific cases. All of these cases relate to proceedings that took place in international jurisdictional bodies or foreign courts. In addition, each case has many individual characteristics and does not generically coincide with the upcoming case of Putin and other senior Russian leaders. After all, it involves liability for a crime against a foreign state and its citizens in a situation where the existence of aggression was recognized by the UN in the General Assembly resolution "Aggression against Ukraine" of 2 March 2022, and when the armed attack continued and intensified even after the UN demanded that Russia immediately cease the use of its force against Ukraine.[11] Examples of the application/non-application of criminal liability immunity to senior state leaders, as well as other sources, contain a lot of useful information. However, they cannot serve as a source for solving the relevant problem in Ukraine. Because these are decisions of foreign or international jurisdictional bodies that do not have the value of precedent in Ukraine in accordance with the principles of its national legal system. The only exception is, as already mentioned, the case law of the European Court of Human Rights, which is a source of law in Ukraine.[12] However, first, this Court is not a criminal court, and second, it has not yet considered cases related to the observance of human rights in terms of the application/non-application of immunity of state representatives. Therefore, its practice is not relevant here.

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10 Memorandum of the Secretariat of the International Law Commission of the United Nations "Immunity of State officials from foreign criminal jurisdiction", adopted at the sixtieth session of the body, held on 5–6 May, 6 June and 8 July 2008 in Geneva, A/CN.4/596, https://www.refworld.org/docid/48abd597d.html [access: 16.11.2023].

11 UN General Assembly, Resolution ES-11/1. Aggression against Ukraine, 2.03.2022, https://digitallibrary.un.org/record/3965290?ln=ru [access: 16.11.2023].

12 On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights (Article 17), Law of Ukraine of 23.02.2006, no. 3477-IV, https://zakon.rada.gov.ua/laws/show/3477-15#Text [access: 16.11.2023].

Therefore, it can be stated that the argument concerning the practice of applying the provisions on the immunity of state representatives from criminal liability before a national court does not work in favour of the criticized legal position.

In general, such arguments (the existence of a legal custom of granting immunity to state representatives, support for the relevant position in publications, and the availability of examples from practice) are subject to criticism and do not seem convincing.

There are also substantive considerations in favour of recognizing immunity and granting it to state representatives. They are generally recognized and therefore do not require reference to sources. Such arguments are reduced to several provisions. The main one is that the granting of the immunity analyzed in this article is a manifestation of respect for the state and the people who authorized the respective persons for representation, recognising that both the state and its representatives are full participants in international relations. The ability to act without regard to possible criminal liability before an international or foreign court is a prerequisite for effective representation and mutually beneficial international relations. Another line of reasoning is based on the fact that in the presence of international conflicts, someone must represent the state that is a party to such a conflict, and bringing the head of state, head of government, or minister of foreign affairs to criminal liability deprives them of their subjectivity.

Of course, such arguments are legitimate. And in certain situations, they provide grounds for granting the appropriate immunity. Namely, when states maintain diplomatic relations or are at least ready to negotiate with each other. Therefore, it would not be surprising if immunity from criminal liability was granted to Russian leaders by China or Belarus under their national laws.

But the situation with Ukraine is completely different. Ukraine has become a victim of Russian aggression, and diplomatic relations between the two countries have been severed. Even at the beginning of Russia's full-scale aggression, Ukraine was ready to negotiate with Putin.[13] Obviously, this also meant a willingness to grant him immunity from prosecution. However, after the discovery of the bloody crimes committed in Ukraine by the Russian military (with Putin as its commander-in-chief) and the announcement of the Russian annexation of the occupied Ukrainian regions of Donetsk, Luhansk, Kherson, and Zaporizhzhia, the position changed. Ukraine, represented by its President and Foreign Minister, has

[13] *Negotiations with Putin Are Impossible: How Zelensky's Position Has Changed*, Slovo i Dilo. Analytical Portal, 4.10.2022, https://www.slovoidilo.ua/2022/10/04/infografika/polityka/perehovory-putinym-nemozhlyvi-yak-zminyuvalasya-pozycziya-zelenskoho [access: 16.11.2023].

repeatedly stated that negotiations with Putin are impossible. This position was also enshrined at the regulatory level – the Decree of the President of Ukraine of 30 September 2022 enacted the Decision of the National Security and Defense Council of Ukraine "On Ukraine's Actions in Response to the Russian Federation's Attempt to Annex the Territories of Our State, in Order to Guarantee the Security of the Euro--Atlantic Area, Ukraine and Restore Its Territorial Integrity." The first paragraph of the Decision states "the impossibility of holding negotiations with the President of the Russian Federation Vladimir Putin." It is also worth mentioning that on 17 March 2023, the International Criminal Court issued an arrest warrant for Russian president Vladimir Putin.[14] This also makes it impossible for him to participate in negotiations with Ukraine and perform representative functions.

The decision of the Parliamentary Assembly of the Council of Europe of 13 October 2023 to recognize Putin as illegitimate after the end of the current presidential term in 2024, and Russia as a dictatorship, cannot be ignored either.[15] This decision means that even if he can claim immunity from criminal liability for now, the grounds for this will disappear completely after the specified date.

It should be noted that the position in favour of immunity in the matter at hand means denial of generally recognized principles of both national and international criminal law. This is, first of all, the principle that holding an official position by the perpetrator does not exclude their criminal liability.[16] Therefore, supporting the applicability of immunity from criminal liability is not consistent with this provision.

In such circumstances, there is no reason to grant Putin, and other senior Russian leaders, immunity from criminal liability in Ukraine. After all, in no case is it about good neighbourly relations, peaceful resolution of conflicts, and other goals enshrined in the UN Charter regarding relations with Russia under Putin's leadership.

Thus, it can be stated that arguments that would explain and justify granting Putin and other representatives of Russia immunity from criminal liability in Ukraine either do not exist at all, or they are subject to reasonable criticism, or they may not be valid in the conditions that currently determine relations between Ukraine and Russia.

Moreover, any immunity, even if it exists, can be overcome. International legal immunity can be overcome by an international jurisdictional body (as the

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14 *Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and [access: 16.11.2023].

15 Resolution of the Parliamentary Assembly of the Council of Europe of 13 October 2023, Examining the legitimacy and legality of the ad hominem term-limit waiver for the incumbent President of the Russian Federation, https://pace.coe.int/en/files/33150 [access: 16.11.2023].

16 Rome Statute of the International Criminal Court, Article 27 § 1.

International Criminal Court has already done with regard to Putin), while national immunity – by the national criminal justice system. At least, when Putin is brought before a Ukrainian court, this court will be able to reasonably assess the relevant claims of immunity from criminal liability in Ukraine.

To criticize the arguments in favour of Putin's and other Russian leaders' immunity from criminal prosecution in Ukraine under Ukrainian legislation is a necessary part of this analysis but it is not enough to solve the problem. No less important is to put forward arguments demonstrating that Putin and other representatives of the aggressor state are subject to criminal liability in Ukraine. In fact, the justification for the absence of special conditions, in particular of immunity, means that a person should be held criminally liable on general grounds. This also applies to representatives of a foreign state to whom Article 95 (2) of the UN Charter does not apply, as was demonstrated above.

In other words, a person who does not enjoy immunity or for whom there are no other grounds for exemption from criminal liability provided for by criminal law is liable under national legislation like any other person. The necessary condition for such liability in Ukraine is the commission of a socially dangerous act that contains all the essential elements of a criminal offence under the Criminal Code (Article 2 (1) of the Criminal Code of Ukraine). The question as to which crimes are present in the actions of Putin and other senior Russian leaders has to be resolved during the pre-trial investigation and trial with strict observance of all procedural guarantees. This requires evidentiary information obtained in accordance with the procedure established by the criminal procedure law. Therefore, it is premature to speak in detail about the qualification of the actions committed by these individuals. However, the information available in the public domain is the grounds to talk about incriminating the commission of at least crimes under Article 437, i.e. "Planning, preparation and waging of an aggressive war," Article 438 "Violation of rules of the warfare" and Article 444 "Criminal offences against internationally protected persons and institutions" of the Criminal Code of Ukraine. Moreover, these crimes were initially committed in 2014, during the aggression in Crimea and its occupation (their criminal law assessment under Ukrainian legislation has already been provided in the literature[17]). The commission of these crimes continued in the period 2014–2022 during the participation of Russian troops in hostilities in Donbas. New and the most expressive and brazen violations of the laws and customs of war, as well as the continuation of the aggressive war, have been committed

[17] V.O. Navrotskyi, *What Did Putin & Co. Do against Ukraine?*, Yurydychnyy visnyk of Ukraine 2014, no. 12 (22–28.03.2014), pp. 6–7.

since the beginning of the full-scale invasion of Ukraine on 24 February 2022. It should be noted in passing that the actions of Putin and other senior Russian leaders resulting in aggression against Ukraine are crimes not only under the Criminal Code of Ukraine. Responsibility for them is also provided for in Article 353 "Planning, Preparing, Unleashing, or Waging an Aggressive War," Article 354 "Public Appeals to Unleash an Aggressive War," Article 356 "Use of Banned Means and Methods of Warfare" (in particular: cruel treatment of prisoners of war or civilians, deportation of civilian populations, plunder of national property in occupied territories) and Article 360 "Assaults on Persons or Institutions Enjoying International Protection" of the Criminal Code of the Russian Federation.

In Ukraine, the principle of inevitability of criminal liability is reflected in two interrelated provisions: a) an act that constitutes a criminal offence must be punishable, thus the perpetrator has to be criminally liable; b) the grounds for not imposing the liability provided for by the Criminal Code of Ukraine. At the same time, the criminal law of Ukraine does not provide for any grounds on which aggression against Ukraine and grave crimes committed against it and its citizens could be left unpunished. The Criminal Code of Ukraine does not contain the concept of immunity from criminal liability at all, and the relevant international custom, as shown above, is not applicable in Ukraine.

The argument that it is impossible to approach the solution of modern problems with the standards of long past centuries seems relevant to the matter discussed. This includes the problem of immunity of representatives of a state and its officials from criminal liability, which is absolutized without proper grounds and is interpreted in fact as an indulgence for any act whatsoever. The thesis of the right to war and unpunished participation in it was formulated in the Middle Ages, when almost all monarchs were relatives (and "one's own" were not judged), and war participants had limited information and choice of behaviour. Now the situation is radically different. In the twenty-first century, humanity has progressed to divide wars into just (defensive) and aggressive (invasive) wars. Any aggressive war is criminal, and all its participants, especially its initiators and organizers, should be held criminally liable.

Finally, one cannot ignore the fact that Ukraine is a victim of aggression and has the right to decide on the criminal liability of the perpetrators. If the outdated theories of immunity of the head of state and other participants in the aggression impede the establishment of justice, then new approaches are needed, including those that involve resolving issues of responsibility for aggression and other crimes committed during the war under the legislation of the state that is a victim of an aggressive war.

Conclusion

The world community's close attention to the Russian-Ukrainian war also touches upon the question of responsibility for its outbreak. One of the conditions for ending the war is the fair punishment of those who started it and who committed crimes during the aggression. This gives confidence that the perpetrators will not escape fair punishment.

Various concepts have been put forward to ensure the prosecution of Russian war criminals. Some speak about the crucial role of the International Criminal Court, others about the need to establish a Special International Tribunal (which will obviously operate under its own specially created Charter – which will in turn require time and additional effort), and still others propose the idea of a hybrid tribunal that will operate under Ukrainian legislation, but with the participation of representatives of the international community. At all events, one cannot and should not exclude the use of the criminal justice system of Ukraine or, in accordance with the universal principle, of any other state.

In the end, the greatest importance should be attached not to which body will try Putin and the perpetrators of his criminal will, but to bringing the perpetrators to justice and passing a fair sentence on them. National criminal law and international criminal law should be partners, not competitors in resolving this issue.

It should be noted that the jurisdiction of international criminal justice bodies over Putin and other senior Russian leaders in the case of aggression against Ukraine should not prevent them from being held accountable by the Ukrainian justice system. The purpose of immunities is not to avoid responsibility, but to facilitate international relations and cooperation between states.

Hopefully, Putin and his henchmen will not hide from criminal liability behind immunities, the presumption of innocence, standards of proof, and other instruments of modern civilized criminal law.

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