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**LEGAL ANALYTICS**

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# Functional immunities of potential suspects of international crimes in national courts

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## LEGAL ANALYTICS

Small research publications by Truth Hounds that provide a brief overview of a selected issue and present the main findings, suggestions or recommendations.

## **TRUTH HOUNDS**

Ukrainian civil society organization specializing in documenting and investigating international crimes and serious human rights violations in Ukraine and other conflict-affected regions of Eastern Europe, the Caucasus, and Central Asia.

## Problem statement

1. An attempt to prosecute for international crimes in a foreign country naturally raises the question of possible jurisdictional exceptions to certain persons entitled to immunity under international law. These exceptions may apply to persons with personal immunity (*ratione personae*) and functional immunity (*ratione materiae*). Therefore, the purpose of this analytical note is to answer the following questions:
  - What immunities exist in international law and what circle of persons do they cover?
  - Is it possible to bring the perpetrators who committed an international crime to justice despite the permanent functional immunity: a difference in opinions?
  - An act committed on behalf of a state or an individual act: where is the line drawn?
  - What does the practice of other national courts and the European Court of Human Rights tell us about the application of functional immunity?
  - Can Ukrainian courts prosecute Russian officials?

## Immunities in international law

2. As noted above, international law distinguishes two types of immunities from international prosecution for alleged international crimes: personal and functional, which, at first glance, declare their scope of application from their very names. The first is recognised for the President of the State, the Head of government and the Minister of Foreign Affairs (commonly referred to as 'troika immunity'). The second is for other representatives of the state who are granted immunity for the effective performance of their functions. Unlike personal immunity, which ceases to apply when a person leaves the office, functional immunity is permanent in its nature. That is why, in the context of the armed conflict between the Russian Federation and Ukraine and the latter's attempts to prosecute suspects of the crime of aggression in national courts, the political and military leadership of the Russian Federation may argue that functional immunity (with the personal immunity ceasing to exist) still prevents their criminal prosecution<sup>1</sup>.
3. The issue of immunities of state representatives, if they are not diplomatic representatives or members of special missions, is not codified in international

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<sup>1</sup>*Immunities and a Special Tribunal for the Crime of Aggression against Ukraine*, (2023). Open Society Justice Initiative, p. 22, [URL](#)

law. This means that the issue of immunities is regulated exclusively by customary international law.

4. The issue of criminal liability of persons enjoying personal immunity was addressed by the International Court of Justice (**ICJ**) in the case of *Congo v. Belgium*, which concerned the latter's attempt to prosecute the Minister of Foreign Affairs of the Congo. In this case, the ICJ stated that persons with personal immunity cannot be prosecuted in a foreign court, even if they have committed an international crime.
5. At the same time, the ICJ pointed out situations in which the possibility of bringing such persons to criminal responsibility may arise:
  - a) liability in the country of citizenship;
  - b) removal of immunity by the country of citizenship;
  - c) resignation from a position that gives the right to personal immunity;
  - d) proceedings before an international criminal court<sup>2</sup>.
6. However, the ICJ's decision does not answer the question of the admissibility of criminal prosecution in a foreign court of persons with functional immunity. There are many and sometimes opposite answers to this question.

## **Functional immunity in international law**

7. The first rapporteur appointed by the UN International Law Commission (**UN ILC**) on the issue of immunity of state representatives in foreign courts, Russian lawyer Roman Kolodkin, argued that international law provides for absolute immunity from foreign jurisdiction for state officials, both current and former. However, this position does not correspond to the existing case law, which is far from providing such a universal answer to the question of immunity.
8. The second rapporteur of the UN ILC took a different position, which is currently embodied in the Draft Articles on Immunities of State Representatives before Foreign Courts approved by the Commission. This position is based on the non-recognition of the absoluteness of immunity for state officials. As follows from Article 1(2) of the Draft, the provisions formulated therein do not apply to persons whose immunity is recognised in international law, i.e. persons with personal immunity. At the same time, Article 7 of the Draft states that functional immunity will not apply in national courts in the case of the following crimes under international law:

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<sup>2</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, No. 121, ICJ, 14 February 2002, para. 61

- a) genocide;
- b) crimes against humanity;
- c) war crimes;
- d) apartheid;
- e) torture;
- f) enforced disappearances<sup>3</sup>.

9. The list of crimes does not include the crime of aggression. Despite the general consensus in the UN ILC, Article 7 of the Draft on the crime of aggression was put to a vote (for the first time in the 69 years of the institution's work), and, as the members of the International Law Commission themselves stated, the political risk of adding the crime of aggression to the list of articles would have meant that the Article would not have been approved and adopted at all<sup>4</sup>. The explanation for this was formulated by the UN ILC in paragraph 18 of the Commentary to the Draft Articles. It identifies three reasons for the Commission's position:

- a) prosecution for the crime of aggression would mean the need to establish an act of aggression by one state against another by a national court;
- b) the special political nature of the crime of aggression as a crime of leaders;
- c) the absence, at the time of the adoption of the Draft Articles, of a decision of the Assembly of States Parties to the Rome Statute on the final activation of the crime of aggression<sup>5</sup>.

10. The last argument of the UN ILC has already lost its relevance, as the crime of aggression has been activated for the International Criminal Court. The second argument is hardly insurmountable, as the political nature and prosecution of leaders can be found in cases of other international crimes. The first is the most serious. However, its criticality can be minimised if the international community has a consolidated position on the commission of aggression against a particular state and decisions of international organisations in this regard.

11. In general, the UN ILC justifies this exclusion by stating that individual criminal responsibility for the crime of aggression without considering the responsibility

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<sup>3</sup> *ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction*, (2017). UN General Assembly, p.176, [URL](#)

<sup>4</sup> *Immunities and a Special Tribunal for the Crime of Aggression against Ukraine*, (2023). Open Society Justice Initiative, p. 23, [URL](#)

<sup>5</sup> *ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction*, (2017). UN General Assembly, pp. 185-186 [URL](#).

of the aggressor state itself would be contrary to the principle of "*par in parem non habet imperium*" ("equal [states] do not have sovereignty over each other")<sup>6</sup>. Some have argued that this logic is primarily driven by the issue of establishing jurisdiction, but once it has been established, the distinction between the crime of aggression and other crimes in the context of functional immunity ceases to be glaring<sup>7</sup>.

12. Despite the non-inclusion of the crime of aggression in the list of Article 7 of the Draft Articles, the Commission, in the same Commentary 18, notes that some States insisted on the inclusion of the crime of aggression and referred to the widespread worldwide criminalisation of this crime and its presence in the Draft Code of Crimes against the Peace and Security of Mankind<sup>8</sup>.
13. In any case, the UN ILC in paragraph 8 of the Commentary notes that its conclusions on functional immunity should not be taken as a codification of customary international law, but only as an indication of a trend towards limiting functional immunity<sup>9</sup>. In other words, the Commission recognised that there is currently no unified approach of states to the issue of extending functional immunity to state officials suspected of committing international crimes. This means that there are no clear rules in customary international law that would unambiguously state that functional immunity is not an obstacle to prosecution at the national level, nor rules that would prohibit national prosecution of persons enjoying such immunity.

## Distinguishing between state and personal acts

14. One of the key problems in determining whether a person has functional immunity is to determine the boundary between an act in favour of the state (*jure imperii*) and a private act of an individual (*jure gestionis*). There is no unified theory of distinguishing between such acts in international law or national case law. The existing approaches are as follows:

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<sup>6</sup> Alebeek R., Herik L., Ryngaert C., (2023). *Prosecuting Russian Officials for the Crime of Aggression: What About Immunities?* European Convention on Human Rights Law Review, p. 130

<sup>7</sup> Ibid.

<sup>8</sup> *ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction*, (2017). UN General Assembly, pp. 185-186 [URL](#).

<sup>9</sup> *ILC Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction*, (2017). UN General Assembly, 182 -183 [URL](#).

- a) Equating immunity with attribution to the state<sup>10</sup>. In this case, an act is covered by immunity if it is committed by a state body (or an official) even in excess of the latter's powers (*ultra vires*).
- b) Focus on the nature of specific acts<sup>11</sup>. In this case, it is necessary to find out whether a particular act was state in nature or whether it was still private. The most problems with this approach will arise with the crime of aggression because in this case, the connection between the decision to use force and the implementation of state policy causes difficulties.
- c) In the ICJ's *Jurisdictional Immunities of the State case*, Judge Trindade, who has always been an innovator in "international judicial activism", expressed a categorical opinion on the distinction between acts of '*jure imperii*' and acts of '*jure gestionis*', which, as will be demonstrated below, was echoed by others. Thus, he noted that the distinction between such acts is irrelevant when it comes to international crimes: "International crimes are not acts of State, nor are they "private acts" either; a crime is a crime, irrespective of who committed it".<sup>12</sup> The judge explains that historically, the commission of war crimes and crimes against humanity (and, accordingly, the crime of aggression) by a person "with the support of the so-called State "intelligence" (with all its cruelty), misuse of language, material resources and the apparatus of the State, in pursuance of State policies."<sup>13</sup> Therefore, in his opinion, it is inappropriate to draw red lines between acts of '*jure imperii*' and '*jure gestionis*' due to their inevitable indivisibility in practice.
- d) Using the axiom that the commission of an international crime is not an act of a state<sup>14</sup>. This approach also circumvents the limitations of other approaches in the case of the crime of aggression. It essentially allows for the jurisdiction of foreign courts when it comes to acts that *prima facie* have the elements of an international crime.

15. In the dissenting opinion of Higgins, Kuijmans and Buergenthal in the *Arrest Warrant* case of the International Court of Justice, the judges expressed the thesis that international crimes cannot be considered acts committed in the

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<sup>10</sup> *United Kingdom, House of Lords, Jones v Ministry of Interior for the Kingdom of Saudi Arabia and others*, 1 AC 270, UKHL 14 June 2006

<sup>11</sup> *Church of Scientology Case*, Federal Supreme Court, No. VI ZR 267/76, 26 September 1978, 65 ILR 193, 195-6.

<sup>12</sup> *Dissenting Opinion of Judge Cançado Trindade (Jurisdictional Immunities of the State (Germany v Italy: Greece intervening))*, ICJ, 3 February 2012, para. 178

<sup>13</sup> *Ibid.*, para. 182

<sup>14</sup> *Letelier v. Chile*, 748 F.2d 790, United States Court of Appeals, 20 November 1984, 63 ILR 378, 388.

official capacity of a state and, accordingly, cannot be considered state acts, because they are not “normal” acts of a state, and such acts cannot be committed by the latter (without private acts of individuals) independently<sup>15</sup>.

16. However, this view has also been widely criticised. In the practice of international and national judges, it has been noted that whether the actions of public officials are considered to be “in favour of the state” does not depend on the “legality” of such actions but on the purposes for which these acts were committed and the means that helped the official to carry them out. In addition, it is difficult to reconcile the view that international crimes are exclusively private by their nature with the principle that a state should be held responsible for internationally wrongful acts committed by its agencies<sup>16</sup>.

## Some topical issues of functional immunities

17. In order to clarify the question of whose and what actions are covered by functional immunity in the Ukrainian context (including in terms of possible prosecution of Russian parliamentarians), it is worth paying attention to several important modern examples of judicial and institutional practice.
18. In February 2021, the Federal Court of Justice of Germany issued a judgement in a war crimes case against a former Afghan soldier, where it commented on the issue of functional immunity in the following way<sup>17</sup>:
- a) Following the ICJ the Federal Court emphasised the difference between the concepts of state immunity and immunity from criminal jurisdiction. This means that criminal proceedings against persons potentially protected by immunity do not violate the rules of international law on state immunity in general<sup>18</sup>.
  - b) Examined the practice of courts in past, including post-World War II courts (which is particularly important in the context of potential cases in Ukraine concerning aggression, as post-World War II courts have dealt with these crimes), to conclude that past practice cannot be ignored in

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<sup>15</sup> *Dissenting Opinion of Judges Higgins, Kooijmans and Buergenthal (Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium))*, ICJ, 14 February 2002, para. 85

<sup>16</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (Article 4). International Law Commission

<sup>17</sup> Kress C., (2021). *On Functional Immunity of Foreign Officials and Crimes under International Law*. Just Security, [URL](#).

<sup>18</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ, 3 February 2012, para. 91

cases where functional immunity is at issue. It cannot protect potential perpetrators of international crimes.

- c) Commented on the Draft Articles on Immunities of State Representatives before Foreign Courts in the sense that this document is important, but does not yet indicate the emergence of new rules of customary international law. However, the court upheld the conclusion that functional immunity cannot be invoked and confirmed that this is in line with the German government's position on the Draft Articles.
- d) Thus, this judgement is an important recent example of circumvention of functional immunity, referring, inter alia, to the post-Nuremberg practice and the Draft Articles.

19. In January 2020, the District Court of The Hague ruled in a civil case that functional immunity applies to all acts of state representatives<sup>19</sup>:

- a) The Court noted that the ILC Draft Articles are the law of the future, not present law.
- b) The Court pointed out that there are no rules in international law that would unambiguously abolish functional immunity when it comes to international crimes.
- c) The Court did not distinguish (although it could have done so, given the nature of the dispute under consideration) between civil and criminal claims against persons with functional immunity.
- d) Thus, the Court did not perceive the trend identified by the ILC as a factor for deviating from what it considered to be the existing rules on functional immunity in international law. At the same time, the case before the court concerned a civil action, not a criminal prosecution. Given the distinction between civil and criminal cases in the context of immunities, the Hague Court's decision does not necessarily contradict the idea that functional immunities do not exist in criminal cases of international crimes.

20. The ECHR case law essentially recognises the existence of functional immunity for members of parliament, which does not protect them from liability in certain cases:

- a) The ECHR has considered cases concerning potential human rights violations by representatives of parliaments in the context of judicial proceedings in the state of nationality of parliamentarians.

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<sup>19</sup> Ryngaert C., (2020). *Functional immunity of foreign State officials in respect of international crimes before the Hague District Court: A regressive interpretation of progressive international law*. EJIL: Talk, [URL](#).

- b) In general, the ECHR considers the practice of granting immunities to parliamentarians to be permissible<sup>20</sup>. The Court sees two components of functional immunity: *non-accountability* (protection from liability in connection with professional activities) and *inviolability* (protection outside of such activities)<sup>21</sup>.
- c) At the same time, the granting of immunity from prosecution should be proportionate to the interests of society and the state that are achieved by their introduction<sup>22</sup>.
- d) Proportionality can be deduced from an examination of whether a particular act of a parliamentarian is related to his or her parliamentary function<sup>23</sup>.
- e) Thus, the ECHR case law cannot serve as a guide to the admissibility of criminal prosecution of persons with functional immunity in foreign jurisdictions. However, the arguments of the ECHR can be incorporated into various legal constructions that justify the concept of limited functional immunity.

## Elements of a strategy for Ukrainian law enforcement

21. To summarise the international legal regulation of functional immunities outlined here, we note that there is currently no single approach to its interpretation. This makes it possible to speak about the admissibility, at least in some cases, of prosecuting state representatives with functional immunity in foreign courts. It seems that the following arguments could form the basis of a legal position on the admissibility of prosecution of Russian officials in Ukraine:
  - a) The UN ILC noted the lack of a universal understanding of functional immunities and their limitations. This means that today it is hardly possible to say that all states of the world accept the absoluteness of immunities.
  - b) The crime of aggression should be among those crimes that allow for exceptions to the application of functional immunity, as the Draft ILC Articles were approved before the Kampala Amendments entered into force and without taking into account the practice of the Nuremberg era.

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<sup>20</sup> *Cordova v Italy*, No. 45649/99, ECtHR, 30 January 2003

<sup>21</sup> *Kart v Turkey*, No. 8917/05, ECtHR, 3 December 2009

<sup>22</sup> *Syngelidis v Greece*, No. 24895/07, ECtHR, 11 February 2011

<sup>23</sup> *Tsalkitzis v Greece*, No. 11801/04, ECtHR, 16 November 2006

- c) Domestic proceedings against a foreigner with functional immunity are possible when there is a reasonable suspicion that such a person has committed an international crime.
- d) Functional immunity is derived from the idea that agents of a foreign state acting within the scope of their official duties should not be prosecuted.
- e) Alternatively, functional immunity is not derived from universal customary rules and is governed by regional, different rules<sup>24</sup>.
- f) As a result, it is not absolute in nature and may be limited (including for prosecution in a foreign jurisdiction).
- g) The ECHR provides for the possibility of limiting functional immunity. This is important in the context of the potential possibility of applying to the Russian Federation for the removal of immunity from its representatives for their prosecution in Ukraine. Such an appeal is doomed to fail. This is due to the overly broad interpretation of immunity in the Russian Federation, which does not allow for the protection of human rights, including those of Russian citizens (who may also be victims of an international crime, primarily aggression).

## Conclusions

22. The established doctrine of international, primarily customary law, and international and national judicial practice cannot provide an unambiguous and unanimous answer to the question of the possibility of prosecuting state officials for alleged international crimes in national courts. Despite the unanimity of opinions on the personal and temporal application of personal immunity, many open questions remain regarding the application of functional immunity: can a state, for example, avoid responsibility for the acts of its officials by claiming that they have exceeded their powers, or are individual acts constituting an international crime inextricably linked to the state? Does the crime of aggression differ from genocide in politicised arguments about the “impossibility” of one sovereign state to “judge” another? All of these questions are not resolved and may not be answered for some time to come. However, despite the controversial case law, Ukrainian law enforcement agencies still have the necessary legal mechanisms in their hands to prosecute Russian officials in domestic courts.

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<sup>24</sup> Pisillo Mazzeschi R., (2015). *The functional immunity of State officials from foreign jurisdiction: A critique of the traditional theories*. Questions of International law, [URL](#).