НАПРЯМ 1. ПРАВОВА АРХІТЕКТУРА ВІДНОВЛЕННЯ УКРАЇНИ: НАЦІОНАЛЬНІ ТА МІЖНАРОДНІ ПІДХОДИ

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«RACIONE MATERIA» IMMUNITY IN INTERNATIONAL CRIMINAL LAW

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Customary international law distinguishes two types of immunity from criminal jurisdiction for state officials: immunity *ratione personae* (personal immunity) and immunity *ratione materiae* (subject-matter immunity).

Immunity *ratione personae* is enjoyed only by a limited number of high-ranking State officials: heads of state, heads of government, and foreign ministers. This immunity extends to all acts, both official and private, committed during the time when the State official is in office as well as private acts committed before this time. Once removed from office, these persons are treated like any other public official and only enjoy immunity *ratione materiae*. Immunity *ratione materiae* is enjoyed by all State officials of every rank. This immunity applies only to official acts committed during the time when the State official is in office. Acts committed in a private capacity are not covered [1, p. 21-22]. Unlike personal immunity, which ceases to apply when a person leaves office, functional immunity is permanent [2, p. 22].

The application of immunity 'ratione materiae' in international criminal law has undergone changes, especially after the establishment of international tribunals and courts.

Ratione materiae immunity cannot be invoked if the person is to be judged by an international tribunal or court [1, p. 21]. This trend was initiated by the Nuremberg Tribunal, whose verdict stated that: «The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings» [4, p. 22]. Ch. Bassiouni wrote, that 'a new rule of customary international law was

established, namely that international immunities do not apply to international prosecutions for certain international crimes' [5, p. 73].

The practice of international tribunals and courts, for example, the International Tribunal for the former Yugoslavia, the Special Court for Sierra Leone, the International criminal court, and the International Court of Justice demonstrates the formation of a norm according to which there is no place for functional and personal immunities before international courts in cases of violation of *jus cogens* norms, which include the prohibition of aggression [6]. In the Arrest Warrant Case, the ICJ established that «the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances», «an incurnbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction» [7, p. 61]. The Appeals Chamber of the ICC in *Al-Bashir case* held that article 27(2) of the ICC Rome Statute, stipulating that immunities are not a bar to the exercise of jurisdiction, reflects the status of customary international law [8].

National tribunals since World War II have denied functional immunity to officials accused of international crimes, including for the crime of aggression. Accordingly, members of the political and military leadership of the Russian Federation would not enjoy functional immunity in criminal proceedings for the crime of aggression. However, the existence of this exception to functional immunity for international crimes, and specifically for the crime of aggression, is not straightforward.

The ILC in its Draft Article 7 on the Immunity of State officials from foreign criminal jurisdiction adopted the position that functional immunity does not bar foreign criminal jurisdiction in respect of only certain international crimes (genocide; crimes against humanity; war crimes; apartheid; torture; enforced disappearances). The crime of aggression was not included in this list of international crimes [2, p. 22-23].

The non-inclusion of the crime of aggression in Article 7 of the Draft Articles was explained, in particular, by the fact that prosecution for the crime of aggression would require a national court to establish an act of aggression by one state against another, which involves complex assessments of international relations and state conduct. Additionally, the special political nature of the crime of aggression as a crime of leaders makes it distinct from other international crimes and often intertwines it with issues of state sovereignty and immunity [9].

Despite the non-inclusion of the crime of aggression in the list of Article 7 of the Draft Articles, the Commission notes that some States have insisted on the inclusion of the crime of aggression in the list and referred to the widespread worldwide criminalisation of this crime, as well as its presence in the Draft Code crimes against peace and security of mankind of the UN ILC. In any case, the ILC

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 limitation of functional immunity. In other words, the Commission recognised the absence of a unified approach of the world's states to the issue of extending functional immunity to public 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, as well as rules that would prohibit national prosecution of persons enjoying such immunity [10, p. 4].

Thus, immunity 'ratione materiae' in international criminal law remains important, but is increasingly subject to restrictions in cases of serious international crimes. The current trend indicates the growing role of international judicial institutions in overcoming legal obstacles to the prosecution of high-ranking officials who commit core international crimes. This confirms that international law is evolving towards ensuring the inevitability of punishment for the most serious crimes, regardless of the official status of the perpetrator.

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ГОЛОВНІ РИСИ ЦІЛІСНОГО ПРАВОВОГО ПОРЯДКУ ЯК ЦІННІСНОГО ПРАВОВОГО ЯВИЩА СУЧАСНОЇ ДЕРЖАВИ

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Для ефективного вирішення питань, пов'язаних з ціннісними аспектами правової сфери, зокрема їхньою структурою, ознаками, динамікою розвитку, процесами позитивації, нормативного закріплення та ієрархічного упорядкування, сучасна правова аксіологія використовує два фундаментальні концептуальні підходи. Під час аксіологічного аналізу правових явищ слід виходити з їхньої дуалістичної природи, а саме: визнання їхньої внутрішньої самоцінності та інструментальної цінності, що полягає у їхньому використанні для досягнення певних цілей. Представлені аргументи демонструють методологічне розмежування двох принципово відмінних способів інтерпретації поняття «цінність». У першому випадку,