ACADEMY OF SCIENCES OF MOLDOVA

INSTITUTE OF LEGAL, POLITICAL AND SOCIOLOGICAL RESEARCH

As a manuscript
C.Z.U: 341.6(043.2)=111

ALEXANDRA NICA

JURISDICTIONAL IMMUNITY OF STATES

SPECIALTY: 552.08 – INTERNATIONAL AND EUROPEAN PUBLIC LAW

Summary of the Ph.D. Thesis in Law

CHIȘINAU, 2022

The thesis was elaborated within the Institute of Legal, Political and Sociological Research of the Academy of Sciences of Moldova

Scientific advisor:

SÂRCU (SCOBIOALĂ) Diana, Ph.D. hab., University professor

Official opponents:

1. ARHILIUC Victoria, Ph.D. hab., University professor
2. GAMURARI Vitalie, Ph.D., Associate professor

Composition of the Specialized Scientific Council:

1. BALAN Oleg, Chairman, Ph.D. hab., University professor
2. CAUIA Alexandru, Scientific secretary, Ph.D., Associate professor
3. POALELUNGI Mihai, Ph.D. hab., University professor
4. DORUL Olga, Ph.D., Associate professor
5. ROȘCA Valentin, Ph.D.

The public defence will take place on **6 May 2022, at 15.00 o'clock**, at the meeting of the Specialized Scientific Council D 552.08-21-59 established within the University of Political and Economic European Studies "C. Stere", at the headquarters of the Academy of Public Administration, Chisinau, 100 Ialoveni str., room 301

The doctoral thesis and the summary of doctoral thesis can be consulted at the Library of the University of Political and Economic European Studies "C. Stere", the Library of the Academy of Public Administration and on the website of the National Agency for Quality Assurance in Education and Research (http://www.cnaa.md/).

The summary was submitted on 17 March 2022

Scientific secretary of the Specialized Scientific Council

CAUIA Alexandru, Ph.D., Associate professor

Scientific advisor

SÂRCU (SCOBIOALĂ) Diana, Ph.D. hab., University professor

Author

NICA Alexandra

CONTENTS

CONCEPTUAL ASPECTS OF THE RESEARCH

Novelty and significance of the topic. Relations between the states of the world, from positions of equality between sovereigns, have always been characteristic to universal history. The privileges that a state - most often in the person of the head of state - recognized for the official representatives of other states: initially envoys, later diplomatic agents, and, undoubtedly, sovereigns, were referred on peacetime and wartime.

The concept of sovereign equality has already emerged separately in Roman law, although the lawyers of the first transcontinental empire demonstrated a separate approach to the equal treatment for other states and nations, equal privileges being recognized in particular for allies.

It is natural that, from a historical-evolutionary perspective, the concept of sovereign equality of states, people and nations has conditioned the emergence of several approaches to the immunity. Thus, the immunity of heads of states, the immunity of diplomatic and consular agents, and more recently the immunity of international organizations, the jurisdictional immunity and the immunity from enforcement of states, have been distinctly asserted. At other times, those categories of immunity were viewed cross-sectional, interspersed.

Although all categories of immunity have found practical application since modern era, the jurisdictional immunity of states has been the object of limited legal and jurisprudential analysis.

The assertion and development of the jurisdictional immunity of states, as a principle of public international law, increased in the 19th century with the famous case settled by the President of the US Supreme Court, Chief Justice Marshall, *The Schooner Exchange v. McFaddon*, when the American judge concluded on the absolute immunity that a state was to enjoy before the courts of another state, practically exemplifying the approach of absolute immunity from jurisdiction.

For a century, until the end of the World War I, the principle of the jurisdictional immunity of states was analysed by judges in rather limited cases, the situation changing in the interwar period. Since then, with the first voices declaring the need to change the attitude towards that rule, by drawing the differences in principle between the state's immunities regarding sovereign actions, in official capacity (*acta jure imperii*) and private domain actions (*acta jure gestionis*), special attention has been paid to the jurisdictional immunity of states.

Regrettably, but the tragic events that characterized World War II, mainly the crimes committed by the Nazi army, caused a new dimension in shaping the principle of the jurisdictional immunity.

The cases initiated by the victims of the horrors committed by the army of the Third Reich in compensation for material and, especially, moral damages for homicides, torture, rape,

displacement, forced labour, destruction of property, breaking up of family and emotional relationships, to which victims and their descendants were subjected, imposed magistrates in various parts of the world to take a position on engaging Germany's responsibility within the limits of the allegations. Thus, European and American judges had to consider the extent to which the actions, which were undoubtedly reprehensible, could be assessed in court, with the determination of compensatory damages.

Meantime, some states, such as those of the common law, have succeeded in enacting special legislation regulating the issues of jurisdictional immunity and its exceptions.

In addition to the divergent solutions adopted in those cases, sometimes even by the courts of the same state, the lack of a clear and uniform approach in public international law on the issue under this scientific work has also been noted.

The disagreement of opinions at national level conditioned the referral to the international jurisdictions to rule in this respect. Some solutions have been put forward by the European Court of Human Rights (ECtHR), which, together with the cases *Al-Adsani v. the United Kingdom* and *Cudak v. Lithuania*, seems to have put an end to the interpretation and application of the principle of the jurisdictional immunity of states, at least at this stage of development of international law and international relations.

The issue in question was not foreign to the case law of the International Court of Justice (ICJ), which in 2012 gave its final solution in the famous case *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), where it acknowledged that for the acts, including illegal ones, committed during World War II, Germany enjoys immunity from jurisdiction under a rule of customary international law and, in this context, cannot be obliged to pay compensatory damages by the tribunals of other states.

The conclusions of the international courts, paradoxically, conditioned the appearance of more questions than solutions. Beyond the emotional criticisms of their justice and fairness, multiple legal issues have arisen, in particular, regarding the balance issues formulated by magistrates between the customary principle of jurisdictional immunity, which took the form of an international treaty with a universal vocation only in 2004 and which has not yet entered into force, and the mandatory rules of public international law concerning the prohibition of torture, of which Nazi Germany has been accused of violating. International jurisdictions have reached agreed conclusions on the correlation of these two rules and the difference that exists between procedural rules, such as those on immunity, and material rules, such as those on the prohibition of torture. But the wave of interest, reactions and criticism among lawyers in different regions of the world, provoked, in particular, by the solution pronounced by the ICJ, places an objective

observer to reflect that the assertion of the evolutions of the jurisdictional immunity of states will not stop here.

New challenges facing humanity – intensified fight against international terrorism and opposition to the states considered to finance it; return to the agenda of discussions on a possible new Cold War; regimes for the protection of wanted persons; struggles and errors of the intelligence services; advanced technologies and virtual properties; assertion of new world economies; growing influence of huge transnational corporations in the international relations, spiced up by human rights and fundamental freedoms, and the major differences between contemporary metropolitan societies, where religious and social disparities are least surprising, will inevitably affect inter-state relations of the legal field, where the principle of jurisdictional immunity cannot be unjustifiably overlooked.

In this regard, from a judicial retrospective glance, recent decades the jurisdictional immunity of one state before the courts of another state has concerned consequences of World War II, payment of compensation for war crimes and crimes against humanity, compensation for damages caused by acts of torture and terrorism by state agents, private activities of states. But main challenges that lawyers will face in its application, given the current realities, are ahead.

Goal of the thesis. Taking into account the significance of the theme of the research, its ***goal*** consists in the multidimensional analysis of the jurisdictional immunity of states, with identification of its acceptations, definitions and peculiarities, namely through study of the acts adopted by national and international jurisdictions on the concrete cases. The formulation of a new (own) definition of the jurisdictional immunity of states will determine the full realization of the goal of the scientific work.

This paper starts from the ***hypothesis*** that the jurisdictional immunity of states, evolving from a rule of customary law to a fundamental principle of procedural nature of public international law, determines the existence of an apparent conflict of legal norms, jurisdictional immunity being seen as a procedural ban in holding States or their highest representatives to responsibility for violations of binding international norms concerning non-aggression and, more recently, the prohibition of torture and ill-treatment.

In order to achieve the set goal, the following ***objectives of the research*** were found:

- ✓ Identifying the current phase of affirmation of the jurisdictional immunity of states by reporting to the historical-evolutionary course;
- ✓ Determination of the meanings of the immunity of state;
- ✓ Defining the concept of the jurisdictional immunity of states;

- ✓ Outlining current approaches to the jurisdictional immunity of states in the light of the ICJ and the ECtHR case-law;
- ✓ Elucidation of examples of judicial practice in the application of jurisdictional immunity of states in the cases relating to the compensation for damages resulting from war crimes and crimes against humanity, from acts of torture and terrorism.

Thus, ***obtained results that contribute to the solution of an important scientific problem*** lies in conceptualization of the principle of jurisdictional immunity of states in the system of international law by identifying its particularities and limits of application by national and international courts, which leads to clarification for legal theorists and practitioners of the cases in which the courts are to recognize jurisdictional immunity to the foreign State, as well as the corresponding exceptions, in order to make the application of immunity uniform and to exclude divergent practice.

- ✓ *From a theoretical perspective*, a veritable scientific theory is formulated on the jurisdictional immunity of states, being established its meanings and approaches in a normative and jurisprudential sense.
- ✓ *From a practical perspective*, a multitude of cases solved by international and national jurisdictional institutions are analysed, thus the limits of application of the jurisdictional immunity of states being determined.

Scientific novelty of the results obtained. The novelty and scientific originality of this work lies in development of a national doctrinal study on the jurisdictional immunity of states, with the determination of its particularities and limits of its applicability, in particular by analysis the solutions formulated by various international and national jurisdictions in a wide range of legal and factual situations; formulating own conclusions and recommendations on the research.

Theoretical meaning. This thesis has a consolidated scientific character, being focused on the peculiarities and limits of applicability of the jurisdictional immunity of states in modern public international law. The scientific approach develops an analytical view of the cases solved by international and national fora regarding the application of jurisdictional immunity of states, in the case of states as such, their bodies and agents representing them.

Practical value of the work. The thesis is addressed to the audience initiated in the field of public international law, customary international law, international litigation law, international human rights law, the law of armed conflict. Undoubtedly, this work arouses interest of theorists of international law to discover the distinctive elements of the jurisdictional immunity of states, its meanings and definitions, its place and role in the modern international law system.

The thesis is of particular interest to practitioners in the field of law and justice, providing a solid platform for reflection on the limits of the applicability of the jurisdictional immunity of states to a wide range of factual and legal situations of a practical nature, including claims against other states that could be submitted to the courts of the Republic of Moldova.

Implementation of the scientific results. The results of the research, conclusions and recommendations formulated through this study had been enlightened in the texts of scientific papers published in specialized journals in the country and abroad, as well as presented and discussed at national and international profile conferences. The results were also discussed during training activities in the field of the ECHR law and international jurisdictions organized at the Moldovan National Institute of Justice.

Synthesis of the research methodology and justification of the chosen research methods. Analysing the jurisdictional immunity of states from a normative and jurisprudential perspective, a variety of scientific research methods were used, namely:

- *historical method*, used to investigate the historical and philosophical-legal evolution of the jurisdictional immunity of states;
- *comparative method*, by means of which the multiple cases solved by the international and national fora on the application of the immunities of the states were analysed;
- *logical method*, indispensable during the study of normative acts and judicial reasoning, as well as in the formulation of conclusions and recommendations;
- *quantitative method*, which was used in the context of systematizing and highlighting the normative and doctrinal sources regarding the jurisdictional immunity of states;
- *prospective method*, used to identify the most effective ways to optimize national legislation and to form guidelines for the application of jurisdictional immunity of states from a uniform perspective;
- *systemic method*, which allowed the study of normative acts as a system that demonstrates external interconnections;
- *synthetic analysis*, indispensable in the formulation of general conclusions and recommendations, including proposals *de lege ferenda*.

Scientific analysis of a particular field inevitably conditions the identification of certain ***research problems***, such as: the existence of divergent views, including the level of supreme fora, on the essence and place of immunity in the system of modern international law related to the correlation between competing concepts of state immunity and individual rights; inaccessibility of jurisdictional acts of national fora containing reflections on jurisdictional immunity; the ongoing process of asserting immunity from the perspective of international law.

In the context of these research problems, the main ***directions of research*** of this work have been related to: the analysis of the approaches of jurisdictional immunity at different historical periods and in the present; identification of its peculiarities and limits of application in the light of the jurisprudence of international fora (ICJ, ECtHR) and national jurisdictions representatively selected from around the world.

Publications on the thesis. The results are published in 6 articles in specialized profile journals and presented at 6 national and international conferences, included in the content of a thematic commentary.

CONTENTS OF THE THESIS

The thesis consists of an introduction, four consolidated chapters, general conclusions and recommendations, a bibliographic list and annexes.

The ***INTRODUCTION*** shows a general characteristic of the work; the significance of the research topic is argued, the goal and objectives of the research are determined; there are described methodological and theoretical-scientific support, theoretical meaning and practical value of the paper, implementation of the scientific results, problems and research directions; results that contribute to the solution of an important scientific problem are formulated; publications on the thesis are listed and the summary of the thesis compartments is presented.

Chapter 1 entitled ***"THEORETICAL, NORMATIVE AND JURISPRUDENTIAL FOUNDATIONS OF THE JURISDICTIONAL IMMUNITY OF STATES"*** reveals the current state of knowledge in the field of research, from the doctrinal, normative and jurisprudential perspective. In section 1.1. ***"Doctrinal considerations regarding the jurisdictional immunity of states"***, the scientific publications in the field of the thesis are analysed, especially the recent scientific results in the foreign and national profile literature. Thus, there are listed opinions of the representatives of Western legal doctrine such as Ernest K. Bankas, Daniel T. Murphy, Pasquale De Sena and Francesca De Vittor, Lorna McGregor, Roger O'Keefe, Lee M. Caplan, Maw Marlar, Christian Tomuschat, Lee Walker, Andrea Bianchi, Curtis A. Bradley and Laurence R. Helfer, August Reinisch; representatives of the Russian doctrine of international law – Mark Boguslavskiy, Gulnara Shaykhutdinova, Nikolay Ushakov, Irina Hlestova, Aleksandr Tsimmerman, Anna Lapshina, Oleg Kravcenko, Aleksandr Vylegzhanin, Nadezhda Churilina and, finally, of the Romanian and Moldovan scholars that studied certain aspects of the jurisdictional immunity of states – Carmen Moldovan, Raluca Miga-Beșteliu, Mihai Poalelungi and Stas Splavnic, Valeriu Babără, Vitalie Gamurari, Olga Dorul.

Section 1.2. ***"International instruments regulating the jurisdictional immunity***", deals with the main international regulatory instruments in this field, namely the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels of 10 April 1926 [20] and the Additional Protocol thereto; United Nations Convention on the Law of the Sea of 10 December 1982 [27]; European Convention on State Immunity (ETS 74) of 16 May 1972 [19] and the Additional Protocol thereto (ETS No 74A) [1], Draft Articles of the International Law Commission on Jurisdictional Immunities of States and Their Property of 1991 [18], and finally the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 [26].

Separately, section 1.3. ***"National acts on the jurisdictional immunity"*** examines national regulations governing immunity from jurisdiction, including the United States Foreign Sovereign Immunities Act of 1976 [28], the United Kingdom State Immunity Act of 1978 [25], Australia Foreign States Immunities Act of 1985 [2], Canada State Immunity Act of 1985 [3], the Russian Federation Federal Law on Jurisdictional Immunities of a Foreign State of 2015 [31]. At the national segment, there are studied the provisions of the Code of Civil Procedure of the Republic of Moldova [17] related to the immunity of jurisdiction of foreign states and the regulations contained in the Recommendation of the Supreme Court of Justice no. 26 on the immunity of diplomatic missions [23], as a tool for unifying the judicial practice.

Additionally, in section 1.4. ***"Jurisdictional act of application of the jurisdictional immunity of states"*** there is analysed the judicial act by which the immunity of states is applied, it being the foundation of the jurisprudential nature of the research. The complex process of analysis and assessing the jurisdictional immunity of states in the circumstances of a particular case takes the predefined form of the judicial act, which, in each separate case, reveals its limits and peculiarities of application. Thus, judicial acts have been classified according to various criteria in order to highlight the peculiarities of the sophisticated process of applying the jurisdictional immunity of states and to establish its limits of practical shape.

The chapter ends with conclusions.

Chapter 2 entitled ***"AFFIRMATION OF THE PRINCIPLE OF THE JURISDICTIONAL IMMUNITY OF STATES"*** highlights the results of scientific research on the historical and evolutionary aspects of the jurisdictional immunity, including the doctrines of absolute and restrictive immunity and their application in various states of the world; the meaning of the state immunity, namely: jurisdictional immunity, immunity from enforcement, immunity of heads of state / agents of the state. Also here there are presented the reflections on the definition of the jurisdictional immunity from the normative perspective (international and national

instruments) and jurisprudence. The own definition of the jurisdictional immunity of states is put forward.

In section 2.1. ***"Historical-evolutionary aspects of the jurisdictional immunity of states"*** there is presented the historical course of the jurisdictional immunity, which represents one of the old concepts affirmed in customary international law, finding expression still in Roman law by the phrase "*par in parem non habet imperium*", which means that one equal has no power over another equal. Historically, the state's jurisdictional immunity developed from the principle of the monarch's sovereignty over the governed territories and people of the country, in medieval Europe kings and rulers enjoyed immunity from the courts of other states when traveling abroad. With the signing in 1648 of the Peace Treaty of Westphalia, the principle of jurisdictional immunity of the sovereign of a state, and consequently of the state he represents, became politically accepted by many subjects of relations in the international arena. However, at that time the jurisdictional immunity of the state was not completely separated from the immunities granted to the monarch of a foreign state, and in fact was generically linked to the universal principle of sovereign equality, not having a distinct legal configuration [24, p. 173].

Currently, the jurisdictional immunity of the state is linked conceptually to the immunity of the head of state abroad, but also the immunities and privileges granted to diplomatic agents, but it has been configured as a separate customary principle, which has evolved and given rise to a real and complex legal doctrine of jurisdictional immunity. In international law, two doctrines of jurisdictional immunity are traditionally emphasized – absolute and restrictive (functional), the doctrine of restrictive immunity being most often invoked, implying the differentiation between the actions of the foreign state exercised within sovereign power (*acta jure imperii*) and those undertaken as a private subject in commercial relations (*acta jure gestionis*). The right to invoke jurisdictional immunity only applies to the exercise of sovereign powers. In other cases, the immunity does not apply to the State, the latter being placed on an equal footing with other participants in private relations.

In section 2.2. ***"Meanings of the state immunity"*** there are analysed the categories of immunity that are attributed to a state. These are specific and complex issues, arising from separate reasoning. The State, its officials and agents shall enjoy certain specific immunities in order to ensure the performance of their separate functions and duties in accordance with the rules and principles of public international law. Actually, various types of state immunity are listed, which differ depending on the subject to whom the immunity is addressed and the amount of special rights included in the content of this immunity.

Thus, immunity can concern the State as such, constituting the sovereign immunity of the state in its capacity as a plenipotentiary subject of rights and obligations in public international law. Such immunity takes the form of jurisdictional immunity (absolute, restrictive) and immunity from enforcement (in absolute form). Moreover, the phrase "immunity of a State" also refers to the advantages / distinctions guaranteed to persons representing the State in the highest rank, the so-called "immunity of Heads of States or Governments", recognized to ensure the proper exercise of the high positions with which dignitaries are invested.

As an example of jurisdictional immunity of another State involving in a way the Republic of Moldova may be invoked the case decided in the courts of the Netherlands between the company registered in the Republic of Moldova, "Ascom-Grup JSC", specialized in oil and gas, and the Government of Kazakhstan. Thus, on 18 December 2020, the Supreme Court of the Netherlands annulled the decision of the Amsterdam Court of Appeal concerning the application of the seizure on the contested actions, which belonged to a disputed third company, registered in Kazakhstan, by invoking Article 19 let. c) of the United Nations Convention on Jurisdictional Immunities of States and Their Property – "State immunity from post-judgment measures of constraint" and recognized the rule in question as an international custom [30]. Currently, this dispute is the only known process in which the rules on state immunity (United Nations Convention on Jurisdictional Immunities of States and Their Property, although not yet in force) have been applied, concerning the Republic of Moldova, with reference to a Moldovan private company.

Reflections on the definition of jurisdictional immunity of state are set out in section 2.3. entitled ***"Definition of the jurisdictional immunity"***, being considered the relevant provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property [26], Draft Articles of the International Law Commission on Jurisdictional Immunities of States and Their Property [18], the European Convention on State Immunity [19], the US Foreign Sovereign Immunities Act [28], the UK State Immunity Act [25], the Australia Foreign States Immunities Act [2], the Code of Civil Procedure of the Republic of Moldova [17], the relevant jurisprudence of the European Court of Human Rights. The own definition of the jurisdictional immunity of state is also formulated.

Traditionally, the Chapter ends with a series of conclusions on the aspects of the research.

Chapter 3, entitled ***"THE DILEMMA OF THE JURISDICTIONAL IMMUNITY OF STATE IN THE PRACTICE OF INTERNATIONAL COURTS"***, reflects the analysis of the jurisdictional immunity of state from the perspective of the jurisprudence of two famous international fora – the International Court of Justice and the European Court of Human Rights.

In section 3.1. ***"Current approaches to the jurisdictional immunity of state in the light of judgments of the International Court of Justice"*** there are studied the views of the ICJ magistrates, who, since the 2000s, have developed a strengthened approach to the state immunity, their reasoning culminating in the revolutionary judgment *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening) [11].

The first case in which the ICJ addressed in a complex way the issue of the principle of the jurisdictional immunity is the *Case concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) [5], which referred to the immunity of the acting Foreign Minister. The ICJ has observed that under international law, similar to diplomatic and consular agents, certain high-ranking officials, such as head of state, head of government and minister of foreign affairs, enjoy immunities from the jurisdictions of other states, both civil and criminal. The duties of a Minister of Foreign Affairs shall be such that, for the duration of his term of office, he or she abroad enjoys full immunity from criminal jurisdiction and inviolability. This immunity and inviolability shall protect the person concerned from any act of authority by another State which would impede the performance of his or her duties. The rules governing the competence of national courts must be carefully differentiated from those governing jurisdictional immunities: jurisdiction does not imply a lack of immunity, while the absence of immunity does not imply jurisdiction. Thus, although various international conventions for the prevention and sanctioning of certain serious crimes impose on States obligations to prosecute or extradite, thus requiring the extension of their criminal jurisdiction, this extension of jurisdiction does not affect the immunities according to the customary international law, including the immunity of foreign ministers. It remains enforceable before the courts of a foreign state, even if those courts exercise their jurisdiction under international conventions. However, the ICJ emphasized that the immunity enjoyed by foreign ministers does not mean they enjoy impunity for the offenses they might have committed, regardless of their seriousness. Immunity from criminal jurisdiction and individual criminal responsibility are separate concepts. Although immunity from jurisdiction is procedural in nature, criminal liability is a matter of substantive law. Immunity from jurisdiction may be waived in criminal proceedings for a specified period or for certain offenses; immunity cannot exempt the person of criminal liability.

In the *Case concerning certain questions of mutual assistance in criminal matters* (Djibouti v. France) [4], the ICJ addressed issues of jurisdictional immunity from the point of view of the immunity enjoyed by the head of state in criminal proceedings abroad.

On 3 February 2012, the International Court of Justice ruled in the *Case of Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), in which it delineated the standards

of applicability of a defendant State jurisdictional immunity in court proceedings initiated under national jurisdiction of the forum state. That case has strengthened a new foundation in addressing the jurisdictional immunity of states.

In detail, the ICJ outlined the object on which it was to rule given the issues raised by the litigants. In that regard, it concluded that its task was to determine whether the failure of a State to satisfy its obligation to pay reparation could have a direct legal effect on the existence and exercising the immunity from the jurisdiction of that State before the courts of a foreign State. The legal issue before the international court was to establish the customary and conventional legal framework of public international law in order to address jurisdictional immunity. Although the judgment, which presents the direct ground of the scientific investigation carried out, is a more recent one, the circumstances underlying the dispute referred back to the events of World War II, being, unfortunately, typical in the German occupation. Thus, questions were raised before the ICJ concerning the authorization by the Italian national courts of the payment of pecuniary reparation claimed by several Italian and Greek nationals, who had suffered as a result of relocation from their national territory, forced to work within the war industry, or who have suffered as a result of massacres organized by German troops, making demands (*in personam* or successors) for the payment of reparations by Germany.

The many requests that will be made to national jurisdictions since 2000 by persons who have suffered as a result of the actions of Nazi forces have been conditioned by the adoption and entry into force of the German Federal Law of 2 August 2000 on the Creation of a Foundation „Remembrance, Responsibility and Future" [21], its competences including payment of compensations for persons who were imposed during the fascist period on forced labour or other injustices, a distinct feature of the normative act being that it did not provide direct mechanisms for payment to the injured persons or their successors, but special indirect mechanisms, through partnership organizations.

The ICJ's conclusion on the illegality of the actions taken by the German military forces is noteworthy, a fact acknowledged by the applicant State at all stages of the international proceedings, which in the opinion of international magistrates does not in any way affect the sovereignty of such actions *acte jure imperii* – actions committed by a state in the exercise of its sovereign power. Therefore, the essence of the contested actions in domestic proceedings, namely that they constitute serious violations of international humanitarian law and of the rules of war against the civilian population (including women and children), does not affect the sovereignty of those actions, the State in the exercise of its official powers adopting both lawful and unlawful actions.

The ICJ has also ruled on the defendant State's argument concerning the special position of the mandatory rules of public international law and their correlation with the principle of jurisdictional immunity. The Italian side claimed that given the superiority of the *jus cogens* rules over any other conventional or customary norm of public international law, in the event that the German State had committed violations of those rules during the war, the customary rule of jurisdictional immunity is not likely to be applied. The ICJ noted that the argument was based on the existence of some conflict between the mandatory norm of international law and the customary norm of jurisdictional immunity, a conflict which is only apparent, in fact there is no opposition between those rules simply because they are special and deals with separate matters, the principle of jurisdictional immunity is of a procedural nature applicable to the determination of whether or not national courts of a State are entitled to exercise jurisdiction over another State.

Thus, the international forum has ruled that, in the presence of a violation, even gross, of a ***substantive rule*** of an imperative nature of public international law, which does not allow any derogation, it is not justified to exclude the application of the customary ***procedural rule*** of jurisdictional immunity of one state before the national courts of another state. The ICJ has ruled that the setting of the purposes and limits of the jurisdiction of an internal tribunal does not derogate from the material provisions of the mandatory norm, thus not affecting the applicability of the latter.

That dispute raised specific issues regarding the position of States in international relations, in particular with regard to the issue of the jurisdictional immunity of one State in the courts of another State, in the context of modern international relations.

There will be highlighted some distinct features of the ICJ judgment, determined by the unique circumstances under which the framework of the case is shaped.

In the foreground, there cannot be ignored the fact that the political context prevailed at the time of the commission of the damage-causing condemnatory acts, the compensation of which was requested by the Italian and Greek nationals. The acts of the German state were committed during the World War II in the active theatre of the belligerent operations and in the most devastating and bloody war known to mankind, but five decades before the requests of the victims to pay the damages. Despite the imprescriptibility of crimes against humanity and of war crimes, and the manifestly illegal nature of the actions taken by the German army, the ICJ has been in a very difficult position to rule on the decision of the Italian courts to lift the rule of immunity granted to Germany by virtue of the customary norms of public international law in the middle of the 21st century, when the atrocities committed between 1939-1945 are still alive in the consciousness of the present generations, but a considerable period of time has elapsed since the commission of

those acts. However, the rationale of the permanent international forum referred to the assessment of the alleged causal link between the mandatory rules of public international law, which, in the case of legal disputes, are those of international humanitarian law and armed conflict law, and the customary rule of jurisdictional immunity of States, based on the principle of sovereign equality, which in its turn also constitutes a *jus cogens* rule.

The ICJ has concluded that no causal link can be drawn between the infringed *jus cogens* rules and the customary principle of jurisdictional immunity, as these two legal categories engage in different essences – substance and procedure, and the determination of competence of the courts of one state over another state, without interfering with the applicability to the litigation case of *jus cogens* material norms.

From the perspective of present scientific work, we cannot completely agree with the legal logic developed by the ICJ, at least for the reason that, as a result, when establishing the jurisdiction of the court of a state, which is to be *ex officio* and automatic, that will have the effect of not resolving the complaint on the merits and, respectively, will lead to the practical inapplicability of the mandatory rules of international law, alleged as being violated. That is, although in theory the application of jurisdictional immunity does not affect the operation of *jus cogens* rules, in practice they will never be addressed by the court, for the simple reason that it will establish its incompetence to resolve the case on its merits.

We cannot fail to emphasize that the judgment rendered by the ICJ, although in its formal sense, is not a source of public international law, being endowed with the power of *res judicata* only with reference to the parties to the dispute and only within the limits of the legal issues solved, in practice, no doubt, is already treated as a relevant model for other international jurisdictions and especially national tribunals, in assessing the applicability in their practice of jurisdictional immunity. However, we cannot fail to pay due attention to the views of scholars and practitioners that the supremacy of *jus cogens* rules they hold over any other rules of customary or conventional origin also implies the supremacy of procedural rules, such as the principle of jurisdictional immunity.

The jurisdictional immunity was reflected not only in the jurisprudence of the ICJ, its various implications were also appreciated by the magistrates of the main European forum. Section 3.2. ***"The jurisdictional immunity in the light of the case law of the European Court of Human Rights"*** examines the relevant judgments on this topic, the first case in which the Strasbourg Court ruled on immunity from jurisdiction being *Fogarty v. the United Kingdom* [8]. The Court found that sovereign immunity is a notion of international law, developed from the principle *par in parem non habet imperium*, by virtue of which one state will not be subjected to the jurisdiction of another

state, and considered that the granting of immunity of a state in civil proceedings pursues the legitimate aim to respect the international law to promote the county and good relations between states while respecting the sovereignty of another state. The Court reiterated that the ECHR must be interpreted in the light of the rules laid down in the Vienna Convention of 23 May 1969 on the Law of Treaties, the European Convention, including Article 6, cannot be interpreted in a vacuum. The special nature of the Convention as a human rights treaty should be taken into account and the relevant rules of international law should be applied. The Convention should, as possible, be interpreted in accordance with the other rules of international law to which it belongs, including those relating to the granting of State immunity. Thus, the measures taken by a Contracting Party, which reflect the generally recognized rules of public international law on the immunity of a State, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court, as provided in Article 6 § 1.

A similar approach was developed by the ECtHR in its judgments in the cases *Al-Adsani v. the United Kingdom* [6] and *McElhinney v. Ireland* [12]. These cases deserve special attention for many reasons. First of all, the provisions of the Law of Treaty that formed the context for the application of the Convention were reiterated, which was seen as an integral part of public international law that cannot be interpreted "in a vacuum". Second, an international jurisdiction has recognized the customary and universal character of the jurisdictional immunity of States. Third, the purpose of the jurisdictional immunity of the States was emphasized as respect for international law, the promotion of *comitas gentium* and good relations between States, and respect for the sovereignty of another State. Fourth, the peculiarities of the relationships in respect of which jurisdictional immunity was applied at the national level were analysed, distinguishing between existing employment relationships (current embassy staff) and planned employment relationships (embassy recruitment process, conditions and requirements in this regard). Fifth, the principle that the state is obliged to conduct an effective investigation of complaints regarding the violation of Article 3 ECHR only in respect of acts committed within its jurisdiction and not in other States, even if the applicant is a national of that State. Sixth, it has been established that, even in the case of applications regarding the violation of Article 3 ECHR, which does not allow any derogation and is of an absolute character, the jurisdictional immunity of the foreign state is applicable. Finally, it was decided that the principle of proportionality should also be taken into account in the examination of claims for infringement of fundamental rights as a result of the application of jurisdictional immunity to a foreign State, including by assessing whether the applicant benefits other options to protect the rights that may be violated.

In the case of *Jones and Others v. the United Kingdom* [10], European judges concluded that the exercise of jurisdictional immunity over official Riyadh does not affect the right to a fair trial in terms of access to justice. In essence, in order to decide this way, the European forum analysed the cases of different national courts that ruled on the applicability of this principle (USA, Canada, Italy, Greece, France, etc.), but also other international courts (ICJ, ICTY), reviewing recent case law. This case is of legal interest from several perspectives. First, the European Court of Human Rights cited a number of judgments of national courts, as well as international courts, in the field of jurisdictional immunity, the conclusions of which serve as an index of comparative law for European judges. Second, the Court also examined the relevant international instruments, namely the United Nations Convention on Jurisdictional Immunities of States and Their Property and the European Convention on State Immunity, linking its final ideas to the essence, meaning and purpose of those treaties. Third, the Court also considered certain elements of the European consensus on the question of the immunity of State officials acting in their official capacity in alleged acts of torture, hearing the views of third parties (non-governmental organizations in the field of human rights), concluding that, depending on the facts of the case, the member states of the Council of Europe formulated different opinions, and there was no clear line between civil and criminal proceedings referring to the commission of acts of torture and the application of state immunity.

This section also reflects current approaches to jurisdictional immunity of states from the perspective of solutions given in the cases *Kalogeropoulou and Others v. Greece and Germany*, *Manoilescu and Dobrescu v. Romania and Russia, Cudak v. Lithuania*, *Sabeh El Leil v. France*, *NML Capital Ltd v. France*, *Naku v. Lithuania and Sweden*, etc.

Traditionally, this chapter is finalized with conclusions based on the researched topics.

Chapter 4, entitled ***"JURISDICTIONAL IMMUNITY OF STATES IN THE LIGHT OF THE NATIONAL JUDICIAL PRECEDENT"*** highlights the results of scientific research into the reasoning of judges from various parts of the world regarding the application of the jurisdictional immunity of states in the context of compensation for war crimes and crimes against humanity, torture and terrorism. Section 4.1 entitled ***"Jurisdictional immunity of states in the context of compensation for war crimes and crimes against humanity"*** reveals the analysis of the solutions adopted by national courts regarding the applicability of jurisdictional immunity to claims lodged by victims and their descendants for convictable actions and the atrocities committed by Nazi forces, but also for other isolated cases of committing international crimes.

The first case to compensate for the atrocities committed by the Nazi regime in the occupied territories is *Prefecture of Voiotia v. the Federal Republic of Germany* (Greece), whose

circumstances related to claims for compensation, following the execution by German occupation troops of about 300 civilians and destruction of property in the Greek village of Distomo, Voiotia prefecture, on 10 June 1944 [13]. This was followed by multiple cases of World War II victims initiated in Italy, Greece, Poland, Slovenia, the United States and Japan, some of which provided grounds for further applications examined by the ECtHR on the jurisdictional immunity. A special analysis is given to the case of the painting of the famous Spanish painter Pablo Picasso, Madame Soler [14], whose legal fate was based on the application of jurisdictional immunity principle.

From the perspective of the relationship, the jurisdictional immunity of the foreign state – the jurisdictional immunity of its agent, there is prominent the case regarding the military operation carried out by the Israel Defence Forces, led by General Moshe Ya'alon, against Lebanon, resulting in casualties among civilians and the destruction of the UN complex located in Qana – *Ali Saadallah Belhas and Others v. Moshe Ya'alon* (USA) [7]. The victims claimed responsibility for acting as a warlord and for committing war crimes and crimes against humanity, whilst the US federal court ruled that the position of general in the Israeli army granted jurisdictional immunity to Moshe Ya'alon under the US Foreign Sovereign Immunities Act. In relation to jurisdictional immunity and international crime, there is analysed the case *Amerada Hess Shipping Corp. v. Argentina* (USA) [29], which has obtained the title of noteworthy legal precedent in the USA, cited in order to diminish the role of divergent practices.

Section 4.2 entitled ***"Jurisdictional immunity of states in the context of compensation for torture and terrorism"*** reveals the scientific analysis of approaches to state immunity from the perspective of judicial practice regarding torture and ill-treatment, intentional murder, abduction, acts of terrorism.

The generic group of cases studied in the context of this research focused on human rights violations, following events related to actions committed during the government of Augusto Pinochet (*Isabel Morel de Letelier and Others v. Republic of Chile and Others* (USA) [9]); the events of the 1976 coup in Argentina, when power was taken over by the military junta (*Siderman de Blake v. Argentina* (USA) [22]); lamentable events in the Middle East, such as the illegal activities of members of the Palestine Liberation Organization dated March 1978 (*Tel-Oren and Others v. Libya and Others* (USA) [16]); the tragic incident organized by Libyan forces, which resulted in the explosion of a civilian transatlantic flight over the small town of Lockerbie in the United Kingdom on 21 December 1988 (*Smith and Others v. Libya and Others* (USA) [15]); kidnappings and ill-treatment in Iran, Iraq, Kuwait and Saudi Arabia during the years 1991-2002; the persecution of Falun Gong followers in China, which is being sued in the US, Australia and New Zealand courts.

It is noteworthy that neither the United Nations Convention on Jurisdictional Immunities of States and Their Property [26] nor the European Convention on State Immunity [19] contain any provision governing aspects of the immunity of States with regard to civil claims compensation for torture outside the forum state. Moreover, there is no provision for resolving the issue of jurisdiction with a view to clarify the applicability of immunity to criminal complaints concerning the punishment of foreign agents for acts of torture. Therefore, the conventions on jurisdictional immunities do not provide for exceptions to torture which exclude the applicability of jurisdictional immunity, at least at this stage of development of international law.

Such findings have been given in many cases settled by jurisdictions on different continents where either the alleged victims or their relatives / successors have sought compensation for violating *jus cogens* rules on the prohibition of torture by foreign agents, which in their turn invoked the lack of jurisdiction of the courts and opted for the application of the jurisdictional immunity to the State and its agents, however, the judicial practice also reveals reverse solutions on the non-recognition of the jurisdictional immunity of the foreign state and its agents regarding the alleged acts of torture, murder, etc., divergent solutions being pronounced even by the jurisdictions of the same state.

The chapter concludes with thematic conclusions on the scientific analysis developed.

CONCLUSIONS AND RECOMMENDATIONS

Goal of the thesis: consists in the multidimensional analysis of the jurisdictional immunity of states, with identification of its acceptations, definitions and peculiarities, namely through study of the acts adopted by national and international jurisdictions on the concrete cases. The own definition of immunity from jurisdiction has been formulated. The **initial objectives of the research**, established in order to realize the proposed goal, were achieved.

The obtained results that contribute to the solution of an important scientific problem lies in conceptualization of the principle of jurisdictional immunity of states in the system of international law by identifying its particularities and limits of application by national and international courts, which leads to clarification for legal theorists and practitioners of the cases in which the courts are to recognize jurisdictional immunity to the foreign State, as well as the corresponding exceptions, in order to make the application of immunity uniform and to exclude divergent practice.

- *From a theoretical perspective,* a veritable scientific theory is formulated on the jurisdictional immunity of states, its meanings and approaches in a normative and jurisprudential sense being established.

- *From a practical perspective,* a multitude of cases solved by international and national jurisdictional institutions are analysed, thus the limits of application of the jurisdictional immunity of states being determined.

Carrying out the multidimensional analysis of the jurisdictional immunity of states in the context of the established goal and objectives, we managed to formulate the following conclusions:

1. The jurisdictional immunity of states, although it has a long history of assertion, is still in the process of transformation and finalization, the realities of 21st century, in particular, the fight against torture and international terrorism, determines its new treatments and generates a harmonization with the binding norms of the public international law *(Chapter 2: par. 2.1, par. 2.2, Chapter 4).*

2. With regard to the jurisdictional immunity in the legal system of the Republic of Moldova, notwithstanding the fact that the State is not a party to the European Convention on State Immunity or to the United Nations Convention on Jurisdictional Immunities of States and Their Property, whether national courts will be notified with a request for a lawsuit against a foreign State, by which certain actions of the latter or its agents will be challenged, the judicial authorities will adopt the restrictive doctrine of jurisdictional immunity. In this context, although Article 457 of the Code of Civil Procedure of the Republic of Moldova regulates the possibility of suing a foreign State, Article 59 of the same Code does not mention the foreign State as a possible participant (plaintiff or defendant) in civil proceedings before national courts, which indicates the existence of a conflict, at least apparent, between national rules of procedural law. However, in the case of admission for examination of an application against a foreign State, there is currently no precondition for national authorities to choose the absolute jurisdictional immunity *(Chapter 2: par. 2.1, par. 2.3).*

3. The concept of immunity of a State is complex and multidimensional, the meanings of immunity refer primarily to the jurisdictional immunity recognized to the State and secondarily to the immunity from enforcement of the State and, lastly, to the immunity of the head of state / a state agent which represents it *(Chapter 2: par. 2.2; Chapter 3; Chapter 4).*

4. The solution ruled by the ICJ in the case of *Jurisdictional Immunities of the State* highlights new perspectives in addressing the jurisdictional immunity of states for the following reasons: the customary rule on the jurisdictional immunity of states has been identified; the limits of the application of this rule have been deliberated and designed; the judgment in this case,

although formally it doesn't represent a source of public international law, being endowed with the power of *res judicata* only with reference to the parties to the dispute and only within the limits of the legal issue resolved, is practically already treated as a relevant model for other international and national jurisdictions; the domestic jurisprudence of the states, which constituted the particular ground for the finding of legal truth by the ICJ, took the form of a *quasi-source* of international law, being present a special case in which domestic judicial acts influence the practice of the international court *(Chapter 3: par. 3.1 Chapter 4: paragraph 4.1).*

5. With regard to jurisdictional immunity in the light of the ECHR, the following approaches are important: the Convention cannot be interpreted "in a vacuum", it is an integral part of public international law and applies in conjunction with international instruments on state immunity such as the United Nations Convention on Jurisdictional Immunities of States and Their Property (even if not in force) and the European Convention on State Immunity; the aim of the jurisdictional immunity of States is the respect of international law and the sovereignty of another States, the promotion of *comitas gentium* and friendly relations between States; the reasoning of the national courts of different states is taken into account by the ECtHR in identifying the solution in the cases on jurisdictional immunity, serving again, as well as in the case settled by the ICJ, in the form of a *quasi-source* of international law; application of the jurisdictional immunity may be conditional on an assessment, depending on the circumstances, of the principle of proportionality, including whether the applicant has other options to protect infringed rights *(Chapter 3: par. 3.1).*

6. In cases where compensation for damages caused by war crimes and crimes against humanity by a foreign State is claimed before the courts of the other State, in view of the lack of conventional rules imposing obligations in this field, States shall have a certain "margin of appreciation", somehow "conditional" based on the provisions of national legislation (often ambiguous) and the limits of judicial discretion. In practice, courts in various parts of the world have ruled on both the lack of jurisdiction on the basis of the application of the jurisdictional immunity to the respondent State and also the admissibility of claims, finally outlining at least until 2012, when the fundamental judgment was adopted in the ICJ case, a non-uniform and divergent case law *(Chapter 4: par. 4.1).*

7. The UN Convention on Jurisdictional Immunities of States and Their Property and the European Convention on State Immunity do not regulate the aspects of the immunity of States in respect of civil actions for damages for acts of torture committed outside the forum State. Subsequently, as it was stated in a number of cases, the Conventions on Jurisdictional Immunities do not provide for exceptions to torture to exclude the applicability of the jurisdictional immunity, at least at the present stage of public international law *(Chapter 3: 3.2; Chapter 4: par. 4.2).*

8. Due to the ever-increasing number of cases settled by national and international jurisdictions and which already shed light on interspersed judgments from the perspective of judicial precedent, the principle of jurisdictional immunity of States assumes a special place in the system of public international law even for the establishment of a separate institution for international litigation law, the importance of which will continue to grow in the light of cases settled in judicial practice and will be strengthened with the entry into force of the United Nations Convention on Jurisdictional Immunities of States and Their Property *(Chapter 2: Chapter 2.3, Chapter 3, Chapter 4).*

9. The own definition of the principle of jurisdictional immunity is formulated as follows: jurisdictional immunity of States is a customary principle, according to which a State, as a subject of public international law, enjoys the prerogative of unquestionable quality during judicial proceedings in the court of the foreign state, thus being exempted from the jurisdiction of the forum state, except strictly defined exceptions. That prerogative, which takes the form of immunity, is applicable both to the state as such and to the entities that form it, its bodies and the persons / agents that represent it *(Chapter 2: par. 2.3).*

The general conclusions set out suggest certain recommendations that we dare to present to the public:

1. Ratification by the Republic of Moldova by adoption of an organic law the European Convention on State Immunity (ETS 74) and the Additional Protocol thereto (ETS No. 74A);

2. Ratification by the Republic of Moldova by the adoption of an organic law the United Nations Convention on Jurisdictional Immunities of States and Their Property;

3. *De lege ferenda*, until the ratification of the above-mentioned international conventions, the amendment of Article 457 par. (1) of the Code of Civil Procedure of the Republic of Moldova, as follows: "*The Republic of Moldova adopts the restrictive doctrine of the jurisdictional immunity of States. Foreign States enjoy jurisdictional immunity before the courts of the Republic of Moldova, except for disputes concerning: commercial transactions; employment; damage caused to persons and property; real estate; intellectual property; commercial entities; maritime and inland waterway vessels owned or operated by a State*".

4. Amendment of the National Institute of Justice Modular Continuing Training Plans by including a new module entitled "International Law and Judicial Practice of International and Foreign Jurisdictions", reflecting training activities for judges and other professionals in the field of jurisdictional immunity in the event of ratification of the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their Property, as well as for explanation of general notions of customary international law and

presentation of examples of international and foreign judicial precedent, with the aim of excluding divergent practice.

Theoretical significance and applicative value of the work

The theoretical significance and the applicative value of the thesis is determined by the scientific novelty and the topicality at national level of the research topic; its results can be used in the elaboration of synthesis works, not only in the field of public international law, but also civil procedure, in the context of the immunity of foreign states, or criminal procedure, in the context of criminal liability of prominent political figures, because it highlights a complex study of jurisprudential approaches on the immunity of states and presents guidelines for its uniform application in accordance with contemporary trends developed by international and foreign fora, being able to guide the process of improving current judicial activity and connecting it to international standards.

The applicative value of the work can be summarized in the following aspects: theoretical-scientific, normative-legislative, practical-jurisprudential and legal-didactic.

In the theoretical-scientific plan, the meanings, definitions and particularities of the jurisdictional immunity of states are analysed and outlined.

In the normative-legislative plan, there are analysed from an evolutionary perspective the international instruments regulating the immunity of jurisdiction, as well as the national legal framework of different states of the world.

In the practical-jurisprudential plan, vast and solid case material is investigated based on the jurisdictional acts pronounced by the ICJ, the ECtHR, the national courts of the multiple states of the world that reveal the complex, different and sometimes contradictory application of the jurisdictional immunity, finally there been determined benchmarks for a uniform application.

In the legal-didactic plan, the analysis of the jurisdictional immunity of states presents a particular interest in the scientific-didactic process within the public international law, the international litigation law and the international jurisdictions for the university lecturers and trainers of the specialized institutions of judicial training.

The impact of research on science and culture

Relating the objectives of the work to the analytical realities of the profile literature on the jurisdictional immunity of states, through the range of researched subjects we supplement the gaps in the study of its meanings and particularities and outline conceptual guidelines for a uniform application.

Thus, in view of the final findings on the jurisdictional immunity of states in this work and, in the context of their use for uniform application, by implementing the recommendations and

proposals *de lege ferenda*, the thesis will contribute to the improvement of the act of justice, which will lead to an improvement in the contribution of the judiciary and, respectively, an increase in the degree of trust and satisfaction of the litigants.

The limits of research. In the context of the complexity of elaborating a scientific research on a topic in the process of continuous affirmation, it is inevitable that certain limits appear in the analysis performed. First, given that the practical application of the jurisdictional immunity of states is an evolving process, leading to new cases in which it is claimed, its approaches and limits of applicability may vary in a relatively short period of time. Second, the complex, different and even contradictory treatments on the part of practitioners make it difficult to establish common benchmarks for standardizing its application. Third, the non-entry into force of the United Nations Convention on Jurisdictional Immunities of States and Their Property, as well as the limited number of States Parties to the European Convention on State Immunity (8 countries), intended to regulate the limits of applicability of the immunity, determined by the reluctance of the states of the world to approve the approaches of international bodies in this field, results in the creation of "formal" barriers in the process of defining the current role of the jurisdictional immunity of states and its uniform applicability.

The prospective research plan will address the following issues:

- analysis of the principle of jurisdictional immunity of states in the context of the circumstances of modern armed conflicts;

- study of the particularities of the applicability of the jurisdictional immunity of states resulting from serious violations of human rights and fundamental freedoms;

- intensification of researches to shape the patterns for the uniform application of the jurisdictional immunity.

BIBLIOGRAPHY

1. Additional Protocol (ETS No 74A) thereto European Convention on State Immunity (ETS 74) of 16 May 1972 [quoted 27.07.2021]. Available: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800730b2
2. Australia Foreign States Immunities Act of 1985, last amendments dated 21.10.2016 [quoted 12.08.2019]. Available: https://www.legislation.gov.au/Details/C2016C00947
3. Canada State Immunity Act of 1985 [quoted 12.08.2019]. Available: https://laws-lois.justice.gc.ca/eng/acts/S-18/FullText.html
4. Case *concerning certain questions of mutual assistance in criminal matters* (Djibouti v. France), the ICJ judgment dated 4.06.2008 [quoted 21.11.2019]. Available: http://www.icj-cij.org/files/case-related/136/136-20080604-JUD-01-00-EN.pdf
5. Case *concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), the ICJ judgment dated 14.02.2002 [quoted 21.11.2019]. Available: http://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf
6. Case of *Al-Adsani v. United Kingdom*, the ECtHR judgment dated 21.11.2001 [quoted 27.11.2019]. Available: http://hudoc.echr.coe.int/eng?i=001-59885
7. Case of *Ali Saadallah Belhas and Others v. Moshe Ya'alon* (USA), judgment of the US Court of Appeals for the District of Columbia Circuit dated 15.02.2008 [quoted 14.10.2019]. Available: http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Belhas_Appeal_15-2-2008.pdf
8. Case of *Fogarty v. United Kingdom*, the ECtHR judgment dated 21.11.2001 [quoted 27.08.2019]. Available: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59886
9. Case of *Isabel Morel de Letelier et al. v. the Republic of Chile and Others* (USA), judgment of the US Court of Appeals for the Second Circuit dated 20.11.1984 [quoted 20.09.2019]. Available: http://law.justia.com/cases/federal/appellate-courts/F2/748/790/218543/
10. Case of *Jones and Others v. United Kingdom*, the ECtHR judgment dated 14.01.2014 [quoted 20.09.2019]. Available: http://hudoc.echr.coe.int/eng?i=001-140005
11. Case of *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), the ICJ judgment dated 3.02.2012 [quoted 25.08.2019]. Available: https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-00-EN.pdf
12. Case of *McElhinney v. Ireland*, the ECtHR judgment dated 21.11.2001 [quoted 20.09.2019]. Available: http://hudoc.echr.coe.int/eng?i=001-59887
13. Case of *Prefecture of Voiotia v. the Federal Republic of Germany* (Greece), ruling of the Court of Cassation (Areios Pagos) dated 4.05.2000, summary [quoted 20.09.2019]. Available: http://www.internationalcrimesdatabase.org/upload/ICD/Upload3247/Prefecture%20of%20Voiotia%20v.%20Germany%20-%20Greece%20-%202000.pdf
14. Case of *Schoeps v. Bavaria* (USA), Opinion and Order of the US District Court New York dated 27.06.2014 [quoted 20.09.2019]. Available: https://casetext.com/case/schoeps-v-bayern
15. Case of *Smith et al v. Lybia et al.* (USA), Memorandum and Order of the US District Court New York dated 17.05.1995 [quoted 20.09.2019]. Available: http://uniset.ca/other/cs5/886FSupp306.html
16. Case of *Tel-Oren et al. v. Lybia et al.* (USA), ruling of the US Court of Appeals for the District of Columbia Circuit dated 3.02.1984 [quoted 20.09.2019]. Available:

http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/Tel-Oren_v_LigyanArabRepublic_3_2_1984.pdf
17. Codul de procedură civilă al Republicii Moldova. Nr. 225-XV din 30.05.2003. Republicat în: *Monitorul Oficial al Republicii Moldova*, 3.08.2018, nr. 285-294/436.
18. Draft Articles of the International Law Commission on Jurisdictional Immunities of States and Their Property of 1991 [quoted 27.08.2019]. Available: https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf
19. European Convention on State Immunity (ETS 74) of 16 May 1972 [quoted 27.07.2021]. Available: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800730b1
20. International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels of 10 April 1926 [quoted 8.11.2018]. Available: https://lege5.ro/Gratuit/g42tgmzs/conventia-internationala-pentru-unificarea-anumitor-reguli-privitoare-la-imunitatile-vaselor-de-stat-semnata-la-bruxelles-la-10-aprilie-1926
21. Law on the Creation of a Foundation „Remembrance, Responsibility and Future" of 2 August 2000 [quoted 12.08.2019]. Available: https://1997-2001.state.gov/regions/eur/holocaust/foundationlaw.pdf
22. LIEBERMAN, Ph. Expropriation, Torture, and Jus Cogens Under the Foreign Sovereign Immunities Act: Siderman de Blake v. Republic of Argentina. In: *Inter-American Law Review*, 1993, Vol. 24, Issue 3, pp. 503-540. ISSN 0884-1756.
23. Recommendation of the Supreme Court of Justice no. 26 on the immunity of diplomatic missions of 1.11.2012 [quoted 8.11.2019]. Available: http://jurisprudenta.csj.md/search_rec_csj.php?id=44
24. STRAUMANN, B. The Peace of Westphalia as a Secular Constitution. In: *Institute for International Law and Justice Constellations Publication*, 2008, Vol. 15, no. 2, pp. 173-188 [quoted 20.09.2019]. Available: https://www.academia.edu/437326/The_Peace_of_Westphalia_As_a_Secular_Constitution
25. UK State Immunity Act of 20.07.1978 [quoted 8.11.2018]. Available: https://www.legislation.gov.uk/ukpga/1978/33
26. United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 [quoted 27.08.2019]. Available: https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf
27. United Nations Convention on the Law of the Sea of 10 December 1982 [quoted 27.05.2021]. Available: http://legislatie.just.ro/Public/DetaliiDocumentAfis/26155
28. USA Foreign Sovereign Immunities Act of 21.10.1976 [quoted 12.08.2019]. Available: https://www.gpo.gov/fdsys/pkg/STATUTE-90/pdf/STATUTE-90-Pg2891.pdf
29. WEBSTER, W.F. Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity to Violators of International Law. In: *The Hastings Law Journal*, 1988, Vol. 39, Issue 5, pp. 1109-1146. ISSN 0017-8322
30. Статья «Верховный суд Нидерландов принял решение в пользу Казахстана по делу Стати» [quoted 17.01.2021]. Available: https://kapital.kz/gosudarstvo/91980/verkhovnyy-sud-niderlandov-prinyal-resheniye-v-pol-zu-kazakhstana-po-delu-stati.html
31. Федеральный закон №297-ФЗ "О юрисдикционных иммунитетах иностранного государства и имущества иностранного государства в Российской Федерации" от 3 ноября 2015 г. В: "Российской газете" от 6 ноября 2015 г., №251.

SCIENTIFIC PAPERS ON THE THESIS

Collective monograph

1. Nica A. et al. Convenția Europeană a Drepturilor Omului: Comentariu asupra hotărârilor Curții Europene a Drepturilor Omului versus Republica Moldova. Chișinău: Tipografia Centrală, 2017. 576 p.

Papers in scientific journals

2. Nica A. Accepțiunile principiului imunității statului. În: Revista Moldovenească de Drept Internațional și Relații Internaționale, 2014, nr. 4 (34), p. 66-74.
3. Nica A. Rule of state immunity: historical perspective. In: International law and integration problems (Azerbaijan), 2016, No. 1 (45), p. 5-11.
4. Nica A. Principiul imunității de jurisdicție în lumina jurisprudenței Curții Europene a Drepturilor Omului. În: Revista Institutului Național al Justiției, 2018, nr. 2 (45), p. 37-46.
5. Nica A. The principle of the jurisdictional immunities of states: from normative to jurisprudential perspective. In: Revista Institutului Național al Justiției, 2018, nr. 3 (46), p. 55-60.
6. Ніка О. Справи, що стосуються застосування принципу юрисдикційного імунітету держав до обставин Другої світової війни. В: Науковий часопис Національної академії прокуратури України. 2019, № 2 (22), с. 73-84.
7. Nica A. Case law of American courts on the application of the principle of jurisdictional immunities of states in cases with regard to the Middle East. In: Bulletin of Academy of Justice (Armenia), No. 1 (3), 2020, p. 14-21.

Articles / abstracts in collections of scientific conferences

8. Nica A. Abordările actuale ale principiului imunității de jurisdicție a statelor în lumina hotărârii CIJ din 03 februarie 2012. În: Materialele Conferinței științifice internaționale a doctoranzilor și tinerilor cercetători "Tendințe contemporane ale dezvoltării științei în contextul valorificării opțiunii europene: viziuni ale tinerilor cercetători". Vol. I, Ediția a VII-a, 30 mai 2013, Chișinău, p. 243-252.
9. Nica A. Aspectele istorico-evolutive ale regulii imunității jurisdicționale a statelor. În: Materialele Conferinței științifice internaționale anuale a tinerilor cercetători „Consolidarea statului de drept în Republica Moldova în contextul evoluției sistemului internațional și proceselor integraționiste", vol. II, Secția drept internațional și relații internaționale, Ediția a VIII-a, 3 iunie 2014, Chișinău, p. 207-216.

10. Nica A. Definirea principiului imunității de jurisdicție prin prisma jurisprudenței degajate de CEDO. În: Materialele Conferinței științifice naționale cu participație internațională „Integrare prin cercetare și inovare”, 10-11 noiembrie 2014, Rezumate ale comunicărilor, Științe sociale, vol. II, CEP USM, Chișinău, 2014, p. 206-209.

11. Nica A. Definirea principiului imunității de jurisdicție a statelor prin prisma surselor normative. În: Materialele Conferinței științifice pentru studenții ciclului I, II și doctoranzi „Jurisdicția teritorială a statelor: obligații pozitive și responsabilitate”, 8 aprilie 2014, Rezumatele comunicărilor, Chișinău, CEP USM, 2015, p. 25-29.

12. Nica A. Principiul imunității de jurisdicție a statelor în lumina hotărârii Curții Europene a Drepturilor Omului în speța Jones ș.a. contra Marii Britanii. În: Culegerea comunicărilor participanților la Conferința științifică internațională „Interacțiunea dreptului intern cu dreptul internațional: provocări și soluții” (Palatul Republicii, 14 noiembrie 2014), manifestare dedicată celei de-a 70-a aniversări a dlui profesor universitar Nicolae Osmochescu, vol. II, Chișinău, 2015, p. 302-307.

13. Nica A. Aplicarea principiului imunității de jurisdicție în speța referitoare la tabloul „Madame Soler” al lui Pablo Picasso. În: Rezumate ale comunicărilor, Științe juridice, Conferința Științifică națională cu participație internațională „Integrare prin cercetare și inovare”, 28-29 septembrie 2016, CEP USM, Chișinău, 2016, p. 109-113.

ADNOTARE

Alexandra NICA

IMUNITATEA DE JURISDICȚIE A STATELOR
Teză de doctor în drept
Specialitatea: 552.08 – Drept internațional și european public. Chișinău, 2022

Structura tezei: introducere, 4 capitole, concluzii generale și recomandări, bibliografia din 165 surse, text de bază 153 pagini, 5 anexe. Rezultatele sunt reflectate în 13 publicații, printre care articole științifice, comunicate la conferințe de profil naționale și internaționale.

Cuvinte-cheie: imunitate de jurisdicție, contencios internațional, jurisprudență, Curtea Internațională de Justiție, Curtea Europeană a Drepturilor Omului, act jurisdicțional.

Scopul lucrării constă în analiza multidimensională a imunității de jurisdicție a statelor, cu identificarea accepțiunilor, definițiilor și a particularităților sale, prin studierea actelor adoptate de diverse jurisdicții naționale și internaționale la soluționarea unor spețe concrete.

Obiectivele cercetării: identificarea fazei actuale de afirmare a imunității de jurisdicție a statelor prin raportare la parcursul istorico-evolutiv; determinarea accepțiunilor imunității statului; definirea imunității de jurisdicție; conturarea abordărilor actuale ale imunității de jurisdicție a statelor în lumina jurisprudenței degajate de CIJ și de CEDO; elucidarea exemplelor de practică judiciară privind aplicarea imunității de jurisdicție a statelor în cauzele referitoare la despăgubiri pentru crime de război și împotriva umanității, pentru acte de tortură și de terorism.

Noutatea și originalitatea științifică rezidă în definitivarea unui studiu doctrinar național asupra imunității de jurisdicție a statelor, cu determinarea particularităților și limitelor de aplicabilitate ale acesteia, în special, prin analiza soluțiilor practice formulate de diverse jurisdicții naționale și internaționale.

Rezultatele obținute, care contribuie la soluționarea unei probleme științifice importante rezidă în conceptualizarea principului imunității de jurisdicție a statelor în sistemul dreptului internațional public prin identificarea particularităților și limitelor sale de aplicare de către diverse instanțe naționale și internaționale, ceea ce conduce la clarificarea pentru teoreticienii și practicienii din domeniul dreptului a situațiilor în care instanțele statului-for urmează să recunoască statului reclamat imunitatea de jurisdicție, precum și excepțiile corespunzătoare, în vederea uniformizării aplicării acestei imunități și excluderii practicii judiciare divergente.

Semnificația teoretică a cercetării. Prezenta teză propusă spre susținere are caracter științific consolidat, fiind axată pe particularitățile și limitele de aplicare ale imunității de jurisdicție a statelor în contextul dreptului internațional public contemporan. Demersul științific dezvoltă o privire analitică asupra cauzelor soluționate de foruri naționale și internaționale, la cazul statelor *per se*, organelor lor și agenților care le reprezintă.

Valoarea aplicativă a lucrării. Lucrarea este destinată unui public inițiat în materia dreptului internațional public, dreptului contenciosului internațional, dreptului internațional al drepturilor omului, dreptului conflictelor armate. Prezenta teză este de interes pentru teoreticienii și practicienii din sfera dreptului și a justiției, oferind platformă solidă pentru reflecție asupra limitelor imunității de jurisdicție a statelor.

Implementarea rezultatelor științifice. Rezultatele cercetării, concluziile și recomandările definitivate pe parcursul efectuării studiului au fost valorificate în textele articolelor științifice publicate în reviste de specialitate în țară și peste hotare, aprobate în cadrul conferințelor de profil naționale și internaționale, discutate pe parcursul unor activități de formare.

ANNOTATION

Alexandra NICA

JURISDICTIONAL IMMUNITY OF STATES
Ph.D. thesis
Specialty: 552.08 – International and European Public Law. Chisinau, 2022

Structure of the thesis: introduction, 4 chapters, general conclusions and recommendations, bibliography which includes 165 sources, basic text of 153 pages, 5 attachments. The results of the research are exposed in 13 scientific articles, reports to scientific conferences, consolidated volume.

Keywords: jurisdictional immunity of states, international litigation, case-law, International Court of Justice, European Court of Human Rights, jurisdictional act.

Goal of the thesis: consists in the multidimensional analysis of the jurisdictional immunity of states, with identification of its acceptations, definitions and peculiarities, namely through study of the acts adopted by national and international jurisdictions on the concrete cases.

Objectives of the research: identifying the current phase of affirmation of the jurisdictional immunity of states by reporting to the historical-evolutionary course; determination of the meanings of the immunity of state; defining the concept of the jurisdictional immunity of states; outlining current approaches to the jurisdictional immunity of states in the light of the ICJ and the ECtHR case-law; elucidation of examples of judicial practice in the application of jurisdictional immunity of states in the cases relating to the compensation for damages resulting from war crimes and crimes against humanity, from acts of torture and terrorism.

Scientific novelty and originality. The scientific novelty and originality of the thesis resides in finalization of a national doctrinal study on the jurisdictional immunity of states, with determination of its peculiarities and limits of its application through the analysis of solutions given by national and international jurisdictions.

Obtained results that contribute to the solution of an important scientific problem: lies in conceptualization of the principle of jurisdictional immunity of states in the system of international law by identifying its particularities and limits of application by national and international courts, which leads to clarification for legal theorists and practitioners of the cases in which the courts are to recognize jurisdictional immunity to the foreign State, as well as the corresponding exceptions, in order to make the application of immunity uniform and to exclude divergent practice.

Theoretical meaning of the research. Present work has a consolidated scientific character, being focused on the peculiarities and limits of application of the jurisdictional immunity of states in the context of modern international public law. The scientific demarche develops an analytical view on the cases solved by national and international fora in relation to the states, their bodies and representing agents.

Practical value of the work. The research is targeting the public initiated in the field of international public law, law of international litigation, armed conflicts law. Undoubtedly, the thesis presents interest for theoreticians and practitioners of law and justice sectors, offering a solid platform for reflection on the limits of the jurisdictional immunity of states.

Implementation of the scientific results. The results, conclusions and recommendations formulated through this research had been enlightened in the texts of scientific articles published in specialised journals, approved at the national and international profile conferences, discussed at training sessions.

АННОТАЦИЯ

Александра НИКА

ЮРИСДИКЦИОННЫЙ ИММУНИТЕТ ГОСУДАРСТВ

Диссертация на соискание учёной степени доктора права.
Специальность: 552.08 – Международное и европейское публичное право.
Кишинёв, 2022

Структура диссертации: введение, 4 главы, общие выводы и рекомендации, библиография, включающая 165 источников, основной текст изложен на 153 страницах, 5 приложений. Результаты исследования освещены в 13 научных статьях и методико-дидактических работах.

Ключевые слова: юрисдикционный иммунитет государств, международное судебное разбирательство, судебная практика, Международный Суд ООН, Европейский Суд по Правам Человека, юрисдикционный акт.

Цель диссертации. Целью исследования является многосторонний анализ юрисдикционного иммунитета государств, а также выявление его значений, определений и особенностей, путем изучения судебных актов, принятых национальными и международными судебными инстанциями в процессе разрешения конкретных споров.

Задачи исследования: выявление текущей стадии развития юрисдикционного иммунитета государств с исторической перспективы; освящение смыслов иммунитета государств; определение концепции юрисдикционного иммунитета государств; идентификация текущих подходов применения юрисдикционного иммунитета государств в свете практики Международного Суда ООН и ЕСПЧ; раскрытие примеров судебной практики по применению юрисдикционного иммунитета государств в отношении компенсации за военные преступления и преступления против человечности, за акты пыток и терроризм.

Новизна и научная оригинальность заключается в завершении национального научного исследования юрисдикционного иммунитета государств, с выявлением его особенностей и рамок применения посредством анализа решений различных национальных и международных инстанций.

Результаты исследования, способствующие решению важной научной проблемы, заключаются в концептуализации принципа юрисдикционного иммунитета государств в системе международного права, с выявлением его особенностей и пределов применения различными судами, что приводит к разъяснению ситуаций, в которых судебным инстанциям следует признать иностранному государству юрисдикционный иммунитет, с целью обеспечить единообразное применение иммунитета и исключить расходящуюся судебную практику.

Теоретическое значение. Исследование обладает научным характером и фокусируется на особенностях и рамках применения принципа юрисдикционного иммунитета государств в контексте современного международного публичного права. Научная работа развивает аналитический взгляд на споры, разрешенные национальными и международными форумами по отношению к государствам как таковым, государственным органам и представителям.

Практическая значимость исследования. Работа нацелена на аудиторию, обладающую знаниями в сфере международного публичного права, международного права судебных споров, международного права прав человека, права международных конфликтов. Несомненно, настоящая диссертация представляет интерес для теоретиков и практиков сфер права и юстиции, открывает платформу для дискуссий о границах юрисдикционного иммунитета государств.

Внедрение научных результатов. Результаты, выводы и рекомендации, сформулированные в диссертации, были опубликованы в статьях различных профильных национальных и зарубежных журналов, одобрены в рамках национальных и международных конференций, обсуждались на учебных тренингах.

NICA ALEXANDRA

JURISDICTIONAL IMMUNITY OF STATES

SPECIALTY: 552.08 – INTERNATIONAL AND EUROPEAN PUBLIC LAW

Summary of the Ph.D. Thesis in Law

Approved for printing: 11.03.2022

Offset paper. Type offset

Print sheets: 2,1

Paper size 60×84 1/16

Drawing 15 copies

CEP USM