

The Humanitarian Exception to State Immunity after *DTEK v. Russia*: Systemic Externalities of Investment Arbitration

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The ‘Crimea Disputes’: A New Impetus to the Debate on State Immunity

Few areas of international law have been as profoundly shaped by transformations within international society as state immunity. Indeed, pivotal transitions in the substance of this rule have consistently mirrored shifts in the world order. Just as state immunity was first articulated in 1812 by the US Supreme Court in favour of France,² then the sole American ally against Great Britain,³ the transition from the absolute to the restrictive theory emerged as an indirect consequence of the 1917 October Revolution.⁴ Similarly, the permeation of new values within the international community has seeded the ground for certain domestic courts to theorise a further exception to adjudicative immunity – the so-called ‘humanitarian exception’ – in instances of gross violations of human rights or humanitarian law prohibited by *jus cogens*.

However, although Italy’s Supreme Court⁵ and Constitutional Court⁶ (the latter in response to the International Court of Justice’s (ICJ) judgment in

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² *Schooner Exchange v McFaddon* [1812] 11 US 116 (US Supreme Court) 116ff.

³ See W Michael Reisman, ‘International Incidents: Introduction to a New Genre in the Study of International Law’ in W Michael Reisman and Andrew R Willard (eds), *International Incidents: The Law that Counts in World Politics* (Princeton University Press 1988) 19.

⁴ See, inter alia, Jacques Jérôme, *Le monopole du commerce extérieur en Russie Soviétique* (Librairie Générale de droit & de jurisprudence 1928) 72ff; Attila Tanzi, ‘Su immunità ed evoluzione della società internazionale’ in Alessandra Lanciotti and Attila Tanzi (eds), *Le immunità nel diritto internazionale. Temi scelti. Atti del Convegno di Perugia 23-25 maggio 2006* (Giappichelli 2007) 4ff; Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd rev edn, OUP 2015) 33.

⁵ *Ferrini v Federal Republic of Germany* [2004] Italy, Court of cassation Case No 5044/2004, 128 ILR 659.

⁶ *Simoncioni and Others v Germany and President of the Council of Ministers of the Italian Republic (intervening)* [2014] Italy, Constitutional court Case No 238/2014, 168 ILR 529.

*Jurisdictional Immunities*⁷), the Seoul District and High Courts,⁸ and the Brazilian Supreme Federal Court⁹ have affirmed this exception, it is doubtful that this judicial practice has reached the point of modifying the customary standard of immunity.

Yet, against this backdrop, such normative divergence has been given renewed impetus, emerging once again in the wake of a profound disruption to the international order, such as the 2014 invasion of Crimea by the Russian Federation. More precisely, a recent decision rendered on 24 February 2026 by the Hague Court of Appeal on the enforcement of an investment arbitration award against the Russian Federation has freshly reignited the debate on the humanitarian exception. The dispute stems from the enforcement proceedings of *DTEK v. Russia*,¹⁰ one of the so-called ‘Crimea disputes’, i.e. the ten (known) cases brought by Ukrainian investors under the Russia-Ukraine BIT, following the military occupation of the peninsula.¹¹

In the aftermath of the arbitral tribunals’ findings in favour of the Ukrainian investors, at least in those decisions that have been made public, the Russian Federation declared its refusal to pay the compensation and interest awarded against it. This stance has precipitated a nebula of domestic proceedings. These involve both applications for *exequatur* – since the disputes were resolved through *ad hoc* arbitrations conducted under the auspices of the Permanent Court of Arbitration – and actions for forced execution.

The Decision of the Hague Court of Appeal on Gazprom Assets’ Entitlement to Immunity

In *DTEK v. Russia*, the claimant was a primary operator of the electricity market in Crimea. Following the 2014 military occupation, Russian authorities progressively targeted DTEK’s operations, culminating in the

⁷ *Jurisdictional Immunities of the State (Germany v Italy) (Judgment)* [2012] ICJ Rep 99 (ICJ).

⁸ *Hee Nam Yoo and Others v Japan* [2021] South Korea, Seoul Central District Court Case No 2016 Ga-Hap 505092; [2023] South Korea, Seoul High Court Case No 2021 Na 2017165.

⁹ *Karla Christina Azeredo Venâncio da Costa and Others v Federal Republic of Germany* [2021] Brazil, Supremo tribunal federal Case No ARE 954858/RJ.

¹⁰ *JSC DTEK Krymenergo v. Russian Federation* (PCA Case No 2018-41) Award (1 November 2023).

¹¹ On arbitral proceedings based on Ukraine-Russia BIT concerning claims of Crimean investors, see, inter alia, Dai Tamada, ‘War in Ukraine and Implications for International Investment Law’ (2024) 26 *International Community Law Review* 187; Fabrizio Marrella, *Arbitrage transnational d’investissement et conflits armés* (Pedone 2025).

Russian-controlled Crimean Council of Ministers' decision in January 2015 to place the claimant's movable and immovable assets under the control of a separate Russian company. The arbitral tribunal, having upheld its jurisdiction, ruled in favour of the investor, finding that an expropriation by the Russian Federation had occurred and ordering the latter to pay compensation in the amount of USD 207,800,000 (plus interest and administrative and legal costs).

After the Hague District Court had granted leave to the claimant to enforce the arbitral award in the Netherlands, DTEK attached, pursuant to the Dutch Code of Civil Procedure, the shares held by Gazprom International in Wintershall Noordzee B.V., a Dutch-incorporated international exploration and production company, thereby piercing the corporate veil between Gazprom and the Russian Federation. The case eventually reached the same Court of Appeal of The Hague, before which Gazprom asserted its entitlement to immunity from execution.¹²

An analysis of all the grounds of appeal exceeds the scope of this brief focus. Suffice here to note that, with particular regard to Gazprom's objection that the attached assets should have benefitted from the Russian Federation's immunity from execution, the Court of Appeal of The Hague anchored its assessment in Article 19 of the 2004 UN Convention on state immunity (UNCIS),¹³ which it deemed as 'reflect[ing ...] the applicable customary international law'.¹⁴

The Court established that the attached assets were ultimately owned by the Russian Federation. Nevertheless, it challenged Gazprom's claim that the assets in question were primarily intended to serve Russia's sovereign purposes. In doing so, it opted for a less stringent threshold of assessment regarding the sovereign character of state property,¹⁵ as – in the words of the Court – 'ultimately all a state's assets serve public purposes to some extent'.¹⁶ More precisely, the Court endorsed the investor's argument that both the Gazprom group and Wintershall function as fundamentally profit-driven

¹² It is worth noting that Gazprom International's sole shareholder is the Russian-incorporated company LLC Gazprom Capital, whose shares are held by PJSC Gazprom, in which the Russian Federation holds a 50.23 percent stake.

¹³ United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UN Doc A/59/508.

¹⁴ *Gazprom International Limited v JSC DTEK Krymenergo et al* [2026] The Hague Court of Appeal Case No 200.360.273/01 [4.29] (translated by the author).

¹⁵ *ibid* [4.31].

¹⁶ *ibid* (translated by the author).

entities and that the targeted assets were untethered from essential sovereign functions, such as securing Russia's domestic energy supply.¹⁷

However, the Court did not confine itself to affirming the commercial exception. Rather, it grounded its decision not to grant immunity to seized assets also on the humanitarian exception. In the Court's view, 'immunity from enforcement (in the Netherlands) may be restricted where a State would, by invoking immunity, be protected from liability under peremptory norms of international law (*jus cogens*), such as the prohibition of violence, war crimes or crimes against humanity'.¹⁸ The Hague judges characterised this finding as a direct corollary of the declaration formulated by the Netherlands when ratifying the UNCSI in 2025, under the terms of which '[t]he Kingdom of the Netherlands interprets the Convention as not precluding the possibility of restricting State immunity in case of war crimes or crimes of aggression as recognized by the international community and in accordance with international law'.

An Unpredictable Expansion of the Humanitarian Exception to State Immunity?

The significance of the Court's decision transcends the immediate dispute between the parties of the arbitral proceedings. Indeed, it assumes a pivotal role from the perspective of the potential evolution of customary international law on state immunity. At the same time, the Court's argumentative path leaves room for some critical remarks.

First, this decision, coupled with the Netherlands' declaration to the UNCSI, can be regarded as a further element of state practice and *opinio iuris* supporting the humanitarian exception to immunity. In doing so, it follows the trajectory carved out by the aforementioned earlier jurisprudence of the Italian, South Korean, and Brazilian courts (while openly contrasting with the position expressed by the 2012 ICJ judgment). Nonetheless, its significance as an element of state practice and *opinio iuris* ought to be weighed against the fact that the judgment was rendered in the context of summary proceedings (*kort geding*).

Crucially, however, this decision goes well beyond the trend initiated by the Italian Supreme Court in *Ferrini*. In particular, it risks blurring the firmly established boundaries between adjudicative immunity and immunity from

¹⁷ *ibid* [4.30].

¹⁸ *ibid* [4.32].

execution and seems to conflate the distinct conceptual focus of these two facets of immunity. On the one hand, adjudicative immunity looks to the acting entity and the conduct that gave rise to the dispute. In its current understanding (as confirmed by the ICJ¹⁹), it constitutes a procedural plea that precludes an examination into the merits of a state's conduct,²⁰ unless it falls under one of the recognised exceptions. On the other hand, immunity from execution is predicated on the purpose (or, under a minority approach, the nature) of the targeted assets. Its function is to shield *jure imperii* state assets from enforcement measures. This distinction has been reaffirmed by the ICJ²¹ and upheld by the same Italian Constitutional Court and Seoul High Court that had provided a strong impetus to the development of the humanitarian exception.²² Indeed, the constitutional judges in Rome observed that, 'in the different context of enforcement proceedings [...], the perspective is different because the principle of the restrictive immunity of states does not exclude the jurisdiction of the national courts but merely limits the assets that can be attached and subject to levy of execution'.²³

Second, this decision extends the scope of application of the humanitarian exception in a significantly (and, in the author's view, unjustifiably) broad manner: not only to protect victims of gross violations of human rights and international humanitarian law, such as international crimes, but also to benefit entities – distinct from the former – whose rights were infringed within the framework of broader state conduct committed in violation of *jus cogens*.

The differences between the *Ferrini* (and related), comfort women, and *Changri-La* cases, on the one hand, and *DTEK v. Russia*, on the other, are illustrative of this conceptual divergence. In the former scenario, at the heart of the courts' assessment lay, albeit with slightly different nuances, the fact that a judicial remedy constituted the sole alternative for victims of international crimes to obtain monetary compensation for the damages suffered and, consequently, to achieve justice for gross breaches of peremptory international law. Here, the scenario is entirely different. The

¹⁹ *Jurisdictional Immunities* (n 7) 140.

²⁰ Fox and Webb (n 4) 38–39.

²¹ *Jurisdictional Immunities* (n 7) 146.

²² *MT G and Others v Germany and Others* [2023] Italy, Constitutional court Case No 159/2023 (English translation at <https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza%20n.%20159%20del%202023%20EN.pdf>). See also 'Court Says Japan Can't Be Forced to Pay Former Sex Slaves' Legal Fees' (*The Korea Herald*, 21 April 2021) <<https://www.koreaherald.com/view.php?ud=20210421000802>>.

²³ *MT G v Germany* (n 22) [3.2].

claimant in the arbitral proceedings was operating in Crimea in the field of electricity generation and distribution before the 2014 occupation. Following various developments in the wake of the ‘independence referendum’, the Crimean Council of Ministers ultimately expropriated the investment. Accordingly, it is difficult to maintain that the Ukrainian claimant was a direct victim of an egregious violation of human rights or international humanitarian law. The judgment of the Dutch Court of Appeal extends the reach of the humanitarian exception to state immunity to a foreign investor solely by virtue of the fact that the breach of investment protection standards occurred against the backdrop of a broader violation of *jus cogens* by the wrongdoing state (such as a military occupation).

While the decision of the Hague Court of Appeal is undoubtedly inspired by the meritorious ambition of seeking to protect a claimant that lost its investment ‘[a]s a result of Russia’s unlawful occupation of parts of Ukraine, including Crimea’,²⁴ its logical consequences do not appear to be justified under current customary international law (which, presumably, does not embrace even the humanitarian exception per se). Not only does the decision vastly expand the *ratione materiae* scope of the humanitarian exception to state immunity – moving far beyond the new horizons charted by Italian, South Korean, and Brazilian jurisprudence (and standing, in any event, at variance with the ICJ decision in *Jurisdiction Immunities* and the current status of customary international law) – but it also runs partly counter to these latter domestic rulings by blurring the settled distinction between adjudicative immunity and immunity from execution.

²⁴ *Gazprom v DTEK* (n 14) [4.33] (translated by the author).