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STRATEGIC LITIGATION BEFORE THE ICJ. A CASE FOR AN ADVISORY OPINION TO ANCHOR THE UKRAINE SPECIAL TRIBUNAL IN THE RULE OF LAW FOR A MEANINGFUL PROSECUTION

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Abstract: On 25 June 2025 the Council of Europe and Ukraine signed an agreement to create the Special Tribunal for the Crime of Aggression against Ukraine. This innovation aims to achieve a double purpose: to end impunity in the specific case, and more generally, to strengthen the primacy of law in international relations. The creators of the Tribunal managed to overcome legal issues which made other fora incapable of prosecuting the perpetrators, however, the Tribunal's design raises questions about judicial efficacy and meaningfulness as its creators decided that personal immunity of certain state officials applies before it. If the reason behind this restriction is to overly ensure legality, an advisory procedure before the International Court of Justice (ICJ) would be a better way than preventing the Tribunal even from indicting the key perpetrators of this leadership crime. This article argues that the creators should consider changing the framework while the Tribunal is still not in operation and request – through the United Nations General Assembly – an advisory opinion of the ICJ. This paper explains how a targeted advisory opinion would likely convert a politically contingent project into a functioning and effective court strengthening the international rule of law.

Keywords: crime of aggression, International Criminal Court, advisory opinion, Ukraine

1. An Individual Case Posing a Systematic Challenge

Russia's full-scale invasion of Ukraine has forced the members of the international community to hold the perpetrators responsible. Although criminal responsibility was deemed to be necessary for the gravity of the breach, the willing states had to realise a puzzling institutional gap. There existed no forum in international law to address the crime. After exploring the available options and the viability of the proposals for new ones, Ukraine, willing states (the Core Group), the European Union (EU) and the Council of Europe (CoE) opted to create a new ad hoc criminal tribunal, the Special Tribunal for the Crime of Aggression against Ukraine (Special Tribunal, or Tribunal). The formal establishment of the Tribunal on 25 June 2025 marks a significant momentum in the political and legal reality of international relations. The Special Tribunal is an attempt to assert the substantive prohibition of aggression through criminal prosecution. While testing new institutional forms of international justice, the creation of the Tribunal is a promising opportunity to clarify the current state of international law on the status of inter partes international courts, personal immunity and their implications in state cooperation with international criminal procedures.

However, the Special Tribunal's design is fragile and open to criticism both from conservative and from progressive legal interpretation. Its Statute allows jurisdiction over Russian nationals without the consent of Russia, but the current form of the Statute explicitly acknowledges personal immunity for the head of state, the prime minister and the minister of foreign affairs. The international status of the Tribunal also raises some questions since its jurisdiction is based on Ukraine's territorial jurisdiction, whereas it is within the framework of the CoE with the possible joint cooperation of other states and international organisations in its management. These institutional choices may be the result of either realpolitik or legal caution. The overly conservative regulation of personal immunity in the Statute provokes a realistic scepticism about the Tribunal's ability to indeed end impunity, deliver justice and to strengthen the primacy of law in international relations. In other words, the international rule of law.

In this sense, this article understands and refers to the concept of the international rule of law from an international criminal law perspective and with a sociological lens, as supported by the interpretation of the United Nations General Assembly. Accordingly, 'an international

order based on the rule of law [is an indispensable foundation] for a more peaceful, prosperous and just world'.[1] The respect for law inevitably entails liability of all subjects of law, including that of persons and states.[2] Individual criminal liability for grave breaches is an indispensable part of the concept of the international rule of law.[3] Therefore, impunity for international crimes cannot be tolerated, proper investigation and prosecution, if needed, through international fora must guarantee the respect for law.[4] However, in order to end impunity, such prosecution needs to be effective and meaningful.

If the Special Tribunal has the ambition beyond being a political showcase of Western action, and intends to do more than publishing symbolic, judicially not confirmed indictment drafts, then, for a meaningful and effective mechanism the personal immunity clause needs to be changed. If the choice for the current form was legal cautiousness based on doubt about the international character of the tribunal or the current rules on personal immunity, the Tribunal's legal foundations and revised procedural rules can be anchored in an authoritative interpretation of international law.

Accordingly, this article is centred around an organised strategic litigation plan to find a remedy. Once identifying the structural and institutional uncertainties in international law, it proposes pursuing an advisory opinion procedure before the ICJ. Strategic litigation is initiated when the aim is not only to resolve the specific case, presently the legal issues around the Special Tribunal, but also to produce an authoritative clarification of the current state of law the pronouncement of which would have systematic implications. The ICJ can be the most adequate forum for strategic litigation in international law, and its advisory opinion procedure is especially suited for this purpose. It can address the legal uncertainties that currently constrain the Special Tribunal, most importantly, territorial jurisdiction, its international character and the issue of personal immunity. A focused advisory opinion request would reduce litigation risk, provide authoritative arguments that the Tribunal

1 UNGA, Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, A/RES/67/1, 24 September 2012, Para. 1.

2 UNGA, Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, A/RES/67/1, 24 September 2012, Para. 2.

3 Binder and Janig, "Rule of Law Considerations," 572.

4 A/RES/67/1, Para. 22.

is legally firm, and thereby improve prospects for cooperation, arrest and enforcement as well as a better understanding of international law.

The analysis in this paper proceeds in three parts. First, it briefly reconstructs the dilemma of choosing a criminal law procedure over mere political ones, the institutional options and choices that resulted in the agreement between the CoE and Ukraine. Second, following a summary of the principal legal features of the Tribunal's Statute this article identifies and critiques the procedural and normative gaps that threaten the Tribunal's objectives of accountability and rule of law consolidation. Third, and at the focus of the argumentation, the paper develops a case for an ICJ advisory opinion as a strategic instrument: this explains why the ICJ is the appropriate forum, proposes a compact set of legal questions suitable for submission, and explains how favourable answers would materially strengthen the Tribunal's legal standing and practical functionality. The article does not attempt to argue those questions comprehensively; rather, it situates an advisory request as the logical and practical next step for states and organisations committed both to ending impunity for aggression and to reinforcing the international rule of law.

2. International Criminal Law for Long-lasting Peace

Scholars of law and international relations seem to agree that the Russian leaders have committed serious breaches of international law, and moreover, international crimes. Nevertheless, it is highly debated how to settle the crisis and find a durable solution. While some challenge whether international criminal law is the most effective tool in the hands of the international community, others fear the consequences of selective justice.

Indeed, in general, apart from, or besides international criminal law, global justice may be achieved by other means. These may include restoration of relationships, ending ongoing violations, redistribution, justice as accountability and punishment, and justice as equality.[5] These are undeniably important considerations, and all should be pursued.[6] However, only one of these concepts, accountability and punishment, has the power to prevent future atrocities by deterring future

[5] Nouwen and Werner, "Monopolizing Global Justice", 157.
[6] Nouwen and Werner, "Monopolizing Global Justice", 174.

perpetrators from committing the crime. It is exactly this form of justice that correlates with international criminal law.[7] Accordingly, a criminal proceeding on the crime of aggression casts a message that those high state officials[8] who start war and shatter international peace, will be held criminally responsible.[9]

However, international criminal law is often criticised as being selective. Selective justice always triggers the risk of devaluing the judicial process: it undermines the rule of law; the idea that law itself serves justice and not revenge. In international law, this phenomenon is more acute than in other fields of law. International criminal law is inherently selective;[10] it steps in occasionally only, and when national jurisdictions fail to do so. Additionally, transitional justice is dependent on the jurisdiction of the given forum, on either the consent of the concerned states, or the willingness of the international community.

Some fear that prosecuting Russian leaders with the means of international criminal law would paint a picture of selective justice where the West could historically escape charges, but the rest of the world cannot. One may see the dilemma through such lenses. But it should not be so. It would rather have to be assessed through the prism of the refraction of small states and superpowers. Russia is a superpower holding a veto power in the Security Council. Selective justice could be used as a merit in this turn of events by selecting a wrongdoer who is among the most powerful. Now selective justice could be used to set an example: all states are equal under international law, even in their liabilities, and their leaders are no exception. Selective justice – by crystallising and developing international law – can be turned into a more objective and unbiased justice. Especially, if the trial maintains vigorously the rule of law and strengthens it further with strong cooperation amongst other authoritative legal institutions.

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7 Nouwen and Werner, "Monopolizing Global Justice", 171.

8 Crimes are committed by individuals and not by abstract entities. See Trial of the major war criminals, International Military Tribunal vol. I Nuremberg 1947. p. 223.

9 The original term for the crime of aggression was 'crimes against peace'. See Article 6 (a) of the Charter Nuremberg Tribunal (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945); Article 5 (a) of the Charter of the Tokyo Tribunal (International Military Tribunal for The Far East, Special proclamation by the Supreme Commander for the Allied Powers at Tokyo 19 January 1946; charter dated 19 January 1946; amended charter dated 26 April 1946).

10 Binder and Janig, "Rule of Law Considerations," 572.

3. A Special Tribunal as a Suboptimal, but Viable Solution

Before the CoE signed an agreement with Ukraine on the establishment of a special tribunal for the Russian aggression, a vibrant debate in academia paved the path to possible solutions. The creation of an ad hoc aggression tribunal can be explained on the basis of why other options were ruled out. This section also anticipates some of the legal issues the Special Tribunal needs to address in an ICJ strategic litigation to ensure its legality and legitimacy.

3.1. International Criminal Court (ICC) Prosecution with Creative Solutions

It is well-known that the International Criminal Court (ICC) investigates the situation in Ukraine and even issued an arrest warrant against the Russian president.[11] Hence it would be tempting to claim that the desired international criminal justice is on its way. The problem is that although Ukraine accepted the jurisdiction of the Court, [12] it only did so in respect of war crimes and crimes against humanity.[13]

The reason is that in the contemporary ICC system, Ukraine alone could not establish jurisdiction over the crime of aggression. The crime of aggression is a special crime under the Rome Statute with special jurisdiction and referral rules applicable thereto. The most important one to consider here is that proprio motu and state referral may only be plausible if the crime of aggression was committed on the territory of a state party and committed by a person who is a national of a state party or who has accepted the jurisdiction of the ICC.[14]

The Rome Statute allows another possibility, which is a Security Council referral[15] adopted under Chapter VII of the UN Charter.[16] In this case, neither territorial, nor personal jurisdiction would be needed.

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[11] ICC Press Release, Situation in Ukraine, ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, 17 March 2023.

[12] ICC OTP, Report on Preliminary Examination Activities 2020. 14 December 2020. Para. 271.

[13] ICC, Situation in Ukraine, Letter addressed to the Registrar of the International Criminal Court by the Minister of Foreign Affairs of Ukraine. 8 September 2015.

[14] Rome Statute Article 15bis (5). Inserted by resolution RC/Res.6 of 11 June 2010.

[15] Rome Statute Article 15bis (5). Inserted by resolution RC/Res.6 of 11 June 2010, Article 15ter (1).

[16] Rome Statute Article 15bis (5). Inserted by resolution RC/Res.6 of 11 June 2010, Article 13 (b).

Consequently, this regime applies even if the states concerned are not parties to the Rome Statute. Since the Kremlin already vetoed the condemnation of the act of aggression, it is apparent that the SC would not refer the case to the ICC due to the Russian veto. The GA could condemn Russia for aggression because the SC referred the issue before it in a resolution, claiming that the SC could not exercise its duties in the maintenance of international peace and security.[17] 'This represented the first time in four decades that the Council has adopted a 'Uniting for Peace' resolution, whereby the Council refers a situation on which its permanent members are deadlocked to the General Assembly'.[18] The original 'Uniting for Peace' resolution[19] was adopted in 1950, aiming to enable the GA to proceed instead of the SC when it was paralyzed. However, the GA could not fully substitute the SC's competence since it could only adopt recommendations to the member states,[20] and not binding decisions as the SC would do.[21] This results in the following. Although the GA proceeded due to the inability of the SC to maintain international peace and security, it only did so without the means to create obligations.[22] Thus, there is no legal ground to refer a situation to the ICC.[23] Consequently, the GA does not have the competence to refer the situation to the ICC as neither the Rome Statute, nor the UN Charter allows so. State queries cannot suffice either, as the Prosecutor of the ICC acknowledged.[24] To sum up, certain scholars discussed the option in which instead of the SC, it is the GA acting under the 'United for

17 UNSC Resolution 2623.

18 Security Council Reports. UN Documents for Ukraine. Summary to S/RES/2623.

19 United General Assembly resolution 377(V). Adopted 3 November 1950.

20 Tomuschat, "Uniting for Peace," 1.

21 UN Charter Article 48 (1).

22 See ICJ, *Certain expenses of the United Nations* (Article 17, para. 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J . Reports 1962. p. 165.

23 The first SC referral was realised in 2005 concerning the situation in Darfur. See S/RES/1593(2005) 31 March 2005, adopted by the Security Council at its 5158th meeting. The resolution was adopted under Chapter VII of the UN Charter; as such, it contained obligatory measures on states: the obligation to cooperate with the Court (para. 2); nationals of non-party states shall be subject to the exclusive jurisdiction of the ICC regarding the crimes concerned. These are coercive norms which cannot be created by the GA, as it can only make recommendations. (UN Charter Arts. 10-12, 14.)

24 ICC, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine, 25 February 2022. "Given that neither Ukraine, nor the Russian Federation are State Parties to the Rome Statute, the Court cannot exercise jurisdiction over this alleged crime in this situation".

Peace' resolution which refers the crime of aggression against Ukraine to the ICC. The problem is that such a referral may not only be contra legem in the UN system, but would definitely be contrary to the Rome Statute, which allows a SC referral only.

As certain scholars proposed, the easiest solution would have been to amend the Rome Statute and render the crime of aggression an ordinary crime; in this sense, either territorial or personal jurisdiction would be sufficient for proceeding. Specifically, Luis Moreno Ocampo proposed ending selective justice permanently:

> The proper solution is to allow the ICC's investigation of the crime of aggression regardless of the aggressor's nationality. A simple revision of Article 15 bis (5) will achieve such a goal by deleting five words: 'by that State's nationals or. Whether States like Ukraine then want to become a State party or accept the ICC jurisdiction for the crime of aggression committed on their territory would be up to them.[25]

Ocampo claimed that the option is legally feasible and would only take a few months.[26] Accordingly, the Parliamentarians for Global Action picked the idea and elaborated a proposal for the amendment of Article 5bis (5) of the Rome Statute.[27] Indeed, apart from politics and power games, there is virtually no moral or legal argument for why there should be a different jurisdiction regime for the crime of aggression than other crimes.

The problem is plausibility. Not only is it dubious whether state parties would have the willingness to amend the Rome Statute, but also, 'it would be naïve to think that [non state parties'] positions would not be properly endorsed by close allies or States with political or economic interests'. [28]

The greatest moral virtue of this solution is also its plausibility weakness. Being victimized by aggression, this solution would allow even for non-state parties to accept the jurisdiction of the ICC by means of a simple declaration. This is the most desirable outcome the international

[25] Moreno Ocampo, "Ending Selective Justice".
[26] Moreno Ocampo, "A Pragmatic Legal Approach".
[27] Parliamentarians for Global Action, Proposal to Amend the Rome Statute Kampala Amendment on the Crime of Aggression. 20 February 2023.
[28] Reisinger Coracini, "Is Amending the Rome Statute".

community could opt for. For this option, legality would be satisfied; legitimacy would be met, which would contribute to the development of international law dramatically. Yet as of now, this simple change seems and proves to be unrealistic.

3.2. Establishing an *erga omnes* ad hoc Tribunal

Prominent figures of the international community and legal society[29] made a statement and initiated a draft declaration to call on states to establish a 'Special Tribunal for the Punishment of the Crime of Aggression against Ukraine'.[30] This proposal aims for states to declare individually that they:

> […] grant jurisdiction arising under national criminal codes and general international law to a dedicated international criminal tribunal that should be established to investigate and prosecute individuals who have committed the crime of aggression in respect of the territory of Ukraine, including those who have materially influenced or shaped the commission of that crime.[31]

A special or ad hoc court is established for one specific conflict only; once the judgments are delivered, the court is dissolved. The above proposed idea, however, differs significantly from the previous special and ad hoc tribunals. The Nuremberg and the Tokyo Tribunals were created with the enforced and blanket consent of the Axis states.[32] Such consent is hard to presume without a complete regime change in Russia. Should there be a regime change, a special tribunal would not even be needed;

[29] Inter alia: Philippe Sands (Professor, KC); Gordon Brown (former UK PM), Benjamin Ferencz (former Prosecutor Nuremberg Military Tribunal), Howard Morrison (former ICC judge), Professor Jean-Marc Thouvenin (Secretary General of the Hague Academy of International Law), Professor Egbert Myjer (former Judge of the European Court of Human Rights), Richard Goldstone (former Chief Prosecutor International Criminal Tribunal for the former Yugoslavia), Professor Volodymyr Butkevych (former judge of the European Court of Human Rights), Sir Nicolas Bratza (former President of the European Court of Human Rights).

[30] Statement Calling For The Creation of A Special Tribunal For The Punishment of The Crime of Aggression Against Ukraine. 4 March 2022.

[31] Statement Calling For The Creation of A Special Tribunal For The Punishment of The Crime of Aggression Against Ukraine. 4 March 2022. Declaration on a special tribunal for the punishment of the crime of aggression against Ukraine. Para. 3.

[32] Vasiliev, "Aggression against Ukraine".

the new regime would be able to recognize the jurisdiction of the ICC instead.[33]

The other example was the creation of the ICTY and the ICTR[34] by the Security Council under Chapter VII of the UN Charter.[35] Russia would veto a draft resolution intending to create an ad hoc tribunal. In case of a regime change, the same applies: referring the case to the ICC would be a more practical solution.[36] The tribunals mentioned before had a common trait: their jurisdiction was practically obligatory, hence *erga omnes*.

The creation of the ICTY and ICTR by SC resolution entailed that all UN members had to recognise and respect the jurisdiction of the tribunals. In the Russian aggression against Ukraine, an *erga omnes* court is not an option due to the Russian veto in the SC. To overcome this, Corten and Koutroulis suggested establishing a special tribunal by the GA. They added that an ICJ advisory opinion could support this claim. Corten and Koutroulis argued that a positive advisory opinion would have provided legitimacy and ensured the legality of the tribunal. Notwithstanding, they also admitted that it is uncertain whether the ICJ would support the right of the GA to establish an erga omnes ad hoc court.[37] Indeed the GA cannot adopt a binding resolution by the very wording of the UN Charter. It would be very difficult to argue that UN practice or the ICJ could overrule that.

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[33] Vasiliev, "Aggression against Ukraine". See also Heller, *Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea*, Opinio Juris, 7 March 2022.

[34] As it established the ICTY (S/RES/827 (1993) 25 May 1993, Adopted by the Security Council at its 3217thh meeting) and the ICTR (S/RES/955 (1994) 8 November 1994, Adopted by the Security Council at its 3453rd meeting).

[35] As the Tadić appeals decision stated: "[T]he Security Council is not a judicial organ and is not provided with judicial powers […]. The principal function of the Security Council is the maintenance of international peace and security, […] The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia." ICTY Prosecution v. Dusko Tadić. Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction. 2 October 1995. Paras. 37-8.

[36] McDougall, "Why Creating a Special Tribunal." However, as the example of Ukraine shows, there is no need to do so. It suffices to recognise the jurisdiction of the ICC for a limited time or for a limited circle of individuals. Therefore, the established organization, set of rules, and the jurisprudence of the ICC would be given. An ad hoc tribunal would be less restrictive for Russia in that sense.

[37] Corten and Koutroulis, "Tribunal for the crime of aggression", 38.

3.3. Establishing a Hybrid Tribunal

The desire for a hybrid tribunal also occurred as a practical solution, which may apply both national and international law.[38] Advocates argue that immunity would not be applicable, hence state officials could be prosecuted.[39] Previous special or hybrid tribunals were created by agreements between the UN and the states concerned.[40] It is possible to create such a special tribunal since it is likely that Ukraine would have the willingness to conclude such an agreement with the UN.[41] If the support were there from the GA, this could be a truly multilateral, legitimate tribunal with the authority of the UN.[42] However, this optimistic law interpretation is dubious. States would perhaps understand international law otherwise and may not recognise the international character of a hybrid tribunal in this case, especially considering the principle of reciprocity.[43] If the international character of the tribunal is challenged, so can its personal immunity rule be likewise challenged.

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38 Johnson, "United Nations Response Options".

39 This argument is based on an ICJ decision stating that immunity from criminal jurisdiction and immunity from criminal responsibility are not the same, and on implying that in case of special international criminal tribunals, the immunity of state officials does not apply. See ICJ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* Judgment, I.C.J. Reports 2002. paras. 58 and 60.

40 Special Court for Sierra Leone was established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000 (Adopted by the Security Council at its 4186^{t}h meeting); the Special Tribunal for Lebanon was established by an Agreement between the United Nations and the Lebanese Republic pursuant to Security Council resolution 1664 (2006) of 29 March 2006 (Adopted by the Security Council at its 5401st meeting); the Extraordinary Cambers in the Courts of Cambodia were formed as a result of the Agreement between the UN and The Royal Government of Cambodia Concerning The Prosecution under Cambodian Law of Crimes Committed during The Period of Democratic Kampuchea, approved by the UNGA (UN General Assembly, Report of the Third Committee : Khmer Rouge trials: Resolution 57/228 adopted by the General Assembly, 22 May 2003, A/RES/57/228 B).

41 As per the previous example, the UN would conclude the agreement through a GA voting.

42 Jennifer Trahan, *U.N. General Assembly Should Recommend Creation Of Crime Of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model*, Just Security, 7 March 2022.

43 Cf. Advisory Committee on Public International Law, Challenges in prosecuting the crime of aggression: jurisdiction and immunities. Advisory report no. 40, 12 September 2022.

3.4. National Criminal Procedure under Territorial or Universal Jurisdiction

Domestic procedures in detail, whether exercising universal or territorial jurisdiction, fall outside the scope of this study. They apply national laws, and they are carried out as per the national procedural laws. However, these domestic norms are usually harmonised with international treaties and in any case, two international aspects should be noted.

First, in a domestic procedure under territorial jurisdiction, the immunity of high state officials vis-à-vis foreign national jurisdictions is exclusively determined by international law.[44] Notwithstanding, there were cases when this issue was simply set aside,[45] or when the judges found that immunity does not apply due to the gravity of the crime in question.[46] This also occurred when a domestic judgement was based on the claim that the conduct was contrary to jus cogens.[47] However, international case law holds that immunity ceases to be applicable in no other cases but before international criminal courts.[48]

Second, universal jurisdiction may seem promising, yet the International Law Commission stated that 'the crime of aggression must be entrusted primarily to international courts and tribunals.'[49] There are two additional problems. First, universal jurisdiction does not overrule the immunity of state leaders. Universal jurisdiction still means a national procedure within the national legal system. Second, it is not proven that aggression is a crime with universal jurisdiction. Being a jus cogens norm does not equate to universal jurisdiction.

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[44] It cannot be otherwise, since it includes the relation between two states and their officials, and in the case of aggression, the act of the state and the conduct of the individual is severely connected.

[45] Federation Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie, Rhone Court of Assizes, judgment of 4 July 1987, ILR, vol. 78, p. 148; and Court of Cassation, judgment of 3 June 1988, ILR, vol. 100, p. 330.

[46] *Eichmann*, Israel, Supreme Court, judgment of 29 May 1962, ILR, vol. 36, pp. 309-310.

[47] *Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, p. 674.

[48] *ICJ Arrest Warrant*, paras. 58 and 60.; SCSL, *Charles Taylor*, AC, paras. 50-1. and paras. 57-9.; ICC *Al-Bashir*, AC, para. 1.

[49] UNGA International Law Commission, Fifth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur. 14 June 2016. A/CN.4/701. para. 222.

3.5. Establishing an *inter partes ad hoc* International Tribunal

A less radical option was indeed to set up a new *ad hoc* international tribunal for prosecuting the perpetrators of the crime of aggression against Ukraine. The tribunal was to be erected by a collective of states, preferably through an international organisation. Ideally this would have been the General Assembly of the UN, but the CoE was proposed as a more relevant regional organisation with stronger support from state parties. Many believe, and rightly so, that the GA or the CoE have no competence to establish a tribunal *erga omnes*. This, however, does not mean that the creation of an *ad hoc* and *inter partes* tribunal would be legally questionable. Indeed, this is the solution the European states and the CoE chose to follow with the creation of the Special Tribunal.

4. The Outline of the Ukraine Special Tribunal

The states supporting the call for holding the Russian leaders responsible opted for creating a new Special Tribunal. Following a brief description of the process of reaching this solution, this article presents the key aspects of the newly created tribunal which in its blueprint indicates some core questions of international law that require further anchors in the rule of law in order to secure its legality, legitimacy and effectiveness.

4.1. The Formation of a New Tribunal

The need to prosecute the Russian top leaders for the international crimes committed in and against Ukraine in the context of the full-scale invasion started on 24 February 2022 was already raised as early as 14 July 2022 at the Ukraine Accountability Conference.[50] The Political Declaration did not specify the crime of aggression, or the exact modalities of the mechanism, but it welcomed 'the rapid and meaningful steps that have already been taken towards accountability for international crimes committed in Ukraine'.[51] It also established a 'Dialogue Group' to further explore possibilities.[52]

[50] Ukraine Accountability Conference, Political Declaration, 14 July 2022, paras. 4, 6. Available from Netherlands Ministry of Foreign Affairs.

[51] Ukraine Accountability Conference, Political Declaration, 14 July 2022, para. 7.

[52] Ukraine Accountability Conference, Political Declaration, 14 July 2022, para. 25.

Shortly, the issues of prosecuting the crime of aggression in the established legal framework came to light, and options for new mechanisms and for a possible forum were discussed. On 30 November 2022, the European Commission presented to the Member States that the ICC cannot exercise jurisdiction over the crime of aggression, hence two options remain: an ad hoc international tribunal created by a multilateral agreement, or a hybrid court, 'integrated in a national justice system with international judges'.[53]

In a background memorial of the CoE, the potential role of the CoE in a special aggression tribunal was deemed to be 'well-placed' and within the mandate of the organisation, ranging 'from assistance in the selection and appointment of judges, the elaboration of rules of evidence and procedure, the provision of technical or legal support in the area of case management, to the secondment of experts'.[54] On the investigation side, the EU contributed to the dialogue with the creation of the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) to foster cooperation between national jurisdiction and the sharing of evidence.[55]

The discussions were indeed channelled towards a special tribunal. On 2 April 2024, the Political Declaration following the Restoring Justice for Ukraine Conference, pledged no impunity for the crime of aggression and expressed commitment to a special tribunal with 'sound legal basis and broad international support'.[56] By 17 May 2024, it was decided that the tribunal should be linked institutionally to the CoE. The CoE Committee of Ministries authorised the Secretary General to draft the necessary legal documents for an agreement with Ukraine for the establishment of a special tribunal, including its draft Statute.[57]

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53 European Commission, Ukraine: Commission presents options to make sure that Russia pays for its crime, 30 November 2022.

54 CoE, Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe, SG/Inf(2023)7, 31 January 2023, paras. 29-30.

55 Eurojust, International Centre for the Prosecution of the Crime of Aggression against Ukraine, 3 July 2023. The decision to establish the Centre was announced by Ursula von der Leyen on 2 February 2023. See European Commission, Statement by President von der Leyen at the joint press conference with Ukrainian President Zelenskyy, 2 February 2023.

56 Restoring Justice for Ukraine, Political Declaration, 2 April 2024, paras. 14-15. Available from Netherlands Ministry of Foreign Affairs.

57 CoE, 133rd Session of the Committee of Ministers, (Strasbourg, 17 May 2024), M/Del/Dec(2024)133/2a, para. 5.

By early 2025, the legal foundations were successfully negotiated between the EU, the CoE and 37 states, and the key elements of the Statute of the tribunal were agreed upon. It was further clarified that based on the agreement between Ukraine and the CoE, the jurisdiction of the tribunal will be based on Ukraine's. It was decided that the court would operate within the institutional framework of the CoE.[58] Once the preparatory work was finalised with the draft legal instruments,[59] the coalition agreed to 'formally endorse the establishment of a Special Tribunal for the Crime of Aggression against Ukraine'.[60] On 19 May 2025, Ukraine launched the official process of establishing the special tribunal by submitting the legal instruments to the CoE.[61] Finally, on 25 June 2025, the CoE and Ukraine signed the agreement to formally establish the Special Tribunal for the Crime of Aggression against Ukraine.[62]

4.2. The Established Special Tribunal for the Crime of Aggression against Ukraine

As foreshadowed, the Special Tribunal for the Crime of Aggression against Ukraine was established by an agreement between the CoE and Ukraine,[63] to which the Statute of the Tribunal was attached.[64] In the Preamble, the Agreement recalled the Nuremberg trials where individuals were held responsible for crimes against peace, and the responsibility of every state to exercise its jurisdiction for international crimes, also referring to the crime of 'planning, preparation and waging

[58] European Commission, The Commission and High Representative Kaja Kallas welcome a major step towards holding Russia accountable for its war of aggression against Ukraine, 4 February 2025.

[59] Joint Statement of the Foreign Ministers Meeting on the conclusion of the work of the Core Group on the Establishment of a Special Tribunal for the Crime of Aggression against Ukraine ("Lviv Statement"), 9 May 2025, para. 1.

[60] European Commission, International coalition agrees on the establishment of the Special Tribunal for the Crime of Aggression against Ukraine, 9 May 2025.

[61] Ukraine Ministry of Foreign Affairs, The Council of Europe has launched the official process of establishing the Special Tribunal for the Crime of Aggression against Ukraine, 19 May 2025.

[62] CoE, Ukraine and the Council of Europe sign Agreement on establishing a Special Tribunal for the Crime of Aggression against Ukraine, 25 June 2025.

[63] Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal for the Crime of Aggression against Ukraine, 25 June 2025. (hereinafter: Agreement).

[64] Statute of the Special Tribunal for the Crime of Aggression against Ukraine, Annex to the Agreement between the Council of Europe and Ukraine on the Establishment of the Special Tribunal for the Crime of Aggression against Ukraine, 25 June 2025. (hereinafter: ST Statute).

of an aggressive war' in the Ukrainian Criminal Code.[65] The Preamble also considered the Tribunal to be a 'collective effort' and invited states and international organisations to become parties to the Enlarged Partial Agreement in support of the Tribunal.

The normative part established the Tribunal with 'the power to investigate, prosecute and try persons who bear the greatest responsibility for the crime of aggression against Ukraine'[66] within the institutional framework of the CoE.[67] Ukraine is obliged to cooperate with the Tribunal and to comply with its orders and request for assistance.[68]

Consistent with the Preamble of the Agreement, the Statute set the mandate of the Tribunal and established that its jurisdiction is based on the territorial jurisdiction of Ukraine.[69] Ipso jure, the Prosecutor General of Ukraine refers the ongoing domestic criminal proceedings, all information and gathered evidence to the Prosecutor of the Tribunal and requests them to investigate further.[70] Therefore, the procedure continues internationally under the authority of the Tribunal's Prosecutor. The judiciary or the Tribunal (Chambers, Judges, Prosecutor, Registrar and the staff) were not incorporated into, or recruited from the domestic judiciary of Ukraine, but were created as separate and international, though not excluding the possibility of Ukrainian or even Russian citizenship to fill the positions.[71] The Tribunal shall apply its Statute and Rules of Procedure, applicable international treaties, customary rules of international law and general principles of law, or failing that, the domestic laws of Ukraine regarding the prosecution and punishment of the crime of aggression.[72]

The Statute follows the definition of the crime of aggression in the Rome Statute of the ICC, keeping the definition under the concept

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65 Criminal Code of Ukraine (Official EN translation), Article 437. Cf. 1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes shall be punishable by imprisonment for a term of seven to twelve years. 2. Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years.

66 Agreement, Article 1(1).

67 Agreement, Article 5(1).

68 Agreement, Article 7(1),(2).

69 ST Statute, Article 1.

70 ST Statute, Article 23(1).

71 ST Statute, Chapter II.

72 ST Statute, Article 3.

of leadership crime. [73] It is further clarified that the official position of the accused 'as head of State or government, a member of a government or parliament, an elected representative or a government official, shall not relieve such person of criminal responsibility nor mitigate punishment'.[74] However, the Statute only acknowledges the non-applicability of functional immunity,[75] whereas it provides personal immunity for the perpetrator of the crime. Should an indictment be drafted against a head of State, head of government or minister of foreign affairs, the Pre-Trial single judge cannot even confirm the indictment, and 'shall order the proceedings be suspended until that person no longer holds that office or an appropriate waiver has been presented to the Special Tribunal', hence the tribunal categorically prohibits the judge and the Tribunal to proceed in such case.[76]

5. A Legalistic Critique: a Tribunal Designed for Failure

Based on the options available and their challenges, considering the choice of the willing states for an ad hoc tribunal within the CoE, the process of establishing it, and analysing the Statute of the Tribunal, this part assesses the objectives behind the creation of the Special Tribunal, why the current framework makes this court unfit to achieve these objectives, and what may be the cause of such failure.

5.1. The Objectives Behind the Tribunal

From the very beginning, the objective behind the dialogue has always been two-fold. First, to end impunity for the crime of aggression, by holding responsible the Russian leaders. Second, and with equal importance,

[73] ST Statute, Article 2. "For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." which is verbatim from Article 8bis of the Rome Statute.

[74] ST Statute, Article 4(2).

[75] ST Statute, Article 23(4).

[76] ST Statute, Article 23(5) "During the suspension, the Pre-Trial Judge shall not otherwise act upon the indictment" which restriction is repeated in Article 25(2).

to strengthen the international rule of law. This double objective accompanied the whole process of creating the Tribunal.[77]

5.2. Is the Tribunal's Design Fit to Achieve its Declared Objectives?

As elaborated in the previous sections, in order to prosecute the crime of aggression in furtherance of ending impunity and strengthening the rule of law, the following obstacles had to be addressed. First, the forum problem. There was no adequate judicial institution to try the crime of aggression with jurisdiction. Second, the immunity problem. Domestic procedures, which could theoretically have jurisdiction over the crime based on territorial or universal jurisdiction, could not initiate procedures against state leaders because of their immunity.

Regarding the forum problem, the Statute of the Special Tribunal created an adequate tool to overcome the problem. The drafters correctly realised that the crime of aggression already had its equivalent

[77] Cf. "We all are committed to enhancing collective action to promote accountability for all alleged international crimes committed in Ukraine" and "[t]he conference further marks our commitment to upholding international law and demonstrating its relevance to people's lives." (Ukraine Accountability Conference, Political Declaration, para. 4 and 5); "It is incumbent upon us, the international community, to uphold the Charter of the United Nations and to ensure that no impunity exists for the crime of aggression against Ukraine" and "[w]e remain committed, […] to work towards the establishment of a special tribunal for the investigation and prosecution of the crime of aggression against Ukraine, that would contribute to accountability of the highest levels of military and political leadership" (Restoring Justice for Ukraine, Political Declaration, para. 14 and 15). Laying down the legal foundations for the establishment of a Special Tribunal "is a breakthrough in a continuing process towards ensuring accountability for the crime of aggression against Ukraine, as well as for upholding the international criminal justice system."(European Commission, The Commission and High Representative Kaja Kallas welcome a major step towards holding Russia accountable for its war of aggression against Ukraine, 4 February 2025); "[O]nce established, […] the Special Tribunal will conduct its proceedings in full respect of international law and human rights, with the aim of securing accountability for the crime of aggression and strengthening the international legal order." (Lviv Statement, para. 3); "Ensuring accountability for the crime of aggression is not only a matter of justice for Ukraine, but also a key prerequisite for restoring trust in the international legal order and a guarantee of lasting peace worldwide. We are grateful to the Council of Europe for its leading role in advancing the initiative to establish the Special Tribunal." (Ukraine Ministry of Foreign Affairs, The Council of Europe has launched the official process of establishing the Special Tribunal for the Crime of Aggression against Ukraine, 19 May 2025); "Ukraine and the Council of Europe have signed an agreement to establish the Special Tribunal for the Crime of Aggression against Ukraine. This historic signature reminds us that international law must apply to all — with no exceptions, and with no double standards" (CoE, Ukraine and the Council of Europe sign Agreement on establishing a Special Tribunal for the Crime of Aggression against Ukraine, 25 June 2025).

in customary law as evidenced by the Nuremberg trials,[78] and consequently, they rightly concluded that the special jurisdiction clauses in Article 15bis of the Rome Statute did not predetermine that another international court would need to restrict its jurisdiction to be both territorial and personal for the purpose of the crime of aggression. Accordingly, the Special Tribunal has jurisdiction based on the territorial jurisdiction of Ukraine, where the commission of the crime occurred.[79] Therefore, the Tribunal's legal framework in this regard overcame the first obstacle. This solution allows the prosecution of the perpetrators of this specific crime,[80] and it also provides precedent for the international rule of law by proving that the crime of aggression is not an exceptional crime which contrary to all the other international crimes would require both territorial and personal jurisdiction of the given judicial forum.[81]

In relation to the immunity problem, the chosen solution is not so promising. As presented, the Statute of the Tribunal obliges the Pre-Trial judge to suspend the procedure, hence not even confirming the indictment should it concern a head of State, head of government or minister of foreign affairs.[82] Reading together with the leadership criteria based on which, ipso jure, the indicted must be 'a person in a position effectively to exercise control over or to direct the political or military action of a State', the possible circle of indictees is relatively narrow. Although the interpretation of the Tribunal may follow a flexible approach and indict not only the Minister of Defence, who is not under the individuals protected by personal immunity under the Statute, but also higher ranking civilian and military personnel, it is arguable whether such individuals indeed had the required leadership criterion.

Not negating the positive prospect of prosecuting such individuals, if interpretation of effective control allows so in the future jurisprudence of the Tribunal, it is still suboptimal given the objectives of the Tribunal declared by its supporters: to hold responsible those with the greatest

78 Agreement, Preamble.

79 ST Statute, Article 1.

80 CoE, Frequently Asked Questions - Special Tribunal for the Crime of Aggression against Ukraine, Question 2.

81 It may provide legal munition for the proposed amendments to the RS in a similar fashion regarding the crime of aggression. See ICC-ASP, Report of the Working Group on Amendments Regarding its Work on the Review of the Kampala Amendments Concerning the Exercise of Jurisdiction with Regard to the Crime of Aggression, ICC-ASP/S-1/2, 4 July 2025.

82 ST Statute Article 23(5) and 25(2).

responsibility, and to strengthen trust in and respect for international law.

It is hard not to see that this legal framework is rather designed to prosecute minor contributors, instead of the real perpetrators, especially in a strictly centralised state system, such as Russia. Ukraine framed the issue in a positive way, seeing the key achievement of the Statute as allowing that 'the head of state, the head of government, and the minister of foreign affairs will bear responsibility for the crime – with no mention of personal immunities. This means they will not escape accountability, even after they leave office'.[83] The CoE communication pictures a less optimistic prospect. It is worth highlighting some key aspects:

> There are clear legal, political and practical obstacles — notably, the immunity of sitting Heads of State, Heads of Governments and Foreign Ministers (so-called 'troika members') and difficulties in obtaining physical custody over potential defendants. […]
> The 'troika members' could only be brought to trial before the Special Tribunal if they were no longer in power or their immunity had been waived. However, investigations and the gathering of evidence can be conducted, indictments can be prepared, and a legal body will stand ready to prosecute and try the persons concerned if and when circumstances allow.
> Furthermore, the Special Tribunal's Prosecutor will be able to publish a formal document setting out the charges and material facts in each case.[84]

From this communication it seems that the ambition of the Tribunal is currently not the prospect of conviction but publishing a judicially unconfirmed indictment document. There are two fundamental problems with this approach which is already embedded in the Statute of the Tribunal. First, the realistic prospect does not resemble a criminal procedure. Second, such understanding of immunity is a step back from the developed rules of international law. Whereas the first problem erodes the objective to prosecute and convict the most responsible

[83] President of Ukraine, Ukraine and the Council of Europe Sign Agreement on the Establishment of a Special Tribunal for the Crime of Russian Aggression Against Ukraine, 26 June 2025.
[84] CoE, Frequently Asked Questions - Special Tribunal for the Crime of Aggression against Ukraine, Question 13.

perpetrators, the second one reverses the trend in the international rule of law, instead of strengthening it. The two problems together mean a much more restrictive ambition for preventing future commissions of the crime. Stressing unnecessarily personal immunity, this Tribunal confirms the belief in impunity and may even encourage leaders to hold on to power by all means, even if it means escalating, or not resolving an armed conflict. Accordingly, these two issues are to be addressed briefly.

The first problem is that the realistic prospect of the Tribunal is currently to submit an indictment against the Russian president or minister of foreign affairs, and then, the Pre-Trial judge suspends the procedure. What the Prosecutor can do, is to publish the unconfirmed indictment submission. This does not justify the establishment and the costs of the Tribunal as this practice does not resemble criminal justice. Such procedure is not adversarial, it does not include the dynamic dialogue between the prosecution and the defence (not a contradictory procedure). Crucially, there would be no judicial overview, and decision on the merits of the charge. In this sense, the Tribunal hardly differs from a fact-finding or an investigation mechanism, which are already operating, such as the ICPA.

The second issue is that the Tribunal claims to be an international court[85] and rightly so as it will be developed further in the section on a proposed ICJ Advisory Opinion procedure. Despite that, the Tribunal is imposing the restriction of personal immunity upon itself, although it was not necessarily the only legally plausible option. Indeed, there are just as many and just as authoritative sources in arguing that before international tribunals, neither functional, nor personal immunity applies. Neither in substantive law, nor in a procedural aspect. Due to the fact that such a choice was not determined in law at all, the question arises, why supporting states opted for such a strong restriction.

5.3. Possible Reasons Behind the Tribunal's Restrictive Design

There can be two explanations behind the decision of the promoters of the Tribunal on why to restrict so drastically its reach for the alleged

[85] CoE, Frequently Asked Questions - Special Tribunal for the Crime of Aggression against Ukraine, Question 7.

perpetrators. First, it may be a conscious political decision. Or second, it may be an orthodox legal constraint fearing that any other solution would have eroded the legality and legitimacy of the Tribunal.

If personal immunity were imposed as a primarily political decision, this would likely reflect states' desire to preserve a convenient justification in other situations: invoking immunity to avoid complying with arrest warrants issued by other international courts against individuals they consider allies. If this is the case, and the Tribunal was designed to be toothless deliberately for primarily political reasons, there is not much to add. It would require another article with a different focus to convince the involved states that ending impunity is their long-term interest.

The other possible explanation would be an overly orthodox legal approach that restricts the Tribunal's prospects in order to conservatively ensure that its legality and legitimacy is beyond challenge. However, if this decision is to prioritise formal legitimacy over the Tribunal's practical effectiveness, it is not a necessary choice. Interestingly, both the EU legal assessment and the CoE background document, prepared for decision making indicated that international jurisprudence is consistent in excluding personal immunity before an international criminal court.[86] If the states were not convinced either about this, or that the Special Tribunal would be considered as international, it is a dilemma which can and should be remedied. To ensure both formal legitimacy (legality) and practical effectiveness, and thereby achieving the two objectives of the Tribunal to end impunity and to strengthen the international rule of law, an ICJ advisory opinion may be the most adequate tool, as proposed, albeit in a very different angle, at the beginning of the process by the Corten-Koutroulis legal assessment prepared for the EU.[87] Since the two objectives of the Tribunal also entail the aim to further promote a more robust international legal order, such an advisory opinion would necessarily fall under the concept of strategic litigation.

[86] Olivier Corten and Vaios Koutroulis, 'Tribunal for the crime of aggression against Ukraine - a legal assessment' In-Depth Analysis Requested by the DROI Subcommittee, European Parliament, December 2022. Section 4.3; CoE, Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe, SG/Inf(2023)7, 31 January 2023, para. 27.

[87] Corten and Koutroulis, "Tribunal for the crime of aggression", 38. Here, the issue at hand to resolve by an ICJ advisory opinion was whether international organisation can create a special tribunal.

6. A Proposed Remedy: the Advisory Opinion Procedure of the ICJ as a Tool for Strategic 'Litigation'

Hereafter is a presentation of why the concept of strategic litigation would fit the above-described dilemma, why such 'litigation' could be pursued through a non-contentious procedure, and why the ICJ and its advisory procedure would be the most adequate forum to anchor the Tribunal in effective rule of law.

6.1. Strategic Litigation and Non-contentious Litigation

In the case of the Tribunal, there is some legal uncertainty – for instance the applicability of personal immunity or the international character of the Tribunal – which, if answered by an authoritative forum would not only settle the legality and legitimacy of the Tribunal but it would also contribute to the proper understanding of the lex lata. This fits the concept of strategic litigation where the key feature is that 'the litigation has implications beyond the individual litigant'[88] with an objective that 'go[es] beyond the outcome of that particular legal process'.[89] Accordingly, there is an intent to promote legal, political and social changes and hence engaging in a legal process.[90] This latter criterion is an important one: the change is to be facilitated through a legal procedure. The point of strategic litigation is that it presupposes that law, as it exists, is capable of addressing the social need in a concretised issue, but since there is no clear and common understanding in the legal interpretation of the question, an authoritative judicial body needs to pronounce the law. Although it may look like judicial law-making, it is formally only the regular feature of the administration of justice, as Lauterpacht highlighted.[91] However, advisory functions are 'not inherent in the function of a judicial body'.[92]

88 Ramsden, "Strategic Litigation", 441.
89 Jeßberger and Steinl, "Strategic Litigation", 384.
90 Jeßberger and Steinl, "Strategic Litigation".
91 Lauterpacht, Development of International Law, 155. Lauterpacht adds that in fact it is law-making, but to overcome the prohibition of judicial legislation in legal theory, law applies a fiction by which when announcing the new rule, the judge only applies or interprets existing law.
92 Oellers-Frahm, "Lawmaking Through Advisory Opinions?", 1033.

If a court's judicial function does include advisory functions, advisory opinions are not legislative tools either but rather used to clarify the content and meaning of applicable law.[93] Therefore, it would be wrong to exclude advisory opinion procedures from the options of strategic litigation as it would disregard the very aim of such practice which is 'to use judicial power instrumentally to pressure structural reform'.[94] Advisory procedures can be an alternative to contentious litigation as they also clarify the normative framework with the same authoritative statement of law capable of promoting further legal and political actions, and to 'guide the conduct of entities part of a legal community'.[95]

In the present case of the Tribunal, there is indeed an objective which would reach beyond the Tribunal's technical mandate, which is to further the legal culture against impunity and to strengthen the international rule of law. To reach this goal, certain legal questions are present, which are deemed to be properly regulated by existing law, but their proper interpretation and meaning is disputed. These questions can and should be answered by an authoritative judicial forum, which may exercise its judicial function through an advisory opinion capable of pronouncing the law as it exists[96] and thereby influencing a better understanding of law and a strong structural change. The next step is finding the adequate forum for the strategic litigation.

6.2. ICJ's Advisory Opinion Procedure as an Adequate Forum

The CoE's own Court, the European Court of Human Rights deals with human rights issues based on the European Convention on Human Rights, and the EU's court also interprets its own particular and institutional law. The International Criminal Court operates under its own mandate regulated by the Rome Statute and does not have a general advisory function. Therefore, in practical terms, only the ICJ has

> the […] capacity to examine legal questions concerning the international community as a whole, and which offers States so wide a range

93 Cruz Carrillo, "The Role of Advisory Opinions", 183.
94 Ramsden, "Strategic Litigation", 444.
95 Cruz Carrillo, "The Role of Advisory Opinions", 171, 173.
96 In this case, on the understanding of immunity, the international character of ad hoc tribunals and their jurisdiction.

> of opportunities for promoting the rule of law. It is thus the only international court with both general and universal jurisdiction.[97]

The legal questions which need consideration by an authoritative court indeed require such universality and general nature. Personal immunity, jurisdiction for international crimes, and the status of ad hoc tribunals which aim to prosecute crimes with the cooperation of the members of the international community are regulated by international treaties and more so by customary international law. The proper meaning of such institutions concerns the international community as a whole with the aim to promote the international rule of law.

Although historically the advisory opinion of the ICJ was relatively rare prior to the end of the 2010s,[98] lately, the number of such procedures are increasing as international actors resort to this tool more strategically to 'judicialize international affairs'.[99] Whereas between 1948 and 2018 there were 27 advisory opinions,[100] between 2019 and October 2025, the ICJ had already delivered four.[101] On a yearly basis this equates to 48% growth in the number of advisory opinions. The reason may be that advisory proceedings of the ICJ may be used to provide more clarity on certain legal questions, or to decide if important issues or actions concerning the international community as a whole are in compliance with international law.[102]

However, in the case of the Special Tribunal it is also important to consider that beyond the far-reaching consequences in the wide concept of the rule of law, the advisory opinion should also be able to definitively decide legal questions, and to provide a strong basis for the prosecution of the perpetrators of aggression.

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97 ICJ Handbook (2018), 95.

98 ICJ Handbook (2018), 84.

99 Stavridi, "The Advisory Function of the International Court of Justice".

100 ICJ Handbook (2018), 84.

101 ICJ website, Advisory proceedings. Accessed on 26 October 2025. These include the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (2019), the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (2024), the Obligations of States in respect of Climate Change (2025), and the Obligations of Israel in relation to the Presence and Activities of the United Nations, Other International Organizations and Third States in and in relation to the Occupied Palestinian Territory (2025).

102 ICJ, 75 Years in the Service of Peace and Justice (2021), 77–78.

It is tempting to see the ICJ advisory opinion procedure as transforming the institution 'from a court into an advising committee of jurists'.[103] However, an advisory opinion expresses the view of the Court, as an institution, on the law, so the distinction vis-à-vis contentious judgements are only clear in theory.[104] When the ICJ pronounces the law in its advisory opinion it is still regarded as authoritative, often bearing a de facto value of precedent as it would be difficult to argue against such a finding.[105] According to Kolb, the Court itself also considers its advisory opinions as 'an integral part of its judicial functions'.[106] Due to the fact that both in contentious judgement and advisory opinions the Court's activity is identical in interpreting the law and clarifying its applicability, Kolb concludes that both carry the same jurisdictional value.[107] Formally, an advisory opinion cannot carry the value of res judicata, but advisory opinions may pronounce the law definitively.[108] It should also be mentioned that other international judicial fora also tend to rely on the ICJ advisory opinions. One prime example is the International Tribunal for the Law of the Sea (ITLOS). In its judgement in the Mauritius v. Maldives case, the judges had to decide what are the legal consequences of the ICJ Chagos Advisory Opinion.[109] The ITLOS maintained that the advisory opinions of the ICJ are indeed non-binding,[110] however, the judges found it necessary to draw a distinction between the binding character and the authoritative nature of an advisory opinion of the ICJ. An advisory

[103] Thirlway, The International Court of Justice, 5.

[104] Thirlway, The International Court of Justice, 139. Or as Kolb puts it: 'The Court's opinions are not simple legal advices.' The emphasis is on its institutional position, inter alia. See Kolb, The International Court of Justice, 1099.

[105] ICJ Handbook (2018), 93; Stavridi, "The Advisory Function of the International Court of Justice."

[106] Kolb, The International Court of Justice, 1020.

[107] Kolb, The International Court of Justice, 1020–1021. See also Aljaghoub, The Advisory Function of the International Court of Justice 1946–2005, 120.

[108] Kolb, The International Court of Justice, 1021.

[109] The Maldives argued that even if the ICJ Chagos opinion gave an opinion on the sovereignty over the Chagos Archipelago, it had no binding effect hence did not settle the issue of sovereignty. See ITLOS, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. the Maldives)*, Judgement, 28 January 2021, paras. 193-195. Mauritius argued with the same legal arguments as presented above in this article (paras. 197-198), adding that it is not the ICJ Advisory Opinion which is binding on States, but the international rules identified by the ICJ (paras. 199-200).

[110] ITLOS, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. the Maldives)*, Judgement, 28 January 2021, para. 202.

opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law.[111]

The ITLOS accordingly decided that the ICJ Chagos Advisory Opinion does have a legal effect and hence are to be considered before the ITLOS as well.[112] Such finding indeed makes an ICJ advisory opinion resemble a decision with de facto res judicata effect.[113] Whereas States, especially those with opposite interests would likely oppose that an advisory opinion is 'correctly reflecting the law',[114] it is hard to deny that there is a tendency to rely on ICJ advisory opinions and its legal findings in international litigations, including criminal procedures.[115] Therefore, while non-binding, ICJ advisory opinions indeed carry highly authoritative weight with an impact that should not be underestimated.[116]

Due to its authoritative institutional weight, and its process, which is essentially judicial in character,[117] advisory opinions 'help to affirm and strengthen the role of international law in international relations [and] [i]t also contributes to the development of that law'.[118] Accordingly, advisory opinions have significant legal and political implications,[119] 'shaping and advancing the international legal order'.[120] This is confirmed by the GA which emphasised the role of the ICJ in the international rule

[111] ITLOS, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. the Maldives)*, Judgement, 28 January 2021, para. 203.

[112] ITLOS, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. the Maldives)*, Judgement, 28 January 2021, paras. 205-206.

[113] Lanzoni, "The Authority of ICJ Advisory Opinions as Precedents", 298. Although the author rightfully adds that time will tell if this view will be followed or remains the isolated view of the ITLOS.

[114] Sthoeger, "How do States React to Advisory Opinions?", 297.

[115] See for instance ICC, *Situation in the State of Palestine*, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', 5 February 2021, paras. 56-57, 81, 93, 120-121.

[116] ICJ, 75 Years in the Service of Peace and Justice (2021), 79–80.

[117] ICJ Handbook (2018), 90–91. See also Kolb, The International Court of Justice, 1099.

[118] ICJ Handbook (2018), 99. See also Oellers-Frahm, "Lawmaking Through Advisory Opinions?", 1040.

[119] Ramsden, "Strategic Litigation", 444.

[120] Main-Klingst and Marjanac, "Downstream Impact of Advisory Opinions", 280.

of law and recalled the ability of the relevant organs to resort to the ICJ's advisory opinion.[121]

To utilise fully and successfully the ICJ advisory opinion for the legality and legitimacy of the Tribunal, as in all strategic litigation, an organised approach is required. The entities which may request the advisory opinion should be identified as well as the questions which are to be submitted to the ICJ judges.

7. An ICJ Advisory Opinion to Anchor the Ukraine Special Tribunal in the Rule of Law for a Meaningful Prosecution

Strategic litigation requires an organised, carefully drafted submission. It is key for both winning the specific case and obtaining the general clarification of the law for the structural change. In the present case, the most important question is whether it is correct that there is no personal immunity before an international criminal tribunal, and accordingly, whether the Special Tribunal would constitute as an international tribunal. For the long-term effect of contributing to the rule of law, it is worth adding related questions, the answers to which also lead to a favourable outcome. In the following, the proposed questions are listed, followed by a description why it is integral for anchoring the Tribunal in the rule of law. Although this paper does not aim to argue in detail and with sufficient legal analysis on the desired answers, it does provide a brief core set of arguments in order to indicate what may be expected from the judges of the ICJ. This section will also touch upon the basic procedural issue of what entity may submit the request to the ICJ and whether the proposed questions could be rejected based on the requesting entity's mandate.

Based on the above elaboration of the legal issues which occurred during the process of choosing the adequate forum for prosecuting the crime of aggression, and the proposed outline of the Special Tribunal, keeping in mind the objectives of the supporting states and entities to end impunity and to strengthen the international rule of law, the following questions should be submitted to an advisory opinion procedure before the ICJ:

[121] A/RES/67/1, Para. 31.

1. Is the prohibition of aggression a jus cogens norm of international law obliging both states and individuals?
2. Is it a rule in customary international law that a person who committed an international crime as a head of state or government or as a foreign minister does not enjoy immunity before an international criminal court? (To consider: If so, would such rule against immunity be applicable both in substantive and in procedural terms?)
3. Can the CoE and the willing states set up an inter partes criminal tribunal with an international treaty? Would such a tribunal constitute an international criminal court where personal immunity does not apply?

The advisory procedure before the ICJ is reserved to the General Assembly and other organs authorised by it.[122] In the present case it would be the General Assembly that could potentially request the advisory opinion based on the proposal of the CoE or a willing member state. The request may be any legal question,[123] which can be any question of international law falling under the UN's mandate. However, as Kolb notes, due to the very general and broad mandate of the UN, 'any question or problem with international repercussions that affect the rights and interests of other members of the international community can be addressed by the United Nations', hence submitted as a question to the judges of the ICJ.[124] As the above proposed questions are sine dubio legal ones with possible effects to the rights and interests of the members of the international community, it is highly unlikely that the ICJ would reject such a request.

7.1. Encouraging Factors for a Positive Outcome

The first question may be relevant to refute possible challenges on jurisdiction ratione materiae on the basis that Russia is not party to the Statute of the Tribunal. If the prohibition of aggression is a jus cogens norm, which it is,[125] and it also obliges individuals, it would acknowledge that

[122] UN Charter, Article 96.
[123] Statute of the International Court of Justice, Article 65 (1).
[124] Kolb, The International Court of Justice, 1040.
[125] ILC Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens). In the Yearbook of the International Law Commission, 2022, vol. II, Part Two. Annex (a).

the crime of aggression is not only a crime inter partes *vis-à-vis* states who accept a Statute defining a crime, as in the ICC,[126] or in the Tribunal,[127] but an act prohibited in international law in general. Accordingly, there would be no need for Russia's consent for the Tribunal to exercise its jurisdiction. Consequently, it would not violate the principle of *nullum crimen sine lege* to prosecute the perpetrators. As per Nuremberg principles II and VI, the fact that no penalty was posed before would not bar the prosecution of the crime.[128]

The second question concerns the immunity of acting heads of states or government and foreign affairs ministers. This is the core question in the strategic litigation, as this clarification would enable the Tribunal to effectively exercise its mandate. The question should relate to the status of customary law, since states can exclude immunity for their officials in an international agreement (i.e. in a Statute) which would be applicable against such state officials. However, a purely treaty obligation would not be applicable against non-state parties, like Russia due to the *pacta tertiis* principle.[129] If the rule is of customary nature, a challenge for immunity would not apply even for non-state parties. Although there are concurring opinions on the matter, international jurisprudence seems consistent that should the tribunal be an international one, immunity does not apply. This is also an acknowledged principle of international law, recognised by the GA as Nuremberg Principle III.

An inter partes ad hoc tribunal, such as the Special Tribunal would not raise the issue of immunities or the *pacta tertiis* principle. It is the international character of a tribunal which counts. Immunity applies between states. A head of state cannot be subject to another state's jurisdiction, just as a state's action cannot be either. A clear example for the validity of this claim is the very existence of the ICC. The ICC is an *inter partes* international criminal court. It is not *erga omnes*, it was created by an international agreement, and there are state parties to it. It is *inter partes*, yet

126 RS Article 8bis.
127 ST Statute, Article 2.
128 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 1950. Yearbook of the International Law Commission, 1950, vol. II, para. 97.
129 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, Article 34.

unquestionably international. Consequently, immunity of heads of states does not apply.[130]

One may argue that the lack of immunity is only the case *vis-à-vis* state parties. However, this is not the case. All the crimes in the Rome Statute except for aggression require territorial or personal jurisdiction. Hence, if the perpetrator committed a crime on the territory of a member state as a national of a non-member state, the ICC would have jurisdiction over the crime and the perpetrator and its rule against immunity would also apply. It is *prima facie* a *pacta tertiis* norm against the Vienna Convention on the Law of Treaties. However, there is no hierarchy between the sources of international law, and the principle of *lex specialis derogat legi generali* points to the primacy of international criminal law. Contextual interpretation which includes the Nuremberg Principles also confirms this. At least it is already accepted that the ICC itself operates on this ground.

Currently, aggression is an exception from this rule as for the crime of aggression both territorial and personal jurisdiction is a must-have. However, this is the result only of the decision of the state parties since there is no reason to distinguish between the crime of aggression and all the other crimes in this sense. Accordingly, should the international community decide to create a new *ad hoc* international tribunal inter partes, there is no dogmatic obstacle against concluding that the crime of aggression therein requires territorial or personal jurisdiction, with the above consequences on immunity. This leads to the third question.

The third question is the other core issue at hand. It is to be recognised that the Special Tribunal is an international court, hence the abovementioned rules would apply before it. The challenge may be that it was established by a regional international organisation (CoE) on the territorial jurisdiction of Ukraine. To be international, hence, not domestic, the tribunal is to be established by an international legal instrument with the involvement of at least two States, even if acting through an international organisation, and not being formally incorporated into a domestic court system.[131] The Ukraine Special Tribunal meets these elements.

The Special Court for Sierra Leone found that a 'truly international' tribunal acts on the will of the international community, in that case, all

[130] ICC Rome Statute Article 27.
[131] Nuridzhanian, "International Enough?"

members of the United Nations, represented by the Security Council with which Sierra Leone (SCSL) agreed in a treaty to establish the Court.[132] Therefore, the SCSL 'was established to fulfil an international mandate and [was] part of the international machinery of international justice',[133] while not being a national court of Sierra Leone,[134] but having an international legal personality.[135] Being an international court,[136] not a national judicial forum, immunity was not applicable.[137]

One may argue that only international courts representing all members of the UN may claim to operate without obligations to respect personal immunities. However, again, the ICC is a clear example that willing states can set up an international court representing the international community, even if at the time of establishment, it meant no more than 60 states.[138]

In the present case, the Special Tribunal was established by an international agreement, by Ukraine and the CoE representing its members. It has its own international legal personality, and it is not incorporated into the Ukrainian domestic judicial system. The fact that its jurisdiction is based on Ukraine's territorial jurisdiction does not mean it is exercising domestic jurisdiction.[139] The ICC also establishes its jurisdiction *inter alia* on the territorial jurisdiction of its member states where the crime was committed. In the Special Tribunal, being an *ad hoc* court, it was evident that the jurisdiction will be based on a territorial basis, which is evidently Ukraine's.

To further ensure that the tribunal is 'international enough', states and international organisations are invited to join an Enlarged Partial

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[132] SCSL, *Charles Taylor,* Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004, para. 38.
[133] SCSL, *Charles Taylor,* Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004, para. 39.
[134] SCSL, *Charles Taylor,* Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004, para. 40.
[135] SCSL, *Charles Taylor,* Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004, para. 41.
[136] SCSL, *Charles Taylor,* Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004, para. 42.
[137] SCSL, *Charles Taylor,* Decision on Immunity from Jurisdiction, Appeals Chamber, 31 May 2004, para. 54.
[138] Nuridzhanian, "International Enough?".
[139] Lobel and Milaninia, "Building a Special Tribunal".

Agreement on the management of the Tribunal.[140] The endorsement of efforts towards the Tribunal by the United Nations General Assembly[141] is further evidence that the Tribunal will act on an international mandate.

However, it is oftentimes raised by conservative interpretation of international law that immunity of high state officials is not applicable only in a substantive term, but not for arrests and prosecution in a procedural term. This is a question worth considering as a litigation risk.

Therefore, there is another question to consider adding to question 2, in italics above. Although it also relates to question 3, it would fit the second general question, which is an integral part of the legal issue therein with its basis in general international law. The core of the issue is that some argue,[142] based on the ICJ Arrest Warrant case, that customary law makes a distinction between substantive and procedural aspects of personal immunity:

> Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.[143]

However, this interpretation of the ICJ decision completely disregards the context of the judgment and the paragraphs before and after the cited part. Para. 58 already sets the framework in which the judges make clear that when they say that there exists no rule in international law which allows exception from personal immunity, such a statement is in regard to national courts,[144] which is emphasised again in paragraph

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[140] CoE, Ukraine and the Council of Europe sign Agreement on establishing a Special Tribunal for the Crime of Aggression against Ukraine, 25 June 2025.

[141] United Nations General Assembly, Resolution adopted by the General Assembly on 16 April 2025, A/RES/79/284, Preamble.

[142] Lobel and Milaninia, "Building a Special Tribunal".

[143] ICJ *Arrest Warrant*, para. 60.

[144] ICJ *Arrest Warrant*, para. 58. When analysing the statutes of international tribunals where personal immunity was and is not applicable (IMT, Tokyo Tribunal, ICTY, ICTR, ICC), it concludes that "these rules likewise do not enable [the Court] to conclude that any such exception exists in customary international law in regard to national courts" [emphasis added].

59.[145] Crucially in para. 61, the Court adds that immunities 'do not represent a bar to criminal prosecution in certain circumstances'. The Court enlisted four such circumstances, one among them is 'criminal proceedings before certain international criminal courts, where they have jurisdiction'. The decision does not only enlist *erga omnes* courts (ICTY, ICTR) but also the ICC, which as discussed is an inter partes international court. Putting the already cited SCSL decision on what criteria is necessary to be an international court, the Special Tribunal could be such an international criminal court, as argued before, hence, immunities would not apply.

On the other hand, the ICJ may not need to clarify this question as it would naturally follow from the positive answers to questions 2-3. Another reason why this question may not be necessary is that based on the ICC's practice, it is likely that the issue of substantive and procedural aspects of immunity would occur from a different angle which may allow future judges of the Special Tribunal to assess the issue when litigated under their mandate. In case of non-compliance with ICC arrest warrants, with the help prima facie provided by Article 98 of the Rome Statute, member states often argue that Article 27 of the Rome Statute in a substantive sense does not relieve the state to respect personal immunity in a procedural sense, since the execution of an arrest is prima facie a domestic action against another state's leader whose immunity was not waived.[146] The Court never accepted such interpretation and emphasised that States cannot unilaterally decide on the matter without consultation with the Court.[147] When executing an arrest warrant

[145] ICJ *Arrest Warrant*, para. 59. "[Immunities under customary international law] remain opposable before the courts of a foreign State even where those States exercise such a jurisdiction under [conventions on the prevention and punishment of certain crimes which exclude immunity]" [emphasis added]. Here, it is important to note that the Court clearly talks about national prosecutions under national jurisdictions, even if such national jurisdiction is exercised or extended based on an international treaty such as the genocide convention.

[146] Cf. ICC, *Judgment in the Jordan Referral re Al-Bashir Appeal, [Jordan Referral]* ICC-02/05-01/09-397-Corr, paras. 17, 63; ICC, *Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, [Mongolia non-compliance decision]* ICC-01/22-90, para. 6; ICC, *Finding under article 87(7) of the Statute on Hungary's non-compliance with the Court's request to cooperate in the provisional arrest of Benjamin Netanyahu and referral to the Assembly of States Parties [Hungary non-compliance decision]* ICC-01/18-462 24-07-2025, para. 21.

[147] Cf. ICC, *Jordan Referral*, paras. 1-2; ICC, *Mongolia non-compliance decision*, paras. 31-37; ICC, *Hungary non-compliance decision*, paras. 22-23.

of an international court, immunity is not applicable even when the relation is horizontal, between states, as they do not execute the arrest for national procedures.[148] It is argued that this understanding is a better reflection of the current evolved state of international law.[149]

7.2. Assessing the Risks of Strategic Litigation

Nevertheless, it cannot be excluded that the judges of the ICJ would, for some reasons, decide to the contrary. It is the risk of all strategic litigation that the authoritative judicial organ ultimately decides contrary to the aim of the requesters. However, for the purposes of strategic litigation, and especially in this case, this is not necessarily a negative outcome either. The aim of the strategic litigation is not only to gain support for its own legal interpretation but also, in a more general sense, to have the most authoritative pronouncement on the current state of law. Should the high judicial body decide contrary to the law interpretation of the petitioners, it would be a clear indication that contrary to the signs of law development, the desired legal institution is not yet crystallised, hence political action is needed towards this result.

In the case of the Special Tribunal, there are strong signs that the strategic litigation would result in a supportive judicial decision, as presented briefly above. This, however, does not make the strategic litigation superfluous. Although there is highly authoritative judicial, institutional and academic support in arguing for the above positive answers for the proposed questions, the very architecture of the Special Tribunal, as well as some non-compliance with ICC arrest warrant requests indicate that

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[148] ICC, *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir,* ICC-02/05-01/09-302, paras. 74-80; ICC, *Jordan Referral,* para. 132. See also ICC, *Mongolia non-compliance decision*, para. 33. "The vertical nature of the obligations towards the Court supersedes traditional interstate immunity principles, meaning that States Parties must act in accordance with their obligations under the Statute, even if it conflicts with horizontal relations with non-States Parties."

[149] To put it plainly: for putting aside immunity, it is not considered anymore that a waiver is needed from the state concerned, or that the international tribunal must be set up by the Security Council of the UN. See Gaiane Nuridzhanian, International Enough? A Council of Europe Special Tribunal for the Crime of Aggression, Just Security, 3 June 2024. See also ICC, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr, para. 1. "There is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court".

certain states may oppose such understanding. This opposition may be the result of pure realpolitik, or it may come from genuine concern for the *lex lata*. In any case, there is a certain level of uncertainty or at least disagreement on the current state of international law on this subject. Therefore, an advisory opinion would assist the international community to provide a legal interpretation to a legal problem. There is no real risk of initiating such a procedure. If the ICJ would surprisingly decide that the Special Tribunal is not an international criminal court, or that for some reasons, personal immunity would indeed be a legal compliance with contemporary international law, the willing states would still be able to proceed with the currently accepted Statute of the Tribunal. It would also not have a jeopardising effect on the ICC, being a separate system with its own legal framework. However, such a 'negative' outcome of the advisory procedure may provoke a political reaction and launch a campaign for a regulation which provides more accountability in the international domain.

These risks, therefore, do not render the procedure useless, undesirable or unrealistic. Such a strategic litigation would also strengthen an institutionalised international rule of law. As in domestic law, the rule of law entails a strong cooperation between different organs, authorities and institutions all with their own competences but acting under the same normative environment. The normative dialogue between such organisations is a key aspect in maintaining the principle of law. International law is developing towards a similar institutionalised rule of law. In the present case, the Tribunal is already a result of interinstitutional work between the EU, the CoE and the willing states. It was also set to cooperate with the ICC and ICPA. The process and CoE's role in it were recognised by the GA. Should an advisory opinion be requested, it would be a step involving further the GA and contributing to the prestige and role of the ICJ. Due to its strategic nature, such litigation may also provide more legal clarity for international criminal law and its institutions in general.

8. Conclusions

The establishment of the Special Tribunal for the Crime of Aggression against Ukraine represents both a milestone and a test for the international legal order. It embodies the international community's determination to respond to aggression not merely through condemnation but

through criminal accountability. Yet the Tribunal's effectiveness will depend on whether it can convincingly operate within the bounds of international legality which also includes not restricting already developed rules. Without a clear legal foundation for its jurisdiction, and a revised immunity rule, this institutional experiment risks being dismissed either as selective or as purely symbolic.

An advisory opinion from the International Court of Justice offers a unique opportunity to anchor the Tribunal in effective rule of law. By clarifying the legal nature of aggression as a jus cogens norm, confirming that personal immunities do not bar prosecution before international tribunals, and recognising the legitimacy of an inter partes ad hoc court as international court, the ICJ could provide the legal certainty and effectiveness that the Special Tribunal presently lacks. This would not only strengthen the tribunal's mandate but also affirm that the rule of law applies equally to all states and their leaders. Finally, considering that presently the Tribunal would not be able to indict the most responsible leaders in a foreseeable future, the additional one or two years of the advisory procedure may not cause any significant loss of time once a meaningful prosecution is considered instead of a purely symbolic one. The risk of a negative opinion would also be valuable: then the international community would know the restrictive state of international law and may be encouraged for political action in changing that for shaping a more effective legal environment.

Beyond Ukraine, such an advisory opinion would advance the institutionalisation of legality in international relations. It would exemplify how strategic litigation before the ICJ can transform abstract legal principles into enforceable norms, demonstrating that the international community possesses judicial tools to uphold its foundational values. The Special Tribunal's success will thus be measured not only by the trials it conducts, but by whether it reinforces the principle that power is bound by law.

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