

Vladimir Medović, PhD, Full Professor
Faculty of Law for Commerce and Judiciary in Novi Sad,
Business Academy University in Novi Sad
e-mail: medlexx@gmail.com
Tel: 0638583987

THE SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE

Abstract:

The Committee of Ministers of the Council of Europe endorsed the establishment of a Special Tribunal for the crime of aggression against Ukraine at a meeting held in Luxembourg on May 14, 2025. In accordance with the decision of Committee of Ministers the Special Tribunal is to be established within the framework of the Council of Europe, in accordance with an international agreement between the Council of Europe and Ukraine, the Statute of the Tribunal, and an Extended Partial Agreement governing the modalities of support models to such a Tribunal, its financing, and other administrative aspects. The Special Tribunal will have the mandate to prosecute high military and political leaders for the crime of aggression against Ukraine. The international crime of aggression refers to the decision to use armed forces against another state, in violation of the UN Charter. The need to establish a Special Tribunal for the crime of aggression is justified by the fact that the International Criminal Court does not have jurisdiction to prosecute such an international crime. The Special Tribunal was formally established on June 25, 2025, by an international agreement between Ukraine and the Council of Europe. An integral part of this agreement is the Statute of the Special Tribunal, which is contained in a separate annex. Considering that the Special Tribunal is being established within the Council of Europe, the question arises regarding the relationship of that tribunal with International Criminal Court and the member states of the Council of Europe. Will the member states of the Council of Europe, including Serbia, participate in the work of the Special Tribunal and will they have obligations to cooperate with that tribunal, and what will those obligations pertain to? These are just some of the questions that the author will address in this paper in an attempt to determine the international legal implications of the establishment of the Special Tribunal for the crime of aggression within the framework Council of Europe.

Key words: *The Special Tribunal for Crime of Aggression, Ukraine, Council of Europe, Committee of Ministers.*

1. INTRODUCTION

On June 25, 2025 Ukraine and the Council of Europe signed the Agreement on the establishment of a Special Tribunal for the Crime of Aggression against Ukraine. Agreement between Ukraine and Council of Europe was signed in accordance with the

decision of Committee of Ministers of Council of Europe adopted on May 14, 2025 at the meeting held in Luxembourg. The Special tribunal will operate within the framework of the Council of Europe with the mandate to prosecute senior political and military officials for the crime of aggression against Ukraine. This crime refers to the decision to use armed force against other state, in violation of the UN Charter. The need to establish a Special Tribunal for the crime of aggression is justified by the fact that the International Criminal Court (ICC) does not have jurisdiction to prosecute such an international crime. Ukraine ratified the Rome Statute with 2010 ICC Kampala Amendments that added the crime of aggression to jurisdiction of ICC in 2024. It became a full member of the ICC on January 1 2025. However Russia is not member of the ICC and ICC cannot exercise jurisdiction over the crime of aggression unless both the victim and the aggressor state has ratified and accepted the Court's jurisdiction over that crime.¹

The fact that the tribunal was established within the framework of a regional organization, the Council of Europe, raises many significant questions regarding its jurisdiction and functioning. First and foremost, considering that Russia and Belarus, from whose territories aggression against Ukraine was carried out, are not members of the Council of Europe, and that Russia was expelled from this organization on March 16, 2022, following the aggression against Ukraine. The next important question is whether the establishment of the Special Tribunal entails international cooperation obligations with this tribunal for all member states of the Council of Europe. This question is particularly significant for Serbia, which has not joined the European Union sanctions against Russia and continues to maintain political and economic ties with that country. Furthermore, given that the institutions of the European Union (the European Commission and the European Parliament) are among the main initiators of the establishment of the Special Tribunal, the question arises whether cooperation with this tribunal will represent one of the obligations on Serbia's path to EU membership. Namely, international agreements to which all or most member states are parties represent a part of the EU *acquis*. This especially applies to agreements adopted within the Council of Europe or agreements concluded by this organization. Candidate countries are expected to accede to such agreements before the moment of joining the European Union. These are just some of the questions that the author will attempt to answer in this paper.

2. ESTABLISHMENT OF THE SPECIAL TRIBUNAL FOR CRIME OF AGGRESSION AGAINST UKRAINE

The idea of establishing a Special Tribunal arose shortly after the Russian aggression against Ukraine on February 24, 2022. At the proposal of the European Commission, the Council of the EU and the European Parliament on May 30, 2022 adopted the Regulation 2022/838 reinforcing the mandate of European Union Agency for Criminal Justice Cooperation (Eurojust) mandate to collect and preserve the evidence of war crimes including the crime of aggression.² With support of the European Commission, in June 2023, the International Centre for the Prosecution of the Crime of Aggression against Ukraine

1 Butchard P. (2024) *Conflict in Ukraine: A Special Tribunal on the Crime of Aggression*, House of Commons Library, p. 10.

2 Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022, amending Regulation (EU) 2018/1727 as regards preservation, analysis and storage at Eurojust of evidence relating to the genocide, crimes against humanity, war crimes and related criminal offences, Official Journal of the EU, L148/1, 31.5.2022.

(ICPA) started its operations in the Hague. Embedded in Eurojust the ICPA provides a coordination structure to support and enhance ongoing and future investigations into the crime of aggression and contribute to the exchange and analysis of evidence gathered since the start of the Russian aggression. In November 2023, the European Commission presented different options to the Member States of the EU to ensure accountability for the crime aggression against Ukraine. In January 2023, the first meeting of the Core Group consisting of around 40 states on the establishment of a Special Tribunal took place, with the objective of determining the the most appropriate model of Tribunal for the prosecution of Russian leaders for the crime of aggression. On February 4, 2025, senior legal experts of the European Commission, the European External Action Service, the Council of Europe, Ukraine and 37 States laid down the legal foundations for the establishment of a Special Tribunal for the Crime of Aggression against Ukraine. The participants also set out the key elements of the draft Statute³, the core legal text that will govern the functioning of the Special Tribunal. At the meeting in Lvov on May 9, 2025 ministers of foreign affairs and representatives of the Core Group issued the joint statement welcoming the completion of technical work on the draft legal instruments necessary to establish within the Council of Europe a Special tribunal for the Crime of Aggression against Ukraine. On May 13, 2025 Ukraine formally submitted an official request to the Council of Europe to establish the Special Tribunal. Following day the Committee of Ministers of the Council of Europe at session in Luxembourg endorsed the request of Ukraine and adopted the decision acknowledging that the establishment of a Special Tribunal for the Crime of Aggression against Ukraine within the framework of the Council of Europe was a priority issue for the Committee of Ministers and the whole Council of Europe. In this context, Committee of Ministers invited the Secretary General of the Council of Europe to steer the process for the establishment of a Special Tribunal for the Crime of Aggression against Ukraine within the Council of Europe. Finally, on June 25, 2025 the President of Ukraine and the Secretary General of the Council of Europe signed the Agreement on the establishment of a Special Tribunal for the Crime of Aggression against Ukraine (Agreement), including the Statute of the Special Tribunal for the Crime of Aggression against Ukraine (Statute).³ The day before, the Council of Europe's Committee of Ministers, composed of representatives of its 46 member states authorised Secretary General to sign the agreement.

3. ORGANISATION AND JURISDICTION OF THE SPECIAL TRIBUNAL

The Special tribunal is established by the international agreement between the Council of Europe and Ukraine. According to the preamble of the agreement creation of the Special Tribunal, “as a collaborative effort, is the most suitable solution to determine criminal accountability in the case of those individuals who bear the greatest responsibility for the crime of aggression against Ukraine and to avoid duplication of prosecutions at national level against the same individuals”. The parties of the Agreement recalls several international legal acts as a legal foundation for the establishment of the Special tribunal. The resolutions of the UN General Assembly. Notably its Resolution A/RES/ES-11/6 of February 23, 2023, emphasising the need to ensure accountability for the most serious crimes under international law committed on the territory of Ukraine through appropriate, fair and independent investigations and prosecutions at the national or international level, and ensure justice for all victims and the prevention of future crimes and Resolution A/RES/79/284 of 16 April 2025, acknowledging the contribution of the Council of Europe to

3 Committee of Ministers of the Council of Europe, 1532nd meeting, June 18 and 24 2025, Consequences of the aggression of the Russian Federation against Ukraine.

the work of the Core Group towards the establishment of a special tribunal for the crime of aggression against Ukraine, and its willingness to examine possible options to provide expert and technical support for the establishment and, as appropriate, operation of such a special tribunal. Agreement also recalls the Charter of the International Military Tribunal of 8 August 1945, whose Article 6.a established individual criminal responsibility for crimes against peace. It also emphasizes that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

In accordance with Article 1 of the Agreement the Special tribunal is established to investigate, prosecute and try persons who bear the greatest responsibility for the crime of aggression against Ukraine. It shall have its seat in one of the States that has joined the Enlarged Partial Agreement, subject to the conclusion of a host State agreement. However, the Special Tribunal may sit away from its seat when it considers it necessary for the efficient exercise of its functions or otherwise desirable.⁴

The Special Tribunal will be financed and managed by the Members and Associate Members of the Enlarged Partial Agreement set up for that purpose. The Management Committee of the Special Tribunal will be established within the institutional framework of the Council of Europe through an Enlarged Partial Agreement to finance the Special Tribunal and to carry out the administrative and managerial functions. The modalities and criteria for membership of the Management Committee will be determined by the Enlarged Partial Agreement.⁵ The tribunal will be financed by a group of supportive states, going beyond the membership of the Council of Europe, through the Enlarged Partial Agreement.⁶

It is expected that the Enlarged Partial Agreement will be modeled upon the existing Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine adopted by the Committee of Ministers of the Council of Europe on May 12 2023. and amended on September 27 2023. That agreement recognizes two categories of participants. According to Article 4 of the Enlarged Partial Agreement on the Register of Damage, any member or observer State of the Council of Europe and the European Union, as well as any other State that has voted in favour of the United Nations General Assembly Resolution A/RES/ES-11/5 of 14 November 2022 “Furtherance of remedy and reparation for aggression against Ukraine”, may join the Register as a Participant by notification addressed to the Secretary General of the Council of Europe. In addition, any member or observer State of the Council of Europe and the European Union, as well as any other State that has voted in favour of the abovementioned United Nations General Assembly Resolution may join the Register as an Associate Member by notification addressed to the Secretary General of the Council of Europe. Associate Members are encouraged to provide voluntary contributions to the Register in accordance with Article 10. Associate Members may, at any time, become Participants by notification addressed to the Secretary General of the Council of Europe.

Each member and associate member of the Management Committee of the Special tribunal will co-operate, within the framework of co-operation agreements or other arrangements and within the limits of their national legislation and their international obligations, with the Special Tribunal for the purpose of enabling it to fulfill its mandate.⁷

4 Article 2 of the Agreement.

5 Article 5 of the Agreement.

6 Article 6 of the Agreement.

7 Article 7 of the Agreement.

In accordance with the Article 48(3) of the Statute, the Special Tribunal may request the assistance and co-operation from members and associate members of the Management Committee as is necessary for the investigation and prosecution of persons for the crime of aggression against Ukraine. In addition, the Special Tribunal may enter into co-operation agreements or arrangements with members and associate members of the Management Committee for the crime of aggression against Ukraine. Such co-operation agreements or arrangements may, as necessary and appropriate, cover matters such as arrest, surrender, transfer or detention of persons; the questioning of suspected or accused persons; the service of documents, including judicial documents; the examination of places or sites, including the exhumation and examination of grave sites; the execution of searches and seizures; the provision of records and documents, including official records and documents; the protection of witnesses and the preservation of evidence; or any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Special Tribunal. The Special Tribunal may also invite any third State to provide assistance on the basis of an agreement or arrangement with such State, an *ad hoc* arrangement, or any other appropriate basis.⁸

The Special Tribunal shall consist of the Chambers, the Office of the Prosecutor and the Registry. The Chambers shall be composed of different formations:

- one judge as a Pre-Trial Judge;
- three judges in the Trial Chamber; and
- five judges in the Appeals Chamber.⁹

The judges of the Special Tribunal shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions and shall not seek or act on instructions from any government or any other source. No two judges may be nationals of the same State.

Upon the recommendation of an independent advisory panel, the Management Committee will elect the judges by secret ballot by an absolute majority for a nine-year period. This advisory panel, whose members shall be appointed by the Management Committee, shall consist of seven eminent members of the highest national courts, former judges of international criminal courts and tribunals and other lawyers of high moral character with substantial experience in international law, including international criminal law. In its composition, the advisory panel shall strive to achieve a geographical and gender balance.¹⁰ The same procedure applies to the appointment of the Prosecutor.¹¹

The Special Tribunal shall have the mandate to investigate, prosecute and try persons who bear the greatest responsibility for the crime of aggression against Ukraine. Such jurisdiction is based on the territorial jurisdiction of Ukraine.¹² That means Ukraine has delegated its own jurisdiction to an international tribunal established by the Council of

8 Article 48(5) of the Statute.

9 Article 7 of the Statute.

10 Article 8 of the Statute.

11 Article 9 of the Statute.

12 Article 1 of the Statute.

Europe to prosecute crime of aggression. According to the Article 2 of the 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. An “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. For the purpose of determining whether an act of aggression, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, the Special Tribunal shall take into account United Nations General Assembly Resolution 3314 (XXIX) of December 14, 1974 and all relevant United Nations General Assembly resolutions with respect to Ukraine. For those reason the crime of aggression is considered a “leadership crime,” meaning it concerns those in positions of power who made or facilitated the decision to go to war.

The Special tribunal will be the first international criminal court that will prosecute political and military leaders individuals for the crime of aggression since the Nuremberg trials.¹³ The crime of aggression is considered a “leadership crime,” meaning it concerns those in positions of power who made or facilitated the decision to go to war. Therefore Special tribunal will focus on senior Russian political and military leaders who are responsible for planning, preparing, initiating, or executing the crime of aggression against Ukraine. However, Belarusian or North Korean individuals could also potentially be prosecuted if evidence shows they played a significant role in the crime of aggression against Ukraine.¹⁴ Given that proceedings before the tribunal will be conducted against the highest political and military leaders, the question arises of the immunity that those individuals may enjoy under international law. With that regard the Statute of the Special tribunal is clear on this matter: “the official position of any accused person at the time of the alleged commission of a crime, whether 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”.¹⁵

4. SERBIA AND THE SPECIAL TRIBUNAL

At the meeting of the Committee of Ministers of the Council of Europe on May 14 in Luxembourg, Serbia distanced itself from the decision to establish a special tribunal. Serbian Minister of foreign affairs Đurć said He added that Serbia supported the principle of territorial integrity and sovereignty of Ukraine and emphasized that at the same time it distanced itself from some other decisions, in accordance with its interests.

Considering this, it is unlikely that Serbia will accede to the agreement and participate in the work of the Special Tribunal in any capacity. This means that Serbia will not has legal obligation to cooperate with this tribunal, since such an obligation exists only for members and associate members of the Management Committee. On the other hand,

13 O zločinu protiv mira (zločin protiv agresije) videti više kod Ignjatović A, Kokolj M. i Đurić A, (2009), *Međunarodno krivično pravo*, Novi Sad: Univerzitet Privredna akademija u Novom Sadu, p. 156.

14 Council of Europe, *Frequently asked questions – Special Tribunal for the Crime of Aggression against Ukraine*, (Retrieved on July 7 2025) from: Frequently Asked Questions - Special Tribunal for the Crime of Aggression against Ukraine - Portal.

15 Article 4 of the Statute.

Serbia is a member of the Council of Europe, so it will be expected not to undermine the work of the Special Tribunal and to refrain from assisting accused political and military officials in evading justice.

However, Serbia is a candidate for membership in the European Union, and the European Union initiated the establishment of the Special Tribunal. The EU Member states will be members of the Management Committee. Serbia, as a candidate for EU membership, is expected to progressively align its foreign policy with the Union's foreign and security policy. It is also expected that by the time it joins the Union, it will harmonize its legislation with the EU *acquis*. International agreements concluded by European Union or by its Member states are part of the EU *acquis*.¹⁶ Especially when it comes to international agreements concluded by or within the Council of Europe with which the European Union has special relations and shares the same membership. Therefore, there is no doubt that the Enlarged partial agreement will constitute part of the EU *acquis*. Serbia will be expected to accede to this agreement and cooperate with the Special Tribunal. It should be noted that the European Union considers Russia's aggression against Ukraine the greatest threat to peace and security in Europe.

Therefore, it is unlikely that the European Union will admit a state that has a neutral stance towards Russian aggression in Ukraine. One possible solution to this problem is for Serbia to conclude a special agreement with the Special Tribunal in accordance with Article 48(5) of the Statute, which would regulate the modalities of cooperation with the Special tribunal. In this way, Serbia would avoid membership in the committee and establish limited cooperation with the tribunal that would allow it to continue on the path to EU membership.

5. CONCLUSION

The establishment of a Special Tribunal for the crime of aggression against Ukraine represents a new step in the development of international criminal law. For the first time, after World War II and the Nuremberg trial, the Special Court will prosecute the highest political and military officials for the crime of aggression. However, the establishment of the Special Tribunal is not without controversy. Considering that the International Criminal Court does not have jurisdiction to try Russian officials for the crime of aggression, it has been decided that the Special Court will be established within the Council of Europe in accordance with a special international agreement concluded between the Council of Europe and Ukraine. The jurisdiction of the Special Tribunal is based on the territorial jurisdiction of Ukraine. In fact, by international agreement Ukraine delegated its jurisdiction to the Special tribunal by the international agreement concluded with the Council of Europe.

The Special tribunal will be managed and financed by the Management Committee in accordance with the Enlarged Partial Agreement. Only the members and associate members of the Management Committee will be legally obliged to provide assistance and to cooperate with the Special Tribunal. Serbia distanced itself from the establishment of the Special Tribunal. At this moment, the chances that Serbia will become a member of the Management Committee are slim. This means that Serbia will not be obligated to cooperate with this tribunal. However, Serbia is a candidate for membership

16 Medović V. (2018), *Evropska unija – pravo i institucije*, Novi Sad: Univerzitet Privredna akademija u Novom Sadu, pp. 160-162.

in the European Union. Therefore the issue of cooperation with the Special Tribunal will inevitably arise at some point. It should not be forgotten that the tribunal was established at the initiative of the European Union and the majority of its member states. Consequently, in near future Serbia will have to find an appropriate modality of cooperation with the Special Tribunal in order to continue the process of European integration.



Dr Vladimir Medović, redovni profesor
Pravni fakultet za privredu i pravosuđe u Novom Sadu,
Univerzitet Privredna akademija u Novom Sadu

SPECIJALNI TRIBUNAL ZA ZLOČIN AGRESIJE PROTIV UKRAJINE

Apstrakt:

Komitet ministara Saveta Evrope je na sednici održanoj 14. maja 2025. godine podržao osnivanje Specijalnog tribunala za zločin agresije protiv Ukrajine. U skladu sa odlukom Komiteta ministara Specijalni tribunal bi trebalo da bude osnovan u okviru Saveta Evrope, u skladu sa međunarodnim ugovorom između Saveta Evrope i Ukrajine, Statutom Tribunala i Proširenim delimičnim sporazumom koji bi regulisali modele podrške ovom tribunalu, njegovo finansiranje i drugih administrativnih pitanja u vezi sa njegovim radom. Specijalni tribunal bi bio nadležan za suđenje visokim vojnim i političkim liderima za zločin agresije protiv Ukrajine. Međunarodni zločin protiv agresije se odnosi na donošenje odluke o upotrebi oružanih snaga protiv druge države, u suprotnosti sa Poveljom UN. Potreba za osnivanjem Specijalnog tribunala za zločin agresije je obrazložena činjenicom da Međunarodni krivični sud nije nadležan za suđenje za takvo međunarodno krivično delo. Specijalni tribunal je formalno osnovan 25. juna 2025. godine međunarodnim sporazumom između Ukrajine i Saveta Evrope. Sastavni deo tog sporazuma je Statut Specijalnog tribunala koji je sadržan u posebnoj aneksu. Imajući u vidu da se Specijalni tribunal osniva u okviru Saveta Evrope postavlja se pitanje odnosa tog tribunala sa članicama Saveta Evrope. Da li će članice Saveta Evrope, uključujući i Srbiju, učestvovati u radu Specijalnog tribunala i da li će imati obaveze da sarađuju sa tim tribunalom i na šta će se te obaveze odnositi. Ovo su samo neka pitanja kojima će se baviti autor u ovom radu u pokušaju da utvrdi međunarodne pravne posledice osnivanja Specijalnog tribunala za zločin agresije u okviru Saveta Evrope.

Ključne reči: *Specijalni tribunal za zločin agresije, Ukrajina, Savet Evrope, Komitet ministara.*

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