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ENFORCEMENT OF SENTENCES OF THE SPECIAL TRIBUNAL FOR THE CRIME OF AGGRESSION AGAINST UKRAINE: INTERNATIONAL LEGAL FOUNDATIONS

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Introduction

The inevitability of punishment (*nullum crimen sine poena*) is a fundamental principle of international criminal law, without the realisation of which the purpose of international justice collapses. The signing on 25 June 2025 of the Agreement between Ukraine and the Council of Europe on the Establishment of the Special Tribunal for the Crime of Aggression

against Ukraine (together with the annexed Statute) became a unique precedent in the doctrine of international justice, given that it was established for the investigation, prosecution, and trial of persons bearing the highest responsibility for the crime of aggression against Ukraine [1]. This international court is the first international judicial body since the Nuremberg and Tokyo military tribunals whose *ratione materiae* is confined exclusively to the «crime of aggression». Its establishment is intended to address the limitation upon the exercise by the International Criminal Court of its jurisdiction over the crime of aggression in the situation concerning Ukraine, notwithstanding that this crime falls within the subject-matter jurisdiction of the ICC pursuant to Article 8 bis of the Rome Statute. In the words of the eminent jurist, Chief Prosecutor for Great Britain at the Nuremberg Tribunal, Hartley Shawcross KC: «*All the peoples of the world ... strove to declare aggressive war a crime against international law, and although it was traditionally the practice to punish the state*

rather than individuals, it will be only logical and just, from a legal point of view ... to make the individuals who are personally responsible for unleashing such wars answer personally for leading their countries down such a path» [25, p. 155]. Thus, this court is vested with the key responsibility to stigmatise a modern war on the European continent.

At the time of writing, the Special Tribunal is currently in the process of being established, with its institutional framework continuing to develop: on 15 May 2026, at the 135th Session of the Committee of Ministers in Chişinău, Resolution CM/Res(2026)5 establishing the Enlarged Partial Agreement on the Management Committee of the Special Tribunal was adopted, its entry into force remaining pending the completion of internal procedures by a number of participating States [20]. Among scholars, there is active discussion surrounding the overcoming of personal (*ratione personae*) and functional (*ratione materiae*) immunities of high-ranking officials, as well as its subject-matter jurisdiction («the crime of aggression»), and the unique legal nature of its creation (on the basis of the Agreement with the Council of Europe) is being analysed; however, the final stage of justice - the institution of the enforcement of sentences remains without due attention from researchers. The effectiveness of the Special Tribunal will be assessed by the global community not only by the number of judgments delivered, but also by the Court's capacity to ensure the actual enforcement of punishments, the confiscation of assets, and the protection of the rights of sentenced persons in accordance with humanitarian standards. It is crucial that the enforcement of sentences of the Special Tribunal complies with the most advanced international human rights standards, guaranteeing the protection of the dignity of sentenced persons and preventing violations of basic conventional rights during the serving of sentences.

Theoretical and legal foundations of the enforcement of sentences in international criminal justice.

The enforcement of sentences in international justice has undergone a rather complex, lengthy, and controversial evolution from the trials after the Second World War to the universal International Criminal Court (hereinafter - the ICC), which has incorporated the most advanced standards of international law. A brief description of the development of the enforcement of sentences in international courts and tribunals is necessary from the perspective of understanding the institutional solutions embodied in the Statute of the Special Tribunal for the Crime of Aggression against Ukraine (hereinafter - the Special Tribunal).

The starting point is the experience of the Nuremberg Tribunal, established pursuant to the London Agreement of 8 August 1945. Section VI served the purpose of addressing the questions of the enforcement of sentences; in particular, Article 27 empowered the tribunal to impose the death penalty or any other punishment which it considered just, while the question of the actual execution of sentences remained outside the scope of statutory regulation [25, p. 20].

The enforcement of sentences in respect of those convicted at Nuremberg was carried out by the Allied powers in Spandau Prison on the basis of the Allied Control Council Directive No. 35 of 7 September 1946. Thus, Karl Dönitz (10 years), Albert Speer (20 years), and Baldur von Schirach (20 years) fully served their sentences and were released, while Rudolf Hess, who received a life sentence, died in prison. A regime of strict isolation was maintained at Spandau, the cells were single (3x2 metres), the day was scheduled by the minute, and the prisoners had to perform forced labour (working in the garden, detaching old postage stamps, cleaning, etc.).

A relatively modern approach to the enforcement of sentences was introduced with the establishment of the International Criminal Tribunal for the former Yugoslavia (hereinafter – the ICTY). Article 27 of the Statute provided that imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons [24]. This provision established two key principles that subsequently became systemic for the entire field of international criminal law: firstly, the voluntary nature of state participation in enforcement; secondly, the retention of the tribunal’s jurisdictional control over the process of serving the sentence.

It is worth noting that the ICTY concluded bilateral agreements on the enforcement of sentences with more than twenty states, including Poland [2] and Ukraine [5]. It is telling that none of these agreements provided for the complete transfer of jurisdiction to the enforcing state—the issues of early release, parole, and pardon remained within the exclusive competence of the tribunal.

An identical legal basis was established by the Statute of the International Criminal Tribunal for Rwanda (hereinafter - the ICTR). Article 26 of its Statute effectively reproduced the provisions of the ICTY Statute, albeit with one crucial difference — the possibility of enforcing the sentence directly in Rwanda [23]. At the same time, it is worth noting that the practical implementation of this provision proved to be exceptionally complex, given the state of Rwanda’s penitentiary system and the existence of parallel national proceedings.

With the development of the Rome Statute of the ICC, the drafters incorporated the best and most advanced practices of the institution of the enforcement of sentences, both in international judicial proceedings and national systems. Part 10 of the Rome Statute (Articles 103–111) en-

compasses many aspects, in particular the procedure for designating the State of enforcement (Article 103), the role of the ICC in supervising the conditions of detention (Article 106), the grounds and procedure for the transfer of a convicted person to another State (Article 104), as well as the mechanism for the reduction of a sentence (Article 110) [21]. The primary distinction from previous *ad hoc* courts lies in the important criteria for the reduction of a sentence; pursuant to paragraph 4 of Article 110, the ICC reviews the question of sentence reduction after the person has served two-thirds of the sentence imposed, or thirty years in the case of life imprisonment, taking into account a number of factors, including the person’s willingness to cooperate with the Court, voluntary assistance in giving effect to the judgements and orders of the Court on reparations to victims, and the possibility of successful resocialisation. It is worth noting that in addition to the Rome Statute, the ICC is guided by the Rules of Procedure and Evidence (hereinafter - the Rules); in particular, Chapter 12 of the Rules is dedicated to this matter [22].

Kai Ambos notes that «in the event that the ICC imposes a sentence of imprisonment, there is no mandatory obligation for States Parties to enforce this sentence. The enforcement of such a sentence depends entirely on the ‘willingness’ of States» [26, p. 2176]. Extending this thesis, it must be recalled that special agreements on the enforcement of sentences have been concluded between the ICC and States (e.g. with Georgia, the United Kingdom, Poland, Finland, Latvia, Norway, Belgium, etc.). Pursuant to Article 1 of the Agreement between Belgium and the ICC «On the Enforcement of Sentences», it «governs questions relating to or arising out of the enforcement of sentences imposed by the Court in penitentiary institutions designated for this purpose by Belgium» [4]. Thus, in our view, a bilateral Agreement between

the ICC and a State that has expressed its willingness to do so constitutes a mandatory condition for the enforcement of a sentence against a convicted person. Although, in this regard, there is no consensus in the scholarly literature [26, p. 2174-2177].

Ukraine became a full member of the Rome Statute on 1 January 2025, having previously adopted the Law on Ratification on 21 August 2024. Ukraine undertook the obligation to align its national legislation with its international obligations. Consequently, amendments were made to the Criminal Procedure Code of Ukraine, and Chapter IX² «Particularities of Cooperation with the ICC» was added. In particular, the issues of the enforcement of decisions at the national level are clearly regulated, with Article 636 of the CPC being dedicated to this matter [14].

It is worth noting the practical experience of other *ad hoc* international criminal tribunals - the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia. The Special Court for Sierra Leone concluded agreements on the enforcement of sentences with Rwanda and the United Kingdom [3], which demonstrated the feasibility of involving states geographically and culturally distant from the place where the crimes were committed. The experience of the Extraordinary Chambers in the Courts of Cambodia proved to be unique for another reason - the enforcement of sentences was carried out within the national penitentiary system under international supervision (given its «hybrid» nature), which raised the question of the minimum standards adherence to which is mandatory regardless of the chosen enforcement model (see Rule 113) [16].

The Institutional Mechanism for the Enforcement of Sentences under the Statute of the Special Tribunal

The issue of the enforcement of sentences of the Special Tribunal is governed by Chapter V

«Enforcement» of its Statute. Paragraph 1 of Article 49 of the Statute of the ST establishes that a sentence of imprisonment «shall be served in a State which has concluded an agreement to that effect with the Special Tribunal» [1]. As we have noted above, this mechanism is actively applied in the activities of the ICC, and this provision has effectively been received into the Statute of the tribunal, as the tribunal itself does not possess its own penal system.

Kai Ambos, analysing the provisions of the Rome Statute, distinguishes two stages of the enforcement process: the factual and the penitentiary. «The factual part, which contains the facts established by the Court and identifies the convicted person, *is irrevocably authoritative*, binding every State Party from the very moment ordinary judicial remedies for challenging the content and character of the decision become unavailable. *The penitentiary (enforcement) part of the sentence, conversely, is authoritative only at the moment a state accepts the obligation regarding enforcement*. This authority is not *autoritas erga omnes* (authority towards all), but binds only the enforcing party» [26, p. 2179].

The voluntary nature of state participation in the enforcement of sentences has deep roots in international law. No norm of international law obliges states to accept persons convicted by international criminal tribunals to serve sentences on their territory. This is primarily due to the fact that the enforcement of sentences of imprisonment is inextricably linked with the sovereign functions of the state in the fields of security, penitentiary administration, and the resocialisation of convicted persons. Therefore, the participation of states in this process is traditionally carried out on the basis of explicitly expressed consent, embodied in a bilateral agreement.

At the same time, the voluntary nature of participation gives rise to a legal problem known in the doctrine of international criminal law as «the

problem of the place of serving the sentence», meaning that the tribunal may find itself unable to enforce its own sentence due to the absence of a state willing to accept the convicted person. This risk is particularly acute for the Special Tribunal, given the specific nature of the cohort of persons falling under its jurisdiction - primarily citizens of the Russian Federation who held or hold the highest state offices.

Paragraph 2 of Article 49 of the Statute vests the President of the Special Tribunal with the authority to designate the State of enforcement in each specific case provided that several States have concluded the relevant agreements. An identical function is assigned to the President of the ICTY (Article 28) [24] and the Presidency of the ICC (Article 103) [21], although in the latter case, the procedure is more detailed.

The procedural character of this authority of the President possesses certain legal flaws. On the one hand, the designation of the State of enforcement is an administrative decision that does not directly concern the subject-matter of the indictment or the severity of the sentence. On the other hand, this decision significantly affects the actual conditions under which the convicted person serves the sentence, including access to consular support, family contact, medical assistance, and legal aid. Thus, we believe that the position according to which a person must have the right to be heard prior to the adoption of such a decision should be supported—similarly to the provisions of paragraph 3(c) of Article 103 of the Rome Statute [21].

The Statute of the Special Tribunal does not contain an express requirement for the convicted person to be heard when designating the State of enforcement, which is a lacuna that must be filled by the Rules of Procedure and Evidence. Consequently, *the process of the drafting of the Rules of Procedure and Evidence by the judges of the Special Tribunal requires separate atten-*

tion. It is essential to emphasise the need for a detailed and extensive regulation of issues regarding the enforcement of sentences in this document. Given the successful experience and high standards of international criminal justice, we consider that the use of the Rules of Procedure and Evidence of the International Criminal Court as a conceptual model appears most expedient.

The authority of the President of the Tribunal to designate the State of enforcement is exercised following consultations with all interested States regarding their readiness and capacity to enforce the sentence in accordance with the decision of the tribunal (paragraph 2 of Article 49 of the Statute).

Paragraph 2 of Article 49 of the Statute of the ST defines two primary criteria by which the President is guided when selecting the State of enforcement: 1) the need to ensure fair burden sharing; 2) whether the States concerned are willing and able to execute the full sentence in compliance with the ruling of the Special Tribunal. These criteria are complementary, but they may conflict in specific situations.

The criterion of fair burden sharing is a relatively new concept in the system of international criminal justice. It presupposes that the burden of enforcing sentences should not be concentrated in specific States, but should be distributed evenly among all States that have undertaken the relevant obligations. From a practical standpoint, this means that where several equivalent candidates are available for the enforcement of a specific sentence, the President of the tribunal should grant preference to the State that has accepted a smaller number of convicted persons.

The criterion of a State being willing and able is more specific and operational. Willingness presupposes the existence of the political will of a State to accept a specific sentenced person and to ensure conditions of detention

that comply with international standards. Ability encompasses the technical, financial, and legal capabilities of a State to fulfil the said obligations—in particular, the availability of appropriate penitentiary institutions, qualified personnel, and financial resources. It is worth noting that the financial aspect of the enforcement of sentences is directly linked to the role of the Management Committee, as provided for by sub-paragraph (h) of paragraph 2 of Article 5 of the Agreement between Ukraine and the Council of Europe on the Establishment of the Special Tribunal. The Management Committee considers mechanisms to assist members and associate members with costs related to the enforcement of sentences [1].

Paragraph 3 of Article 49 of the Statute of the ST establishes the subsidiary role of Ukraine as the State of enforcement—if no State has concluded a relevant agreement with the Special Tribunal, the sentence may be enforced in Ukraine [1]. The chosen mechanism is a distinctive feature of an *ad hoc* tribunal, given that it was established exclusively for the investigation, prosecution, and trial of persons bearing the highest responsibility for the crime of aggression against Ukraine, whose jurisdiction is founded upon the territorial jurisdiction of Ukraine (Article 1).

The transfer of jurisdiction to the Special Tribunal does not deprive Ukraine of the right and duty to bring to justice individuals guilty of committing crimes on its territory. Article 437 of the Criminal Code of Ukraine, which establishes liability for the planning, preparation, initiation, and waging of an aggressive war, serves as the normative basis for the application of Ukrainian penitentiary legislation to persons convicted by the Special Tribunal [13].

At the same time, the subsidiary role of Ukraine gives rise to a number of questions that require separate research:

- firstly, the enforcement of sentences in Ukraine in the conditions of an ongoing armed

conflict is problematic from the perspective of ensuring the security of convicted persons and compliance with international standards of detention;

- secondly, the placement of persons convicted of the crime of aggression against Ukraine into Ukrainian penitentiary institutions may be perceived as a violation of the principle of impartiality of international justice;

- thirdly, the extension of the provisions of Ukrainian legislation on parole and pardon to persons convicted by the Special Tribunal is incompatible with the principle of the retention of the tribunal's jurisdictional control, as enshrined in Article 50 of the Statute.

With these considerations in mind, subsidiary enforcement in Ukraine should be viewed as a measure of *last resort*, the application of which is undesirable and should prompt an intensification of the search for agreements with other States.

It is necessary to note the importance of paragraph 3 of Article 49 of the Statute, which prohibits sentences of imprisonment from being served in the host State of the Special Tribunal. The *ratio legis* of this prohibition is multifaceted. It protects the neutral status of the host State of the tribunal and prevents a situation where this State would perform a dual role as the location of the judicial body and the place of serving the sentence imposed by it. Furthermore, the prohibition protects the convicted person from an excessive concentration of sovereign functions in the hands of a single State and reflects the interests of the host State itself, which may not wish to bear the burden of detaining convicted persons in addition to the costs of hosting the tribunal itself.

The Content of Agreements on the Enforcement of Sentences: Conditions of Detention, Supervision, Reporting

Despite the absence of detailed requirements within the Statute of the ST regarding the content

of agreements on the enforcement of sentences, an analysis of comparative material and the general principles of international criminal law allows for the identification of the minimum necessary content of such agreements. Agreements on the conditions of detention must, in our view, take into account:

1. the specification of the penitentiary institutions where the sentence will be served, or the mechanism for their designation;

2. the standards of physical conditions of detention, with an express reference to the Nelson Mandela Rules as the minimum standard;

3. guarantees of medical care and psychological support;

4. the conditions of the sentenced person's access to consular support from the State of their nationality, their counsel, and relatives.

In particular, it is necessary to take into account Articles 2, 3, 5, 8, and 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 [11], the long-standing jurisprudence established by the European Court of Human Rights (specifically, the cases of *Othman (Abu Qatada) v. the United Kingdom* [9, paras 187–190], *Muršić v. Croatia* [8, paras 122–141], and other cases), the 1984 UN Convention against Torture and its Optional Protocol, the UN Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), and the European Prison Rules.

Provisions on supervision are a critically important element of the agreements, as it is through the supervision mechanism that the tribunal exercises its jurisdictional control over the process of serving sentences. The agreements must provide for: the right of authorised representatives of the tribunal to have unhindered access to the places of detention of sentenced persons; the right of the sentenced person to lodge complaints with the tribunal regarding the conditions of detention; and the obligation of the enforcing State

to promptly notify the tribunal of any changes in the conditions of detention or the state of health of the sentenced person.

Reporting obligations must include the regular provision by the enforcing State of information on the progress of the serving of the sentence, the state of health of the sentenced person, and other material circumstances. Reporting is a prerequisite for the exercise by the Special Tribunal of the powers provided for in Article 50 of the Statute, in particular regarding the review of the question of sentence reduction, for which up-to-date information on the conduct and personal circumstances of the sentenced person is required.

It is worth noting the role of the Management Committee regarding compliance with the conditions of the enforcement of sentences. Paragraph 2(h) of Article 5 of the Agreement provides that the Management Committee considers mechanisms to assist members and associate members with costs related to the enforcement of sentences, the release of sentenced persons and the protection of witnesses after the termination of the Enlarged Partial Agreement, including possibly through the establishment of a trust fund. It is worth recalling that the Management Committee is a distinctive administrative and managerial body of the Special Tribunal, established within the institutional framework of the Council of Europe through an enlarged partial agreement for the duration of its activities [15], for the financing of the Special Tribunal. The Committee acts on the basis of the Enlarged Partial Agreement adopted by Resolution CM/Res(2026)5 on 15 May 2026 at the 135th Session of the Committee of Ministers in Chişinău, which additionally provides for the functions of the protection of witnesses, the supervision of the enforcement of sentences, the processing of requests for early, interim and final release, the preservation of evidence and archives of the Special Tribunal, as

well as the financing of such residual functions (Article 2(j)) [20].

An analysis of this provision in systemic connection with Article 6 of the Agreement [1], which regulates the financing of the tribunal itself, indicates that the financing of the enforcement of sentences constitutes a separate budget line, distinct from the financing of the judicial activities of the tribunal. This distinction is methodologically justified, given that the expenditure on the enforcement of sentences has a different time horizon—it will continue after the conclusion of all proceedings and, potentially, after the termination of the tribunal itself, when the residual mechanism is initiated.

The Detention Unit of the Registry and its Connection to the Enforcement of Sentences

Paragraph 3(b) of Article 11 of the Statute provides for the creation within the Registry of a Detention Unit, which manages the conditions of detention of suspects and accused persons. A literal interpretation of this provision indicates that the Detention Unit is oriented primarily towards the stage prior to the sentence entering into legal force—that is, towards persons in respect of whom an investigation or trial is being conducted, rather than sentenced persons serving a sentence. However, a systemic analysis of the Statute allows for the assertion that the functions of the Detention Unit are not entirely detached from the issues of the enforcement of sentences.

On the one hand, the Detention Unit accumulates institutional competence in penitentiary matters and constitutes a natural partner for the enforcing States when resolving operational issues related to the conditions of detention of sentenced persons. On the other hand, during the transitional period between the sentence entering into legal force and the transfer of the sentenced person to the enforcing State the sentenced person will remain precisely under the supervision of the Detention Unit. The duration of this tran-

sitional period may be substantial, taking into account the time required to resolve all procedural matters associated with the transfer. Furthermore, upon the implementation of the subsidiary mechanism for the enforcement of sentences in Ukraine (paragraph 3 of Article 49 of the Statute), the Detention Unit may perform supervisory functions in respect of the relevant institutions.

In light of the aforementioned, the *Rules of Procedure and Evidence must clearly regulate the issue of delineation and coordination between the functions of the Detention Unit regarding suspects and accused persons, on the one hand, and the mechanisms for the supervision of the enforcement of sentences regarding sentenced persons, on the other. The absence of clear regulation on this matter may lead to institutional ambiguity and weaken the effectiveness of the tribunal's control over the process of the enforcement of sentences imposed by it.*

Reduction of Sentence and Early Release under the Statute of the Special Tribunal for the Crime of Aggression against Ukraine

The State of enforcement of the sentence cannot release a person before the expiry of the term of imprisonment imposed by the Special Tribunal. This provision is a direct consequence of the principle of the retention of the tribunal's jurisdictional control, examined in the previous section, and is simultaneously its most concentrated expression. Regardless of any grounds provided for by the domestic legislation of the enforcing State — such as amnesty, pardon, parole, or commutation of the unserved part of the sentence to a more lenient form of punishment - the State does not possess the right to independently resolve the issue of the release of a sentenced person.

The States that will conclude agreements on the enforcement of sentences will possess their own penitentiary legislation, which, as a rule,

provides for various grounds for early release or the reduction of a sentence. The application of this legislation to persons convicted by the Special Tribunal without additional reservations would lead to a situation where the effective term of imprisonment would be determined not by the tribunal, but by the domestic law of the enforcing State depending on the designated State. This would undermine the principle of equality of sentenced persons before the tribunal and the principle of the inevitability of punishment. It is precisely for this reason that paragraph 1 of Article 50 of the Statute contains a provision of direct effect, which takes precedence over the domestic legislation of the enforcing State regarding the grounds for release.

A comparative analysis demonstrates that an identical approach is enshrined in paragraph 1 of Article 110 of the Rome Statute of the ICC, pursuant to which the State of enforcement cannot release a person before the expiry of the sentence imposed by the Court, and the ICC may consider the question of reducing the sentence [21].

The ICTY in its practice also consistently upheld the exclusive competence of the tribunal in resolving issues of early release, denying the enforcing States the right to independently apply their own legislation on parole. According to the position of the Bureau and the President of the ICTY, the question of early release of sentenced persons is not governed by the national legislation of the State of enforcement, but is resolved exclusively on the basis of the criteria established by the Statute and the Rules of Procedure and Evidence of the ICTY [18].

Paragraph 2 of Article 50 of the Statute establishes that the Special Tribunal shall have the right to decide on a reduction of the sentence or a change in the conditions of its enforcement, and shall issue a ruling on this matter after having heard the person. The phrasing «shall have the right to decide» is discretionary in nature—the

tribunal is vested with the power, rather than the obligation, to review the question of sentence reduction. This distinguishes the Statute of the Tribunal from the Rome Statute of the ICC, paragraph 3 of Article 110 of which obliges the ICC to review the question of sentence reduction after the person has served two-thirds of the sentence imposed, or thirty years in the case of life imprisonment [21]. Consequently, the question arises as to what timelines must elapse before the Tribunal may initiate a review of the question of sentence reduction. It is not excluded that this issue will be regulated through the adoption of the Rules of Procedure and Evidence.

The procedural guarantee of hearing the person prior to the adoption of a decision under paragraph 2 of Article 50 of the Statute reflects the general principle of *audi alteram partem* and ensures the sentenced person the opportunity to provide information regarding changes in personal circumstances, state of health, conduct during the serving of the sentence, and readiness for resocialisation—namely, those very factors which, according to comparative experience, are relevant to resolving the question of sentence reduction. The form of such a hearing - whether by personal appearance, video link, or written submissions—must be detailed in the Rules of Procedure and Evidence, taking into account practical feasibility and security considerations.

Paragraph 3 of Article 50 of the Statute of the ST establishes that the procedure for the application of the measures provided for in paragraph 2 shall be determined by the Rules of Procedure and Evidence. This delegation of rule-making authority to the judges of the tribunal is significant in scope, as virtually the entire procedural mechanism for considering issues of sentence reduction—the grounds for initiation, timelines, the composition of the authorised body, the criteria for decision-making, and the appeals procedure—remains at the discretion of the judges

who will adopt the Rules of Procedure and Evidence. The question of researching the international legal foundations of the activities of the Special Tribunal's judiciary remains a subject of debate. The effectiveness of decision-making and the scope of the tasks resolved will depend on the high professionalism of the selected personnel [7, p. 76].

The Residual Mechanism and Early Release

Article 54 of the Statute regulates the procedure for the dissolution of the Special Tribunal upon the fulfilment of its mandate and, in paragraph 2, regulates the establishment of a residual mechanism. The tasks of the residual mechanism are not confined to the supervision of the enforcement of sentences and the processing of requests for release. Pursuant to paragraph 2 of Article 54, the residual mechanism is to be vested with the necessary personnel and financial resources to carry out any remaining prosecutorial functions and any remaining judicial functions, including retrials in accordance with Article 28, paragraph 3, of the Statute, as well as to deal with any matters pertaining to the protection of witnesses, the supervision of the enforcement of sentences and the processing of requests for early, interim and final release [1]. For the purposes of the present study, the last two categories of residual functions are of primary interest.

This provision addresses a fundamental problem that arose in the practice of the ICTY and the ICTR: upon the completion of the mandates of those tribunals, sentenced persons continued to serve their sentences, while the tribunals that had imposed those sentences were winding down and were no longer in a position to exercise the corresponding powers, so that institutional continuity had to be secured by way of a transfer of competences. That need was met through the transfer of the relevant functions to the International Residual Mechanism for Criminal Tribunals (herein-

after—the IRMCT), established by UN Security Council Resolution 1966 (2010). The experience of the IRMCT demonstrates that the function of supervising the enforcement of sentences and considering requests for early release is lengthy and resource-intensive, and its proper execution requires a specialised body with sufficient institutional capacity. Paragraph 2 of Article 54 of the Statute takes this experience into account, providing that the residual mechanism shall be vested with the necessary human and financial resources to perform all residual functions.

In our view, a matter requiring clarification at the institutional level is that the Statute, while providing for the establishment of a residual mechanism, does not determine its legal status or the procedure for its establishment. Article 54 provides that the Parties shall establish a residual mechanism, but does not specify its precise institutional form, composition, financing or relationship with the Council of Europe. This is not, strictly speaking, an absolute legal lacuna, since the Statute deliberately leaves these questions to be settled by the Parties; it does, however, identify a set of institutional questions that will require clarification in due course. This issue is of major importance, given that the institutional choice will determine whether the residual mechanism will operate as an independent international body, an organ within the Council of Europe, or a body with a different institutional affiliation.

In light of the experience of the IRMCT, it is submitted de lege ferenda that constituting the residual mechanism as an international judicial body endowed with international legal personality would be the most appropriate solution for the proper conclusion of the Special Tribunal's activities. In the authors' view, the legal basis of the residual mechanism may be provided for in a separate legal instrument or in other arrangements agreed between the Parties and the Council of Europe, defining

its powers, functions, organisation and international status. This is advanced as a proposal de lege ferenda and not as a conclusion dictated by the current text of the Statute.

Release of Detained Persons and the Principle of Non-Refoulement

Article 45 of the Statute establishes a special regime for the release of persons held in the detention facilities of the Special Tribunal in the host State. Pursuant to this provision, such persons shall not be released on the territory of the host State; instead, they shall be transferred and released in the State of their nationality, in the State where they were originally detained, or—if they do not have rights of residency in the latter - in a State where they are ordinarily or lawfully resident, or in another State that agrees to accept them [1].

The legal structure of Article 45 of the Statute is complex and combines elements of an absolute prohibition with a hierarchically ordered list of alternative options for release. The absolute character of the prohibition of release on the territory of the host State is underscored by the absence of any exceptions: the provision does not permit situations under which release in the host State would be permissible regardless of the circumstances: neither in the event of an incurable illness of the detained person, nor upon serving the full term of imprisonment, nor in the absence of another State willing to accept that person. Such an unconditional nature constitutes a deliberate normative choice and requires separate justification.

In our view, the prohibition of release on the territory of the host State is explained by the following considerations:

1. Protection of the sovereignty and public order of the host State. It is known that the Tribunal will be located in The Hague, the Netherlands—the international capital of justice. The State (the Netherlands) which has provided its

territory for the seat of an international criminal tribunal assumes, under the relevant Headquarters Agreement, general obligations to facilitate the secure and effective functioning of this body, including in aspects concerning the security of personnel, witnesses, and participants in the proceedings. The presence on its territory of persons convicted of the crime of aggression—an offence which, by its nature, may be committed by persons who occupied senior governmental or military positions (a leadership crime)—may give rise to concerns relating to public order and complicate the relations of the host State with third States.

2. The status of the host State and the avoidance of a conflict of interests. The Headquarters Agreement, which pursuant to Article 2 of the Agreement is concluded between the Special Tribunal and the host State, grants certain privileges and immunities to the tribunal and its personnel. Allowing the release of detained persons on the territory of this State would alter the character of its relations with the tribunal, whereby the host State would become a de facto participant in the enforcement of sentences. Article 45 thus appears intended to keep the status of the host State, as the seat of an international judicial body, distinct from the role of the State responsible for the enforcement of the sentence.

3. Protection of the rights and legal position of the detained person. The host State may lack legal grounds for granting the person concerned the right to permanent residence after release, which would place them in the position of an irregular migrant. The forced removal of such a person after release to the State of their nationality without prior agreement with the tribunal could raise an issue under the principle of *non-refoulement*, where an individualised assessment discloses a real risk of prohibited treatment in the receiving State. Article 45 of the Statute prevents the occurrence of such a situation by regulating

the place of release directly at the level of the Statute, rather than leaving it to the discretion of the host State [1].

In this context, the experience of the ICTY is instructive, which was also located in The Hague and, from the inception of its functioning, proceeded from the premise that the Netherlands was not an appropriate place for the release of convicted persons. The Headquarters Agreement between the UN and the Netherlands of 29 July 1994 contained provisions according to which persons held in the custody of the ICTY were, upon the conclusion of proceedings, subject to transfer outside Dutch territory (Article 20) [6, p. 366-367]. The practical implementation of this principle was carried out through agreements on the enforcement of sentences concluded with the respective States, and for acquitted persons, through agreements with third States on the provision of temporary asylum.

This was reinforced by subsequent practice during the activities of the ICTY. In the case of *Prosecutor v. Orić*, the Appeals Chamber of the ICTY quashed the conviction and acquitted the accused [19, p. 64]. Nevertheless, the Netherlands denied him the right to remain on its territory after his release from the custody of the ICTY, which prompted the tribunal to appeal to States with a request for the provision of temporary asylum.

Pursuant to Article 45 of the Statute, the primary option for release is the transfer of the person to the State of their nationality. This priority is founded upon several legal grounds. Firstly, the State of nationality bears particular obligations towards its own nationals under international law. In this connection, paragraph 4 of Article 12 of the International Covenant on Civil and Political Rights provides that no one shall be arbitrarily deprived of the right to enter his own country [17]. That provision guarantees a right of the individual and should not be construed as

an unqualified obligation of the State to admit its nationals in all circumstances; it does, however, substantially narrow the grounds on which the State of nationality may lawfully refuse admission. Secondly, release in the State of nationality ensures the person concerned access to social guarantees provided for by the legislation of that State and facilitates their resocialisation.

The second alternative pursuant to Article 45 of the Statute is the transfer of the person to the State where they were initially detained. This alternative holds particular practical significance in cases where the person was arrested on the territory of a third State and surrendered to the Special Tribunal on the basis of an arrest warrant. In such an event, the State that executed the arrest and initial detention is legally and factually linked to the person concerned and may possess legal grounds for admitting them upon release—specifically, if that person was lawfully present on its territory prior to the arrest.

The third alternative—release in a State where the person concerned is ordinarily or lawfully resident—is the most flexible and potentially the broadest in its scope of application. It encompasses instances where, prior to the commission of the crime or the arrest, the person concerned resided in a State other than the State of their nationality and held a legal status there that guaranteed them the right of residence.

The final aspect involves transfer to any other State that agrees to accept the person concerned - this is a residual measure and is applied in the event that none of the preceding alternatives can be realised. It is the least clearly regulated and the most dependent upon the political will of third States.

Regarding the principle of *non-refoulement*, it was primarily enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees as the principle of non-expulsion of a person to a State where their life or freedom would

be threatened on account of their race, religion, nationality, membership of a particular social group, or political opinion [12]. Subsequently, the legal basis of this Convention was expanded through the adoption of a modern legal framework and the interpretation of judicial institutions. Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights, likewise contains a prohibition on the expulsion of a person to a State where they face treatment reaching the minimum threshold of severity. Specifically, in the case of *Soering v. the United Kingdom*, the ECtHR established that the extradition of a person to a State where they would face the «death row phenomenon» would engage the responsibility of the extraditing State under Article 3 of the Convention [10, paras. 85-91, 100, 111] - thereby laying the foundation for a broad interpretation of the principle of *non-refoulement* within the context of human rights law.

It was noted above that the State of nationality bears particular obligations towards its own nationals. However, in the context of persons detained or convicted by the Special Tribunal, the operation of Article 45 may enter into potential tension with the principle of *non-refoulement*. Where the State of nationality of the person concerned is the Russian Federation, the permissibility of return cannot be determined on the basis of a general or automatic presumption of danger. What is required is an individualised assessment of whether substantial grounds have been shown for believing that the person concerned would, if returned, face a real and concrete risk of torture or of inhuman or degrading treatment or punishment, or of other prohibited treatment. Such an approach is consonant with Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and with the relevant case-law of the European Court of Human Rights.

The resolution of this tension requires a differentiated approach. Firstly, where an individualised assessment establishes a real risk of prohibited treatment upon return to the Russian Federation, the principle of *non-refoulement* precludes forced return and activates the subsequent alternatives provided for by Article 45 of the Statute. Any voluntary return of the person concerned to the State of nationality after the sentence has been served falls to be assessed in the light of the applicable norms of international law and of the legal status of the State concerned. Secondly, the risk that the person may commit further offences must be kept strictly distinct from the principle of *non-refoulement*. That principle concerns the real risk of prohibited treatment to which a person would be exposed in the receiving State, whereas the prospect of future offending is essentially a matter of public security and risk assessment. The two questions must therefore be addressed within separate legal mechanisms; the latter requires the development of an independent regulatory approach in the Rules of Procedure and Evidence—specifically, a risk assessment mechanism when considering the question of sentence reduction or release.

Another potential approach is the pre-emptive regulation of this issue at the level of the Management Committee, through the adoption by the Management Committee of a recommendation which could encourage member States and associate members to consider, on a priority basis, requests for the admission of sentenced persons after they have served their sentences. Such a recommendation, lacking binding legal force, would create a political commitment and significantly increase the likelihood of finding an acceptable solution.

Conclusion

The conducted study of the institution of the enforcement of sentences of the Special Tribunal for the Crime of Aggression against Ukraine al-

lows for the formulation of the following conclusions:

1. The institution of the enforcement of sentences in international criminal law has evolved from the specific Nuremberg model (as the first precedent for punishing state leaders) to the modern and developed Rome Statute of the ICC. The Statute of the Special Tribunal incorporates the best legal achievements of its predecessors, adapting them to the specific nature of punishment for the «crime of aggression» and the institutional characteristics of the Council of Europe as a regional international organisation;

2. The systemic principle of the mechanism for the enforcement of sentences is the retention of the tribunal's jurisdictional control while simultaneously involving states in the actual enforcement of sentences on the basis of voluntariness and fair burden sharing. This principle receives regulatory embodiment in the prohibition against the enforcing State independently releasing the sentenced person (paragraph 1 of Article 50 of the Statute of the ST), the competence of the Special Tribunal to decide on any reduction of sentence (paragraph 2 of Article 50 of the Statute of the ST), and the regulation of the place of release of detained persons directly by the Statute (Article 45 of the Statute of the ST).

3. The mechanism for the reduction of a sentence, enshrined in Article 50 of the Statute, remains insufficiently regulated. The Statute establishes neither mandatory time thresholds for initiating a review nor criteria for adopting a relevant decision, delegating these matters to the Rules of Procedure and Evidence. In their drafting, it is advisable to draw upon the ICC model, enshrined in Article 110 of the Rome Statute and, in particular, in Rules 223 and 224 of the ICC Rules of Procedure and Evidence, which set out respectively the criteria for, and the procedure governing, the review concerning reduction of sentence, adapting it to the specific nature of the «crime of aggression» by including addition-

al criteria: the sentenced person's demonstrated dissociation from the crime, cooperation with mechanisms established to provide remedies to victims, and guarantees of a non-violent return to social life.

4. The tension between the position of the State of nationality in respect of its own nationals and the prohibition of their forced return to a State where they would face a real risk of serious harm cannot be resolved on the basis of the literal text of the Statute of the ST. The specific nature of the tribunal—primarily the likely nationality of many persons falling within its jurisdiction and the duration of the armed conflict—gives rise to practical challenges that lack direct precedents in the practice of previous international criminal tribunals and require resolution at the level of the Rules of Procedure and Evidence and preemptive collective measures of the Management Committee.

Thus, the effectiveness of the mechanism for the enforcement of sentences of the Special Tribunal will depend on the timely resolution of three key tasks:

1. the conclusion of a sufficient number of agreements on the enforcement of sentences with the member States of the Management Committee at an early stage of the tribunal's activities;

2. the development of detailed Rules of Procedure and Evidence regarding the reduction of sentences and the release of sentenced and detained persons;

3. the formulation by the Management Committee of preemptive collective measures to ensure the legal certainty of the release mechanism.

The actual enforcement of sentences, and not merely their imposition, is an essential condition for the legal effectiveness of international criminal justice, and it is in this dimension that the legal framework of the Special Tribunal requires the further normative development identified above.

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XÜLASƏ

Məqalədə Ukraynaya qarşı təcavüz cinayəti üzrə Xüsusi Tribunalın hökmlərinin icrası institutu beynəlxalq cinayət hüququ kontekstində tədqiq edilir. Araşdırmanın əsas məqsədi Tribunalın Statutunda nəzərdə tutulan hökmün icrası mexanizminin hüquqi əsaslarını və praktiki tətbiq xüsusiyyətlərini müəyyən etməkdir. Bu məqsədlə Statutun 45, 49, 50 və 54-cü maddələri beynəlxalq cinayət məhkəmələrinin müvafiq hüquqi tənzimlənməsi və təcrübəsi ilə müqayisəli təhlil edilir. Tədqiqat nəticəsində icra mexanizminin əsas elementləri, o cümlədən icraçı dövlətlərin müqavilə əsasında cəlb edilməsi, cəza müddətinin azaldılması və məhkum edilmiş şəxslərin azad edilməsi qaydaları müəyyənləşdirilir. Eyni zamanda, məhkum edilmiş şəxslərin başqa dövlətə təhvil verilməsi zamanı non-refoulement prinsipinin tətbiqi ilə bağlı yarana biləcək praktiki və hüquqi problemlər araşdırılır. Məqalədə, həmçinin, Prosedur və Sübut Qaydalarında hökmün icrası ilə bağlı mövcud normativ boşluqlar təhlil edilir və onların aradan qaldırılmasına dair müvafiq yanaşmalar irəli sürülür.

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**ИСПОЛНЕНИЕ ПРИГОВОРОВ СПЕЦИАЛЬНОГО ТРИБУНАЛА
ПО ПРЕСТУПЛЕНИЮ АГРЕССИИ ПРОТИВ УКРАИНЫ:
МЕЖДУНАРОДНО-ПРАВОВЫЕ ОСНОВЫ**

РЕЗЮМЕ

В статье исследуется институт исполнения приговоров Специального трибунала по преступлению агрессии против Украины в контексте международного уголовного права. Основной целью исследования является определение правовых основ и особенностей практической реализации механизма исполнения приговоров, предусмотренного Статутом Трибунала. С этой целью статьи 45, 49, 50 и 54 Статута анализируются в сравнительно-правовом контексте с учетом соответствующего правового регулирования и практики международных уголовных судов. В результате исследования определяются основные элементы механизма исполнения приговоров, включая привлечение государств-исполнителей на основании соглашений, порядок сокращения срока наказания и освобождения осужденных лиц. Наряду с этим рассматриваются практические и правовые проблемы, которые могут возникнуть при передаче осужденных лиц другому государству с учетом применения принципа non-refoulement. В статье также анализируются существующие нормативные пробелы в Правилах процедуры и доказывания, касающиеся исполнения приговоров, и предлагаются соответствующие подходы к их устранению.

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