



LAW AND DEMOCRACY CENTER

JUSTICE HUB

CRIMES AGAINST HUMANITY IN BELARUS

LEGAL ANALYSIS AND ACCOUNTABILITY OPTIONS



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July 2023

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EXECUTIVE SUMMARY

For decades, the Belarusian population face violent suppression and serious human rights violations by Aliaksandr Lukashenka and the Belarusian authorities under his leadership. Since May 2020, in the context of the upcoming presidential election on 9 August 2020, Belarusian authorities unleashed a widespread and unprecedentedly brutal crackdown on the civilian population continuing until today. Belarus became the scene of protracted mass violence, in which the total number of victims of the unfolding repressions and terror already exceeds 136,000 people.¹ Several authoritative fact-finding human rights reports have concluded that crimes against humanity may have been committed.²

The purpose of this report “*Crimes Against Humanity in Belarus – Legal Analysis and Accountability Options*” is to provide a legal analysis of the serious human rights violations committed by the Belarusian authorities since May 2020 according to the standards of international criminal law. It thereby adds to the large number of conclusions that since May 2020, Lukashenka and the Belarusian authorities are responsible for large scale human rights abuses, by analyzing the facts through the elements of crimes against humanity in accordance with international criminal law practice. It thereby applies the standard of “reasonable grounds to believe” to assess whether crimes against humanity have been committed against the Belarusian civilian population. The report is primarily addressed to policymakers and investigators to facilitate the formulation of effective measures in response to the documented atrocities.

The report concludes in Part II that there are reasonable grounds to believe that crimes against humanity have been committed against the Belarusian population since May 2020 by the Belarusian authorities. Chapter 4 concludes that there are reasonable grounds to believe that since May 2020 there has been an “attack” that is “directed against the Belarusian civilian population,” and specifically against civil society and those perceived as democratic opposition. And that this attack is “widespread” and “systematic” and qualifies as a “state policy.” The requisite contextual elements for crimes against humanity therefore appear to have been met. Moreover, in Chapter 5, the report concludes there are reasonable grounds to believe that the following crimes against humanity are committed: imprisonment, torture, murder, rape and other grave forms of sexual violence, enforced disappearance, persecution and deportation.

¹ See section 4.3 of this report.

² See, for instance: The United Nations High Commissioner for Human Rights, Report, *Belarus in the run-up to the 2020 presidential election and in its aftermath*, Feb. 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>; The United Nations High Commissioner for Human Rights, Report, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, March 4, 2022, available at <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session49/list-reports>; Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus, Situation of human rights in Belarus*, Jul. 20, 2022, available at <https://www.ohchr.org/en/documents/country-reports/a77195-report-special-rapporteur-situation-human-rights-belarus-anais>; Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, Nov 5, 2020, delivered to the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>; Hervé Ascensio, *Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020, May 11, 2023*, delivered to the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, available at <https://www.osce.org/files/f/documents/d/5/543240.pdf>.

Chapter 6 discusses that there are strong indications that the migrant crisis on the EU-Belarus border also amounts to the crime against humanity of deportation against these refugees and migrants, and that this violence is closely linked to the crimes against humanity committed against the Belarusian civilian population, which is the main focus of this report. Lukashenka and the Belarusian authorities started a deliberate campaign in 2021 to destabilize Europe by luring migrants into Belarus and sending them to EU borders, weaponizing them and creating an artificial migration crisis. While most reports on the issue of the migrant crisis on the EU-Belarus border focus on the attack by Belarus against the EU, this report includes this chapter on the migrant crisis to focus on the migrants as victims of the Belarusian authorities. It analyzes how the migrants are victimized in this violence and that the violence they are subjected to may well qualify as crimes against humanity against them as a civilian population as well.

Chapter 7 provides a preliminary analysis on perpetrators, which requires further investigation by investigatory and prosecutorial authorities. However, the chapter provides analysis that, in addition to Lukashenka and other government leaders, further investigation is warranted into the authorities responsible for security and law enforcement, detention center personnel, prosecutors and judges, and individuals working at the Belarusian state media.

Part III of the report focuses on accountability options. Considering that according to the International Law Commission crimes against humanity pose a threat to international peace and security, which results, according to Article 1(1) UN Charter in obligations by the international community to take effective collective measures to prevent and remove such threats to the peace, in combination with the lack of effective remedies in Belarus, Part III of this report analyzes possible accountability mechanisms that can support the Belarusian people in their hopes for an end to the violence, suppression and impunity, and in their fight for peace, democracy and justice.

Chapter 8 discusses the options through the International Criminal Court (ICC). It particularly analyses the possibility of the ICC to exercise jurisdiction over the situation in Belarus because the crimes of deportation and persecution take partially place on territory over which the ICC has jurisdiction, namely Lithuania, Poland, Latvia, and Ukraine. Chapter 9 analyses the options for accountability in domestic courts both in Belarus and in foreign domestic courts under the universal jurisdiction doctrine. Chapter 10 examines how the remaining impunity gap can be addressed by establishing a special tribunal for crimes against humanity in Belarus that can prosecute Lukashenka and others that are responsible for the crimes and other human rights violations.

Even though other transitional justice such as truth telling will be important to repair from the violence and suppression, accountability is crucial. If impunity triumphs, injustice will prevail and those responsible will continue to wreak havoc onto the Belarusian society. There is an obligation for the international community to take collective and effective measures to address crimes against humanity. This report aims to contribute to the international community's ability to do so and support the Belarusian people in their hopes for an end to the violence, suppression and impunity, and in their fight for peace, democracy and justice.

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The Law and Democracy Center (Justice Hub) is a public non-profit organization founded in July 2021. The mission of the Center is to support the implementation of universally recognized standards of justice and due process for victims of repressions by the current political regimes in Belarus and other post-soviet countries, as well as to provide expert assistance on the constitutional and democratic reforms in those countries.

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PART I BACKGROUND AND CONTEXT

Chapter 1 – Introduction

For decades, the Belarusian population face violent suppression and serious human rights violations by Aliaksandr Lukashenka and the Belarusian authorities under his leadership. Since May 2020, in the context of the upcoming presidential election on 9 August 2020, Belarusian authorities unleashed a widespread and unprecedentedly brutal crackdown on the civilian population continuing until today. Belarus became the scene of protracted mass violence, in which the total number of victims of the unfolding repressions and terror already exceeds 136,000 people.³ Several authoritative fact-finding human rights reports have concluded that crimes against humanity may have been committed.⁴

The purpose of this report “*Crimes Against Humanity in Belarus – Legal Analysis and Accountability Options*” is to provide a legal analysis of the serious human rights violations committed by the Belarusian authorities since May 2020 according to the standards of international criminal law. It thereby adds to the large number of conclusions by human rights organizations and the UN that since May 2020,⁵ Lukashenka and the Belarusian authorities are responsible for large scale human rights abuses, by analyzing the facts through the elements of crimes against humanity in accordance with international criminal law practice.

Specifically, this report analyses whether, based on the documentation collected by authoritative organizations, there are *reasonable grounds to believe* that crimes against humanity have been committed against the Belarusian population since May 2020 (Part II). Moreover, it provides a legal analysis of options for accountability (Part III). The report is primarily addressed to policymakers and investigators to facilitate the formulation of effective measures in response to the documented atrocities.

³ See section 4.3 of this report.

⁴ See, for instance: The United Nations High Commissioner for Human Rights, Report, *Belarus in the run-up to the 2020 presidential election and in its aftermath*, Feb. 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>; The United Nations High Commissioner for Human Rights, Report, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, March 4, 2022, available at <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session49/list-reports>; Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus, Situation of human rights in Belarus*, Jul. 20, 2022, available at <https://www.ohchr.org/en/documents/country-reports/a77195-report-special-rapporteur-situation-human-rights-belarus-anais>; Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, Nov 5, 2020, delivered to the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>; Hervé Ascensio, *Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020, May 11, 2023*, delivered to the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, available at <https://www.osce.org/files/f/documents/d/5/543240.pdf>.

⁵ See, for instance: Human Rights Center Viasna, *Human Rights Situation in Belarus in 2020, Annual report 2020*, available at https://spring96.org/files/misc/review_2020_en.pdf; Human Rights Center Viasna, *Human Rights Situation in Belarus in 2021, Annual report 2021*, available at https://spring96.org/files/reviews/en/review_2021_en.pdf; Human Rights Center Viasna, *Human Rights Situation in Belarus in 2022, Annual report 2022*, available at https://spring96.org/files/reviews/en/review_2021_en.pdf; International Committee for the Investigation of Torture in Belarus, *Belarus: Crimes Against Humanity*, available at <https://torturesbelarus2020.org/wp-content/uploads/2022/12/belarus-crimes-against-humanity-1.pdf>; International Accountability Platform, *Progress Report to supporting States*, available at <https://iapbelarus.org/progress-reports/>.

In conducting its legal analysis, the report assesses whether there are *reasonable grounds to believe* that crimes against humanity have been committed. This is the standard that is applied by international fact-finding missions as well as the International Criminal Court when deciding to open an investigation into alleged crimes within its jurisdiction. In the developed practice of international criminal law, *reasonable grounds to believe that crimes have been committed* means that “there are strong preliminary indications that crimes have been committed and that further investigation is warranted.”⁶

On the basis of the authors’ investigation and the large amount of authoritative fact-finding missions, this report concludes that there are reasonable grounds to believe that crimes against humanity have been committed against the Belarusian population since May 2020 by the Belarusian authorities. Further criminal investigation is required into the role of specific individuals to assess whether the *reasonable grounds to believe*-standard is met to trigger prosecution of specific individuals, which is beyond the scope of this report.

Considering that crimes against humanity pose a threat to international peace and security,⁷ resulting in the international community’s obligations to take effective collective measures for the prevention and removal of such threats to the peace,⁸ as well as the lack of effective remedies in Belarus, Part III of this report is dedicated to analyzing possible accountability mechanisms that can support the Belarusian people in their hopes for an end to the violence, suppression and impunity, and in their fight for peace, democracy and justice.

⁶ Public international Law & Policy Group, Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State, Factual Findings & Legal Analysis, p. 52 (Sep. 24, 2018), available at <https://burmacampaign.org.uk/media/PILPG-ROHINGYA-REPORT-Dec-2018.pdf>, accessed 7 May 2023. See also Michael Ramsden, Reasonable Grounds to Believe, in: Max Planck Encyclopedias of International Law, available at <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2792.013.2792/law-mpeipro-e2792>.

⁷ International Law Commission, Commentary to Draft articles on Prevention and Punishment of Crimes Against Humanity, p. 24, delivered to the General Assembly, U.N. Doc. A/74/10, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf.

⁸ United Nations Charter, art. 1(1), (Multilateral, 1945), available at <https://www.un.org/en/about-us/un-charter/chapter-1>.

Chapter 2 – Contextual Background in Belarus

2.1 *Historical Background: Authoritarianism and Suppression under Lukashenka*

In July 1994, three years after independence, Aliaksandr Lukashenka was elected President of Belarus with 80 percent of the votes cast.⁹ He has since carried out reforms to consolidate and concentrate state power around his presidency.

Within a year of his presidency, Lukashenka initiated a referendum on several amendments to the Belarusian Constitution. Among other expansions of his powers, the adopted amendments allowed Lukashenka to dissolve the Parliament in case there is a “violation of the Constitution.” During 1995-1996, Lukashenka issued a number of decrees that were all declared unconstitutional by the Constitutional Court of Belarus.¹⁰ In response, on 28 December 1995, Lukashenka issued an order “On Compliance with the Norms of Decrees of the President of the Republic of Belarus.” According to this act, all state bodies were ordered to ensure the implementation of all presidential decrees, including those declared as unconstitutional and void by the Constitutional Court.¹¹

A year later, in 1996, Lukashenka organized a referendum called “A Constitutional Coup,” which was widely criticized by the international community and international organizations.¹² The introduced changes gave the president the power to dissolve Parliament, and to call referendums and elections to Parliament and local councils. Moreover, Lukashenka gained the sole right to determine the structure of the government, the right to appoint the Prosecutor General, the Head and members of the Board of Directors of the National Bank, members of the Central Election Commission, and the Head and judges of the Constitutional Court and the Supreme Court. At the same time, the decrees and directives of Lukashenka as president, unless otherwise provided by the Constitution, received legal supremacy over the acts of other state bodies and officials.

Under the original Constitution, Lukashenka was to be re-elected in 1999 after the end of the five-year-term. However, after the 1996 referendum, Lukashenka unilaterally declared that, since the Constitution was changed in 1996, his presidential term should run from 1996, but not from 1994, extending his term to 2001.

In the heavily contested 2001 presidential elections, Lukashenka got his second presidential term. Since the Constitution had a provision on two-term presidency limitations, Lukashenka would have been constitutionally required to step down after the presidential elections in 2006. However, in 2004 this limitation was eliminated by another referendum on amendments to the

⁹ Central Election Commission of the Republic of Belarus, *Information on the results of the election of the President of the Republic of Belarus*, Jun 23, 1994, available at <https://rec.gov.by/uploads/folderForLinks/archive-elections-prb1994-itogi.pdf>.

¹⁰ Further on Amendments to Constitution of the Republic of Belarus, Law and Democracy Center, *Conclusions on Draft Amendments to the Constitution of the Republic of Belarus announced on 27 December 2021*, Jan 31, 2022, available at <https://ldc-jh.eu/conclusions-on-draft-amendments-to-the-constitution-of-the-republic-of-belarus-announced-on-27-december-2021/>.

¹¹ *How Lukashenko acquired absolute power. Here we describe what happened in Belarus a quarter of a century ago*, Zerkalo.io, Nov 24, 2021, available at <https://news.zerkalo.io/economics/5471.html>.

¹² U.S. Department of State, *Belarus Country Report on Human Rights Practices for 1996*, Jan 30, 1997, available at https://1997-2001.state.gov/global/human_rights/1996_hrp_report/belarus.html; OSCE Troika, *Statement on Belarus*, Dec 6, 1996, available at <https://www.osce.org/node/52438>.

Constitution. Under the Constitution of the Republic of Belarus, amendments and additions to the Constitution can be made through a referendum.

The results of the 2001 presidential elections as well as further elections for the third (2006-2010),¹³ the fourth (2010-2015),¹⁴ the fifth (2015-2020)¹⁵ and the sixth (2020-present)¹⁶ presidential terms were not recognized by a large number of countries and relevant international organizations.¹⁷ Furthermore, since 1996, none of the referendums' results were recognized.¹⁸ Lukashenka's third and fourth elections in 2006 and 2010 were infamous for the harsh dispersal of protesters who disagreed with the results of these elections.

In parallel, during the entire presidency of Lukashenka, the Belarusian authorities aggressively suppressed alternative views with regard to the results of elections and referendums. Each of the amendments towards improving the concentration of Lukashenka's power was accompanied by the use of force against protesters and constant gross violations of human rights.

Thus, since 1994, Lukashenka has been consistently strengthening his authority, and by the beginning of 2020, he had complete control over all branches of state power: executive, legislative and judicial. By 2020, not a single decision regarding the use of force, methods of treating certain categories of citizens in Belarus or pursuing any policy of suppressing civil society could be taken without the knowledge and approval of Lukashenka. Leading representatives of all branches of state power are directly accountable to Lukashenka.

2.2 Violence in the Context of the 2020 Presidential Elections

On 8 May 2020, the Belarusian House of Representatives of the National Assembly (the Lower House of Parliament) announced that the presidential election would take place on August 9,

¹³ Central Election Commission of the Republic of Belarus, *Notice of Central Commission of the Republic of Belarus for Elections and National Referendums*, Mar 23, 2006, available at <https://rec.gov.by/uploads/folderForLinks/archive-elections-prb2006-soob13.pdf>.

¹⁴ Central Election Commission of the Republic of Belarus, *Notice on the results of voting in the presidential elections of the Republic of Belarus*, Dec 19, 2010, available at <https://rec.gov.by/uploads/folderForLinks/elections-prb-sved21.pdf>.

¹⁵ Central Election Commission of the Republic of Belarus, *Notice on the results of voting*, Oct 11, 2015, available at <https://rec.gov.by/uploads/folderForLinks/elections-prb2015-itog.pdf>.

¹⁶ Central Election Commission of the Republic of Belarus, *Notice on the results of voting*, Aug 9, 2020, available at https://rec.gov.by/files/2020/gol_itog.pdf.

¹⁷ OSCE/ODIHR Limited Election Observation Mission, *Final Report*, Sep 9, 2001, available at <https://www.osce.org/files/f/documents/9/e/14459.pdf>; OSCE/ODIHR Election Observation Mission, *Report*, Mar 19, 2006, available at <https://www.osce.org/files/f/documents/4/c/19395.pdf>; OSCE/ODIHR Election Observation Mission, *Final Report*, Dec 19, 2010, available at <https://www.osce.org/files/f/documents/6/4/75713.pdf>; OSCE/ODIHR Election Observation Mission, *Final Report*, Oct 11, 2015, available at <https://www.osce.org/files/f/documents/0/0/218981.pdf>; Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, Nov 5, 2020, delivered to the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

¹⁸ U.S. Department of State, *Belarus Country Report on Human Rights Practices for 1996*, Jan 30, 1997, available at https://1997-2001.state.gov/global/human_rights/1996_hrp_report/belarus.html; European Parliament, *Resolution on the political situation in Belarus after the parliamentary elections and referendum*, Oct 17, 2004, available at https://www.europarl.europa.eu/doceo/document/TA-6-2004-0045_EN.html.

2020. Since May 2020, citizens that were perceived as “opposition-minded”¹⁹ have been widely subjected to arbitrary arrests and detention by Belarusian law enforcement, which continues until today.²⁰ Between May to December 2020, more than 33,000 people were detained in Belarus.²¹ At the height of the protests in August-November 2020, the authorities resorted to secret detention methods.²² This practice continues until now.²³

After the elections on 9 August 2020, when the protests by opposition supporters increased, law enforcement agencies and the armed forces resorted to the use of force against the protesting civilian population. Particularly, lethal (firearms) and less-lethal weapons (stun grenades, rubber bullets, water cannons, police batons) were used against the protesters. This resulted in fatal outcomes and numerous serious injuries (mine-explosive, gunshot and stab wounds) among civilians.²⁴ The disproportionate use of force had been authorized by Lukashenka as well as the Head of the GUBOPiK (the “Main Directorate for Combating Organized Crime and Corruption,” a department within the Belarusian Ministry of Internal Affairs), Mikalai Karpenkou (Department within Ministry of Internal Affairs). In an audio recording, published by BYPOL in January 2021, Karpenkou talks about a meeting with an incumbent, where the security forces were told how to respond to protests and protesters:²⁵

“As the president said, if someone’s pushing toward you — use non-lethal weapons. Point-blank [at] the legs, stomach, balls. So that he [the protester] understands what he’s done after he regains consciousness. Just injure him in some way: either cripple him, mutilate him, or kill him. Use your weapon [to shoot] right in the forehead, right in the face, right to the point of no return to the condition he was in beforehand. If they resuscitate him, alright then. He’ll be missing half his brain, well, good riddance. (...) These are superfluous people in our country...

The assignment is to develop and build a camp [...] not for prisoners of war or even the interned, but a camp for the especially sharp-hoofed [sic], for resettlement. And surround it with barbed wire along the perimeter. Set up two rooms: the furnace – a

¹⁹ The term “perceived as opposition” or “perceived as opposition-minded” is used in this report to refer to those that the Belarusian authorities led by Lukashenka target and describe as “disloyal,” “dissenters” or “opposition.” Using this term, the authors of this report in no way draw a distinction on any ground of the civilian population in Belarus.

²⁰ Human Rights Center Viasna, *Human Rights Situation in Belarus: April 2023*; May 5, 2023, available at <https://spring96.org/en/news/111622>.

²¹ Human Rights Center Viasna, *Human Rights Situation in Belarus in 2020, Annual report 2020*, para 11, available at https://spring96.org/files/misc/review_2020_en.pdf.

²² Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, para 49, Nov 5, 2020, delivered to the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

²³ Ms Sviatlana Tsikhanouskaya, *Statement “The regime deprives political prisoners of communication with the outside, assuming the whole world will forget about them. But we will never let this happen”*, May 19, 2023, available at <https://tsikhanouskaya.org/en/events/news/e6ade76d1eb46d0.html>.

²⁴ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, p 42, Nov 5, 2020, delivered to the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

²⁵ *The audio recording about “camps for sharp-shooters” has been analysed*, Feb 02, 2021, Reform.by, available at <https://reform.by/198859-provedena-jekspertiza-audiozapisi-pro-lagerja-dlja-ostrokopynyh>

floor for feeding — and a floor for them to work. But they must be kept there until everything clams down.”²⁶

Law enforcement and penitentiary officers also widely used torture, sexual violence and ill-treatment as repressive measures against so-called “political” detainees. The number of detainees and those arrested who have been tortured today exceeds 1,000 people and increases every day.²⁷

At the same time, the thesis on the readiness to physically annihilate “representatives of democratic forces” became a narrative of state propaganda.²⁸

With the outbreak of large-scale protests after 9 August 2020, those perceived as opposition-minded civilians became the target of persecution for political and ethnic reasons.²⁹ In particular, repressions against critics of the Lukashenka and his authorities are based on the “anti-extremism” laws put in place in Belarus. Such laws include the designation of online content produced by independent media outlets or politicians as “extremist materials,” and the classification of organizations as “extremist formations.”

In light of this legislation, in 2021, the Criminal Code of Belarus was amended, and now foresees individual criminal responsibility for participating in and aiding an “extremist formation.” In 2023, Lukashenka signed a law which allows to deprive a Belarusian of their citizenship if the person was sentenced for “participating in an extremist activity” and lives abroad.³⁰ Other measures include the restrictions on crossing the borders of Belarus³¹ (both when entering and leaving), trials behind closed doors,³² and the deprivation of parental rights.³³ As a result of the persecution, at least 100,000 citizens of Belarus were either forced by the law enforcement authorities or fled the territory of Belarus.³⁴

²⁶ ‘Use your weapon’ Leaked recording implicates Lukashenko in authorizing use of lethal force against Belarusian protesters, Meduza.io, Jan 15, 2021, available at <https://meduza.io/en/feature/2021/01/15/use-your-weapon>; N.N. Karpenkov: “We will create camps for protesters”, Jan 15, 2021, By_Pol., available at <https://youtu.be/VeGigtOJI24>.

²⁷ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, p. 13, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

²⁸ International Committee for the Investigation of Torture in Belarus, *Belarus: Crimes Against Humanity*, para 46-47, available at <https://torturesbelarus2020.org/wp-content/uploads/2022/12/belarus-crimes-against-humanity-1.pdf>.

²⁹ United States Commission on International Religious Freedom, *Religious Freedom in Belarus in 2021*, p. 3-4, Nov 2021, available at <https://www.uscirf.gov/sites/default/files/2021-11/2021%20Belarus%20Country%20Update.pdf>.

³⁰ Law “On Citizenship of the Republic of Belarus” No. 242-3 (the Republic of Belarus, 2023), available in Russian at <https://pravo.by/document/?guid=12551&p0=H12300242&p1=1&p5=0>.

³¹ Law “On amendments to laws” No 268-3 (the Republic of Belarus, 2023), available at <https://pravo.by/document/?guid=12551&p0=H12300268>.

³² Law “On amending the Code of Criminal Procedure of the Republic of Belarus” No 199-3 (the Republic of Belarus, 2022), available at <https://pravo.by/document/?guid=12551&p0=H12200199&p1=1&p5=0>

³³ Anastasiia Krupoe, *Belarusian authorities put pressure on protesters through children*, Oct 9, 2020, Human Rights Watch, available at <https://www.hrw.org/ru/news/2020/10/09/belarus-uses-children-pressure-dissenting-parents>.

³⁴ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para. 12, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68 (Feb. 3, 2023), available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

Following the million-strong protests in 2020, Lukashenka continued to concentrate authority towards himself. In 2022, he held a referendum on further amendments to the Constitution. These amendments introduced a number of changes, such as renouncing Belarus' status as a nuclear-neutral state, establishing the All-Belarusian People's Assembly and Lukashenka's lifetime membership in the Council of the Republic of the National Assembly (Upper House of Parliament).³⁵

It is in this context that Lukashenka, after rigging election result after election result and centralizing power towards himself for over two decades, violently suppressed the opposition and anyone else that expressed criticism or was perceived as opposition-minded in the run-up to the 2020-election and in the aftermath, when protests made clear that the Belarusian people were ready to fight for their freedom. Ever since, the Belarusian people are subjected to not only violent suppression but also the systematically committed atrocities that, according to this analysis, meet the standards of "reasonable grounds to believe" that crimes against humanity have been committed in Belarus since May 2020 and are ongoing until today.

³⁵ Venice Commission, *Belarus - Final Opinion on the Constitutional Reform*, para 92, Oct 22, 2022, available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)035-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)035-e).

Chapter 3 – Methodology of Investigation

This report documents and analyzes patterns of serious human rights violations committed in Belarus between May 2020 and May 2023 that may amount to crimes against humanity. It thereby applied the standard of “reasonable grounds to believe” to assess whether crimes against humanity have been committed against the Belarusian civilian population. This is the standard that is applied by international fact-finding missions as well as the International Criminal Court (ICC) when deciding to open an investigation into alleged crimes within its jurisdiction. In the developed practice of international criminal law, *reasonable grounds to believe that crimes have been committed* means that “there are strong preliminary indications that crimes have been committed and that further investigation is warranted.”³⁶ Further criminal investigation is required into the role of specific individuals to assess whether the *reasonable grounds to believe*-standard is met to trigger prosecution of specific individuals, which is beyond the scope of this report.

The focus of the analysis is on the crimes against humanity committed against the Belarusian civilian population in the context of the suppression of opposition to Lukashenka and the authorities during and following the 2020 protests against the fraudulent presidential elections. On the basis of the authors’ investigation and the large amount of authoritative fact-finding missions, this report concludes that there are reasonable grounds to believe that crimes against humanity have been committed against the Belarusian population since May 2020 by the Belarusian authorities.

However, the report also notes in Chapter 6 that there are also reasonable grounds to believe that crimes against humanity are committed in Belarus against migrants at the EU-Belarus border. As will be discussed in Chapter 6, migrants may also qualify as a civilian population within the meaning of the notion of crimes against humanity.

The factual information was collected from various resources. This includes the analysis of reliable, publicly available information, in particular, media reports published by Belarusian and other independent media, as well as information shared by international and Belarusian human rights organizations, such as the Human Rights Centre “Viasna,” the Belarusian Helsinki Committee, Human Constanta, and the Committee on the Investigation of Torture. Information about specific targeted groups, namely journalists, students, medical specialists and athletes, was analyzed especially based on data provided by the Belarusian Association of Journalists, the Association of Belarusian Students, the Belarusian Medical Solidarity Foundation, and the Belarusian Sport Solidarity Foundation. All inputs were duly verified to the extent possible. The report also draws extensively from reports of UN institutions, such as the UN Special Rapporteur on Belarus, and the Office of the High Commissioner for Human Rights as well as OSCE’s Moscow Mechanism expert reports.

The authors moreover interviewed six individuals who were tried in Belarus *in absentia* and were persecuted by the Belarusian authorities on political grounds, namely Sviatlana Tsikhanouskaya, Pavel Latushka, Volha Kavalkova, Aliaksandr Apeikin, Aliaksandra Herasimenia and Uladzimir Astapenka. The interviews focused on the circumstances of their

³⁶ Michael Ramsden, Reasonable Grounds to Believe, in: Max Planck Encyclopedias of International Law, available at: <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e2792.013.2792/law-mpeipro-e2792>; see also Public international Law & Policy Group, Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State, Factual Findings & Legal Analysis, p. 52, 2018, available at <https://burmacampaign.org.uk/media/PILPG-ROHINGYA-REPORT-Dec-2018.pdf>.

trials *in absentia* and were conducted remotely and in Belarusian. All respondents gave informed consent for the disclosure of their names.

Wherever statements originally made in Belarusian or Russian are quoted, the authors of the report provide an unofficial translation into English, unless otherwise specified.

PART II CRIMES AGAINST HUMANITY – FACTUAL FINDINGS AND LEGAL ANALYSIS

Chapter 4 – Contextual Elements

4.1 *Crimes Against Humanity under International Law*

Under international law, certain crimes – such as murder, torture, rape, arbitrary detention, deportation and persecution – amount to crimes against humanity when they are committed in a particular *context*, namely as part of a widespread or systematic attack against a civilian population and with knowledge of the attack.³⁷ This context elevates crimes that otherwise might only fall under a national jurisdiction to crimes of concern to the international community as a whole.

As reflected in Article 7 of the Rome Statute (RS) of the International Criminal Court (ICC), the following acts can amount to “crimes against humanity” if the contextual elements are met:

- Murder;
- Extermination;
- Enslavement;
- Deportation or forcible transfer;
- Arbitrary imprisonment;
- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity;
- Persecution on political, racial, national, ethnic, cultural, religious, gender or other grounds;
- Enforced disappearance of persons;
- Apartheid; or
- Other inhumane acts intentionally causing great suffering or serious injury to the body or to mental or physical health.³⁸

This report examines whether there are reasonable grounds to believe that the ongoing attacks against the civilian population in Belarus since May 2020 amount to crimes against humanity under international law.

To that end, this Chapter 4 discusses the legal and factual basis for this conclusion with regard to the contextual elements, while Chapter 5 analyzes the physical elements of the specific crimes against humanity.

³⁷ See for instance *Rome Statute of the International Criminal Court*, art. 7, (Multilateral, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>; International Law Commission, *Draft Articles on Prevention and Punishment of Crimes Against Humanity*, art. 2, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf

³⁸ *Rome Statute of the International Criminal Court*, art. 7, (Multilateral, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

This chapter concludes that the authors of this report find that there are reasonable grounds to believe that the contextual elements for crimes against humanity are satisfied with regard to the attack against the Belarusian population since May 2020.

This section first provides analysis related to whether there are reasonable grounds to believe that there was an attack directed against the Belarusian population since 2020 (4.2); then finds that these attacks were both widespread (4.3) and systematic (4.4); and finally concludes that such attacks were part of a State policy (4.5).

4.2 *An Attack Directed Against Any Civilian Population*

International Legal Framework

For crimes to amount to crimes against humanity, they need, *inter alia*, to be committed in the context of an attack that was directed against the civilian population.

Article 7(2)(a) RS provides a relatively broad definition of the term “attack” and defines it as “a course of conduct involving the multiple commission of acts referred to in paragraph 1.” Thus, an attack is not limited to the use of armed or military force³⁹ and does not have to be carried out in the context of an armed conflict.⁴⁰ It can encompass any mistreatment of the civilian population⁴¹ and need not be violent.⁴²

The term “population” refers to the collective nature of the crime as an attack upon multiple victims.⁴³ It must be established that the attack was directed against more than just a limited group of individuals.⁴⁴ Importantly, international courts have established that the notion of “population” does not mean that the entire civilian population of the geographical area in question must have been subject to an attack.⁴⁵

“Any” in such a context means that an attack can be directed “regardless of nationality, ethnicity or other distinguishing feature.”⁴⁶ In the *Ruto and Sang* case, the ICC found that “the

³⁹ International Criminal Court, *Elements of Crimes, ‘Crimes Against Humanity’*, para 3, para 75, 2013, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

⁴⁰ *Rome Statute of the International Criminal Court*, art. 7, (Multilateral, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁴¹ *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No IT-96-23 & IT-96-23/1-A, Decision, para 86 (Jun 12, 2002), available at <https://www.icty.org/x/cases/kunarac/acjug/en/>; *the Prosecutor v Milomir Stakić*, Case No IT-97-24-T, Judgement, para 623 (Jul 31, 2003), available at <https://www.refworld.org/cases,ICTY,41483ab14.html>.

Prosecutor v Jean-Paul Akayesu, Case No ICTR-96-4-T, Judgement, para 581, (Sep. 2, 1998), available at <https://www.refworld.org/cases,ICTR,40278fbb4.html>.

⁴³ *The Prosecutor v. Duško Tadić a/k/a “Dule”*, Case No. IT-94-1-T, Opinion and Judgment, para 644, (7 May 1997), available at <https://www.refworld.org/cases,ICTY,4027812b4.html>.

⁴⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision, para 77, (Jun 15, 2009), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF.

⁴⁵ *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision, para 82, (Mar 31, 2010), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF.

⁴⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision, para 399, (Sep 30, 2008), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF.

civilian population targeted can include a group defined by its (perceived) political affiliation.”⁴⁷

The term “civilian” includes all persons during peacetime “except those individuals who have a duty to maintain public order and have legitimate means to exercise force to that end at the time they are being attacked.”⁴⁸

Finally, the requirement “directed against” specifies that the civilian population is intended to be the primary target of the attack.⁴⁹ It aims to exclude incidental situations.⁵⁰

Analysis

The authors of this report find that since May 2020, the Belarusian authorities have directed an attack against the civilian Belarusian population that is perceived to support the opposition to Lukashenka.

From May 2020 onwards, there had been a sharp increase in politically motivated detentions all over Belarus.⁵¹ On 5 May 2020, Siarhei Tsikhanouski announced his candidacy for the 9 August 2020 presidential elections. One day later, law enforcement authorities detained Tsikhanouski on the pretext of a 15-day jail sentence that he had received in January 2020 for participating in a protest.⁵² The Central Election Commission of Belarus subsequently refused to register Tsikhanouski as a candidate for the elections.⁵³

On 29 May 2020, at least ten people were arrested in the city of Hrodna during a demonstration held to collect signatures for the nomination of Sviatlana Tsikhanouskaya, Siarhei

⁴⁷ *The Prosecutor v. William Samoeiruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision, para 164, (Jan 23, 2012), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01004.PDF.

⁴⁸ *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment, para 127, (May 21, 1999), available at <https://www.refworld.org/cases,ICTR,48abd5760.html>.

⁴⁹ *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No IT-96-23-T & IT-96-23/1-T, Decision, para 421, (Feb 22, 2001), available at <https://www.refworld.org/cases,ICTY,3ac6b7560.html>.

⁵⁰ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment, para 674, (Mar 21, 2016), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

⁵¹ Human Rights Center Viasna, *Human Rights Situation in Belarus: May 2020*, Jun 03, 2020, available at <https://spring96.org/en/news/97358>; Human Rights Watch, *Belarus: Activists, Journalists Jailed as Election Looms*, May 22, 2020, available at <https://www.hrw.org/news/2020/05/22/belarus-activists-journalists-jailed-election-looms>, Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, para 32, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf> Human Rights Watch, *Belarus: Crackdown on Political Activists, Journalists*, Jul 30, 2020, available at <https://www.hrw.org/news/2020/07/30/belarus-crackdown-political-activists-journalists>.

⁵² Human Rights Defenders for free elections, *Republic of Belarus. 2020 Presidential Election: Report on the nomination and registration of presidential candidates*, p. 5, available at https://belhelcom.org/sites/default/files/2020_milestone_nomination_and_registration_of_candidates_15.07_en.pdf.

⁵³ Human Rights Defenders for free elections, *Republic of Belarus. 2020 Presidential Election: Report on the nomination and registration of presidential candidates*, p. 5, available at https://belhelcom.org/sites/default/files/2020_milestone_nomination_and_registration_of_candidates_15.07_en.pdf; Human Rights Center Viasna, *Blogger Tsikhanovski is the first political prisoner for the events of 2020: we recall the story of his persecution and the detainees with him on the picket line*, May 31, 2022, available at <https://spring96.org/ru/news/107892>.

Tsikhanouski's wife.⁵⁴ Siarhei Tsikhanouski was among those arrested.⁵⁵ According to video evidence, Siarhei Tsikhanouski and other demonstrators were arrested by the police after a woman approached Tsikhanouski, persistently trying to "ask him a question," and Tsikhanouski refused to interact with her.⁵⁶ The incident has been qualified by Belarusian human rights organizations and mass media as a staged action or "provocation" to arrest Tsikhanouski and other protesters.⁵⁷ Belarusian and international human rights organizations have recognized Tsikhanouski as a political prisoner.⁵⁸

In June 2020, the attack by the authorities of the Lukashenka against the civilian population continued to gain momentum.⁵⁹ Dozens of civilians were detained on political grounds. In particular, Viktor Babaryka, one of the most popular candidates for the presidency, and his son Eduard Babaryka were arrested. Moreover, Babaryka's election fund was frozen and he was denied to proceed with his election campaign.⁶⁰

On 14 July 2020, Viktor Babaryka and Valery Tsapkala were denied to be candidates in the presidential election campaign.⁶¹ Furthermore, Mikalai Statkevich, one of the most famous politicians in opposition to Lukashenka authorities, was also not admitted as a candidate in elections.⁶²

Among the arrested were also several well-known bloggers, such as Aliaksandr Kabanau, Uladzimir Tsyhanovich, Ihar Losik, Siarhei Piatrukhin and Uladzimir Niaronski.⁶³ All of them were convicted for organizing protests.⁶⁴

⁵⁴ Human Rights Center Viasna, *Blogger Tsikhanovski is the first political prisoner for the events of 2020: we recall the story of his persecution and the detainees with him on the picket line*, May 31, 2022, available at <https://spring96.org/ru/news/107892>

⁵⁵ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, para 37, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

⁵⁶ CurrentTimeStories, *How Sergei Tikhanovsky was detained. Elections in Belarus*, Jun 1, 2020, available at <https://www.youtube.com/watch?v=SDEkcsQ2dTM>

⁵⁷ Human Rights Center Viasna, *Blogger Tsikhanovski is the first political prisoner for the events of 2020: we recall the story of his persecution and the detainees with him on the picket line*, May 31, 2022, available at <https://spring96.org/ru/news/107892>

⁵⁸ Human Rights Center Viasna, *Release Siarhei Tsikhanouski!*, Jun 1, 2020, available at <https://spring96.org/en/news/97276>; Amnesty International, *Belarus: Growing crackdown on human rights ahead of presidential election*, Jun 29, 2020, available at <https://www.amnesty.org/en/documents/eur49/2620/2020/en/>.

⁵⁹ Human Rights Center Viasna, *Human Rights Situation in Belarus: June 2020*, Jul 2, 2020, available at <https://spring96.org/en/news/98021>

⁶⁰ Human Rights Center Viasna, *Human Rights Situation in Belarus: June 2020*, Jul 2, 2020, available at <https://spring96.org/en/news/98021>

⁶¹ Human Rights Defenders for free elections, *Republic of Belarus. 2020 Presidential Election: Report on the nomination and registration of presidential candidates*, p. 10, available at https://belhelcom.org/sites/default/files/2020_milestone_nomination_and_registration_of_candidates_15.07_en.pdf

⁶² Human Rights Defenders for free elections, *Republic of Belarus. 2020 Presidential Election: Report on the nomination and registration of presidential candidates*, p. 5, available at https://belhelcom.org/sites/default/files/2020_milestone_nomination_and_registration_of_candidates_15.07_en.pdf

⁶³ Human Rights Defenders for free elections, *Republic of Belarus. 2020 Presidential Election: Report on the nomination and registration of presidential candidates*, p. 5, available at https://belhelcom.org/sites/default/files/2020_milestone_nomination_and_registration_of_candidates_15.07_en.pdf

⁶⁴ Human Rights Defenders for free elections, *Republic of Belarus. 2020 Presidential Election: Report on the nomination and registration of presidential candidates*, p. 5, available at

On 14-15 July 2020, law enforcement authorities detained more than 420 people participating in peaceful assemblies across Belarus.⁶⁵ In July 2020, numerous journalists of independent media were detained in the course of their direct journalistic duties. Human rights organizations noted an atmosphere of fear and intimidation in the Belarusian society, created by the repression in the context of the presidential election campaign.⁶⁶

In July 2020, human rights organizations began reporting “special” treatment (ill-treatment) of political prisoners in detention centers.⁶⁷

After the elections on 9 August 2020, many civilians that did not believe the election results that were announced by the Central Election Commission of Belarus came out to protest peacefully.⁶⁸ In the following days and during August-September, the total number of those constantly protesting all across Belarus was in the hundreds of thousands. The protesters represented large segments of the population countrywide: workers of public and private sectors, students, pensioners, businessmen, IT specialists⁶⁹, healthcare,⁷⁰ education⁷¹ and culture⁷² workers. Starting from 11 August 2020, the workers of the largest state-owned enterprises began to strike.⁷³

Responding to the outbreak of protests, on 9 August 2020, the law enforcement agencies and armed forces resorted to the use of force against the protesting civilian population. In particular, lethal (firearms) and less-lethal weapons (stun grenades, rubber bullets, water cannons, police

https://belhelcom.org/sites/default/files/2020_milestone_nomination_and_registration_of_candidates_15.07_en.pdf

⁶⁵ Human Rights Center Viasna, *Human Rights Situation in Belarus: July 2020*, Aug 3, 2020, available at <https://spring96.org/en/news/98647>

⁶⁶ Human Rights Center Viasna, *Human Rights Situation in Belarus: July 2020*, Aug 3, 2020, available at <https://spring96.org/en/news/98647>

⁶⁷ Human Rights Center Viasna, *Human Rights Situation in Belarus: July 2020*, Aug 3, 2020, available at <https://spring96.org/en/news/98647>

⁶⁸ Central Election Commission of the Republic of Belarus, *Notice on the results of voting*, Aug 9, 2020, available at https://rec.gov.by/files/2020/gol_itog.pdf

⁶⁹ Human Rights Center Viasna, *Statement of the UN experts, Belarus must stop crackdown to silence opposing views*, Jun 5, 2020, available at <https://spring96.org/en/news/97414>.

⁷⁰ Amnesty international. *Belarus 22. Right to health*, available at <https://www.amnesty.org/en/location/europe-and-central-asia/belarus/report-belarus/>.

⁷¹ Human Rights Center Viasna, *Dismissals for “politics” primarily affect professionals with a clear civic position*, Dec 27, 2021, available at <https://spring96.org/ru/news/106226>.

⁷² PEN Belarus. *Violations of cultural rights and human rights of culture figures. Monitoring results. Belarus, 2022*, Mar 3, 2023, available at <https://penbelarus.org/en/2023/03/03/rus-pravo-na-kulturu-belarus-2022.html>.

⁷³ Belaruskali potash company: Business and Human Rights Resource Center. *Belaruskali to reinstate workers fired over attempt to organise a strike after pressure from Yara*, Jan 2, 2021, available at <https://www.business-humanrights.org/en/latest-news/belarus-potash-producer-belaruskali-to-reinstate-workers-fired-over-attempt-to-organise-a-strike-after-pressure-from-yara/>; *Belarusian Steel Works: Euroradio.FM*, 26 Belarusian Steel Works employees on trial for August strike, Dec 8, 2020, available at <https://euroradio.fm/ru/26-sotrudnikov-bmz-sudyat-za-avgustovskuyu-zabastovku>; petroleum refiner NAFTAN: Center for Eastern Studies, *Belarus: the government helpless in the face of protests*, Aug 18, 2020, available at <https://www.osw.waw.pl/en/publikacje/analyses/2020-08-18/belarus-government-helpless-face-protests>; nitrogen compounds and fertilizers producer Grodno Azot: The Guardian, *Workers and students in Belarus launch anti-Lukashenko strike*, Oct 26, 2020, available at <https://www.theguardian.com/world/2020/oct/26/workers-and-student-in-belarus-launch-anti-alexander-lukashenko-strike>.

batons) were used.⁷⁴ This violence resulted in fatal outcomes and numerous serious injuries (mine-explosive, gunshot, stab wounds) among civilians.⁷⁵

As part of the campaign of terror, those civilians that are perceived as opposition-minded have since been subjected to arbitrary detention and imprisonment.⁷⁶ Detainees and those imprisoned for “political beliefs” are affected by “special treatment” amounting to torture and sexual violence. In the same vein, many persons have since been forced to leave the territory of Belarus, being subject to violent actions, unbearable living conditions and harassment.⁷⁷ See Chapter 5 for a more specific analysis per crime.

In addition to the protesters, Belarusian authorities also targeted and attacked non-state media journalists that cover anti-government manifestations,⁷⁸ lawyers that defend those that are perceived as opposition-minded clients,⁷⁹ and athletes that publicly criticized the violence by the authorities.⁸⁰ Such journalists and lawyers, as a rule, are deprived of their accreditations and licenses, and are subsequently subjected to harassment or persecution by the Belarusian authorities.

The targeted persons are not a limited group of individuals, but those civilians that are perceived by the authorities as political opponents, regardless of nationality, ethnicity or another distinguishing feature. In addition to those that have a political affiliation that is in opposition to the Lukashenka, it also includes anyone seen as a threat to the current Belarusian authorities, even if they were only exercising their professional duty. The targeted group therefore qualifies as “any civilian population” in accordance with the contextual elements for crimes against humanity.

Between 2021-2023, the repression campaign intensified. Numerous international and non-governmental organizations reported various methods of repression against opposition-minded

⁷⁴ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

⁷⁵ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

⁷⁶ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

⁷⁷ Unbearable conditions and the atmosphere of fear was also determined by the UN Special Rapporteur Anaïs Marin in the Report “Situation of human rights in Belarus”, para 10: “*The above-mentioned systematic infringements have resulted in an atmosphere of fear that penetrates the entire Belarusian society. This brought about a mass exodus of Belarusians – opposition leaders and supporters, socially and politically active people, human rights defenders and practitioners, journalists, bloggers and media workers, scientists and cultural figures, and many others – who were either directly forced or otherwise compelled by circumstances to leave their country, for fear of repression.*”, May 4, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/332/24/PDF/G2233224.pdf?OpenElement>.

⁷⁸ Amnesty International, *Belarus: Attacks on journalists mount amid protest crackdown*, Aug 12, 2020, available at <https://www.amnesty.org/en/latest/news/2020/08/belarus-journalists-under-attack/>.

⁷⁹ International Bar Association, *Belarus: harassment and intimidation of lawyers is of great concern and must end*, Oct 29, 2020, available at <https://www.ibanet.org/article/3bac5c3d-eaf1-45f2-a422-c7d503c2c47d>.

⁸⁰ Amnesty International, *Belarus: Once a showcase of the country's success, sport is now a battleground for reprisals*, Aug 2, 2021, available at <https://www.amnesty.org/en/latest/news/2021/08/belarus-once-a-showcase-of-the-countrys-success-sport-is-now-a-battleground-for-reprisals/>.

civilians, such as politically motivated imprisonment,⁸¹ torture and inhuman and degrading treatment,⁸² amendments to domestic law aiming to discriminate and punish civilians that are perceived as opposition-minded,⁸³ and impunity of crimes committed against targeted civilians.⁸⁴ Chapter 5 will discuss the crimes that this attack comprises of in more detail.

On the basis of the large amount of publicly available evidence, the authors of this report conclude that there are reasonable grounds to believe that at least since May 2020, Belarusian authorities launched an ongoing campaign of violence and terror that qualifies as “an attack directed against any civilian population.”

4.3 Widespread Attack

International Legal Framework

Another contextual element of crimes against humanity is that the nature of the attack needs to be “widespread or systematic.” “Widespread” and “systematic” are disjunctive: a prosecutor only needs to satisfy either the “widespread” or the “systematic”-threshold.⁸⁵

“Widespread” is a mainly quantitative criterion, which is satisfied either when the attack extends over a broad geographic area or affects a significant number of victims.⁸⁶ International

⁸¹ Hervé ASCENSIO, *Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020*, paras 65-71, May 11, 2023, delivered to the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, available at <https://www.osce.org/files/f/documents/d/5/543240.pdf>.

⁸² Human Rights Center Viasna, *Human Rights Situation in Belarus: May 2023*, Jun 2, 2023, available at <https://spring96.org/en/news/111863>; Hervé ASCENSIO, *Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020*, paras 152-158, May 11, 2023, available at <https://www.osce.org/files/f/documents/d/5/543240.pdf>; United Nations High Commissioner for Human Rights, *Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, paras 15-21, U.N. Doc. A/HRC/52/68, Feb 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/008/97/PDF/G2300897.pdf?OpenElement>.

⁸³ Hervé ASCENSIO, *Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020*, paras 42-49, May 11, 2023, available at <https://www.osce.org/files/f/documents/d/5/543240.pdf>; United Nations High Commissioner for Human Rights, *Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 31, U.N. Doc. A/HRC/52/68, Feb 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/008/97/PDF/G2300897.pdf?OpenElement>; Human Rights Center Viasna, *Human Rightst Situation in Belarus in 2022*, p.11, available at https://spring96.org/files/misc/annual_review_2022_final_en.pdf.

⁸⁴ Hervé ASCENSIO, *Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020*, paras 173-177, May 11, 2023, available at <https://www.osce.org/files/f/documents/d/5/543240.pdf>; United Nations High Commissioner for Human Rights, *Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, paras 13-14, U.N. Doc. A/HRC/52/68, Feb 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/008/97/PDF/G2300897.pdf?OpenElement>.

⁸⁵ *The Prosecutor v. Kunarac et. al*, Case No. IT-96-23, Judgement, para 93, Jun 12, 2002, available at <https://www.icty.org/x/cases/kunarac/acjug/en/>.

⁸⁶ *The Prosecutor v Katanga and Ngudjolo Chui*, Case No ICC-01/04-01/07, Decision, para 395, Sep 30, 2008, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF; *The Prosecutor v Jean-Pierre Bemba Gombo*, Case No ICC-01/05-01/08, para. 77, Decision, Jun 15, 2009, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF; *Situation in the Republic of Kenya*, Case No ICC-01/09, para. 95, Decision, Mar 31, 2010, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF; *Situation in the Republic of Côte d’Ivoire*, Case No ICC-02/11, para. 53, Decision, Nov 15, 2011, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2011_18794.PDF; *The Prosecutor v Dragoljub Kunarac Radomir Kovac and Zoran Vukovic*, Case No IT-96-23 & IT-96-23/1-A, para. 94, Judgment, Jun 12, 2002, available at <https://www.refworld.org/cases,ICTY,3debaafe4.html>; *the Prosecutor v. Tihomir Blaskic*, Case No IT-95-14-A,

courts have held that an attack is “widespread” when it is “massive, frequent, carried out with considerable seriousness and directed against a multiplicity of victims.”⁸⁷ An attack can be “widespread” if they are attacks in various places “over a large geographical area” but also if it is “in a small geographical area against a large number of victims.”⁸⁸

While “widespread” usually refers to “the cumulative effect of a series of inhumane acts,” no specific numerical limit has been set and it could also be satisfied by a singular effect of an inhumane act of extraordinary magnitude.⁸⁹ Thus, crimes committed in multiple provinces throughout a state may satisfy this requirement.⁹⁰ One location may also suffice if the number of allegedly committed crimes in that particular area is high.

Analysis

While it is only necessary to establish that attacks are either “widespread” or “systematic” for the crimes committed in Belarus since May 2020 to amount to crimes against humanity, this analysis leads to the conclusion that there are reasonable grounds to believe that the crimes were both “widespread” and “systematic.”

In accordance with the “widespread” criterion, the repressions covered a very broad geographic area. Anti-government protests and police violence against them took place all across the country, including the capital, Minsk, but also Brest, Hrodna, Homel, Bobruisk, Zhodino and others. Likewise, torture, sexual violence and arbitrary deprivation of liberty⁹¹ have been committed in all regional and practically in all district centers of Belarus. The acts described in Chapter 5 were applied simultaneously against protesters throughout Belarus and, in particular, continue to be applied in the penitentiary institutions of Belarus, which includes 16 penal colonies, 4 settlement colonies, 3 prisons, 6 pre-trial detention centers and 8 compulsory

para 101, Judgment, Jul 29, 2004, available at <https://www.refworld.org/cases,ICTY,4146f0eb4.html>; the *Prosecutor v. Dario Kordic, Mario Cerkez*, Case No IT-95-14/2-A, para. 94, Judgment, Dec 17, 2004, available at <https://www.refworld.org/cases,ICTY,47fd53d.html>; the *Prosecutor v Tolimir*, Case No IT-05-88/2-T, para. 698, Judgment, Dec 12, 2012, available at <https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>; the *Prosecutor v Stanišić and Simatović*, Case No IT-03-69-T, para. 963, Judgment, May 30, 2013, available at <https://www.legal-tools.org/doc/066e67/pdf/>; the *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No ICTR-99-52-A, para. 920, Judgment, Nov 28, 2007, available at <https://www.refworld.org/cases,ICTR,48b5271d2.html>; *Bagosora and Nsengiyumva v the Prosecutor*, Case No ICTR-98-41-A, para. 389, Judgment, Dec 14, 2011, available at <https://www.legal-tools.org/doc/52d501/pdf/>; the *Prosecutor v. Ildéphonse Nizeyimana*, Case No ICTR-2000-55-T, para. 1542, Judgment, Jun 19, 2012, available at <https://www.internationalcrimesdatabase.org/Case/131/Nizeyimana/>.

⁸⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, para 83, Decision, Jun 15, 2009, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF.

⁸⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, para 83, Decision, Jun 15, 2009, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF.

⁸⁹ *Decision on Situation in the Republic of Kenya*, Case No ICC-01/09, para. 95, Decision, Mar 31, 2010, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF; Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Fourth Edition), p. 232.

⁹⁰ *The Prosecutor v. William Samoeiruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No ICC-01/09-01/11, para 175-180, Decision, Jan 23, 2012, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01004.PDF

⁹¹ The International Committee for the Investigation of Torture in Belarus, *Fourth interim report: Conditions of Detention in Places of Detention from August 2020 to May 2021*, p. 7, available at <https://torturesbelarus2020.org/wp-content/uploads/2022/12/promezhutochnyj-otchet-4-1.pdf>; Human Rights Watch. *Belarus: Systematic Beatings, Torture of Protesters*, Sep 15, 2020, available at <https://www.hrw.org/news/2020/09/15/belarus-systematic-beatings-torture-protesters>.

rehabilitation centers distributed throughout the territory of Belarus,⁹² administered by the Ministry of Internal Affairs.

Additionally, the repressions have affected a high number of victims. The total number of victims of the acts described in Chapter 5, in the context of the ongoing attack on the civilian population of Belarus from May 2020, exceeds 136,000 people, with 10 people killed, about 1,500 persons imprisoned as political prisoners,⁹³ over 35,000 people arbitrarily detained,⁹⁴ and more than 100,000 Belarusians forced to flee the country after the elections.⁹⁵

Consequently, the attack against the civilian population in Belarus involves numerous victims and was carried out throughout the entire territory of Belarus and, therefore, meets the criteria “widespread.”

4.4 Systematic Attack

International Legal Framework

The term “systematic” refers to the organized or planned nature of an attack and the improbability that it was a random occurrence.⁹⁶ The crimes must be organized, premeditated, and deliberately targeted at a civilian population.⁹⁷ The practice of the International Criminal Tribunals attributes the presence of a pattern or methodical plan as the determining factors of a “systematic” attack.⁹⁸ Meanwhile, the “patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.”⁹⁹ In practice, the ICC has found the criterion “systematic” met when “the perpetrators employed similar means and methods to attack the different locations,”¹⁰⁰

⁹² The Ministry of Internal Affairs of the Republic of Belarus, *The structure of the penal system of the Republic of Belarus*, available at <https://www.mvd.gov.by/ru/page/departament-ispolneniya-nakazaniy/struktura-ugolovno-ispolnitel-noj-sistemy>.

⁹³ Human Rights Center Viasna, *List of political prisoners*, 2023, available at <https://prisoners.spring96.org/en>

⁹⁴ United Nations Human Rights Office of the High Commissioner, *Over the Past Year, More than 35 000 People have been Arbitrarily Detained in Belarus*, Jul 05, 2021, available at <https://www.ohchr.org/en/2021/07/over-past-year-more-35000-people-have-been-arbitrarily-detained-belarus-special-rapporteur>.

⁹⁵ The United Nations High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para. 50, U.N. Doc A/HRC/49/71, Mar 4, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/276/97/PDF/G2227697.pdf?OpenElement>.

⁹⁶ *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, para 203, Judgment, Mar 3, 2000, available at <https://www.refworld.org/cases,ICTY,4146f1b24.html>.

⁹⁷ Office of the Prosecutor, *Report on Preliminary Examination Activities 2017*, para 248, Dec 4, 2017, available at https://www.icty.org/x/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf.

⁹⁸ *Prosecutor v. Du[Ko Tadi] A/K/A/ “Dule”*, Case No IT-94-1-T, para 648, Opinion and Judgment, May 7, 1997, available at <https://www.refworld.org/cases,ICTY,4027812b4.html>.

⁹⁹ *The Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No IT-96-23 & IT-96-23/1-A, Decision, para 86 (Jun 12, 2002), available at <https://www.icty.org/x/cases/kunarac/acjug/en/>; *the Prosecutor v Milomir Stakić*, Case No IT-97-24-T, Judgement, para 94 (Jul 31, 2003), available at <https://www.refworld.org/cases,ICTY,41483ab14.html>.

¹⁰⁰ The International Law Commission, *Draft articles on Prevention and Punishment of Crimes Against Humanity*, with commentaries, p. 33, 2019, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf.

when “preparations for the attack were undertaken in advance,”¹⁰¹ and the attack itself had a “clear pattern”¹⁰² coordinated with acts of violence.¹⁰³

Analysis

The attack directed against the civilian population of Belarus qualifies as “systematic.” It is characterized by uniform means and methods of committing acts of violence throughout the entire territory of Belarus. Many of the crimes that are discussed in Chapter 5 are committed in an organized, premeditated and deliberate manner directed against a civilian population. In particular, the victims predominantly align with the political opposition,¹⁰⁴ the violence is committed by the authorities,¹⁰⁵ the acts take place in the context of the protests against the Lukashenka, and they occur oftentimes repeatedly over a relatively short period of time.¹⁰⁶

During the active protests, all over Belarus, law enforcement officials resorted to similar patterns of violence against protesters. In particular, this includes the use of specific and less-lethal weapons at a distance at which they become lethal,¹⁰⁷ the large-scale arbitrary detentions, and the torture and ill-treatment of those detained, such as the so-called “death corridors” or beating checkpoints (Minsk, Lida, Baranavichy, Pinsk)¹⁰⁸ and sleep deprivation (Minsk, Zhodzina).¹⁰⁹ But also the denial of medical care for those incarcerated in penitentiary

¹⁰¹ The International Law Commission, *Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries*, 2019, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf; *Prosecutor v. Bosco Katanga*, Case No. ICC-01/04-02/06, para 31, Decision, Jul 13, 2012, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07506.PDF.

¹⁰² Para 225, ICC, *Situation in the Republic of Côte D’Ivoire in the case of the Prosecutor v. Laurent Gbagbo*, case No ICC-02/11-01/11, 12 June 2014, Pre-Trial Chamber I; <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_04863.PDF> accessed 13 May 2023.

¹⁰³ The International Law Commission, *Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries*, p. 34, 2019, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf.

¹⁰⁴ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, p 33, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

¹⁰⁵ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

¹⁰⁶ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

¹⁰⁷ BYPOL, the International Strategic Action Network for Security, *Report: The use of weapons by Belarusian law enforcement agencies to disperse peaceful protests*, available at <https://isans.org/wp-content/uploads/2021/03/the-use-of-weapons-by-belarusian-law-enforcement-agencies.pdf>.

¹⁰⁸ The International Committee for the Investigation of Torture in Belarus, *the International Rehabilitation Council for Torture Victims. Country report, Belarus: A Coordinated Policy of Torture*, p.10, available at https://torturesbelarus2020.org/wp-content/uploads/2023/03/belarus_coordinated_policy_of_torture-1.pdf.

¹⁰⁹ Human Rights Centre Viasna. They starve and freeze”. New evidence of torture and circumstances of Vitold Ashurk's death in Correctional Colony 17; Mar 29, 2023, available at <https://spring96.org/ru/news/111242>; Human Rights Centre Viasna. “I had an asphyxiation attack on my first day in the TsIP,” former detainee Okrestina, Apr 29, 2023, available at <https://spring96.org/ru/news/111566>.

institutions¹¹⁰ and the deprivation of detainees of the ability to communicate with their relatives who were often denied information about their whereabouts.¹¹¹

Sexual violence, including rape, has occurred in various towns and cities across Belarus in a similar pattern. Most of the victims of sexual violence are men who are raped in police vans, police stations and detention facilities with police batons, stun guns and other weapons.¹¹²

There is moreover a striking pattern in the way the Belarusian judiciary conduct their trials against civilians that face political charges combined with a uniform method that was introduced in these past three years since the attack started. Individuals that appear before the court on political charges are now deprived of the right to legal assistance of their own choosing. Moreover, legal counsel are not allowed to call or cross-examine witnesses or present additional evidence.¹¹³ Furthermore, from August 2020, judges began to simply implement the decisions of investigators and State security forces on whether an investigation should be opened and whether a person will be detained, charged and convicted to prison terms.¹¹⁴ Since the end of 2020, the courts have treated actions related to the exercise of the right to freedom of speech and assembly, as well as minor offenses, as criminal acts.¹¹⁵

Thus, Belarusian authorities and law enforcement agencies employed similar means and methods of attack against the civilian population in Belarus throughout the entire country. Following the practice of international criminal tribunals, such a uniform and clear pattern demonstrates the “systematic” character of the attack.

4.5 State or Organizational Policy

International Legal Framework

Under the Rome Statute, an attack must also have been committed pursuant to or in furtherance of a State or organizational policy.¹¹⁶ The ICC Elements of Crimes explain that a “State or organizational policy” to commit such an attack “requires that the State or organization actively promote or encourage such an attack against a civilian population.”¹¹⁷

¹¹⁰ Human Rights Centre Viasna. Human Rights Situation in Belarus: March 2023, Apr 04, 2023, available at <https://spring96.org/en/news/111306>; Human Rights Centre Viasna, Human Rights Situation in Belarus: April 2023, May 5, 2023, available at <https://spring96.org/en/news/111622>.

¹¹¹ The United Nations High Commissioner for Human Rights, Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, para. 40, U.N. Doc A/HRC/49/71, Mar 4, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/276/97/PDF/G2227697.pdf?OpenElement>.

¹¹² The United Nations High Commissioner for Human Rights, Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, para. 25, para 44, U.N. Doc A/HRC/49/71, Mar 4, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/276/97/PDF/G2227697.pdf?OpenElement>.

¹¹³ Hervé ASCENSIO, Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020, para 166, May 11, 2023, available at <https://www.osce.org/files/f/documents/d/5/543240.pdf>.

¹¹⁴ Hervé ASCENSIO, Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020, para 166, May 11, 2023, available at <https://www.osce.org/files/f/documents/d/5/543240.pdf>.

¹¹⁵ Law and Democracy Center, Right to a fair trial and due process in Belarus after 2020 presidential elections, Mar 15, 2023, available at <https://ldc-jh.eu/report-right-to-a-fair-trial-and-due-process-in-belarus-after-2020-presidential-elections/>.

¹¹⁶ Rome Statute of the International Criminal Court, art. 7(2)(a), (Multilateral, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹¹⁷ International Criminal Court, Elements of Crimes, art 7, 2013, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

Consequently, for an attack to amount to crimes against humanity, the policy must be attributed to a State or organization.¹¹⁸ Such a policy can be deduced from the repetition of acts, from preparatory activities, or from a collective mobilization.¹¹⁹ It can be implemented by action or deliberate failure to act,¹²⁰ and can be inferred from the totality of circumstances.¹²¹

A “policy” adopted by regional or local organs of the State could satisfy the requirement of “State or organizational policy.”¹²² Simultaneously, “policy” need not be formally established or promulgated in advance of the attack,¹²³ and proof of a particular rationale or motive is not required.¹²⁴

Although the “systematic” and “policy” requirements appear synonymous and even the ICC Pre-Trial Chambers sometimes conflate these two requirements, the former requirement is more extensive and concerns the repetitive nature and similar modus operandi of the attack.¹²⁵ The latter concerns whether the state or organization meant to commit the attack.¹²⁶ According to ICC Trial Chamber II, this could mean “repeated actions occurring according to the same sequence, or the existence of preparations or collective mobilization orchestrated and coordinated by that State or organization.”¹²⁷ As such, there has to be an intention on the part of the perpetrators acting on behalf of the state to commit such crimes.

Analysis

This analysis concludes that there are ample shared features between the different acts to qualify as “policy.” This policy has clearly been designed, promoted, encouraged and executed by the State, and therefore meets the standards set out under the Rome Statute.

The existence of a State policy since May 2020 is especially illustrated by the following indicators:

- Violence against peaceful protesters
- Ensuring impunity of law enforcement officers

¹¹⁸ The Prosecutor v. Laurent Gbagbo, Case No ICC-02/11-01/11, para 217, Decision, Jun 12, 2014, *available at* https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2014_04863.PDF.

¹¹⁹ The Prosecutor v Katanga, Case No ICC-01/04-01/07, Judgment, para 1109, Mar 7, 2014, *available at* https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

¹²⁰ The Prosecutor v Katanga, Case No ICC-01/04-01/07, Judgment, para 1108, Mar 7, 2014, *available at* https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

¹²¹ The International Law Commission, Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, p. 39, 2019, *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf.

¹²² Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, para 89, *available at* https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF.

¹²³ The Prosecutor v Katanga, Case No ICC-01/04-01/07, Judgment, para 1109, Mar 7, 2014, *available at* https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

¹²⁴ The International Law Commission, Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, p. 39, 2019, *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf.

¹²⁵ The Prosecutor v Katanga, Case No. ICC-01/04-01/07, Judgment, paras. 1111-1113, Mar. 7, 2004, *available at* https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

¹²⁶ *The Prosecutor v Katanga*, Case No. ICC-01/04-01/07, Judgment, paras. 1111-1113, Mar. 7, 2004, *available at* https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

¹²⁷ *The Prosecutor v Katanga*, Case No. ICC-01/04-01/07, Judgment, paras. 1109, Mar. 7, 2004, *available at* https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

- Legal reforms aimed at discrimination and targeting of civilians that are perceived as opposition-minded
- Imprisonment of civilians perceived as opposition-minded
- Statements of high officials encouraging the attack
- Hate propaganda through the media
- Banning professional activities

Violence against peaceful protesters

During the 2020 protests against the falsified elections, Belarusian law enforcement officials systematically used massive violence against peaceful protesters. In addition to the facts discussed in Section 4.4, it is clear that the state meant to commit this attack. They comprise “repeated actions occurring according to the same sequence, or the existence of preparations or collective mobilization orchestrated and coordinated by that State or organization” as explained by the ICC’s Pre-Trial Chamber.¹²⁸ In particular, the perpetrators were state authorities that committed violations in similar manner throughout the Belarusian state.

While this state policy can easily be inferred from the occurrences, it has also been confirmed in an audio recording. In January 2021, a voice recording of Mikalai Karpenkou, the head of GUBOPiK (the “Main Directorate for Combating Organized Crime and Corruption,” a department within the Belarusian Ministry of Internal Affairs), was leaked. In this recording, Karpenkou affirmed the specific orders allegedly given by Lukashenka:

“As the president said, if someone’s pushing toward you — use non-lethal weapons. Point-blank [at] the legs, stomach, balls. So that he [the protester] understands what he’s done after he regains consciousness. Just injure him in some way: either cripple him, mutilate him, or kill him. Use your weapon [to shoot] right in the forehead, right in the face, right to the point of no return to the condition he was in beforehand.

If they resuscitate him, alright then. He’ll be missing half his brain, well, good riddance. (...) These are superfluous people in our country.”¹²⁹

Ensuring impunity of law enforcement officers

In its 2023 report on the situation in Belarus, the Office of the High Commissioner for Human Rights (OHCHR) expressly noted an “active policy to shield perpetrators and prevent accountability” in the context of the attack against the civilian population.¹³⁰ The OHCHR pointed out that violent acts against the civilian population were carried out by law enforcement

¹²⁸ *The Prosecutor v Katanga*, Case No. ICC-01/04-01/07, Judgment, paras. 1109, Mar. 7, 2004, available at https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

¹²⁹ ‘Use your weapon’ Leaked recording implicates Lukashenko in authorizing use of lethal force against Belarusian protesters, Meduza.io, January 15, 2021, available at <https://meduza.io/en/feature/2021/01/15/use-your-weapon>.

¹³⁰ The United Nations High Commissioner for Human Rights, Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, para. 57, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/008/97/PDF/G2300897.pdf?OpenElement>.

officers in balaclavas who are not wearing insignia, which makes it impossible to identify and prosecute them.¹³¹

A similar policy of concealing the identities of law enforcement officers has also been adopted during the trials of repressed civilians.¹³² It is common practice to interview OMON (*Otryad militsii osobogo naznachenia*; “Special Purpose Police Detachment”) officers that wear masks via videoconference as witnesses during the trial of targeted civilians.¹³³ Legal counsel are deprived of the possibility to cross-examine such witnesses.¹³⁴ Broadcasting of these trials is prohibited.¹³⁵

OHCHR suggested that the ban on independent real-time reporting, along with the aforementioned practices of concealing the identities of law enforcement officers, are aimed primarily at ensuring the impunity of the latter for the alleged crimes, assuming that their identities cannot be identified.¹³⁶

Law enforcement officers are also told and shown that they are protected by the state in other ways. For example, on 30 December 2020, Lukashenka presented awards for service to law enforcement officers. Lukashenka then said in the context of the brutal suppression of manifestations that the law enforcement officers had protected the country from external and internal threats.¹³⁷

Most strikingly, on 17 May 2021, amendments to the Law “On the Internal Affairs Bodies of the Republic of Belarus” came into force. This provides that officers cannot be held liable for the use of physical force, special means and firearms in cases determined by the President.¹³⁸

As a result, on 26 August 2021, the Investigative Committee of the Republic of Belarus informed that no criminal case had been initiated after receiving approximately 5,000 complaints of torture or ill-treatment for the period of 9 August – 30 November.¹³⁹

¹³¹ The United Nations High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para. 57, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/008/97/PDF/G2300897.pdf?OpenElement>.

¹³² Human Rights Center Viasna, *Six journalists were found guilty of taking part in an unauthorised rally. They were sentenced to three days of arrest*, Sep 4, 2020, available at <https://spring96.org/ru/news/99381>.

¹³³ Human Rights Center Viasna, *Six journalists were found guilty of taking part in an unauthorised rally. They were sentenced to three days of arrest*, Sep 4, 2020, available at <https://spring96.org/ru/news/99381>.

¹³⁴ The United Nations High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para. 27, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/008/97/PDF/G2300897.pdf?OpenElement>.

¹³⁵ Maksim Polovinko, *Watch out for justice being shut down. A lawyer's view on why courts should be held in the open*, Zerkalo.io, Apr 27, 2022, available at <https://news.zerkalo.io/life/13394.html>.

¹³⁶ The United Nations High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para. 57, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/008/97/PDF/G2300897.pdf?OpenElement>.

¹³⁷ National Internet Law Portal of the Republic of Belarus, Aliaksandr Lukashenka visits special-purpose police detachment of the Main Department of Internal Affairs of Minsk city executive committee, Dec30, 2020, available at <https://pravo.by/novosti/obshchestvenno-politicheskie-i-v-oblasti-prava/2020/december/58011/>.

¹³⁸ Law “On the agencies of internal affairs of the Republic of Belarus”, No 263-3, arts 26, 28, 29, (the Republic of Belarus, 2007), available at <https://pravo.by/document/?guid=3871&p0=h10700263>.

¹³⁹ Investigatory Committee of the Republic of Belarus. Investigatory Committee Nearly 5,000 people allegedly injured by police in the summer and fall of 2020. Why cases were denied, Aug 26, 2021, available at <https://sk.gov.by/ru/news-ru/view/pochti-5-tysjach-chelovek-jakoby-postradavshix-ot-militsii-letomosenjju-2020-go-pochemu-otkazano-v-10349/>.

Thus, impunity of law enforcement officers and other officials is another element that demonstrates that the attack directed against the civilian population in Belarus is a “State policy.”

Legal reforms aimed at discrimination and targeting of opposition-minded civilians

Another indicator of the existence of a “State policy” is the extensive legal reforms carried out since 2020. These reforms aim to create a quasi-legitimacy of the attack directed against the civilian population by criminalizing active expression and self-identification of the political opinion attributed to the opposition-minded civilians as well as justifying the use of firearms, physical force and ill-treatment of a targeting group of civilians. As it was also noted by the Rapporteur under the OSCE's Moscow Mechanism,¹⁴⁰ the core of this legal reform is a set of provisions on “extremism.”

Additionally, the UN Special Rapporteur on the human rights situation in Belarus, Anaïs Marin, detailed in her 2022 annual report “a policy of systematically tightening legislation that restricts civil and political rights by Belarusian authorities.”¹⁴¹ Such legislation includes the 2022 constitutional referendum and amendments to the criminal legislation, which, for instance, further restricted the freedom of peaceful assembly, association and expression and broadened the “terrorist acts” definition.¹⁴²

In effect, these legislative and policy changes and the resulting practices caused “a virtual annihilation of independent non-governmental organisations, media, and cultural organisations.”¹⁴³

Some of these legislative reforms directly violate international human rights law and contribute to the attack against the civilian population, while others particularly do so in the way they are applied and enforced to target civilians and organizations that are perceived to be opposition-minded. They are indicators for “State policy” because they are, per definition, enacted by the state, and done so with the purpose to facilitate the attack against the civilian population.

Above, the amendment to the Law “On the Internal Affairs Bodies of the Republic of Belarus” that ensures impunity of law enforcement officers was already noted. Other examples include the following amendments:

A special role in the policy of attacking the civilian population is given to changes of the “extremism” legislation. On 14 May 2021, a new version of the Law “On Countering Extremism” was adopted. This law establishes the concept of “extremism,” which is interpreted so broadly that it applies to activities relating to the exercise of rights guaranteed by

¹⁴⁰ Hervé ASCENSIO, Report on the serious threat to the OSCE human dimension in Belarus since 5 November 2020, para 34, May 11, 2023, available at <https://www.osce.org/files/f/documents/d/5/543240.pdf>.

¹⁴¹ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, U.N. Doc A/HRC/53/53, May 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/083/75/PDF/G2308375.pdf?OpenElement>.

¹⁴² Anaïs Marin, Report of the Special Rapporteur on the situation of human rights in Belarus, U.N. Doc A/HRC/53/53, May 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/083/75/PDF/G2308375.pdf?OpenElement>.

¹⁴³ Anaïs Marin, Report of the Special Rapporteur on the situation of human rights in Belarus, U.N. Doc A/HRC/53/53, May 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/083/75/PDF/G2308375.pdf?OpenElement>.

fundamental human rights law treaties. Among other acts, this law equates to extremism the dissemination of false information about various spheres of life in Belarus, about the legal status of Belarusian citizens, information “discrediting the Republic of Belarus,” insulting a public servant, discrediting the government and administration, obstructing the work of the Central Election Commission and other state bodies, and active participation in mass disturbances or their organization.¹⁴⁴ Since the adoption of this law, any manifestation of dissent, including peaceful assemblies and journalistic activities covering manifestations, amounts to extremism and is punishable with up to 10 years of imprisonment.¹⁴⁵

In July 2022, new provisions to the Criminal Procedure Code of Belarus introduced trials *in absentia*,¹⁴⁶ primarily aimed to prosecute those forced to flee Belarus as a result of political persecution. While *in absentia* trials are not prohibited per definition, the manner in which Belarus applies the procedure is a violation of fundamental human rights since the suspects do not appear to be informed of their trials,¹⁴⁷ are not allowed access to their case file, were not allowed to participate in their trial through legal representation that was chosen by themselves, or even participate through videoconference as a reasonable alternative to guarantee the right to attend one’s own trial, and were unable to contact the court-appointed attorneys.¹⁴⁸

By 30 June 2023, this procedure had been used against at least 22 individuals, most of whom are perceived by the authorities as opposition-minded. Most of them were convicted under the new “extremism” provisions. In particular, Sviatlana Tsikhanouskaya (15 years imprisonment), Pavel Latushka (18 years imprisonment), Maryia Maroz (15 years imprisonment), Volha Kavalkova (12 years imprisonment), and Siarhei Dyleuski (12 years imprisonment) were tried *in absentia* as the representatives of the Coordination Council, the democratic civic organization of Belarus established after the 2020 crackdown, which in January 2023 was recognized as “extremist” by the authorities. The leaders of the Belarusian Sport Solidarity Foundation, the organization created after 2020 to support the Belarusian athletes who have been discriminated based on the civic position, three-time Olympic medalist Aliaksandra Herasimenia and sports functionary Aliaksandr Apeikin were prosecuted *in absentia* and sentenced to 12 years of imprisonment each. The ex-presidential candidate and oppositionist Valery Tsepka was sentenced *in absentia* to 17 years.

The authors of this report have interviewed six persons that were convicted through these *in absentia* trials: namely Sviatlana Tsikhanouskaya, Pavel Latushka, Volha Kavalkova, Aliaksandr Apeikin, Aliaksandra Herasimenia and Uladzimir Astapenka. The authors asked them about the circumstances of their trials. All of them reported that they learned about the trials against themselves from the media. None of them was given access to the case materials, as well as the opportunity to participate in the process via videoconference. Court-appointed lawyers deliberately avoided contact with their clients. None of the attempts to contact the

¹⁴⁴ Law “On Countering Extremism”, No 203-3, (the Republic of Belarus, 2007), available at <https://pravo.by/document/?guid=3871&p0=h10700203>.

¹⁴⁵ Law “On Countering Extremism”, No 203-3, (the Republic of Belarus, 2007), available at <https://pravo.by/document/?guid=3871&p0=h10700203>.

¹⁴⁶ Criminal Procedure Code of Belarus, No 275-3, (the Republic of Belarus, 1999), available at <https://pravo.by/document/?guid=3871&p0=hk9900275>.

¹⁴⁷ *Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb)*, European Court of Human Rights, August 31, 2022, para. 293, available at https://www.echr.coe.int/documents/d/echr/guide_art_6_criminal_eng.

¹⁴⁸ *Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (criminal limb)*, European Court of Human Rights, August 31, 2022, para. 477, available at https://www.echr.coe.int/documents/d/echr/guide_art_6_criminal_eng.

lawyer was successful. In practice, there was also no possibility of choosing a defense attorney at their own discretion, as the defense lawyers were appointed by the authorities.

On the basis of these accounts, these trials *in absentia* do not seem to comply with the minimum standards of fair trial rules set out in the International Covenant on Civil and Political Rights, which are well-interpreted by the UN Counter-Terrorism Implementation Task Force (CTITF) Working Group on Protecting Human Rights,¹⁴⁹ and are intended to create conditions for the trial that guarantee a guilty verdict in relation to opposition-minded civilians.

On 5 January 2023, Lukashenka signed amendments to the Law “On Citizenship of the Republic of Belarus,” which came into force on 11 July 2023. Besides other changes, these amendments foresee the possibility to deprive an individual residing outside Belarus of their Belarusian citizenship, even if the citizenship was acquired by birth, if a Belarusian court finds that this person participated in “extremist” activities or caused grievous harm to the interests of the Republic of Belarus.¹⁵⁰ This law also introduced the possibility to restrict the rights and freedoms of citizens of the Republic of Belarus who have a second citizenship or a residence permit of a foreign state, which, at the discretion of the competent authorities of Belarus, grants the right to benefits and other advantages in connection with political, religious views or national affiliation.¹⁵¹

In this context, on 27 May 2021, the Law “On the Bar and Advocacy in the Republic of Belarus” was also amended. The new version of the Law determines legal consultation offices as the only possible form of advocacy. At the same time, such new forms of advocacy as bureaux and sole practitioners were abolished. Total control over and interference in the activities of the Bar and advocacy have been set. The Ministry of Justice has become the so-called regulator of lawyers’ activities. In violation of the attorney-client privilege, the Ministry of Justice is entitled to analyze the consistency of fees with the quality and scope of legal assistance provided, request for the verification of information and documents, including those that include the clients’ act of seeking legal aid, the personal details of the person seeking legal aid, and the type of legal aid. As the UN Special Rapporteur on the situation of human rights in Belarus, Anaïs Marin, noted, the Belarusian legislative framework effectively limits the independence of lawyers, whose activities are under excessive control of the Ministry of Justice, via the Belarusian National Bar Association, an institution which has lost the features of an independent self-governing body able to defend the interests of its members. In order to exert their profession, lawyers must receive a license delivered by the Ministry of Justice, following an examination by a Certification Commission, which is itself controlled by the Ministry.

In January 2022, May 2022 and March 2023, amendments to the Criminal Code of Belarus were adopted. In particular, criminal liability for the participation in activities of political parties, other non-governmental associations, religious organizations or foundations liquidated by the authorities was introduced.¹⁵² Criminal liability was also introduced for repeated

¹⁴⁹ *Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism*, UN Counter-Terrorism Implementation Task Force (CTITF) Working Group on Protecting Human Rights, October 2014, available at <https://www.ohchr.org/sites/default/files/newyork/Documents/FairTrial.pdf>.

¹⁵⁰ Law “On Citizenship of the Republic of Belarus,” No 136-3, art 19 (the Republic of Belarus, 2002), available at <https://pravo.by/document/?guid=12551&p0=H12300242>.

¹⁵¹ Law “On Citizenship of the Republic of Belarus,” No 136-3, art 11 (the Republic of Belarus, 2002), available at <https://pravo.by/document/?guid=12551&p0=H12300242>.

¹⁵² Law “On amending the Criminal Code”, No. 256-3, (the Republic of Belarus, 2023), available at <https://pravo.by/document/?guid=12551&p0=H12300256&p1=1&p5=0>.

procedural violations concerning the organization and holding of mass gatherings, and for the repeated distribution of prohibited information online (earlier sanctioned as an administrative offense).¹⁵³ Criminal responsibility was also increased for defamatory statements such as libel, libel or insult against the President, illegal collection or obtaining information constituting state secrets.¹⁵⁴ The death penalty for treason has been included.¹⁵⁵

On 1 March 2021, a new version of the “Code of Administrative Violations” came into force. Under the new Code, the participation in unsanctioned assemblies was tightened: fines were significantly increased (up to 200 base rates) and the maximum term of administrative arrest was increased from 15 to 30 days for repeated prosecution.¹⁵⁶

On 24 July 2021, the Law “On Mass Events in the Republic of Belarus” and the Law “On Media” were amended. The first Law introduced that all mass events require preliminary permission from the authorities. It entailed that as long as the event is not officially permitted, the media is prohibited to cover it. Live broadcasts at mass events were thereby banned. Journalists are equated with the participants or organizers. At the same time, media representatives are not allowed to act as organizers or participants of mass events. It is also prohibited to collect money or help in any other way people who have been prosecuted for violating the procedure for organizing or holding mass events. Political parties and public associations are liable for their members if they violate the law on mass events.¹⁵⁷

Simultaneously, the Law “On Media” provides for the deprivation of accreditation of journalists for “deliberate unlawful act in the exercise of professional activities” and also allows the Inter-Institutional Commission for Security in the Information Sphere (executive body) to liquidate the media outlet or limit access to online publications¹⁵⁸ if it considers that such content threatens the national security of the country. It is forbidden to publish the results of public opinion polls related to the socio-political situation in the country, republican referenda, presidential and parliamentary elections in the media and in Internet resources if they were conducted without the necessary accreditation. In practice, any materials that are critical to the official government line, are considered “extremist” and a threat to national security.

This list of above-mentioned amendments to the domestic law is not exhaustive. However, it demonstrates that the state uses legal reforms as a policy that facilitates the attack against the civilian population in Belarus.

¹⁵³ Law “On amending the Criminal Code”, No. 256-3, (the Republic of Belarus, 2023), *available at* <https://pravo.by/document/?guid=12551&p0=H12300256&p1=1&p5=0>.

¹⁵⁴ Law “On amending the Criminal Code”, No. 256-3, (the Republic of Belarus, 2023), *available at* <https://pravo.by/document/?guid=12551&p0=H12300256&p1=1&p5=0>.

¹⁵⁵ Law “On amending the Criminal Code”, No. 256-3, (the Republic of Belarus, 2023), *available at* <https://pravo.by/document/?guid=12551&p0=H12300256&p1=1&p5=0>.

¹⁵⁶ Code of Administrative Violations, No 91-3, (the Republic of Belarus, 2021), *available at* <https://etalonline.by/document/?regnum=hk2100091>.

¹⁵⁷ Law “On Mass Events in the Republic of Belarus”, No 114-3, (the Republic of Belarus, 1997), *available at* <https://pravo.by/document/?guid=3871&p0=h19700114>.

¹⁵⁸ Law “On Media”, No 427-3, (the Republic of Belarus, 2008), *available at* <https://pravo.by/document/?guid=3871&p0=h10800427>.

Imprisonment of opposition-minded civilians

Imprisonment is another indicator of the “State policy” of this attack since it is the prerogative of the state to use the method of imprisonment and because imprisonment is used as another way to facilitate, actively promote and encourage the attack against the Belarusian population.

Imprisonment of civilians that are perceived as opposition-minded occurs on a large-scale and is one of the main political narratives of the attack against civilians in the context of crimes against humanity in Belarus.

Imprisonment of civilians based on political grounds is conducted on a large-scale and the number of political prisoners continues to increase. In 2019, there were 7 political prisoners.¹⁵⁹ As of July 2023, Viasna counts over 1,490 civilians as political prisoners in Belarus.¹⁶⁰ According to human rights organizations, over the past three years 2,291 people have been officially recognized as political prisoners in Belarus. In total, at least 4,300 citizens have faced criminal prosecution for political reasons during this period.

Statements of high officials encouraging the attack

The State policy of the attack directed against civilians is also confirmed by the statements of high officials.

Official statements by Lukashenka include passages such as that the mistreatment of protesters is “well deserved” or that “we take no prisoners”¹⁶¹ The attack against the civilian population of Belarus is carried out exclusively by state bodies of the Republic of Belarus, the leadership of which is directly subordinate to Lukashenka.

On 9 September 2020, in an interview with Russian journalists, Lukashenka, referring to the actions of riot police and the observation of the rule of law, stated:

“I can’t condemn these guys, who have protected not only the country, but also me. ...OMON and internal troops are working on the streets. It’s their job to stabilize the situation. Have they broken the law? No! The only thing I didn’t like about it was that they beat a man lying down.”¹⁶²

On 10 September 2020, when introducing Andrei Shved as Prosecutor General of Belarus, Lukashenka said:

¹⁵⁹ Human Rights Center Viasna, The human rights situation in Belarus in 2019, Jan 13, 2020, *available at* <https://spring96.org/ru/news/95700>.

¹⁶⁰ Human Rights Center Viasna, The List of Political Prisoners, 2023, *available at* <https://prisoners.spring96.org/en>.

¹⁶¹ International Partnership for Human Rights, Communication Submitted Under Article 15(2) of the Rome Statute of the International Criminal Court: The Situation in Belarus/Lithuania/Poland/Latvia and Ukraine: Crimes Against Humanity of Deportation and Persecution, para. 102, May 2021, *available at* https://www.iphronline.org/wp-content/uploads/2021/05/BY_ICC_Submission.pdf.

¹⁶² ANT: News of the World and Belarus, *Lukashenka’s interview with Russian journalists* | LIVE, Sep 9, 2020, *available at* https://youtu.be/I_eWbQAk5R4.

*“Although when there is an almost brazen intervention, as I call it, from the outside and it is warmed up from the inside and directed from the outside, sometimes there is no time for laws, we must take tough measures to stop all the trash that pretends to be.”*¹⁶³

On 27 October 2020, Lukashenka said that he personally gave the order to break into citizens’ apartments and seize people, slandering protesters as “drug addicts:”

*“What should the police have done? It was my order to keep people safe. They [the police] started to break into the apartments, rushed into these apartments. We had to pull these drug addicts out of the apartments. It’s not normal, it’s intolerable (...).”*¹⁶⁴

On 30 October 2020, Lukashenka stated:

*“From today, especially in the apartments of citizens where they are hiding, we are not taking anyone captive. If someone touches a soldier (I have already reprimanded the generals), he must leave at least without hands. I say this publicly, so that everybody understands our further determination. That’s all. We have nowhere to retreat, and we are not going to retreat. Whoever is ready, we will act.”*¹⁶⁵

On 9 August 2021, during the “Big Talk,” a regular event organized by Lukashenka to meet with members of the public and media, which was broadcasted by the state channels, Lukashenka said that he had personally given all the orders to the security forces to suppress the protests in the country in 2020: “Do not look for the guilty, I gave them. Put everyone in their place, without shooting.”¹⁶⁶

On 19 November 2021, during the interview with a BBC correspondent, Lukashenka responded to the question whether protesters are being beaten and tortured as follows:

*“Okay, Okay, I admit it, I admit it. People were beaten in the Okrestina detention centre. But there were police beaten up too and you didn’t show this.”*¹⁶⁷

As was also provided under the heading “Violence against peaceful protestors,” in January 2021, a sound record was published. The results of an independent phonoscope of this record confirmed that the voice of the person speaking belongs to the head of the GUBOPiK (the “Main Directorate for Combating Organized Crime and Corruption,” a department within the Belarusian Ministry of Internal Affairs), M. Karpenkou, who said:

¹⁶³ Reform.By, Lukashenka to prosecutors: Sometimes it is not about laws, Sep 10, 2020, available at <https://www.youtube.com/watch?v=EVzWN41hVBs>.

¹⁶⁴ Reform.By, Lukashenka: It was my order to open up flats and pull out these drug addicts, Oct 27, 2020, available at <https://reform.by/175193-lukashenko-jeto-by-l-moj-prikaz-vskryvat-kvartiry-i-vytaskivat-jetih-narkomanov>; CTBY, Lukashenka on the events of Sunday: is it normal when a crowd, hundreds of people, rushed into these neighbourhoods?, Oct 27, 2020, available at <https://www.youtube.com/watch?v=3ffnEwiW980&t=207s>.

¹⁶⁵ Belta.by, “That is it from here. We have nowhere to retreat, and we are not going to retreat,” Lukashenka warned the rioters, Oct 30, 2020, available at <https://www.belta.by/president/view/dalshe-vse-nam-otstupat-nekuda-i-my-otstupat-ne-sobiraemsja-lukashenko-predupredil-uchastnikov-413359-2020/>.

¹⁶⁶ TASS, Lukashenka said he personally gave commands to suppress protests after the election, Aug 9, 2021, available at <https://tass.ru/mezhdunarodnaya-panorama/12090333>.

¹⁶⁷ BBC.News, Belarus’s Lukashenko tells BBC: We may have helped migrants into EU, Nov 19, 2021, available at <https://www.bbc.com/news/world-europe-59343815>.

“As the president said, if someone’s pushing toward you — use non-lethal weapons. Point-blank [at] the legs, stomach, balls. So that he [the protester] understands what he’s done after he regains consciousness. Just injure him in some way: either cripple him, mutilate him, or kill him. Use your weapon [to shoot] right in the forehead, right in the face, right to the point of no return to the condition he was in beforehand.

If they resuscitate him, alright then. He’ll be missing half his brain, well, good riddance. (...) These are superfluous people in our country.”¹⁶⁸

In the context of the unfolding repressions against representatives of the church and national minorities of Poles and Lithuanians, perceived by the authorities as opposition-minded, Volha Barko, the head of the sector for ideological work and youth affairs of Iyve District, said:

“The use of the Polish language during services in the Catholic churches of the region remains a problem, which is unacceptable according to the Law of the Republic of Belarus On Languages in the Republic of Belarus.”¹⁶⁹

These public statements by high officials are evidence of a deliberate State policy to attack the opposition-minded Belarusian civilian population.

Hate propaganda through the media

Another element of State policy of the attack directed against the civilian population in Belarus is the hate propaganda against opposition-minded civilians disseminated through the state media.

With the outbreak of the protests in August 2020, the rhetoric of Belarusian state television became deliberately violent and aggressive. It was used to incite punitive operations and coordinate attacks of Lukashenka’s supporters on internal “enemies.” In its language, state television started to dehumanize those participating in pro-democratic activism. It called for violence against political, national, ethnic, and linguistic groups of “traitors” (foremost – Poles and Lithuanians) and critics of Lukashenka.

State media, especially the three major television companies, BTRC (and its subdivision ATN), CTV, and ONT, deliberately demanded political repressions against civilians, incited politically-motivated violence, targeted ethnolinguistic and religious minorities, and promoted psychiatric isolation of political opponents and extrajudicial reprisals, including the public hanging of pro-democratic activists.

Banning professional activities

One of the components of the state policy of attack in the context of crimes against humanity in Belarus are measures related to the ban on professional activities through the denial of

¹⁶⁸ *Use your weapon’ Leaked recording implicates Lukashenko in authorizing use of lethal force against Belarusian protesters*, Meduza.io, January 15, 2021, available at <https://meduza.io/en/feature/2021/01/15/use-your-weapon>.

¹⁶⁹ *Nasha Niva, Officials called it illegal to hold services in churches in Grodno region in the Polish language*, Mar 01, 2023, available at <https://nashaniva.com/ru/311385>.

licensing or direct dismissal of opposition-minded employees of the public sector. They particularly pertain to lawyers, journalists, medical workers, athletes, students, and artists.

As of 15 April 2023, there are ten Belarusian lawyers who are subject to criminal prosecution and about 90 lawyers who are deprived of the right to practice their profession.¹⁷⁰ Before the protests, the number of Belarusian lawyers willing and able to assist victims already was, with one lawyer for about 5,000 persons, very low,¹⁷¹ and has dramatically decreased since the 2020 protests. As a result, it has become almost impossible to ensure legal representation and accountability in cases of human rights violations.¹⁷²

Journalists are also systematically prevented from practicing their profession. In December 2021, the Committee to Protect Journalists reported that Belarus ranked 5th in the world in terms of the number of imprisoned journalists. According to Reporters without Borders, as of 1 June 2023, there were 37 imprisoned media staff (of which 33 journalists) in Belarus.¹⁷³ Belarus ranks 157 in the world out of 180 in the media freedom index, while becoming the most dangerous country for journalists in Europe to work since 2020.¹⁷⁴ This is partly the result of the laws passed to suppress independent media.

According to the Belarusian Medical Solidarity Foundation, at least 205 medical workers were dismissed based on their civic position as of November 2022. Furthermore, criminal cases were filed against at least 17 Belarusian medical workers. The minimum sentence received was 1,5 year-imprisonment, the maximum was 6 years.¹⁷⁵

The Belarusian Sport Solidarity Foundation documented that more than 30 political prisoners are athletes repressed based on their statements that were critical on the state policy since 2020.¹⁷⁶

For the year 2021, the Belarusian Students Association collected 492 cases of politically motivated detention of students, 246 cases of dismissals, and 52 cases of criminal prosecution.¹⁷⁷ At the same time, Tatiana Shchytsova, the representative for education and

¹⁷⁰ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 86, U.N. Doc A/HRC/53/53, May 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/083/75/PDF/G2308375.pdf?OpenElement>.

¹⁷¹ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para. 60, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

¹⁷² Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, p 11, U.N. Doc A/HRC/53/53, May 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/083/75/PDF/G2308375.pdf?OpenElement>.

¹⁷³ Reporters Without Borders, *Score Global*, 2023, available at <https://rsf.org/fr/classement>.

¹⁷⁴ Reporters Without Borders, *Score Global*, 2023, available at <https://rsf.org/fr/classement>.

¹⁷⁵ The Belarusian Medical Initiative “White Coat” (“Белые Халаты”), *The Medical Solidarity Foundation shared with us data on repressed medical workers*, Nov 16, 2022, available at https://t.me/belhalat_by/7962.

¹⁷⁶ The Belarusian Sport Solidarity Foundation, *The BSSF statement to the Team USA and Olympics positions regarding the participation of Russia and Belarus athletes in the 2024 Paris Games, or any other international sports competition, in a neutral capacity*, Dec 13, 2022, available at <https://www.facebook.com/bssfbel/posts/pfbid0Sou6yTzz1weApRr8dgsCaF69y1inMCWSWDnGaS9L29C8tj1W6QWQ4MhhzDYc3Sbrl>.

¹⁷⁷ The Belarusian Student Association, *The data on repressions towards students*, Nov 12, 2021, available at https://zbsunion.by/news/pressure_on_students.

science of Sviatlana Tsikhanouskaya Office, declared that more than 1,500 students and professors became victims of repressions.¹⁷⁸

As of March 2021, the Pen-Center.by monitored 33 cases of political imprisonment of the Belarusian culture professions.¹⁷⁹

Removing opposition-minded civilians from their profession and civic engagement is another key element through which the Belarusian government attacks its civilian population. It is therefore another indicator for the “State policy” element.

The authors of this report conclude that the above policies demonstrate that the Belarusian authorities actively promote or encourage the attack directed against the civilian population in Belarus and qualify as a state policy in accordance with the contextual elements for crimes against humanity.

¹⁷⁸ The Sviatlana Tsikhanouskaya Office, “*More than 1,500 students and professors have been victims of repression.*” *Appeal to the International Academic Community*, available at <https://tsikhanouskaya.org/ru/events/video/aed38f964a983e3.html>.

¹⁷⁹ Human Rights Center Viasna, *There are 33 political prisoners of culture in Belarus. Pen-Center Monitoring of Cultural Rights Violations*, May 6, 2021, available at <https://spring96.org/ru/news/103268>.

Chapter 5 – Physical Elements

Article 7(1) RS lists as crimes against humanity the following acts: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance, apartheid, and other inhumane acts. Each of these acts have different elements, which are provided in an annex to the Rome Statute that is called “Elements of Crimes.”¹⁸⁰

Each of these acts listed in Article 7(1) RS may amount to crimes against humanity, but they are also acts prohibited under human rights law. Importantly, the thresholds for criminal liability of such acts are different from the requirements for human rights violations established in human rights law. This means that human rights violations do not necessarily qualify as “crimes” under international criminal law. For instance, the crime of rape and sexual violence as a crime against humanity has a higher threshold of gravity and is narrower in scope than the human rights violations of gender-based violence as prohibited under human rights law.¹⁸¹

This report limits its discussion to those violations for which the authors have found reasonable grounds to believe that they amount to crimes against humanity on the basis of publicly available sources. Further investigation will have to examine these violations in more detail as well as who are responsible for them.

In addition to finding that there are reasonable grounds to believe that the requisite contextual elements for crimes against humanity are satisfied (Chapter 4), the authors of this report found that there are reasonable grounds to believe that the following crimes were committed against the Belarusian population and that they amount to crimes against humanity: imprisonment (section 5.1); torture (5.2); murder (5.3); rape and other grave forms of sexual violence (5.4); enforced disappearance (5.5); persecution (5.6); and deportation (5.7).

5.1 Imprisonment

International Legal Framework

The Rome Statute recognizes not only imprisonment but the material elements include also “other severe deprivation of physical liberty.” Moreover, imprisonment as a crime against humanity has to be “in violation of fundamental rules of international law.”¹⁸²

Imprisonment as a crime against humanity has been considered by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Dario Kordic, Mario Cerkez case*. It stated that imprisonment “should be understood as arbitrary imprisonment” and defined this as “the deprivation of liberty of the individual without due process of law.”¹⁸³ A deprivation of

¹⁸⁰ International Criminal Court, *Elements of Crimes*, 2013, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

¹⁸¹ Gloria Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law*, 96 *International Review of the Red Cross* 503, 510 (2014), available at <https://international-review.icrc.org/sites/default/files/irc-894-gaggioli.pdf>.

¹⁸² *Rome Statute of the International Criminal Court*, art. 7(1)(e), (Multilateral, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

¹⁸³ *The Prosecutor v. Dario Kordic, Mario Cerkez*, Case No IT-95-14/2-T, para 302, Judgment, Feb 26, 2001, available at <https://www.refworld.org/cases,ICTY,41483e9be.html>.

liberty will be arbitrary and unlawful “if no legal basis can be called upon to justify the initial deprivation of liberty.”¹⁸⁴

Not every minor procedural defect makes a detention “arbitrary.” It requires significant infringements. According to the Human Rights Committee, “the notion of ‘arbitrariness’ is not to be equated with ‘against the law,’ but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.”¹⁸⁵

The deprivation of liberty may only be lawful following a decision of an independent and impartial judicial body.¹⁸⁶ The Human Rights Committee held that this requirement is breached when the evaluation of evidence was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality.¹⁸⁷

Three categories can be distinguished on the basis of which an imprisonment may qualify as a crime against humanity:¹⁸⁸

- 1) Absence of a legal basis;
- 2) Deprivation of liberty caused by the exercise of fundamental political rights and freedoms (“political prisoners”);
- 3) When international fair trial rights are sufficiently violated to give the deprivation of liberty an arbitrary character.

Analysis

There have been many reports on mass arbitrary imprisonment in Belarus.¹⁸⁹ For instance, in July 2021, the United Nations (UN) Special Rapporteur on the situation of human rights in Belarus, Anaïs Marin, noted that there had been over 35,000 cases of arbitrary arrests in Belarus.¹⁹⁰ This number resembles estimates by other organizations which range between 30,000 and 33,000 cases as a minimum.¹⁹¹

¹⁸⁴ *The Prosecutor v. Milorad Krnojelac*, Case IT-97-25-T, para 114, Judgment, Mar 15, 2002, available at <https://www.refworld.org/cases ICTY 414806c64.html>.

¹⁸⁵ Human Rights Committee of the United Nations. *General comment No. 35 on Article 9, Liberty and security of person*, para 12, available at <https://www.ohchr.org/en/calls-for-input/general-comment-no-35-article-9-liberty-and-security-person>.

¹⁸⁶ International Covenant on Civil and Political Rights (ICCPR), art 9, art 14, (Multilateral, 1966), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

¹⁸⁷ Selected Decisions of the Human Rights Committee under the Optional Protocol, pages 139-140, the United Nations, Volume 8, 2007, available at <https://www.ohchr.org/sites/default/files/Documents/Publications/SDecisionsVol8en.pdf>.

¹⁸⁸ Report of the UN Working Group of Arbitrary Detention, para 8, UN Doc. E/CN.4/1998/44 (1998), available at https://ap.ohchr.org/documents/alldocs.aspx?doc_id=1140.

¹⁸⁹ Mrs Anaïs Marin, *UN Special Rapporteur on the situation of human rights in Belarus, at the Urgent Debate on the situation of human rights in Belarus, Human Rights Council 45th session*, Sep 18, 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26261&LangID=E>.

¹⁹⁰ United Nations Human Rights Office of the High Commissioner, *Over the Past Year, More than 35 000 People have been Arbitrarily Detained in Belarus, Special Rapporteur on Belarus tells Human Rights Council*, Jul 05, 2021, available at <https://www.ohchr.org/en/2021/07/over-past-year-more-35000-people-have-been-arbitrarily-detained-belarus-special-rapporteur>.

¹⁹¹ Aleksander Brezar & Euronews, *Two Years after Belarus Election, ‘Torch of Freedom’ burning, Genocide Watch*, Aug. 19, 2022, available at <https://www.genocidewatch.com/single-post/two-years-after-belarus-election-torch-of-freedom-burning>; Human Rights Center Viasna, *Human Rights Situation in Belarus in 2020*, available at https://spring96.org/files/reviews/en/review_2020_en.pdf.

For example, the International Committee for the Investigation of Torture in Belarus found that, in the period from 9 August 2020 to 9 August 2021, over 35,000 people were deprived of their liberty all over Belarus in the context of their protest activity.¹⁹² Viasna reported that authorities detained a minimum of 8,712 people in connection with the protests between November 2020 and October 2021.¹⁹³ The Belarusian Prosecutor General's Office reported in May 2021 that the Prosecution has submitted criminal cases against 944 people for acts related to the protests.¹⁹⁴ The OHCHR also found that "by the end of 2021, 969 persons (858 men and 111 women) were in prison on seemingly politically motivated charges. Of those sentenced, several received prison terms of 10 years or more."¹⁹⁵

Viasna reported that in 2022 alone, 6,381 persons were arrested for the exercise of their rights and freedoms. Moreover, in 2022, at least 1,242 persons were convicted on politically motivated criminal charges; and a total of at least 2,627 individuals were convicted for activities related to the protests of 2020.¹⁹⁶

Imprisonment was already a main method of repression in Belarus before the 2020 election campaign started. However, in the beginning of the 2020 election campaign the numbers of imprisonments significantly increased, and then surged after the elections on 9 August 2020. According to the UN Special Rapporteur, in the repression against peaceful protests, 1,500 persons were arrested before the election and more than 10,000 directly after the election until the end of October 2020.¹⁹⁷ People were generally not informed of the reasons for detention, and then often had to sign an arrest record (protocols of detention) while being beaten. Families were not informed and no access to lawyers was granted.¹⁹⁸

The politically motivated imprisonment still continues in 2023. Viasna reports that, as of 31 January 2023, there are 1,436 political prisoners in Belarus.¹⁹⁹ As of 31 May 2023, approximately 1,500 persons in Belarus are considered as political prisoners.²⁰⁰ These people

¹⁹² International Committee for the Investigation of Torture in Belarus, *Belarus: Crimes Against Humanity*, p 21, available at <https://torturesbelarus2020.org/wp-content/uploads/2022/12/belarus-crimes-against-humanity-1.pdf>.

¹⁹³ Human Rights Watch, *World Report 2022. Events of 2021*, p. 81-82, available at https://www.hrw.org/sites/default/files/media_2022/01/World%20Report%202022%20web%20pdf_0.pdf.

¹⁹⁴ Official portal of General Prosecutor's Office of the Republic of Belarus, *Prosecutor General's Office: the number of unauthorized mass events detected is growing*, May 21, 2021, available at <http://prokuratura.gov.by/ru/media/novosti/genprokuratura-vozrastaet-chislo-vyyavlennykh-uchastnikov-nesanktsionirovannykh-massovykh-meropriyat/>.

¹⁹⁵ The United Nations High Commissioner for Human Rights, *Report Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 73, U.N. Doc. A/HRC/49/71, Mar 4, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/276/97/PDF/G2227697.pdf?OpenElement>.

¹⁹⁶ Human Rights Center Viasna, *Human Rights Situation in Belarus in 2022*, p. 3, available at https://spring96.org/files/misc/annual_review_2022_final_en.pdf.

¹⁹⁷ Mrs Anaïs Marin, *UN Special Rapporteur on the situation of human rights in Belarus, at the Urgent Debate on the situation of human rights in Belarus, Human Rights Council 45th session*, Sep 18, 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26261&LangID=E>.

¹⁹⁸ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, p. 32, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

¹⁹⁹ Human Rights Centre Viasna, *Human Rights Situation in Belarus: January 2023*, Feb 3, 2023, available at <https://spring96.org/en/news/110640>.

²⁰⁰ Human Rights Center Viasna, *The list of the political prisoners in Belarus, 2023*, available at <https://prisoners.spring96.org/en>.

are from different regions of Belarus and are of different professions, such as bloggers, businessmen, presidential campaign members, peaceful protesters, journalists,²⁰¹ and lawyers. They have in common that they are perceived by the authorities as opposition-minded.²⁰²

On 15 March 2023, the Law and Democracy Center published a report that outlines how the judicial system became the main instrument for the arbitrary imprisonment and deprivation of liberty of opposition-minded civilians.²⁰³ The Venice Commission also concluded that the judicial bodies in Belarus are not independent and impartial from the power of the President.²⁰⁴ Moreover, the OHCHR found numerous violations of the rights to due process and to a fair trial in both administrative and criminal cases.²⁰⁵ Particularly, it noted that “[l]awyers’ access to their clients was obstructed, defendants were not able to talk to their lawyers confidentially, and lawyers were denied adequate access to files or sufficient time to consult them and prepare their defense. Prosecution witnesses often testified anonymously via Skype.”²⁰⁶

It is the lack of due process in combination with judicial bodies’ dependence on the executive power that has allowed that the judiciary have become to the main instrument in the commission of the crime of against humanity of (arbitrary) imprisonment.

5.2 Torture

International Legal Framework

According to the Rome Statute, “‘torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”²⁰⁷

Thus, this definition provides two elements to identify torture: the infliction of severe physical or mental pain or suffering (*actus reus*) and that such infliction is directed against a person in custody or under the control of the perpetrator (status of victim and perpetrator).

²⁰¹ Further on prosecution of journalists, Law and Democracy Center, *Report “Crimes against humanity in the Republic of Belarus: Politically motivated systematic prosecution of journalists (June 2020 – September 2022)”*, Oct 11, 2022, available at <https://ldc-jh.eu/crimes-against-humanity-in-the-republic-of-belarus-politically-motivated-systemic-prosecution-of-journalists-june-2020-september-2022-ru/>.

²⁰² Law and Democracy Center, *Report “Crimes against humanity in the Republic of Belarus: Politically motivated systematic prosecution of journalists (June 2020 – September 2022)”*, Oct 11, 2022, available at <https://ldc-jh.eu/crimes-against-humanity-in-the-republic-of-belarus-politically-motivated-systemic-prosecution-of-journalists-june-2020-september-2022-ru/>.

²⁰³ Law and Democracy Center, *Report “Right to a fair trial and due process in Belarus after 2020 presidential elections”*, p. 50, Mar 15, 2022, available at, <https://ldc-jh.eu/report-right-to-a-fair-trial-and-due-process-in-belarus-after-2020-presidential-elections/>.

²⁰⁴ Venice Commission, *Belarus - Final Opinion on the Constitutional Reform*, para 70, Oct 22, 2022, available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2022\)035-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2022)035-e).

²⁰⁵ The United Nations High Commissioner for Human Rights, *Report Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 60, U.N. Doc. A/HRC/49/71, Mar 4, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/276/97/PDF/G2227697.pdf?OpenElement>.

²⁰⁶ The United Nations High Commissioner for Human Rights, *Report Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 60, U.N. Doc. A/HRC/49/71, Mar 4, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/276/97/PDF/G2227697.pdf?OpenElement>.

²⁰⁷ *Rome Statute of the International Criminal Court*, art. 7(2)(e), (Multilateral, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

With regard to the severity threshold, the ICC provided that “an important degree of pain and suffering has to be reached.”²⁰⁸ In determining whether a particular form of ill-treatment may be qualified as torture, the European Court of Human Rights stated that assessments depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim.²⁰⁹

Analysis

In Belarus, law enforcement officers have widely and systematically used the following means and methods of treatment and interrogation of detained civilians that are perceived as opposition-minded that were in their custody or under their control: severe beatings, sexual violence and forced nudity, handcuffing, hooding, stretching, stun guns, other forms of physical violence, deprivation of sleep, chemical compounds, mental torture (threats to life and health of detainee and his family). Such processes of mistreatment and interrogations are long-lasting, cause devastating physical and mental effects, and are used regardless of the health, gender and age of the victim.

Civil society organizations have collected large amounts of testimonies from victims of torture.²¹⁰ On June 24, 2021, Anaïs Marin released a statement noting that investigative bodies in Belarus had received 4,644 complaints about Belarusian officials using physical force and special measures against protesters.²¹¹ The witness testimonies collected by the International Partnership for Human Rights confirm that the conditions in detention centers most likely amount to torture, which does not appear to relate to isolated incidents.²¹² The government has admitted to rejecting such complaints.²¹³

Instead, the Belarusian authorities reportedly seek out and persecute human rights, labor, and political activists, lawyers, and companies.²¹⁴ Between May and October 2020 alone, local

²⁰⁸ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision, para 193, (Jun 15, 2009), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF.

²⁰⁹ *Satybalova and Others v. Russia*, para 76, Judgment, Jun 30, 2020, available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-203313%22%7D>.

²¹⁰ Human Rights Center Viasna, *Human Rights Situation in Belarus in 2020. Analytical Review by Viasna*, Jan 8, 2021, available at <https://spring96.org/en/news/101223>.

²¹¹ Ms Anaïs Marin, Statement of the Special Rapporteur on Belarus, at “New Belarus against Torture” event dedicated to the International Day in Support of Victims of Torture, Jun 25, 2021, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27213&LangID=E>.

²¹² International Partnership for Human Rights, *Communication Submitted Under Article 15(2) of the Rome Statute of the International Criminal Court: The Situation in Belarus/Lithuania/Poland/Latvia and Ukraine: Crimes Against Humanity of Deportation and Persecution*, May 2021, available at https://www.iphronline.org/wp-content/uploads/2021/05/BY_ICC_Submission.pdf.

²¹³ Investigatory Committee of the Republic of Belarus. *Investigatory Committee Nearly 5,000 people allegedly injured by police in the summer and fall of 2020. Why cases were denied*, Aug 26, 2021, available at <https://sk.gov.by/ru/news-ru/view/pochti-5-tysjach-chelovek-jakoby-postradavshix-ot-militsii-letomoseniju-2020-go-pochemu-otkazano-v-10349/>.

²¹⁴ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 13, U.N. Doc A/HRC/53/53, May 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/083/75/PDF/G2308375.pdf?OpenElement>; Human Rights Centre Viasna, *Human Rights Situation in Belarus: June 2021*, Jul 03, 2021, available at <https://spring96.org/en/news/104120>; Human Rights Center Viasna, *Human Rights Situation in Belarus in 2020, Analytical Review by Viasna*, Jan 8, 2021, available at <https://spring96.org/en/news/101223>.

monitoring organizations documented over 400 instances of harassment, including torture, arrests, and ill-treatment, of media workers aimed to prevent uncensored reporting.²¹⁵

Human rights organizations, including Amnesty International and the International Partnership for Human Rights, also note instances of the Belarusian authorities acting against students, academics, journalists, athletes, religious and cultural figures, NGO members, employees of state enterprises, and political figures for supporting the protests or speaking out against the authorities.²¹⁶ The World Organization Against Torture (OMCT) report includes a selection of torture cases for “public investigation,” patterns of torture and other human rights violations.²¹⁷ This includes sexual gender-based violence against both women and men.²¹⁸ Until the end of 2021, OMCT and its partners had also collected more than 2,500 testimonies from torture victims.²¹⁹ Other organizations, such as the OSCE Moscow Mechanism,²²⁰ Human Rights Watch,²²¹ and Amnesty International²²² have collected similar evidence that suggests that Belarusian authorities’ acts may qualify as crimes against humanity.

The next sub-sections discuss fact-findings related to specific forms of torture.

Severe Beatings

Severe beatings have been found to be a form of torture in a number of cases by international criminal tribunals²²³ as well as by human rights courts.²²⁴

According to the International Committee for Investigation of Torture in Belarus (ICIT), in the context of attacks against the civilian population after August 9, 2020, “seventy-six percent of

²¹⁵ Amnesty International, *Amnesty International Report 2020/21: The State of the World’s Human Rights, April 2021*, p. 83-85, Apr 7, 2021, available at <https://www.amnesty.org/en/documents/pol10/3202/2021/en/>.

²¹⁶ International Partnership for Human Rights, *Communication Submitted Under Article 15(2) of the Rome Statute of the International Criminal Court: The Situation in Belarus/Lithuania/Poland/Latvia and Ukraine: Crimes Against Humanity of Deportation and Persecution*, May 2021, available at https://www.iphronline.org/wp-content/uploads/2021/05/BY_ICC_Submission.pdf; Amnesty International, *Amnesty International Report 2020/21: The State of the World’s Human Rights, April 2021*, Apr 7, 2021, available at <https://www.amnesty.org/en/documents/pol10/3202/2021/en/>.

²¹⁷ World Organization Against Torture, *Belarus: Corridor of Truncheons. How Popular Demonstrations are met with Massive Police Violence and Denial of Justice*, Jan 26, 2021, available at https://www.omct.org/site-resources/files/Doklad_en_Web.pdf.

²¹⁸ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 45, U.N. Doc. A/HRC/47/49, May 4, 2021, available at <https://undocs.org/A/HRC/47/49>.

²¹⁹ The World Organisation Against Torture, *Belarus: Human Rights Crisis Still Ongoing*, Jul 05, 2021, available at <https://www.omct.org/en/resources/news/belarus-human-rights-crisis-still-ongoing>.

²²⁰ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, p. 41-44, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

²²¹ Human Rights Watch, *World Report 2021, Belarus, Events of 2020*, available at <https://www.hrw.org/world-report/2021/country-chapters/belarus>.

²²² Amnesty International, *Belarus: “You Are Not Human Beings”: State-sponsored Impunity and Unprecedented Police Violence Against Peaceful Protesters*, Jan 2021, available at <https://eurasia.amnesty.org/wp-content/uploads/2021/01/belarus-you-are-not-human-beings.pdf>.

²²³ See for instance, *the Prosecutor v. Anto Furundzija*, Case No IT-95-17/1-T, p. 26, 117, Judgment, Dec 10, 1998, available at <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>; *the Prosecutor v. Martić*, Case No IT-95-11-T, para 76, Judgment, Jun12, 2007, available at <https://www.icty.org/x/cases/martic/tjug/en/070612.pdf>.

²²⁴ See for instance, *Satybalova and Others v. Russia*, para 76, Judgment, Jun 30, 2020, available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-203313%22%5D%7D>

individuals claim to have been beaten with fists, kicks and batons while mostly lying face down during transportation to the detention facility often in a so-called paddy – a large truck several meters in length used to transport prisoners, frequently used by the riot police.”²²⁵

Many victims noted the practice of so-called death corridors or beating checkpoints, which were narrow roads to the interior of penitentiaries, along which law enforcement officers stood in line, brutally beating passing detainees.²²⁶

Detailed analysis of visual and medical evidence carried out by ICIT demonstrates that the type, extent and location of injuries also bear striking similarity for all victims.²²⁷ There were documented injuries of lower limbs in ninety-two percent of the cases, injuries of the glutei and buttocks in seventy-two percent of cases, and injury of the back in sixty-six percent of the cases.²²⁸

Such beatings of a victim lasted up to several hours.²²⁹ All requests of the detainees for medical assistance were ignored, even if the injuries threatened the health and life of the detainees.²³⁰

Beatings are widely practiced specifically against civilians that are perceived as opposition-minded as a means of extracting confessions or information during interrogations.²³¹ Particularly, on 20 September 2022, during a trial in Minsk Centralny District Court, Anatol Latushka, cousin of politician Pavel Latushka and seemingly persecuted for this family connection to one of the opposition leaders, evidences the use of physical force against him during pre-trial interrogation:

“[I] was brought to an office on the fourth floor, and the officers there started talking to me. An officer put a plastic bag on my head twice, and they explained that they wanted to get some information from me that I myself did not know. One of the officers took a truncheon in his hands and started threatening to... [the judge omitted a part of the text]... Something about hitting, at least 50 blows... They wanted to get information about some Telegram channels. Because of the physical pressure, I agreed to give the testimony they demanded.”²³²

²²⁵ International Committee for the Investigation of Tortures in Belarus, *Belarus: A Coordinated Policy of Torture*, p. 9, available at https://torturesbelarus2020.org/wp-content/uploads/2023/03/belarus_coordinated_policy_of_torture-1.pdf.

²²⁶ International Committee for the Investigation of Tortures in Belarus, *Belarus: A Coordinated Policy of Torture*, p. 10, available at https://torturesbelarus2020.org/wp-content/uploads/2023/03/belarus_coordinated_policy_of_torture-1.pdf

²²⁷ International Committee for the Investigation of Tortures in Belarus, *Belarus: A Coordinated Policy of Torture*, p. 14-15, available at https://torturesbelarus2020.org/wp-content/uploads/2023/03/belarus_coordinated_policy_of_torture-1.pdf

²²⁸ International Committee for the Investigation of Tortures in Belarus, *Belarus: A Coordinated Policy of Torture*, p. 13, available at https://torturesbelarus2020.org/wp-content/uploads/2023/03/belarus_coordinated_policy_of_torture-1.pdf

²²⁹ International Committee for the Investigation of Tortures in Belarus, *Belarus: crimes against humanity*, p. 72-73, available at <https://torturesbelarus2020.org/wp-content/uploads/2022/12/belarus-crimes-against-humanity-1.pdf>.

²³⁰ International Committee for the Investigation of Tortures in Belarus, *Mass Torture in Belarus 2020*, p.17, available at https://torturesbelarus2020.org/wp-content/uploads/2022/12/ictb_report_2_eng-1.pdf.

²³¹ Human Rights Center Viasna, *Human rights situation in Belarus 2022*, p. 12, available at https://spring96.org/files/misc/review_2021_en.pdf; Human Rights Center Viasna, *Tortures continue in detention: the most notable cases in 2022*, Dec 30, 2022, available at <https://spring96.org/en/news/110290>.

²³² Human Rights Center Viasna, *Tortures continue in detention: the most notable cases in 2022*, Dec 30, 2022, available at <https://spring96.org/en/news/110290>.

Sexual violence. Forced Nudity

Tribunal case law has recognized that rape can constitute a form of torture.²³³ Human rights courts similarly found that rape,²³⁴ forced nudity²³⁵ and other forms of sexual violence²³⁶ may constitute forms of torture.

The section “rape and other forms of sexual violence” as a separate crime against humanity discusses more details of sexual violence committed in the Belarus. They should also be investigated by prosecutorial authorities in the context of “torture” since they appear to have also been committed on a widespread and systematic attack in the form of torture.

Forty cases of forced nudity were documented by the OHCHR, which also found another 137 cases documented by civil society organizations to be credible.²³⁷ These cases included detainees being naked during transfers between prison facilities sections and, in some cases, even while appearing before a judge.²³⁸

The victims interviewed by the OHCHR noted that the rape and other forms of such violence were most often committed by high-ranking officers or those in command or under their supervision.²³⁹

Handcuffing. Hooding. Stretching. Stun guns. Other Forms of Physical Violence

The European Court of Human Rights recognized as torture such severe forms of physical violence as strappado (reversed hanging or “Palestinian hanging”),²⁴⁰ handcuffing and hooding.²⁴¹

²³³ *Prosecutor v Jean-Paul Akayesu*, Case No ICTR-96-4, para 597, Judgment, Sep 2, 1998, available at <https://www.refworld.org/cases,ICTR,40278fbb4.html>; the *Prosecutor Zejnil Delalic, Zdravko Mucic also Known As “Pavo” Hazim Delic Esad Landzo also known as “Zenga”*, Case No IT-96-21-T, para 495, Judgment, Nov 16, 1998, available at https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf.

²³⁴ *Affaire Aydin c. Turquie*, No 57/1996/676/866, para 83-87, Judgment, Sep 25, 1997, available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-62660%22%7D%7B%22ref%22:%5B%22%22%22%7D%7B%22itemid%22:%5B%22001-62660%22%7D%7D%7D>; *Raquel Martí de Mejía v. Perú*, Case 10.970, Mar 1, 1996, available at <http://hrlibrary.umn.edu/cases/1996/peru5-96.htm>.

²³⁵ *Affaire Aydin c. Turquie*, No 57/1996/676/866, para 64, Judgment, Sep 25, 1997, available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-62660%22%7D%7D%7D>.

²³⁶ *El-Masri v. the Former Yugoslav Republic of Macedonia*, Application No. 39630/09, GC, Judgment, para. 205 (Dec. 13, 2012), available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-115621%22%7D%7D%7D>.

²³⁷ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para. 60, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

²³⁸ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para. 60, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

²³⁹ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para. 46, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

²⁴⁰ *Aksoy v. Turkey*, No 21987/93, para 64, Dec 18 1996, available at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-58003%22%7D%7D%7D>.

²⁴¹ *El-Masri v. the Former Yugoslav Republic of Macedonia*, Application No. 39630/09, GC, Judgment, para. 205 (Dec. 13, 2012), available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-115621%22%7D%7D%7D>.

Moreover, seven to twelve detainees are held in cells with four beds. The detainees were made to sleep on a very cold concrete floor or metal frame, since the mattresses were taken away.²⁵³

As a result of the described conditions of detention some of detainees became hallucinatory and lost consciousness;²⁵⁴ others got hypothermia with no proper medical treatment that was provided.²⁵⁵

Mental torture

The International Criminal Tribunal for Rwanda (ICTR) found that the interrogation of a victim that occurred under threat to her life by Jean-Paul Akayesu constituted torture.²⁵⁶

The use of mental torture by law enforcement agencies was documented by the OHCHR,²⁵⁷ the ICIT,²⁵⁸ and Viasna.²⁵⁹ The most widespread forms of mental torture that are used are threats to be raped and threats or violence against relatives.

For instance, there was reported a case of a woman who was humiliated and threatened to be raped and killed. According to her testimony: “He [policeman] took my phone and sat on me. (...) He took a Vaseline from his pocket and said ‘Do you know what we are going to do with you? We are simply going to rape you.’ (...) They threatened me with death.”²⁶⁰ Similarly, the other victims reported the threats to be raped “altogether” by the CIP officers and to be made “sit on the bottle.”²⁶¹

Political prisoner Pavel Rezanovich evidenced the use of psychological torture alongside with physical abuse. In order to force Rezanovich to sign documents, the officers threatened him to arrest his wife. At the time of interrogation, his mother was being taken along the corridor and was beaten, so that Rezanovich could hear her screams.²⁶²

²⁵³ International Committee for Investigation of Torture in Belarus, *Belarus: crimes against humanity*, p. 92, available at <https://torturesbelarus2020.org/wp-content/uploads/2022/12/belarus-crimes-against-humanity-1.pdf>

²⁵⁴ Human Right Center Viasna, “*Starving and freezing*”. *New evidence of torture and circumstances of Vitold Ashurk’s death in Correctional Facility No. 17*, Mar 29, 2023, available at <https://spring96.org/ru/news/111242>.

²⁵⁵ International Committee for Investigation of Torture in Belarus, *Belarus: crimes against humanity*, p. 92-93, available at <https://torturesbelarus2020.org/wp-content/uploads/2022/12/belarus-crimes-against-humanity-1.pdf>.

²⁵⁶ *The Prosecutor v. Jean-Paul Akayesu*, Case No ICTR-96-4-T, para 682, Judgment, Sep 2, 1998, available at <https://www.refworld.org/cases,ICTR,40278fbb4.html>

²⁵⁷ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 38, para 40, U.N. Doc. A/HRC/47/49, May 4, 2021, available at <https://undocs.org/A/HRC/47/49>

²⁵⁸ International Committee for Investigation of Torture in Belarus, *Belarus: crimes against humanity*, p.21, available at <https://torturesbelarus2020.org/wp-content/uploads/2022/12/belarus-crimes-against-humanity-1.pdf>.

²⁵⁹ Human Rights Center Viasna, *16 Days of Activism: Unite to End Violence Against Women*, Nov 25, 2022, available at <https://spring96.org/ru/news/109942>.

²⁶⁰ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, p. 46, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

²⁶¹ International Committee for Investigation of Torture in Belarus, *Mass torture in Belarus 2020*, p. 17, available at https://torturesbelarus2020.org/wp-content/uploads/2022/12/ictb_report_3_eng-1.pdf.

²⁶² Human Rights Center Viasna, *How political prisoners were tortured in Belarus in 2022 - we recall the most high-profile cases*, Dec 29, 2022, available at <https://spring96.org/ru/news/110275>.

Riot control agents and chlorine

Law enforcement officers resort to wide and systematic use of riot control agents (RCA) and chlorine against opposition-minded civilians in a manner which causes severe physical and psychological pain and suffering to victims.

This practice occurs not only during the arrests but also there is also evidence that chemicals are used in detention centers. For example, political prisoner Mikalai Dziadok testified in court that law enforcement officers made him sign documents while being beaten and that he was then locked up in a storage room that was filling with pepper spray. In addition, shortly thereafter, an officer sprayed tear gas in Dziadok's face four times.²⁶³ Moreover, there are cases when gas was sprayed into the ventilation system of detention facilities,²⁶⁴ and chlorine was poured into cells floor²⁶⁵ and on personal belongings of detainees.²⁶⁶ Viasna reported that political prisoner Nikolai Kozlov was taken to the hospital because of chlorine poisoning: in a single cell, where eight people were held, twenty liters of concentrated chlorine solution were deliberately poured on the floor.²⁶⁷

5.3 Murder

International Legal Framework

Murder as a crime against humanity includes two material elements: the death of the victim, and the fact that the victim's death must have been caused by an act or omission of the perpetrator.²⁶⁸ The physical elements of murder as a crime against humanity provide that the killing of one person in the context of an attack against civilians may be sufficient to amount to a crime against humanity.²⁶⁹ Hence even one homicide of a civilian by government agents in such a context may be evidence of this crime.

Analysis

Several civilians have been killed in the context of the attack directed against the civilian population in Belarus as a result of the action or omission of law enforcement officers. In 2020, homicides of opposition-minded civilians occurred predominantly as a result of the excessive

²⁶³ Human Rights Center Viasna, *"They strangled me with a pillow and put a bottle in my mouth."* At the trial political prisoner Dedok told about torture and beatings, Jul 01, 2021, available at <https://spring96.org/ru/news/104085>.

²⁶⁴ Human Rights Center Viasna, *"Gas sprayed into ventilation reached us": Akrestsina facilities detention conditions throughout 2022 in detainees own words*, Jan 11, 2023, available at <https://spring96.org/en/news/110396>.

²⁶⁵ Human Rights Center Viasna, *Belarusians on the "roof": how political prisoners continue to be persecuted in colonies*, Jan 29, 2023, available at <https://spring96.org/ru/news/107187>.

²⁶⁶ Human Rights Center Viasna, *Maksim Urbanovich stated about torture in the TsIP on Akrestsina, Pavel Severinets is also tortured*, Jun 15, 2020, available at <https://spring96.org/ru/news/97578>.

²⁶⁷ Human Rights Center Viasna, *In Akrestsina the cells are filled with chlorine, in Zhodzina they are beaten, in Mahiliou they are woken up in the middle of the night. In what conditions are the detainees held?*, Apr 06, 2021, available at <https://spring96.org/ru/news/102802>

²⁶⁸ Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, para. 132, (Jun. 15, 2009), available at <https://www.icc-cpi.int/court-record/icc-01/05-01/08-424>.

²⁶⁹ Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, para. 423, (Sep. 30, 2008), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF.

use of force against protestors. Currently, most of the killed civilians are victims of torture and ill-treatment of civilians in custody, carried out by law enforcement officers.

For instance, on 10 August 2020, Aliaksandr Taraikouski died in Minsk after being shot by law enforcement officers.²⁷⁰ According to the death certificate, his death was a result of massive blood loss from an open chest wound.²⁷¹ Presumably, a fatal wound was inflicted by a rubber bullet from 10-15 meters, which makes such a weapon lethal.²⁷²

On 11 August 2020, Henadz Shutau was wounded in the head by a firearm bullet in Brest and died eight days later in a military hospital.²⁷³

On 28 September 2021, IT-specialist Andrei Zeltser who actively participated in the protest was shot in his apartment when officers of the State Security Committee (KGB) tried to detain him.²⁷⁴ Zeltser resisted the arrest and was armed because the officers behaved like robbers and wore no insignia on their clothes.²⁷⁵ Prior to the attempted arrest that killed him, Zeltser had called the police twice to report that unknown people were breaking into his apartment.²⁷⁶

There are moreover many detained civilians that died as a result of torture and use of force while in custody. Their killings also appear to amount to murder as a crime against humanity. For instance, Aliaksandr Vikhor (12 August 2020, delivered to a tuberculosis clinic in a state of clinical death with a brain edema after detention in Homel),²⁷⁷ Denis Kuznetsov (3 October 2020, Akrestsina Detention Centre, Minsk),²⁷⁸ Raman Bandarenka (12 November 2020, Minsk, delivered to the hospital unconscious after severe beatings from the Central police

²⁷⁰ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, p. 44, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

²⁷¹ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 33, U.N. Doc. A/HRC/47/49, May 4, 2021, available at <https://undocs.org/A/HRC/47/49>.

²⁷² BYPOL, the International Strategic Action Network for Security, *Report: The use of weapons by Belarusian law enforcement agencies to disperse peaceful protests*, available at <https://isans.org/wp-content/uploads/2021/03/the-use-of-weapons-by-belarusian-law-enforcement-agencies.pdf>.

²⁷³ Human Rights Center Viasna, *Three months after, still no justice for people who died in protests*, Nov 11, 2020, available at <https://spring96.org/en/news/100344>.

²⁷⁴ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, p. 12, U.N. Doc. A/HRC/50/58, May 4, 2021, available at <https://digitallibrary.un.org/record/3974497?ln=en>.

²⁷⁵ Voice of Belarus, *KGB officers shoot Minsk resident dead during raid in apartment block*, available at <https://www.voiceofbelarus.org/belarus-news/during-a-raid-in-an-apartment-block-kgb-officers-shot-dead-a-minsk-resident/>.

²⁷⁶ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 33, U.N. Doc. A/HRC/47/49, May 4, 2021, available at <https://undocs.org/A/HRC/47/49>.

²⁷⁷ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, p 6, U.N. Doc. A/HRC/47/49, May 4, 2021, available at <https://undocs.org/A/HRC/47/49>.

²⁷⁸ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, p 45, Nov 5, 2020, delivered to the Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

precinct of Minsk),²⁷⁹ Vitold Ashurok²⁸⁰ (21 May 2021, died in Correctional Colony No. 17 of Shklou under unclear circumstances, however, the body showed signs of severe beatings).²⁸¹

Moreover, the following detained civilians are known to have died in custody or due to the consequences of being in custody where they were denied of proper medical care: Syarhei Shchatsinka (11 December 2020, died of Covid-19 which he contracted while in detention from sharing a cell with infected people and in conditions of denial of medical care),²⁸² Alena Amielina (12 October 2021, died of Covid-19 which she contracted in the Akrestina detention center and she was denied of proper medical care),²⁸³ and Mikalai Klimovich (7 May 2023, died as a result of denial of proper medical care in Viciebsk penal colony No. 3).²⁸⁴

Furthermore, there are many civilians that died under unclear circumstances that human rights groups believe were also attacks on opposition-minded civilians. Some of them were officially labeled as suicides.²⁸⁵ Given the facts discussed in this report, further investigations are warranted to examine the circumstances of their deaths to determine whether they may also qualify as murder as a crime against humanity.

5.4 Rape and Other Grave Forms of Sexual Violence

International Legal Framework

Rape is commonly considered the most severe form of sexual violence. The key distinctive element of rape from other forms of sexual violence, which covers all acts of a sexual nature under coercive circumstances, is penetration.²⁸⁶ The *actus reus* of this crime consists of two elements: i) the perpetrator invaded any part of the body of a victim with a sexual organ or with any object, and ii) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power or by taking advantage of a coercive environment.²⁸⁷ The concept of “invasion” is gender-neutral.²⁸⁸

²⁷⁹ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, p 6, U.N. Doc. A/HRC/47/49, May 4, 2021, available at <https://undocs.org/A/HRC/47/49>.

²⁸⁰ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, p. 11, U.N. Doc. A/HRC/50/58, May 4, 2021, available at <https://digitallibrary.un.org/record/3974497?ln=en>.

²⁸¹ Amnesty International. *Belarus: Peaceful protester held by police after beating dies in hospital*, Nov 13, 2020, available at <https://www.amnesty.org/en/latest/press-release/2020/11/belarus-peaceful-protester-held-by-police-after-beating-dies-in-hospital/>.

²⁸² Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 68, U.N. Doc. A/HRC/50/58, May 4, 2021, available at <https://digitallibrary.un.org/record/3974497?ln=en>.

²⁸³ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 68, U.N. Doc. A/HRC/50/58, May 4, 2021, available at <https://digitallibrary.un.org/record/3974497?ln=en>.

²⁸⁴ Human Rights Center Viasna, *Political prisoner Mikalai Klimovich dies in Viciebsk colony*, May 8, 2023, available at <https://spring96.org/en/news/111635>.

²⁸⁵ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 69, U.N. Doc. A/HRC/50/58, May 4, 2021, available at <https://digitallibrary.un.org/record/3974497?ln=en>; Dissident.By. *Victims of the regime project*, 2023, available at <https://dissidentby.com/en/victims>.

²⁸⁶ Maria Sjöholm, *Commentary to the art 5, Rome Statute of the International Criminal Court*, (Multilateral, 1998), available at <https://www.casematrixnetwork.org/index.php?id=335>.

²⁸⁷ International Criminal Court, *Elements of Crimes*, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

²⁸⁸ International Criminal Court, *Elements of Crimes*, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>

The elements of this crime are well-interpreted by international criminal tribunals. The ICTY developed the “force or threat of force”-element with a non-consensual factor.²⁸⁹ The International Criminal Tribunal for Rwanda held that a coercive environment does not require physical force.²⁹⁰

According to the ICC, “threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or military presence.”²⁹¹

With regard to “other form of sexual violence of comparable gravity”, both the ICTY and the ICTR held that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”²⁹²

Analysis

The United Nations High Commissioner for Human Rights documented over 100 cases of sexual and gender-based violence in Belarus and reviewed over 180 additional cases documented by reputable civil society organizations.²⁹³ Moreover, many other reports also detail situations of rape²⁹⁴ and sexual abuse.²⁹⁵

There have been reports that particularly men that are being subjected to sexual abuse.²⁹⁶ The OHCHR documented six cases of rape committed in police vehicles and in police stations against four men and two boys.²⁹⁷ Moreover, there are reports on the targeting of male genitals by the anti-riot police when attacking peaceful protesters with batons, stun guns and other

²⁸⁹ *The Prosecutor v. Kunarac et al*, Case No IT-96-23-T& IT-96-23/1-T, para. 438, Judgment, Feb 22, 2001, available at <https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

²⁹⁰ *The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, para 598, Judgment, Sep 2, 1998, available at <https://www.refworld.org/cases,ICTR,40278fbb4.html>.

²⁹¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, para 440, Decision, Sep 30, 2008, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF.

²⁹² *The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, para 688, Judgment, Sep 2, 1998, available at <https://www.refworld.org/cases,ICTR,40278fbb4.html>; *the Prosecutor v. Miroslav Kvočka, Melojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Pcac*, Case No IT-98-30/1-T, para 180, Judgment, Nov 2, 2001, available at <https://www.icty.org/x/cases/kvočka/tjug/en/kvo-tj011002e.pdf>.

²⁹³ United Nations High Commissioner for Human Rights, *Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 39, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>

²⁹⁴ International Federation for Human Rights, *Belarus - Human Rights NGOs call on torture and arbitrary arrests of peaceful protesters to stop*, Aug 24, 2020, available at <https://www.fidh.org/en/region/europe-central-asia/belarus/belarus-human-rights-ngos-call-on-torture-and-arbitrary-arrests-of>.

²⁹⁵ U.S. Department of State, *2021 Country reports on Human Rights Practices: Belarus*, 2021, available at <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/belarus>.

²⁹⁶ United Nations High Commissioner for Human Rights, *Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 39, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>

²⁹⁷ United Nations High Commissioner for Human Rights, *Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 43, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>

weapons.²⁹⁸ Traumatic injuries to male genitalia include lesions, multiple abrasions and contusions.²⁹⁹

The Committee against Torture or Committee on the Investigation of Torture reported three cases of males' rape. In one case, the victim was placed in a car for transporting prisoners and demanded to unlock his phone. As soon as the victim refused, the security officers called a senior in rank. The officer cut the victim's shorts, pulled a condom on the truncheon and thrust it into his anus. Then the officer took a truncheon out and again demanded a password starting beatings with fists and legs.³⁰⁰

5.5 *Enforced Disappearance*

International Legal Framework

The ICC's definition of enforced disappearance reads as follows: "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."³⁰¹

According to the Committee on Enforced Disappearances, the prohibition of enforced disappearance includes a prohibition of secret detention,³⁰² which has been endorsed by the ICC. When reviewing the allegations on enforced disappearances in *the Decision on the Authorization of an Investigation into the Situation of Burundi*, the ICC held that "oftentimes the manner in which the person is deprived of his or her liberty allows the Chamber to infer the intention to remove the victim from the protection of the law, such as the lack of a court order for the detention; abduction in cars without license plates and with tinted windows; detention in secret, unofficial prisons; non-registration of names of the detainees in official records; or capture in desolate areas."³⁰³

With regard to the "prolonged period of time"-element, the ICC provided that "a period of several months or years certainly fulfills that requirement."³⁰⁴ However, this does not preclude that shorter periods may qualify as a "prolonged" period of time. Thus, for instance, the

²⁹⁸ United Nations High Commissioner for Human Rights, *Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 39, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>

²⁹⁹ United Nations High Commissioner for Human Rights, *Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 39, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>

³⁰⁰ International Committee for Investigation of Torture in Belarus, *Belarus: crimes against humanity*, p.75, available at <https://torturesbelarus2020.org/wp-content/uploads/2022/12/belarus-crimes-against-humanity-1.pdf>

³⁰¹ *Rome Statute of the International Criminal Court*, art 7(2)(i), (Multilateral, 1998), available at <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>

³⁰² The International Convention for the Protection of All Persons from Enforced Disappearance, art 17(1), (Multilateral, 2010), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced>.

³⁰³ *Situation in the Republic of Burundi*, Case No. ICC-01/17-X, para 120, Decision, Oct 25, 2017, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_06720.PDF

³⁰⁴ *Situation in the Republic of Burundi*, Case No. ICC-01/17-X, para 120, Decision, Oct 25, 2017, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2017_06720.PDF

Committee on Enforced Disappearances in the case *Yrusta v. Argentina* concluded that the victim was secretly detained since the relatives did not receive any information about him and were not even told that he had been transferred from one prison to another for more than seven days.³⁰⁵

Considering that the Belarusian authorities actively practice incommunicado methods in relation to the imprisoned civilians that are perceived to be opposition-minded, it is important to clarify the following. According to the UN Working Group on Enforced Disappearances, the act of enforced disappearance is defined in a way which clearly distinguishes it from related offenses such as enforced deprivation of liberty, abduction, kidnapping, or incommunicado detention.³⁰⁶ Distinguishing between enforced disappearances and incommunicado, it also clarifies that the victim is only considered forcibly disappeared if the government does not respond to one of the following questions: whether the person is detained, where the detained person is, and whether the person is alive or dead.³⁰⁷

Enforced disappearance often involves other crimes such as killing, torture or arbitrary imprisonment. The essence of the crime of enforced disappearance is that the families and friends of the disappeared person is kept unaware whether the person is alive or dead.³⁰⁸

Analysis

In addition to the crimes against humanity discussed above, the authors conclude that there are reasonable grounds to believe that the crime against humanity of enforced disappearances has occurred in Belarus.³⁰⁹

Until present and throughout Belarus, law enforcement agencies have resorted to arrests of civilians that are perceived as opposition-minded without notifying their relatives for a prolonged time. Already on 1 September 2020, UN human rights experts confirmed that there were multiple enforced disappearance cases at the height of protests in Belarus in August 2020.³¹⁰ Moreover, the kidnapping of Maria Kalesnikava, one of the most influential political activists, on the streets of Minsk by unknown persons dressed as civilians and without identifying marks, and the three days that here whereabouts were kept unknown, was recognized as an “enforced disappearance” in a joint statement of UN human rights experts,

³⁰⁵ Maria Clara Galvis Patino, *the work of the Committee on enforced disappearances. Achievements and jurisprudence of ten years after the entry into force of the International Convention for the protection of all persons from enforced disappearance*. Academy of international Humanitarian Law and Human Rights, Aug 2021, available at <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20Work%20of%20the%20CED.pdf>.

³⁰⁶ Working Group on Enforced or Involuntary Disappearances, *Compilation of General Comments on the Protection of All Persons from Enforced Disappearance*, para. 55, available at https://www.ohchr.org/sites/default/files/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf.

³⁰⁷ The United Nations Working Group on Enforced or Involuntary Disappearances, *What is an enforced disappearance*, p. 5, available at https://ishr.ch/wp-content/uploads/2021/10/WGEID-Explainer_English.pdf.

³⁰⁸ Robert Cryer, Darryl Robinson, Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* p. 256, (fourth edition, 2019).

³⁰⁹ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, p 9-10, U.N. Doc. A/HRC/47/49, May 4, 2021, available at <https://undocs.org/A/HRC/47/49>

³¹⁰ UN human rights experts: Belarus must stop torturing protesters and prevent enforced disappearances, Press Release, Sep 1 2020, available at <https://www.ohchr.org/en/press-releases/2020/09/un-human-rights-experts-belarus-must-stop-torturing-protesters-and-prevent>> accessed 23 May 2023.

among whom are all members of the UN Working Group on Enforced or Involuntary Disappearances.”³¹¹

In the past three years and continuing today, law enforcement agencies have deprived detainees of communication with the outside world. Relatives do not receive information about the whereabouts and the fate of their relatives who have been imprisoned for months, even if they are transferred between penitentiary institutions or to medical institutions with serious health problems.³¹² The main victims of such practices are well-known opposition figures.³¹³

In particular, until April 27, 2023, the fate of Viktor Babaryka, who has been in custody since June 2020, was unknown for several months.³¹⁴ On 27 April 2023, it became known that Babaryka was moved to a surgery unit in a hospital in Navapolatsk.³¹⁵ Since then, no further information has been released about his whereabouts.³¹⁶

5.6 Persecution

International Legal Framework

Persecution entails the intentional and severe deprivation of fundamental rights against an identifiable group or collectivity on prohibited discriminatory grounds.³¹⁷

The main element of the act of persecution is its discriminatory nature. This discrimination can be based on political, racial, national, ethnic, cultural, religious or gender grounds, or other grounds that are universally recognized as impermissible under international law. The ground most applicable to Belarus is discrimination against a political group, which means the targeting of individuals due to their actual or perceived political opposition.³¹⁸

The act of persecution is the severe deprivation of fundamental rights, and it includes all acts listed in the definition of crimes against humanity when they are committed with

³¹¹ UN human rights experts: Belarus must release opposition leader Maria Kalesnikava, Sep 25, 2020, available at <https://www.ohchr.org/en/press-releases/2020/09/un-human-rights-experts-belarus-must-release-opposition-leader-maria?LangID=E&NewsID=26296>.

³¹² Human Rights Center Viasna, *Imprisoned ex-candidate for presidency Viktor Babaryka moved to hospital*, Apr 28, 2023, available at <https://spring96.org/en/news/111555>.

³¹³ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 51, U.N. Doc. A/HRC/47/49, May 4, 2021, available at <https://undocs.org/A/HRC/47/49>.

³¹⁴ Human Rights Center Viasna, *Imprisoned ex-candidate for presidency Viktor Babaryka moved to hospital*, Apr 28, 2023, available at <https://spring96.org/en/news/111555>.

³¹⁵ Human Rights Center Viasna, *Imprisoned ex-candidate for presidency Viktor Babaryka moved to hospital*, Apr 28, 2023, available at <https://spring96.org/en/news/111555>.

³¹⁶ Malanka.Media, *What is going on with Viktor Babaryka*, Jun 27, 2023, available at <https://malanka.media/news/29650>.

³¹⁷ *Rome Statute of the International Criminal Court*, art. 7(2)(g) (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEngl.pdf>.

³¹⁸ *The Prosecutor v. Laurent Gbagbo*, Case No ICC-02/11-01/11, para. 274, Decision, Jun 12, 2014, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04777.PDF.

discriminatory intent.³¹⁹ Persecution can also involve acts that severely deprive a group of political, civil, economic, or social rights, such as the enactment of discriminatory laws.³²⁰

In addition to the regular mental element necessary to prosecute crimes against humanity, the crime of persecution requires a specific intent to discriminate against a group or collectivity.³²¹ The knowledge that an action is discriminatory is not enough.

Furthermore, the act of persecution needs to be committed in connection to other crimes against humanity or another crime within the jurisdiction of the Court (genocide, crime of aggression, or war crimes).³²²

Sections 5.1-5.5 discussed the commission of at least five other crimes against humanity. Below follows an analysis that these crimes are committed with discriminatory intent that amounts to the crime of persecution.

Analysis

Since the 2020 post-election protests and until today, Belarusian law enforcement agencies have been carrying out a massive persecution campaign against persons that are perceived as opposition-minded by the Lukashenka authorities.

As described above, this specifically includes cases of arbitrary imprisonment, torture, murder, rape, other forms of sexual violence, enforced disappearance, and deportations, as well as other gross violations of human rights committed by the Belarusian authorities, which are all undertaken with the specific discriminatory intent to target any opposition to Lukashenka:

- (a) **Imprisonment or other severe deprivation of physical liberty:** During the 2020 protests, mass arbitrary arrests and detentions were carried out by the authorities to “intimidate, punish and deter the population from leaving their homes in exercise of their rights.”³²³ According to the OHCHR, between 9 and 14 August alone, approximately 13,500 had been arrested across more than 100 Belarusian cities and towns; overall, between May 2020 and May 2021, over 37,000 people were arrested and detained.³²⁴ Viasna reports that as of July 2023, over 1,490 persons are considered

³¹⁹ *The Prosecutor v Zoran Kupre[Ki], Mirjan Kupre[Ki], Vlatko Kupre[Ki], Drago Josipovi], Dragan Papi], Vladimir [Anti], Also Known As “Vlado”*, Case No IT-95-16-T, para. 593-608, Judgment, Jan 14, 2000, available at <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

³²⁰ *The Prosecutor v Zoran Kupre[Ki], Mirjan Kupre[Ki], Vlatko Kupre[Ki], Drago Josipovi], Dragan Papi], Vladimir [Anti], Also Known As “Vlado”*, Case No IT-95-16-T, para. 608-615, Judgment, Jan 14, 2000, available at <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>.

³²¹ *The Prosecutor v Milorad Krnojelac*, Case No IT-97-25-T, para 435, Judgment, Mar 15, 2002, available at <https://www.icty.org/x/cases/krnjelac/tjug/en/krn-tj020315e.pdf>.

³²² International Criminal Court, *Elements of Crimes*, art 7(1)(h)(4), available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

³²³ the United Nations High Commissioner for Human Rights, Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, p. 6, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>.

³²⁴ the United Nations High Commissioner for Human Rights, Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, p. 6, U.N.Doc A/HRC/49/71, Mar 4, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/276/97/PDF/G2227697.pdf?OpenElement>

political prisoners,³²⁵ including human rights defenders, lawyers, journalists, bloggers, representatives of civil society organizations, and other politically engaged persons.³²⁶ Most of them were convicted for the “organization of mass riots” (Article 293.1 of the Criminal Code), the “organization of or participation in actions that grossly violate public order” (Article 342.1) or the “incitement to social discord” (Article 130.1).³²⁷ Additionally, after the Russian full-scale invasion of Ukraine supported by the Lukashenka regime, those expressing solidarity with Ukraine were targeted as well.³²⁸

- (b) **Torture:** Following the post-election protests, Belarusian law enforcement officials systematically tortured protesters in their custody or under their control. This included severe beatings, sexual violence and forced nudity, handcuffing, hooding, stretching, stun guns, other forms of physical violence, deprivation of sleep, chemical compounds, and mental torture (such as threats to life and health of detainee and his family).
- (c) **Murder:** Several protesters, such as Aliaksandr Taraykouski or Henadz Shutau, were killed as a result of the deliberately unnecessary or disproportionate use of force by Belarusian law enforcement officers during the demonstrations. Other victims died from ill-treatment suffered in detention.³²⁹
- (d) **Rape or any other form of sexual violence of comparable gravity:** rape and other acts of sexual violence, as well as the threat of rape, were repeatedly used by law enforcement officials against protesters, especially men.
- (e) **Enforced disappearance:** Law enforcement agencies have resorted to arrests of civilians that are perceived as opposition-minded, with several cases amounting to enforced disappearances.³³⁰ For instance, the kidnapping of Maria Kalesnikava, one of the most influential political activists, and the three days that her whereabouts were kept unknown was recognized as an enforced disappearance in a joint statement of UN human rights experts.³³¹ The fate of Viktor Babaryka, who had been in custody since June 2020, was unknown for several months. Only on 27 April 2023 it became known

³²⁵ Human Rights Center Viasna, *List of Political Prisoners*, 2023, available at <https://prisoners.spring96.org/en/#list>.

³²⁶ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, p. 3, U.N. Doc. A/HRC/50/58, May 4, 2021, available at <https://digitallibrary.un.org/record/3974497?ln=en>.

³²⁷ the United Nations High Commissioner for Human Rights, *Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, p. 10, U.N.Doc A/HRC/49/71, Mar 4, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/276/97/PDF/G2227697.pdf?OpenElement>.

³²⁸ Amnesty International, *Belarus 2022*, available at <https://www.amnesty.org/en/location/europe-and-central-asia/belarus/report-belarus/>.

³²⁹ the United Nations High Commissioner for Human Rights, *Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, p. 3-4, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>.

³³⁰ UN human rights experts: Belarus must stop torturing protesters and prevent enforced disappearances, Sep 1, 2020, available at <https://www.ohchr.org/en/press-releases/2020/09/un-human-rights-experts-belarus-must-stop-torturing-protesters-and-prevent>.

³³¹ UN human rights experts: Belarus must release opposition leader Maria Kalesnikava, Sep 23, 2020, available at <https://www.ohchr.org/en/press-releases/2020/09/un-human-rights-experts-belarus-must-release-opposition-leader-maria?LangID=E&NewsID=26296>.

that Babaryka was moved to a surgery unit in a hospital in Navapolatsk.³³² However, since then, no further information has been released about his whereabouts.³³³

- (f) **Deportation:** Belarusian authorities have not only resorted to direct deportations of opposition members to Poland and Ukraine, but have also created a coercive environment that forced about 100,000 Belarusians to leave the country since the 2020 protests.³³⁴ See Section 5.7 for a detailed analysis.

Additionally, the Belarusian authorities severely deprived civilians of their fundamental human rights, including the freedom of expression,³³⁵ the right of peaceful assembly,³³⁶ the right to a fair trial,³³⁷ the right to work,³³⁸ and the right to participate in public affairs.³³⁹

In particular, since 2021, Belarusian authorities have amended and further broadened the existing “anti-extremist” legislation, facilitating the intimidation and persecution of opposition-minded civilians.³⁴⁰ For instance, the Belarusian “On Countering Extremism” Law allows the Ministry of Internal Affairs or the State Security Committee (KGB) to classify organizations as “extremist formations.” The involvement in such an organization entails criminal liability under the amended Criminal Code of Belarus. The term “extremist” is interpreted very broadly and may equate, among others, with calls to participate in demonstrations, or insults a government official.³⁴¹ In practice, this concept covers almost any legitimate activity under human rights law.³⁴²

These provisions have especially been used against journalists from independent media and civil society organizations: accordingly, numerous independent media outlets were labelled

³³² RadioLiberty, *Belarusian Ex-Presidential Candidate Babaryka Hospitalized After Reportedly Being Beaten In Prison*, Apr 27, 2023, available at <https://www.rferl.org/a/belarus-babaryka-prison-beating-hospitalized/32381714.html>.

³³³ RadioLiberty, *Belarusian Ex-Presidential Candidate Babaryka Hospitalized After Reportedly Being Beaten In Prison*, Apr 27, 2023, available at <https://www.rferl.org/a/belarus-babaryka-prison-beating-hospitalized/32381714.html>.

³³⁴ the United Nations High Commissioner for Human Rights, Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, p. 12, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>.

³³⁵ Enshrined in International Covenant on Civil and Political Rights (ICCPR), art 19(2), (Multilateral, 1966), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>, ratified by Belarus.

³³⁶ International Covenant on Civil and Political Rights (ICCPR), art 21, (Multilateral, 1966), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

³³⁷ International Covenant on Civil and Political Rights (ICCPR), art 14(1), (Multilateral, 1966), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

³³⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR), art 6, (Multilateral, 1966), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

³³⁹ International Covenant on Civil and Political Rights (ICCPR), art 25, (Multilateral, 1966), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

³⁴⁰ Human Constanta/Access Now/ARTICLE 19/World Organisation Against Torture, *Joint Submission to the Special Rapporteur on the Situation of Human Rights in Belarus*, Jun 5, 2023, available https://www.article19.org/wp-content/uploads/2023/06/SR-Input-Anti-extremism-Belarus_HC_A19_AN_OMCT.pdf.

³⁴¹ Law “About Counteraction to Extremism”, art 1, No 203-3, Jan 4, 2007, available at <https://pravo.by/document/?guid=3871&p0=h10700203#>.

³⁴² Human Rights Center Human Constanta, “Extremism” in wartime – review of the fight against “extremism” in Belarus for January-March 2022; Apr 25, 2022, available at <https://humanconstantia.org/en/extremism-in-wartime-review-of-the-fight-against-extremism-in-belarus-for-january-march-2022/>.

“extremist” and stripped of their licenses, with many websites being blocked.³⁴³ Between May 2020 and December 2022, 625 journalists and media workers had been arrested, with 32 of them remaining in detention.³⁴⁴ Journalists and bloggers are regularly given extremely high sentences: For instance, the bloggers Eduard Palchys and Ihar Losik were sentenced to 13 and 15 years in prison, respectively, for politically motivated charges.³⁴⁵

At the same time, by December 2022, almost all non-governmental organizations (including human rights organizations) were liquidated or had decided to cease their activities in Belarus.³⁴⁶ By 31 March 2023, at least 803 non-profit organizations, most of which promoted democratic values, had been in the process of forced liquidation.³⁴⁷

According to the OHCHR, the right to fair trial has been systematically violated since the 2020 protests.³⁴⁸ In particular, this includes disproportionately long sentences against human rights defenders, journalists or members of the political opposition,³⁴⁹ but also clearly erroneous decisions and the massive intimidation and prosecution of lawyers who defend opposition-minded clients.³⁵⁰

Additionally, recent amendments to the Criminal Procedure Code adopted in 2022 establish the possibility of *in absentia* trials in relation to accused residing outside Belarus without the due process safeguards that the right to a fair trial requires.³⁵¹ Practice shows that these trials apply only to those whom the Belarusian authorities perceive as opposition-minded. The accused face heavy fines and risk property confiscation.³⁵²

³⁴³ Human Rights Watch, *Belarus: Events of 2021*, available at <https://www.hrw.org/world-report/2022/country-chapters/belarus#cba979>.

³⁴⁴ the United Nations High Commissioner for Human Rights, Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, p. 9, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>.

³⁴⁵ Reporters without Borders, *Two Belarusian bloggers sentenced to more than 10 years in prison*, Dec 23, 2021, available at <https://rsf.org/en/two-belarusian-bloggers-sentenced-more-10-years-prison>.

³⁴⁶ The United Nations High Commissioner for Human Rights, Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, p. 9, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>.

³⁴⁷ LawTrend, *Liquidation of NPOs in Belarus 2021-2023*, available at <https://www.lawtrend.org/freedom-of-association/ezhegodnyj-monitoring/likvidatsiya-nko-v-belarusi-2021-2023>.

³⁴⁸ the United Nations High Commissioner for Human Rights, Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, p. 7, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>.

³⁴⁹ the United Nations High Commissioner for Human Rights, Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, p. 7-8, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>.

³⁵⁰ the United Nations High Commissioner for Human Rights, Report on Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath, p. 8, U.N. Doc A/HRC/52/68, Feb 3, 2023, available at <https://www.ohchr.org/en/documents/country-reports/ahrc5268-belarus-run-2020-presidential-election-and-its-aftermath-report>.

³⁵¹ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 33, U.N. Doc A/HRC/53/53, May 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/083/75/PDF/G2308375.pdf?OpenElement>.

³⁵² Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 39, U.N. Doc A/HRC/53/53, May 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/083/75/PDF/G2308375.pdf?OpenElement>.

Those prosecuted in trials *in absentia* are deprived of the possibility to access the case materials or to participate in the process via videoconference. Court-appointed defense attorneys avoid contact with their clients. The accused are denied the right to dismiss the court-appointed defense attorney or choose one at will³⁵³ (see also Section 4.5). At least twenty opposition-minded civilians have been prosecuted through this provision. It has also been used against several well-known politicians. On 6 March 2023, Sviatlana Tsikhanouskaya was sentenced to 15 years, Pavel Latushka to 18 years, and Maryia Maroz, Volha Kavalkova and Siarhei Dyleuski to 12 years of imprisonment.³⁵⁴

In January 2023, Lukashenka also signed a law that provides the possibility to deprive Belarusians of their nationality on political grounds even if the Belarusian citizenship is their only nationality and had been acquired at birth that comes into force on 11 July 2023.³⁵⁵

Among those persecuted for political reasons, there are also many representatives from different religious communities who spoke up against the Lukashenka regime.³⁵⁶ As a part of the attack directed against civilians in Belarus, Tadeusz Kondrusevich, Archbishop of Minsk–Mohilev (Catholic Church), who condemned violence against peaceful protesters, was denied entry to Belarus despite his Belarusian nationality.³⁵⁷

Furthermore, there have been repressions on ethnic grounds against members of the Polish and Lithuanian minorities in Belarus.³⁵⁸ While such repressions had been going on for many years,³⁵⁹ they have further intensified after 2020, with Lukashenka accusing the Polish government of bearing responsibility for the post-election protests.³⁶⁰

The Belarusian authorities detained several representatives of the Union of Poles in Belarus, such as Andželika Borys, the leader of the organization, and Andrzej Poczobut, who was sentenced, on 8 February 2023, to eight years in a labor camp after two years spent in

³⁵³ Belta.by, *Pavel Latushka challenged the lawyer, but the court denied the request*, Jan 17, 2023, available at <https://www.belta.by/society/view/latushko-zajavil-otvod-advokatu-no-sud-otkazal-v-udovletvorenii-hodatajstva-544963-2023/>.

³⁵⁴ Human Constanta/Access Now/ARTICLE 19/World Organisation Against Torture, *Joint Submission to the Special Rapporteur on the Situation of Human Rights in Belarus*, Jun 5, 2023, available at https://www.article19.org/wp-content/uploads/2023/06/SR-Input-Anti-extremism-Belarus_HC_A19_AN_OMCT.pdf.

³⁵⁵ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 29-30, U.N. Doc A/HRC/53/53, May 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/083/75/PDF/G2308375.pdf?OpenElement>.

³⁵⁶ Church and Political Crisis in Belarus, *A Monitoring of the Persecution in Belarus of People on Religious Grounds During the Political Crisis*, available at <https://belarus2020.churchby.info/monitoring/>.

³⁵⁷ European Union, *EU Statement on the recent developments in Belarus*, p. 2, Sep 17, 2020, available at [https://www.government.is/library/09-Embassies/Vienna/1281%20PC%20EU%20on%20Belarus%20-%20Copy%20\(1\).pdf](https://www.government.is/library/09-Embassies/Vienna/1281%20PC%20EU%20on%20Belarus%20-%20Copy%20(1).pdf).

³⁵⁸ European Union, *EU Statement on the recent developments in Belarus*, p. 2, Sep 17, 2020, available at [https://www.government.is/library/09-Embassies/Vienna/1281%20PC%20EU%20on%20Belarus%20-%20Copy%20\(1\).pdf](https://www.government.is/library/09-Embassies/Vienna/1281%20PC%20EU%20on%20Belarus%20-%20Copy%20(1).pdf).

³⁵⁹ European Parliament, *Resolution on further repression against the people of Belarus, in particular the cases of Andrzej Poczobut and Ales Bialiatski*, (2023/2573(RSP)), Mar 15, 2023, available at https://www.europarl.europa.eu/doceo/document/TA-9-2023-0075_EN.html; Amnesty International, *Belarus 2022*, available at <https://www.amnesty.org/en/location/europe-and-central-asia/belarus/report-belarus/>.

³⁶⁰ Tatyana Nevedomskaya, *Belarus: Polnische Minderheit als Sündenbock?*, Deutsche Welle, Apr 22, 2021, available at <https://www.dw.com/de/belarus-polnische-minderheit-als-s%C3%BCndenbock/a-57265315>.

detention.³⁶¹ The Belarusian authorities do not recognize the Union of Poles, which is considered as the only representative of ethnically Polish people in Belarus by Poland.³⁶² Language education was suspended and replaced with Russian or Belarusian in the only two Polish secondary schools,³⁶³ located in the West of Belarus,³⁶⁴ where a large Polish minority lives; the Belarusian authorities also closed a Lithuanian school in the region of Hrodna.³⁶⁵ Furthermore, Polish military cemeteries in Belarus have been vandalized, and no one was held accountable by the Belarusian authorities.³⁶⁶

Overall, it can be concluded that the massive human rights violations committed by the Belarusian authorities specifically targeted civilians that are perceived as opposition-minded and were conducted in order to intimidate and to shatter the opposition against Lukashenka, appear to amount to persecution as a crime against humanity under the Rome Statute.

5.7 Deportation

International Legal Framework

Article 7(1)(d) Rome Statute stipulates that deportation or forcible transfer of population constitutes a crime against humanity. Under Article 7(2)(d), these crimes mean the forced displacement of persons by expulsion or other coercive acts from the area in which they are lawfully present, in the absence of any grounds permitted under international law.³⁶⁷

While the term “deportation” refers to a displacement across borders, “forcible transfer” is regarded as referring to internal displacement.³⁶⁸ For the act of deportation to be constituted under Article 7(1)(d) of the Rome Statute, it requires the fulfillment of specific elements which are detailed in the Elements of Crime adopted by the ICC.³⁶⁹

³⁶¹ International Federation of Journalists, *Belarus: Journalist Andrzej Poczobut sentenced to 8 years in prison*, Feb 09, 2023, available at <https://www.ifj.org/media-centre/news/detail/article/belarus-journalist-andrzej-poczobut-sentenced-to-8-years-in-prison>.

³⁶² Tony Wesolowsky, *Stand Up And Be Counted: Ethnic Poles In Belarus Gear Up For Census*, RadioLiberty, Sep 29, 2019, available at <https://www.rferl.org/a/ethnic-poles-belarus-census-remember-who-i-am/30190010.html>.

³⁶³ Tony Wesolowsky, *Stand Up And Be Counted: Ethnic Poles In Belarus Gear Up For Census*, RadioLiberty, Sep 29, 2019, available at <https://www.rferl.org/a/ethnic-poles-belarus-census-remember-who-i-am/30190010.html>.

³⁶⁴ Kamil Krysinski, *Abolition of Polish education in Belarus*, Center of Eastern Studies, Jun 10, 2022, available at <https://www.osw.waw.pl/en/publikacje/analyses/2022-06-10/abolition-polish-education-belarus>.

³⁶⁵ Amnesty International, *Belarus 2022*, available at <https://www.amnesty.org/en/location/europe-and-central-asia/belarus/report-belarus/>.

³⁶⁶ Reuters, *Poland condemns Belarus for vandalism of Polish graves*, Jun 30, 2022, available at <https://www.reuters.com/world/europe/poland-condemns-belarus-vandalism-polish-graves-2022-06-30/>; Amnesty International, *Belarus 2022*, available at <https://www.amnesty.org/en/location/europe-and-central-asia/belarus/report-belarus/>.

³⁶⁷ *Rome Statute of the International Criminal Court*, art. 7(2)(d) (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, para 474, Judgment, Mar. 15, 2002, available at <https://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf>.

³⁶⁸ *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, para 521, Judgment, Aug. 02, 2001, available at <https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

³⁶⁹ International Criminal Court, *Elements of Crimes*, art. 7(1)(d), available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

First, there needs to be a displacement of one or more individuals across a border. Deportation usually occurs in the form of an expulsion across a *de jure* border, recognized by law, but can also occur across a *de facto* border, established by practical means or military control without any formal legal ground.³⁷⁰

Second, the displacement must have been forced³⁷¹ and thus involuntary in nature, with the victim having “no real choice.”³⁷² Deportation does not require physical force, but may result from an “atmosphere of fear and terror”³⁷³ created by the perpetrators to force civilians to flee. This includes the “threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”³⁷⁴ Specifically, such acts may include killings, severe beatings, insults, threats and intimidation, detention, looting and destruction of property.³⁷⁵ It can also take the form of an abuse of power against the concerned individuals, or another person related to them, or the abuse of a coercive environment.³⁷⁶ “The essential element is that the displacement be involuntary in nature, that “the relevant persons had no real choice.”³⁷⁷ In other words, a civilian is involuntarily displaced if he is “not faced with a genuine choice as to whether to leave or to remain in the area.”³⁷⁸ If a group escapes from its own genuine volition, for instance to escape a war zone, this would not be “forced displacement.” However, if a group flees to escape deliberate persecution and violence against them, they would not be exercising a genuine choice.³⁷⁹ As noted by the *Krnjelac* Trial Chamber, “an apparent consent induced by force or threat of force should not be considered to be real consent.”³⁸⁰

³⁷⁰ *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, para 300, Judgment, Mar. 22, 2006, available at <https://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf>.

³⁷¹ *Rome Statute of the International Criminal Court*, art. 7(2)(d) (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, para 475, Judgment, Mar. 15, 2002, available at <https://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf>.

³⁷² *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, para 475, Judgment, Mar. 15, 2002, available at <https://www.icty.org/x/cases/krnojelac/tjug/en/krn-tj020315e.pdf>.

³⁷³ Situation in Georgia, No. ICC-01/15, para 22, Decision, Jan 27, 2016, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_00608.PDF.

³⁷⁴ *Prosecutor v. Blagoje Simic et al.*, Case No IT-95-9-T, Judgment, Oct 17, 2003; Judgment footnotes: *Krnjelac* Trial Judgment, para. 475, and *Krstić* Trial Judgment, para. 529 (both quoting the Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of the Crimes, UN Doc PCNICC/2000/INF/3/Add.2, 6 July 2000, p. 11); *Naletilić* Trial Judgment, para. 519 (referring to Article 31 of Geneva Convention IV which inter alia provides that “[no] physical or moral coercion shall be exercised against protected persons [...]”); see also *Prosecutor v. Milorad Krnojelac*, Case No IT-97-25-A, para. 229, Judgment, Sep 17, 2003, available at <https://www.refworld.org/cases,ICTY,414806124.html>.

³⁷⁵ Situation in Georgia, Case No. ICC-01/15, para 22, Decision, Jan 27, 2016, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_00608.PDF.

³⁷⁶ International Criminal Court, *Elements of Crimes*, art. 7(1)(d) element 1, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

³⁷⁷ *Prosecutor v. Milorad Krnojelac*, Case No IT-97-25-T, para. 475, Judgment, Mar 15, 2002, available at <https://www.refworld.org/cases,ICTY,414806c64.html>; *Prosecutor v. Milorad Krnojelac*, Case No IT-97-25-A, para. 233, Judgment, Sep 17, 2003, available at <https://www.refworld.org/cases,ICTY,414806124.html>.

³⁷⁸ *Prosecutor v. Radislav Krstic*, Case No IT-98-33-T, para. 147, Judgment, Aug 2, 2001, available at <https://www.refworld.org/cases,ICTY,414810d94.html>.

³⁷⁹ *Prosecutor v. Radislav Krstic*, Case No IT-98-33-T, para. 530, Judgment, Aug 2, 2001, available at <https://www.refworld.org/cases,ICTY,414810d94.html>.

³⁸⁰ *Prosecutor v. Milorad Krnojelac*, Case No IT-97-25-T, para. 475, footnote 1435, Judgment, Mar 15, 2002, available at <https://www.refworld.org/cases,ICTY,414806c64.html>.

Third, the deportation must have occurred without any ground under international law.³⁸¹ International law generally prohibits the deportation of a state's nationals as well as the arbitrary or collective expulsion of aliens.³⁸² While international humanitarian law exceptionally allows for displacement of persons in specific circumstances, it only applies in the context of armed conflicts.³⁸³

Fourth, the deported persons must have been lawfully present on the territory.³⁸⁴ The lawfulness of the presence should be assessed on the basis of international law and not under the domestic requirements of lawful residence.³⁸⁵

Importantly, the ICC explained in *Ruto* that deportation is an open-conduct crime, which means that the perpetrator may commit several different conducts which can amount to “expulsion or other coercive acts,” so as to force the victim to leave the area where he or she is lawfully present.³⁸⁶

The ICC added in the *Bangladesh/Myanmar* jurisdictional ruling that this entails that “various types of conduct may, if established to the relevant threshold, qualify as “expulsion or other coercive acts” for the purposes of the crime against humanity of deportation, including deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting.”³⁸⁷

Analysis

Sections 5.1-5.6 showed the numerous crimes and deprivations of fundamental rights that the Belarusian authorities have committed against the Belarusian civilian population since May 2020, creating an “atmosphere of fear and terror” due to which more than 100,000 civilians were forced to leave Belarus and seek safety abroad. Moreover, there are multiple cases in which civilians were directly deported across Belarusian borders.³⁸⁸

There are three categories of people that were victim of deportation. First, persons who were physically expelled by the Belarusian authorities. Second, persons who fled as a result of an imminent threat of arrest and/or coercive measures. They were questioned, threatened to be

³⁸¹ International Criminal Court, *Elements of Crimes*, art. 7(1)(d) element 1, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>

³⁸² *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Case No. ICC-01/19, para. 98, Decision, Nov. 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF.

³⁸³ *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Case No. ICC-01/19, para. 98, Decision, Nov. 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF; Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, para. 287, Judgment, Mar 22, 2006, available at <https://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf>.

³⁸⁴ International Criminal Court, *Elements of Crimes*, art. 7(1)(d) element 2, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

³⁸⁵ *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, para. 99, Case No. ICC-01/19, Decision, Nov. 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF.

³⁸⁶ *The Prosecutor v. William Samoeiruto, Henry Kiprono Kosgey And Joshua Arap Sang*, Case No ICC-01/09-01/11, para 244, Decision, Jan 23, 2012, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_01004.PDF.

³⁸⁷ Request under Regulation 46(3) of the Regulations of the Court, Case No ICC-RoC46(3)-01/18-37, para. 61, Decision, Sep 6, 2018, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF.

³⁸⁸ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 10, U.N. Doc. A/HRC/50/58, May 4, 2021, available at <https://digitallibrary.un.org/record/3974497?ln=en>.

arrested, prosecuted or suffered other coercive measures by the authorities and felt they had no choice but to flee the country to avoid imprisonment or worse. Third, persons who fled as a result of the coercive environment. They fled the country pre-emptively to avoid becoming victims of coercive measures themselves.

First, law enforcement has resorted to the direct expulsion of civilians on several occasions. For instance, on the night of 5 September 2020, KGB officers picked up Volha Kavalkova, a member of the presidium of the Belarusian Coordination Council, from the remand center, and brought her to the no-man's land on the Belarusian-Polish border.³⁸⁹ Before, Kavalkova had been sentenced to 10 days imprisonment on 25 August³⁹⁰ and faced another subsequent 15 days in custody.³⁹¹ The KGB officers told Kavalkova that she could choose between expulsion from Belarus or indefinite detention. Kavalkova left the country. Masked, she was driven to the Bruzhi checkpoint at the Belarusian-Polish border. After passing through passport control, Kavalkova was released and entered Poland.

Similarly, on 7 September 2020, masked members of the Belarusian security service abducted Marya Kalesnikava, Ivan Krautsou and Anton Radnianskou in order to expel them to Ukraine.³⁹² They were brought to the no-man's land on the Belarusian-Ukrainian border. Krautsou and Radnianskou crossed into Ukraine³⁹³ under the threats of criminal charges.³⁹⁴ Meanwhile, Kalesnikava tore her passport into pieces, preventing her from being expelled.³⁹⁵ She then got out of the car and walked back to the Belarusian border, where she was detained by Belarusian authorities.³⁹⁶ Kalesnikava later stated she was threatened that she would be “taken out [of the country] anyway, alive or in bits” if she refused to leave Belarus.³⁹⁷

These are straightforward cases of deportation since they were conducted by the authorities and without the conduct, the persons would not have left Belarus, or at least not under these conditions.

³⁸⁹ Institute for the Study of War, *Belarus Warning Update: Lukashenko Expels Opposition Leaders to Support Kremlin Information Operation*, Sep 8, 2020, available at <https://www.understandingwar.org/backgrounder/belarus-warning-update-lukashenko-expels-opposition-leaders-support-kremlin-information>.

³⁹⁰ Reuters Staff, *Belarusian opposition activist Kovalkova leaves country after arrest*, Sep 5, 2020, available at <https://www.reuters.com/article/uk-belarus-election-poland-kovalkova-idUKKBN25W0PJ>.

³⁹¹ Igor Sevruhin, *Instead of an ambulance they came to me from the KGB. Olga Kovalkova from Tihanowskaya's headquarters told how the Belarusian siloviki took her to Poland*, Current Time, Sep 6, 2020, available at <https://www.currenttime.tv/a/kovalkova-interview/30823830.html>.

³⁹² Human Rights Center Viasna. *Maryia Kalesnikava*, available at <https://prisoners.spring96.org/en/person/maryja-kalesnikava>; George Barros, Mason Clark, *Belarus Warning Update: Lukashenko Expels Opposition Leaders To Support Kremlin Information Operation*, Institute for the Study of War, Sep 8, 2020, available at <https://www.understandingwar.org/backgrounder/belarus-warning-update-lukashenko-expels-opposition-leaders-support-kremlin-information>.

³⁹³ Yuras Karmanau, *Belarus activist resists effort to deport her to Ukraine*, the Washington Post, Sep 8, 2020, available at https://www.washingtonpost.com/world/europe/belarus-activist-resists-authorities-push-to-leave-country/2020/09/08/e82b1548-f1ab-11ea-8025-5d3489768ac8_story.html.

³⁹⁴ Yuras Karmanau, *Voice of Belarus, Coordination Council members Rodnenkov and Kravtsov on their deportation along with Kalesnikava from Belarus*, the Washington Post, Sep 8, 2020, available at <https://www.voiceofbelarus.com/black-sack-over-the-head/>.

³⁹⁵ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, p 37, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

³⁹⁶ Reuters, *Belarusian protest leader ripped up passport to avoid expulsion, allies say*, Sep 8, 2020, available at <https://www.reuters.com/article/belarus-election-idINKBN25Z17V>.

³⁹⁷ Reuters, *Belarus protest leader says she was threatened with expulsion “alive or in bits”*, Sep 8, 2020, available at <https://www.reuters.com/article/us-belarus-election-idUSKBN2611AF>.

Second, there are many examples of persons who fled as a result of an imminent threat of arrest and/or other coercive measures, such as torture. Their decision to leave the country was often triggered by an arrest or threats of being arrested. Moreover, they know that they will be unable to return to their country, making the decision to leave even harder. Their flight from Belarus was therefore closely and directly linked to the coercive measures they experienced or could foresee that they would experience.

Third, since May 2020, the Belarusian authorities created a coercive atmosphere of fear and terror in relation to opposition-minded civilians. Sections 5.1-5.6 discuss the crimes committed against the Belarusian civilian population on the basis of their political beliefs, as well as further severe fundamental human rights deprivations, including politically motivated dismissals,³⁹⁸ professional bans,³⁹⁹ threats of deprivation of parental rights⁴⁰⁰ and separation from their children.⁴⁰¹ In this context, international criminal law's tribunal case law recognizes that the fleeing of people amounts to "forced displacement" and this "deportation" in accordance with the ICC's Rome Statute.

Persons perceived as political dissenters risk being dismissed or banned from their profession. For example, in March 2023, many employees of various State-owned enterprises were fired for signing in support of the nomination of Viktor Babaryka as a candidate for the presidential elections in accordance with the official procedures of these elections in May-June 2020.⁴⁰²

Persons also risk being searched or arbitrarily detained. In this regard, many victims also reported the seizure of property during searches.⁴⁰³ Thus, under the recently adopted "On seizure of property" Law,⁴⁰⁴ persons perceived as affiliated with those involved in unfriendly actions toward the Republic of Belarus are facing the risk of property confiscation.⁴⁰⁵ Also,

³⁹⁸ Pavel Slunkin, Artyom Shraibman, Philipp Bikanau, Henadz Korshunau, Kateryna Bornukova, Lev Lvovskiy, *Expert Assessments: Belarus Change Tracker, December 2022 — February 2023*, p.8, Friedrich Ebert Foundation, available at <https://library.fes.de/pdf-files/bueros/belarus/20148-20230322.pdf>.

³⁹⁹ Human Rights Center Viasna, *Statement on the mounting repression against Belarusian lawyers and the disbarment of Dmitriy Laevski*, Aug 2, 2021, available at <https://spring96.org/en/news/104519>; Human Rights Center Viasna, *Human Rights Situation in Belarus: April 2022*, May 13, 2022, available at <https://spring96.org/en/news/107697>.

⁴⁰⁰ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, p 24, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

⁴⁰¹ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 48, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>

⁴⁰² Human Rights Center Viasna, *Dismissals for Babariko nomination, detention of journalists: Chronicle of harassment on March 23-24*, Mar 24, 2023, available at <https://spring96.org/ru/news/111196>.

⁴⁰³ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 24, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>

⁴⁰⁴ Law "On seizure of property" No 240-3, (the Republic of Belarus, 2023), available at <https://pravo.by/document/?guid=12551&p0=H12300240&p1=1&p5=0>

⁴⁰⁵ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 39, U.N. Doc A/HRC/53/53, May 3, 2023, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/083/75/PDF/G2308375.pdf?OpenElement>.

victims of the above repressions report an atmosphere of massive fear of reprisals against their families.⁴⁰⁶

Political dissenters especially face a significant risk of being arrested, sentenced and imprisoned in an unfair trial.

Moreover, in accordance with the amendments to the Criminal Code of the Republic of Belarus dated 9 March 2023, the list of grounds for applying the death penalty has been expanded. It establishes that the capital punishment can be applied for treason, which could be interpreted broadly as encompassing political dissent.⁴⁰⁷ How it will be interpreted and applied remained unclear when this report was finalized.

As a result of this coercive environment and the systematic, unpredictable repressions carried out by the Lukashenka regime, individuals lack a genuine choice between staying or fleeing Belarus. Thus, overall, at least 100,000 civilians were forced to leave Belarus and seek safety abroad since, in particular, 9 August 2020.⁴⁰⁸

In conclusion, the fleeing of the Belarusian civilian population due to the repressions carried out by Belarusian authorities constitute, direct or indirect, deportations that amount to crimes against humanity under the Rome Statute.

⁴⁰⁶ Anaïs Marin, *Report of the Special Rapporteur on the situation of human rights in Belarus*, para 4, U.N. Doc A/HRC/77/195, Jul 20, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/432/95/PDF/N2243295.pdf?OpenElement>.

⁴⁰⁷ Criminal Code of the Republic of Belarus, No 275-3, art 356, (the Republic of Belarus, 1999), available in Russian at <https://pravo.by/document/?guid=3871&p0=hk9900275>.

⁴⁰⁸ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 50, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

Chapter 6 – Belarusian Deportations of Migrants

In addition to the crimes against humanity against the Belarusian civilian population on the basis of their (perceived) opposition to Lukashenka, there are strong indications that the violence against the migrants and their expulsion into EU states amounts to the crime against humanity of deportation, in accordance with Article 7(1)(d) RS.

While most reports on the issue of the migrant crisis on the EU-Belarus border focus on the attack by Belarus against the EU, this report includes this chapter on the migrant crisis to focus on the migrants as victims of the Belarusian authorities. It analyzes how the migrants are victimized in this violence and that the violence they are subjected to may well qualify as crimes against humanity against them as a civilian population as well.

6.1 *Deportations of Migrants from Belarus into EU border States*

As reported by the European Parliament, Amnesty International, Human Rights Watch, Der Spiegel and Dossier Central, Lukashenka and the Belarusian authorities started a deliberate campaign in 2021 to destabilize Europe by luring migrants into Belarus and sending them to EU borders, weaponizing them and creating an artificial migration crisis. This situation is closely linked to the massive repressions by the Belarusian authorities following the peaceful post-2020 protests. Lukashenka's statement "We stopped drugs and migrants. Now you will eat them and catch them yourselves"⁴⁰⁹ came shortly after the European Union imposed new sanctions on members of the Belarusian authorities⁴¹⁰ for the unlawful⁴¹¹ forcible landing of a Ryanair aircraft in Minsk on 23 May 2021. The aircraft had been diverted by Belarusian authorities while passing through the airspace of Belarus, allegedly due to a bomb threat.⁴¹² However, the real purpose of the interference was the arrest Raman Pratasevich, a prominent dissident blogger and former editor-in-chief of the Telegram channel NEXTA, and his partner Sofia Sapega.⁴¹³

In retaliation to the sanctions, the Belarusian authorities have been distributing short-term tourist visas to migrants from Middle East and African countries and organized much more frequent flight connections to Belarus. The migrants initially received accommodation in state-owned hotels and were then transported to the Belarus-EU borders with Poland, Lithuania and Latvia.⁴¹⁴ Here, migrants are dropped in so-called "exclusion zones" – the no man's land between the two borders – and either instructed how to cross into a neighboring EU state, or

⁴⁰⁹ Joe Evans, *Belarus dictator threatens to 'flood EU with drugs and migrants'*, The Week, available at <https://www.theweek.co.uk/news/world-news/europe/952979/belarus-dictator-threatens-flood-eu-with-drugs-migrants-avoid-sanctions>.

⁴¹⁰ The European Council, *Timeline – EU restrictive measures against Belarus*, the European Parliament, available at <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-belarus/belarus-timeline/>.

⁴¹¹ International Civil Aviation Organization, *Event involving Ryanair Flight FR4978 in Belarus airspace on 23 May 2021, Report of the ICAO Fact-Finding Investigation*, July 2022, available at <https://www.icao.int/Security/Documents/Ryanair%20FR4978%20FFIT%20report.pdf>.

⁴¹² Andrew Roth, *Belarus accused of "hijacking" Ryanair flight diverted to arrest blogger*, The Guardian, May 23, 2021, available at <https://www.theguardian.com/world/2021/may/23/belarus-diverts-ryanair-plane-to-arrest-blogger-says-opposition>.

⁴¹³ Andrew Roth, *Belarus accused of "hijacking" Ryanair flight diverted to arrest blogger*, The Guardian, May 23, 2021, available at <https://www.theguardian.com/world/2021/may/23/belarus-diverts-ryanair-plane-to-arrest-blogger-says-opposition>.

⁴¹⁴ European Parliament, *Briefing Memo, EU-Belarus relations: State of Play*, p. 4, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698806/EPRS_BRI\(2021\)698806_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698806/EPRS_BRI(2021)698806_EN.pdf).

threatened and violently forced to do so. Migrants in the “exclusion zones” are also exposed to the harshest living conditions and ill-treatment, including the lack of food, medicine and shelter. In what has been described as a “pingpong game,” migrants have been pushed back at the European borders and simultaneously been prohibited to leave the “exclusion zone” by Belarusian authorities, so that migrants were trapped in a limbo for weeks or months.⁴¹⁵ The EU describes the situation as “a trap set by the Belarusian authorities.”⁴¹⁶

According to Reuters, Polish authorities have as of July 2023 again scaled up police presence around the Polish border with Belarus.⁴¹⁷ This decision came after the number of migrants trying to enter Poland from Belarus once again increased during the preceding months.⁴¹⁸ Polish authorities fear that Wagner Group fighters relocating to Belarus after their failed mutiny in Russia could use migrants from conflict areas where the paramilitary group operates to further destabilize Polish borders.⁴¹⁹ Similarly, Polish authorities fear that soon to be opened air connections between Russia, Belarus and other countries could be used to channel migrants to the Polish border.⁴²⁰

Lithuania is currently seeking up to 120 million euros in compensation from Belarus for the migrant crisis that Lukashenka’s regime caused.⁴²¹ Since mid-2021, Lithuania has stopped up to twenty thousand migrants trying to enter the country from Belarus.⁴²² Because of this, the Lithuanian government decided to erect a barbed wire fence along its 679-kilometer-wide border with Belarus.⁴²³

While the expulsions of migrants at the Belarus-EU borders violate a range of international obligations, including international human rights and refugee law, they may also amount to a crime against humanity against the migrants as a civilian population under Article 7(1)(d) RS. This chapter analyzes the contextual and the physical elements of the crime and concludes that there may also be a reasonable basis to believe that the violence of the Belarusian authorities against the migrants amounts to crimes against humanity.

⁴¹⁵ Human Rights Watch, “Die here or go to Poland”, Nov 24, 2021, available at <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>.

⁴¹⁶ European Parliament, *Briefing Memo, EU-Belarus relations: State of Play*, p. 4, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698806/EPRS_BRI\(2021\)698806_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698806/EPRS_BRI(2021)698806_EN.pdf).

⁴¹⁷ Reuters, *Poland to bolster security on border with Belarus, interior minister says*, Jul. 02, 2023, available at <https://www.reuters.com/world/europe/poland-bolster-security-forces-border-with-belarus-interior-minister-2023-07-02/>.

⁴¹⁸ Reuters, *Poland to bolster security on border with Belarus, interior minister says*, Jul. 02, 2023, available at <https://www.reuters.com/world/europe/poland-bolster-security-forces-border-with-belarus-interior-minister-2023-07-02/>.

⁴¹⁹ Raphael Minder and Barbara Erling, *Poland fears Wagner in Belarus could spark migration crisis*, Financial Times, available at <https://www.ft.com/content/4ee8d1eb-2836-4e23-aaac-422a8dc06ddb>.

⁴²⁰ TVP World, *New air links bringing migrants to Belarus could threaten border security: official*, available at <https://tvpworld.com/70966289/new-air-links-bringing-migrants-to-belarus-could-threaten-border-security-official>.

⁴²¹ Associated Press, *Lithuania seeks compensation from Belarus for migrant crisis*, Apr 6, 2023, available at <https://apnews.com/article/lithuania-belarus-migration-crisis-border-f5e2b2b6e34fdda425465b9c15ea264a>.

⁴²² Associated Press, *Lithuania seeks compensation from Belarus for migrant crisis*, Apr 6, 2023, available at <https://apnews.com/article/lithuania-belarus-migration-crisis-border-f5e2b2b6e34fdda425465b9c15ea264a>.

⁴²³ Associated Press, *Lithuania seeks compensation from Belarus for migrant crisis*, Apr 6, 2023, available at <https://apnews.com/article/lithuania-belarus-migration-crisis-border-f5e2b2b6e34fdda425465b9c15ea264a>.

6.2 Contextual Elements

Attack Directed Against a Civilian Population

For crimes to amount to crimes against humanity, they need to be committed in the context of an attack that was directed against the civilian population.

As mentioned above in Section 4.2, Article 7(2)(a) RS provides a broad definition of the term “attack” and defines it as “a course of conduct involving the multiple commission of acts referred to in paragraph 1” of Article 7 RS, such as murder, torture or other inhumane acts of a similar character that intentionally cause great suffering, or serious injury to body or mental or physical health.

The repeated expulsion of Belarusian migrants across the Polish, Lithuanian and Latvian borders is accompanied by severe ill-treatment committed against migrants trapped in the so-called exclusion zones between the borders.

Since summer 2021,⁴²⁴ migrants, mostly from Middle East and African countries, have been arriving to Belarus in order to cross into the European Union through the Belarusian border. After a few days spent in Minsk, the migrants were escorted to the Belarusian border,⁴²⁵ from where they reached the fenced off military zone between Belarus and the neighboring EU State. Often trapped in this so-called exclusion zone for weeks or even months,⁴²⁶ they are subjected to various forms of ill-treatment.⁴²⁷

For example, several human rights organizations reported that Belarusian border guards regularly beat people, including with batons and other weapons, and that they tortured and otherwise ill-treated migrants and refugees.⁴²⁸ Often, migrants were violently forced by Belarusian border guards to cross the border, with several people being attacked and bitten by police dogs,⁴²⁹ and some forced to cross freezing rivers.⁴³⁰ In one case, Belarusian border guards forced three Iraqi men pushed back from Poland to stand in cold knee-high water for an

⁴²⁴ Human Rights Watch, “Die here or go to Poland”, Nov 24, 2021, available at <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>.

⁴²⁵ Human Rights Watch, “Die here or go to Poland”, Nov 24, 2021, available at <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>.

⁴²⁶ Human Rights Watch, “Die here or go to Poland”, Nov 24, 2021, available at <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>.

⁴²⁷ Human Rights Watch, “Die here or go to Poland”, Nov 24, 2021, available at <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>.

⁴²⁸ Human Rights Watch, “Die here or go to Poland”, Nov 24, 2021, available at <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>.

⁴²⁹ Human Rights Watch, *Violence and Pushbacks t Poland-Belarus Border*, Jun 7, 2022, available at <https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>; Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum seekers and migrants facing pushbacks from the EU*, Dec 20, 2021, available at <https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>.

⁴³⁰ Human Rights Watch, *Violence and Pushbacks t Poland-Belarus Border*, Jun 7, 2022, available at <https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>.

hour and to swim across a lake to neighboring Lithuania. Of the three men, one drowned, and one was swept away.⁴³¹ In some cases, migrants have reported that they were beaten if they wanted to leave the exclusion zone to go back to Minsk.⁴³² People were also severely deprived of food, water, shelter and sanitation in freezing temperatures within the “exclusion zone,”⁴³³ sometimes for weeks.⁴³⁴ For instance, one person told a human rights organization that they were “almost unconscious” due to hunger and thirst on some days.⁴³⁵ Many migrants who were pushed back at the border several times have developed serious mental health conditions.⁴³⁶ Some migrants were also brought by Belarusian authorities to “collection sites.” These are open-air locations without tents or shelter, guarded by Belarusian officials.⁴³⁷ Many migrants described the conditions and treatment in the camps as “atrocious,” including alleged cases of beatings, rape, deprivation of food, medicine and heating.⁴³⁸ These conditions were inflicted on migrants in the attempt to expulse them and to create a hostile and coercive environment to make them leave Belarus.

The term “population” refers to the collective nature of the crime as an attack upon multiple victims.⁴³⁹ It must be established that the attack was directed against more than just a limited group of individuals.⁴⁴⁰ Importantly, international courts have established that the notion of “population” does not mean that the entire civilian population of the geographical area in question must have been subject to an attack.⁴⁴¹ The attack can be directed against “any” civilian population, “regardless of nationality, ethnicity or other distinguishing feature.”⁴⁴² Finally, the requirement “directed against” specifies that the civilian population is intended to be the target of the attack,⁴⁴³ excluding incidental situations.⁴⁴⁴

⁴³¹ Human Rights Watch, *Violence and Pushbacks t Poland-Belarus Border*, Jun 7, 2022, available at <https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>.

⁴³² Jon Henley, “People treated like weapons”, : more deaths t Poland-Belarus border, The Guardian, Oct 31, 2021, available at <https://www.theguardian.com/world/2021/oct/31/poland-belarus-border-migrants-deaths>.

⁴³³ Jon Henley, “People treated like weapons”, : more deaths t Poland-Belarus border, The Guardian, Oct 31, 2021, available at <https://www.theguardian.com/world/2021/oct/31/poland-belarus-border-migrants-deaths>.

⁴³⁴ Human Rights Watch, *Violence and Pushbacks t Poland-Belarus Border*, Jun 7, 2022, available at <https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>.

⁴³⁵ Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum seekers and migrants facing pushbacks from the EU*, Dec 20, 2021, available at <https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>.

⁴³⁶ Jon Henley, “People treated like weapons”, : more deaths t Poland-Belarus border, The Guardian, Oct 31, 2021, available at <https://www.theguardian.com/world/2021/oct/31/poland-belarus-border-migrants-deaths>

⁴³⁷ Human Rights Watch, “Die here or go to Poland”, Nov 24, 2021, available at <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>.

⁴³⁸ Human Rights Watch, *Violence and Pushbacks t Poland-Belarus Border*, Jun 7, 2022, available at <https://www.hrw.org/news/2022/06/07/violence-and-pushbacks-poland-belarus-border>.

⁴³⁹ *Prosecutor v. Dusko Tadic aka “Dule”*, Case No. IT-94-1-T, para 644, Opinion and Judgment, May 7, 1997, available at <https://www.refworld.org/cases,ICTY,4027812b4.html>.

⁴⁴⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, para 77, ICC, Decision, Jun 15, 2009, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF.

⁴⁴¹ *Situation in the Republic of Kenya*, Case No. ICC-01/09, para 82, Decision, Mar 31, 2010, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_02409.PDF.

⁴⁴² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, para 399, Sep 30, 2008, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2008_05172.PDF.

⁴⁴³ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No IT-96-23-T & IT-96-23/1-T, para 421, Decision, Feb 22, 2001, available at <https://www.refworld.org/cases,ICTY,3ae6b7560.html>.

⁴⁴⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No ICC-01/05-01/08, para 674, Judgment, Mar 21, 2016, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

Although the migrants came from different countries, they qualify as a “civilian population” against whom the attack was deliberately directed by Belarusian authorities. In particular, it appears that every person in the fenced off zone could become a victim of the ill-treatment by Belarusian border guards, including by omission to provide food and medical treatment. Moreover, it appears that the attacks have been directed at migrants and refugees as such: for being migrants/refugees. These migrants and refugees have in common that they were brought to Belarus as a result of a widely advertised opportunity to travel to the EU via Belarus. Furthermore, these migrants have in common that once they are lured towards Belarus’ border with the EU, they are subjected to similar forms of abuse by Belarusian authorities and are targeted on the basis of their shared status as migrants.

Consequently, it seems like there are reasonable grounds to believe that there has also been an attack directed against the migrants as a civilian population by the Belarusian authorities, which warrants further investigation.

Widespread

As discussed in Section 4.3, the “widespread” criterion connotes the large-scale nature of the attack. The attack may be massive, frequent, or carried out collectively with considerable seriousness and directed against a multiplicity of victims. However, the assessment is neither exclusively quantitative nor geographical but must be carried out on the basis of the individual facts.⁴⁴⁵

While the number of victims of forcible expulsion and ill-treatment by Belarusian authorities cannot be established with certainty, the number of illegal border-crossings into the EU indicates how many migrants could so far have been affected by the situation at the Belarus-EU borders.

Thus, in 2020, the European Border and Coast Guard Agency (Frontex) identified 677 cases of illegal border-crossings into the EU (Latvia, Lithuania, Poland) from Belarus, noting also that the political instability in Belarus had no significant impact on the EU’s external borders.⁴⁴⁶ In earlier years, this figure ranged from 700 to 1,100.⁴⁴⁷ However, in 2021, Frontex registered 8,184 illegal border crossings, a more than tenfold increase in comparison to 2020.⁴⁴⁸ Frontex concluded that this growth is due to the artificial migration crisis created by the Lukashenka authorities. In 2022, Frontex documented 6,127 cases of illegal border crossings at the EU-Belarus border. Accordingly, the crimes against the migrants by the Belarusian authorities continued in 2022.⁴⁴⁹ Moreover, according to the Center for New Ideas, in 2023 the number of illegal border crossings at EU-Belarus border is growing in comparison with 2022.

⁴⁴⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment, para 163, (Mar 21, 2016), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

⁴⁴⁶ Frontex, *Migratory Routes*, available at <https://frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/eastern-borders-route/>.

⁴⁴⁷ Frontex, *Migratory Routes*, available at <https://frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/eastern-borders-route/>.

⁴⁴⁸ Frontex, *Migratory Routes*, available at <https://frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-routes/eastern-borders-route/>.

⁴⁴⁹ Frontex, *EU’s external borders in 2022: Number of irregular border crossings highest since 2016*, Jan 13, 2023, available at <https://frontex.europa.eu/media-centre/news/news-release/eu-s-external-borders-in-2022-number-of-irregular-border-crossings-highest-since-2016-YsAZ29>.

In this regard, in total, the number of victims of the Lukashenka authorities' attack against migrants can be estimated to constitute at least 12,000 people and increasing as this report is finalized.

Thus, the attack against the migrants in Belarus involves thousands of victims and is carried out throughout the territory of Belarus and specifically the entire EU-Belarus border. It also has a cross border effect in the EU countries and countries of origin of the migrants. Therefore, the attack against the migrants seems to meet the “widespread”-threshold.

Systematic

Not only does the situation appear to meet the criterion of “widespread,” it also seems to amount to a “systematic” attack due to the apparent existence of patterns of crimes reflected in the non-accidental repetition of similar criminal conduct on a regular basis,⁴⁵⁰ and preceded by preparatory measures.⁴⁵¹ The fact that Frontex reports that the number of illegal crossing has become fifteen times higher in one year time between 2020 and 2021 also indicates a systematic nature.

The *pattern* can for instance be seen in that the targeted civilians are transported in an organized manner to the so-called exclusion zones at the Belarus-EU border and are then interned in these exclusion zones at the Belarus-EU border. The coercive measures aimed to push civil migrants across the border from Belarus into the European Union occur in dangerous conditions (including through a fast-flowing river and in cold weather) also seem to follow similar patterns throughout the borders with Poland, Lithuania and Latvia and in the various years that the attack is now ongoing. Belarusian authorities thereby use security dogs and weapons such as batons and rifle butts as means of threats and beatings.⁴⁵²

It is also clear that the Belarusian authorities have taken a series of *preparatory measures* for the subsequent forcible and violent transfers of migrants to the territory of the European Union. Tourist companies controlled by the Belarusian authorities have organized a campaign to stimulate the flow of migrants to Belarus. They repeatedly advertised opportunities of onward travel to the European Union to point clients to that possibility in advance and attract them to come to Belarus.⁴⁵³ At the same time, the Belarusian authorities stimulated an increase in air traffic from Iraq to Belarus.⁴⁵⁴ It was allowed to open three new air routes at once, which were used mainly for the transfers of migrants.⁴⁵⁵

Therefore, the attack against migrants appears also to meet the “systematic”-criterion.

⁴⁵⁰ *Prosecutor v. Katanga*, Case No ICC-01/04-01/07, para. 1123, Judgment, Mar 7, 2014, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF.

⁴⁵¹ *Prosecutor v. Bosco Katanga*, Case No. ICC-01/04-02/06, para 31, Decision, Jul 13, 2012, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_07506.PDF.

⁴⁵² Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum seekers and migrants facing pushbacks from the EU*, Dec 20, 2021, available at <https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>.

⁴⁵³ Belarusian Investigative Center, Jun 7, 2023, available at <https://investigatebel.org/ru/investigations/who-could-make-millions-of-dollars-on-the-migration-crisis>.

⁴⁵⁴ Dossier, *Minsk takes revenge on Europe with the help of refugees from Iraq*, Aug 13, 2021, available at <https://dossier.center/bel-tours/>.

⁴⁵⁵ Dossier, *Minsk takes revenge on Europe with the help of refugees from Iraq*, Aug 13, 2021, available at <https://dossier.center/bel-tours/>.

State Policy

“State policy” requires that the attack is committed pursuant to or in furtherance of a state or organizational policy. It requires the active promotion or encouragement of an attack against a civilian population.⁴⁵⁶ This does not have to be formalized, but may be inferred from, *inter alia*, a recurrent pattern of violence, the involvement of the state in the commission of the crimes and an underlying motivation.⁴⁵⁷

As established by several human rights organizations, there has been a clear policy to bring thousands⁴⁵⁸ of migrants and asylum-seekers from countries of the Middle East and Africa to Belarus, and to push them into neighboring EU states, in particular Poland, Lithuania, and Latvia.

For this purpose, the Belarusian regime especially relied on a network of Belarusian and local travel agencies in the Middle East.⁴⁵⁹ “Attractive travel packages”⁴⁶⁰ offered to migrants were explicitly and widely advertised as an opportunity to easily and safely cross into States of the European Union.⁴⁶¹ These false promises have been described as “luring” migrants into Belarus,⁴⁶² especially because many applicants were particularly vulnerable, fleeing repressions, corruption and poverty,⁴⁶³ and planning to apply for asylum in the European Union.⁴⁶⁴

In particular, the Belarusian State-owned travel agency Tsentrkurort, which is subordinate to the Administration of the President, was directly involved in the coordination of the transfer of migrants to Belarus.⁴⁶⁵ On the basis of the agreement “on the development of international tourism between the countries of the Arab world and the Republic of Belarus”, concluded with

⁴⁵⁶ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment, para 159, (Mar 21, 2016), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

⁴⁵⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment, para 160, (Mar 21, 2016), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

⁴⁵⁸ Reality Check, *Belarus border crisis: How are migrants getting there?*, BBC News, Nov 26, 2021, available at <https://www.bbc.com/news/59233244>.

⁴⁵⁹ Thomas Gutschker, *So funktioniert Lukaschenkos Schleuser-System*, Dec 3, 2021, available at <https://www.faz.net/aktuell/politik/ausland/sanktionen-gegen-belarus-eu-nennt-verantwortliche-fuer-migration-17665803.html>.

⁴⁶⁰ Amnesty International, *Poland: Cruelty not Compassion, at Europe's Other Borders*, p. 3, Apr 11, 2022, available at <https://www.amnesty.org/en/documents/eur37/5460/2022/en/>.

⁴⁶¹ Amnesty International, *Poland: Cruelty not Compassion, at Europe's Other Borders*, p. 3, Apr 11, 2022, available at <https://www.amnesty.org/en/documents/eur37/5460/2022/en/>; Human Rights Watch, “Die here or go to Poland”, Nov 24, 2021, available at <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>.

⁴⁶² Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum seekers and migrants facing pushbacks from the EU*, Dec 20, 2021, available at <https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>.

⁴⁶³ The New York Times, *Migrants say Belarusian took them to E.U. border and supplied wire cutters*, available at <https://www.nytimes.com/2021/11/13/world/middleeast/belarus-migrants-iraq-kurds.html>; Abbas Al-Hashali | Hamza Al-Shawabkeh, *Lukashenko takes revenge on Europe by luring migrants to Lithuania*, Aug 19, 2021, available at <https://www.dw.com/ru/minsk-ispolzuet-bezhencev-s-blizhnego-vostoka-dlja-davlenija-na-litvu-i-es/a-58895434>.

⁴⁶⁴ The New York Times, *Migrants say Belarusian took them to E.U. border and supplied wire cutters*, available at <https://www.nytimes.com/2021/11/13/world/middleeast/belarus-migrants-iraq-kurds.html>.

⁴⁶⁵ Dossier, *Minsk takes revenge on Europe with the help of refugees from Iraq*, Aug 13, 2021, available at <https://dossier.center/bel-tours/>.

several travel agencies, including the Minsk-based agency Oskartour,⁴⁶⁶ Tsentrkurort assisted hundreds of Iraqi migrants at obtaining tourist visas.⁴⁶⁷ Leaked documents prove that Tsentrkurort apparently issued invitation letters for at least 200 Iraqi migrants, including children. The alleged purpose of almost all visa applications was to visit Belarus for hunting.⁴⁶⁸ Before, Belarusian authorities had significantly simplified the visa rules.⁴⁶⁹ At the same time, by July 2021, the State-owned airline Belavia had doubled⁴⁷⁰ the flights to Belarus from Turkey, Lebanon and the United Arab Emirates.⁴⁷¹ Oskartour also reported to Tsentrkurort that it had contacted the Iraqi airline Fly Baghdad, which launched regular flights to Minsk shortly after.⁴⁷²

After their arrival in Belarus, migrants were often accommodated in state-owned hotels. The transportation from Minsk airport to the hotels was reportedly provided for by Tsentrkurort.⁴⁷³ After a few days spent in Minsk, the migrants were escorted to the Belarus-EU border zone.⁴⁷⁴ Instructed to walk on foot, they would reach the fenced off “exclusion zone” between Belarus and Poland. While in some cases Belarusian authorities have reportedly cut open the wire fence to let the migrants pass the border,⁴⁷⁵ apparently voluntarily, in other cases, migrants were beaten and violently forced to cross into Poland by Belarusian guardians.⁴⁷⁶

⁴⁶⁶ Sergey Romashenko, *A state travel agency from Belarus helped Iraqis to infiltrate into Lithuania*, Deutsche Welle, Aug 13, 2021, available at <https://www.dw.com/ru/gosturfirma-iz-belarusi-pomogala-irakcam-nelegalno-pronikat-v-litvu/a-58861149>.

⁴⁶⁷ Dossier, *Minsk takes revenge on Europe with the help of refugees from Iraq*, Aug 13, 2021, available at <https://dossier.center/bel-tours/>.

⁴⁶⁸ Charlotte Bruneau, Joanna Plucinska, Yara Abi Nader, *Insight: How Minsk became a destination for migrants travelling as tourists*, Reuters, Nov 16, 2021, available at <https://www.reuters.com/world/europe/how-minsk-became-mecca-migrants-travelling-tourists-2021-11-15/>.

⁴⁶⁹ The New York Times, *Migrants say Belarusian took them to E.U. border and supplied wire cutters*, available at <https://www.nytimes.com/2021/11/13/world/middleeast/belarus-migrants-iraq-kurds.html>.

⁴⁷⁰ Charlotte Bruneau, Joanna Plucinska, Yara Abi Nader, *Insight: How Minsk became a destination for migrants travelling as tourists*, Reuters, Nov 16, 2021, available at <https://www.reuters.com/world/europe/how-minsk-became-mecca-migrants-travelling-tourists-2021-11-15/>.

⁴⁷¹ Thomas Gutschker, *So funktioniert Lukaschenkos Schleuser-System*, Dec 3, 2021, available at <https://www.faz.net/aktuell/politik/ausland/sanktionen-gegen-belarus-eu-nennt-verantwortliche-fuer-migration-17665803.html>.

⁴⁷² Dossier, *Minsk takes revenge on Europe with the help of refugees from Iraq*, Aug 13, 2021, available at <https://dossier.center/bel-tours/>.

⁴⁷³ Dossier, *Minsk takes revenge on Europe with the help of refugees from Iraq*, Aug 13, 2021, available at <https://dossier.center/bel-tours/>.

⁴⁷⁴ Dossier, *Minsk takes revenge on Europe with the help of refugees from Iraq*, Aug 13, 2021, available at <https://dossier.center/bel-tours/>.

⁴⁷⁵ Demian von Osten, “*Mit Gewalt Richtung Polen geschubst*”, Tagesschau, Nov 29, 2021, available at <https://www.tagesschau.de/ausland/europa/belarus-grenze-113.html>; BBC News, *Poland border crisis: EU to widen Belarus sanctions as row intensifies*, Nov 15, 2021, available at <https://www.bbc.com/news/world-europe-59289998>.

⁴⁷⁶ Demian von Osten, “*Mit Gewalt Richtung Polen geschubst*”, Tagesschau, Nov 29, 2021, available at <https://www.tagesschau.de/ausland/europa/belarus-grenze-113.html>; United Nations, *End ‘appalling’ Belarus-Poland border crisis, UN rights office urges*, Dec 21, 2021, available at <https://news.un.org/en/story/2021/12/1108502>.

While Polish authorities pushed migrants back to Belarus, Belarusian border guards did also not allow them to leave the fenced off area and to return to Minsk.⁴⁷⁷ Sent back and forth,⁴⁷⁸ some people even made 20-30 attempts to cross the EU border,⁴⁷⁹ while being trapped in the fenced off area for weeks.⁴⁸⁰ Belarusian soldiers were also quoted threatening migrants: “*There is no return for you refugees. Either you make it to Europe, or you die here at the border.*”⁴⁸¹ As discussed above, migrants have also been subjected to other grave human rights abuses.

It has also been reported that migrants were forced by Belarusian security forces to storm the Polish border⁴⁸² or to attack Polish border guards.⁴⁸³

Although Lukashenka has formally denied that he was encouraging migrants to travel to Belarus,⁴⁸⁴ he publicly admitted that it was “perfectly possible” that Belarusian authorities “are helping the migrants get into Polish territory.”⁴⁸⁵

Among the latest developments that were ongoing while this report was being finalized was an apparent use by the Belarusian authorities of the International Art Festival “Slavonic Bazaar” to attract foreigners who are then illegally pushed across the borders into EU countries. Lukashenka personally signed a decree that allowed nationals from 73 countries to attend the “Slavonic Bazaar” from 4 to 23 July 2023 without needing visas to enter Belarus. The countries concerned are India, Pakistan, Iran, Lebanon, Egypt, and South Africa, among others.⁴⁸⁶

The website of the festival indicates: “*Tourists can visit without a visa Grodno City, Brest, Bialowieza Forest, Augustow Canal, and part of Belarus near Poland and Lithuania.*”⁴⁸⁷ The

⁴⁷⁷ Human Rights Watch, “*Die here or go to Poland*”, Nov 24, 2021, available at <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>.

⁴⁷⁸ Charlotte Bruneau, Joanna Plucinska, Yara Abi Nader, *Insight: How Minsk became a destination for migrants travelling as tourists*, Reuters, Nov 16, 2021, available at <https://www.reuters.com/world/europe/how-minsk-became-mecca-migrants-travelling-tourists-2021-11-15/>.

⁴⁷⁹ Amnesty International, *Poland: Cruelty not Compassion, at Europe’s Other Borders*, p. 3, Apr 11, 2022, available at <https://www.amnesty.org/en/documents/eur37/5460/2022/en/>.

⁴⁸⁰ Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum seekers and migrants facing pushbacks from the EU*, Dec 20, 2021, available at <https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>.

⁴⁸¹ Demian von Osten, “*Mit Gewalt Richtung Polen geschubst*”, Tagesschau, Nov 29, 2021, available at <https://www.tagesschau.de/ausland/europa/belarus-grenze-113.html>.

⁴⁸² Monika Scislowska, Vanessa Gera, *Migrants aided by Belarus try to storm border into Poland* <https://apnews.com/article/europe-middle-east-poland-migration-warsaw-8cf4879019d24406dcca21922af48ff1>.

⁴⁸³ Demian von Osten, “*Mit Gewalt Richtung Polen geschubst*”, Tagesschau, Nov 29, 2021, available at <https://www.tagesschau.de/ausland/europa/belarus-grenze-113.html>.

⁴⁸⁴ Steve Rosenberg, *Belarus’s Lukashenko tells BBC: We may have helped migrants into EU*, BBC News, Nov 19, 2021, available at <https://www.bbc.com/news/world-europe-59343815>.

⁴⁸⁵ Steve Rosenberg, *Belarus’s Lukashenko tells BBC: We may have helped migrants into EU*, BBC News, Nov 19, 2021, available at <https://www.bbc.com/news/world-europe-59343815>.

⁴⁸⁶ *Belarus: Visa-Free Entry During Slavianski Bazaar*, Fragomen, Jun 22, 2023, available at <https://www.fragomen.com/insights/belarus-visa-free-entry-during-slavianski-bazaar.html>; Karol Badohal, *Belarus art festival could renew pressure on Poland’s border, official says*, Reuters, Jun 1, 2023, available at <https://www.reuters.com/world/europe/belarus-art-festival-could-renew-pressure-polands-border-official-says-2023-06-01/>; Belarus Visa Free, *Slavianski Bazaar 2022 in Vitebsk*, 2022, available at https://beviz.by/en/belarus/slavianski_bazar_2022.

⁴⁸⁷ Belarus Visa Free, *Slavianski Bazaar 2022 in Vitebsk*, 2022, available at https://beviz.by/en/belarus/slavianski_bazar_2022.

only requirements are a valid document for crossing the State Border of the Republic of Belarus, an electronic or original ticket, medical insurance, and money.

It is unclear at this point in time whether this will follow a same pattern of systematic and forced expulsion into EU territory, but if it will, the explicit lowering of visa requirements and indication towards the EU border area may further demonstrate the state policy element as well as the systematic nature of this attack against migrants.

Regardless of the Belarusian policy to lure migrants into the country, the Belarusian authorities' abusive practices against migrants near the borders with Poland and Lithuania might in itself be sufficient to infer the required "state policy" from. As described by Amnesty International, Belarusian authorities keep migrants in collection sites within an exclusion zone close to the borders.⁴⁸⁸ The goal of the authorities is to starve and exhaust these migrants to the extent that they try to leave the exclusion zone through attempts to cross the border.⁴⁸⁹ The involvement of Belarusian authorities in directing migrants to these collection sites and their involvement in maintaining these sites shows the direct involvement of the state in the commission of the attack against the migrants.

It thus seems that Belarusian authorities are responsible for the instrumentalization of the migrants, the transfer of migrants and asylum-seekers from Middle East and African Countries to Belarus, and, after a short stay in Belarus, the inhumane conditions and human rights violations that the Belarusian authorities inflict upon them in the Belarus-EU border area. The repeated violent expulsions (and attempted expulsions) of migrants at the EU borders were prepared and orchestrated by the Belarusian authorities. There is thus a reasonable basis to believe that there is a "state policy" in accordance with the requirements of the Rome Statute and that the required contextual elements of crimes against humanity appear to have all been met.

6.3 *Physical Elements of Deportation*

Under Article 7(2)(d) RS, "deportation" means the forced displacement of one or more persons by expulsion or other coercive acts from the area in which they are lawfully present, in the absence of any grounds permitted under international law.⁴⁹⁰

To meet the requirements of the Rome Statute, first, there needs to be a displacement of one or more individuals across a border. According to Frontex, the EU border with Belarus was the most affected by the migration flow in 2021, reaching a historical high of arrivals in July 2021 alone of more than 3,200 migrants illegally crossing the border from Belarus into the EU.

Second, to meet the physical elements of "deportation," the migrants need to have been lawfully present on the Belarusian territory. For this element, it is especially relevant that

⁴⁸⁸ Amnesty International, *Poland: Cruelty not Compassion, at Europe's Other Borders*, p. 5, Apr 11, 2022, available at <https://www.amnesty.org/en/documents/eur37/5460/2022/en/>.

⁴⁸⁹ Amnesty International, *Poland: Cruelty not Compassion, at Europe's Other Borders*, p. 5, Apr 11, 2022, available at <https://www.amnesty.org/en/documents/eur37/5460/2022/en/>.

⁴⁹⁰ *Rome Statute of the International Criminal Court*, art. 7(2)(d) (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>; *Prosecutor v. Milorad Krnojelac*, Case IT-97-25-T, para 474, Judgment, Mar 15, 2002, available at <https://www.refworld.org/cases,ICTY,414806c64.html>.

migrants were given short-term tourist visas, and were thus present in Belarus lawfully.⁴⁹¹ Thousands of people were provided with tourist visas in 2021. There are indications that the Belarusian authorities knew that these visas were not obtained for tourism purposes but to then obtain asylum in the EU.⁴⁹²

Third, the deportation must have occurred without any ground under international law.⁴⁹³ International law generally prohibits the arbitrary or collective expulsion of aliens.⁴⁹⁴ While international humanitarian law exceptionally allows for displacement of persons in specific circumstances, it only applies in the context of armed conflicts.⁴⁹⁵

Fourth, the displacement must have been forced⁴⁹⁶ and thus involuntary in nature, with the victim having “no real choice.”⁴⁹⁷ Deportation does not require physical force, but may result from an “atmosphere of fear and terror”⁴⁹⁸ created by the perpetrators to force civilians to flee. This includes the “threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”⁴⁹⁹ Specifically, such acts may include killings, severe beatings, insults, threats and intimidation, detention, looting and destruction of property.⁵⁰⁰ It can also take the form of an abuse of power against the concerned individuals, or another person related to them, or the abuse of a coercive environment.⁵⁰¹ In other words, a civilian is involuntarily displaced if he is “not faced with a genuine choice as to whether to leave or to remain in the area.”⁵⁰²

⁴⁹¹ European Parliament, *Briefing Memo, EU-Belarus relations: State of Play*, p. 4, available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698806/EPRS_BRI\(2021\)698806_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698806/EPRS_BRI(2021)698806_EN.pdf).

⁴⁹² Charlotte Bruneau, Joanna Plucinska, Yara Abi Nader, *Insight: How Minsk became a destination for migrants travelling as tourists*, Reuters, Nov 16, 2021, available at <https://www.reuters.com/world/europe/how-minsk-became-mecca-migrants-travelling-tourists-2021-11-15/>

⁴⁹³ International Criminal Court, *Elements of Crimes*, art. 7(1)(d) element 1, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>

⁴⁹⁴ Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19, para. 98, Nov. 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF.

⁴⁹⁵ Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, No. ICC-01/19, para. 98, Nov. 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, para. 287, Mar 22, 2006, available at <https://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf>.

⁴⁹⁶ *Rome Statute of the International Criminal Court*, art. 7(2)(d) (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>; *Prosecutor v. Milorad Krnojelac*, Case IT-97-25-T, para 475, Judgment, Mar 15, 2002, available at <https://www.refworld.org/cases,ICTY,414806c64.html>.

⁴⁹⁷ *Prosecutor v. Milorad Krnojelac*, Case IT-97-25-T, para 475, Judgment, Mar 15, 2002, available at <https://www.refworld.org/cases,ICTY,414806c64.html>.

⁴⁹⁸ Situation in Georgia, Case No. ICC-01/15, para 22, Decision, Jan 27, 2016, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_00608.PDF.

⁴⁹⁹ *Prosecutor v. Blagoje Simić et al.*, Case No IT-95-9-T, Judgment, Oct 17, 2003; *Judgment footnotes: Krnojelac Trial Judgement*, para. 475, and *Krstić Trial Judgement*, para. 529 (both quoting the Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text of the Elements of the Crimes, UN Doc PCNICC/2000/INF/3/Add.2, 6 July 2000, p. 11); *Naletilić Trial Judgement*, para. 519 (referring to Article 31 of Geneva Convention IV which inter alia provides that “[no] physical or moral coercion shall be exercised against protected persons [...]”); see also *Prosecutor v. Milorad Krnojelac*, Case No IT-97-25-A, para. 229, Judgment, Sep 17, 2003, available at <https://www.refworld.org/cases,ICTY,414806124.html>.

⁵⁰⁰ Situation in Georgia, Case No. ICC-01/15, para 22, Decision, Jan 27, 2016, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_00608.PDF.

⁵⁰¹ International Criminal Court, *Elements of Crimes*, art. 7(1)(d) element 1, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

⁵⁰² *Prosecutor v. Radislav Krstić*, Case No IT-98-33-T, para. 147, Judgment, Aug 2, 2001, available at <https://www.refworld.org/cases,ICTY,414810d94.html>.

While it is difficult to establish the specific numbers of voluntary crossings versus forcible expulsion, thorough documentation by human rights organizations demonstrate many cases of migrants that were forced to cross into EU states. In many cases, migrants were beaten and violently forced to cross into Poland by Belarusian guardians.⁵⁰³

Amnesty International took testimonies of 75 people that were lured into Belarus between July and November 2021 under the false promise of easily crossing into the EU and being “escorted in groups to ‘collection sites’ within the fenced-off zone.”⁵⁰⁴ Once in a “collection site” the individuals are not allowed to leave or go back into the territory of Belarus, with inhumane conditions on site for days or weeks.⁵⁰⁵ Then, they are “violently forced to cross into Poland, while being chased by dogs and forced to walk through freezing rivers by Belarusian authorities.”⁵⁰⁶

A testimony of a Syrian man about a situation that involved around 80 people reads:

“They offloaded us... There were about ten [Belarusian] soldiers and they had four dogs with them. They said they would let the dogs loose so if we didn’t run fast, we would get bitten. The soldiers ran after us beating anyone who didn’t run fast enough with batons. After they had chased us for about 200 meters the soldiers turned around, leaving us in the buffer zone in the middle of the woods. Families had been separated. Those bitten by the dogs were bleeding.”

At the border, Polish authorities regularly pushed migrants back to Belarus,⁵⁰⁷ while Belarusian authorities routinely forced them to try to cross into Poland again. Belarusian soldiers also threatened migrants: *“There is no return for you refugees. Either you make it to Europe, or you die here at the border.”*⁵⁰⁸ Sent back and forth,⁵⁰⁹ in what has been described as “pingpong

⁵⁰³ Demian von Osten, “Mit Gewalt Richtung Polen geschubst”, Tagesschau, Nov 29, 2021, available at <https://www.tagesschau.de/ausland/europa/belarus-grenze-113.html>; United Nations, *End ‘appalling’ Belarus-Poland border crisis, UN rights office urges*, Dec 21, 2021, available at <https://news.un.org/en/story/2021/12/1108502>.

⁵⁰⁴ Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum seekers and migrants facing pushbacks from the EU*, Dec 20, 2021, available at <https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>

⁵⁰⁵ Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum seekers and migrants facing pushbacks from the EU*, Dec 20, 2021, available at <https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>

⁵⁰⁶ Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum seekers and migrants facing pushbacks from the EU*, Dec 20, 2021, available at <https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>

⁵⁰⁷ Human Rights Watch, *Die Here or Go to Poland*, available at <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>

⁵⁰⁸ Demian von Osten, “Mit Gewalt Richtung Polen geschubst”, Tagesschau, translated from German into English, Nov 29, 2021, available at <https://www.tagesschau.de/ausland/europa/belarus-grenze-113.html>.

⁵⁰⁹ Charlotte Bruneau, Joanna Plucinska, Yara Abi Nader, *Insight: How Minsk became a destination for migrants travelling as tourists*, Reuters, Nov 16, 2021, available at <https://www.reuters.com/world/europe/how-minsk-became-mecca-migrants-travelling-tourists-2021-11-15/>

pushbacks,”⁵¹⁰ some people even made 20-30 attempts to cross the EU border,⁵¹¹ while being trapped in the fenced off area for weeks.⁵¹² In the same vein, Human Rights Watch quoted migrants who “said that Belarusian border guards routinely take groups of people who are in or near the border area on foot or in vehicles (cars, trucks) to specific locations at the Polish border and make them cross into Poland, even those who are no longer willing to attempt it.”⁵¹³

A report by Protecting Rights at Borders reads:

*“Intimidation, violence and illegal practices by Belarusian border guards were reported by the interviewees. According to the numerous reports from the refugees in transit, Belarusian border guards are directly pushing them to cross the border illegally. In case of unsuccessful attempts to cross the border, refugees in transit find themselves stranded in the forest, trying to survive without shelter, food, water, or access to medical care.”*⁵¹⁴

At the same time, Belarusian border guards did not allow migrants to leave the fenced off area and to return to Minsk,⁵¹⁵ exposing migrants to the harshest living conditions.

As was also discussed in Section 5.7, deportation does not require physical force, but may result from an “atmosphere of fear and terror”⁵¹⁶ created by the perpetrators to force civilians to flee. The violent, coercive and inhumane treatment by the Belarusian authorities of the migrants created such an “atmosphere of fear and terror” in which the migrants were forced to cross the border, whether or not this would have initially been the voluntary choice of some or many among them. When discussing the crime against humanity of deportation, it is the actions and inactions of those who coerce and use violence, which the Belarusian authorities seem to have done repeatedly and systematically.

Whether by using physical force, the threat of force or by creating inhumane living conditions in the “exclusion zone,” there are therefore reasonable grounds to believe that the actions of the Belarusian authorities may constitute forced expulsions and amount to deportation within the sense of Article 7(1)(d) of the Rome Statute.

⁵¹⁰ Henry Ridgwell, ‘Pingpong Pushbacks’: Winter Misery for Migrants Trapped on Poland-Belarus Border, VOA News, Nov 24, 2021, available at <https://www.voanews.com/a/ping-pong-pushbacks-winter-misery-for-migrants-trapped-on-poland-belarus-border-/6326229.html>

⁵¹¹ Amnesty International, *Poland: Cruelty not Compassion, at Europe’s Other Borders*, p. 3, Apr 11, 2022, available at <https://www.amnesty.org/en/documents/eur37/5460/2022/en/>.

⁵¹² Amnesty International, *Belarus/EU: New evidence of brutal violence from Belarusian forces against asylum seekers and migrants facing pushbacks from the EU*, Dec 20, 2021, available at <https://www.amnesty.org/en/latest/news/2021/12/belarus-eu-new-evidence-of-brutal-violence-from-belarusian-forces-against-asylum-seekers-and-migrants-facing-pushbacks-from-the-eu/>

⁵¹³ Human Rights Watch, *Die Here or Go to Poland*, available at https://www.hrw.org/sites/default/files/media_2021/11/eca_migrant1121_web_0.pdf.

⁵¹⁴ *Report Beaten, punished and pushed back A pattern of institutionalised human rights violations at EU borders reconfirmed: How pushbacks remained the standard practice and a de facto tool for border management in 2022*, Protecting Rights at Borders, available at <https://pro.drc.ngo/media/cxihgutp/prab-report-january-to-december-2022.pdf>

⁵¹⁵ Human Rights Watch, *Die Here or Go to Poland*, available at https://www.hrw.org/sites/default/files/media_2021/11/eca_migrant1121_web_0.pdf

⁵¹⁶ Situation in Georgia, No. ICC-01/15, para 22, Decision, Jan 27, 2016, available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_00608.PDF.

Chapter 7 – Perpetrators

Criminal prosecution requires that a specific person can be proven to be criminally responsible for the alleged violations. This chapter examines how to link specific individuals to crimes against humanity, in particular in the context of the ICC or a special tribunal.

This chapter provides a preliminary analysis on some of the key perpetrators and indicates the types of perpetrators into whom further investigation is warranted by investigatory and prosecutorial authorities. Further criminal investigation is required into the role of specific individuals to assess whether the *reasonable grounds to believe*-standard is met to trigger prosecution of specific individuals, which is beyond the scope of this report.

7.1 Potential Perpetrators

The section on State Policy (4.5) in Chapter 4 has already provided a sample of statements by Lukashenka directly linking him to the crimes. However, he is not the only person responsible for these crimes.

Since the crimes in Belarus primarily occurred in the context of demonstrations, reports identify perpetrators that belong to the authorities responsible for security and law enforcement, including members of the police, the State Security Committee (KGB), the Special Purpose Police Detachment (the Belarusian riot police, abbreviated as OMON), the special forces (the Spetsnaz and Almaz Special Anti-terrorism Units), the Main Directorate for Combating Organized Crime and Corruption (abbreviated as GUBOPiK), the Internal Troops, as well as detention center personnel.⁵¹⁷

With respect to the involvement of the army, Defense Minister Viktor Khrenin stated, on 23 August 2020:

*“We cannot stand idly by as the flags under which fascists organized mass murders of Belarusians, Russians, Jews, and representatives of other nationalities - are now used to organize actions in these sacred places. We cannot allow that to happen! That is why from today on we take them under our protection. We categorically warn you: if you disturb the order and peace in these places, you will have to deal not with the police, but with the army.”*⁵¹⁸

On 24 September 2020, the newly appointed Prosecutor General Andrei Shved stated that the Prosecutor’s Office together with the law enforcement block, other competent bodies and organizations would work out a tactic and strategy of actions for implementation of the President’s orders:

⁵¹⁷ Human Rights Centre Viasna, *Belarus After Election: Report on the human rights situation in Belarus in the post-election period*, Oct 5, 2020, available at http://spring96.org/files/book/en/2020_elections_tortures_en.pdf; Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, p 19-23, 42-45, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>; High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para 23, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

⁵¹⁸ VoenTB, *Statement of the Ministry of Defense of the Republic of Belarus*, Aug 23, 2020, available at <https://www.youtube.com/watch?v=DHFqzwWRLhg>.

*“Everyone who is guilty will be punished sooner or later. Not a single blogger, not a single person who has committed a crime, not only at unsanctioned events, but also on the Internet, will escape responsibility. Today there is a very active work to identify such persons and bring them to justice.”*⁵¹⁹

Overall, prosecutors and judges have also been involved in the State system of persecution of opposition-minded civilians on political grounds.⁵²⁰ This includes judges of the Belarusian Constitutional Court, who confirmed the constitutionality of several repressive laws, thus providing legal justification for the repressions.⁵²¹ Ordinary court judges systematically subjected opposition-minded civilians to unfair and politically motivated trials. Defendants are systematically deprived of the opportunity to defend themselves effectively precisely as a result of the decisions of judges directed to the elimination of adversarial trials. Actions related to the exercise of the right to freedom of speech and assembly, such as carrying white-red-white flags and clothing, as well as minor offenses, were interpreted by the courts as criminal acts.⁵²² The role of judges and prosecutors in the commission of crimes against humanity, therefore, also requires further investigation.

As was provided in Section 4.5, the Belarusian state media has played a significant role in the violence against the Belarusian population. For example, State television threatens Lukashenka’s political opponents with inevitable violent death,⁵²³ and demands the establishment of formal dictatorial rule.⁵²⁴ Certain state media workers, including the top management of BTRC (ATN), ONT, and CTV channels, as well as their correspondents Lyudmila Hladkaya,⁵²⁵ Kseniya Lebiadzeva,⁵²⁶ and Ryhor Azaryonak⁵²⁷ may have been directly involved in commissioning torture-related video content, including violent and illegal interrogations of political prisoners. Further investigation should examine to what extent these and other individuals are linked to the violations.

⁵¹⁹ Belta.by, *Shved: no organiser and participant of unsanctioned protests will escape responsibility*, Sep 24, 2020, available at <https://www.belta.by/society/view/shved-ni-odin-organizator-i-uchastnik-nesanktsionirovannyh-aktsij-ne-ujdet-ot-otvetstvennosti-408042-2020>

⁵²⁰ Law and Democracy Center, *Right to a fair trial and due process in Belarus after 2020 presidential elections*, p. 49, Mar 15, 2023, available at <https://ldc-jh.eu/report-right-to-a-fair-trial-and-due-process-in-belarus-after-2020-presidential-elections/>.

⁵²¹ Law and Democracy Center, *Right to a fair trial and due process in Belarus after 2020 presidential elections*, p. 5-22, Mar 15, 2023, available at <https://ldc-jh.eu/report-right-to-a-fair-trial-and-due-process-in-belarus-after-2020-presidential-elections/>.

⁵²² Law and Democracy Center, *Right to a fair trial and due process in Belarus after 2020 presidential elections*, p. 29-32, Mar 15, 2023, available at <https://ldc-jh.eu/report-right-to-a-fair-trial-and-due-process-in-belarus-after-2020-presidential-elections/>.

⁵²³ SB.By, *Colour revolution - it is already being prepared here, against all of us: Women’s Revolution, or the Women’s Revolt*, Jul 22, 2020, available at <https://www.sb.by/articles/zhenskaya-revolutsiya-ili-babiy-bunt.html>

⁵²⁴ CTV.By, *Yulia Artyukh: “Better a dictatorship than a corrupt puppet democracy”*, Apr 02, 2021, available at <http://www.ctv.by/yuliya-artyuh-luchshe-diktatura-chem-prodazhnaya-marionetchnaya-demokratiya>

⁵²⁵ Aleksei Ivashkevich, *Investigative journalist. Correspondent of “the SB. Belarus Today” correspondent Lyudmila Gladkaya interrogates the detainees together with law enforcers*, Mar 29, 2021, available at <https://mediazona.by/article/2021/03/29/gladkaya>

⁵²⁶ Lebiadzeva’s Telegram publications, available at <https://t.me/lebedevalive>

⁵²⁷ CTV.By, *State TV appearances*, available at <http://www.ctv.by/grigoriy-azarenok-1>

7.2 *Mens Rea and Knowledge*

The elements of the various crimes against humanity that are included in the ICC's Rome Statute all end with the provision that "[t]he perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population." This means that with respect to the individual accused, in addition to (1) the requisite mental elements (*mens rea*) for the particular offenses, (2) the accused must also be aware of the "broader context in which his actions occur," namely the widespread or systematic attack directed against a civilian population.⁵²⁸

The perpetrator does not need to know the details of the attack or share in the purpose of the goals of the overall attack but does need to be aware of such an attack.⁵²⁹ Such knowledge may be inferred from the relevant facts and circumstances.⁵³⁰ And, as the ICC Elements of Crimes explain, "[i]n the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack."

Further investigations into specified individual will have to examine to what extent the *mens rea* elements are met for each suspect. However, Belarusian authorities simultaneously carried out large-scale and coordinated attacks across Belarus. The scale and coordination of these attacks lead to a conclusion that the underlying prohibited acts were not isolated events and that perpetrators must have had knowledge of the wider context and conduct.

7.3 *Modes of Liability*

The ICC can prosecute not only those who perpetrated the crimes directly but also perpetrators that are otherwise connected to the crime's commission (or attempt). While the ICC's Office of the Prosecutor (OTP) may initiate proceedings against any individual who has committed a crime within the Court's jurisdiction, it has adopted a strategy of focusing on those who bear the greatest responsibility.⁵³¹ This means that the OTP prefers to concentrate its efforts on high-ranking individuals, such as heads of state or heads of organizations.⁵³² However, high-ranking officials are unlikely to be the direct perpetrators of the crimes in Belarus, in the sense that they were not the ones who made the arrests or tortured themselves.

The OTP would likely seek to connect the high-ranking officials of the state organs that have been involved in the commission of crimes, as well as Lukashenka himself, based on one or

⁵²⁸ *Prosecutor v. Dusko Tadic*, Case No IT-94-1-A, para 248, Judgment, Jul 15, 1999, available at <https://www.refworld.org/cases,ICTY,40277f504.html>; *The Prosecutor v Zoran Kupre[Ki], Mirjan Kupre[Ki], Vlatko Kupre[Ki], Drago Josipovi], Dragan Papi], Vladimir [Anti], Also Known As "Vlado"*, Case No IT-95-16-T, para. 134, Judgment, Jan 14, 2000, available at <https://www.icty.org/x/cases/kupreski/tjug/en/kup-tj000114e.pdf>.

⁵²⁹ *Prosecutor v Dragoljub Kunarac Radomir Kovac and Zoran Vukovic*, Case No IT-96-23 & IT-96-23/1-A, para. 102-103, Judgment, Jun 12, 2002, available at <https://www.refworld.org/cases,ICTY,3debaafe4.html>.

⁵³⁰ International Criminal Court, *Elements of Crimes. General Introduction*, para 3, available at <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>.

⁵³¹ Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, p.7, Sep 2003, available at https://www.icc-cpi.int/sites/default/files/NR/rdoonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

⁵³² Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, p.7, Sep 2003, available at https://www.icc-cpi.int/sites/default/files/NR/rdoonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

more modes of liability. While lower ranking perpetrators may fall outside of the scope of the ICC, they could be prosecuted in Belarusian or foreign domestic courts (Chapter 9) or if a special tribunal would be established (Chapter 10).

The most relevant modes of liability for the situation in Belarus are superior responsibility and ordering. Indirect perpetration and indirect co-perpetration may also apply in certain circumstances, but they would be more difficult to establish.

Command or Superior Responsibility

Command or superior responsibility allows that a commander or superior can be held responsible for the crimes committed by his subordinate. This requires i) a superior/subordinate relationship, ii) *mens rea*, iii) a failure to take reasonable measures to prevent or punish violations of international criminal law, and iv) causation.⁵³³ To establish superior responsibility, it is necessary to prove that the superior had knowledge of their subordinate's intention to commit a crime and failed to prevent it or failed to punish them for it.⁵³⁴

High-ranking Belarusians may be connected to the crimes through superior responsibility through publicly available statements and reports. The command and control of the law enforcement system form a hierarchy of subordination from a specific officer to Lukashenka, who personally gives orders to the leadership of the Ministries of Internal Affairs and Defense, the State Security Committee and other state bodies (See Chapter 2.1). Following the public statements of high-ranking officials mentioned in Chapter 4.5 of this Report, on more than one occasion, Belarusian authorities, including representatives of law enforcement agencies, have publicly acknowledged the complaints of abuse of duty by law enforcement officials and responded that they do not intend to investigate these complaints.⁵³⁵ This suggests that high-ranking officials knew that their subordinates had committed crimes, but failed to take any measures to punish those responsible. Considering that similar crimes continued to take place following the August 9, 2020, elections, it can be said that this failure to punish led to the commission of further crimes.⁵³⁶

Moreover, Lukashenka made statements in the context of the migrant crisis that may link him personally to the crimes. In particular, he repeatedly and publicly affirmed the intentional push of migrants toward EU borders, thereby making them an instrument for foreign policy purposes.⁵³⁷

⁵³³ *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision, para 170, (Jun 15, 2009), available at https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_04528.PDF; Werle and Jessberger, *Principles of International Criminal Law*, pages 136-137, (3rd edition, 2014).

⁵³⁴ *Rome Statute of the International Criminal Court*, art. 28 (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵³⁵ Stephanie Nebehay, *Belarus tells U.N. it has seen no cases of police abuse*, Reuters, Nov 2, 2020, available at <https://www.reuters.com/article/us-belarus-election-un-idUSKBN27I14B>; United Nations Human Rights Office of the High Commissioner, *Statement by Ms Anaïs Marin, Special Rapporteur on Belarus*, at “New Belarus against Torture” event dedicated to the International Day in Support of Victims of Torture, Jun 25, 2021, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27213&LangID=E>.

⁵³⁶ Human Rights Centre Viasna, *Belarus After Election: Report on the human rights situation in Belarus in the post-election period*, Oct 5, 2020, available at http://spring96.org/files/book/en/2020_elections_tortures_en.pdf.

⁵³⁷ Joe Evans, *Belarus Dictator threatens to 'Flood EU with Drugs and Migrants'*, *The Week*, May 28, 2021, available at <https://www.theweek.co.uk/news/world-news/europe/952979/belarus-dictator-threatens-flood-eu-with-drugs-migrants-avoid-sanctions>.

Ordering the Crimes

Additionally, Lukashenka and high-ranking members of the Belarusian security forces could be responsible for ordering the crimes. For instance, in October 2020, the interior ministry announced that the police had authorization to use lethal weapons against protesters.⁵³⁸ Around the same time, Lukashenka reportedly claimed, “[i]f anyone touches a security officer, that person should leave the site without their hands at least.”⁵³⁹ Moreover, Lukashenka instructed the head of Minsk OMON, Dmitry Balaba, to be “heavy-handed” on protesters. The head of Minsk regional police also instructed to beat and detain anyone “talking on the phone” or standing in a group of five “at a bus stop.”⁵⁴⁰

These statements indicate that the crimes were at the very least approved by officials, and may well have been ordered by them.

Indirect Perpetration

Another possible mode of liability is indirect perpetration, although this may be more difficult to establish. Notably, evidence would need to show that the suspect exerted control either over the will of the physical perpetrator or over a hierarchical organization that assures automatic compliance with the suspect’s orders.⁵⁴¹ The latter criterion is more likely to be relevant in this case, but applies primarily to extreme cases where low-level members of the organization are completely interchangeable, or where these members go through rigorous training and indoctrination.⁵⁴² In Belarus, they may apply to institutions such as the KGB.⁵⁴³

Indirect Co-Perpetration

Where multiple agencies are involved in the commission of a crime, it is sometimes difficult to establish exactly who is responsible for its direct perpetration. For instance, in Belarus, where human rights groups report that plainclothes police participated in the response to demonstrations,⁵⁴⁴ it may not be possible to determine the specific agency to which they belong, and therefore which officials are responsible.

⁵³⁸ Reuters, Belarus allows police to use combat weapons as protests persist, Oct 12, 2020, available at <https://www.reuters.com/article/belarus-election-protests-arms-idINKBN26X1T5?edition-redirect=in>; Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, Nov.

⁵³⁹ RadioFreeEurope/RadioLiberty, *Lukashenka Meets New Belarusian Security Chiefs, Warns Protesters of ‘Harsh’ Measures*, Oct 30, 2020, available at <https://www.rferl.org/a/lukashenka-meets-new-belarusian-security-chiefs-warns-protesters-of-harsh-measures/30921029.html>.

⁵⁴⁰ The United Nations High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, para. 34, U.N. Doc A/HRC/49/71, Mar 4, 2022, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/276/97/PDF/G2227697.pdf?OpenElement>.

⁵⁴¹ *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, paras 1403-1412, Judgment, Mar 7, 2014, available at https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

⁵⁴² *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, paras. 1407-1412, Judgment, Mar 7, 2014, available at https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

⁵⁴³ Wolfgang Benedek, *Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus*, paras 40, 42, 51, 52, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

⁵⁴⁴ Human Rights Center Viasna, *Human Rights Situation in Belarus in 2020, Analytical Review*, p. 9, available at https://spring96.org/files/reviews/en/review_2020_en.pdf.

If multiple agencies are involved in the commission of crimes, the officials of each agency can be held responsible for the actions of the members of any of the agencies based on the mode of liability of indirect co-perpetration.⁵⁴⁵ As with indirect perpetration, evidence would need to show that the suspect had control over a hierarchical organization that assures automatic compliance with the suspect's orders, in the same way as described above.⁵⁴⁶

Moreover, evidence would need to show that there was a common plan between the officials of the agencies and that each suspect provided an essential contribution to this plan, meaning that the suspect's withdrawal from the plan would result in its failure.⁵⁴⁷

Furthermore, the evidence would need to show that the suspect was aware of all the factual circumstances,⁵⁴⁸ and that they accepted that implementing the plan would result in the commission of the crime.⁵⁴⁹

⁵⁴⁵ *Prosecutor v Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, paras. 490-494, Decision, Sep 30, 2008, available at https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF.

⁵⁴⁶ *Prosecutor v Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, para 512, Decision, Sep 30, 2008, available at https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF.

⁵⁴⁷ *Prosecutor v Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, paras. 522-523, Decision, Sep 30, 2008, available at https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF.

⁵⁴⁸ *Prosecutor v Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, para 512, Decision, Sep 30, 2008, available at https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF.

⁵⁴⁹ *Prosecutor v Katanga and Ngudjolo*, Case No. ICC-01/04-01/07-717, paras. 524-526, Decision, Sep 30, 2008, available at https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF.

PART III JUSTICE OPTIONS FOR CRIMES AGAINST HUMANITY

Chapter 8 – The International Criminal Court

The ICC is a permanent international court created to prosecute perpetrators of core international crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression. The Rome Statute (RS) is the foundational treaty of the ICC, which established the Court and sets out its powers.⁵⁵⁰

The ICC may only prosecute nationals of states parties to the Rome Statute or people who have committed a crime in the territory of a state party, or when the United Nations Security Council (UNSC) refers a situation to the ICC.⁵⁵¹ Moreover, states that are not a state party to the ICC may lodge a declaration under Article 12(3) RS to accept the exercise of jurisdiction by the ICC.

The ICC is designed to function as a court of last resort, stepping in where local courts are unable or unwilling to prosecute those responsible for international crimes.⁵⁵² While the ICC may prosecute any individual who has committed a crime within the Court's jurisdiction, the Prosecutor of the ICC has adopted a strategy of focusing on those who bear the greatest responsibility.⁵⁵³ This means that the Office of the Prosecutor (OTP) of the ICC prefers to concentrate its efforts on high-ranking individuals, such as heads of states, senior officials, and heads of organizations.⁵⁵⁴

8.1 Jurisdiction of the ICC over Belarus

Jurisdiction of the ICC

A court may only administer justice when it has jurisdiction: the authority to make judgments. A court's jurisdiction relates to the territory over which it has the power to adjudicate, which people fall under its jurisdiction, which crimes, and during what time period. The ICC may only prosecute suspects of crimes committed in Belarus if it has jurisdiction over the situation in Belarus, and then only for the crimes that are in the Rome Statute.

For conduct to fall within the ICC's jurisdiction, it must fulfill three requirements. First, it should fall under the category of crimes listed by Article 5 RS and defined by Articles 6 to 8bis RS (*ratione materiae*): genocide, crimes against humanity, war crimes, and the crime of

⁵⁵⁰ Rome Statute of the International Criminal Court, (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>

⁵⁵¹ Rome Statute of the International Criminal Court, art 12(2), art13(b), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>

⁵⁵² Rome Statute of the International Criminal Court, art 17, (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁵³ Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor*, p. 7, Sep 1, 2003, available at <https://www.icc-cpi.int/news/paper-some-policy-issues-office-prosecutor>.

⁵⁵⁴ Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor*, p. 7, Sep 1, 2003, available at <https://www.icc-cpi.int/news/paper-some-policy-issues-office-prosecutor>.

aggression.⁵⁵⁵ Second, the temporal condition set by Article 11 RS must be fulfilled, being that the crime must have been committed after the entry into force of the Statute (*ratione temporis*).⁵⁵⁶ Third, one of the two requirements contained in Article 12(2) RS must be met: either the perpetrator is a national of a state party to the Rome Statute (Article 12(2)(b), *ratione personae*) or the territory on which the conduct took place is of a state party (Article 12(2)(a), *ratione loci*).⁵⁵⁷

Belarus is not a state party to the ICC. Article 11 RS provides that the ICC has jurisdiction over crimes committed after Belarus will have become a state party, unless Belarus makes a special declaration accepting the ICC's jurisdiction under Article 12(3) RS.

Article 12 RS provides the preconditions to the exercise of jurisdiction. Article 12(2) RS sets out that the ICC may only exercise jurisdiction if the criminal conduct occurred on the territory of a state party to the Rome Statute or of a state that accepted the ICC's jurisdiction under Article 12(3) RS,⁵⁵⁸ or was committed by a person with citizenship of a state party.⁵⁵⁹

Article 13 RS provides that the ICC may exercise jurisdiction if a situation is referred by a state party or by the UNSC, or if the Prosecutor initiates an investigation him/herself.

UN Security Council Referral

Before discussing how Belarus can become a state party to the ICC or lodge an article 12(3) declaration, and the options for the ICC to exercise jurisdiction on the basis of the 2019 Bangladesh/Myanmar-precedent, under Article 13(b) RS, the ICC can also obtain jurisdiction over a situation in a non-state party is through a referral by the UNSC. The UNSC may refer a situation to the ICC Prosecutor where crimes under the jurisdiction of the ICC appear to have been perpetrated.⁵⁶⁰

⁵⁵⁵ Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, para 40, Nov 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF; Rome Statute of the International Criminal Court, articles 5 to 8bis, (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>; Charter of the United Nations, (Multilateral, 1945), available at <https://www.un.org/en/about-us/un-charter/full-text>.

⁵⁵⁶ Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, para 40, Nov 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF; Rome Statute of the International Criminal Court, art 11, (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>; Charter of the United Nations, (Multilateral, 1945), available at <https://www.un.org/en/about-us/un-charter/full-text>.

⁵⁵⁷ Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, para 40, Nov 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF; Rome Statute of the International Criminal Court, art 12, (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>; Charter of the United Nations, (Multilateral, 1945), available at <https://www.un.org/en/about-us/un-charter/full-text>.

⁵⁵⁸ Rome Statute of the International Criminal Court, art 12(2)(a), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁵⁹ Rome Statute of the International Criminal Court, art 12(2)(b), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁶⁰ Rome Statute of the International Criminal Court, art 13(b), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>; Charter of the United Nations, (Multilateral, 1945), available at <https://www.un.org/en/about-us/un-charter/full-text>.

Such referrals are rare. It is moreover unlikely in the case of Belarus, considering the composition of the UNSC and its voting process.⁵⁶¹ The UNSC is composed of 15 members, five of which are permanent members who hold veto powers over UNSC decisions, including those related to an ICC referral.⁵⁶² The five permanent members are the United States, China, France, the United Kingdom, and Russia. To refer the situation in Belarus to the ICC, the UNSC has to collect affirmative votes of all five permanent members, including that of Russia.⁵⁶³

Prior to the Russian invasion of Ukraine, the previous voting pattern of some of the UNSC permanent members suggest that the UNSC is unlikely to collect a sufficient number of affirmative votes.⁵⁶⁴ This was confirmed by Russia vetoing the UNSC from taking collective action on the situation in Ukraine.⁵⁶⁵ As Belarus is currently an ally to Russia, it is unlikely Russia will refer the situation in Belarus to the ICC.⁵⁶⁶

Ratification of the Rome Statute

In general, the ICC has jurisdiction over crimes committed on the territory of state parties or by nationals of state parties. Belarus is not a state party to the ICC.

To become a state party, Belarus would have to ratify the Rome Statute. The Court's jurisdiction, if invoked, is activated only from the date at which the Rome Statute comes into force in Belarus. The ICC will therefore not automatically have retrospective jurisdiction over the crimes committed in the context of the electoral violence in 2020 and since when Belarus becomes a state party.

Article 12(3) Declaration

An exception to this rule is if Belarus accepts retrospective ICC jurisdiction explicitly by filing a declaration under Article 12(3) RS.⁵⁶⁷ This provision allows non-states parties to grant

⁵⁶¹ Charter of the United Nations, art 27(3), (Multilateral, 1945), available at <https://www.un.org/en/about-us/un-charter/full-text>

⁵⁶² Charter of the United Nations, art 23(1), (Multilateral, 1945), available at <https://www.un.org/en/about-us/un-charter/full-text>.

⁵⁶³ Charter of the United Nations, art 27, (Multilateral, 1945), available at <https://www.un.org/en/about-us/un-charter/full-text>; Rome Statute of the International Criminal Court, art 12(3), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁶⁴ Kateryna Busol, *Can the International Criminal Court Help Belarus?*, CHATHAM HOUSE, Aug 26, 2020, available at <https://www.chathamhouse.org/2020/08/can-international-criminal-court-help-belarus>; Rome Statute of the International Criminal Court, art 12(3), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁶⁵ United Nations, Russia vetoes Security Council resolution condemning attempted annexation of Ukraine regions, Sep 30, 2022, available at <https://news.un.org/en/story/2022/09/1129102>; <https://news.un.org/en/story/2022/09/1129102>; Rome Statute of the International Criminal Court, art 12(3), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁶⁶ UN Security Council, Resolution 2623 (2022), UN Doc. S/Res/2623 (2022), available at https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2623.pdf; Kateryna Busol, *Can the International Criminal Court Help Belarus?*, CHATHAM HOUSE, Aug 26, 2020, available at <https://www.chathamhouse.org/2020/08/can-international-criminal-court-help-belarus>.

⁵⁶⁷ Rome Statute of the International Criminal Court, art 11(2), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

jurisdiction to the ICC without acceding to the Court.⁵⁶⁸ The decision to make such a declaration lies entirely with the state itself.⁵⁶⁹

The practice so far has been that once a state makes such a declaration, the ICC's OTP assesses its own jurisdiction based on the available information⁵⁷⁰ and then seeks authorization from the Pre-Trial Chamber.⁵⁷¹

Previously, Palestine and Ukraine have exercised the right to lodge a declaration under Article 12(3) RS. Palestine lodged such a declaration for crimes committed since 2014.⁵⁷² Ukraine lodged two declarations under Article 12(3) for crimes committed from 2013 to 2014 and an open-ended declaration for crimes committed since 2014.⁵⁷³ On March 3, 2021, the Prosecutor opened an investigation into the situation in Ukraine. The situation in Ukraine was pending authorization from the Pre-Trial Chamber to start an investigation until the Russian invasion of Ukraine on February 24, 2022. On February 28, 2022, Prosecutor Khan announced that his Office was proceeding to gain authorization from the Pre-Trial Chamber to open an investigation into the situation in Ukraine as quickly as possible.⁵⁷⁴ Ultimately, 43 referrals by states parties expedited the opening of the investigation.⁵⁷⁵

While it appears highly unlikely that the current government of Belarus would lodge an Article 12(3) declaration, a new government could accept the ICC's jurisdiction after a change of power in Belarus. Since an Article 12(3) declaration can have retroactive effect, it could grant the ICC jurisdiction over the crimes committed since May 2020, and could thus help hold accountable those most responsible for these crimes.

⁵⁶⁸ Rome Statute of the International Criminal Court, art 12(3), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁶⁹ James Chan, Judicial Oversight over Article 12(3) of the ICC Statute, FICHL Policy Brief Series No. 11, 1 (2013), available at <https://www.toaep.org/pbs-pdf/11-chan>.

⁵⁷⁰ James Chan, Judicial Oversight over Article 12(3) of the ICC Statute, FICHL Policy Brief Series No. 11, 1 (2013), available at <https://www.toaep.org/pbs-pdf/11-chan>.

⁵⁷¹ James Chan, Judicial Oversight over Article 12(3) of the ICC Statute, FICHL Policy Brief Series No. 11, 1 (2013), available at <https://www.toaep.org/pbs-pdf/11-chan>.

⁵⁷² International Criminal Court, Situation in the State of Palestine, ICC-01/18, available at <https://www.icc-cpi.int/palestine>.

⁵⁷³ International Criminal Court, Ukraine accepts ICC jurisdiction over alleged crimes committed since 20 February 2014, Sep. 8, 2015, available at <https://www.icc-cpi.int/news/ukraine-accepts-icc-jurisdiction-over-alleged-crimes-committed-20-february-2014>.

⁵⁷⁴ International Criminal Court, Statement of the ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation", Feb 28, 2022, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>.

⁵⁷⁵ International Criminal Court, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, Mar 2, 2022, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

Jurisdiction through the Bangladesh/Myanmar Precedent

In 2019, the ICC decided that it had (partial) jurisdiction over crimes committed by authorities of Myanmar against the Rohingya even though Myanmar is also not a state party.⁵⁷⁶

The ICC's Pre-Trial Chamber III concluded that the Court can exercise jurisdiction over the crime of forced deportation that is (allegedly) committed by nationals of Myanmar against the Rohingya, even though Myanmar is not a state party to the ICC.⁵⁷⁷ Since one of the elements of forced deportation requires the transfer of population "to another state or location," the ICC decided that *part of* the crime had taken place on the territory of a state party to the Rome Statute (Bangladesh), thereby providing the ICC with jurisdiction over the crime.⁵⁷⁸

Moreover, persecution as defined in the RS occurs when another crime contained in the RS is committed with the intent to discriminate against a group or collectivity.⁵⁷⁹ The Court considered that the alleged act of forced deportation could have been committed against the Rohingya on ethnic or religious grounds, and therefore the act of persecution could also be prosecuted in this situation.⁵⁸⁰

The ICC may therefore be able to exercise jurisdiction over the crimes against humanity of deportation or forcible transfer of population, and possibly also over persecution, if it can be proven that Belarus has persecuted and forcefully deported people that fled to ICC state parties such as Lithuania, Poland, and Latvia.

Applying the ICC's reasoning to the situation in Belarus, the Court might consider that part of the alleged conduct required for deportation or persecution under Article 7 RS (*ratione materiae*), has occurred in a neighboring state party to the statute, extending its jurisdiction to the situation in Belarus. Many people fled to Latvia, Lithuania, Poland,⁵⁸¹ which are all state parties to the ICC where the Rome Statute entered into force well before August 2020 (*ratione temporis*).⁵⁸² The ICC may be able to exercise jurisdiction over the crimes committed by Belarusian officials that have taken place at least in part on the territory of Lithuania, Poland,

⁵⁷⁶ International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, Nov 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF.

⁵⁷⁷ International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, Nov 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF.

⁵⁷⁸ International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, para 62, Nov 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF.

⁵⁷⁹ Rome Statute of the International Criminal Court, art 7, (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁸⁰ International Criminal Court, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, para 109, Nov 14, 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF.

⁵⁸¹ International Partnership for Human Rights, Communication Submitted Under Article 15(2) of the Rome Statute of the International Criminal Court: The Situation in Belarus/Lithuania/Poland/Latvia and Ukraine: Crimes Against Humanity of Deportation and Persecution, para 50, May 2021, available at https://www.iphronline.org/wp-content/uploads/2021/05/BY_ICC_Submission.pdf.

⁵⁸² Latvia deposited its instrument of ratification of the Rome Statute on 28 June 2002, available at <https://asp.icc-cpi.int/states-parties/eastern-european-states/latvia>; Lithuania deposited its instrument of ratification of the Rome Statute on 12 May 2003, available at <https://asp.icc-cpi.int/states-parties/eastern-european-states/lithuania>; Poland deposited its instrument of ratification of the Rome Statute on 12 November 2001, available at <https://asp.icc-cpi.int/states-parties/eastern-european-states/poland>.

and Latvia (*ratione loci*), or any other ICC state party or state accepting the ICC's jurisdiction, such as Ukraine.

Therefore, even if Belarus is not a state party to the Rome Statute, jurisdiction over the situation of a non-state party may be invoked on the basis of the findings in this report and by others that there are reasonable grounds to believe that the crimes against humanity of deportation or forcible transfer of population and persecution have been committed.

Jurisdiction through the Ukraine Situation on Child Deportation

Through the Article 12(3) declaration by Ukraine, the ICC has jurisdiction over war crimes, crimes against humanity and genocide committed against Ukraine. On 17 March 2023, the ICC issued arrest warrants against Vladimir Putin and Maria Lvova-Belova for the war crime of the unlawful deportation and transfer of children from Ukraine.⁵⁸³

The National Anti-Crisis Management (NAM) indicated in their preliminary report that these children were not only brought to Russia but also to Belarus.⁵⁸⁴ In response to this report, the office of the prosecutor general of Ukraine announced on 23 May 2023 that it was also investigating the role of Belarusian authorities in the child deportations.⁵⁸⁵

On 27 June 2023, the NAM announced the submission of their Article 15 Communication to the ICC.⁵⁸⁶ It communicated that more than 2,100 Ukrainian children from the Russian occupied territories of Ukraine were placed to at least five facilities in Belarus.⁵⁸⁷ This may interest the ICC to also investigate Belarusian suspects for these crimes.

While it would be important that Belarusian authorities are held accountable for those crimes as well and recognizing that accountability of these officials for any crimes would be better than no accountability at all, the inclusion of Belarusian perpetrators in this case would not acknowledge the crimes against humanity that the Belarusian authorities have been committing, and continue to commit, on a widespread and systematic manner against their own civilian population.

Accountability for those crimes is crucial for establishing the truth, fighting disinformation, establishing an accurate historical record for future generations, acknowledging victims, and communicating to current and future perpetrators of atrocity crimes that impunity is no longer an automatic given.

⁵⁸³ Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova, International Criminal Court, March 17, 2023, available at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

⁵⁸⁴ *Exclusive: Belarus abducts thousands of Ukrainian children*, The Telegraph, July 17, 2023, available at <https://www.telegraph.co.uk/world-news/2023/07/17/russia-abducting-ukrainian-children-via-belarus/>.

⁵⁸⁵ *Ukraine investigating role of Belarus in transfers of children*, Reuters, May 23, 2023, available at <https://www.reuters.com/world/europe/belarus-accused-role-transfers-ukrainian-children-2023-05-23/>.

⁵⁸⁶ *Evidence of the war crimes committed by Lukashenko was submitted to the International Criminal Court*, National Anti-Crisis Management, July 27, 2023, available at <https://www.belarus-nau.org/en/post/evidence-of-the-war-crimes-committed-by-lukashenko-was-submitted-to-the-international-criminal-court>.

⁵⁸⁷ *Evidence of the war crimes committed by Lukashenko was submitted to the International Criminal Court*, National Anti-Crisis Management, July 27, 2023, available at <https://www.belarus-nau.org/en/post/evidence-of-the-war-crimes-committed-by-lukashenko-was-submitted-to-the-international-criminal-court>.

8.2 Referral of the Belarus Situation to the ICC by Other State Parties

Based on the evidence that there are reasonable grounds to believe that the ICC has jurisdiction over the crimes against humanity of “deportation or forcible transfer of population” and “persecution” through its territorial jurisdiction over Lithuania, Poland, Latvia and Ukraine, any ICC state party may refer the Belarus situation to the ICC.

Article 14 of the Rome Statute provides that a state party may refer a situation to the ICC in which one or more crimes within the jurisdiction of the Court appears to have been committed. This referral is a request to the Prosecutor to investigate the situation to determine whether one or more specific persons should be charged for these crimes.

If there is an Article 15(3) declaration but not a state referral, the Prosecutor may only proceed with an investigation *proprio motu* after the Pre-Trial Chamber has authorized this investigation if it finds that there is a reasonable basis to proceed with an investigation. However, when at least one state party refers a situation to the ICC in accordance with Article 14 RS, this Pre-Trial Chamber authorization is not required. Referral of the situation by at least one state party will therefore expedite the ability of the Prosecutor to start its work.

The referral should be specific about the relevant circumstances and accompanied by available evidence or other supporting documentation.

In the Ukraine situation, 43 referrals by states parties expedited the opening of the investigation.⁵⁸⁸

8.3 Communications to the ICC

Article 15(2) of the Rome Statute allows states, organs of the United Nations, and inter-governmental or non-governmental organizations to provide the OTP with additional information to assist their analysis of a situation.⁵⁸⁹ This also includes communications relating to situations that are not yet under examination by the OTP to attract further attention to a situation. Accordingly, even though the situation in Belarus is not under formal examination by the OTP, various actors can still submit information to the OTP to raise awareness.

In this respect, in May 2021,⁵⁹⁰ the International Partnership for Human Rights (IPHR), the Norwegian Helsinki Committee, Global Diligence LPP and Truth Hounds (the Filing Parties) filed a communication on “The Situation in Belarus/Lithuania/Poland/Latvia and Ukraine: Crimes Against Humanity of Deportation and Persecution.”⁵⁹¹ The communication requests

⁵⁸⁸ International Criminal Court, Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, Mar 2, 2022, available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states><https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states><https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

⁵⁸⁹ Rome Statute of the International Criminal Court, art 15(2), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁹⁰ Truth Hounds, “The Situation in Belarus: Crimes Against Humanity of Deportation and Persecution”, May 19, 2021, available at <https://truth-hounds.org/cases/the-situation-in-belarus-crimes-against-humanity-of-deportation-and-persecution/>.

⁵⁹¹ International Partnership for Human Rights, Communication Submitted Under Article 15(2) of the Rome Statute of the International Criminal Court: The Situation in Belarus/Lithuania/Poland/Latvia and Ukraine:

the OTP to open a preliminary examination into the situation in Belarus (and Lithuania, Poland, Latvia, Ukraine) to investigate and prosecute the alleged crimes committed.

8.4 Evidence

The ICC focuses on those most responsible for the crimes committed.⁵⁹² The evidence to prove the liability of such high-ranking officials must establish their guilt beyond reasonable doubt.⁵⁹³ However, for such actors, sufficient and reliable evidence *linking* them to the crimes committed may be difficult to find. After all, the materials available may not depict the architects or masterminds of these crimes. For instance, many materials are available that show the violations and tell the stories of the victims, yet much of the evidence rarely depict the perpetrators at the higher level.

It is therefore common that criminal cases at the ICC will have to take recourse to circumstantial evidence. However, it is not always easy to reach the beyond reasonable doubt standard using circumstantial evidence. Reports from NGOs and the press combined with anonymous testimonies will not suffice in that regard because the ICC cannot sufficiently test the reliability of such evidence.⁵⁹⁴ Instead, the ICC prefers information that it can challenge and question directly. To ensure that the ICC (or prosecutions at other courts) can avail of such information, it is important to collect information directly from its source, and write down how this information has been collected and stored.

Because it may be hard to prove linkage and mental elements of higher-level perpetrators, circumstantial evidence is often necessary. There are several different types of circumstantial evidence which can be used in criminal cases. This includes witness testimony, video recordings, credible documentation of violations,⁵⁹⁵ and, lately, open-source material from social media sites.⁵⁹⁶ Nonetheless, to date, ICC cases have relied heavily on witness testimony.⁵⁹⁷

According to ICC Rules of Procedure and Evidence, the Court can assess any evidence as to its relevance and admissibility.⁵⁹⁸ The Rome Statute additionally confers the Court with the authority “to request the submission of all evidence that it considers necessary for the determination of the truth.”⁵⁹⁹

Crimes Against Humanity of Deportation and Persecution, May 2021, available at https://www.iphronline.org/wp-content/uploads/2021/05/BY_ICC_Submission.pdf.

⁵⁹² Office of the Prosecutor, Paper on some policy issues before the Office of the Prosecutor, p. 7, September 2003, available at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf.

⁵⁹³ Rome Statute of the International Criminal Court, art 66, (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁹⁴ Thijs Bouwknecht, Gbagbo – An Acquittal Foretold, JUSTICEINFO.NET, Jan 31, 2019, available at <https://www.justiceinfo.net/en/40156-gbagbo-an-acquittal-foretold.html>.

⁵⁹⁵ Rome Statute of the International Criminal Court, art 69 (2), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

⁵⁹⁶ *Prosecutor v. Mahmoud Mustafa Busayf Al-werfalli*, Case No.: ICC-01/11-01/17, Warrant of Arrest, para 3, Aug 15, 2017, available at https://www.icc-cpi.int/CourtRecords/CR2017_05031.PDF.

⁵⁹⁷ International Bar Association, Evidence Matters in ICC Trials, IBA ICL Perspectives, p. 18, August, 2016, available at <https://www.ibanet.org/document?id=Evidence-matters-in-icc-trials>.

⁵⁹⁸ International Criminal Court, Rules of Procedure and Evidence, Rule 63, 64, (2019), available at <https://www.icc-cpi.int/Publications/Rules-of-Procedure-and-Evidence.pdf>.

⁵⁹⁹ Rome Statute of the International Criminal Court, art 69(3), (Multilateral, 1998), available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

In the context of the attack directed against civilians in Belarus, there is a large body of evidence consisting of the testimonies of victims and witnesses, including medical reports and statements of doctors and medical specialists; testimonies of former members of law enforcement agencies who resigned over Lukashenka's policy; extensive photo and video imagery of the alleged crimes; statements made by Belarusian officials in State media; as well as public and internal documents, laws and court decisions.

A significant contribution to the collection, preservation and analyzation of information is made by the International Accountability Platform for Belarus comprising 18 Belarusian and international human rights organisations led by DIGNITY (Danish Institute Against Torture), Viasna, the International Committee for the Investigation of Torture in Belarus and REDRESS.⁶⁰⁰

⁶⁰⁰ Dignity, *Belarus platform's mandate extended as human rights situation in Belarus remains critical*, Jul 8, 2022, available at <https://www.dignity.dk/en/news/belarus-platforms-mandate-extended-as-human-rights-situation-in-belarus-remains-critical/>

Chapter 9 – Accountability at Domestic Courts

Chapter 8 discussed the ICC, which is founded on the principle of complementarity. This means that a case is only admissible at the ICC if no state is able or willing to prosecute that case in a domestic court. This means that the system is designed around the idea that prosecutions, also for international crimes, primarily belong within a domestic jurisdiction, unless there are reasons why such a trial does not take place in a domestic jurisdiction. This is in particular the situation when a state is unable or unwilling to prosecute.

Moreover, the ICC focuses on those suspects that are most responsible for the commission of international crimes, which are usually a handful of individuals that used their high-ranking positions to commit those crimes. In addition to a number of high-ranking officials that would fit with the ICC's policy of selecting those types of perpetrators, there are many more perpetrators in Belarus that are responsible for the commission of the crimes that were discussed in Chapter 7 than only the few senior officials the ICC would focus on. This leaves the need for additional avenues for prosecution than merely at the ICC.

The prohibition of crimes against humanity and the obligation to prosecute also exists outside the ICC's Rome Statute framework in customary international law. Customary international law refers to widespread practice of states together with the conviction that they are bound by a legal obligation not to commit such crimes.⁶⁰¹ This customary prohibition of crimes against humanity binds every state, including states that have not ratified the Rome Statute, such as Belarus.⁶⁰² Moreover, many states, including Belarus, have incorporated the concept of "crimes against humanity" in their domestic codes of criminal law. Furthermore, Belarus is a state party to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT).⁶⁰³ The CAT explicitly requires member states to criminalize torture in their domestic criminal codes and to investigate and prosecute alleged perpetrators. The Criminal Code of Belarus has included the concept of "crimes against humanity," and also specifically torture as a crime against humanity, in Article 128 of the Criminal Code of Belarus.

However, the concept of "crimes against humanity" under Belarusian law is different from "crimes against humanity" under international criminal law. While all the crimes that are committed are also recognized as crimes under Belarusian law, they do not necessarily qualify as crimes against humanity and fail to recognize the state policy and widespread and systematic nature of the attack against the civilian population.

This section discusses the options for domestic prosecutions of international crimes against the Belarusian population. The section starts with an overview of the Belarusian legal framework for crimes against humanity. Given that the current government remains unwilling to prosecute those responsible, this subsection focuses on – possible – future prosecutions in a post-

⁶⁰¹ International Law Commission, Text of the draft conclusions on identification of customary international law, para 65, conclusion 2, delivered to the General Assembly, U.N. Doc. A/73/10 (2018), available at <https://undocs.org/en/A/73/10>; United Nations Office on Genocide Prevention and Responsibility to Protect, Definitions: Crimes Against Humanity (2021), available at <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>.

⁶⁰² United Nations Office on Genocide Prevention and Responsibility to Protect, Definitions: Crimes Against Humanity (2021), available at <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>; International Criminal Court, The States Parties to the Rome Statute (2021), available at https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

⁶⁰³ United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 7, (Multilateral, 1984), available at <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

Lukashenka-era. Second, the section discusses to what extent perpetrators can be prosecuted in foreign domestic courts under the doctrine of universal jurisdiction. Finally, the section analyses the doctrine of immunities in foreign domestic courts and the extent to which Belarusian perpetrators may be able to invoke immunity to prevent prosecution.

Perpetrators of crimes against humanity and other serious human rights violations may also be held liable internationally under the so-called “Magnitsky laws.”⁶⁰⁴ These laws allow imposing “targeted” or “intelligent” sanctions (such as visa bans or the freezing of bank accounts and other assets) on the perpetrators of serious human rights violations who are not prosecuted for them in their state of origin for political reasons and therefore enjoy impunity.⁶⁰⁵

The Council of Europe has called upon its member states to use the principle of universal jurisdiction in their domestic courts to prosecute acts of torture and to use the Magnitsky laws to impose targeted sanctions on perpetrators of serious human rights violations.⁶⁰⁶ The United States has moreover adopted the Global Magnitsky Act. This includes serious human rights violations such as torture, extrajudicial killing, and enforced disappearance.⁶⁰⁷

9.1 *Accountability in Belarus*

Criminalization Under Belarusian Law

The crimes that are committed against civilians that are perceived as opposition-minded civilians in Belarus are recognized as crimes under Belarusian criminal law. However, even though Belarusian criminal law includes a concept close to “crimes against humanity,” it may not include some of the crimes that are being committed, such as murder, and most importantly, the Belarusian concept fails to recognize the state policy and widespread and systematic nature of the attack against the civilian population.

Article 128 of the Criminal Code of Belarus defines “crimes against the safety of humanity” (in short: “crimes against humanity”) as deportation, illegal detention, enslavement, mass or systematic executions without trial, enforced disappearance, torture, and other cruelties committed on grounds of race, nationality, ethnicity, political beliefs, or religion.⁶⁰⁸

Unlike the ICC’s Rome Statute, the Criminal Code of Belarus does not prescribe contextual requirements for crimes against humanity. This means that, in the Belarusian criminal law system, the nature of the attack against the civilian population and the gravity of the crimes do not need to reach the level of “systematic or widespread,” which is required by the ICC. Moreover, this definition fails to recognize that there is a state policy behind the attack against

⁶⁰⁴ Parliamentary Assembly, Resolution “Sergei Magnitsky and beyond – fighting impunity by targeted sanctions”, 2252 (2019), Council of Europe, available at <https://www.europarl.europa.eu/cmsdata/161079/6%20-%2006%20Resolution%20COE%20Sergei%20Magnitsky.pdf>; Parliamentary Assembly, Resolution “Refusing impunity for the killers of Sergei Magnitsky”, 1966 (2014), Council of Europe, available at <https://pace.coe.int/en/files/20409/html>

⁶⁰⁵ Council of Europe Committee on Legal Affairs and Human Rights, *Human rights violations in Belarus require an international investigation*, Second part-session (2021), available at <https://pace.coe.int/en/files/29094>.

⁶⁰⁶ Council of Europe Committee on Legal Affairs and Human Rights, *Human rights violations in Belarus require an international investigation*, Second part-session (2021), available at <https://pace.coe.int/en/files/29094>.

⁶⁰⁷ Human Rights First, *The Global Magnitsky Act: Frequently Asked Questions*, Apr. 5-6, 2019, available at <https://humanrightsfirst.org/wp-content/uploads/2022/09/Global-Magnitsky-FAQs.pdf>

⁶⁰⁸ Criminal Code of the Republic of Belarus, art 128, (the Republic of Belarus 1999), available at <https://etalonline.by/document/?regnum=HK9900275#>.

the civilian population. Also, such acts as murder,⁶⁰⁹ knowingly unlawful imprisonment,⁶¹⁰ rape and other form of sexual violence of comparable gravity⁶¹¹ are prosecuted as separate crimes under the Code. Crimes of Article 128 are punishable by the death penalty, similar to the commission of murder of at least two persons.

For the purpose of future prosecutions in Belarus, it may serve as a basis for prosecution since the provision appears to reflect the criminalization of crimes that are committed against people on the basis of their political beliefs. However, it is important to note that the provision fails to recognize the contextual elements and thus the particular nature of the attack as directed against the civilian population as a state policy.

Impunity and Lack of Effective Remedies Due to a Failure to Prosecute

Under the current regime, remedy is unlikely within the Belarusian justice system. This in itself is also a crime under Belarusian law: the inaction of an official to pursue effective remedies is recognized as a punishable crime under Article 425 of the Belarusian Criminal Code.⁶¹²

Yet, no judicial procedure was initiated for the victims of torture and ill-treatment, although there are at least 5,000 known complaints.⁶¹³ Moreover, the Center for the Promotion of Women's Rights – “Her Rights” reported that it had brought numerous cases to the authorities for investigation.⁶¹⁴ Yet, the prosecutor's office has not opened a single criminal case concerning sexual violence,⁶¹⁵ torture, or arbitrary detention.⁶¹⁶

This is not only a violation of Belarusian law, it is also a violation of Belarus' obligations under international human rights law. Belarus is a State party to several international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the UN Convention Against Torture (UNCAT). Under these mechanisms, prompt, impartial and thorough investigations must especially be carried out whenever there is reasonable ground to

⁶⁰⁹ Criminal Code of the Republic of Belarus, art 139, (the Republic of Belarus 1999), available at <https://etalonline.by/document/?regnum=HK9900275#>.

⁶¹⁰ Criminal Code of the Republic of Belarus, art 397, (the Republic of Belarus 1999), available at <https://etalonline.by/document/?regnum=HK9900275#>.

⁶¹¹ Criminal Code of the Republic of Belarus, art 166-170, (the Republic of Belarus 1999), available at <https://etalonline.by/document/?regnum=HK9900275#>.

⁶¹² Criminal Code of the Republic of Belarus, art 425, (the Republic of Belarus 1999), available at <https://etalonline.by/document/?regnum=HK9900275#>.

⁶¹³ Human Rights Center Viasna, Human Rights Situation in Belarus in 2022, available at https://spring96.org/files/misc/annual_review_2022_final_en.pdf.

⁶¹⁴ Wolfgang Benedek, Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus, para 50, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

⁶¹⁵ Anaïs Marin, Report of the Special Rapporteur on the situation of human rights in Belarus, para 45, U.N. Doc. A/HRC/47/49, May 4, 2021, available at <https://undocs.org/A/HRC/47/49>.

⁶¹⁶ Wolfgang Benedek, Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus, p 48, Nov 5, 2020, available at <https://www.osce.org/files/f/documents/2/b/469539.pdf>.

believe that an individual was arbitrarily deprived of their life⁶¹⁷ or that acts of torture have been committed.⁶¹⁸

In September 2020, Belarusian authorities admitted to having received 900 complaints related to the 2020 protests.⁶¹⁹ However, no investigations into the alleged violations were opened.⁶²⁰ In August 2021, the Investigative Committee of Belarus publicly announced that no criminal investigations or prosecutions will be carried out, stating that all use of force by Belarusian law enforcement officials in the context of the 2020 protests has been lawful.⁶²¹

Instead, as documented by the United Nations High Commissioner for Human Rights, “an active policy to shield perpetrators and prevent accountability” was put in place.⁶²² Already during the 2020 protests, Belarus actively took measures to impede the documentation of violations and to disguise the identity of perpetrators. While some law enforcement officials wore uniforms, their faces were usually covered up by balaclavas or masks, and their uniforms did not display any insignia.⁶²³ Moreover, many law enforcement officials were plain-clothed as well as wore masks.⁶²⁴ This was a purposeful policy so that perpetrators mostly could remain anonymous.

Furthermore, Belarusian authorities also took other measures to frustrate the documentation, preservation and sharing of evidence of serious human rights violations. For instance, they repeatedly disrupted internet access, especially from 9 to 12 August 2020, when the internet connection was severely restricted for 61 hours.⁶²⁵ The Belarusian Information Ministry also blocked websites of numerous independent media outlets and political opponents.⁶²⁶

What is more, Belarusian authorities not only perpetrated atrocities, failed to investigate and provide remedies, and frustrated the ability to collect evidence against them, Lukashenka also

⁶¹⁷ International Covenant on Civil and Political Rights (ICCPR), para 27, art 6(1), (Multilateral, 1966), as interpreted by the General Comment 36, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁶¹⁸ United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 12, (Multilateral, 1984), available at <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

⁶¹⁹ Amnesty International, *Belarus: “You are not human beings”. State-sponsored impunity and unprecedented police violence against peaceful protesters*, p. 9, 2021, available at <https://www.amnesty.org/en/wp-content/uploads/2021/01/EUR4935672021ENGLISH.pdf>.

⁶²⁰ Amnesty International, *Belarus: “You are not human beings”. State-sponsored impunity and unprecedented police violence against peaceful protesters*, p. 9, 2021, available at <https://www.amnesty.org/en/wp-content/uploads/2021/01/EUR4935672021ENGLISH.pdf>.

⁶²¹ Human Rights Center Viasna, *International Accountability Platform condemns Belarus’s decision not to initiate criminal investigations into allegations of torture and ill-treatment*, Sep 3, 2021, available at <https://spring96.org/en/news/104850> accessed 24 May 2023.

⁶²² High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, p 14, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

⁶²³ Amnesty International, *Belarus: “You are not human beings”. State-sponsored impunity and unprecedented police violence against peaceful protesters*, p. 15, 2021, available at <https://www.amnesty.org/en/wp-content/uploads/2021/01/EUR4935672021ENGLISH.pdf>.

⁶²⁴ Amnesty International, *Belarus: “You are not human beings”. State-sponsored impunity and unprecedented police violence against peaceful protesters*, p. 15, 2021, available at <https://www.amnesty.org/en/wp-content/uploads/2021/01/EUR4935672021ENGLISH.pdf>.

⁶²⁵ Human Rights Watch. *Belarus: Internet Disruptions, Online Censorship*, Aug 28, 2020, available at <https://www.hrw.org/news/2020/08/28/belarus-internet-disruptions-online-censorship>.

⁶²⁶ Human Rights Watch. *Belarus: Internet Disruptions, Online Censorship*, Aug 28, 2020, available at <https://www.hrw.org/news/2020/08/28/belarus-internet-disruptions-online-censorship>.

repeatedly approved the behavior of law enforcement officials during the protests and since.⁶²⁷ In April 2021, he also signed a new law that justifies, in vague terms, the use of lethal force by law enforcement officials in future operations.⁶²⁸

Under the remaining repression up to today, it is very hard for victims of crimes against humanity or other human rights violations to obtain legal assistance. As noted in Chapters 5.1 and 7.1, the judiciary itself is part of the attack against the civilian population in Belarus. At the same time, lawyers who defend dissidents face systematic repressions from the Belarusian regime. This includes threats and harassment, administrative and criminal persecution, unlawful arrests and the withdrawal of their licenses.⁶²⁹ Accordingly, the number of lawyers willing and able to represent victims of violations committed by the Lukashenka regime is extremely low.⁶³⁰

Consequently, there is currently no accountability for the crimes committed by Belarusian authorities on a national level.

Future Prosecutions Post-Lukashenka

While remedy under Lukashenka is currently impossible, these crimes could be prosecuted in the future, if evidence of the crimes can be documented and secured. For this reason, it is important that documentation occurs based on the standards that criminal evidence requires and that the information is analyzed and labeled in a manner that it can be found and used at a later stage.

As is common in other countries as well, in accordance with Article 85 of the Criminal Code of Belarus, there is no statute of limitations for crimes against humanity that fall under Article 128.⁶³¹ While ordinary crimes may not be prosecutable after a period of time has transpired, these crimes can therefore still be prosecuted in the far future, so even if it takes time before the regime changes, evidence is gathered against the specific suspect, or the suspect is detained.

However, as Chapter 10 discusses, with no regime change in foresight, the chances of impunity increases by the day. Moreover, the likelihood that investigations and prosecutions are prepared at the ICC and a special tribunal would help undermine Lukashenka's support and bring about the end of his reign. This would allow a start with a rebuilding of the Belarusian justice system, which after decades of corruption and the judiciary's own involvement in the commission of crimes is not expected to be able to function in accordance with international human rights standards, the Belarusian population's needs for justice, and the fight against impunity on any short term. It is therefore important that international legal mechanisms support and provide

⁶²⁷ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, p 14, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

⁶²⁸ Law "On Amendments to the Laws on National Security of the Republic of Belarus", No 106-3 (the Republic of Belarus, 2022), available at <https://pravo.by/document/?guid=12551&p0=H12100106&p1=1>.

⁶²⁹ Anastasiia Kruope, *Belarusian Authorities Retaliate Against Lawyers Defending Human Rights*, Human Rights Watch, Oct 26, 2021, available at <https://www.hrw.org/news/2021/10/26/belarusian-authorities-retaliate-against-lawyers-defending-human-rights>.

⁶³⁰ High Commissioner for Human Rights, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath*, p 14, delivered to the Human Rights Council, U.N. Doc. A/HRC/52/68, Feb. 3, 2023, available at <https://www.ohchr.org/en/hr-bodies/hrc/ohchr-belarus/index>.

⁶³¹ Criminal Code of the Republic of Belarus, No 275-3, art 85, (the Republic of Belarus, 1999), available at <https://pravo.by/document/?guid=3871&p0=hk9900275>.

for accountability for the crimes against humanity committed against the Belarusian population.

9.2 Domestic Prosecutions in Foreign States

In addition to the limited but important cases that the ICC could exercise jurisdiction over, other states may be able to initiate prosecutions in foreign domestic judicial systems by invoking the principle of universal jurisdiction. Under this principle, states may prosecute citizens of other states for serious crimes against international law committed on the territory of any state.⁶³² These crimes include crimes against humanity, war crimes, and genocide.⁶³³

The exercise of universal jurisdiction differs per state. In general, states have limited the cases under universal jurisdiction to those suspects that are present on their territory. Trying suspects *in absentia* (without the suspect being present at trial) under the doctrine of universal jurisdiction remains controversial and is generally regarded by states as undesirable. Therefore, actual prosecutions are unlikely unless Belarusian suspects are present in other jurisdictions that are willing to then prosecute them.

Several states have begun to initiate proceedings related to the situation in Belarus using the universal jurisdiction principle. Lithuania launched a criminal probe against Belarusian officials for allegedly committing torture.⁶³⁴ In Germany, criminal complaints were filed against six members of the Belarusian security apparatus for crimes against humanity.⁶³⁵ Ten Belarusians also filed a legal claim in Germany to initiate criminal proceedings against Aliaksandr Lukashenka for alleged crimes against humanity.⁶³⁶ Furthermore, in Poland criminal proceedings against members of the Belarusian riot police were initiated for allegations of detention and torture of Polish citizens.⁶³⁷ And also the prosecutorial authorities of the Czech Republic are considering torture cases submitted by Belarusian civilians.⁶³⁸

Outside the Rome Statute framework, the definition and interpretation of crimes against humanity is subject to discussion.⁶³⁹ The ICC's definition is perceived to be the most

⁶³² International Justice Resource Center, Universal Jurisdiction (2021), available at <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/>.

⁶³³ International Justice Resource Center, Universal Jurisdiction (2021), available at <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/>.

⁶³⁴ AFP, *Lithuania Opens Torture Probe Targeting Belarusian Officials*, JUSTICEINFO.NET, Dec 9, 2020, available at <https://www.justiceinfo.net/en/46200-lithuania-opens-torture-probe-targeting-belarusian-officials.html>.

⁶³⁵ World Organisation Against Torture, *Germany: Complaint filed against six members of the Belarus security apparatus*, Oct 29, 2021, available at <https://www.omct.org/en/resources/news-releases/germany-complaint-filed-against-6-members-of-the-belarus-security-apparatus>.

⁶³⁶ Euronews, *Belarusians file 'state torture' case against Lukashenko in Germany*, May 5, 2021, available at <https://www.euronews.com/2021/05/05/belarusians-file-state-torture-case-against-lukashenko-in-germany>.

⁶³⁷ Voice of Belarus, *Poland's prosecutor's office initiates investigation into alleged torture and beatings of Polish citizens by Belarusian government security forces*, Sep 5, 2020, available at <https://www.voiceofbelarus.com/poland-initiates-investigation-into-alleged-torture-of-polish-citizens/>; Just Security, *Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine*, Mar 10, 2022, available at <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/>.

⁶³⁸ Belsat, *When will arrest warrant for Lukashenka be issued?*, Apr 16, 2023, available at <https://belsat.eu/en/news/16-04-2023-when-will-the-arrest-warrant-for-lukashenka-be-issued>

⁶³⁹ Asser Institute, *Crimes Against Humanity* (2021), available at https://www.asser.nl/nexus/international-criminal-law/international-crimes-introduction/crimes-against-humanity/#_ftn3.

authoritative definition,⁶⁴⁰ but domestic criminal courts are free to adopt a different interpretation. As a result, the customary law definition and contextual elements of crimes against humanity may differ from the Rome Statute. In particular, the ICC's requirement that constituent crimes are committed under a state or organizational *policy* is contested in domestic jurisdictions,⁶⁴¹ as well as whether the ICC definition could be understood as reflecting a minimum standard for crimes against humanity as provided for in customary international law.⁶⁴²

A general conclusion to draw from these developments in domestic jurisdictions is that while the ICC is focused on prosecuting senior officials and needs to adhere to standards and elements of the crimes that all of its member states can agree to, domestic criminal justice systems can jointly create customary international law that applies to how domestic jurisdictions prosecute crimes against humanity that may be less strict than how the ICC applies the concept. How this will develop further remains to be seen and depends on how domestic judges apply and interpret the law.

9.3 Immunity in Foreign Domestic Courts

While the ICC does not recognize immunity, officials are often immune from prosecution in foreign domestic courts. However, there are increasing developments towards an exception of this immunity when it concerns international crimes such as crimes against humanity. This subsection analyzes the legal concept of immunities.

Immunities in a Foreign Domestic Court

Immunities are derived from the principle of sovereignty. In accordance with the principle of sovereignty, the international legal order is characterized by states that are legal equals and that are required to respect this equality by not prosecuting another state in their courts, nor those that embody that other state.⁶⁴³ This aspect of sovereignty is referred to as the principle of immunity.⁶⁴⁴

State immunity extends to certain individuals in different forms, depending on their relation to the state they represent. They all have in common that they do not have immunity before their own courts, but only before courts of other countries, based on the principle of sovereignty. And that this immunity may be waived by their own state, which allows the foreign state to proceed with the court proceedings.

⁶⁴⁰ Asser Institute, Crimes Against Humanity (2021), available at https://www.asser.nl/nexus/international-criminal-law/international-crimes-introduction/crimes-against-humanity/#_ftn3.

⁶⁴¹ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, para 98, Judgment, Jun 12, 2002, available at <https://www.icty.org/x/cases/kunarac/acjug/en/>.

⁶⁴² William Schabas, Part 2: Jurisdiction, Admissibility, and Applicable Law: Compétence, Recevabilité, Et Droit Applicable, Art.7 Crimes against humanity/Crimes contre l'humanité in the International Criminal Court: a Commentary on the Rome Statute, p. 10, (William Schabas, ed., 2nd ed., 2016), available at https://www.icc-cpi.int/RelatedRecords/CR2020_00289.PDF.

⁶⁴³ Paul Gragl, Jurisdictional immunities of the state in international law, in the oxford handbook of jurisdiction in international law 229, 229-230 (Stephen Allen, Daniel Costelloe, Malgosia Fitzmaurice, Paul Gragl and Edward Guntrip, eds., 2019).

⁶⁴⁴ Paul Gragl, Jurisdictional immunities of the state in international law, in the oxford handbook of jurisdiction in international law 229, 229-230 (Stephen Allen, Daniel Costelloe, Malgosia Fitzmaurice, Paul Gragl and Edward Guntrip, eds., 2019).

The two forms of immunity that are relevant with respect to Belarus are personal immunity (*ratione personae*) and functional immunity (*ratione materiae*). Personal immunity relates to an individual's office or status, and includes heads of states, heads of governments and foreign ministers.⁶⁴⁵ Personal immunity applies for as long as the individual holds the office or status and applies to both official and private acts.⁶⁴⁶ Personal immunity ceases to apply when the individual leaves their office or loses their status but continues to apply to official acts that were carried out while the individual was holding their office or status.⁶⁴⁷

Functional immunity applies to any state official and relates to official acts: acts that can be qualified as carried out in the context of and reflecting a state's sovereign affairs.⁶⁴⁸ Functional immunity does not apply to acts carried out in a private capacity (private acts).⁶⁴⁹

Exceptions to Immunity for Suspects of International Crimes and Lukashenka

By now, it is widely accepted that international law has developed an exception to functional immunity when it concerns the prosecution of international crimes like crimes against humanity.⁶⁵⁰ There are different theories/rationales for this exception, including, first, that some scholars argue that the obligation to prosecute and to abstain from committing international crimes are *jus cogens* norms, which take precedence over other norms in international law.⁶⁵¹ Second, there are scholars that argue that through adopting international treaties that contain obligations to prosecute crimes under international law, states have implicitly waived the immunity of their officials who commit such crimes.⁶⁵² This line of the reasoning was at the heart of the *Pinochet* case before the UK House of Lords, which decided that functional immunity for the crime of torture was implicitly waived by those states that adopted the 1984 Torture Convention.⁶⁵³ Finally, there are also scholars that argue that an exception has emerged within customary international law that provides that functional immunity does not apply to the exercise of jurisdiction over crimes under international law, such as crimes against humanity.⁶⁵⁴

⁶⁴⁵ Elizabeth Helen Franey, Immunities from the criminal jurisdiction of national courts, in research handbook on jurisdiction and immunities in international law 205, 214 (Alexander Orakhelashvili, ed., 2015).

⁶⁴⁶ Dapo Akande and Sangeeta Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, 21 European Journal of International Law 815, 818-819 (2010), available at <https://academic.oup.com/ejil/article/21/4/815/418198>.

⁶⁴⁷ Dapo Akande and Sangeeta Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, 21 European Journal of International Law 815, 818-819 (2010), available at <https://academic.oup.com/ejil/article/21/4/815/418198>.

⁶⁴⁸ Elizabeth Helen Franey, Immunities from the criminal jurisdiction of national courts, in research handbook on jurisdiction and immunities in international law 205, 221 (Alexander Orakhelashvili, ed., 2015).

⁶⁴⁹ Dapo Akande and Sangeeta Shah, Immunities of State Officials, International Crimes, and Foreign Domestic Courts, 21 European Journal of International Law 815, 828 (2010), available at <https://academic.oup.com/ejil/article/21/4/815/418198>.

⁶⁵⁰ International Law Commission, Eighth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, Draft Article 7, (Feb. 28, 2020), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/054/37/PDF/N2005437.pdf?OpenElement>.

⁶⁵¹ Robert Cryer, Immunities and international criminal tribunals, in research handbook on jurisdiction and immunities in international law 468, 481 & 477 (Alexander Orakhelashvili, ed., 2015).

⁶⁵² Elizabeth Helen Franey, Immunities from the criminal jurisdiction of national courts, in research handbook on jurisdiction and immunities in international law 205, 230 (Alexander Orakhelashvili, ed., 2015).

⁶⁵³ Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3) (24 March 1999) AC 147, available at <https://www.bailii.org/uk/cases/UKHL/1999/17.html>.

⁶⁵⁴ Helmut Kreicker, Immunities, in the crime of aggression: a commentary 675, 683 (Claus Kress and Stefan Barriga, eds., 2017).

For personal immunities, and thus for the ability to prosecute a head of state in a foreign domestic court, this exception to immunity for international crimes does not exist under current international law. However, since the international community has widely condemned the outcome of the 2020 presidential elections and Lukashenka as rightful winner, foreign jurisdictions that could prosecute Lukashenka could arguably set aside a claim to head of state immunity if they are willing to prosecute Lukashenka for his crimes against the Belarusian population.

Notwithstanding, the ICC does not recognize any immunity claims and officials are not immune within the Belarusian system either in case there will be future prosecutions after a regime change. Moreover, upon a regime change, a new Belarusian government can waive any immunities these officials may try to claim if they are prosecuted outside of the jurisdiction of Belarus.

Chapter 10 – Establishing a Special Tribunal for Belarus

10.1 *Impunity Gap for Crimes Against Humanity*

The previous chapter already described the lack of effective remedies in Belarus. There is currently no accountability for the crimes committed by Belarusian authorities on a national level nor is it likely to be expected in the near future. Hopefully, in a post-Lukashenka era, a new government will start transforming and improving the Belarusian judiciary as soon as possible to bring the justice system up to the standards required by international human rights law and able to assist in fighting impunity for the crimes committed by the Belarusian authorities. However, after decades of suppression and corruption, aided by the judiciary, it will take time and effort to change the system, organization and culture. Accountability in Belarusian courts is therefore not only impossible now, it is also unlikely in the foreseeable future.

Moreover, as discussed in Section 9.2, prosecutions of Belarusian officials in foreign courts will likely remain of a limited amount due to the limitations in how states exercise universal jurisdiction. While these prosecutions would be very welcome, if they are the only prosecutions that lead to accountability, the vast majority of the perpetrators will enjoy impunity.

As discussed in Chapter 8, the ICC may also prosecute Belarusian authorities for the crimes against humanity of deportation and persecution. Since an element of the crime of deportation, and possibly also persecution as it is connected to it, is committed on the territory of several states where the ICC has jurisdiction, e.g. Lithuania, Poland, Latvia and Ukraine, the ICC appears to have jurisdiction over those crimes against humanity committed by the Belarusian authorities.

However, even if the Office of the Prosecutor is willing to investigate these crimes, it is less clear whether the ICC will also be able to exercise its jurisdiction over the other crimes against humanity that are committed in the context of the persecution, in particular torture and imprisonment. Moreover, the ICC focuses only on those that are “most responsible” as high-ranking authorities. The vast majority of the perpetrators will therefore not be prosecuted by the ICC.

The currently existing legal framework therefore leaves a large impunity gap. This chapter therefore examines the options for expanding the legal framework with a mechanism that would allow accountability for the crimes against humanity that are committed by Belarusian authorities.

10.2 *Special Tribunal for Crimes Against Humanity in Belarus*

Since the establishment of the ICC as a permanent international criminal court, the international community has been reluctant in supporting the establishment of special courts and tribunals. Nevertheless, the ICC lacks jurisdiction in many situations. The fight against impunity therefore requires that *ad hoc* international(ized) criminal tribunals are established for situations that would otherwise remain free zones for impunity for perpetrators that commit atrocities. They should exist alongside the framework of the ICC and ideally in close cooperation, for instance to share evidence and expertise where possible. As the previous chapters in this report have discussed, Belarus is such a situation that requires a special tribunal to address an otherwise large impunity gap for crimes against humanity.

Importantly, a special tribunal can take many different forms. International law does not proscribe one particular form for how a special criminal tribunal should look like. Until date, no tribunal has been the same as others, with the exception of the ICTY and ICTR, which were established as “twins.”

This section provides some observations on the questions of the legal basis for such a tribunal and immunities. Current times demonstrate an openness in the international legal and political community to find new ways to fight the impunity of heads of states that commit atrocity crimes. Hopefully, this will include a willingness to find a way to address the impunity gap in Belarus as well. The severity of the crimes against humanity that are committed by Lukashenka and his accomplices calls for it.

Legal Basis for Establishing a Tribunal

There are three broad categories of legal bases to establish a tribunal. First, through the UN. The ICTY and ICTR were established through the UNSC under Chapter VII of the UN Charter. This provided these tribunals with the legal basis to surpass immunity since obligations stemming from decisions of the UNSC under Chapter VII are of a higher legal status than other obligations under international law. Due to Russia’s status as a permanent member of the UNSC with veto power, this option is not feasible for a tribunal for Belarus. Other tribunals were established with the consent of the government of the state involved, which is not feasible since Lukashenka will not agree to a tribunal.

Second, a tribunal may be established under Belarusian domestic law. This could then be entirely domestically organized or be internationalized (or hybrid) by adding international components, such as international judges. The legal basis stems from Belarusian domestic law but can be established in a way that it applies international criminal law. However, importantly, under Lukashenka, it will not be feasible to establish such a domestic, internationalized or hybrid court under Belarusian law.

A third category consists of establishing a tribunal through a multilateral treaty.

The main challenges here include that, if Belarus is not part of any agreement, and the UNSC does not provide an authorization thereto, it is challenging to consider how such a tribunal could exercise territorial jurisdiction and would have jurisdiction over the crimes committed in Belarus beyond what states can pool together in terms of universal jurisdiction. In similar vein, it is challenging how an internationally binding obligation upon Belarus to cooperate with such a special tribunal would be created.

Overcoming such legal hurdles requires creative legal thinking and consideration of what existing legal bases may be worth exploring further. One avenue for such is to establish the tribunal under international law by a treaty, decision or legal instrument that represents the support of the international community, in similar vein as to how developing case law in the international criminal tribunals that personal immunity is inapplicable before any court or tribunal that is “international in nature” or “truly international.” This interpretation is supported by the ICC’s and SCSL’s judgments in the *Al-Bashir* and *Taylor* cases. It remains unclear from that early and developing case law when a court or tribunal is international in nature without a UNSC Resolution. This is further discussed below in the section on immunity. Here, the role of the UNGA is further explored first.

In the context of the establishment of a special tribunal for the crime of aggression against Ukraine, scholars have argued that the United Nations General Assembly is an appropriate and well-advised option that is well-grounded in international law and its practice to create a tribunal.⁶⁵⁵

Since for a Belarus tribunal, the UNSC is also blocked by Russia, it could be considered for Belarus as well whether the UNGA can act under the “Uniting for Peace” Resolution. In that resolution, adopted on 3 November 1950, a fundamental provision holds that

“Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.”⁶⁵⁶

The International Law Commission recognized that crimes against humanity pose a threat to international peace and security.⁶⁵⁷ The Security Council reaffirmed part of a General Assembly resolution in which it stated that in the context of using peaceful means to protect against crimes against humanity, the General Assembly is prepared to take collective action based on Chapter VII of the UN Charter through the Security Council.⁶⁵⁸ Consequently and in line with Article 1(1) of the UN Charter, there is an obligation for the international community to take collective and effective measures to prevent and remove threats to the peace caused by crimes against humanity.

In addition to the crimes against humanity that are committed, the situation in Belarus is also a threat to the peace, a breach of the peace and an act of aggression since Belarus is actively involved in the aggression against Ukraine, since Russia has placed nuclear weapons in Belarus, and because Belarus is pushing migrants illegally over EU borders.

One could argue that if the General Assembly has the ultimate authority to make recommendations to use armed force in the case of a threat or breach of the peace or act of

⁶⁵⁵ See for instance, Hans Corell, *A Special Tribunal for Ukraine on the Crime of Aggression – The Role of the U.N. General Assembly*, JUST SECURITY, (Feb. 14, 2023), available at <https://www.justsecurity.org/85116/a-special-tribunal-for-ukraine-on-the-crime-of-aggression-the-role-of-the-u-n-general-assembly/>.

⁶⁵⁶ General Assembly, Emergency special session, the United Nations, available at <https://www.un.org/en/ga/sessions/emergency.shtml>

⁶⁵⁷ International Law Commission, *Draft Articles on Prevention and Punishment of Crimes Against Humanity*, UNDOC A/74/10, preamble, p. 11, available at <https://legal.un.org/ilc/reports/2019/english/chp4.pdf>,

⁶⁵⁸ UN Security Council, Resolution 1674 (2006), UNDOC S/RES/1674, para. 4 in which the Security council reaffirmed UN General Assembly, available at https://digitallibrary.un.org/record/573969/files/S_RES_1674%282006%29-EN.pdf?ln=en; World Summit Outcome (2005), UNDOC A/RES/60/1, paras. 138-139, available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.

aggression, which is the highest level of coercive powers, the General Assembly should also be able to make a recommendation on a Special Tribunal for Belarus.⁶⁵⁹

In 2003, the UN General Assembly authorized the UN Secretary-General to negotiate an agreement with the Government of Cambodia with the intention to establish a criminal tribunal.⁶⁶⁰ Challenging for Belarus is that the UNSG won't be able to negotiate such an agreement with the Belarusian regime.

However, the UN may consider concluding such an agreement with Sviatlana Tsikhanouskaya as Head of the United Transitional Cabinet of Belarus. The international community has until now not yet created a tribunal without the consent of the state in whose territorial jurisdiction the crimes have been committed. In the situation of Belarus, there is a strong argument for doing so based on the recognition of the international community that the elections in 2020 were manipulated and that therefore Lukashenka and his regime are not the legitimate representatives of the Belarusian state. It could therefore be explored whether the UN could enter in an agreement with the United Transitional Cabinet of Belarus, led by Sviatlana Tsikhanouskaya.

The European Union could also play an instrumental role in supporting and establishing a tribunal for Belarus. The European Union has recognized the 2020 elections as fraudulent and refused to recognize Lukashenka's claims to victory.⁶⁶¹ The European Union have imposed several packages of restrictive measures against Belarus related to the violence against civil society and democratic opposition since 2020.⁶⁶² Sviatlana Tsikhanouskaya was received at the European Union several times as the presumed winner of the presidential elections.⁶⁶³

Surpassing Immunity

As discussed in Section 9.3, international law has developed an exception to functional immunity for international crimes such as crimes against humanity. This will allow a tribunal to surpass the immunity of most Belarusian officials if they committed crimes against humanity.

This exception does not apply to head of state immunity, or personal immunity. A head of state, head of government and minister of foreign affairs are immune before foreign courts. If a Belarus tribunal would accept the argument that Lukashenka is not the lawful head of state and

⁶⁵⁹ See for a comparable argument with regard to the role of the UNGA for an aggression tribunal for Ukraine, Hans Corell, *A Special Tribunal for Ukraine on the Crime of Aggression – The Role of the U.N. General Assembly*, JUST SECURITY, (Feb. 14, 2023), available at <https://www.justsecurity.org/85116/a-special-tribunal-for-ukraine-on-the-crime-of-aggression-the-role-of-the-u-n-general-assembly/>.

⁶⁶⁰ 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, United Nations Audiovisual Library of International Law, available at https://legal.un.org/avl/pdf/ha/abunac/abunac_ph_e.pdf

⁶⁶¹ European Council, *Belarus: Declaration by the High Representative on behalf of the European Union on the so-called 'inauguration' of Aleksandr Lukashenko*, Sep 24, 2020, available at <https://www.consilium.europa.eu/en/press/press-releases/2020/09/24/belarus-declaration-by-the-high-representative-on-behalf-of-the-european-union-on-the-so-called-inauguration-of-aleksandr-lukashenko/>

⁶⁶² For a timeline of the EU restrictive measures, see <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-belarus/belarus-timeline/>

⁶⁶³ Chatham House, *Rethinking Western policy towards Belarus*, April 2023, available at <https://www.chathamhouse.org/sites/default/files/2023-04/2023-04-04-western-policy-belarus-astapenia.pdf>.

as such not entitled to head of state immunity due to his widely recognized falsifications of the elections in 2020 and before, Lukashenka may be prosecuted at the tribunal.

However, if this argument is not accepted, whether Lukashenka may invoke head of state immunity depends on how to interpret what an “international court” really is. In current scholarship, two interpretations exist on how to interpret the “international court”-exception that was formulated by the International Court of Justice (ICJ) in its *Arrest Warrant* case.

First, it could be argued that a court should be created following a UNSC Resolution either directly establishing that court under Chapter VII of the UN Charter or requesting the UNSG to enter into an agreement with a government to establish that court, for that Court to be international in nature and able to pierce personal immunity. Under this interpretation, the presence of a UNSC resolution would activate Article 103 of the UN Charter based on which the obligations to cooperate with the court triumph over the customary international law on personal immunity. This interpretation is defended in scholarship and based on the notion that the ICJ’s international court-exception in *Arrest Warrant* should be interpreted restrictively as only recognizing the possibility that states waive personal immunity before an international court and the possibility that an international court is backed by the UNSC acting under Chapter VII of the UN Charter.⁶⁶⁴ Additionally, scholars argue that, without the involvement of the UNSC, states cannot bestow a power upon a court that they themselves do not possess; states do not gain the ability to bypass a third state’s immunity simply by working together.⁶⁶⁵

However, a second interpretation is that personal immunity is inapplicable before any court or tribunal that is “international in nature” or “truly international.” This interpretation is supported by the ICC’s and SCSL’s judgments in the *Al-Bashir* and *Taylor* cases. It remains unclear from that early and developing case law when a court or tribunal is international in nature without a UNSC Resolution. Nevertheless, this early and developing case law may point to a recognition that when a court is recognized as “international,” for instance by the UNGA acting under its United for Peace-powers, it may surpass the head of state immunity that sitting heads of state have in foreign courts, but not in international courts.

This question has been popular among scholars debating the potential model for the Special Court for the Prosecution of the Crime of Aggression against Ukraine that would be best situated to pierce immunity of Russian and Belarusian senior-level officials. Central to these discussions is the notion that a certain numerical threshold of members of the international community engaging in the setting up of the tribunal should be met.⁶⁶⁶ In relation to this threshold, scholars ask themselves how many states should participate in the creation of the tribunal in order to make its mandate reflective of the will of the international community as a

⁶⁶⁴ Robert Cryer, Darryl Robinson and Sergey Vasiliev, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 528 (2019).

⁶⁶⁵ Robert Cryer, Darryl Robinson and Sergey Vasiliev, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 528 (2019).

⁶⁶⁶ Astrid Reisinger Coracini and Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), available at <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

whole.⁶⁶⁷ In this context, reference is made to the ICC's judgment in *Al-Bashir* and the fact that the Statute of the ICC became operative as soon as it was ratified by sixty states.⁶⁶⁸

Furthermore, scholars refer to potential involvement of international institutions other than the UNSC, such as the UNGA, the Council of Europe (CoE), and the EU.⁶⁶⁹ In reference to the UNGA, it is mentioned that Article 11(1) of the UN Charter allows the UNGA to make recommendations regarding the maintenance of international peace and security. Although these recommendations do not create legal obligations and consequently do not trigger Article 103 of the UN Charter, in light of the SCSL's judgment in *Taylor*, recommendations could still be said to be reflective of the will of the international community if they are adopted by a majority of the UNGA's members.⁶⁷⁰ Similarly, although their Statutes lack a provision similar to Article 103 of the UN Charter, the involvement of the CoE and the EU in the establishment of the Tribunal could add to its international character, as these regional institutions represent larger parts of the international community.⁶⁷¹

Based on the foregoing, the question whether a special tribunal will be able to bypass both functional and personal immunity of Belarussian senior-level officials may boil down to whether the court will be international in nature.

To increase the chances of the tribunal being deemed international enough, the tribunal's establishment would have to originate from as strong an international mandate as is possible. A UNGA Resolution recommending the UNSG to enter into an agreement establishing the tribunal with the United Transitional Cabinet of Belarus would in this regard be the most straightforward, as the UNGA is backed by Article 11(1) of the UN Charter. Alternatively, the involvement of a regional organization such as the CoE or the EU could strengthen the international mandate, as these organizations represent large groups of states. Finally, a multilateral treaty amongst a large number of states representing a large number and geographical spread of the international community could provide for the required international character.

⁶⁶⁷ James A. Goldston and Anna Khalfaoui, *In Evaluating Immunities before a Special Tribunal for Aggression Against Ukraine, the Type of Tribunal Matters* JUST SECURITY (Feb. 1, 2023), available at <https://www.justsecurity.org/84959/in-evaluating-immunities-before-a-special-tribunal-for-aggression-against-ukraine-the-type-of-tribunal-matters/>.

⁶⁶⁸ Astrid Reisinger Coracini and Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), available at <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

⁶⁶⁹ James A. Goldston and Anna Khalfaoui, *In Evaluating Immunities before a Special Tribunal for Aggression Against Ukraine, the Type of Tribunal Matters* JUST SECURITY (Feb. 1, 2023), available at <https://www.justsecurity.org/84959/in-evaluating-immunities-before-a-special-tribunal-for-aggression-against-ukraine-the-type-of-tribunal-matters/>.

⁶⁷⁰ Astrid Reisinger Coracini and Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities*, JUST SECURITY (Nov. 8, 2022), available at <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>.

⁶⁷¹ James A. Goldston and Anna Khalfaoui, *In Evaluating Immunities before a Special Tribunal for Aggression Against Ukraine, the Type of Tribunal Matters* JUST SECURITY (Feb. 1, 2023), available at <https://www.justsecurity.org/84959/in-evaluating-immunities-before-a-special-tribunal-for-aggression-against-ukraine-the-type-of-tribunal-matters/>.

Chapter 11 – Conclusions

The purpose of this report “*Crimes Against Humanity in Belarus – Legal Analysis and Accountability Options*” is to provide a legal analysis of the serious human rights violations committed by the Belarusian authorities since May 2020 according to the standards of international criminal law. It thereby adds to the large number of conclusions by human rights organizations and the UN that since May 2020, Lukashenka and the Belarusian authorities are responsible for large scale human rights abuses, by analyzing the facts through the elements of crimes against humanity in accordance with international criminal law practice. The report is primarily addressed to policymakers and investigators to facilitate the formulation of effective measures in response to the documented atrocities.

This report documents and analyzes patterns of serious human rights violations committed in Belarus between May 2020 and May 2023 that may amount to crimes against humanity. It thereby applied the standard of “reasonable grounds to believe” to assess whether crimes against humanity have been committed against the Belarusian civilian population. This is the standard that is applied by international fact-finding missions as well as the ICC when deciding to open an investigation into alleged crimes within its jurisdiction. In the developed practice of international criminal law, *reasonable grounds to believe that crimes have been committed* means that “there are strong preliminary indications that crimes have been committed and that further investigation is warranted.”⁶⁷² Further criminal investigation is required into the role of specific individuals to assess whether the *reasonable grounds to believe*-standard is met to trigger prosecution of specific individuals, which is beyond the scope of this report.

The report concludes in Part II that there are reasonable grounds to believe that crimes against humanity have been committed against the Belarusian population since May 2020 by the Belarusian authorities.

Chapter 4 provides an analysis on the requisite contextual elements for crimes against humanity in accordance with the framework of the ICC’s Rome Statute. It concludes there are reasonable grounds to believe that since May 2020, there has been an “attack” that is “directed against the Belarusian civilian population,” and specifically against civil society and those perceived as democratic opposition. And that this attack is “widespread” and “systematic” and qualifies as a “state policy.” The state policy argument is substantiated with analysis on the violence against peaceful protesters, how the impunity of law enforcement officers is ensured, the many legal reforms that are aimed at discrimination and targeting of civilians that are perceived as opposition-minded, arbitrary imprisonment of civilians that are perceived as opposition-minded, statements of high officials that encourage the attacks, hate propaganda through the media, and the banning of professional activities of particularly lawyers, journalists, medical workers, athletes, students, and artists.

Chapter 5 provides an analysis on the physical elements of seven crimes against humanity that we find there are reasonable grounds to believe for that they have been committed. They are imprisonment, torture, murder, rape and other grave forms of sexual violence, enforced disappearance, persecution and deportation. We thereby believe that the crimes of

⁶⁷² Michael Ramsden, Reasonable Grounds to Believe, in: Max Planck Encyclopedias of International Law, available at <https://opil.oup.com/display/10.1093/law-mpeipro/e2792.013.2792/law-mpeipro-e2792>; Public international Law & Policy Group, Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State, Factual Findings & Legal Analysis, p. 52, available at <https://burmacampaign.org.uk/media/PILPG-ROHINGYA-REPORT-Dec-2018.pdf>.

imprisonment, torture, murder, rape, enforced disappearance and deportation should all be considered in the context of persecution and as acts of persecution. Moreover, all these crimes and the widespread and systematic persecution led to an “atmosphere of fear and terror,” in accordance with ICC case law, due to which those civilians that have fled the country should be recognized as victims of deportation. We recognize three groups of civilians that are victims of deportation. First, those that were directly expelled by the authorities. Second, people that fled as a result of an imminent threat of arrest and/or other coercive measures, such as torture. Their decision to leave the country was often triggered by an arrest or threats of being arrested. Third, those people that fled due to the coercive atmosphere of fear and terror in relation to opposition-minded civilians that the Belarusian authorities created. In the context that is analyzed in Chapter 5, international criminal law’s tribunal case law recognizes that the fleeing of people amounts to “forced displacement” and this “deportation” in accordance with the ICC’s Rome Statute.

Chapter 6 discusses the migrant crisis on the EU-Belarus border as a crime against humanity against these refugees and migrants. In addition to the crimes against humanity against the Belarusian civilian population on the basis of their (perceived) opposition to Lukashenka, there are strong indications that the violence against the migrants and their expulsion into EU states amounts to the crime against humanity of deportation as well. Lukashenka and the Belarusian authorities started a deliberate campaign in 2021 to destabilize Europe by luring migrants into Belarus and sending them to EU borders, weaponizing them and creating an artificial migration crisis. This situation is closely linked to the massive repressions by the Belarusian authorities following the peaceful post-2020 protests. While most reports on the issue of the migrant crisis on the EU-Belarus border focus on the attack by Belarus against the EU, this report includes this chapter on the migrant crisis to focus on the migrants as victims of the Belarusian authorities. It analyzes how the migrants are victimized in this violence and that the violence they are subjected to may well qualify as crimes against humanity against them as a civilian population as well.

Chapter 7 provides a preliminary analysis on perpetrators, which requires further investigation by investigatory and prosecutorial authorities. However, the chapter provides analysis that, in addition to Lukashenka and other government leaders, further investigation is warranted into the authorities responsible for security and law enforcement, including members of the police, the State Security Committee (KGB), the Special Purpose Police Detachment (the Belarusian riot police, abbreviated as OMON), the special forces (the Spetznaz and Almaz Special Anti-terrorism Units), the Main Directorate for Combating Organized Crime and Corruption (abbreviated as GUBOPiK), the Internal Troops, as well as detention center personnel. Moreover, the prosecutors and judges have played a key role in persecuting opposition-minded civilians on political grounds. This includes judges of the Belarusian Constitutional Court, who confirmed the constitutionality of several repressive laws, thus providing legal justification for the repressions. Furthermore, the chapter suggests that further investigation is also warranted against individuals working at the Belarusian state media for threatening political opponents and commissioning torture-related video content, including violent and illegal interrogations of political prisoners.

Part III of the report analyzes options for accountability. Chapter 8 discusses the options through the ICC. It particularly analyses the possibility of the ICC to exercise jurisdiction over the situation in Belarus because the crimes of deportation and persecution take partially place on territory over which the ICC has jurisdiction, namely Lithuania, Poland, Latvia, and Ukraine.

Chapter 9 analyses the options for accountability in domestic courts. First, in Belarus itself, accountability is currently not possible and it also will take some time after a change of power before the judiciary will be reformed after being instrumentalized in the commission of crimes against humanity itself for decades. Second, there are some promising and increasing initiatives in foreign states under the universal jurisdiction doctrine, including in Lithuania, Germany, Poland, and the Czech Republic.

Chapter 10 examines how the remaining impunity gap can be addressed by establishing a special tribunal for crimes against humanity in Belarus. It thereby analyses recent developments in case law and with regard to the establishment of a possible tribunal for the aggression against Ukraine and provides legal arguments to establish a tribunal through the UNGA and with the United Transitional Cabinet of Belarus, led by Sviatlana Tsikhanouskaya. It moreover explores how Lukashenka's claim to head of state immunity could be set aside by either not recognizing him as head of state following the fraudulent presidential elections that was determined as fraud by the EU and wider international community, or through a recognition of the tribunal as "international in nature" or "truly international" by the UNGA.

This report aims to assist those that fight against the impunity in Belarus and that are able and willing to investigate the crimes against humanity committed by Lukashenka and his authorities. On the basis of legal analysis according to international criminal law's standards, the authors of this report believe there are reasonable grounds to believe that crimes against humanity are committed and that therefore, the international community has a responsibility to assist the Belarusian people in their hopes for justice.

Since the 1990s in particular, international criminal law is a fast-growing field of law and practice, creating every time again new legal avenues to end the guarantee of impunity that perpetrators of atrocities were used to enjoying. With the Ukraine war, investigators and prosecutors again show that with political will and evidence of atrocity crimes, new avenues for justice can be found. The Belarusian people also hope that such political will and prosecutorial focus can help them find justice.

Accountability alone will not be enough, and other transitional justice options can also play important roles in a future, rule-of-law-based society with a government that respects human rights. These may include a truth commission, a people's tribunal, reconciliation, reparations and other ways in which society can repair and transition.

But accountability will also be key. If impunity triumphs, injustice will prevail and those responsible will continue to wreak havoc onto the Belarusian society. The International Law Commission and the Security Council have recognized that there is an obligation for the international community to take collective and effective measures to address crimes against humanity. This report aims to contribute to the international community's ability to do so and support the Belarusian people in their hopes for an end to the violence, suppression and impunity, and in their fight for peace, democracy and justice.