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the Prosecutor of the International Criminal Court**

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ON THE REFERRAL OF THE BELARUS SITUATION TO THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

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Abstract: This article outlines the legal and factual basis for the referral of the Belarusian situation to the International Criminal Court (ICC) by the Government of Lithuania under Article 14 of the Rome Statute. It focuses on two core international crimes: the mass deportation of Belarusian citizens and their extraterritorial persecution by Belarusian authorities. Since 2020, over 600,000 Belarusians have fled the country due to systematic repression, with many seeking asylum in EU member states. The document highlights the discriminatory nature of these acts, targeting individuals based on perceived political opposition, and details the widespread deprivation of fundamental rights.

The ICC's jurisdiction is established through subject matter (crimes against humanity), territorial (crimes committed on the territory of Rome Statute States Parties), and temporal (post-Statute ratification) grounds. The admissibility of cases is supported by the absence of domestic investigations and the gravity of the crimes, which include torture, arbitrary detention, and persecution of exiles through trials in absentia.

The referral is justified by the ICC's ability to overcome immunities that hinder national prosecutions, avoid legal fragmentation across jurisdictions, and enhance cooperation for arrest and extradition. The document draws on UN reports, EU asylum data, and legal precedents to argue that the ICC is the appropriate venue to investigate and prosecute those most responsible, including senior Belarusian officials. It concludes by encouraging further State referrals to strengthen international accountability and justice for victims of systemic repression.

Keywords: Deportation; Extraterritorial Persecution; Crimes Against Humanity; International Criminal Court; Accountability.

Resumo: Este artigo aborda os fundamentos jurídicos e factuais para o governo da Lituânia encaminhar a situação da Bielorrússia ao Tribunal Penal Internacional (TPI), ao abrigo do artigo 14.º do Estatuto de Roma. Centra-se em dois crimes internacionais fundamentais: a deportação em massa de cidadãos bielorrussos e a sua perseguição extraterritorial pelas autoridades bielorrussas. Desde 2020, mais de 600 000 bielorrussos fugiram do país devido à repressão sistemática, muitos dos quais procuraram asilo em Estados-Membros da UE. O artigo destaca a natureza discriminatória destes atos, que têm como alvo indivíduos suspeitos de oposições políticas, e descreve em pormenor a privação generalizada de direitos fundamentais. A jurisdição do TPI é estabelecida com base em critérios de matéria (crimes contra a humanidade), territoriais (crimes cometidos no território dos Estados Partes do Estatuto de Roma) e temporais (após a ratificação do Estatuto). A admissibilidade dos casos é sustentada pela ausência de investigações internas e pela gravidade dos crimes, que incluem tortura, detenção arbitrária e perseguição de exilados por meio de julgamentos à revelia.

O encaminhamento justifica-se pela capacidade do TPI de ultrapassar as imunidades que impedem os processos judiciais nacionais, evitar a fragmentação jurídica entre jurisdições e reforçar a cooperação em matéria de detenção e extradição. O documento baseia-se em relatórios da ONU, dados da UE sobre asilo e precedentes jurídicos para argumentar que o TPI é a instância adequada para investigar e julgar os principais responsáveis, incluindo altos funcionários bielorrussos. Conclui incentivando novos encaminhamentos por parte dos Estados, a fim de reforçar a responsabilização internacional e a justiça para as vítimas de repressão sistémica.

Palavras-chave: Deportação; Perseguição Extraterritorial; Crimes Contra a Humanidade; Tribunal Penal Internacional; Responsabilização.

1. Context of Deportation

Over the past five years, Belarus has remained at the epicentre of one of the most serious human rights and security crises in Europe. Following the falsified presidential elections in August of 2020, the peaceful mass unrest was met by the illegitimate regime of Lukashenka with unprecedented

violence. Since then, Belarus has been transforming from authoritarianism into outright totalitarianism – more than 1,200 people remain imprisoned for political reasons; independent media, trade unions, and NGOs have been dismantled; and laws on “extremism” and “terrorism” are arbitrarily applied to silence any dissent. The regime does not limit its repressive actions to the territory of Belarus but actively targets those citizens who were forced to live in exile. In view of this, on 30 September 2024, in accordance with Article 14 of the Rome Statute, the Government of Lithuania referred to the Office of the Prosecutor of the International Criminal Court (OTP) the Belarus situation related to the context of mass international crimes in the form of the deportation of Belarusian people and their extraterritorial prosecution by the Belarusian authorities.

According to the latest report of the UN Group of Independent Experts on the Situation of Human Rights in Belarus (“UN GIE”) published in 2025, up to 600,000 individuals have left Belarus since 2020, which represents up to 6.4% of the country’s population as of 2020 (UN Group of Independent Experts, 2025: para 58). Previously, in 2024, the OHCHR estimated that up to 300,000 individuals had been forced to leave Belarus since 2020 (OHCHR, 2024: para 47). The reason for this phenomenon, according to the UN GIE and the OHCHR, is a concerted campaign of violence and repression intentionally directed at those opposing – or perceived to oppose – the current government of Belarus (OHCHR, 2023: paras 50, 53-54).

Between 9 August 2020 and 30 November 2024, 13,118 Belarusian nationals applied for international protection in Poland. From 2021 to the end of 2023, Belarusians were the largest nationality group among the countries of origin of potential refugees. It is now the second country of origin of applicants for protection (after Ukrainian citizens). Due to the negligible number of negative decisions, the recognition rate of Belarusian applications averages 98% (European Council on Refugees and Exiles, 2024). The number of international protection applications from Belarusians has been increasing annually. In 2019, there were virtually no requests for international protection from Belarusians, in 2020, the number of applications for international protection submitted by Belarusian citizens in Poland was 407. However, in 2021, this number increased to 2,257 applications, followed by 3,132 in 2022 and 3,713 in 2023 (Office for Foreigners, 2024). During the same period, Lithuania experienced an increase in asylum applications from Belarusians, with 81 cases recorded in 2020, 260 cases in 2021, 416 cases in 2022, and 87

cases in 2023. Simultaneously, the total number of Belarusians who arrived in Lithuania increased from 17,769 in 2020 to 62,165 in 2024 (Migration Department of Lithuania, 2023: 11). Overall, according to data from the European Union Agency for Asylum, approximately 3,800 Belarusians applied for asylum in 2021 in European Union member states. In 2022, this number increased to 5,051 cases, and at least 3,820 new applications were recorded in 2023 (Eurostat, 2023). At the same time, a significant part of the Belarusian population, amid the wave of repression and fear, left Belarus with non-humanitarian visas and other valid documents they already had, or crossed without such documents.

In 2024, the OHCHR concluded that the driving reasons for individuals to flee Belarus were the well-founded fear of arbitrary arrest, detention and conviction without respect for procedural safeguards and fair trial rights, possible torture and ill-treatment, threats of removal of children, and discriminatory restrictions on the right to work and education (OHCHR, 2024: para 47). Likewise, in the report to the UN General Assembly, the UN Special Rapporteur on Belarus noted that intimidation, harassment, searches of homes, prosecution, arrests, detention, and criminal charges forced Belarusians to leave their country (Marin, 2022: para 41). While underlining that Belarusians were persecuted solely for their political views, the Special Rapporteur identified specific professional groups that were subjected to particular repression and found themselves in the most vulnerable position. Among them are civil society activists and human rights defenders, journalists and media workers, political opposition figures, writers, artists and other cultural workers, lawyers, students and academics, and athletes. As a result of the repressions, from 2020 until the end of 2023, “around 740,000 Belarusians who allegedly supported the protests lost their jobs” (Libereco, 2024).

2. Context of Extraterritorial Persecution

Since May 2020 and to this day, the Belarusian authorities continue to systematically target and persecute individuals perceived as disloyal, both in Belarus and beyond its borders. This especially includes judicial harassment, including fabricated criminal charges and trials in absentia conducted against those in exile, home searches and the seizure of property, individual threats, and the intimidation of family members who remained in

Belarus. Additionally, restrictive legislation was imposed, along with heavy-handed measures designed to severely restrict the rights of those who left Belarus, instill fear in them to prevent them from speaking out against the government, and deprive them of basic public services.

This persecutory campaign has further intensified in 2023 and 2024, with the development and use of a wide range of measures and practices for gross violation and deprivation of fundamental rights of persons who fled from such persecution abroad. Practically all of them were deprived of the right to a fair trial and the right to an effective remedy. Many were also deprived of their right to equality and non-discrimination, the right to security, the right not to be subjected to inhuman or degrading treatment, the right to respect for private and family life, the right to respect for human dignity, the right to property, the right to freedom of thought and conscience, the right to freedom of expression, and/or the right to freedom of assembly. In particular, the Lukashenka regime unleashed a campaign of judicial harassment using trials in absentia aimed at the prosecution and imprisonment of those perceived as disloyal. In 2024, the number of such cases against Belarusians in exile increased sharply, with over 110 persons convicted as of November 2024 (Human Rights Centre "Viasna", 2024). Several cases with a large number of criminal prosecutions are well-known, such as the case of Sviatlana Tsikhanouskaya's analysts (against 20 individuals in exile), the case of the Coordination Council (against 257 persons in exile), and the case of Freedom Day 2024 (against 105 persons in exile). Following the orchestrated 2025 presidential elections in Belarus, criminal cases were opened against about 400 participants of demonstrations against Aliaksandr Lukashenka's re-election abroad (RFI, 2025).

3. Jurisdiction of the International Criminal Court

Under Articles 13(a) and 14 of the Rome Statute, the Court may exercise its jurisdiction if a situation is referred to the Office of the Prosecutor by a State Party to the Rome Statute. In the Belarusian situation described above, it could be concluded that the International Criminal Court (ICC) has jurisdiction over the alleged crime of deportation and extraterritorial persecution as well as other inhumane acts as crimes against humanity, including jurisdiction *ratione materiae* (subject matter jurisdiction), *ratione loci* (territorial jurisdiction), and *ratione temporis* (temporal jurisdiction).

3.1. Jurisdiction *ratione materiae* (subject matter jurisdiction)

Under Articles 5(b) and 7(1)(d), 7(1)(h), 7(1)(k) of the Rome Statute, the ICC has jurisdiction over deportation, persecution, and other inhumane acts as crimes against humanity. Deportation is defined as 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. The displacement must have been “forced and thus involuntary in nature”, and “does not require physical force, but may result from an atmosphere of fear and terror created by the perpetrators to force civilians to flee” (Law and Democracy Centre, 2023: 64), including the “deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting of property.”¹

The main element of the act of persecution is its discriminatory nature, leading to a severe deprivation of fundamental rights. 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. In the context of Belarus, the most applicable ground is discrimination against a political group, which means the targeting of individuals due to their actual or perceived political opposition towards the Lukashenka regime.² 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 discriminatory intent.³ Persecution can also involve acts that severely deprive a group of political,

1. *Request under Regulation 46(3) of the Regulations of the Court*, Case No ICC-RoC46(3)-01/18-37, Decision (6 September 2018), para 61. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF (accessed: 13 October 2024).

2. *Prosecutor v Laurent Gbagbo*, Case No ICC-02/11-01/11, Decision (12 June 2014), para 274. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04777.PDF (accessed: 13 October 2024).

3. *Prosecutor v Kupreškić and Others*, Case No IT-95-16-T, Judgment (14 January 2000), paras 593-615. Available at: <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf> (accessed: 13 October 2024).

civil, economic, or social rights, such as the enactment of discriminatory laws.

The information provided above demonstrates the presence of all such circumstances in the situation related to the forced fleeing of hundreds of thousands of Belarusians to the territory of the EU countries and their extraterritorial persecution by the senior political, law enforcement, and military officials of Belarus.

3.2. Jurisdiction *ratione loci* (territorial jurisdiction)

According to Article 12(2)(a) of the ICC Statute, the Court can especially exercise its jurisdiction if a crime has been committed on the territory of a State Party. The Republic of Belarus is not a State Party to the Rome Statute; hence, crimes committed exclusively on the territory of Belarus cannot be prosecuted by the ICC.

However, as recently established by the ICC in the Bangladesh/Myanmar precedent,⁴ the Court may exercise its jurisdiction over the crime of deportation if the victims have been deported to the territory of a State Party to the Rome Statute. Pre-Trial Chamber I of the ICC concluded that “an element of the crime of deportation is forced displacement across international borders, which means that the conduct related to this crime necessarily takes place on the territories of at least two States”. Moreover, in deciding the question of jurisdiction, the Court concluded that it potentially had such jurisdiction “if at least one element of a [any] crime within the jurisdiction of the Court or part of such a crime is committed on the territory of a State Party to the Statute”.⁵

4. *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Case No ICC-01/19 (14 November 2019), para 126. Available at: https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF (accessed: 13 October 2024).

5. *Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”*, Pre-Trial Chamber I, Case No ICC-RoC46(3)-01/18 (6 September 2018), paras 71-72. Available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF (accessed: 29 August 2024).

Since most Belarusians fled to States Parties to the Rome Statute in the context described above and are extraterritorially persecuted by the Belarusian regime, the International Criminal Court should have jurisdiction over the alleged crimes.

3.3. Jurisdiction *ratione loci* (territorial jurisdiction)

Under Article 11 of the Rome Statute, the ICC may exercise its jurisdiction over crimes committed after the entry into force of the Rome Statute or, if a State becomes a Party to the Statute later, after the entry into force of the Statute for that State. With most countries having ratified the Rome Statute before 2020, the ICC has jurisdiction over the crime of deportation, persecution, and other inhuman acts committed by the Belarusian authorities.

There are additional criteria that should be considered in the context of the ICC jurisdiction. In order to determine the admissibility of a case before the ICC, the Court needs to assess whether the principle of complementarity has been respected, and whether the case is of sufficient gravity. The Rome Statute codifies the principle of *complementarity* and in particular, in its Article 17(1)(a) states that a case is inadmissible before the ICC if “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. The provision thus sets out a two-step test: the Court needs to determine whether a State is already investigating or prosecuting the case in question, and whether, despite the ongoing investigations or prosecution on the national level, the State in question is unwilling or unable to genuinely carry out the investigations or prosecution (Robinson, 2010).

The wording of the provision makes clear that “Article 17 (1) (a) of the Statute [only] covers a scenario where, at the time of the Court’s determination of the admissibility of the case, investigation or prosecution is taking place in a State having jurisdiction.” Where no investigations have been initiated yet, “the question of unwillingness and inability does not arise”, and the inaction of the State having jurisdiction “renders [the] case admissible before the

Court”.⁶ To determine whether national authorities investigate or prosecute the same case, the ICC Appeals Chamber ruled that investigations carried out by national courts “must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.”⁷

According to publicly available information, no investigations have been initiated on behalf of Belarusian nationals in the EU countries since 2020 for the crimes of deportation or extraterritorial persecution. Following the prong of “same person/same conduct”, potential cases will thus be admissible before the ICC since no investigations within domestic jurisdiction cover the same persons or the same conduct (which resulted in deportation or extraterritorial persecution).

Under Article 17(1)(d) of the Rome Statute, a case is inadmissible if it is “not of sufficient gravity to justify further action by the Court.” While the *gravity* assessment must be made on a case-by-case basis, in its jurisprudence, the Court has relied on both quantitative and qualitative criteria, including the scale and intensity of the alleged crimes,⁸ the nature of the unlawful behaviour, the rank of the suspect as a senior State official, the manner of the commission of the crimes, as well as the impact of the crimes and the harm caused to victims and their families.⁹

The reference to the insufficiency of gravity in Article 17 “is a safeguard, which prevents the Court from investigating, prosecuting and trying peripheral cases”. In other words, the ICC proceedings must be directed

6. *Prosecutor v Katanga and Ngudjolo Chui*, Appeals Chamber Judgment, ICC-01/04-01/07 OA 8, paras 75, 78

7. *Prosecutor v Ruto and Others*, ICC-01/09-01/11-307, Appeals Chamber Decision, para 40

8. *Prosecutor v Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1497 OA 8, Judgment on the Appeal of Mr Germain Katanga, para 76

9. *Prosecutor v Muthaura and Others*, ICC-01/09-02/11, Decision on the Confirmation of Charges, para 43

against those suspected of being most responsible for the commission of the crimes.¹⁰

The deportation of the civilian population from Belarus has been the result of the creation of an atmosphere of fear and terror all across Belarus, with State officials resorting to grave atrocities, such as torture, rape, murder, and imprisonment, against civilians perceived as disloyal by the Belarusian regime. Extraterritorial persecution is carried out massively and is aimed at depriving the targeted population of the most fundamental rights. The main perpetrators of these crimes are members of the higher political and military leadership of Belarus. Therefore, the Belarusian situation relating to these crimes meets the “gravity” criterion.

4. Arguments in favour of a State referral to initiate and conduct preliminary examinations

As confirmed by the ICC Trial Chamber, any State “may, without breaching the complementarity principle, refer a situation concerning its territory to the Court if it considers it opportune to do so, just as it may decide to carry out an investigation or prosecution of a particular case.”¹¹

The arguments in favour of a referral of the Belarusian situation to the Office of the Prosecutor of the ICC may include the following:

4.1. Personal and functional immunities of State officials will likely hamper investigations in national courts.

Even if there were investigations at the domestic level on these crimes, national courts may be unable to prosecute the main perpetrators of these crimes, as they enjoy personal immunity. In national courts, the prosecution of Heads of States and Heads of Governments accused of international crimes is hampered by the principle of personal immunity, granted to office holders for both private and official acts, and (for official acts) even after they leave office. Accordingly, Aliaksandr Lukashenka cannot be prosecuted

10. *Situation in the Republic of Kenya*, ICC-01/09, Pre-Trial Chamber II, Decision Pursuant to Article 15, paras 51-52

11. *Prosecutor v Katanga and Chui*, ICC-01/04-01/07-1213, Trial Chamber II, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case, paras 79-80

for the crimes committed in national courts. Additionally, other State officials generally enjoy functional immunity for official acts. Although there is a clear trend to recognize an exception for the commission of international crimes, including crimes against humanity, so far, there seems not to be sufficient State practice to prove the existence of this exception unequivocally (Corder, 2023).

In contrast, Article 27 of the Rome Statute explicitly states that the ICC does not recognize any immunities, enabling the Court to prosecute high-ranking officials from Belarus.

4.2. Prosecution in different national courts may lead to inconsistent findings on the facts or to fragmentation.

Additionally, given the scale and the systematic nature of the crimes committed, a referral of the situation to the International Criminal Court might further facilitate the investigation and the prosecution of those most responsible for the crimes, in particular those who ordered the crimes, such as Aliaksandr Lukashenka and other members of the Belarusian regime. It might not only be advantageous to concentrate the investigations in one instead of several courts in different countries, but it might also help to avoid legal fragmentation, especially if cases are brought before national courts of several States in parallel.

4.3. Higher probability of an arrest and extradition of suspects through the obligation of States Parties to the Rome Statute to cooperate with the ICC.

A State referral of the case to the ICC could also facilitate the arrest and extradition of suspects for their prosecution. While in the European Union, since 2004, member states are obliged to execute European arrest warrants (EAW) as a “simplified cross-border judicial surrender procedure.”¹² Under Article 86 of the Rome Statute, all 125 States Parties are under the obligation to “cooperate fully with the Court in its investigation and prosecution”. This

12. Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). Available at https://eur-lex.europa.eu/eli/dec_framw/2002/584/oj (accessed 13 October 2024).

includes the obligation to execute arrest warrants issued by the ICC, especially by arresting and surrendering a suspect at the request of the Court. Given the wider circle of States and the higher probability of Belarusian officials traveling to non-EU countries, a referral of the case to the ICC will also increase the probability of an arrest and extradition, ensuring an effective prosecution by the ICC.

4.4. Importance of further referrals for the fight against impunity in Belarus.

On 2 March 2022, 38 states made a state referral allowing the ICC to initiate prompt investigations into the crimes committed in the context of Russia's aggression against Ukraine. In the same vein, the Lithuanian Government's referral of the Belarusian situation to the OTP constitutes a crucial step in the fight against impunity in Belarus, as at present an Article 14 referral is the only viable procedure to initiate investigations into the crimes committed by the Belarusian regime against the Belarusian people and to hold those responsible to account. Within the preliminary examination, the OTP will determine if there is a reasonable basis to proceed with the opening of an investigation.

However, the specifics of the Government of Lithuania's referral allow the OTP to proceed with the investigation of the situation concerning only those victims from Belarus who ended up on the territory of Lithuania. Meanwhile, with the potential investigation being currently limited to one country, alleged crimes committed against victims who fled to other States, such as Poland, where a majority of Belarusians found refuge, but also Latvia, Germany, Georgia, Switzerland, and others, as well as evidence of such crimes, remain outside the scope of the current preliminary examination. Although the OTP could examine and subsequently request the authorization of the Pre-Trial Chamber to open an investigation into the crimes committed against Belarusians in other countries *proprio motu*, this procedure would significantly delay the investigation, especially if authorization requests were to be filed for several countries. It might also result in increased uncertainty and hardship for victims of potential crimes: in particular, in line with the OTP's approach to prosecute those most responsible for international crimes, it is highly likely that victims of widespread or systematic crimes committed by high-level perpetrators reside in different countries. Yet, limiting the investigation to crimes

committed against Belarusian nationals residing in Lithuania would therefore create an arbitrary differentiation between victims of the same crime, likely excluding them from the participation in the proceedings, justice, and reparations.

As highlighted by the Office of the Prosecutor, “even if a referral comes from a third State not involved in the alleged crimes, the referral will indicate support for the involvement of the Court from that part of the international community” (OTP, 2021: 5). Accordingly, State referrals, whether submitted to prompt the opening of an investigation by the OTP or to further support it, have proven to be a strong and effective mechanism, including in the cases of Ukraine (ICC, 2024) and Afghanistan (ICC, 2022), where group referrals have expedited the investigation, leading to the timely application for and issuance of arrest warrants.

With the reports of the UN High Commissioner for Human Rights, the UN Special Rapporteur for Belarus, and the newly established UN Group of Independent Experts consistently confirming that there are reasonable grounds to believe that crimes against humanity, including persecution, are being committed in Belarus, and with no efforts made by the Belarusian regime to investigate any of the alleged crimes, an impartial, independent, and thorough investigation by the International Criminal Court is crucial to ensure accountability. Additional referrals would therefore not only significantly facilitate and expedite the investigation, but would also respond to the interests of the victims. Such initiatives could demonstrate the condemnation of the crimes committed by the Belarusian regime and the strong and united support for their prosecution by the ICC.

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