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THE TRANSBOUNDARY CRISIS: FORCED DISPLACEMENT AND EXTRATERRITORIAL PERSECUTION OF BELARUSIANS AS CRIMES AGAINST HUMANITY

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Abstract: Following the falsified presidential election of August 9, 2020, Belarus has witnessed an unprecedented campaign of state-sponsored persecution that has forced approximately 300,000 Belarusians to flee their homeland, primarily to Lithuania and Poland. This exodus represents 3.2% of Belarus's population and constitutes one of the largest forced displacement crises in contemporary Europe. The Belarusian regime's systematic persecution extends beyond national borders, targeting exiled citizens through intimidation of relatives, property seizures, *in absentia* trials, and denial of consular services. This analysis examines the transboundary nature of these alleged crimes against humanity, demonstrating how deportation and extraterritorial persecution occur across multiple jurisdictions, thereby engaging international criminal law mechanisms previously unavailable. The study proposes invoking the OSCE Moscow Mechanism under Paragraph 8 to establish an expert mission capable of investigating these crimes on Lithuanian and Polish territory, where victims now reside and continue to face persecution.

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

Resumo: Após as eleições presidenciais fraudulentadas de 9 de agosto de 2020, a Bielorrússia foi palco de uma campanha sem precedentes de perseguição promovida pelo Estado, forçando cerca de 300 000 bielorrussos a fugir do seu país, principalmente para a Lituânia e a Polónia. Este êxodo representa 3,2% da população da Bielorrússia e constitui uma das maiores crises de migração forçada da Europa contemporânea. A repressão sistemática do regime bielorrusso transcende as fronteiras nacionais, visando cidadãos exilados através da intimidação de familiares,

apreensão de bens, julgamentos à revelia e recusa de serviços consulares. Esta análise examina a natureza transfronteiriça destes alegados crimes contra a humanidade, demonstrando como a deportação e a repressão extraterritorial ocorrem em várias jurisdições, envolvendo assim mecanismos de direito penal internacional anteriormente indisponíveis. O estudo propõe invocar o Mecanismo de Moscovo da OSCE ao abrigo do parágrafo 8 para estabelecer uma missão de peritos capaz de investigar estes crimes em território lituano e polaco, onde as vítimas agora residem e continuam a enfrentar perseguição.

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

1. Introduction

The post-2020 Belarusian crisis represents a paradigmatic case of state-sponsored crimes against humanity with transboundary implications. The systematic persecution campaign initiated by Aleksandr Lukashenka's regime has created an atmosphere of fear and terror that has compelled the mass displacement of Belarusian civilians (OHCHR, 2024). At the same time, those who have already left Belarus continue to be persecuted on political grounds by the Belarusian regime abroad, in particular in Lithuania and Poland. Two previously invoked OSCE Moscow Mechanism missions in 2020 and 2023 have, to some extent, assessed Belarus's compliance with OSCE commitments and human rights obligations concerning the persecution of Belarusians within the country, as well as abroad (OSCE, 2020). Simultaneously, international human rights mechanisms and organizations noted that the human rights violations committed by the Belarusian authorities potentially amount to international crimes (OMCT, 2021).

According to the reports of the Office of the United Nations High Commissioner for Human Rights (OHCHR), as well as international and Belarusian human rights organizations, there are sufficient grounds to believe that such abuses amount to crimes against humanity. The scale and severity of the repressions indicate potentially one of the largest crimes against a civilian population in Europe committed in the 21st century, as the number of victims of these crimes is estimated in the hundreds of thousands (OHCHR, 2024).

The international community's response to this crisis has been fragmented and insufficient, partly due to the unprecedented nature of systematic extraterritorial persecution by a European state against its own citizens. Traditional diplomatic and legal mechanisms have proven inadequate to address crimes that span multiple jurisdictions and involve complex interactions between domestic persecution and international displacement. This analysis proposes a comprehensive framework for understanding and addressing these transboundary crimes through an innovative application of existing international legal mechanisms.

2. Forced displacement of Belarusians and their territorial persecution

It should be stressed that the forced displacement and persecution of a part of the Belarusian population are currently being committed by the Belarusian regime not only inside the country but also abroad, mainly in Lithuania and Poland. At least one element of these offenses occurs in the countries to which victims are forced to flee and where they are currently located, respectively. These circumstances potentially make it possible to resort to legal mechanisms that were previously out of the focus of the international community, due to the lack of attention to these crimes and human rights abuses. In this regard, we deem it important to consider in more detail the context and the transboundary nature of the crimes of the forced displacement of a part of the Belarusian population and its extraterritorial persecution.

The OHCHR report on the situation in Belarus concluded that among the reasons which drive individuals to flee Belarus are the following: 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. In 2024 up to 300,000 individuals were forced to leave Belarus since 2020, which represented 3.2% of the country's population as of 2020. The reason for this phenomenon, according to 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, 2023a).

Initially, before and shortly after the August 2020 elections, the Belarusian authorities primarily targeted prominent opposition figures, forcing them to leave the country as part of a strategy to eliminate all political alternatives

to the government. However, this was soon followed by a wider crackdown on the civic space, which led to the mass exodus of individuals perceived as disloyal. Individuals from specific professions, including independent journalists, media workers, civil society activists, human rights defenders, artists, and cultural workers, were specifically targeted, and the atmosphere of fear forced these individuals to leave the country. Consequently, Belarusians had no real choice but to stay due to the deprivation of their fundamental rights, the intimidation of their colleagues, friends, and relatives, and the lack of safe avenues to protect their rights (Marin, 2022: para 32).

Overall, according to data from the European Union Agency for Asylum, approximately 3,800 Belarusians applied for asylum in European Union member states in 2021. In 2022, this number increased to 5,051 cases, and to at least 3,820 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 in their possession or crossed the border without such documents. Most probably, the actual displacement likely exceeds official statistics given irregular migration patterns, temporary visa arrangements, and individuals who relocated without seeking formal refugee status. Academic estimates suggest the total number of Belarusians who left the country since 2020 may approach 400,000, representing over 4% of the pre-crisis population (Beroc, 2023).

The hostile action of the Lukashenka regime is not limited to the forced deportation only. The Belarusian authorities systematically persecute individuals who fled Belarus and is perceived as disloyal beyond its borders as well. This includes the intimidation of family members who remained in Belarus (Current Time, 2024), home searches and the seizure of property (HRC Viasna, 2023), arrests of relatives (Current Time, 2022), as well as criminal charges and trials *in absentia* against those in exile (HRC Viasna, 2024). Additionally, restrictive legislation was imposed, along with heavy-handed measures designed to severely restrict the rights of those who left Belarus. Simultaneously, in the described context of the widespread state policy on the prosecution of “disloyal” individuals, it is highlighted that the law enforcement agencies, the judiciary, and the court system not only fail to ensure adequate protection for human rights but are frequently employed as tools of repression and intimidation.

In particular, since 2021, the Belarusian authorities have adopted highly repressive legislation, including a broad “anti-extremism” and “anti-terrorism” legislation, targeting all those perceived as disloyal, including opposition figures, journalists, human rights defenders, lawyers, members of trade unions, and others. This legislation has caused “a virtual annihilation of independent non-governmental organizations, media, and cultural organizations” (OHCHR, 2022).

In 2022, the amendments to the Criminal Procedure Code established the possibility of *in absentia* trials in relation to accused individuals residing outside Belarus without the due process safeguards required by the right to a fair trial (OHCHR, 2023b). Since September 2022, the Belarusian authorities have initiated “special procedure” criminal cases against 89 individuals, mostly against opposition politicians, human rights defenders, and activists (Belarusian Helsinki Committee, 2024). A so-called special procedure provides for trials to take place without the presence of defendants charged with crimes under 43 different articles of the Belarusian Criminal Code (Human Rights Watch, 2024). In July 2023, legislative amendments to the citizenship law entered into force, allowing the president to strip Belarusians of their citizenship if convicted of “participation in an extremist organization” or causing “grave harm to the interests of Belarus,” including those convicted *in absentia*.¹ In September 2023, a presidential decree was signed abolishing the authority of consulates and diplomatic missions to issue, replace, or extend passports and other documents of Belarusians abroad, making it obligatory for them to travel to Belarus (Human Rights Watch, 2023). Consequently, thousands of forcibly exiled Belarusians are left either without access to valid identification documents while abroad or at risk of politically motivated prosecution if they return to Belarus to process their documents.

Both the forced displacement of Belarusians and their extraterritorial persecution may be considered as acts referred to in article 7 of the Rome Statute and thus falling within the sphere of competence of the International Criminal Court.² It should be noted that Pre-Trial Chamber I of the International Criminal Court with respect to the situation in

1. Law “On Citizenship” of the Republic of Belarus (1 August 2002), No 136-3

2. Rome Statute of the International Criminal Court article 7(1)(h), opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002)

Bangladesh/Myanmar 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”³. 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”⁴. Although Belarus is not a party to the Rome Statute, this legal framework directly applies to the Belarusian situation. The systematic creation of conditions forcing civilian displacement constitutes the initiation of deportation within Belarus, while the completed displacement and continuing persecution occur in Lithuania and Poland, which have ratified this international act and recognize the jurisdiction of the ICC. Thus, the ICC’s precedential decision in the Bangladesh/Myanmar case fundamentally expands available legal remedies for the Belarusians in exile.

3. Reasons to invoke the Moscow Mechanism for Belarus

So far, international monitoring mechanisms, including the UN High Commissioner for Human Rights and the UN Special Rapporteur on Belarus, as well as the two missions of experts established under the OSCE Moscow Mechanism in 2020 and 2023, have assessed the situation in Belarus almost exclusively from the perspective of the international and regional human rights law. Yet, as established by the OHCHR, some of the human rights violations committed by the Belarusian regime, especially persecution, might amount to crimes against humanity, and “warrant further assessment of the available evidence from the perspective of applicable international criminal law” (OHCHR, 2024). Despite the OHCHR findings, these circumstances have not been properly assessed under the standards of international criminal law. At the same time, this standard was effectively applied in the OSCE Moscow Mechanisms on Ukraine, the resort to which has established it as “an important tool of the international community to catalogue patterns of behavior through a mission of independent experts to

3. Prosecutor v Myanmar (Decision on the Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute) ICC-RoC46(3)-01/18, Pre-Trial Chamber I (6 September 2018), para 71

4. *Ibid*, para 72

raise awareness about violations and crimes being committed and call for action, including towards preventing impunity by ensuring accountability” (Sancin, 2023: 224). Today, this mechanism has an added value on a par with other international means and methods of fact-finding, such as those established within the United Nations.

The new report under the Moscow Mechanism relating to the mentioned crimes against part of the Belarusian population could therefore effectively complement the existing efforts by providing an extensive legal analysis under an international criminal law standard inclusively. It could not only become the first report to comprehensively analyze some of the international crimes committed in Belarus, but, thanks to its highly authoritative character, also have a catalytic effect on future accountability efforts for Belarus.

Grave concerns about the deteriorating human rights situation in Belarus have been consistently raised by the overwhelming majority of the OSCE participating States in different international fora. A new Moscow Mechanism supported by as many OSCE participating States as possible will therefore show the continued attention to the human rights violations committed in Belarus, and the strong commitment of the participating States to hold those responsible for the grave human rights violations to account.

The Moscow Document (CSCE, 1991) establishes four distinct procedures for mechanism invocation, each designed to address different circumstances and provide varying degrees of international oversight:

- Paragraph 4 – Self-Invocation: Every participating State can invoke the Moscow Mechanism to address the human rights violations committed on its own territory.
- Paragraph 8 – Cooperative Invocation: One or more participating States can request the OSCE Office for Democratic Institutions and Human Rights to inquire of another participating State whether it would agree to invite a mission of experts to address a particular, clearly defined question on its territory relating to the human dimension of the OSCE. The cooperative nature of this procedure requires consent from the state where investigation would occur, but enables international initiative in raising human rights concerns. Significantly, this procedure can address

transboundary situations where human rights violations in one state affect others.

- Paragraph 12 – Adversarial Invocation: Ten or more participating States can invoke the Moscow Mechanism in an adversarial procedure if a particularly serious threat to the fulfillment of the provisions of the OSCE human dimension has arisen in another participating State. This adversarial procedure does not require consent from the investigated state, making it suitable for situations where governments refuse cooperation.
- Paragraph 13 – Permanent Council Invocation: the Moscow Mechanism may be invoked upon the request of any participating State by the consensus decision of the OSCE Permanent Council.

In the case of Belarus, both missions of experts were invoked under Paragraph 12 of the Moscow Document, forcing the rapporteur to collect evidence online (OSCE, 2020: 9; OSCE, 2023: 13). With a view to the ongoing crimes of the forced displacement of Belarusians and their extraterritorial persecution it is suggested that the Moscow Mechanism should be best initiated by Lithuania and Poland under Paragraph 8 of the Moscow Document. This Cooperative Invocation implies that a State may invite a mission of experts to address a particular question on its territory relating to the human dimension of the OSCE. Since deportation and persecution are recognized as transboundary crimes (International Criminal Court, 2019: para 62), which are committed, in part, in the territory of the State where the victim of deportation or persecution fled, one of the States affected could invite, upon the request and with the support of as many OSCE participating States as possible, a mission of experts to investigate the human rights violations and international crimes related to the deportation and persecution of Belarusians.

This would allow for the establishment of a mission of three experts who have three weeks to examine the violations of international law committed by the Belarusian regime and to submit their report. Unlike the previous cases where Belarus refused to cooperate within the Moscow Mechanism this mission of experts will have the opportunity to collect evidence and conduct interviews in person, directly exchange with leading Belarusian human rights organizations and other members of the Belarusian

community located in Lithuania and Poland, and benefit from the support of the ODIHR, which is based in Warsaw.

In light of the above, the mission of experts could be mandated to examine the circumstances related to the mass exodus of a part of the civilian population of Belarus to Lithuania and Poland from May 2020 to the present, allegedly caused by widespread and systematic violence and deprivation of rights on political grounds against a group of the population, as well as persecution of this group in the territory of Lithuania and Poland by the Belarusian regime.

Given the scale and gravity of the situation and the previous lack of attention to the phenomenon of the forced displacement from Belarus of those perceived as disloyal to the Lukashenka regime, and their subsequent extraterritorial persecution, further examination of abuses and obtaining expert recommendations within a multilateral format is especially important. The invocation of the OSCE Moscow Mechanism appears to be the most appropriate instrument for protecting the rights and interests of victims of human rights abuses and core international crimes and for obtaining an expert assessment and recommendations facilitating the resolution of the situation in Belarus and in Lithuania/Poland. In this regard, it should be of fundamental importance to include in the mandate of the expert mission the possibility of assessing the situation not only according to the standards of international human rights law, but also international criminal law with a view to provide information to relevant accountability mechanisms, as well as national, regional, or international courts or tribunals that have, or may in future have, corresponding jurisdiction.

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