

for

Belarus

Briefing

THE INTERNATIONAL CRIMINAL COURT AND BELARUS:

Understanding Lithuania's Referral and Why ICC Member
States Must Act to Bring Justice to Belarusian Victims



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EXECUTIVE

Summary

The human rights crisis in Belarus has intensified significantly since the contested presidential elections of August 2020. In response, the Republic of Lithuania submitted a referral to the International Criminal Court ('ICC') on 30 September 2024, alleging that crimes against humanity had been committed under the authority of senior Belarusian officials since at least 1 May 2020 ('the Referral'). While Belarus is not a State Party to the Rome Statute, the Referral asserts jurisdiction based on the partial occurrence of these crimes in Lithuania and other State Parties to the ICC.

This briefing sets out the relevant legal considerations as they relate to the Referral at this stage. Crucially, its purpose is to underscore the urgent need for a unified international response to address the atrocities in Belarus. The ICC's preliminary examination is a critical step in securing justice and accountability, but broader support by States - through joining or submitting additional referrals, evidence sharing, and extraterritorial prosecutions at national level - will be essential to achieving justice for victims and survivors of the regime, and in signalling the international community's intolerance for impunity.

In particular, we draw attention to the following actions that States can take at this time:

- Support Lithuania by Joining the Referral. Previous joint referrals have demonstrated the impact of collective action in pushing for the opening of investigations before the ICC. Moreover, by joining Lithuania's Referral, States can reinforce the legitimacy of the ICC's proceedings and emphasise a united stance against impunity.
- Strengthen Universal Jurisdiction Efforts. National-level extraterritorial prosecutions can complement ICC actions, particularly for crimes outside the purview of the ICC and those that involve low and mid-level perpetrators. States should collaborate with one another to ensure the mutual exchange of evidence relevant to these proceedings, conduct structural investigations, protect witnesses and uphold the commitment to ensure that there are no safe havens for perpetrators.

States are urged to act decisively to support the Referral and to leverage all available legal mechanisms to hold perpetrators accountable for their crimes.

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Background

The longstanding human rights crisis in Belarus has significantly worsened since the presidential elections in August 2020. It is widely acknowledged that since at least 1 May 2020, disputed President Lukashenko is responsible for serious and widespread human rights violations committed against the civilian population, including arbitrary detention; politically motivated prosecutions; unfair trials; unlawful killings; sexual violence; torture and other cruel, inhuman or degrading treatment or punishment; intimidation and harassment; forced labour; and enforced disappearance.¹ Some of these violations may amount to crimes against humanity as “*part of a campaign of violence and repression and punishment, pursuant to or in furtherance of a policy to attack a civilian population, specifically defined and delineated by its real or perceived opposition to the Government*”, as stated by the Office of the High Commissioner for Human Rights (‘OHCHR’).²

It is alleged that the regime has forcibly displaced hundreds of thousands of lawful residents of Belarus to neighbouring Lithuania and other State Parties without grounds permitted under international law, either by direct expulsion or through the coercive circumstances outlined above.

In its March 2024 report, the OHCHR estimated that “*up to 300,000 individuals have been forced to leave Belarus since 2020 in what has been a concerted campaign of violence and repression intentionally directed at those opposing, or perceived to be opposing, the Government or expressing critical or independent voices.*”³ Those who were forced to leave Belarus continue to face severe human rights violations by the Belarusian regime while in exile. These violations range from politically motivated criminal charges pursued through trials and sentences in absentia; threats and intimidation, including against relatives remaining in Belarus; publicly disseminated hate speech, unlawful seizure and confiscation of property; to other forms of severe deprivation of fundamental rights.

According to information gathered by the International Accountability Platform Belarus (IAPB), residents of Belarus have now been dispersed to over 25 ICC State Parties, as well as to at least 10 other States that have not ratified the Rome Statute.⁴

The organised and sustained nature of these violations “*renders it improbable that they were random or accidental*”,⁵ but rather they appear to have been, and continue to be, part of a deliberate campaign of violence and repression committed by Lukashenko’s government.⁶

1 [OSCE Rapporteur’s Report under the Moscow Mechanism on Alleged Human Rights Violations related to the Presidential Elections of 9 August 2020 in Belarus](#), 5 November 2020, Doc. No. ODIHR.GAL/68/20/Corr.1.

2 OHCHR, [Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath](#), UN Doc. A/HRC/55/61 (Advance unedited version), 15 March 2024, para. 52; OHCHR, [Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath](#), UN Doc. A/HRC/52/68, 3 February 2023, para. 54. See also, Viasna, [Belarusian authorities target group of the individuals perceived as disloyal: Viasna lawyer speaks at the OSCE conference](#), 11 October 2024; [Submission by Article 19, Human Constanta, Access Now and World Organisation against Torture \(OMCT\) to the Special Rapporteur on the Situation of Human Rights in Belarus](#), 6 June 2023; Claire Mills, [Belarus: One year on from the disputed Presidential election](#) (House of Commons Library, 5 October 2021) pp. 9-10.

3 OHCHR, [Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath](#), UN Doc. A/HRC/55/61 (Advance unedited version), 15 March 2024, para. 47.

4 [Open Letter calling on ICC State Parties to join Lithuania’s referral to the ICC requesting an investigation into alleged crimes against humanity committed by Belarusian authorities](#), 4 November 2024.

5 OHCHR, [Situation of human rights in Belarus in the run-up to the 2020 presidential election and in its aftermath](#), UN Doc. A/HRC/55/61, 25 March 2024, para. 51.

6 Ibid, para. 52.

The Referral

In a letter dated 30 September 2024, the Republic of Lithuania submitted a Referral on the situation in Belarus to the Office of the Prosecutor ('OTP') of the ICC.⁷ The situation is now classified as Republic of Lithuania/Republic of Belarus ('Lithuania/Belarus') as a result of the preliminary examination the Referral has triggered.⁸ In the Referral, Lithuania asserted that there are reasonable grounds to believe that beginning in April 2020, and from at least 1 May 2020, crimes against humanity—including deportation, persecution, and other inhumane acts—have been committed against the civilian population at the direction of senior Belarusian political, law enforcement, and military officials. Lithuania submitted that part of the elements of these crimes was committed on the territory of Lithuania and other State Parties, bringing such crimes temporally, territorially, and materially (by subject-matter) within the jurisdiction of the ICC.⁹

A State referral does not automatically open an investigation, but it does require the OTP to open a preliminary examination into the situation. The OTP has confirmed that it will now conduct a **preliminary examination**, guided by the Rome Statute, to determine if there is a **reasonable basis to proceed with an investigation into the alleged crimes**.¹⁰

Crimes Against Humanity and the International Criminal Court

Where the ICC has jurisdiction, it can decide to investigate and, where warranted, prosecute and try individuals charged with the most serious crimes of concern to the international community as a whole, namely: war crimes; crimes against humanity; genocide; and the crime of aggression.¹¹

In the context of Belarus, the ICC's subject matter jurisdiction for crimes against humanity is directly relevant as they form the basis of the allegations set out by Lithuania in its Referral of the situation in Lithuania/Belarus to the OTP. Under Article 7 of the Rome Statute, certain acts constitute crimes against humanity if such acts:

⁷ [Letter submitted by the Minister of Justice of the Republic of Lithuania to the ICC concerning the State Party Referral of the Situation in Belarus](#), 30 September 2024.

⁸ See further, ICC, [Preliminary Examinations](#).

⁹ [Letter submitted by the Minister of Justice of the Republic of Lithuania to the ICC concerning the State Party Referral of the Situation in Belarus](#), 30 September 2024.

¹⁰ [Statement of the ICC Prosecutor Karim A.A. Khan KC on receipt of a referral by the Republic of Lithuania](#), 30 September 2024.

¹¹ ICC Rome Statute, art. 5(1).



are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (Art. 7(1)).



‘Acts’ here include deportation or forcible transfer of a population and persecution.¹² It also includes murder,¹³ extermination,¹⁴ enslavement,¹⁵ imprisonment or other severe deprivation of liberty,¹⁶ torture,¹⁷ rape and other forms of sexual violence,¹⁸ enforced disappearance,¹⁹ apartheid,²⁰ and other inhumane acts.

The jurisdictional requirements of the Rome Statute provide that the alleged crimes being considered by the OTP during the preliminary examination phase must fall within its temporal, territorial, subject matter, and personal jurisdiction.

- Temporal Jurisdiction. The OTP can **only** investigate crimes within the jurisdiction of the Court, i.e. **crimes committed after 1 July 2002** (the date that the Rome Statute establishing the Court came into force).²¹
- Territorial Jurisdiction. The OTP can **only** exercise its investigative functions in the **territory of State Parties** to the Rome Statute (States who have ratified it),²² **non-State Parties that consent to the Court’s jurisdiction**,²³ or **non-State Parties that are referred by the UN Security Council** to the Court.²⁴
- Subject Matter Jurisdiction. The OTP can **only** investigate **war crimes, crimes against humanity, genocide, or the crime of aggression**.²⁵
- Personal Jurisdiction. The OTP can **only** investigate and prosecute **‘natural persons’ who are over the age of 18**.²⁶ It cannot investigate or prosecute governments, corporations, political parties, or rebel movements, but may investigate individuals who are members of groups.²⁷

12 Ibid, art. 7(1)(d).

13 Ibid, art. 7(1)(a).

14 Ibid, art. 7(1)(b).

15 Ibid, art. 7(1)(c).

16 Ibid, art. 7(1)(e).

17 Ibid, art. 7(1)(f).

18 Ibid, art. 7(g).

19 Ibid, art. 7(1)(i).

20 Ibid, art. 7(1)(j).

21 Ibid, art. 11 (Jurisdiction *ratione temporis*).

22 Ibid, art. 12(2)(a).

23 Ibid, art. 12(3).

24 Ibid, art. 13(b). Article 12 is the central legal source when it comes to determining the territorial jurisdiction of the ICC (Jurisdiction *ratione loci*), but it may be pierced, or otherwise extended, only by the referral of a situation to the prosecutor by the UN Security Council. See further, ICC Commentary (CLICC), Article 12, para. 175.

25 Ibid, art. 5.

26 Ibid, arts. 25-26.

27 Ibid.

What is important to note about the Referral for the situation in Lithuania/Belarus is that the ICC will only be able to investigate crimes **where an element of the crimes in question**—specifically, crimes against humanity, including deportation, persecution, and other inhumane acts as set out by Lithuania in the Referral—were **committed on the territory of Lithuania, or on the territory of other State Parties**.

Deportation or forcible transfer of a population is defined as the “*forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law*” (Art. 7(2)(d)).

Persecution is defined as “*the international and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectively*” (Art. 7(2)(g)).

Other inhumane acts are defined as “*inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health*” (Art. 7(1)(k)).

The Office of the Prosecutor of the ICC opened a preliminary examination into the Belarus situation. What next?

During its preliminary examination, the OTP will evaluate whether to initiate an investigation into the situation raised by Lithuania, which would be the next stage of the ICC proceedings.

The OTP will conduct the preliminary examination in accordance with **Article 53(1)** of the Rome Statute which sets out the factors for the OTP to consider in deciding whether to initiate an investigation. These include:

1. Whether the available information provides a reasonable basis to believe that one or more crimes within the Court’s jurisdiction have been committed, and the elements of that crime or crimes were committed in Lithuania or another ICC State Party, taking into consideration the temporal, territorial, subject matter, and personal jurisdiction of the Court (see Jurisdiction: [Can the ICC try Belarusian officials for crimes against humanity allegedly committed in Belarus?](#), below).
2. Whether the admissibility criteria are met (see [Admissibility and Complementarity with national-level prosecutions](#), below).
3. Whether there are any reasons to believe that opening an investigation would not serve the interests of justice, taking into account the gravity of the alleged crimes and the interests of victims (see [The Interests of Justice](#), below).

Depending on this assessment, the Prosecutor will either proceed with opening the investigation, decide not to initiate an investigation, or continue to collect information to enable him to make a determination on the situation in Lithuania/Belarus.

If the Prosecutor decides that opening an investigation is warranted, he may proceed directly to opening the investigation without requiring authorisation from the Pre-Trial Chamber. This is because the Belarus situation has been referred by a State Party.²⁸

A 'situation' refers to a set of events or incidents occurring at a specified period, in a particular geographic location where the Court can exercise its jurisdiction, and that involves multiple actors, which form the basis to determine whether the particular situation should give rise to a criminal investigation by the OTP.²⁹ A 'case', by contrast, involves a higher level of specificity, defined by "specific incidents during which one or more crimes with the jurisdiction of the Court seem to have been committed by one or more identified suspects" and takes place after the issuance of an arrest warrant or summons to appear.³⁰

Jurisdiction: Can the ICC try Belarusian officials for crimes against humanity allegedly committed in Belarus?

The ICC's ability to act is limited to cases where it has jurisdiction, a question governed by Article 53(1)(a) of the Rome Statute. As set out above, this means that the OTP must establish that:

- The referred situation alleges crimes that have been committed after 1 July 2001 (temporal jurisdiction);
- These crimes include war crimes, crimes against humanity, genocide or the crime of aggression (subject matter jurisdiction);
- The alleged perpetrators are 'natural persons', such as named individual officials of a regime, but not the government as such (personal jurisdiction); and
- The crimes have been committed either on the territory of State Parties, on the territory of non-State Parties who consent to the Court's jurisdiction, or non-State Parties that have been referred to the Court by the UN Security Council (territorial jurisdiction).

Looking at another example of ICC jurisdiction over situations in non-State Parties, neither the Russian Federation nor Ukraine are State Parties to the Rome Statute. However, Ukraine has twice used its prerogative to accept the ICC's jurisdiction over alleged crimes committed on its territory, in accordance with Article 12(3) of the Rome Statute. The OTP has since issued public warrants of arrest against six individuals in the context of the situation in Ukraine for allegedly committing crimes within the Court's jurisdiction.

²⁸ Authorisation from the Pre-Trial Chamber would be required when a preliminary examination is launched on the basis of information submitted by civil society groups or individuals (via an Article 15 communication), thereby informing a *proprio motu* investigation by the Prosecutor after the referral by a non-State Party (ICC Rome Statute, art. 15(3)), or where the crime of aggression is invoked (ICC Rome Statute, art. 15bis(8)). These factors do not apply to the present Referral.

²⁹ ICC, Pre-Trial Chamber I, *Situation in the Democratic Republic of the Congo, Decision on the applications for participation in the proceedings of VPRS 1, VPRS2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, Case No. ICC-01/04-101-tEN-Corr, 17 January 2006, para. 65.

³⁰ Ibid. See also Rod Rastan, *What is a 'Case' for the Purpose of the Rome Statute?* (Springer 2008) p. 1.

Relevant to the situation in Lithuania/Belarus, the Court may also have jurisdiction when **crimes are committed on the territory of non-State Parties and continue on the territory of a State Party** to the ICC. While Belarus is not a State Party to the Rome Statute, the Referral by Lithuania nevertheless submits that part of the alleged crimes were committed, and continue to be committed, on the territory of Lithuania and on the territory of other State Parties to the Rome Statute, thereby bringing them within the jurisdiction of the Court.

While the full submission issued by Lithuania to the OTP on the situation in Lithuania/Belarus is not publicly available, Lithuania's communication on its Referral confirms that the crimes alleged to have been committed partly in the territory of Lithuania and other State Parties are crimes against humanity, namely the crimes of deportation, persecution, and other inhumane acts. The Referral states that there are reasonable grounds to believe that these acts amount to crimes against humanity, have been committed against the civilian population of Belarus by senior political, law enforcement, and military leaders, and amount to a *"widespread and systematic attack on the civilian population, pursuant to a state policy to eliminate opposition and dissent."*³¹

In 2018, the ICC ruled that it could assert jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh. The Pre-Trial Chamber accepted the argument put forth by the OTP, that the Court could exercise jurisdiction over the cross-border deportation, even though the crime originated in Myanmar, a non-State Party. The Court could exercise jurisdiction because certain 'elements of the crime' occurred within and continue in Bangladesh, which is a State Party.

In considering the situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar (Bangladesh/Myanmar), the Prosecutor requested a ruling from the Court on the question of jurisdiction before opening an investigation.³² The Court responded affirmatively owing to the fact that the alleged acts concerned the deportation of the Rohingya people through a range of coercive acts which forced them to cross the border from Myanmar to Bangladesh, and took place on the territories of at least two States—in this case, partly on the territory of a non-State Party (Myanmar) and partly on the territory of a State Party (Bangladesh).³³ This was the first time this question had been considered.

The Pre-Trial Chamber confirmed that the crime of deportation (where citizens were expelled or fled because of other coercive acts), which initiated in a non-State Party and completed in a State Party, fell within the jurisdiction of the Court as one element of this crime or part of it was committed on the territory of a State Party. Therefore, the ICC has jurisdiction over the alleged crimes.³⁴

31 The Ministry of Justice of the Republic of Lithuania, Lithuania refers the Situation in Belarus to the Prosecutor of the International Criminal Court to investigate the crimes against humanity committed by the authoritarian regime of Lukashenko, 30 September 2024, para. 3.

32 ICC Rome Statute, art. 19(3).

33 ICC, Pre-Trial Chamber I, Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, Case No. ICC-RoC46(3)-01/18, 6 September 2018, para. 71; ICC, Pre-Trial Chamber I, Prosecutor's Request for Ruling on Jurisdiction under Article 19(3) of the Statute, Case No. ICC-RoC46(3)-01/18-1, 9 April 2018.

34 ICC, Pre-Trial Chamber I, Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, Case No. ICC-RoC46(3)-01/18, 6 September 2018, para. 71; ICC, Pre-Trial Chamber I, Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute, Case No. ICC-RoC46(3)-01/18-9, 30 May 2018, para. 49.

In the Referral of the situation in Lithuania/Belarus, the Prosecutor does not need to request authorisation from a Pre-Trial Chamber to open an investigation, because the preliminary examination has been opened based on the Referral by an ICC State Party. Articles 13(a) and 14(1) of the Rome Statute provide for the possibility for a State Party to refer to the OTP a “*situation in which one or more crimes within the jurisdiction of the Court appear to have been committed.*”

However, the Prosecutor may decide to seek clarification on jurisdiction, by making a request to Pre-Trial Chamber based on Article 19(3) of the Rome Statute.

If an investigation is opened, the Prosecutor will proceed to gather evidence to determine which crimes were committed, and which individuals are responsible, focusing on those who bear the greatest responsibility for the crimes. For example, the OTP may travel to the territory or territories where the crimes allegedly occurred and to other locations, to identify and speak to witnesses, visit the locations of the crimes, and obtain documents or other types of evidence to inform the investigation. In doing so, the OTP depends on the cooperation of State Parties³⁵ and others³⁶ to conduct these investigations.³⁷

Based on the collected evidence, the OTP may at a later stage request that the Pre-Trial Chamber issue arrest warrants or summonses for suspects it has identified. If the Chamber decides to issue such warrants or summonses, one or more cases are opened against the suspect(s).

Admissibility and Complementarity with national-level prosecutions

During the preliminary examination phase, the OTP will consider the admissibility of the situation in Lithuania/Belarus. This is governed by Article 53(1)(b) of the Rome Statute. The OTP will consider whether a State with jurisdiction over the crimes is willing or able to investigate or prosecute the alleged crimes. This is known as the **principle of complementarity**.

Complementarity, operationalised by **Article 17** of the Rome Statute, establishes the relationship between the ICC and domestic courts by recognising the primary responsibility of States to investigate and prosecute international crimes.³⁸

35 ICC Rome Statute, Part 9.

36 According to Article 87(5) of the Rome Statute, the Court “[m]ay invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.”

37 Where a situation is referred to the Court by the UN Security Council under Chapter VII of the UN Charter in accordance with Article 13(b) of the Rome Statute, the Security Council can impose obligations on all Member States (including non-State Parties to the Rome Statute) and urge them to cooperate with the ICC through the issuance of binding Security Council resolutions, e.g. [Security Council Resolution 1593](#) (2005) [on referring the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC] para. 2. This does not apply to the situation in Belarus.

38 The Office of the Prosecutor, [Policy on Complementarity and Cooperation](#), April 2024.

Under the Rome Statute, State Parties have the duty to exercise their criminal jurisdiction when core international crimes are committed on their territory or by their nationals.³⁹ Therefore, the OTP may only investigate and prosecute when States are unwilling or unable to do so. Consequently, the case cannot proceed at the ICC unless the requirements set out in Article 17 are satisfied.

The complementarity analysis involves two steps:

1. First, the Court must determine whether “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it.”⁴⁰ This is what is known as the ‘activity’ requirement.⁴¹ If a State with jurisdiction, whether Belarus, Lithuania or any other State, is **inactive** regarding the case, the complementarity analysis ends, and the OTP is free to continue its investigation.⁴²
2. If a State with jurisdiction is instead **active** regarding the case, the OTP **must** defer to the national proceeding unless “the State is unwilling or unable genuinely to carry out the investigation or prosecution.”⁴³ Only if the Court finds that the State is either unwilling or unable can it continue its investigation.

Under Article 17(2) of the Rome Statute, to determine whether a State is **unwilling**, the Court will consider:

- Whether the national proceedings seek to shield a person from criminal responsibility;
- Whether there has been an unjustified delay to the national proceedings indicating no intent to meaningfully bring the person to justice; and/or
- Whether the proceedings are not being conducted independently or impartially and are inconsistent with the intent to bring the person to justice.⁴⁴

Under Article 17(3) of the Rome Statute, in order to determine whether a State is unable to carry out the investigation or prosecution, the Court will consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.⁴⁵

The ICC does not replace national authorities but plays a subsidiary role, stepping in only when national authorities are unable or unwilling to prosecute.⁴⁶ Accordingly, the Court is only meant to act when domestic authorities fail to take the necessary steps to investigate and prosecute crimes that fall within the Court’s jurisdiction—genocide, crimes against humanity, war crimes, and aggression.

³⁹ ICC Rome Statute, Preamble para. 6.

⁴⁰ Ibid, art. 17(1)(a).

⁴¹ ICC, Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case*, Case No. ICC-01/04-01/07-1497 OA 8, 25 September 2009, para. 2.

⁴² ICC Commentary (CLICC), *Article 17(1)(a)*, para. 216.

⁴³ ICC Rome Statute, art. 17(1)(a).

⁴⁴ Ibid, art. 17(2).

⁴⁵ Ibid, art. 17(3).

⁴⁶ *Understanding the International Criminal Court*, 2020, para. 9.

Given the court acts as a last resort, the OTP will have to determine during the preliminary examination phase whether there are any ongoing investigations at national level, whether by authorities of Belarus, Lithuania or any other State with jurisdiction, in relation to the situation in Lithuania/Belarus and if so, whether these would preclude the OTP from advancing the Referral to an investigation.

Belarus is not a State Party to the Rome Statute and no domestic efforts have been taken to investigate or prosecute those bearing the greatest responsibility who form part of the Belarusian regime. This has been emphasised by Lithuania, which stressed that the crimes outlined in the Referral have not been investigated anywhere to date.⁴⁷

The Interests of Justice

Moreover, the OTP will consider whether the crimes are of **sufficient gravity** to justify the Court's involvement,⁴⁸ and whether there is any other reason to believe that an investigation would not serve the interests of justice. This is governed by Article 53(1)(c) of the Rome Statute. Gravity is assessed by the OTP by reviewing the scale, nature, manner, and impact of the alleged crimes.⁴⁹

In 2009, Sudanese rebels Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus were charged by the ICC with the killing of 12 African Union peacekeepers in 2007 by the ICC. The Court accepted the Prosecutor's application under Article 58, which argued that the crime was an attack on the millions of civilians that the peacekeepers were sent to protect and thus met the gravity threshold.⁵⁰

47 [Open Letter calling on ICC State Parties to join Lithuania's referral to the ICC requesting an investigation into alleged crimes against humanity committed by Belarusian authorities](#), 4 November 2024. In this letter, the IAPB recalls this point and the remarks made at a meeting at the Embassy of Lithuania in the Netherlands in the Hague 'On the legal responses of the international community to the crimes against humanity committed by the current authoritarian regime of Belarus' on 1 October 2024.

48 ICC Rome Statute, art. 17(1)(d). The scope of an application of the gravity threshold was clarified by the Pre-Trial Chamber in the Lubanga case where it indicated that it applies to two different stages of proceedings: "(i) at the stage of initiation of the investigation into a situation, the relevant situation must meet such a gravity threshold and (ii) once a case arises from the investigation of a situation, it must also meet the gravity threshold provided for in that provision." See ICC, Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga*, *Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, 24 February 2006, Annex 1, para. 44.

49 In determining whether a case is sufficiently grave to warrant the Court's intervention, two features must be considered. First, "the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale." This permits to exclude isolated instances of criminal activity. Second, the assessment of gravity must give due consideration "to the social alarm such conduct may have caused in the international community." Ibid, ICC, Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga*, para. 46.

50 ICC, Pre-Trial Chamber I, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, *Second Decision on the Prosecutor's Application under Article 58*, Case No. ICC-02/05-03/09, 27 August 2009.

What can States do to support the opening of an investigation into the situation in Lithuania/Belarus?

State Parties can support Lithuania's Referral of the situation in Lithuania/Belarus before the ICC

There have been two occasions since the establishment of the ICC where a situation was referred to the ICC by a group of States.⁵¹ The first such referral took place in 2018 when six ICC State Parties submitted a joint referral of the situation in Venezuela. The second occurred in 2022 when 39 States referred the situation in Ukraine to the ICC, later joined by four additional States,⁵² bringing the total number of referring States to 43. In both cases, the OTP decided to proceed to an investigation.⁵³ By joining Lithuania's Referral, State Parties will **send a united message that the international community will not tolerate impunity** for such crimes.

While group referrals do not enjoy any specific privileges within the legal regime or practice of the ICC, a group referral regarding the situation in Lithuania/Belarus would solidify the support for the request to investigate the alleged international crimes committed by Belarusian authorities. It may further signal to the Prosecutor that the Referral is not based on political considerations by a single State but on the interests of justice shared by several States and would serve to emphasise the **ICC's unique role in the international justice system** to deliver justice in cases of mass atrocities. This is reinforced by the fact that, under Article 27 of the Rome Statute, no accused, no matter their position, can claim immunity before the ICC.⁵⁴ There is no bar to the ICC issuing arrest warrants against sitting Heads of State and other high-ranking officials.

Moreover, by joining the Referral, States can signal their willingness to cooperate with the ICC, including by **providing the Court with relevant information** they may have gathered regarding the situation in the Referral. This could include witness evidence, which may be crucial to the investigation pending the outcome of the OTP's preliminary examination. Importantly, State Parties can join the Referral, regardless of whether they hold relevant information.

⁵¹ [Uniting for Justice: Group Referrals to the International Criminal Court](#).

⁵² [Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Additional Referrals from Japan and North Macedonia; Contact portal launched for provision of information](#), 11 March 2022. They were shortly followed Montenegro intention to join the referral on 21 March, and the Republic of Chile on 1 April 2022. On these, see [Letter submitted by the Embassy of Montenegro to the Kingdom of Belgium to the ICC concerning the Group State Party Referral of the Situation in Ukraine](#), 21 March 2022; [Letter submitted by the Embassy of Chile to the ICC concerning the Group State Party Referral of the Situation in Ukraine](#), 1 April 2022.

⁵³ [The Situation in the Bolivarian Republic of Venezuela](#) I has been open for investigation since 3 November 2021, while the [Situation in Ukraine](#) has been open for investigation since 2 March 2022.

⁵⁴ Article 27 states: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." In the context of international criminal law, relevant immunities include personal immunity (immunity *ratione personae*) which protects high-ranking officials from all forms of legal proceedings during their term in office, and functional immunity (immunity *ratione materiae*) which shields officials for acts performed in an official capacity, even after they leave office.

Finally, by joining the Referral, ICC State Parties will send a strong signal to victims and survivors of international crimes, many of whom face continued persecution, demonstrating support for Belarusian human rights defenders who are currently imprisoned. Moreover, it will honour the efforts of Belarusian and human rights defenders in documenting the alleged crimes.

Article 14(2) of the Rome Statute stipulates that, *“as far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.”* In joining the Referral, States may provide further information on the situation which may encourage an investigation by drawing attention to further information held by the State. For instance, they may have gathered information that supports the Referral.

As outlined above, thousands of lawful residents of Belarus have fled to the territories of other State Parties. In those cases, joining the Referral will **allow other State Parties to contribute to the preliminary examination** by: (i) sending a strong message that the crimes set out in the Lithuania Referral are of a serious nature; (ii) sharing existing evidence and information; and (iii) formally referring, if they so wish, a situation in their own territory where crimes of the same nature may have occurred, at least in part, thus giving the OTP the opportunity to investigate this conduct as well.⁵⁵

However, as emphasised above, a State Party may join the Referral regardless of whether it has evidence to provide or witnesses on its territory. Moreover, the case law of the ICC provides that the OTP may also extend its investigation to alleged crimes committed, at least in part, on the territory of other States Parties, regardless of whether these States have joined the Referral, and in so far as these crimes are sufficiently linked to those set out in the initial Referral by Lithuania.

Joining the Referral

- State Parties wishing to support the Referral can submit a letter to the OTP confirming their intention to join the Referral initiated by Lithuania;⁵⁶
- In their letter, State Parties can—but do not have to—express their willingness to cooperate with the ICC in any investigation, or directly provide documentation in support of the Referral.
- Submissions by other interested persons or entities with relevant information on the crimes set out in the Referral, or on other alleged crimes that fall within the jurisdiction of the Court, can be made via OTPLink, the secure online platform established by the OTP to receive such submissions.⁵⁷

⁵⁵ Eugenia Andreyuk and Anonymous, [International Mechanisms for Accountability for Human Rights Violations in Belarus](#) (GMF Policy Paper, 18 January 2022).

⁵⁶ ICC Rules of Procedure and Evidence, Rule 45.

⁵⁷ [ICC Prosecutor Karin A.A. Khan KC announces launch of advanced evidence submission: OTPLink](#), 24 May 2023.

States should continue investigating and prosecuting crimes committed in Belarus based on the principle of Universal Jurisdiction

In addition to a possible investigation by the ICC, there remains a pressing need for continued efforts to combat impunity through national-level extraterritorial investigations and prosecutions. This is made possible under the principle of Universal Jurisdiction. Universal Jurisdiction refers to the ability of national criminal justice systems to investigate and prosecute individuals based on the serious nature of the crimes against international law without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim(s), or any other connection to the State exercising such jurisdiction.

In the case of Belarus, national-level extraterritorial investigations and prosecutions can be used to ensure that there is a possibility of justice beyond the constraints of the ICC (as explored below). This could include prosecutions for crimes committed wholly in Belarus, or Belarus and a third country, or by lower-ranking perpetrators. Universal Jurisdiction, therefore, remains a vital element in the fight against impunity,⁵⁸ and its goal is the same: **to reduce safe havens for international criminals and promote accountability for international crimes.**

Universal Jurisdiction can allow for a greater range of crimes to be prosecuted. As noted, with regards to Belarus the ICC will only be able to investigate crimes where an element of the crime took place on the territory of an ICC State Party. Further, the ICC can only investigate the specific international crimes set out in the Rome Statute.⁵⁹

While the call to investigate these crimes at international level is crucial, evidence collected by the United Nations, the Council of Europe, and civil society organisations to date suggests that further international crimes, which may not form part of the Referral, may have been committed by the Belarusian regime.⁶⁰ These include the crimes of arbitrary deprivation of liberty, torture, sexual and gender-based violence and enforced disappearance. Through the use of Universal Jurisdiction, States can address the limitations faced by ICC jurisdiction.

A further advantage of Universal Jurisdiction is the ability of national prosecution to pursue perpetrators of all levels, including direct perpetrators, lower and mid-level perpetrators in the chain of command, whereas the ICC's prosecutorial policy is to focus on the highest level officials.⁶¹ Extraterritorial prosecutions at national levels also have the potential to **demonstrate inter-State solidarity on combatting impunity for international crimes through strengthening collaborative efforts.** This can be helped by joint efforts of domestic authorities to exchange information and complement evidence-collection activities, particularly in tandem, with European prosecution services such as Eurojust.⁶²

⁵⁸ [The AU-EU Expert Report on the Principle of Universal Jurisdiction](#), 16 April 2009, para. 28.

⁵⁹ See *Jurisdiction: Can the ICC try Belarusian officials for crimes against humanity allegedly committed in Belarus*, above.

⁶⁰ OHCHR, *Situation of human rights in Belarus in the run-up to the 2020 presidential election and its aftermath*, UN Doc. A/HRC/55/61, 25 March 2024, paras. 47-48; Council of Europe, *Addressing the specific challenges faced by the Belarusians in exile*, Committee on Migration, Refugees and Displaced Persons Report, Doc. No. 15783, 5 June 2023.

⁶¹ [Understanding the International Criminal Court](#), 2020, para. 12.

⁶² The Office of the Prosecutor, [Policy on Complementarity and Cooperation](#), April 2024, p. 5.

Pending the outcome of the OTP preliminary examination, States should continue to leverage their national legal frameworks to uphold their international commitments and pursue all possible avenues for delivering justice to survivors of international crimes committed in Belarus.

Measures States Can Take

- States should continue to explore avenues for extraterritorial prosecutions for crimes committed by the Belarussian regime. To do so, States should ensure that core international crimes can be tried in national courts as well as grave crimes that fall outside the scope of the Rome Statute.⁶³
- States should ensure that they have the structures in place to guarantee coordination amongst national bodies tasked with the investigation of international crimes to facilitate prosecutions based on Universal Jurisdiction—even where potential perpetrators have not yet been definitively identified—⁶⁴ and to work with relevant institutions in other jurisdictions to facilitate the mutual exchange of information.
- States should ensure that domestic criminal justice authorities can commence investigations of core international crimes without the necessity for either the victim or the perpetrator to be present on the territory of the investigating State.
- States should remove the requirement of nationality or residence for Universal Jurisdiction cases so that investigations can be commenced even if the perpetrator or victim is not a State national.
- States should collaborate in investigations of alleged Belarusian perpetrators, through mutual judicial assistance, the Europol Analysis Project Core International Crimes ('AP CIC'),⁶⁵ and possibly through the establishment of a Joint Investigation Team ('JIT') under Eurojust.⁶⁶
- States should strengthen their cooperation at the international level in prosecuting international crimes through signing, ratifying and applying relevant treaties, such as the Ljubljana-Hague Convention.⁶⁷ The Convention aims to clarify the duties of State Parties to assist one another in the domestic investigation and prosecution of cases of genocide, war crimes, and crimes against humanity.⁶⁸

63 For instance, classifying torture as an international crime in its own right that is not connected to war crimes (when connected to an armed conflict) or a crime against humanity (when connected to a widespread or systematic attack against a civilian population). See this treatment, for instance, in *R v. Bow Street Metropolitan Stipendiary Magistrate and others, Ex parte Pinochet Ugarte (No. 3)*, 24 March 1999, p. 246G-247C (Lord Hope).

64 Otherwise known as 'structural investigations' which are essentially broad preliminary investigations without specific suspects, designed to gather evidence related to potential crimes that can be used in future proceedings either before a court in the investigating State itself or before another domestic or international criminal court. See further, ECCHR, FIDH and REDRESS, *Breaking down Barriers: Access to Justice in Europe for Victims of International Crimes*, September 2020, p. 63.

65 Europol, *Genocide, Crimes against Humanity and War Crimes*.

66 Eurojust, *Joint Investigation Teams*.

67 *Ljubljana-The Hague Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes*, 26 May 2023.

68 Ibid.

for

Belarus

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Protests against Alexander Lukashenko
in 2020 in Minsk, Belarus.

About the IAPB

The IAPB is a coalition of independent Belarusian and international non-government organisations that have joined forces to collect, consolidate, verify, preserve and analyse evidence of gross human rights violations constituting crimes under international law allegedly committed by Belarusian authorities and others in the run-up to the 2020 presidential election and its aftermath.

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