

Why the application of the universal jurisdiction principle in respect of cases from Belarus is stumbling in Europe and what can be done about it

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Addressing the accountability gap

There are reasonable grounds to believe that the Lukashenka regime has perpetrated crimes against humanity against Belarusians. Hundreds of thousands of people have become victims of torture, enforced disappearances, including prolonged *incommunicado* detention, sexualised violence, extrajudicial executions, politically motivated persecution, and deportation. More than three years after the start of unprecedented repression, there has been no progress in bringing perpetrators to justice. Impunity prevails, encouraging the de-facto authorities to continue and intensify their repressive policies and commit new crimes.

Ensuring justice for victims of international crimes in Belarus in the national law enforcement systems of other states on the basis of the universal jurisdiction has been recommended in reports and resolutions by many inter-governmental organisations. This avenue has been hailed as an effective instrument to deal with the accountability gap. Given that hundreds of thousands of Belarusians have fled to other countries, it could be expected that a large number of applications for investigation of crimes would be submitted there. Indeed, the first complaint was filed already in autumn 2020. However, investigation of cases from Belarus in European countries has stumbled and faces various legal, procedural, and institutional obstacles.

In this context, iSANS has done research of the existing challenges to the effective application of the universal jurisdiction principle to cases of international crimes committed by the Lukashenka regime in Belarus by studying the situation in four European states where lawsuits from victims from Belarus have been submitted. A report with the research findings has just been released. We have identified several

major problems and developed 12 concrete recommendations. Our hope is that they will be seriously taken into account by all relevant actors, including government officials, law enforcement personnel, lawyers representing victims, and civil society, and will serve as a basis for further discussion and concrete action. Belarusians, who collectively chose the European path for themselves and their country in 2020, fought for their future, their ideals, and their dreams consistently, peacefully, and courageously, risking their freedom, health and ultimately their lives for this cause, deserve nothing less than accountability in action.

The principle of universal jurisdiction and growth of its application

The fight against impunity has played a role in the development of international criminal law ever since the aftermath of World War II, when the argument was formulated that the most serious crimes of concern to the international community as a whole, such as war crimes, crimes against humanity and genocide, should not go unpunished. The idea that even when standard grounds of jurisdiction are absent, national courts may nevertheless exercise jurisdiction under international law over crimes of such exceptional gravity was developed into a notion of universal jurisdiction – jurisdiction based solely on the nature of the crime. This principle thus derogates from the ordinary rules of criminal jurisdiction requiring a territorial or personal link with the crime, the perpetrator, or the victim. It is based on the notion that certain crimes are so harmful to international interests that states are entitled and even obliged to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim. Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world.

A number of investigations and prosecutions within the frame of the universal jurisdiction is increasing every year. According to Eurojust, the number of newly opened cases in Europe increased by 44% between 2016 and 2021. Convictions have been obtained in relation to situations as diverse as Syria, Afghanistan, Iran, Rwanda and Liberia, sometimes for crimes dating back 40 years.

The year 2022 was marked by an unprecedented mobilisation of legal and judicial resources to respond to the international crimes committed in Ukraine. In parallel with the opening of proceedings by the international bodies, numerous countries started investigation on a national level within the frame of the universal jurisdiction. In addition to countries with considerable experience in the area, such as Germany, France and Sweden, where specialised prosecutors have been carrying out such investigations into crimes committed during the Syrian war and other armed conflicts, political will to prosecute outrageous crimes in Ukraine has been demonstrated by countries with little to no experience in investigating

international crimes, such as Poland, Lithuania, Estonia, Latvia, Slovakia, and Romania.

Against the background of a swift and massive uptake of universal jurisdiction in response to the atrocities committed in Ukraine, the absence of progress with cases related to events in Belarus looks disappointing.

Situation with the review of cases from Belarus

Our research focused on the application of the universal jurisdiction for cases from Belarus in four countries where complaints have been lodged by victims of the persecution by the Lukashenka regime after the beginning of mass protests in response to the falsification of the results of the presidential election in August 2020. However, it is also worth looking at a case originating from an earlier period of repression in Belarus, the case of Yury Harausky. It is the first case concerning the situation in Belarus that reached a national court of another country within the framework of the universal jurisdiction. The trial of an ex-fighter of the Special rapid response unit of the Ministry of the Interior of Belarus was held in September 2023 in Switzerland. Harausky was accused of enforced disappearance in the case of abduction and murder of four Belarusian opposition politicians in 1999.

Ahead of the trial, there were hopes that, in the case of a guilty verdict, it will spur the investigation of cases of Belarusian victims of torture and other crimes submitted in other countries, and that new circumstances may open up and evidence be obtained, thus making it possible to initiate an official investigation into other likely participants in the crime. However, to a strong disappointment of the filing parties, victims' relatives, and everyone concerned, the court acquitted Yury Harauski of the enforced disappearances. The court held that his participation in the crimes could not be established beyond reasonable doubt. Explaining the verdict, the judge said that this is a special case in which "the authorities are involved, and they are responsible for enforced disappearances. Yury Harausky has been acquitted today, but the representatives of the regime in Belarus are not." In the words of the three human rights NGOs which had filed the case, "Irrespective of the verdict, the trial of Yury Harauski has already set an historic precedent: for the first time anywhere in the world, a court ruled on crimes committed in Belarus, on the principle of universal jurisdiction. Today's acquittal demonstrates that the road to justice is sometimes strewn with pitfalls. However, it will not undermine the determination of the victims to pursue their fight for truth and justice." The NGOs pledged to appeal the verdict.

At the moment, the Harausky case remains the only Belarusian case that made it to a court under universal jurisdiction in any country. Despite the fact that applications for an investigation into cases of torture (both as part of a crime

against humanity and as a stand-alone crime) in the countries under consideration were filed many months ago and, in some instances, three years ago, investigations into them have either not been open, have been suspended, or have not yet led to tangible procedural results.

In Poland, for example, in both cases of Belarusian citizens submitted for investigation, the decision not to initiate an investigation was taken. In one case, the refusal to launch an investigation was explained by the lack of “the interest of the Republic of Poland” which clearly demonstrated absence of relevant knowledge and understanding of international law among the investigative authorities. In the second case, the reason was the “inability to conduct an investigation,” in particular, to receive information from the state bodies of Belarus. Given the fact of the initiation of criminal cases in situations affecting citizens of Poland who had their rights violated by the Lukashenka regime and citizens of Ukraine in the framework of investigation of war crimes committed in this country, this discrepancy shows that the legislative provisions of Poland allow broad discretion by the prosecutors. The main obstacles to progress in the universal jurisdiction cases in relation to citizens of Belarus in Poland include the secrecy surrounding the review of these cases, appearing to go beyond reasonable measures to protect the rights of victims, witnesses, and suspects; the absence of a single specialised body that would be responsible for the investigation of crimes falling under the scope of universal jurisdiction and the lack of prosecutors' expertise in relevant international law, leading to their apparent lack of willingness to open such criminal cases, and the lack of guidance on the interpretation of the provisions of the legislation applicable to universal jurisdiction, including the interpretation of provisions of Art. 110 of the Criminal Code, indicating that an offense should be committed “against the interests of the Republic of Poland or of the Polish nationals”.

In the Czech Republic, where the single filed case is handled by the Department of the Ministry of Internal Affairs for Combating Organized Crime, the treatment of the applicant was more similar not to the treatment of the victim, but to the treatment of a suspect in a crime: he had to undergo lengthy and biased examinations, including body examination, asked sceptical questions, his failed attempt to seek justice in Belarus was put into question. A few months later, a decision was made to “postpone the consideration of the case”, with a short justification. Most of the arguments cited in it do not stand up to any criticism, since they are refuted by information readily available in open sources. The decision of the Department to “postpone the consideration of the case” based on these arguments demonstrates its apparent unwillingness – or the inability – to deal with this case seriously. Clearly, police officers who in their professional duties fight organised crime rings, lack competence in dealing with torture and international crimes. In the final account, it is not their fault that the case is stuck. It is the

responsibility of the state to forward the application to a body properly staffed and having appropriate competence. The fact that this has not happened for more than two years, demonstrates the lack of political will.

In Germany, after initiating a so-called monitoring process, a sort of preliminary investigation procedure, and interviewing a witness, the prosecutor's office decided in the summer of 2023 not to initiate investigations against the suspects named in the complaint filed by two leading international NGOs, alleging there were no further possibilities to successfully investigate the facts of the case in Germany. According to NGOs, however, this assessment does not sufficiently take into account the availability of evidence gathered by bodies such as the International Accountability Platform for Belarus and the UN High Commissioner for Human Rights examination of the human rights situation in Belarus, which were not contacted in the course of the monitoring process.

Lithuania has clearly progressed the most among the countries studied. A special investigative group was created by a decision of the Prosecutor General's Office on the basis of the Police Department for Especially Dangerous Crimes to consider Belarusian cases in the universal jurisdiction framework. This group was created immediately after the beginning of the investigation of the first case submitted in November 2020. It was decided by the investigators to combine other incoming cases with the first leading case into one large investigation, with the exception of a few situations that are clearly different from a legal point of view. According to various sources, today the large case unites up to 55 victims. Officials state that, in general, there is progress in the investigation – a number of specific suspects who may have been involved in crimes have been identified, work is underway to obtain strong evidence (which is a challenge in all universal jurisdiction cases where it is impossible to collect information on the ground) and concretise charges. In the beginning of summer 2023, there were plans to submit the case involving several dozen applicants to court towards the end of the year, with a prospect of holding a trial *in absentia*. Later, however, it was decided that a trial *in absentia* may not be the best option, considering the Lukashenka regime's expanding practice of *in absentia* politically motivated trials against opposition members, and instead to possibly issue arrest warrants and wait until culprits visit one of the countries ready to detain and extradite them. Despite of the progress made in Lithuania, especially in comparison with other countries, NGOs are rather critical about the lack of information from the law enforcement bodies about the ongoing proceedings and their plans. NGOs note there seems to be no clear long-term strategy in the universal jurisdiction field.

The key findings

Lessons that can be learned from the application of the universal jurisdiction principle in respect of cases from Belarus largely reflect the general problems in this area noted by scholars and practitioners from the experience with cases from other countries. These common challenges include lack of specialized structures with competent personnel and target financing, legislative restrictions, lack of cooperation between government agencies and civil society, as well as between government agencies of different countries, inadequate witness protection and treatment, and lack of access of the public to information on the investigation. At the same time, lessons from the study emphasize the specifics of Belarusian cases which apparently are not considered by authorities to be violations of international criminal law and threats to international public order.

There is currently no problem of lack of evidence of the physical elements of crimes against humanity committed in Belarus since the summer of 2020. It is estimated that NGOs have documented more than 5,000 potential cases. There are about 200 potential suspects who can be identified, including employees of the Ministry of Internal Affairs of Belarus, staff of isolation wards, and high ranking officials. Evidence of contextual elements of crimes against humanity in Belarus is also available in two reports by the UN High Commissioner for Human Rights and NGO reports. At the same time, as it turned out, this and other information, accumulated by NGOs, is not available to the national law enforcement bodies authorised to investigate crimes within the framework of the universal jurisdiction. There is an obvious lack of vital communication and coordination between government agencies and civil society, as well as between the government agencies of different countries. Our research has shown that representatives of the relevant agencies in some countries researched are aware of this issue and expressed hope that an interstate investigation team will be created.

The problem of the lack of regular information exchange between the investigative authorities and NGOs is compounded by the lack of publicity on universal jurisdiction cases. It is observed in all, without exception, countries studied. In Poland, a non-publicity clause ordered by judges covers not only the identity of the applicant and the accused, but also the entire investigation process. The lack of access to information for general public and NGOs hinders both the popularisation of the universal jurisdiction among potential applicants and the pursuance of the goal of deterring international crimes. Potential input of Belarusian diaspora in these countries also remains untapped as a result of the policy of secrecy.

The absence of a special department authorised to investigate cases within the framework of the universal jurisdiction, or, if it is established, the lack of resources and qualifications of its employees, was identified as one of the key problems by all

respondents. In connection with the problem of qualification, the lack of methodological guidelines was also mentioned, which could be used by employees working with the universal jurisdiction cases, starting from the lowest level, including police officers who receive initial statements from applicants.

Another obstacle to the investigation of a number of filed cases, as well as the filing of new cases, is the problem of the applicant having international protection preventing the disclosure of information about him or her, allegedly necessary when communicating information about the opening of investigation to the state bodies of Belarus. This problem is not only legal (there is a fundamentally different interpretation of the existing provisions of interstate agreements on cooperation in criminal matters in the absence of a mandatory norm on the disputed issue), but also administrative, since the interpretation of the relevant norms is a prerogative of state bodies, and the adoption of an official interpretation that allows concealing the applicant's name by analogy with the protection measures used in criminal proceedings, could be a solution and would open the doors to dozens of new cases.

The lack of political will to investigate cases concerning the events in Belarus is evidenced by the absence of an initiative by states to clarify the applicable legislation. Our analysis shows that where the decision to prosecute made at a high political level, the investigation is carried out more effectively. With regard to Belarus, we have to admit that most of the states researched are not yet fully ready to recognise the crimes carried out by the Lukashenka regime as a threat to the global rule of law and security and therefore are of direct national interest of the countries concerned. This is especially demonstrative in comparison with the efforts that the same countries undertake to investigate cases related to war crimes and crimes against humanity in Ukraine.

And finally, respondents from different countries, including civil servants, lawyers, and representatives of NGOs, refer to the unavailability of the suspects. A conflict between the need to impose and expand personal sanctions, including travel bans, as an important tool of holding perpetrators accountable, and the necessity to ensure their arrest during their travel to countries whose authorities would be willing to detain and extradite them, has no clear solution. The absence of visible opportunity to arrest and try them has a significant cooling effect on the investigative authorities who do not want to open a case with no prospects, although collecting sufficient evidence, issuing arrest warrants, and waiting for the moment when the suspects arrive in countries where they can be detained, appears as a reasonable approach. Refusal to open investigations, collect evidence, and issue arrest warrants indicates not only a lack of understanding of the essence of the universal jurisdiction, one of the goals of which is to send a strong deterring signal to perpetrators that justice is in the work, but also the lack of a clear strategy, including a long-term one, in the field of universal jurisdiction.

Recommendations

The research findings were translated into recommendations addressed to national authorities and law enforcement bodies in order to facilitate prompt and effective investigation and prosecution of culprits, as well as to motivate more survivors of international crimes committed in Belarus to submit their applications:

1. to amend legislation, where relevant, in order to eliminate provisions unduly restricting the scope of application of the universal jurisdiction principle or giving too broad discretion to the law enforcement officials such as the requirement to prove that the crime threatens national interests; expand the list of crimes covered by the universal jurisdiction to include torture, enforced disappearances and sexualised violence as stand-alone crimes; and bring the definitions of international crimes fully in line with the provisions of the Rome Statute;
2. to create specialised bodies to investigate international crimes within the framework of the universal jurisdiction, including international crimes committed in Belarus; in case of existence of such bodies, allocate necessary resources and strengthen them both numerically and in terms of expertise;
3. to strengthen inter-country cooperation on cases of universal jurisdiction covering international crimes committed in Belarus by creating a joint interstate investigation team to exchange expertise and data on suspects and specific situations;
4. to build up expertise of the relevant personnel dealing with the universal jurisdiction cases, including by regular exchange of experience with specialists from the countries that have strong experience in investigating cases under universal jurisdiction;
5. to build up expertise of relevant personnel dealing with the universal jurisdiction cases by producing and widely disseminating methodological guidelines on working with international crimes and organising corresponding educational programmes and trainings;
6. to increase the knowledge of the investigation team's staff about the criminal procedure, methods of working with evidence in situations of lack of interaction on the part of the authorities of the respondent state, protection of victims and witnesses, etc., including by taking into account the experience of the European Court of Human Rights and the UN Human Rights Committee;

7. to deepen the interaction of state bodies with NGOs, including by holding regular face-to-face meetings to discuss the available and required information on cases;
8. to agree on the interpretation of the norms of inter-state cooperation agreements providing for the need to report information about the case under investigation to the state bodies of Belarus, to ensure the safety of applicants and their relatives;
9. to compile a list of documents of intergovernmental and non-governmental organisations containing evidence of physical and contextual elements of crimes against humanity committed on the territory of Belarus for their use by investigative groups of different countries;
10. to compile a non-public database of evidence of alleged crimes committed in a certain location during a certain period of time, with information on linkages with suspects and the chain of command, that would be made available to investigators in different states;
11. to provide access to information that does not disclose the identity of the applicant and witnesses in cases of universal jurisdiction for NGOs and the academic community, and, at a certain stage of the investigation, for the general public, including outside the state administering universal jurisdiction;
12. to provide for the obligation of competent authorities to publish an annual report on the progress in investigation of cases of universal jurisdiction, including reasons for refusal to initiate or discontinue an investigation.

While the financing and staffing of special investigation teams, as well as the adoption of legislation and the implementation of inter-state agreements are within the jurisdiction of states, the problem of methodological and expert support to address a number of issues identified above can be solved with the participation of civil society. Thus, the recommended guidelines could be developed with the involvement of specialised non-governmental experts. The experience and knowledge of NGOs could also be useful in organizing trainings for employees of specialised investigative groups.