

EUROPEAN HUMANITIES UNIVERSITY

Academic Department of Social Sciences and Public Policy

**ALIAKSANDRA KUTSKO**

5<sup>th</sup> year student

**UNIVERSAL JURISDICTION IN GERMANY IN THE CONTEXT OF BELARUS  
PROTESTS SINCE 2020**

MASTER THESIS

Supervisor: PhD, docent DOVILE SAGATIENE

Vilnius, 2021

## Aliaksandra Kutsko

Universal jurisdiction in Germany in the context of Belarus protests since 2020

**Keywords:** *universal jurisdiction, protests in the Republic of Belarus since 2020, tortures, universal jurisdiction in Germany, Belarus under universal jurisdiction principle*

*The object of this master thesis* is the principle of universal jurisdiction in Germany in the context of Belarus protests since 2020. *The subject* – jurisdiction of the actions of the authorities during the protests in Belarus since 2020, as a crime against humanity, torture.

*The aim of the study* is to analyse: how to bring to justice people who committed crimes during the suppression of protests in the Republic of Belarus according to the rules of universal jurisdiction in accordance with the legislation of Germany.

*The tasks of the thesis:* to study the concept of universal jurisdiction and prove its relevance in the context of fair trial prosecution for international crimes, to analyse the concept of torture as a crime against humanity, to analyse the available materials regarding the protests in the Republic of Belarus since 2020 in this regard, to prove that victims of torture do not have the opportunity to implement a fair trial on the national level, to identify the main problems in the prosecution of international crimes at the national level in general, to analyse the regulation of universal jurisdiction in Germany, to prove the possibility of prosecuting persons who have committed crimes against humanity in the Republic of Belarus in accordance with German law.

The usage of such *methods* as a doctrinal research method, to conduct a critical qualitative analysis of legal materials to confirm the hypothesis, also the comparative legal and logical-legal research method for a critical analysis of different sets of laws and for comparison of different jurisdictions led to a *conclusion* that crimes committed by representatives of the Belarusian authorities definitely fall under the definition of torture in German law, as well as international criminal law, and universal jurisdiction can be applied.

## Александра Куцко

Универсальная юрисдикция в Германии в контексте протестов в Республике Беларусь в 2020 году

*Ключевые слова: универсальная юрисдикция, протесты в Республике Беларусь с 2020 года, пытки, универсальная юрисдикция в Германии, Беларусь под универсальной юрисдикцией*

*Объектом магистерской работы* является принцип универсальной юрисдикции в Германии в контексте протестов в Беларусь с 2020 года. *Предмет исследования* - подсудность действий властей во время протестов в Беларуси с 2020 года, как преступление против человечества, пытки.

*Цель исследования* - проанализировать: как привлечь к ответственности лиц, совершивших преступления при подавлении протестов в Республике Беларусь согласно универсальной юрисдикции в Германии. *Задачи работы*: изучить концепцию универсальной юрисдикции и доказать ее актуальность в контексте справедливого судебного преследования за международные преступления, изучить и проанализировать концепцию пыток как преступление против человечества, проанализировать имеющиеся материалы, касающиеся протестов в Республики Беларусь с 2020 года и доказать, что жертвы пыток не имеют доступа к справедливому судебному разбирательству на национальном уровне, выявить основные проблемы в преследовании за международные преступления на национальном уровне в целом, проанализировать регулирование универсальной юрисдикции в Германии, чтобы доказать возможность преследования лиц, совершивших преступления против человечества в Республике Беларусь, в соответствии с законодательством Германии.

Использование таких *методов*, как метод доктринального исследования, для проведения критического качественного анализа юридических материалов с целью подтверждения гипотезы, а также метод сравнительно-правового и логико-правового исследования для критического анализа различного законодательства, который помог автору лучше понять, как законодательство об универсальной юрисдикции Германии может более эффективно решить проблему в Республике Беларусь по сравнению с национальным законодательством Беларуси, привели к *выводу*, что преступления, совершенные представителями белорусских властей, однозначно подпадают под определение пыток в немецком законодательстве, а также в международном уголовном праве, и может быть применён принцип универсальной юрисдикции.

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## INTRODUCTION

After the elections in August 2020, in the Republic of Belarus (hereinafter – Belarus), mass peaceful protests began in Minsk and other cities, which have not yet been crowned with success. But they became exciting for the entire world community not because during the protests the protesters did not smash windows or desecrate state buildings, not because thousands of people took to the streets and protested against the current government, not because they supplied people with water or they took off their shoes when climbing on the benches of the city, but because of how terribly peaceful protests were suppressed by the authorities of the Republic of Belarus. Thousands of those detained, mutilated, crushed, dozens of missing, raped and imprisoned, as well as several human lives, were the price of protests due to the methods of suppressing rallies. The international community shudders at what is happening.<sup>1</sup>

The unlawful behaviour of the state forces us to seek solutions and achieve justice. Complaints are rejected, representatives of the authorities who repeatedly commit crimes are not called to account. The current so-called president, Alexander Grigorievich Lukashenko, in every possible way promotes and contributes to the behaviour of the special troops of the Ministry of Internal Affairs, in connection with which it became obvious that it is not possible to seek justice within the country. Therefore, it is necessary to refer to International Criminal Law and the concept of universal jurisdiction, which applicable to our situation and will help bring those responsible to justice.<sup>2</sup>

The **aim** of the study is to analyse: how to bring to justice people who committed crimes during the suppression of protests in the Republic of Belarus according to the rules of universal jurisdiction in accordance with the legislation of Germany, which today is the leader implementing and resorting to this rule. Nowadays as authorised representatives acting on behalf of torture victims, the lawyers Mark Lupschitz, Onur U. Özata, Roland Krause and Benedikt Lux have already submitted to the

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<sup>1</sup> HUMAN RIGHTS WATCH. *Belarus: Systematic Beatings, Torture of Protesters* [online]. September, 2020. [cited 2021-05-03] Available from Internet: <<https://www.hrw.org/news/2020/09/15/belarus-systematic-beatings-torture-protesters>>

<sup>2</sup> ЛОКШИНА, Т. *Граждане Беларуси вправе рассчитывать на правосудие. Международное сообщество должно в этом помочь* [online]. September, 2020. [cited 2021-05-11] Available from Internet: <<https://www.hrw.org/ru/news/2020/09/16/376410>>

Federal Prosecutor General in Karlsruhe a criminal complaint against Alexander G. Lukashenko and other Belarusian security officers.<sup>3 4</sup>

One another example was already set by Lithuania, Lithuania's Prosecutor General Evaldas Pašilis has launched a pre-trial investigation into crimes against humanity under a complaint by a Belarusian citizen, Maxim Khoroshin who turned to Lithuanian prosecutors on November 30, 2020. The prosecution service said that “the claimant's stated circumstances of the event and other initial data presented to the prosecution service have been assessed as having signs of a crime under universal jurisdiction under the Criminal Code of the Republic of Lithuania”. Moreover, the prosecution service has not ruled out that information on other victims might also be collected during the probe. As presumed the universal jurisdiction applies irrespective of the citizenship of the victim or the alleged perpetrator. And under the country’s laws, “a person who tortures someone on behalf of a state, or by supporting a state, and thus inflicts physical or psychological suffering can be punished by up to life in prison”.<sup>5</sup>

The **object** of the research is the principle of universal jurisdiction in Germany in the context of Belarus protests since 2020. The **subject** is jurisdiction of the actions of the authorities during the protests in Belarus since 2020, as a crime against humanity, torture.

**Hypothesis:** the actions of the Belarussian authorities during the protests fall under the concept of a crime against humanity as torture and can be prosecuted in accordance with the principle of universal jurisdiction in German.

The work consists of three chapters and implements the following **tasks**:

1. To study the concept of universal jurisdiction and prove its relevance in the context of fair trial prosecution for international crimes by studying the formation and implementation of this principle, as well as problems and ways to solve them;

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<sup>3</sup> DEUTSCHE WELLE (DW). *Lawyers file suit against Belarus' Lukashenko in Germany* [online]. May, 2021. [cited 2021-05-15] Available from Internet: <<https://www.dw.com/en/lawyers-file-suit-against-belarus-lukashenko-in-germany/a-57432482>>

<sup>4</sup> LUPSCHITZ, Mark; and ÖZATA, Onur U.; and KRAUSE, Roland; and LUX, Benedikt. *Criminal Proceedings Against Alexander G. Lukashenko in Germany* [online]. Press release. May, 2021. Vilnius (Lithuania): mail from Liudmila Ulyashyna, 10 May 2021, 20:14 GMT+3 [cited 2021-05-10, 20:34 GMT+3]. Private message.

<sup>5</sup> BNS, LRT.lt. *Lithuanian prosecutors launch probe into regime violence in Belarus* [online]. December, 2020. [cited 2021-05-03] Available from Internet: <<https://www.lrt.lt/en/news-in-english/19/1294884/lithuanian-prosecutors-launch-probe-into-regime-violence-in-belarus>>

2. to analyse the concept of torture as a crime against humanity, and therefore as an international criminal offence, its legislative basis, as well as its implementation in the legislation of the Republic of Belarus;
3. to provide the available material on the methods of suppressing protests in the Republic of Belarus since 2020, analyse it; to study and provide reports from the international community regarding the current situation in the country; to analyse the national legislation of Belarus on access to justice, identify its main problems and prove that victims of torture do not have the opportunity to implement a fair trial;
4. to identify the main problems in the prosecution of international crimes at the national level in general and analyse the regulation of universal jurisdiction in Germany at the legislative level, as well as on the basis of existing precedents; to show the possibility of prosecuting persons who have committed crimes against humanity in the Republic of Belarus in accordance with German law, identify possible difficulties, prove jurisdiction and the possibility of implementation.

**Methodology:** in its work, the author uses a doctrinal research method, conducting a critical qualitative analysis of legal materials to confirm the hypothesis. Also resorts to the comparative legal and logical-legal research method, both for a critical analysis of different sets of laws and for comparison of different jurisdictions. In particular, this method helps the author to better understand how the legislation on the universal jurisdiction of Germany can more effectively solve the problem in the Republic of Belarus in comparison with the national legislation of Belarus.<sup>6</sup>

The practical **significance** of the work is confirmed by its relevance. In addition to studying and analysing various sources, the work directly helps to understand and predict the outcomes of the implementation of universal jurisdiction to the consequences of the 2020 protests in the Republic of Belarus.

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<sup>6</sup> *Legal Dissertation: Research and Writing Guide* [online]. The Jerome Hall Law Library. [cited 2021-05-10] Available from Internet: <<https://law.indiana.libguides.com/dissertationguide>>

## 1. THE PRINCIPLE OF UNIVERSAL JURISDICTION

“International criminal law is a body of law that generates rules that govern certain acts committed by real persons. With the exception of these rules, a real person's acts are generally governed by national laws”.<sup>7</sup>

Indeed, some human crimes are considered serious to such an extent that states agree to place them under international law. And here there arises such a sphere of international law as international criminal law, which operates in such cases and transforms real people into subjects of the international legal system. And here it is important to note that international criminal law has the purpose of prosecuting serious crimes committed against large numbers of people, both in wartime and in peacetime.

Before the formation of such a sphere as international criminal law, all criminal acts, including the most horrendous ones, popularly called international crimes, fell only under national jurisdiction and were prosecuted by national courts. The prosecution of criminal activity was carried out by the state on the territory of which the crime was committed in accordance with the principles of sovereignty and territoriality. In this regard, the doctrine of universal jurisdiction was developed to punish those who committed crimes of particular seriousness and avoid impunity. Initially, this principle was focused on ensuring privacy, but over time its scope has expanded to include other international crimes, including aircraft hijacking, genocide, war crimes, torture and crimes against humanity.<sup>8 9</sup>

For a better understanding of this principle let go deeply into the questions what is the universal jurisdiction principle in international criminal law, the background of this principle and why it is so important.

### 1.1.The meaning of universal jurisdiction principle

The principle of universal jurisdiction in its superficial meaning is assumed to be a principle that allows and even insists that the state initiate criminal cases without relying on the place of the crime

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<sup>7</sup> ÇAKMAK, C. *A Brief History of International Criminal Law and International Criminal Court*. New York: Springer Nature, 2017. 305 p. ISBN 9781137567369. p.2

<sup>8</sup> ÇAKMAK, C. *A Brief History of International Criminal Law and International Criminal Court*. New York: Springer Nature, 2017. 305 p. ISBN 9781137567369. p.2

<sup>9</sup> *The Princeton Principles on Universal Jurisdiction*. Princeton Project on Universal Jurisdiction. Project Chair and Editor, S. Macedo. Published by the Program in Law and Public Affairs, 2001 67 p. ISBN 0971185905 p.16

and the citizenship of the perpetrator and victim. In the usual understanding of the principles of criminal law, the jurisdiction of law is based precisely on the reverse, however, the principle of universal jurisdiction assumes otherwise. However, there are some very important points here. Not all crimes fall under universal jurisdiction, but only certain ones, which are so harmful to international interests and needs special measures. In this case, the state has the right and even is obliged to initiate a criminal case. From which we can conclude that universal jurisdiction is designed to judge international crimes committed by anyone and anywhere in the world.<sup>10</sup>

The presence of such a concept in international law is due to the need to separate the criminal offence in the usual sense from very serious crimes that harm the entire international community, as well as to prevent the provision of safe havens to the criminals who have committed these crimes. Since prevention of crime and a fair, lawful and proportionate solution are among the basic principles of international criminal law, the international community must intervene to prosecute and punish those responsible for such crimes.<sup>11</sup> Eichmann, Pinochet or Habré are one of the most famous cases that have been tried under universal jurisdiction.<sup>12</sup>

The philosophical foundations of universal jurisdiction can be observed in the works of such famous scholars as Alberico Gentili and Hugo Grotius.<sup>13</sup> But it takes its historical roots in the prosecution and punishment of the crime of piracy.<sup>14</sup> However, the emergence of this principle as an important principle of international law is observed after the Second World War. This idea has spread through the establishment of the International Military Tribunal and the adoption of new conventions containing explicit or implicit provisions on universal jurisdiction.<sup>15</sup>

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<sup>10</sup> PHILIPPE, X. The principles of universal jurisdiction and complementarity. In *International Review of the Red Cross* [online]. [cited 2021-04-28] 2006, vol. 88, no. 862, pp. 375–398. Available from Internet: <[https://www.icrc.org/en/doc/assets/files/other/irrc\\_862\\_philippe.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_862_philippe.pdf)> p.377

<sup>11</sup> PHILIPPE, X. The principles of universal jurisdiction and complementarity. In *International Review of the Red Cross* [online]. [cited 2021-04-28] 2006, vol. 88, no. 862, pp. 375–398. Available from Internet: <[https://www.icrc.org/en/doc/assets/files/other/irrc\\_862\\_philippe.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_862_philippe.pdf)> p.378

<sup>12</sup> STAHN, C. *A critical introduction to international criminal law*. Cambridge, United Kingdom; New York, NY, USA: Cambridge University Press, 2019. 448 p. DOI10.1017/9781108399906 p. 185

<sup>13</sup> CHADWICK, M. The Philosophical Foundations of Universal Jurisdiction: Piracy in the Works of Alberico Gentili and Hugo Grotius. In *Piracy and the Origins of Universal Jurisdiction*. Leiden: Brill Nijhoff, 2018. pp. 83–112 ISBN 9789004390461

<sup>14</sup> HELLER, K. et al. *The Oxford Handbook of International Criminal Law*. UK: Oxford University Press, 2020. 878 p. ISBN 9780198825203 p.226

<sup>15</sup> PHILIPPE, X. The principles of universal jurisdiction and complementarity. In *International Review of the Red Cross* [online]. [cited 2021-04-28] 2006, vol. 88, no. 862, pp. 375–398. Available from Internet: <[https://www.icrc.org/en/doc/assets/files/other/irrc\\_862\\_philippe.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_862_philippe.pdf)> p.378

This principle was first codified in the Geneva Conventions of 1949, defining the rules of war, which provide that states-participants must prosecute or extradite persons suspected of serious violations of the conventions (war crimes).<sup>16</sup> The provision that under certain circumstances sovereignty can be limited for such heinous crimes has been adopted as a General Principle. Later, other international conventions and customary law have expanded the scope of this principle.<sup>17</sup>

International treaties binding States parties to use universal jurisdiction include the 1949 Geneva Conventions, the 1973 Convention against Apartheid, the 1984 Convention against Torture, and the 2006 Convention against Enforced Disappearance. These conventions are of paramount importance in this regard, establishing universal jurisdiction over serious violations of these conventions. The vast majority of states recognize the validity of the concept of universal jurisdiction since they are parties to the conventions that provide for it.<sup>18</sup>

All of the above is confirmed by a number of cases, starting with the Eichmann case in 1961, the Demaniuk case in 1985, and the Pinochet cases in 1999 and Butare the Fourth in 2001, which emphasize that universal jurisdiction can lead to the prosecution of persons guilty of international crimes.<sup>19</sup>

It is important to mention that in the exercise of universal jurisdiction, the tribunals act as agents of the international community. This position was expressed at the Nuremberg Trials (1945-1946). Moreover, when national courts exercise universal jurisdiction, they also act on behalf of the international community.<sup>20</sup>

Summing up, we can say that the principle of universal jurisdiction is a unique phenomenon that makes it possible to bring to justice those who have violated international criminal law. Thanks to

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<sup>16</sup> *Basic Facts on Universal Jurisdiction*. Prepared for the Sixth Committee of the United Nations General Assembly [online]. October, 2009. [cited 2021-04-20] Available from Internet: <<https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>>

<sup>17</sup> PHILIPPE, X. The principles of universal jurisdiction and complementarity. In *International Review of the Red Cross* [online]. [cited 2021-04-28] 2006, vol. 88, no. 862, pp. 375–398. Available from Internet: <[https://www.icrc.org/en/doc/assets/files/other/irrc\\_862\\_philippe.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_862_philippe.pdf)> p.378

<sup>18</sup> *Basic Facts on Universal Jurisdiction*. Prepared for the Sixth Committee of the United Nations General Assembly [online]. October, 2009. [cited 2021-04-20] Available from Internet: <<https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>>

<sup>19</sup> PHILIPPE, X. The principles of universal jurisdiction and complementarity. In *International Review of the Red Cross* [online]. [cited 2021-04-28] 2006, vol. 88, no. 862, pp. 375–398. Available from Internet: <[https://www.icrc.org/en/doc/assets/files/other/irrc\\_862\\_philippe.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_862_philippe.pdf)> p.378

<sup>20</sup> HELLER, K. et al. *The Oxford Handbook of International Criminal Law*. UK: Oxford University Press, 2020. 878 p. ISBN 9780198825203 p.227

this principle, countries, by cooperating, can apply the law at a higher level than the national one, preventing the possibility of avoiding punishment for a crime that has damaged the entire international community.

## **1.2.The importance and the problems**

It is important to take into account the fact that for the principle of universal jurisdiction to work and become a valid legal norm, first of all, a basis for universal jurisdiction is necessary, then a sufficiently clear definition of the crime and its constituent elements, as well as national means of law enforcement, allowing national judicial authorities to exercise their jurisdiction over these crimes.

Turning to practice, we see certain differences between the existence of a principle and its implementation. If we turn to the comparative method, then the states interpret and implement this principle either in a narrow sense or in a broad sense. The first involves bringing to justice a person accused of international crimes only if he is available for trial, while the broader concept includes the possibility of initiating a case in the absence of the wanted or accused. The difference in approaches affects how the principle is implemented in practice.<sup>21</sup>

A universal jurisdiction is indeed a powerful tool in the service of international justice, but it requires states to enact appropriate legislation and sufficient resources to implement it. Many states have adopted such legislation, but very few of them have the necessary resources to effectively combat impunity for international crimes since the specificity and complexity of these crimes require significant resources.<sup>22</sup>

Hence, despite the fact that the importance of this principle and its necessity is obvious, only in the event of changes within the legislation, the system of internal structures of the state and the formation of precedents in the future, the principle can be fully implemented and achieve its intended goal – the prosecution and invocation of the guilty party.

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<sup>21</sup> PHILIPPE, X. The principles of universal jurisdiction and complementarity. In *International Review of the Red Cross* [online]. [cited 2021-04-28] 2006, vol. 88, no. 862, pp. 375–398. Available from Internet: <[https://www.icrc.org/en/doc/assets/files/other/irrc\\_862\\_philippe.pdf](https://www.icrc.org/en/doc/assets/files/other/irrc_862_philippe.pdf)> pp. 379-380

<sup>22</sup> *Universal Jurisdiction* [online]. By TRIAL International. [cited 2021-04-20] Available from Internet: <<https://trialinternational.org/topics-post/universal-jurisdiction/>>

## 2. SUPPRESSION OF PROTESTS IN THE REPUBLIC OF BELARUS SINCE 2020

### 2.1. Tortures as a crime against humanity

There is a clear and absolute prohibition of torture of any kind in international law. The prohibition applies even during emergencies such as war and there are no exceptions or excuses for torture.<sup>23</sup> States are bound and unquestioningly internationally responsible if their officials commit torture. It is important to note that torture, under certain conditions, can constitute a crime against humanity or a war crime. Although there may be no international element in the commission of a crime, states have concluded the 1984 Convention on the Suppression of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>24</sup>

The 1984 Convention “Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” was concluded to enhance the effectiveness of an already existing prohibition under international law.<sup>25</sup> This convention requires States parties to prescribe torture as a crime in their domestic legislation, including, at one level, attempts and participation in them.<sup>26</sup> The Committee against Torture established by the Convention has reaffirmed that all states must define torture as a separate crime in their criminal law, but they are not obliged to reproduce the literal designation of torture in their national law. It will be enough for them to introduce their own definition of torture - let it be broader.

Like terrorism, torture falls under the jurisdiction of ad hoc tribunals and the International Criminal Court (ICC) if it is committed under certain conditions. Torture is explicitly included in the categories of crimes against humanity and war crimes in all relevant statutes. Although the main part of the definition of the Convention, namely the willful infliction of severe pain or suffering, is also an integral part of torture as a crime against humanity and as a war crime.

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<sup>23</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987)

<sup>24</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987)

<sup>25</sup> Preamble to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987)

<sup>26</sup> RODLEY, Nigel; and POLLARD, Matt. Criminalisation of Torture: State Obligations Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *European Human Rights Law Review*, 2006; Issue 2: 115-141

With regard to the fact that crimes against humanity are crimes under international law, the Nuremberg Statute included crimes against humanity as one of the components of the Tribunal's jurisdiction. Among other things, the Tribunal noted that “individuals can be punished for violations of international law. Crimes against international law are committed by men, not abstract entities, and only by punishing the individuals who commit such crimes can the provisions of international law be enforced”.<sup>27</sup> Crimes against humanity also fell under the jurisdiction of the International Military Tribunal for the Far East.<sup>28</sup>

The adoption of the Rome Statute of the International Criminal Court (hereinafter - ICC Statute) in 1998 and its ratification by states prompted a review of their national laws regarding the prosecution of international crimes.<sup>29</sup> The International Criminal Court (hereinafter - ICC) is used as a last resort because the ICC Statute emphasizes that states have primary responsibility for the prosecution of international crimes. Litigation in a third state or in an international court such as the ICC is a last resort, taking into account security or infrastructural problems, as well as political interference in the territorial state. However, not only the technical legal implementation of the ICC Statute at the national level faces challenges but also political considerations when investigations by state law enforcement agencies contradict the foreign policy of the state itself. As a result, only a few perpetrators of international crimes from very few countries have been prosecuted before third country courts, for example, immigrants from the former Yugoslavia or Rwanda.<sup>30</sup> The principle of complementarity of the ICC, enshrined in Article 17 of the Charter, requires that states cannot prosecute offences under the ICC as a criterion of admissibility. This new system completely redefines the concept of ad hoc tribunals, in which the primary responsibility for the prosecution of crimes committed in the former Yugoslavia and in Rwanda rests with the respective tribunal.<sup>31</sup>

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<sup>27</sup> Judgment of 30 September 1946, International Military Tribunal. In *Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945 - 1 October 1946)*. 1948, vol. 22. 596 p. p. 466

<sup>28</sup> International Military Tribunal for the Far East Charter (Tokyo, 1946), Article 5 c)

<sup>29</sup> AMNESTY INTERNATIONAL. *Universal jurisdiction: A preliminary survey of legislation around the world – 2012 update* [online]. October, 2012. Index number: IOR 53/019/2012. [cited 2021-05-12] Available from Internet: <<https://www.amnesty.org/download/Documents/24000/ior530192012en.pdf>>

<sup>30</sup> LANGER, M. The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes. *The American Journal of International Law* 105(1) [online]. July, 2010. [cited 2021-05-12] Available from Internet: <[https://www.researchgate.net/publication/228162248\\_The\\_Diplomacy\\_of\\_Universal\\_Jurisdiction\\_The\\_Political\\_Branches\\_and\\_the\\_Transnational\\_Prosecution\\_of\\_International\\_Crimes](https://www.researchgate.net/publication/228162248_The_Diplomacy_of_Universal_Jurisdiction_The_Political_Branches_and_the_Transnational_Prosecution_of_International_Crimes)>

<sup>31</sup> CASSESE, A. *International Criminal Law*. Oxford University Press: Oxford, 2003. 472 p. pp. 339-342

The new system of international criminal law has another component besides the principle of complementarity: states are obliged to cooperate with the ICC. The Member States must not only prosecute crimes themselves<sup>32</sup> but also act in mutual assistance in the work of the Court. The principle of complementarity and the duty to cooperate in cases of international crime, where evidence is usually circulated around the world, underline the burden of the international community to investigate and prosecute international crimes.<sup>33</sup> In 2002, Germany introduced its Code of Crimes against International Law (CCIL) to be able to prosecute all crimes established under the ICC Statute at the national level. Until 2002, international crimes were punishable under ordinary German criminal law.

Unfortunately, most individuals who have committed crimes against the peace and security of humanity, namely genocide, war crimes and crimes against humanity, will never be brought to justice for their crimes. Cases referred to national courts are often known only in the country or region where the trial took place. In some cases, defendants are held accountable for international crimes that have been incorporated into domestic law. In other cases, defendants are prosecuted for ordinary domestic crimes, such as murder, because a country has failed to adequately incorporate international crimes into national law, even though the country has ratified the relevant international treaties.

The importance of the domestic prosecution of international crimes cannot be underestimated. International tribunals are called upon to try only the most serious cases of international crime. In many cases it may be preferable for a competent national court to decide on such a case. Domestic trials of genocide and other international crimes can play a critical role in fostering a culture of legal justice following such massive crimes.<sup>34</sup>

Citing the example of international crimes such as torture and inhuman treatment, in this case there are two main elements that are taken into account by the court: the dominant and active participation in the crime committed, as well as the position held during this action. An example is the Kambanda case of 4 September 1998 (Kambanda ICTR-97-23, § 61-62). The Trial Chamber of the International Criminal Tribunal of Rwanda pointed out, however, the fact that if the accused held a high position

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<sup>32</sup> The obligation of states to investigate and prosecute exists in a number of international treaties, such as the Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>33</sup> WERLE, G. Völkerstrafrecht und deutsches Völkerstrafgesetzbuch. *Juristen Zeitung (JZ)*, Aufsätze, Jahrgang 67, 2012. Heft 8, S. 373-380 p. 374.

<sup>34</sup> JUROVICS, Y. *Réflexions sur la spécificité du crime contre l'humanité*. Paris: L.G.D.J., 2002. Bibliothèque de droit international et communautaire, t. 116.

at the time of the criminal offence, no matter how he behaved subsequently towards the victims, his guilt cannot be mitigated. This means that he played a decisive role in the crimes committed.<sup>35</sup> In this case, a parallel can be drawn from such an example to the actions of the President of the Republic of Belarus, who, using his status and position in the country, issues criminal orders and still avoids punishment.

According to the above, all victims of the events of 2020-2021 after the presidential elections in the Republic of Belarus can be brought to the same examples and the measures to counter-protests can be qualified as torture in accordance with international law. There is a video and a photo of this, eyewitnesses. No one will deny that torture in Belarus and inhuman treatment of their people are obvious. Therefore, both the people of Belarus and the entire world community will try to do everything to somehow stop this and so that all those guilty and those involved in these events are punished according to the law.

## **2.2. The current situation in Belarus since 2020 protests**

If you look at the map of Europe, then Belarus is located practically in the very centre, which creates favourable conditions for both economic and political development, the situation of which has raised great questions in recent years. It should be noted that the chosen strategic model of state behaviour, on the example of Belarus, affects absolutely everything: both the situation inside the country and abroad, in particular in relation to other countries. In accordance with Article 8 of the Constitution of the Republic of Belarus:

“The Republic of Belarus recognizes the priority of the generally recognized principles of international law and ensures the compliance of the legislation with them”.<sup>36</sup>

In other words, in the Republic of Belarus – on paper – international law has a priority, which is spelt out in the Constitution, the most important document of the state.

Referring to the theory and practice of international criminal law, one should distinguish between two common terms that at first glance are the same: “traditional international crimes” and “crimes of an

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<sup>35</sup> MÉDECINS SANS FRONTIÈRE, Врачи без границ. *Практический словарь гуманитарного права* [online]. [cited 2021-05-12] Available from Internet: <<https://slovar-gumanitarnogo-prava.org/content/article/4/voennoe-prestuplenie-prestuplenie-protiv-chelovechnosti/>>

<sup>36</sup> Конституция Республики Беларусь (с изменениями и дополнениями, принятыми на республиканских референдумах 24 ноября 1996 г. и 17 октября 2004 г.)

international character”. The first definition includes crimes that are committed directly by states, and the second includes precisely those crimes that are committed by individuals. Speaking in general about the two mentioned concepts, it should be said that international crimes pose an increased danger. By themselves, such acts demonstrate a criminal policy, as well as the mood of the state. This is, in a way, a manifestation of aggression, colonialism and, as well as torture, which is actually relevant at the present time for the Republic of Belarus, as well as other crimes of this kind. In other words, it can be called a modern used term – a crime against the peace and security of mankind, which is a very serious article not only at the national level but also at the international level. Nowadays, such behaviour of states seems to be unethical, unacceptable, illegal at the present time, but as recent events in Belarus have shown, it is possible. The subjects of such crimes, in addition to the aforementioned states, who bear political and material responsibility, are also high-ranking officials, leaders and other persons who supported the criminal policy of the state.<sup>37</sup>

Attention should be paid to the category of international crimes since they differ significantly from ordinary criminal acts. Of course, we can immediately say that the main difference can be the inhuman nature of these crimes, which not only undermines the peace and security of mankind but also inspires fear for the lives of people.<sup>38</sup> However, there is no consensus on this score, although legal scholars are actively discussing what key characteristics can be taken as the basis for international crimes. For example, Gerhard Werle – Head of the Department of German and International Criminal Law, as well as Criminal Procedure and Modern History of Law at the University of Berlin,<sup>39</sup> in his second edition of the book “Principles of International Criminal Law”, defined three cumulative conditions according to which a crime falls under the action of international criminal law: the norm should be part of international law; the crime must entail individual responsibility and be punished; a criminal act must be punishable regardless of whether it has been incorporated into domestic law.<sup>40</sup>

Antonio Cassese, an Italian lawyer, a specialist in international law,<sup>41</sup> also speaks on this matter. He, in turn, identifies four aggregate elements. Unlike G. Verle, who argued that this rule should be part of international law, Cassese believes that the violated rule should have a customary status in

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<sup>37</sup> СМІРНОВ, А.В., и др. *Международное сотрудничество в борьбе с преступностью: Учебное пособие*. В 2 ч. Ч. I: Теоретико-правовые основы международного сотрудничества в сфере борьбы с преступностью. Москва: Международный юридический институт, 2012. 158 с.

<sup>38</sup> FERDINANDUSSE, W.N. *Direct Application of International Criminal Law in National Courts*. Den Haag: T.M.C. Asser Press, 2006. 338 p. pp. 177-178.

<sup>39</sup> Biography of Verle

<sup>40</sup> WERLE, G. *Principles of International Criminal Law*, 2nd edn. Den Haag: T.M.C. Asser Press, 2009. 660 p. p. 29.

<sup>41</sup> Biography of Cassese

international law and be designed to protect values that the international community considers important.<sup>42</sup> In addition, there must be a general interest in the suppression of these crimes, in the sense that, under certain conditions, the alleged perpetrators can, in principle, be prosecuted and punished by any state.<sup>43</sup>

It can be said that the debate around the concept of international crime revolves around the importance attached to these and other existing characteristics. Indeed, these characteristics are used in different ways by scholars in defining the concept of “international crimes”, leading to different views that are currently present in a legal debate.<sup>44</sup>

In the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “torture” means any act that deliberately inflicts severe pain on a person, as well as suffering, physical or mental, in order to receive from him or information or confession from a third party, to punish him for an act that he or a third party he is suspected of committing, as well as to intimidate or coerce him or a third party, or for any reason based on discrimination of any nature, when such pain or suffering is inflicted by a government official or other person acting in an official capacity, or at their instigation, or with their knowledge or tacit consent.<sup>45</sup>

At the moment, only 450 documented cases of torture and ill-treatment of people are known in the Republic of Belarus during detentions after the 2020 presidential elections. There are also reports of violence against women and children, including sexual violence and rape with rubber truncheons. After the appeal of human rights defenders, the UN called on the authorities of the Republic of Belarus to stop torturing the detainees and bring to justice those police officers who, according to witnesses, humiliated and beat demonstrators in places of detention. Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains the following: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture”.<sup>46</sup>

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<sup>42</sup> CASSESE, A. *International Criminal Law*. Oxford University Press: Oxford, 2003. 472 p. p.23

<sup>43</sup> CASSESE, A. *International Criminal Law*. Oxford University Press: Oxford, 2003. 472 p. p.23

<sup>44</sup> NAQVI, Y.Q. *Impediments to Exercising Jurisdiction over International Crimes*. The Hague: T.M.C. Asser Press, 2010. 400 p. p. 31.

<sup>45</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987)

<sup>46</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987)

Today in Belarus there are no mechanisms for the consideration of mass crimes that occurred after August 9 and later. These crimes continue even now because there are arrests. In conjunction with this, cases of inhuman treatment and beatings also do not cease to be recorded. Now, this is not happening as massively as after August 9, but nevertheless, it is happening. It should be noted that what happened on August 9, 10, as well as on August 11 – this has never happened in the history of Belarus since Stalin's times. More than 8 thousand people were detained, more than a thousand were hospitalized with various injuries or wounds, the presence of which the state of our country denies, some of these injuries were life-threatening. Doctors actually pulled some people out of the afterlife. But the worst thing is that five people were killed during these protests in different parts of Belarus, although this is still not recognized and state institutions in every possible way deny this, claiming that this has nothing to do with the events of last summer.<sup>47</sup>

Article 4 of the same Convention states that “Each State Party shall ensure that all acts of torture are offences under its criminal law”.<sup>48</sup> However, the justice system in Belarus does not work at all now. The Investigative Committee of the Republic of Belarus received several hundred statements from people who were tortured, who were bullied, but the Investigative Committee has not yet opened a single criminal case on the fact of torture. It is important to note that some criminal cases were nevertheless initiated – on the fact of beating up police officers, inflicting grievous bodily harm on them. In addition, cases of mass riots are being initiated, for some other criminal cases directed against peaceful demonstrators, dozens of people are in prison for these cases, arrests continue almost every day, sometimes without explanation. It is obvious that the authorities are using these investigation tools for their own purposes, and they are not aimed at restoring the truth, and people perceive it extremely negatively, but no one can do anything about it, no matter how hard they try. After all, the President of the Republic himself said that sometimes there is no time for laws. This is what all the bodies of justice in Belarus do.<sup>49</sup>

At the moment, those detained during the protest actions remain in Belarusian pre-trial detention centres, and those who are released speak of the unprecedented brutality of the security forces. Women who were in custody told about numerous cases of beatings, cruel and inhuman treatment, as

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<sup>47</sup> ЧИЖОВА, Л. «Такого не было со сталинских времен». *Пытки в Беларуси* [online]. September, 2020. [cited 2021-04-24] Available from Internet: <<https://www.svoboda.org/a/30820604.html>>

<sup>48</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987)

<sup>49</sup> ЧИЖОВА, Л. «Такого не было со сталинских времен». *Пытки в Беларуси* [online]. September, 2020. [cited 2021-04-24] Available from Internet: <<https://www.svoboda.org/a/30820604.html>>

well as humiliation. People who left Akrestin<sup>50</sup> after 24 hours claimed that they saw the immobilized bodies, which they carried away. But none of the employees of the detention centre confirmed this fact, although there is a video on the Internet that shows this. For example, Sergei, released from the IVS, said: “Normally, they did not treat anyone there. One girl was beaten at night in such a way that it is beyond words”.<sup>51</sup> According to Sergei, riot police took money from the detainees. When they drew up acts with a list of their personal belongings, no one wrote down the amount of money found with them, and if there were one hundred dollars that people wanted to pay for an apartment, they were beaten, taken to the KGB and asked who paid them. According to M., the KGB officers for some reason suspected that the protesters were being paid for their activity and demanded confessions from them.<sup>52</sup> Sergey also said that there were people with him in the cell who were literally dying, and the inmates asked for a doctor for six hours. But when the doctors came in and said that the person should be taken to the hospital, the law enforcement officers refused them and said, “Let him die”.<sup>53</sup> Those in need of medical care, such as people with diabetes who constantly need to take medication, also did not receive it on time. The detainees, according to M.'s testimony, were regularly beaten, regardless of gender and time of day.<sup>54</sup>

All the facts of cruel and inhuman treatment, torture are still denied, and the Investigative Committee does not accept any statements of this kind or does not find *corpus delicti*. In the constitution of the Republic of Belarus, in the second section, art. 21 states that “The state guarantees the rights and freedoms of citizens of Belarus, enshrined in the Constitution, laws and provided for by the state's international obligations”.<sup>55</sup> However, everyone can see that in fact, the rights and freedoms of citizens of the Republic of Belarus are absent.

A report released by the British human rights organization Amnesty International claims that Belarusian law enforcement officers beat, tortured and sexually abused not only men but also women

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<sup>50</sup> A complex of places of detention in Minsk. “Akrestsin” became a household name, as well as the expression “to get to Akrestsin”, which means being detained or simply going to jail. The term named after the place of detention has become a symbol of torture of civilians who disagree with election fraud, protesters in Belarus (2020-2021)

<sup>51</sup> ИВАНОВА, Т. *Узники Окрестина. Шокирующие истории* [online]. August, 2020. [cited 2021-04-24] Available from Internet: <<https://naviny.online/article/20200815/1597485162-uzniki-okrestina-shokiruyushchie-istorii>>

<sup>52</sup> ИВАНОВА, Т. *Узники Окрестина. Шокирующие истории* [online]. August, 2020. [cited 2021-04-24] Available from Internet: <<https://naviny.online/article/20200815/1597485162-uzniki-okrestina-shokiruyushchie-istorii>>

<sup>53</sup> ИВАНОВА, Т. *Узники Окрестина. Шокирующие истории* [online]. August, 2020. [cited 2021-04-24] Available from Internet: <<https://naviny.online/article/20200815/1597485162-uzniki-okrestina-shokiruyushchie-istorii>>

<sup>54</sup> ИВАНОВА, Т. *Узники Окрестина. Шокирующие истории* [online]. August, 2020. [cited 2021-04-24] Available from Internet: <<https://naviny.online/article/20200815/1597485162-uzniki-okrestina-shokiruyushchie-istorii>>

<sup>55</sup> Конституция Республики Беларусь (с изменениями и дополнениями, принятыми на республиканских референдумах 24 ноября 1996 г. и 17 октября 2004 г.)

detained at the protests.<sup>56</sup> The Belarusian authorities have not carried out a single serious investigation of these crimes and cover up the security officials who participated in them, intimidating and harassing victims and witnesses. Amnesty International called on official Minsk to release all those detained for participating in peaceful protests after the elections on August 9, 2020, as well as to immediately investigate human rights violations, remove the law enforcement officers involved and compensate their victims. A report by Russian human rights activists from the “Committee against Torture” was also published, which accused the Belarusian authorities of sexual violence and ill-treatment of detainees. The BBC's Russian service published its own investigation last December, in which several torture victims told their stories. The illegitimate President of Belarus Alexander Lukashenko denies torture by the security forces and says that the riot police defended the country from the blitzkrieg, and Western powers such as Lithuania, Poland, America were behind the protests. Michelle Bachelet, UN High Commissioner for Human Rights, also reported complaints of torture, ill-treatment of detainees by the Belarusian security forces, as well as the persecution of human rights defenders and journalists. In turn, the European Union and the United States have imposed sanctions against Lukashenka and a number of Belarusian officials, whom they believe are involved in electoral fraud and human rights violations. Amnesty emphasizes that throughout the 26 years of Lukashenka's rule, allegations of torture were recorded, however, after the elections on August 9, 2020, and the mass protests that followed, violations of human rights took on an unprecedented scale, which no one expected. The EU and the US did not recognize the results of the August 9 vote, believing that they were carried out with massive falsifications. They call for the holding of new, free elections, but nothing is happening in the Republic of Belarus at the moment and no proceedings on the fact of human rights violations and torture are being carried out. The Amnesty report accuses the Belarusian authorities of widespread violence, mass arrests, torture and ill-treatment of detainees, as well as the persecution under increasingly serious articles of those who disclosed and documented these human rights violations.<sup>57 58</sup>

It is also alleged that the victims were not only protesters but also bystanders. Despite Lukashenko's promise, law enforcement officers did not conduct a serious and detailed investigation of all

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<sup>56</sup> Доклад Amnesty International 2020/21: Права человека в современном мире [online]. London: Amnesty International Ltd, 2021. 191 p. [cited 2021-05-05] Available from Internet: <<https://www.amnesty.org/download/Documents/POL1032022021RUSSIAN.PDF>> P.76-80

<sup>57</sup> BBC News. Беларусь: правозащитники обвиняют власти в пытках [online]. January, 2021. [cited 2021-05-04] Available from Internet: <<https://www.bbc.com/russian/news-55826259>>

<sup>58</sup> Доклад Amnesty International 2020/21: Права человека в современном мире [online]. London: Amnesty International Ltd, 2021. 191 p. [cited 2021-05-05] Available from Internet: <<https://www.amnesty.org/download/Documents/POL1032022021RUSSIAN.PDF>> P.76-80

complaints of ill-treatment, and even intimidated victims to silence them, human rights activists say. This also applies to the deaths of protesters – the data collected by human rights activists indicate the consistent refusal of the Belarusian authorities to investigate the killings of demonstrators and the prosecution of witnesses to these crimes. Moreover, the state guarantees impunity for those who committed these crimes, guided by the fact that they protected civilians from the crowd of drug addicts and extremists. Most of the victims interviewed by human rights defenders spoke on condition of anonymity for fear of reprisals.<sup>59</sup>

As mentioned earlier, Russian rights defenders from the Committee Against Torture published their investigation. Their report recounts twelve cases of ill-treatment of detainees in Minsk and one in Vitebsk. Most of them say that they did not participate in the protests at the time of their arrest. The report describes cases of sexual violence, beatings of detainees, which resulted in fractures of the jaw, nose and head injuries, as well as a practice called the “truncheon corridor”: detainees are driven through two lines of security officials who beat them with truncheons. In addition, Russian human rights activists emphasize that the Belarusian authorities did not conduct any serious investigation of the complaints and, as mentioned above, did not initiate a single criminal case on abuse of authority by law enforcement officials. The Belarusian security forces committed “unprecedented and massive violations of human rights in terms of the prohibition of torture and other types of cruel, degrading treatment”, the report says.<sup>60</sup>

Since the peaceful protests after the August 9 elections, human rights defenders have collected evidence of the torture of hundreds of peaceful demonstrators and documented the deaths of at least four people, according to Amnesty International's Director for Eastern Europe and Central Asia Marie Struthers. Amnesty International's report documented how peaceful demonstrators were massively arrested and tortured, stripped naked, brutally beaten, forced to bent or standing for extended periods, and deprived of food, water or medical care for several days. The exact number of arbitrarily detained protesters who passed through Akrestsin and other detention centres throughout Belarus remains

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<sup>59</sup> BBC News. *Беларусь: правозащитники обвиняют власти в пытках* [online]. January, 2021. [cited 2021-05-04] Available from Internet: <<https://www.bbc.com/russian/news-55826259>>

<sup>60</sup> BBC News. *Беларусь: правозащитники обвиняют власти в пытках* [online]. January, 2021. [cited 2021-05-04] Available from Internet: <<https://www.bbc.com/russian/news-55826259>>

unknown. At the beginning of December 2020, it has already exceeded 27 thousand people. Arbitrary arrests have continued since then.<sup>61</sup>

As for international obligations, the Republic of Belarus ignores them in every possible way. Oleg Kozlovsky, a Russian rights activist, a researcher at Amnesty International and one of the authors of the report on torture, emphasizes that victims of violence and torture cannot count on the slightest understanding and assistance from the state. Oleg Kozlovsky recalls the case of Alexander Kordyukov, a witness to the murder of his friend Gennady Shutov by the police in Brest – this was the second case of a person killed at the hands of security officials in Belarus. At the moment, Kordyukov is now accused of attempted murder of a police officer, he faces life imprisonment. The authorities have no questions about the police themselves, who shot the unarmed man. The Investigative Committee refused to initiate a case on the fact of the murder of a person, stating that it sees no reason for this. There is a fact of the murder of a person, but there is still no case. And, of course, how not to mention the tragic death of activist Roman Bondarenko. There is currently no criminal case for his murder, but a journalist and a doctor who told the facts of what happened were punished. It should be noted that on January 27, the initiative of former ByPOL law enforcement officers published the results of its check on the death of Roman Bondarenko and names by name all those involved in the tragedy.<sup>62</sup>

Human rights activist Oleg Kozlovsky also emphasizes that the Belarusian authorities do not even demonstrate an attempt to portray the desire for justice, instead, a system of obstacles has been created, which begins at the stage of torture: in some cases, the detainees signed papers of silence under the threat of some responsibility for disclosing what they were happening. All this shows the systemic unwillingness of the Belarusian authorities to fulfil their obligations, including as a signatory to the Convention against Torture, which must be unquestioningly fulfilled. This means that this is where the international community must somehow act. Firstly, to increase pressure on the Belarusian

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<sup>61</sup> RFI. *Amnesty International: Насилие и пытки в Беларуси продолжаются* [online]. January, 2021. [cited 2021-05-04] Available from Internet: <<https://www.rfi.fr/ru/европа/20210127-amnesty-international-насилие-и-пытки-в-беларуси-продолжаются>>

<sup>62</sup> RFI. *Amnesty International: Насилие и пытки в Беларуси продолжаются* [online]. January, 2021. [cited 2021-05-04] Available from Internet: <<https://www.rfi.fr/ru/европа/20210127-amnesty-international-насилие-и-пытки-в-беларуси-продолжаются>>

authorities, and secondly, to apply all other international mechanisms in order to still ensure justice and legal courts in such cases. One effective method is universal jurisdiction.<sup>63</sup>

According to Valentin Stefanovich, deputy chairman of the Belarusian human rights centre “Viasna”, torture is something that a Belarusian has been constantly faced with for 26 years, it has always been used in the electoral campaign, but the human rights crisis that exists now differs in that repression are of a very large-scale nature, which was not previously seen in modern history, since 1991. According to the latest data from Viasna, since August 2020, 33 thousand people have been brought to administrative responsibility for participating in actions, criminal cases have been opened against 900. Almost two thousand victims of torture appealed to the Investigative Committee, but not a single criminal case has been opened. Valentin Stefanovich believes that the authorities are confident that the situation with the protests has been taken under full control and the time has come to take revenge on the disaffected, that is, on their own people. Alyona Pomakha, an activist and organizer of volunteer assistance, stressed that torture and violence are still used by the authorities, impunity only encourages their use. The situation with torture in Belarus remains acute, albeit not in such volumes as in August, but the violence continues.<sup>64</sup>

Summing up the above, we can say that the above evidence testifies to the commission of an international crime in the Republic of Belarus. The entire international community is making efforts to ensure that everyone's attention is drawn to the current situation and that proportionate and fair measures should be taken. All kinds of reports developed by qualified specialists indicate that the international community is really concerned about the use of torture, humiliation, etc., and also make it possible to assess the situation not only from the point of view of generally accepted human concepts but also from the legal point of view. What is happening goes beyond the bounds of universal understanding and possible international rights and obligations, national and international law, the applied opposition is not only not proportional, it is, in principle, illegal and must be stopped and prosecuted by law.

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<sup>63</sup> RFI. *Amnesty International: Насилие и пытки в Беларуси продолжаются* [online]. January, 2021. [cited 2021-05-04] Available from Internet: <<https://www.rfi.fr/ru/европа/20210127-amnesty-international-насилие-и-пытки-в-беларуси-продолжаются>>

<sup>64</sup> RFI. *Amnesty International: Насилие и пытки в Беларуси продолжаются* [online]. January, 2021. [cited 2021-05-04] Available from Internet: <<https://www.rfi.fr/ru/европа/20210127-amnesty-international-насилие-и-пытки-в-беларуси-продолжаются>>

### 2.3. Access to the justice in Belarus

The justice system in Belarus has failed to hold accountable human rights violators against protesters and is not prosecuting the perpetrators, but the victims. In August 2020, the whole world was shocked by the unprecedented brutality of the Belarusian security forces, who openly violated the law and exceeded their powers. In the first three days of protests after the presidential elections, the authorities used not only water cannons, stun grenades, but also rubber bullets against peaceful and, most importantly, unarmed demonstrators, which they literally fired to kill. Some people were left crippled, but the most important thing of those days - there are also those who died. The security forces treated the detainees especially harshly; in the isolation ward on Akrestsin, people were kept in inhuman conditions.<sup>65</sup>

Throughout the entire period of incessant protests, the level of violence on the Belarusian streets, if it decreased, then only for a while. None of the allegations of violence, torture, as well as violation of all kinds of human rights, which were used by law enforcement officials, have not been prosecuted. What is the reason for such brutality of the Belarusian security forces? It is important to note the fact that the Belarusian security forces used violence long before 2020. This could be observed in 2006 and 2010 during the protests after the next presidential elections. However, there has not been such unprecedented cruelty in Belarus since the 90s. Former law enforcement officials cite impunity as one of the main reasons for the security forces' aggression. This is due to the fact that not a single criminal case has been opened against them so far, no matter what action they have committed towards the people. It becomes clear why the security forces do not go over to the side of the people - after all, the current government covers up their crimes and guarantees anonymity and safety. And if the regime falls, then they will have to appear before the law and answer for everything they have done. As evidence of these crimes, there is all sorts of evidence: numerous photographs, videos and testimonies of detainees, victims and eyewitnesses.<sup>66</sup>

Meanwhile, the chairperson of the Bundestag's Human Rights Committee, Gyde Jensen, has declared the need to bring to justice all those responsible for the ill-treatment of demonstrators in 2020-2021.

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<sup>65</sup> АЛЕКСАНДРОВСКАЯ, Б. *Жестокость белорусских силовиков: в чем причина?* [online]. November, 2020 [cited 2021-05-11] Available from Internet: <<https://www.dw.com/ru/zhestokost-belorusskih-silovikov-v-chem-prichina/a-55770096>>

<sup>66</sup> АЛЕКСАНДРОВСКАЯ, Б. *Жестокость белорусских силовиков: в чем причина?* [online]. November, 2020 [cited 2021-05-11] Available from Internet: <<https://www.dw.com/ru/zhestokost-belorusskih-silovikov-v-chem-prichina/a-55770096>>

In her opinion, the EU, due to its geographic proximity to Belarus, should take on part of this task. It is the position with regard to gross violations of human rights in Belarus, which was watched by the whole world, that will demonstrate whether the European Union is ready to speak on this issue in the international arena.<sup>67</sup>

Not only the government plays a major role in violence, torture and violates all human rights, but also those who work in law enforcement agencies, which were created for the safety of the population, and not vice versa, as it really is in the Republic of Belarus. An example of this is the temporary detention center at Akrestsin Street. It was there, in one of the cells, that several dozen women were imprisoned, who could neither move nor breathe. Many of these conditions fainted. The women begged the guards to separate them in different cells and somehow give them more space, because there was no longer any strength to endure such conditions. Eventually, the door opened - the guards poured cold water from a bucket inside. The door slammed shut and the women were left in wet clothes on the damp floor. After they were released, dozens of former detainees wrote statements on the facts of cruel and degrading treatment. Almost all the people of Belarus, friends and relatives, time and again go out to demonstrations, demanding justice, without fear of what might happen. This demand brought together people of all professional and social backgrounds, who each time show their courage and determination to make radical changes. Some have never participated either in civic activism, or, moreover, in protest demonstrations, but now the authorities, with their cruelty, have actually driven people out into the streets.<sup>68</sup>

On August 26, 2020, the General Prosecutor's Office announced the creation of an interdepartmental commission to assess the facts of unlawful actions by law enforcement officers both during detentions and in places of detention. Of course, not a single criminal case has yet been opened.<sup>69</sup>

As already mentioned, the Belarusian justice system not only guarantees the anonymity of the police but also encourages intimidation and further violence against victims and witnesses of violations of the law. Marie Struthers, Amnesty International Director for Eastern Europe and Central Asia. In

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<sup>67</sup> АЛЕКСАНДРОВСКАЯ, Б. *Жестокость белорусских силовиков: в чем причина?* [online]. November, 2020 [cited 2021-05-11] Available from Internet: <<https://www.dw.com/ru/zhestokost-belorusskih-silovikov-v-chem-prichina/a-55770096>>

<sup>68</sup> ЛОКШИНА, Т. *Граждане Беларуси вправе рассчитывать на правосудие. Международное сообщество должно в этом помочь* [online]. September, 2020. [cited 2021-05-11] Available from Internet: <<https://www.hrw.org/ru/news/2020/09/16/376410>>

<sup>69</sup> ЛОКШИНА, Т. *Граждане Беларуси вправе рассчитывать на правосудие. Международное сообщество должно в этом помочь* [online]. September, 2020. [cited 2021-05-11] Available from Internet: <<https://www.hrw.org/ru/news/2020/09/16/376410>>

Amnesty International's 2020/21 report, she says that the complete failure of the Belarusian judiciary to take control of the situation suggests that justice must now be administered only at the international level. Governments, international, as well as regional organizations, should use all their levers of pressure on the authorities of the Republic of Belarus to put an end to such an infringement on human rights and stop the tortures.<sup>70</sup> Also, in its report, Amnesty International publishes documentary evidence of how peaceful demonstrators were massively arrested and tortured, stripped naked, beaten mercilessly, forced to be bent or standing for a long time, deprived of food, drinking water or medical care for several days.<sup>71</sup>

Many people wonder why there is still no justice to the actions of law enforcement agencies at that time, which took place in 2020-2021. In my opinion, this is only due to the fact that the police, courts and other bodies that serve to administer justice are not independent and are subordinate only to the president. And he, in turn, does everything possible for them to stay on his side and obey his illegal orders. It is this fact that plays an important role in the fact that there is no justice in the Republic of Belarus, and if there are civil servants left who do not approve of the current regime and the state of affairs in the country, they are afraid to express their disagreement because of the possible consequences. It is the courts that are the body of power that could administer justice regardless of what the illegitimate president demands.

The independence of the judiciary is the main condition for ensuring the rule of law and the fundamental guarantee of a fair trial not only in the Republic of Belarus but also in any other country. The right to a fair trial is declared by international human rights law, which aims to protect a person from illegal or arbitrary restriction or deprivation of fundamental rights and freedoms, the most important of which is the right to life and freedom of a person and a citizen. This right is guaranteed by Article 14 of the International Covenant on Civil and Political Rights (hereafter - ICCPR), according to which “in the determination of any criminal charge against him, or of his rights and

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<sup>70</sup> Доклад Amnesty International 2020/21: Права человека в современном мире [online]. London: Amnesty International Ltd, 2021. 191 p. [cited 2021-05-05] Available from Internet: <<https://www.amnesty.org/download/Documents/POL1032022021RUSSIAN.PDF>> P.76-80

<sup>71</sup> AMNESTY INTERNATIONAL. Виновные в применении пыток в Беларуси остаются безнаказанными. Страна нуждается в международном правосудии. Доклад Amnesty International [online]. January, 2021. [cited 2021-05-11] Available from Internet: <<https://eurasia.amnesty.org/2021/01/27/vinovnye-v-primenenii-pytok-v-belarusi-ostayutsya-beznakazannymi-strana-nuzhdaetsya-v-mezhdunarodnom-pravosudii-doklad-amnesty-international/>>

obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.<sup>72</sup>

It should be noted that the independence of judges is enshrined at the level of principles in the Constitution and legislation of Belarus. Thus, according to Article 60 of the Constitution of the Republic of Belarus, everyone is guaranteed the protection of his rights and freedoms by a competent, independent and impartial court. Article 110 of the Constitution of the Republic of Belarus proclaims: “When administering justice, judges are independent and are subject only to the law. Any interference in the activities of judges in the administration of justice is unacceptable and entails liability under the law”.<sup>73</sup> In the current Code on the Judicial System and the Status of Judges of the Republic of Belarus, in Article 85, there is also a norm that contains guarantees of independence, which is ensured by the procedure for their appointment (election, approval), suspension and termination of powers, as well as inviolability, the procedure for consideration established by legislative acts cases and issues, secret consultation when passing court decisions and the prohibition to demand its disclosure, liability for contempt of court or interference in its activities, other guarantees corresponding to the status of judges and people's assessors, as well as the creation of appropriate organizational and technical conditions for the activities of courts. In the draft Law adopted in the first reading, which was mentioned above, this provision is literally enshrined in Article 67.<sup>74</sup>

However, the consolidation of the independence of judges in the Republic of Belarus, at the national level, is purely declarative, since there are no real legal guarantees for the implementation of this principle in the law and law enforcement practice. Likewise, in practice and the verdicts of the court, it is clear that justice, enshrined in one of the most important documents of the country, is not implemented and is neglected in every possible way. The requirement for the independence of judges refers, in particular, to the procedure and conditions for the appointment of judges and guarantees of their irremovability until the statutory retirement age is reached, and so on.<sup>75</sup>

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<sup>72</sup> International Covenant on Civil and Political Rights (entry into force 23 March 1976)

<sup>73</sup> Конституция Республики Беларусь (с изменениями и дополнениями, принятыми на республиканских референдумах 24 ноября 1996 г. и 17 октября 2004 г.)

<sup>74</sup> АГЕЕВА, Т. *Основные проблемы независимости судей в области реализации права на справедливое судебное разбирательство в Республике Беларусь* [online]. July, 2015 [cited 2021-05-11] Available from Internet: <<https://bydc.info/analytics/151-problemy-v-oblasti-realizatsii-prava-na-spravedlivoe-sudebnoe-razbiratelstvo-v-respublike-belarus>>

<sup>75</sup> АГЕЕВА, Т. *Основные проблемы независимости судей в области реализации права на справедливое судебное разбирательство в Республике Беларусь* [online]. July, 2015 [cited 2021-05-11] Available from Internet: <<https://bydc.info/analytics/151-problemy-v-oblasti-realizatsii-prava-na-spravedlivoe-sudebnoe-razbiratelstvo-v-respublike-belarus>>

Each state should take specific measures to guarantee the independence of the judiciary, to ensure that judges are protected from any form of political interference in their decision-making through constitutional guarantees or the adoption of laws that establish clear procedures and objective criteria for appointment, payment of remuneration, retention of office, promotion on service, suspension and termination of the powers of members of the judiciary and the disciplinary sanctions applied to them.

International standards (Basic Principles on the Independence of the Judiciary and Recommendation (94) 12 of the Committee of Ministers to member states on the independence, efficiency and role of judges) speak of the need to guarantee the service of a judge until the age of retirement or before the expiration of their term of office, where it is established. The European Charter of Judges also recognizes the possibility of appointment for a limited period with possible renewal, but it emphasizes that the decision not to appoint definitively or not to renew the term can only be taken by an independent body, either on its proposal or on its recommendation, or with her consent, or after her notification. At the same time, the Venice Commission raises this standard by arguing that judges should be appointed for a permanent period until they reach retirement age, a probationary period for judges seems to be problematic from the point of view of independence. However, the state did not recognize and does not recognize today the existence of this problem either at the international or at the national level. Thus, to the recommendation made in the framework of the Universal Periodic Review, the purpose of which was to strengthen the independence of the judiciary, which already does not have one, Belarus replied that it has been implemented and at the legislative level such independence is ensured. The Address on the prospects for the development of the system of general courts of the Republic of Belarus, approved by the Decree of the President of the Republic of Belarus dated October 10, 2011, No. 454, states that “there are no systemic problems in the activities of courts”.<sup>76</sup>

An analysis of the current national legislation shows that in the Republic of Belarus at the legislative level it is precisely the dependence of judges on the head of state (appointment of judges to the office by the President, dismissal, the possibility of imposing a disciplinary penalty on any judge, etc.) by the President. How such a rule can guarantee the independence of the courts if judges are appointed

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<sup>76</sup> АГЕЕВА, Т. *Основные проблемы независимости судей в области реализации права на справедливое судебное разбирательство в Республике Беларусь* [online]. July, 2015 [cited 2021-05-11] Available from Internet: <<https://bydc.info/analytics/151-problemy-v-oblasti-realizatsii-prava-na-spravedlivoe-sudebnoe-razbiratelstvo-v-respublike-belarus>>

by the President. Therefore, we can conclude that there are no independent courts in Belarus since all of them are directly subordinate to the president.

Victims of torture and persecution cannot make a complaint, which means they cannot get a fair solution. Demonstrative internal investigations did not lead to anything effective and efficient, Belarusian citizens, victims of protests, can only rely on international criminal legislation, as well as on the application of the principle of universal jurisdiction of one of the countries, since it is obvious that justice cannot be achieved within the country.

### 3. UNIVERSAL JURISDICTION IN GERMANY

#### 3.1. Problems of prosecution for international crimes at the national level in general

Crimes against humanity and security, crimes against peace and war crimes are defined and provided for by the criminal codes of different states, but sometimes the title and content of the articles may differ. According to the Rome Statute of the ICC, it became possible to harmonize national and international definitions of crimes. However, punishing such crimes at the national level is often challenging. Since crimes of this kind are often committed in the course of a conflict, in which not only the national army is involved, but also representatives of state authorities. In addition, the problem of considering such cases in court is that the national judicial body does not always have independence, most importantly - impartiality, as well as the means that are necessary to consider the case in court.<sup>77</sup>

The existing codes of the military discipline of the armed forces of states have mechanisms for punishing behaviour that violates military regulations. Such decisions are taken directly by the civil courts of that state, tribunals. This allows the maintenance of order within the armed forces through national mechanisms. However, bringing to justice the most important and perpetrators of crimes - high-ranking military and political leaders - is a difficult task at the national level. Despite this, the Geneva Conventions of 1949 provide for the expansion of the powers of national justice systems in relation to international criminal offences even outside the territory of the state, which falls under universal jurisdiction. This principle implies the prosecution of all perpetrators of crimes, especially crimes against humanity, even if the state is not associated with the accused, as well as with the actions committed. All this will work in practice only when states incorporate these principles into national legislation and are really guided and used by them.<sup>78</sup>

Thus, punishment for war crimes, crimes against the peace and security of mankind is based on international legal proceedings, as well as on the actions of existing international criminal tribunals. To ensure that international crimes of a criminal nature do not go unpunished, the law does not extend

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<sup>77</sup> JUROVICS, Y. *Réflexions sur la spécificité du crime contre l'humanité*. Paris: L.G.D.J., 2002. Bibliothèque de droit international et communautaire, t. 116.

<sup>78</sup> JUROVICS, Y. *Réflexions sur la spécificité du crime contre l'humanité*. Paris: L.G.D.J., 2002. Bibliothèque de droit international et communautaire, t. 116.

the statute of limitations to such crimes. So, even for a long-standing crime, the prosecution can be started at any time, despite the fact that many years have passed.<sup>79</sup>

As mentioned earlier, the concepts of international crimes and crimes of an international character must be distinguished. Not only because of the difference in crimes but also because of the consequences, as well as the subsequent punishment. The latter implies drug trafficking, smuggling, criminal money laundering and so on. It should be noted that the danger of an international criminal offence is much higher and more serious than crimes of an international character since these acts are capable of harming not only individual states but also the world community as a whole. In this case, the object of criminal encroachment is human rights, as well as other values that are protected by the norms of international law. It is important that responsibility for crimes of an international character comes precisely according to national law, not international law. Consequently, prosecution for criminal offences of an international character is based on the norms of criminal law, and responsibility for international crimes is based on international criminal law.<sup>80</sup>

At the time of bringing to justice the perpetrators of a crime, under certain circumstances, the question of privileges and immunity may arise. This insignia is bestowed on officials in accordance with national and international law. However, at the same time, this fact is one of the interesting and topical issues in the study of international legal problems of combating crime at the present time.<sup>81</sup>

State officials, such as the head of state, head of government, minister of foreign affairs and others, enjoy absolute immunity from the criminal jurisdiction of another state in relation to any action.<sup>82</sup>

There are a number of conventions, according to which the immunity of high-ranking officials from criminal jurisdiction is established: the Convention “On Special Missions” 1969, “On the Prevention and Punishment of Crimes against Persons Enjoying International Protection, Including Diplomatic Agents” 1973, as well as 1975 “On the Representation of States in their Relations with International Organizations of a Universal Character”. According to the laws of many countries, the head of state

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<sup>79</sup> JUROVICS, Y. *Réflexions sur la spécificité du crime contre l'humanité*. Paris: L.G.D.J., 2002. Bibliothèque de droit international et communautaire, t. 116.

<sup>80</sup> АВТОР24. Международные преступления: понятие международного преступления. *Справочник от Автора24* [online]. [cited 2021-05-13] Available from Internet: <[https://spravochnick.ru/pravo\\_i\\_yurisprudenciya/ponyatie\\_prestupleniya/mezhdunarodnye\\_prestupleniya/](https://spravochnick.ru/pravo_i_yurisprudenciya/ponyatie_prestupleniya/mezhdunarodnye_prestupleniya/)>

<sup>81</sup> КОЛОДКИН, Р. А. Иммуниет должностных лиц государства от иностранной уголовной юрисдикции. *Юрист-международник*, 2005, № 3.

<sup>82</sup> СКУРАТОВА, А. Ю. К вопросу об иммунитете от уголовной юрисдикции должностных лиц в случае совершения международных преступлений. *Московский журнал международного права*, 2009, № 3. С. 104-120.

has immunity from criminal jurisdiction for the actions that he committed while in the aforementioned position. However, the head of state may be criminally liable during a certain procedure for removing him from his post - impeachment. In this case, the already former head of state can be prosecuted only for committing a particularly grave crime during his tenure.<sup>83</sup>

Since 1990, 65 heads of state have been legally prosecuted for serious human rights violations or financial crimes. It should be noted that most of the leaders of states included in this number were brought to justice. As a result of the trial, some were sentenced to prison terms. If we consider the data on the criminal prosecution of heads of state, then in percentage terms it looks like this: 48% - Latin America, 23% - Africa, 15% - Europe, 11% - Asia, 3% - the Middle East. Examples of the lifting of immunity in special cases, such as the persecution of former leaders of Georgia, Italy, Ukraine, France (2014), Israel (2010, 2014), Mongolia (2012), Maldives (2008) and others, leave the hope that absolutely everyone, regardless of the position they hold, should be held accountable for the crimes.<sup>84</sup>

However, high-ranking officials of states, not only former ones, are not immune from the jurisdiction of the international criminal justice authorities. It is important that those actions that were committed in violation of international law - crimes against peace and security, cannot be related to the definition of functionality. This means that responsibility also occurs in the event that the actions were committed directly on behalf of the state, in the performance of their official duties or their personal immunity.<sup>85</sup>

International tribunals for East Timor, Rwanda, Sierra Leone, Yugoslavia - tried former political and military leaders of these countries for crimes against security, humanity, as well as war crimes that occurred during their time in power. It is important that the Statute of the International Criminal Court stipulates that despite the official position of the head of state or government, as well as parliament, it is not exempt from criminal liability. In addition, according to the Statute, is not a reason for commutation of the sentence.<sup>86</sup>

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<sup>83</sup> JUROVICS, Y. *Réflexions sur la spécificité du crime contre l'humanité*. Paris: L.G.D.J., 2002. Bibliothèque de droit international et communautaire, t. 116.

<sup>84</sup> LUTZ, Ellen L.; and REIGER, Caitlin. *Prosecuting Heads of State*. Cambridge: Cambridge University Press, 2009. 326 p.

<sup>85</sup> Shaw, M. N. *International Law*. 6<sup>th</sup> ed. Cambridge: Cambridge University Press, 2008. 1542 p.

<sup>86</sup> СКУРАТОВА, А. Ю. К вопросу об иммунитете от уголовной юрисдикции должностных лиц в случае совершения международных преступлений. *Московский журнал международного права*, 2009, № 3. С. 104-120.

In conclusion, we can say that in view of the politicization and the possible dependence of the courts on the authorities, and also the lack of the necessary means to prosecute an international crime is a very difficult process that may not always be successful. In the case of criminal actions by representatives of the authorities, the process can also be complicated by privileges and the presence of immunity. And here we again turn to the principle of universal jurisdiction, which can solve this problem. Despite the fact that this also has a system of immunities, however, if the commission of a crime by a state person was carried out outside the definition of functionality, it can be held accountable and deprived of immunity, which means to call for responsibility.

### **3.2. The regulation of universal jurisdiction in Germany**

Germany is currently the world leader in providing international justice through universal jurisdiction. It actively initiates investigations through this principle.<sup>87</sup> For example, the world's first trial of former member of the Syrian secret police in a war crimes case began here and ended successfully.<sup>88</sup>

On February 24, the Supreme Regional Court in Koblenz, Germany, found former Syrian secret service agent Eyad A. guilty of aiding and abetting 30 crimes against humanity committed in the early months of the 2011 uprising and sentenced him to four years and six months in prison.<sup>89</sup>

This verdict was the first-ever trial outside Syria to rule on state-backed torture by the regime of Syrian President Bashar al-Assad. Human rights activists hope that this decision will set a precedent for other cases.<sup>90</sup>

It was alleged that Eyad A., a 44-year-old man who worked for the Syrian intelligence services, sent at least 30 anti-government protesters to a secret prison near Damascus known as Al-Khatib, or Section 251, for torture in 2011. The prosecutor's office instructed for a period of five and a half years. The line of defence was based on the fact that his disobedience to orders could be the reason

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<sup>87</sup> VARNEY, H. *Groundbreaking International Justice in Germany* [online]. May, 2020. [cited 2021-05-05] Available from Internet: <<https://www.ictj.org/news/groundbreaking-international-justice-germany>>

<sup>88</sup> DEUTSCHE WELLE (DW). *German court hands down historic Syrian torture verdict* [online]. February, 2021. [cited 2021-05-17] Available from Internet: <<https://www.dw.com/en/german-court-hands-down-historic-syrian-torture-verdict/a-56670243>>

<sup>89</sup> CIJA. *Koblenz court issues verdict in Eyad A. case* [online]. 24 February, 2021 [cited 2021-05-17] Available from Internet: <<https://cijaonline.org/news/2021/2/24/koblenz-court-issues-verdict-in-eyad-a-case>>

<sup>90</sup> DEUTSCHE WELLE (DW). *German court hands down historic Syrian torture verdict* [online]. February, 2021. [cited 2021-05-17] Available from Internet: <<https://www.dw.com/en/german-court-hands-down-historic-syrian-torture-verdict/a-56670243>>

for his murder. And also that he did not kill the victims of the protests on the orders of a higher authority, but only detained them. In 2019 he was arrested with a higher-ranking former Syrian official, Anwar R., who is also under investigation in Koblenz. During the hearings, more than a dozen witnesses were heard, thousands of photographs were examined, which showed victims of torture and bullying. Anwar R. was charged with crimes against humanity for overseeing the ill-treatment of prisoners in the Al-Khatib detention centre between 2011 and 2012. He is charged with overseeing the torture of at least 4,000 inmates, which killed at least 58 people.<sup>91</sup>

But back to Eyad A., who was a low-ranking officer, whose unit was responsible for suppressing demonstrations. The verdict represents the first conviction for crimes against humanity handed down to a former member of the Syrian regime. In addition, Eyad A. knew and admitted that his behaviour would result in the torture of civilians and that his behaviour was part of widespread and systematic attacks against the civilian population.<sup>92</sup>

Speaking of the accused, Anwar R., he is the highest-ranking former Syrian government official arrested and prosecuted in Europe under the principles of universal jurisdiction for atrocities. The hearing is still ongoing, but there are many meeting materials available. From the latest: On March 10, 2021, the court heard testimony from a 55-year-old man,<sup>93</sup> who was transferred to the Al-Khatib branch, where he was held in a "death cell" along with over a hundred other inmates. He described the cell as dark and airless, like a grave. On March 11, another witness tells how, on the way to the Al-Khatib department, the security officers stopped at an arbitrary place and ordered the detainees to get off the bus. Then they threw cigarette butts at the detainees and beat them. The witness also described sexual harassment by officials who stroked his hair and shoved the barrel of a rifle into his anus.<sup>94</sup>

If we talk about other appalling circumstances of the case, then it is necessary to refer to the testimony of the witness dated December 16, 2020: a 41-year-old female witness testified about her detention.

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<sup>91</sup> DEUTSCHE WELLE (DW). *German court hands down historic Syrian torture verdict* [online]. February, 2021. [cited 2021-05-17] Available from Internet: <<https://www.dw.com/en/german-court-hands-down-historic-syrian-torture-verdict/a-56670243>>

<sup>92</sup> CIJA. *Koblenz court issues verdict in Eyad A. case* [online]. 24 February, 2021 [cited 2021-05-17] Available from Internet: <<https://cijaonline.org/news/2021/2/24/koblenz-court-issues-verdict-in-eyad-a-case>>

<sup>93</sup> KOSTAS, Steve. *First Prosecution of Syrian Government Officials for Crimes Against Humanity* [online]. [cited 2021-05-17] Available from Internet: <<https://www.justiceinitiative.org/litigation/federal-prosecutors-office-v-anwar-r>>

<sup>94</sup> SJAC. *Inside the Raslan Trial: "I am not me."* Trial of Anwar Raslan, Higher Regional Court: Koblenz, Germany. *Trial Monitoring Report 29* [online]. May 13, 2021. Hearing Dates: March 10 & 11, 2021. [cited 2021-05-17] Available from Internet: <<https://syriaaccountability.org/updates/2021/05/13/inside-the-raslan-trial-i-am-not-me/>>

She constantly heard people screaming from the torture, and she witnessed the torture in the corridors of Section 251 through the gap in her cell door. She also described the treatment of female inmates in Division 251, based on her experiences of living in solitary confinement with a pregnant woman, as well as being in an overcrowded cell with several women and girls.<sup>95</sup> Anwar Raslan's lawyer read out his statement in court, rejecting the charges, stating that he never ordered torture, that he had no power, and that he helped many detainees.<sup>96</sup>

Also in April of 2020, an Iraqi known as Taha Al-J was brought to trial in Frankfurt. He is accused of genocide, as well as war crimes, crimes against humanity, human trafficking, membership of a terrorist organization and the murder, especially of a five-year-old girl, paramount tied to a window in the scorching midday heat of an Iraqi summer, who called her mother before at the end ends silenced, presumably dead.<sup>97</sup>

More than half of the known criminal cases against alleged Syrian war criminals were initiated by the German prosecutor's office. But it was not always so. German law even prohibited the prosecution of Nazi-era criminals unless it was proven that they were directly linked to specific killings. It was only in a 2009 case against renowned Nazi security guard John Demjanjuk that a German court finally recognized that those who knowingly participated in the death mechanism should be brought to justice, even in the absence of evidence of direct involvement in particular murder.<sup>98</sup>

The German Code of Crimes against International Law (CCIL) (Völkerstrafgesetzbuch - VStGB in Germany) entered into force on June 30, 2002 and prohibits the core crimes of the Rome Statute in accordance with domestic law. Previously, the German Penal Code allowed universal jurisdiction over genocide and those international crimes for which Germany is obliged to prosecute by treaty. However, the courts have interpreted these provisions to limit jurisdiction to situations in which the

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<sup>95</sup> SJAC. Inside the Raslan Trial: Pregnant at Al-Khatib. Trial of Anwar Raslan and Eyad Al Gharib, Higher Regional Court: Koblenz, Germany. *Trial Monitoring Report 22* [online]. April 8, 2021. Hearing Dates: December 16, 2020. [cited 2021-05-17] Available from Internet: <<https://syriaaccountability.org/updates/2021/04/08/inside-the-raslan-trial-pregnant-at-al-khatib/>>

<sup>96</sup> SJAC. Inside the Anwar Raslan Trial: Raslan speaks (through his lawyer). Trial of Anwar Raslan and Eyad Al Gharib, Higher Regional Court: Koblenz, Germany. *Trial Monitoring Report 2* [online]. May 28, 2020. Hearing Dates: May 18 & 19, 2020. [cited 2021-05-17] Available from Internet: <<https://syriaaccountability.org/updates/2020/05/28/inside-the-anwar-raslan-trial-raslan-speaks-through-his-lawyer/>>

<sup>97</sup> EL-HITAMI, Hannah. *The Yazidi trial in Germany: How to prove genocide in a single case?* [online]. October, 2020. [cited 2021-05-17] Available from Internet: <<https://www.justiceinfo.net/en/45808-yazidi-trial-germany-prove-genocide-single-case.html>>

<sup>98</sup> VARNEY, H. *Groundbreaking International Justice in Germany* [online]. May, 2020. [cited 2021-05-05] Available from Internet: <<https://www.ictj.org/news/groundbreaking-international-justice-germany>>

suspect was present in Germany or where there is another “legitimizing link” between the crime and Germany.<sup>99 100</sup>

From 1993 to 2003, about a hundred criminal cases were investigated and initiated against the Bosnian Serbs. One of the most important precedents was the case of Nikola Jorgis, who was sentenced to life imprisonment. The Düsseldorf High District Court ruled on many counts on 26 September 1997, including eleven charges of genocide. This decision was confirmed by the Federal Court of Justice, the Constitutional Court and the European Court of Human Rights. A non-governmental organization called the Coalition Against Impunity has advocated criminal investigations in Germany and the prosecution of Germans (and Germans by descent) during the 1976-1983 dictatorship in Argentina. And already since 1998, the prosecutor in Nuremberg has issued convictions against former Argentine military personnel for a crime against German citizens.<sup>101</sup>

At that time, media attention was drawn to the case of the German student Elisabeth Kasemann, who was killed by the Argentine military in 1977, which attracted close attention from the entire public. Who moved to Argentina in 1968/9 and joined the resistance after the beginning of the military dictatorship (24 March 1976). She was kidnapped on 9 March 1977 and her extremely tortured body was found on the night of 23 May. The government of Argentina insisted that she was killed during a firefight between the military and guerrilla fighters. But Germany made the autopsy, which proved the contrary: "she had been shot in the neck and back at close-range". For today, around 150 former police and military officers have been sentenced for human rights abuses.<sup>102</sup>

Significantly, former Argentine President Rafael Videla was among the five suspects for whom the court issued an arrest warrant in November 2003 for creating a terrorist organization. It was Germany that advocated the extradition of the former president, despite the fact that Argentina had already had lengthy trials, unlike Italy, Spain and France, which also opened an investigation into these suspects,

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<sup>99</sup> KALECK, Wolfgang. From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008 [online]. In *Michigan Journal of International Law*, 2009, vol. 30, Issue 3, pp. 927–980. [cited 2021-05-15] Available from Internet: <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1137&context=mjil>> p. 949

<sup>100</sup> HUMAN RIGHTS WATCH. *The Legal Framework for Universal Jurisdiction in Germany* [online]. USA, 2021. [cited 2021-05-05] Available from Internet: <[https://www.hrw.org/sites/default/files/related\\_material/IJ0914German\\_0.pdf](https://www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf)>

<sup>101</sup> KALECK, Wolfgang. From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008 [online]. In *Michigan Journal of International Law*, 2009, vol. 30, Issue 3, pp. 927–980. [cited 2021-05-15] Available from Internet: <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1137&context=mjil>> p. 950

<sup>102</sup> ECCHR. *Justice at last: Judgment in the Elisabeth Käsemann case* [online]. [cited 2021-05-15] Available from Internet: <<https://www.ecchr.eu/en/case/justice-at-last-judgment-in-the-elisabeth-kaesemann-case/>>

among other things. Here the source of the solution was the desire to support Argentina's efforts on this issue.<sup>103</sup>

The same cannot be said about the Pinochet case. On September 11, 1973, General Augusto Pinochet Ugarte came to power in Chile in a military coup, namely the overthrow of the government in the person of President Allende. Pinochet was the commander-in-chief of the Chilean army until 1974, when he assumed the title of president of the republic. His presidency lasted until 1990, and his role as commander-in-chief until 1998. His regime was known for its systematic and widespread human rights abuses, with charges of murder, torture and hostage-taking of political opponents.<sup>104</sup> In this case, the German authorities determined that the prosecution in Chile was sufficient.

Pinochet was arrested by the British authorities during his stay in England for treatment in 1998. The purpose of the arrest was his extradition to Spain, where an international warrant was issued. An interesting fact is that Pinochet decided to invoke immunity, in view of the fact that he was a former head of state. However, by a decision of 25 November 1998, the House of Lords ruled by a 3: 2 majority that Pinochet was not entitled to immunity from prosecution and, therefore, could be extradited.<sup>105</sup>

In addition to executions, arrests without a legal, fair trial, which undoubtedly led to the disappearance of people, attempted murders committed or actually committed outside Chile, in Argentina, Portugal, Spain and the United States, the actual crime was the widespread and systematic use of torture in numerous clandestine detention centres. It is important to note that neither the Spanish prosecutor's office nor Pinochet's defence in London has ever questioned the veracity of the facts disclosed in various court orders, which was confirmed by a plenary session of the Criminal Section of the National Court when it unanimously decided to deny the appeal of the Spanish District Attorney, who

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<sup>103</sup> KALECK, Wolfgang. From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008 [online]. In *Michigan Journal of International Law*, 2009, vol. 30, Issue 3, pp. 927–980. [cited 2021-05-15] Available from Internet: <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1137&context=mjil>> p. 951

<sup>104</sup> *Opinions of the Lords of Appeal for Judgement in the Caus. Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte PINOCHET / Regina v. Evans and another and the Commissioner of Police for the Metropolis and others ex parte PINOCHET* [online]. House of Lords, Great Britain (UK). Decision date 25 November 1998. [cited 2021-05-04] Available from Internet: <<http://www.internationalcrimesdatabase.org/Case/855/Pinochet/>>

<sup>105</sup> *Opinions of the Lords of Appeal for Judgement in the Caus. Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte PINOCHET / Regina v. Evans and another and the Commissioner of Police for the Metropolis and others ex parte PINOCHET* [online]. House of Lords, Great Britain (UK). Decision date 25 November 1998. [cited 2021-05-04] Available from Internet: <<http://www.internationalcrimesdatabase.org/Case/855/Pinochet/>>

opposed Spanish jurisdiction.<sup>106</sup> The House of Lords (UK) judgment in the Pinochet case is the first conviction by a municipal court in which a former foreign head of state was prosecuted for acts of torture committed during his tenure.<sup>107</sup>

On 30 October 2006, Pinochet was charged with 36 counts of kidnapping, 23 counts of torture, and one of murder for the torture and disappearance of opponents of his regime at Villa Grimaldi.<sup>108</sup> On 28 November 2006, Pinochet was placed under house arrest; he died twelve days later, on 10 December 2006.<sup>109</sup>

According to the CCIL, German courts are empowered to exercise universal jurisdiction over crimes against humanity, genocide and war crimes. However, the law leaves the Federal Attorney's Office complete discretion with regard to investigations and prosecutions. Complaints against this discretionary right must be appealed to the higher district courts.<sup>110</sup>

It was on the basis of this rule that the prosecutor's office dismissed many complaints: the case against the former President of China Jiang Zemin (2003), the case against the former Minister of Internal Affairs of Uzbekistan Zokirjon Almatov (2005), and the case against the US Secretary of Defense Donald Rumsfeld and others (2004 and 2006). According to German law, the prosecutor can refrain from investigating when the presence of the suspect cannot be confirmed or excluded, although the mandatory necessity of the presence of the suspect is not directly enshrined, but, which is not enshrined, is interpreted by the party with prevailing rights. This is because of the presence or presumptive presence of the suspect makes the investigation permissible and more likely, provided that no other jurisdiction is conducting a genuine investigation of the crimes. For example, in the

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<sup>106</sup> SOLE, Antoni Pigrau. The Pinochet Case in Spain. In *ILSA Journal of International & Comparative Law* [online]. [cited 2021-05-04] 2000, vol. 6, no. 653, pp. 653-683 Available from Internet: <<https://core.ac.uk/download/pdf/51091815.pdf>> p. 657

<sup>107</sup> BIANCHI, Andrea Immunity versus Human Rights: The Pinochet Case. In *European Journal of International Law* [online]. [cited 2021-05-10] 1999, vol. 10, no. 2, pp. 237-277 Available from Internet: <<http://www.ejil.org/pdfs/10/2/581.pdf>> p. 276

<sup>108</sup> HUMAN RIGHTS WATCH. *Chile: Pinochet Finally Faces Torture Charges* [online]. December, 2006. [cited 2021-05-15] Available from Internet: <<https://www.hrw.org/news/2006/12/01/chile-pinochet-finally-faces-torture-charges>>

<sup>109</sup> *Opinions of the Lords of Appeal for Judgement in the Caus. Regina v. Bartle and the Commissioner of Police for the Metropolis and others ex parte PINOCHET / Regina v. Evans and another and the Commissioner of Police for the Metropolis and others ex parte PINOCHET* [online]. House of Lords, Great Britain (UK). Decision date 25 November 1998. [cited 2021-05-04] Available from Internet: <<http://www.internationalcrimesdatabase.org/Case/855/Pinochet/>>

<sup>110</sup> KALECK, Wolfgang. From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008 [online]. In *Michigan Journal of International Law*, 2009, vol. 30, Issue 3, pp. 927-980. [cited 2021-05-15] Available from Internet: <<http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1137&context=mjil>> p.951

2003 case of former Chinese President Jiang Zemin, the prosecutor referred to immunity for former as well as current heads of state and foreign ministers.<sup>111</sup>

In the Donald Rumsfeld case, based on a complaint from Iraqi torture victims in 2004, the prosecutor dismissed the case due to the principle of subsidiarity. In accordance with this principle, the prosecutor argued, Germany had no jurisdiction after the investigation began in a more appropriate direction. Since the investigation was conducted by the US authorities, a state that has territorial jurisdiction over the crime. Despite evidence that Rumsfeld was not under US investigation, the prosecutor found that the US authorities were investigating the crime as a whole, later the High Regional Court in Stuttgart dismissed the applicants' appeal as inadmissible.<sup>112</sup>

In the case of the charges brought against Zokirzhon Almatov, the Minister of Internal Affairs of Uzbekistan, they were also dismissed in 2005. Despite the fact that he was accused of crimes against humanity and torture. Moreover, Mr Almatov was previously in Germany but left it before the start of the trial. Here the Federal Prosecutor referred to the article prohibiting the prosecution of representatives of the state and their delegates if such delegates are invited by the state authorities (art. 20 of the Law on the Judicial Service Act).<sup>113</sup>

In 2009, a specialized unit was created in the Federal Prosecutor's Office. In the same year, the Federal Criminal Police established the Central Unit for Combating War Crimes and Other Offenses under the Code of Crimes against International Law (ZBKV). Between 2009 and 2017, the number of cases reviewed increased steadily: from three investigations in 2009 to 46 in 2017. Of these, six are so-called structural investigations. Likewise, the number of complaints and information submitted to the prosecutor's office rose sharply from 25 in 2013 and 2000 in 2015 to 600 in 2017.<sup>114</sup>

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<sup>111</sup> KALECK, Wolfgang. From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008 [online]. In *Michigan Journal of International Law*, 2009, vol. 30, Issue 3, pp. 927–980. [cited 2021-05-15] Available from Internet: <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1137&context=mjil>> p.951-952

<sup>112</sup> KALECK, Wolfgang. From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008 [online]. In *Michigan Journal of International Law*, 2009, vol. 30, Issue 3, pp. 927–980. [cited 2021-05-15] Available from Internet: <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1137&context=mjil>> p.952

<sup>113</sup> KALECK, Wolfgang. From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008 [online]. In *Michigan Journal of International Law*, 2009, vol. 30, Issue 3, pp. 927–980. [cited 2021-05-15] Available from Internet: <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1137&context=mjil>> p.952

<sup>114</sup> *Universal jurisdiction and international crimes: Constraints and best practices* [online]. WORKSHOP, requested by the European Parliament's Subcommittee on Human Rights. September, 2018 [cited 2021-05-16] pp. 60 Available from Internet: <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO\\_STU\(2018\)603878\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/603878/EXPO_STU(2018)603878_EN.pdf)> p.50

That is, as we can trace the trend, Germany has greatly expanded its criminal jurisdiction outside its country, directly implementing the principle of universal jurisdiction. Based on all of the above, and directly on the legislation of Germany in relation to universal jurisdiction, several of the most notable features of the principle of universal jurisdiction in Germany can be distinguished:<sup>115</sup>

1. Delineation of unconditional and conditional universal jurisdiction over treaty- based-crimes. How It Works - Unconditional universal jurisdiction applies to crimes against humanity, war crimes, genocide and is unlimited. In turn, conditional jurisdiction works in relation to crimes based on contracts, and requires additional conditionality - a legal connection with the territory of Germany or the state.<sup>116</sup>

2. Distinguishing the scope of German criminal jurisdiction in terms of substantive law and procedural obligations for its implementation, as already mentioned earlier. That is, despite the fact that the applicability of German criminal law exists, this may not constitute a basis for the opening of proceedings and further prosecution by the prosecution authorities or criminal courts of Germany outside the state. It must be emphasized that compulsory universal jurisdiction exists only in relation to international crimes and when there is a direct connection with the State, it can be residence or citizenship. Otherwise, the proceeding begins at the discretion of the Federal Attorney.<sup>117</sup>

3. Also, German legislation directly takes into account the hierarchy of jurisdictions, namely, it takes into account the principle of subsidiarity in the case of the exercise of universal jurisdiction. Here, again referring to the prosecution of international crimes, the German prosecutor's office acts in connection with certain circumstances, namely, such as the state of the crime, the nationality of the offender and the victim, the actions of the International Criminal Court. Based on the foregoing, it

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<sup>115</sup> HUMAN RIGHTS WATCH. *The Legal Framework for Universal Jurisdiction in Germany* [online]. USA, 2021. [cited 2021-05-05] Available from Internet: <[https://www.hrw.org/sites/default/files/related\\_material/IJ0914German\\_0.pdf](https://www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf)>

<sup>116</sup> JESSBERGER, F. *The Principle of Universal Jurisdiction in German Criminal Law* [online]. Berlin, 2007. [cited 2021-05-16] Available from Internet: <<https://www.jura.uni-hamburg.de/die-fakultaet/professuren/professur-jessberger/forschung/landesbericht-jessberger-2007.pdf>>

<sup>117</sup> JESSBERGER, F. *The Principle of Universal Jurisdiction in German Criminal Law* [online]. Berlin, 2007. [cited 2021-05-16] Available from Internet: <<https://www.jura.uni-hamburg.de/die-fakultaet/professuren/professur-jessberger/forschung/landesbericht-jessberger-2007.pdf>>

can be concluded that Germany resorts to the principle of universal jurisdiction in the event that the aforementioned jurisdictions are unwilling or unable to initiate prosecution.<sup>118</sup>

4. Last but not least, the need for the presence of the accused during the trial, there is also a distinction here. Despite the fact that pre-trial proceedings can be conducted in absentia, there is a need for the presence of the accused precisely during the main proceedings. Importantly, the presence of the accused in Germany is critical to the question of whether the prosecutor is obliged to prosecute. Prosecutors have wide discretionary powers and can refuse an investigation if the suspect is outside Germany and his or her presence is not expected if neither the suspect nor the victim is a German citizen.<sup>119120</sup>

Germany has really adequately implemented the principle of universal jurisdiction into legislation and is famous for one of the broadest approaches. Based on all of the above, we can conclude that Germany is indeed the state that can call to account the Belarusian criminals who have committed a crime against humanity.

### 3.3. Implementation to the situation in Belarus

Speaking about the situation in the Republic of Belarus, already in some states, criminal cases and pre-trial investigations are initiated on the facts of torture and other violations of human rights in Belarus, based on the principle of universal jurisdiction. Here, states refer to the 1984 International Convention against Torture, which imposes an obligation on states to investigate torture committed by their citizens against their citizens, or if the perpetrator is on the territory of that state. These countries include Lithuania, Poland, the Czech Republic and Germany, however, this is probably not the limit, and new litigation will follow.<sup>121</sup>

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<sup>118</sup> JESSBERGER, F. *The Principle of Universal Jurisdiction in German Criminal Law* [online]. Berlin, 2007. [cited 2021-05-16] Available from Internet: <<https://www.jura.uni-hamburg.de/die-fakultaet/professuren/professur-jessberger/forschung/landesbericht-jessberger-2007.pdf>>

<sup>119</sup> JESSBERGER, F. *The Principle of Universal Jurisdiction in German Criminal Law* [online]. Berlin, 2007. [cited 2021-05-16] Available from Internet: <<https://www.jura.uni-hamburg.de/die-fakultaet/professuren/professur-jessberger/forschung/landesbericht-jessberger-2007.pdf>>

<sup>120</sup> HUMAN RIGHTS WATCH. *The Legal Framework for Universal Jurisdiction in Germany* [online]. USA, 2021. [cited 2021-05-05] Available from Internet: <[https://www.hrw.org/sites/default/files/related\\_material/IJ0914German\\_0.pdf](https://www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf)>

<sup>121</sup> BNS, LRT.lt. *Lithuanian prosecutors launch probe into regime violence in Belarus* [online]. December, 2020. [cited 2021-05-03] Available from Internet: <<https://www.lrt.lt/en/news-in-english/19/1294884/lithuanian-prosecutors-launch-probe-into-regime-violence-in-belarus>>

Moreover, in connection with the growth of violence, Polish MEP Radoslaw Sikorski warned Lukashenko that he should expect not only sanctions but also the possible intervention of the International Criminal Court (hereinafter – ICC). However, there are certain difficulties here.<sup>122</sup>

Since in the situation with Belarus there is a crime against humanity – torture, violence – the jurisdiction of the ICC is valid. According to the Rome Statute, the founding treaty of the ICC, crimes against humanity include widespread or systematic abuses directed against civilians. However, the ICC is the last resort. It is assumed that initially, the states should independently investigate crimes, especially considering the fact that the legislation of the Republic of Belarus, namely the Criminal Code, has an article devoted to crimes against the safety of humanity.<sup>123</sup> Unfortunately, such actions are not observed, and then we return to the principle of universal jurisdiction. Moreover, Belarus is not a party to the Rome Statute, the only way to use the jurisdiction of the Court is the referral of the case by the UN Security Council.<sup>124</sup>

According to the resource on May 5, 2021, lawyers already filed a criminal case in Germany on behalf of 10 Belarusians, claiming that the authoritarian ruler Alexander Lukashenko committed crimes against humanity. “Speaking on behalf of the victims of torture, the lawyers said on May 5 that they had filed a complaint against Lukashenka and other “Belarusian security officials” with the federal prosecutor's office in the German city of Karlsruhe”.<sup>125</sup>

Since Belarus does not observe the prospect of criminal prosecution of Lukashenka or the security forces, Germany becomes a chance for Belarusian society and the international community in general to conduct an independent investigation of the alleged crimes within the framework of the principle of universal jurisdiction.<sup>126</sup>

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<sup>122</sup> BUSOL, K. *Can the International Criminal Court Help Belarus?* [online]. August, 2020. [cited 2021-05-03] Available from Internet: <<https://www.chathamhouse.org/2020/08/can-international-criminal-court-help-belarus>>

<sup>123</sup> Уголовный Кодекс Республики Беларусь 275-3 от 9.07.1999 г. Статья 128. Преступления против безопасности человечества

<sup>124</sup> BUSOL, K. *Can the International Criminal Court Help Belarus?* [online]. August, 2020. [cited 2021-05-03] Available from Internet: <<https://www.chathamhouse.org/2020/08/can-international-criminal-court-help-belarus>>

<sup>125</sup> RFE/RL'S BELARUS SERVICE. *Case Filed in Germany Accusing Lukashenka of Crimes Against Humanity* [online]. May, 2021. [cited 2021-05-05] Available from Internet: <<https://www.rferl.org/a/belarus-lukashenka-crimes-against-humanity-germany-court/31238838.html>>

<sup>126</sup> RFE/RL'S BELARUS SERVICE. *Case Filed in Germany Accusing Lukashenka of Crimes Against Humanity* [online]. May, 2021. [cited 2021-05-05] Available from Internet: <<https://www.rferl.org/a/belarus-lukashenka-crimes-against-humanity-germany-court/31238838.html>>

“Germany is one of the few remaining countries that has genuine universal jurisdiction, meaning that its laws do not require any connection between grave international crimes committed abroad and Germany before prosecutors can investigate and prosecute”.<sup>127</sup>

As was already mentioned, in 2002, the Rome Statute of the International Criminal Court (Rome Statute) was transformed into German law by the Code of Crimes against International Law (Völkerstrafgesetzbuch – VStGB). The VStGB was amended by Article 1 of the Law of December 22, 2016, which entered into force on January 1, 2017. With regard to jurisdiction, Section 1 of the VStGB specifically distinguishes between: serious crimes, aggression and other criminal offenses. According to the VStGB, torture and enforced disappearance are only major crimes against humanity and war crimes, both of which imply universal jurisdiction.<sup>128</sup>

The German legislature has sought to define crimes against humanity in the VStGB as close as possible to the wording of article 7 of the Rome Statute. However, the requirements of the German Constitution (Grundgesetz – GG), in particular the principle of legal certainty (Bestimmtheitsgrundsatz), are set out in Section 103 GG (2) and StGB Section 1 is reduced to a more reasonable and narrow wording of Section 7 of the VStGB compared to Article 7 of the Rome Statute, as indicated below. Crimes against humanity can be committed in times of peace, as well as during international or non-international armed conflicts. Most major criminal acts are also punishable under the general principles of the German Penal Code and – in accordance with article 7 of the Rome Statute – constitute crimes against humanity as they are committed as part of a widespread or systematic attack against any civilian population.<sup>129</sup>

German law classifies crimes against humanity as Willful killing, Extermination, Enslavement, Deportation or forced transfer of persons, Torture, Sexual violence, Enforced disappearance, Causing

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<sup>127</sup> HUMAN RIGHTS WATCH. *The Legal Framework for Universal Jurisdiction in Germany* [online]. USA, 2021. [cited 2021-05-05] Available from Internet: <[https://www.hrw.org/sites/default/files/related\\_material/IJ0914German\\_0.pdf](https://www.hrw.org/sites/default/files/related_material/IJ0914German_0.pdf)>

<sup>128</sup> Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. *Universal Jurisdiction Law and Practice in Germany* [online]. Briefing paper, March, 2019. 37 p. [cited 2021-05-02] Available from Internet: <<https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>> pp. 3-4

<sup>129</sup> Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. *Universal Jurisdiction Law and Practice in Germany* [online]. Briefing paper, March, 2019. 37 p. [cited 2021-05-02] Available from Internet: <<https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>> p. 5

serious physical or mental harm, Unlawful deprivation of physical liberty, Persecution, Apartheid and Other inhumane acts.

The crime of torture is defined in accordance with articles 7 (1) (f) and 7 (2) (e) of the Rome Statute. The exception to the legal sanctions set out in paragraph 1 of Article 7 of the VStGB applies only to forms of punishment that are outlawed worldwide in accordance with customary international law. Consequently, forms of punishment that, at least at the regional level, are considered legal are not considered torture; criminal liability under other provisions remains unchanged.<sup>130</sup>

The definition of torture contained in article 7(2)(e) of the 1998 Rome Statute of the International Criminal Court (ICC):

“Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.<sup>131</sup>

Everything that happened during the suppression of protests from August 9, 2020, by the special forces of the Ministry of Internal Affairs (hereinafter – OMON) and other representatives of the authorities fall under the concept of torture, which has already been proven in the author's work and is also argued by the article of German law presented above.<sup>132</sup>

OMON officers used disproportionate and unjustified physical force, special equipment and non-lethal weapons, which, nevertheless, are dangerous depending on how they are used (water cannons, batons, stun grenades, rubber bullets). As a result, many people were injured. At least two protesters were killed as a result of direct police action, and two others died after being detained. On August 12, 2020, the Ministry of Health said just over 200 people were admitted to hospital with injuries in two days of protests, some of them requiring surgery. During August, more than 7,500 people were arrested for participating in peaceful protests. The protesters were detained in almost all cities of the

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<sup>130</sup> Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. *Universal Jurisdiction Law and Practice in Germany* [online]. Briefing paper, March, 2019. 37 p. [cited 2021-05-02] Available from Internet: <<https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>> p.7

<sup>131</sup> Rome Statute for the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 Jul. 1998

<sup>132</sup> Committee On Legal Affairs And Human Rights. Human rights violations in Belarus require an international investigation [online]. Report. April, 2021. 19 p. [cited 2021-05-05] Available from Internet: <<https://www.ecoi.net/en/file/local/2048745/doc.+15256.pdf>> P.8

country. Some of the detainees were kept incommunicado for several days, thus exerting psychological pressure on them. Belarusian human rights organizations have registered and documented more than 500 cases of torture and other types of cruel or inhuman treatment, which indicates the systematic use of such tactics on a massive scale.<sup>133</sup>

In September 2020, more than 3,500 people were arrested for participating in protests, of which more than 2,700 were detained. Human rights defenders and activists claim that from 9 to 14 August 2020, the actions they describe as crimes against human and security were widespread throughout the country: people were detained and taken away because of their political beliefs, and then subjected to torture and other prohibited types of abuse. According to the Office of the United Nations High Commissioner for Human Rights, for several days starting from August 9, law enforcement officials throughout the country carried out actions aimed at inflicting serious injuries on people (protesters, members of the political opposition, innocent passers-by, journalists, bloggers).<sup>134</sup>

VStGB provides two main categories of responsibility:

- the individual criminal responsibility of the offender for his or her own actions; and
- responsibility of the military command and civilian authorities for crimes committed by their subordinates.

Does not provide for any special regimes of liability, for example, for participation in a crime. Thus, the general types of liability set out in the general criminal law StGB also apply to the offenses provided for by the VStGB.<sup>135</sup>

Responsibility of commanders / superiors in accordance with Article 28 of the Rome Statute, the VStGB distinguishes between military commanders and civilian commanders. In addition, the VStGB includes chiefs who do not hold an official position of command, but actually control it. According to German law, Article 28 of the Rome Statute corresponds to Section 4 of the VStGB.

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<sup>133</sup> COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS. *Human rights violations in Belarus require an international investigation* [online]. Report. April, 2021. 19 p. [cited 2021-05-05] Available from Internet: <<https://www.ecoi.net/en/file/local/2048745/doc.+15256.pdf>> P.9

<sup>134</sup> COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS. *Human rights violations in Belarus require an international investigation* [online]. Report. April, 2021. 19 p. [cited 2021-05-05] Available from Internet: <<https://www.ecoi.net/en/file/local/2048745/doc.+15256.pdf>> P.9

<sup>135</sup> Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. *Universal Jurisdiction Law and Practice in Germany* [online]. Briefing paper, March, 2019. 37 p. [cited 2021-05-02] Available from Internet: <<https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>> P.12

According to Section 4 of the VStGB, if a commander / superior willfully fail to prevent his or her subordinate from committing an offense set forth in VStGB Sections 6-13, that person is liable as if he or she had committed an offense and therefore could be charged with the same crime. In accordance with Articles 14 and 15 VStGB – in contrast to Article 4 StGB – the commander / superior is not liable for the subordinate's misconduct, but solely for his own breach of duty or failure to act. Under Section 4 of the VStGB, a commander / superior can be sentenced as a direct executor, while committing crimes under Articles 14 and 15 of the VStGB is punishable by up to five years' imprisonment.<sup>136</sup>

It is worth paying attention to this, because under German law, any person who intentionally orders / induces another person to intentionally commit a wrongful act will be sentenced as if that person were the main executor.<sup>137</sup>

Thanks to the existence of such a method of responsibility, it is possible to involve not only the OMON officers and the police, but also the person who directly rules and gives the orders, namely Alexander Grigorievich Lukashenko. At the moment, he is the commander-in-chief of the Armed Forces of the Republic of Belarus, and only he has the power to give such orders on how to generate violence on the streets of the country. In addition to orders, A.G. Lukashenka signs decrees on the appointment of benefits, the payment of large sums of money to employees who “resist” the protests thereby encouraging the criminal actions of its charges.

With regard to the main crimes of genocide, crimes against humanity and war crimes, paragraph 1 of the VStGB judgment does not provide for any criteria limiting universal jurisdiction. One of the main goals of the VStGB was to enable Germany to prosecute crimes falling under the jurisdiction of the International Criminal Court (ICC); however, in practice, the prosecution has discretion to refrain from investigating when certain requirements are not met.<sup>138</sup>

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<sup>136</sup> Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. *Universal Jurisdiction Law and Practice in Germany* [online]. Briefing paper, March, 2019. 37 p. [cited 2021-05-02] Available from Internet: <<https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>> P.13

<sup>137</sup> Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. *Universal Jurisdiction Law and Practice in Germany* [online]. Briefing paper, March, 2019. 37 p. [cited 2021-05-02] Available from Internet: <<https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>> P.14

<sup>138</sup> Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. *Universal Jurisdiction Law and Practice in Germany* [online]. Briefing paper, March, 2019. 37 p. [cited 2021-05-02] Available from Internet:

Also it is important that – Investigations and prosecutions of VStGB crimes under universal jurisdiction are not subject to any formal or informal political approval.<sup>139</sup>

Because the political side of the issue prevents the maximum integration of universal jurisdiction. Using the example of the Republic of Belarus, against which sanctions have already been imposed several times, world leaders are asking the president to change his mind. In some countries, he is not even perceived as a legitimate president.

Leading political groups in the European Parliament called for a repeat presidential election in Belarus.

“We do not recognize Alyaksandr Lukashenka as the re-elected President of Belarus and consider him *persona non grata* in the European Union. We join the Belarusian people in their demand to hold new and free elections under the supervision of independent observers,” reads the joint statement of the leaders of the five parties of the European Parliament, circulated on Monday, 17 August 2020.<sup>140</sup>

Anyone, including victims and non-governmental organizations, can report wrongdoing orally or in writing to any public prosecutor's office, police or local courts regarding the initiation of an investigation. Once notified of a possible crime, prosecutors are required to investigate the case, unless otherwise provided by law (mandatory prosecution principle).<sup>141</sup> According to the Belarusian legislation, any complaint or statement must also be considered, however, any attempts to obtain a court decision on the initiation of the victim were unsuccessful.

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<<https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>> P.16

<sup>139</sup> Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. *Universal Jurisdiction Law and Practice in Germany* [online]. Briefing paper, March, 2019. 37 p. [cited 2021-05-02] Available from Internet: <<https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>> P.19

<sup>140</sup> ДЕМІДОВА, О. В *Европарламенте назвали Лукашенко персоной нон грата в ЕС* [online]. August, 2020 [cited 2021-04-28] Available from Internet: <<https://www.dw.com/ru/partii-evroparlamenta-ne-priznali-lukashenko-pereizbrannym-prezidentom/a-54598349>>

<sup>141</sup> Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. *Universal Jurisdiction Law and Practice in Germany* [online]. Briefing paper, March, 2019. 37 p. [cited 2021-05-02] Available from Internet: <<https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>> P.21

The threshold to open an investigation is defined in Section 152 paragraph 2 StPO and provides that there must be sufficient factual indications (zureichende tatsächliche Anhaltspunkte) of a crime for the prosecutor to investigate.<sup>142</sup>

German criminal law does not contain any specific rules regarding the length of an investigation, but the principle of a fair trial set out in Article 6 of the European Convention on Human Rights may limit the length of an ongoing investigation. Therefore, depending on the complexity of the particular case, the investigation should be completed within a reasonable time frame.

As mentioned earlier, as authorized representatives acting on behalf of torture victims, the lawyers Mark Lupschitz, Onur U. Özata, Roland Krause and Benedikt Lux have already submitted to the Federal Prosecutor General in Karlsruhe a criminal complaint against Alexander G. Lukashenko and other Belarusian security officers. Ten Belarusians have filed criminal cases in Germany against President Alexander G. Lukashenko and his security apparatus. Lawyers claim that their clients were victims of crimes against humanity during the suppression of protests by the Belarusian government since August 2020. According to lawyers, the plaintiffs were physically abused, deprived of food and sleep, and humiliated.<sup>143</sup>

According to the press release by Mark Lupschitz, Onur U. Özata, Roland Krause and Benedikt Lux ten victims turned to lawyers to file a complaint against systematic state-ordered torture with the Federal Prosecutor General for an investigation by the German judicial authorities.<sup>144</sup>

All clients reported fake arrests, torture and ill-treatment during their days of detention. Moreover, they were held in too small cells or vehicles and subjected to physical abuse, humiliation, threats, insults and humiliation in other ways. Other methods of torture included officers lining up corridors and beating people who had to walk through them. In addition, people were forced to kneel with their hands tied behind their backs so that in this position they could only use the head as additional support.

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<sup>142</sup> Open Society Justice Initiative in partnership with TRIAL International and Allen & Overy. *Universal Jurisdiction Law and Practice in Germany* [online]. Briefing paper, March, 2019. 37 p. [cited 2021-05-02] Available from Internet: <<https://www.justiceinitiative.org/uploads/0b3c66af-68e0-4fd3-a8e0-d938a6e2b43b/universal-jurisdiction-law-and-practice-germany.pdf>> P.21

<sup>143</sup> DEUTSCHE WELLE (DW). *Lawyers file suit against Belarus' Lukashenko in Germany* [online]. May, 2021. [cited 2021-05-15] Available from Internet: <<https://www.dw.com/en/lawyers-file-suit-against-belarus-lukashenko-in-germany/a-57432482>>

<sup>144</sup> LUPSCHITZ, Mark; and ÖZATA, Onur U.; and KRAUSE, Roland; and LUX, Benedikt. *Criminal Proceedings Against Alexander G. Lukashenko in Germany* [online]. Press release. May, 2021. Vilnius (Lithuania): mail from Liudmila Ulyashyna, 10 May 2021, 20:14 GMT+3 [cited 2021-05-10, 20:34 GMT+3]. Private message.

This was accompanied by an arbitrary beating, deprivation of food and sleep, and denial of medical assistance. Each of the clients had dire health consequences. In general, the treatment by the state can only be described as excessively harsh.<sup>145</sup> Officials expect the Office of the Federal Prosecutor General to exercise its powers and prosecute these crimes in accordance with the principle of universal jurisdiction.

The lawyers also refer to the case mentioned above, namely the Eyad A. case, also the prosecution on the highest-ranking former Syrian government official Anwar R. and expect from Germany that it will also support universal human rights in the case of Belarus. Officials, as well as their clients, are demanding fairness, namely an independent investigation and prosecution of these serious crimes.<sup>146</sup>

As in the Syrian case, there are also multiple testimonies of torture, violence, humiliation, inappropriate conditions of detention in cells, etc. in Belarus. And according to German law, these actions fall under the concept of a crime against humanity and should be prosecuted by this law. Despite the fact that criminal prosecution can be instituted against the perpetrators even many years after the crime was committed, the sooner the trial begins, the more likely it is that the current government will have to leave office. The state will be able to recover and begin to improve legislation in all areas, especially regarding the independence of the courts, electoral law of the state and the prosecution of crimes against humanity. Unfortunately, mistakes have to be corrected based on such bitter experience.

Indeed, without the intervention of Germany, none of the perpetrators will face any legal consequences for the crimes committed. And it is very important that lawyers approach this case with full responsibility. From the point of view of legislation, this is the only way out, unless the current President Alexander G. Lukashenko voluntarily leaves his post under pressure from the public and the entire international community, taking into account the applied sanctions. But in this case, this will only simplify the issue of depriving him of his immunity, as well as bringing other government officials to justice, since they will be deprived of their patronage. It will also be easier to access all ignored complaints, medical reports and information about missing people who are now being

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<sup>145</sup> LUPSCHITZ, Mark; and ÖZATA, Onur U.; and KRAUSE, Roland; and LUX, Benedikt. *Criminal Proceedings Against Alexander G. Lukashenko in Germany* [online]. Press release. May, 2021. Vilnius (Lithuania): mail from Liudmila Ulyashyna, 10 May 2021, 20:14 GMT+3 [cited 2021-05-10, 20:34 GMT+3]. Private message.

<sup>146</sup> LUPSCHITZ, Mark; and ÖZATA, Onur U.; and KRAUSE, Roland; and LUX, Benedikt. *Criminal Proceedings Against Alexander G. Lukashenko in Germany* [online]. Press release. May, 2021. Vilnius (Lithuania): mail from Liudmila Ulyashyna, 10 May 2021, 20:14 GMT+3 [cited 2021-05-10, 20:34 GMT+3]. Private message.

carefully hidden or destroyed, which means that the prosecution will have more evidence to prosecute.

All kinds of detentions will be stopped, people who left the country due to repression by the authorities will be able to return to Belarus, illegal and disproportionate decisions of the court will be reviewed and fair decisions will be made, all complaints will finally be considered, and the innocent will be acquitted. The decision of this case will be a large-scale and relevant precedent for a long time to come. Germany will further improve the principle of universal jurisdiction and consolidate it in practice. It will also once again emphasize its leadership position among other states and serve as an example for other states regarding the implementation of this principle in national legislation.

The author highlights that universal jurisdiction can be applied in accordance with German law, despite the fact that the political side of the issue prevents the maximum integration of universal jurisdiction. One has only to take into account that the criminals are currently in the Republic of Belarus, which means that the prosecution can, at its discretion, refrain from investigating. There are no other evident factors for refusal to initiate prosecutions that limit universal jurisdiction.

## CONCLUSIONS

1. The author explored the concept of universal jurisdiction both in general terms and in the context of German law and practice. It has been proven that this principle is not only a unique phenomenon but also very effective in the case of bringing to justice the perpetrators of international crimes. It also aims to unite States in the fight for a fair trial in cases where national law fails to meet this obligation. However, for the implementation of this principle, certain measures must be applied, such as changing legislation in accordance with the norms of international criminal law, creating or changing internal structures carrying out this process, eliminating any dependence and bias of the courts, as well as transparency to avoid possible politicization.
2. The actions of the Belarusian security officials and other representatives of the authorities, in particular the actions of the self-named President Alexander G. Lukashenko, fall under the concept of a crime against humanity - torture. This study, all kinds of reports prepared by qualified specialists, testimonies of victims and witnesses of torture, as well as violation of international law are irrefutable evidence of this fact. An analysis of the current national legislation shows that in the Republic of Belarus there can be no fair trial in relation to these crimes since at the legislative level, as well as in practice, it is shown that there are no independent courts in Belarus since all of them are directly subordinate to the president. All investigations were quickly closed and did not lead to any result, which means that it is not possible to rely on national jurisdiction.
3. German legislation has established itself as a well-developed, well-thought-out and valid legislation. Recent lawsuits only confirm this fact. Under German law, criminals who have committed crimes against humanity can and should be prosecuted, especially on the basis of the Syrian precedent. Regarding to the universal jurisdiction, the victims of the protests still have a chance for a fair trial, especially when addressing the leader in the implementation of this principle - Germany. In accordance with the above, it can be assumed that the 10 statements that were received by the authorized body of Germany have grounds for investigation, and, moreover, a call to account for the perpetrators according to the principles of universal jurisdiction and crimes against humanity. Crimes committed by representatives of the Belarusian authorities definitely fall under the definition of torture in German law, as well as in Articles 7 (1) (f) and 7 (2) (e) of the Rome Statute.

The author believes that the Federal Prosecutor of Germany will open investigations, based so far on 10 complaints submitted by lawyers: Mark Lupschitz, Onur U. Özata, Roland Krause and Benedikt Lux. And he will conduct such a detailed investigation, as in the case of Syria, at the

end of which he will call the criminals to account. It can be assumed that if this investigation is opened, there will be more complaints against the actions of the authorities, which will form an even more weighty precedent. All this will not only affect the formation and implementation of the principle of universal jurisdiction in other states, not only improve the current advanced judicial system in Germany but also restore justice and help Belarus get rid of the dictatorial regime. In any case, Germany should investigate cases regarding the suppression of protests in the Republic of Belarus and call those responsible to account, in order not only to restore justice within the state but also to give even greater importance to the institution of international criminal law.

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