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The use of ‘Push-back policies’ by Polish officers from the perspective of the provisions of the Rome Statute of the International Criminal Court

In assessing the conduct of Polish officers in the context of their push-back operations, or deportation, meaning the process of forcing back to Belarus persons who, in the opinion of the Polish authorities, have illegally crossed the border, I will confine myself to one crime listed in Art. 5 of the [Statute of the International Criminal Court](#) (hereinafter ICC) and defined in Art. 7 thereof, namely the crime against humanity. Given the absence of genocidal intent, the assessment will not address whether the conditions for the crime of genocide, as defined in Art. 6 of the ICC Statute, are met. Furthermore, due to the absence of an armed conflict on the territory of Poland, the assessment will not address war crimes or aggression, as we are not dealing so far with acts that could be qualified as aggression. For such an evaluation to be possible, acts of aggression would have to occur which, according to Art. 8 bis of the Statute, would ‘by its character, gravity and scale, constitute a manifest violation of the Charter of the United Nations’. According to the [Understandings regarding the amendment](#) to the Statute, these conditions must be met contemporaneously and must be sufficiently grave to justify the indisputability of such an assessment. The incidents at the border that are currently taking place do not meet these prerequisites to the extent that would justify describing them as acts of aggression.

It is also worth noting that Belarus (whose officers are responsible for the incidents at the border) is not a party to the ICC Statute. Thus, for it to fall under the jurisdiction of the International Criminal Court, the only possibility is for the UN Security Council to refer the case to it (on the basis of Art. 13 (b)). However, this is difficult to envisage in a situation where Russia is a permanent member of that body.

According to the definition in the ICC Statute, crimes against humanity must be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’. Such acts include murder, extermination, torture, as well as ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’ (Art. 7 (1) (k)). For an act to be considered as an attack against a civilian population, a series of actions must be used in support of state policy. However, in order for the Court to address the reported crimes against humanity, they must not only be systematic or widespread, but also the case must be admissible and the Court has to assess whether to prosecute given case. (Art. 17 of the ICC Statute). The admissibility of a case depends on whether the State has taken any action to punish the perpetrators of the alleged crimes, and whether the gravity of the case justifies further action by the Court. The case cannot therefore concern marginal issues and crimes. The pushback policy is a plan organised by the Polish state (by its officers, by order of the executive authorities and with the consent of the legislative authorities) to forcibly remove from the territory of Poland persons who, according to the government, have illegally crossed the border. In the assessment of the actions of the State, however, it is irrelevant whether these persons are admitted to the asylum procedure or whether they have crossed the border legally or illegally. If they are on Polish territory, the state is under the obligation to provide them with protection and assistance if they are in a condition that could endanger their life or health.

However, these migrants are not given the right to apply for asylum despite the fact that some of them are refugees who were forced to flee from their previous place of residence (e.g. Afghanistan). These people are being taken to the Polish border and forced to cross it illegally into Belarus. The Polish authorities not

only fail to provide them with the opportunity to request international protection, but also fail to provide assistance, and they even forcibly remove them from hospitals. These measures have also been applied to mothers with children or people who are ill. As a result of this policy, nine deaths have already been officially confirmed ([data as of 28 December 2021](#)). The deaths were caused by low temperatures, starvation, hypothermia, lack of access to medicines and failure to receive adequate medical assistance in a timely manner.

The Polish authorities are not granting aid to the sick and the hypothermic migrants, nor are they allowing other entities (humanitarian organisations or medical services) to administer such aid, by preventing their entry into the zone covered by the state of emergency. These are widespread and systematic actions, consistently directed against the civilian population, leading to death (from hunger, hypothermia, and failure to receive assistance) and physical harm. These actions are a means of implementing a deliberate state policy designed to remove these people from the territory of Poland. The persistence, scale and systematic nature of these operations is also evidenced by the fact that the Polish authorities had already committed violations in similar circumstances. The judgments of the European Court of Human Rights have already confirmed this twice, finding that Poland was in breach of the [European Convention on Human Rights](#) (ECHR) by making it impossible to apply for international protection and by carrying out collective expulsions from its territory.

In [M.K and Others v. Poland](#), the Court addressed the illegality of collective expulsions as contrary to the provisions of Art. 3 of the ECHR and Art. 4 of Protocol IV to the Convention, describing the Polish expulsion policy as a wider state policy and thus acknowledging its systemic character (§ 208). Infringements of the same provisions for the same reasons were also confirmed by the Court in the judgment [D.A and Others v. Poland](#). Undoubtedly, we can classify the above-described acts as a crime against humanity. Their nature, their widespread and extensive character and the participation of state officials who knowingly and intentionally carry out the crime substantiate this.

As for the admissibility of the case before the Court, it is certainly not a marginal case, as push-backs affect hundreds of people every day. We already know of several deaths on the Polish–Belarusian border. However, the scale of physical violations cannot be established due to the limited possibility of reaching the expelled persons. Moreover, the state does not conduct any investigation, and the behaviour of its officers towards those trying to cross the border is not frowned upon by the authorities at all. As indicated above, the opposite process is taking place: These behaviours are part of a planned state policy. Additionally, individuals who make critical comments about the actions of border guards are publicly condemned, accused of damaging the reputation of Polish soldiers and [threatened with criminal prosecution](#).

By implementing such a policy, the state aims mainly to remove these people from Poland. The scale of the problem and the simultaneous lack of reaction on the part of the authorities so as to punish those guilty of such a policy means that these actions may be judged as crimes against humanity. Poland has been a party to the ICC Statute since 2002. There is, therefore, no obstacle to informing the Court of the scale of the violations on the Polish-Belarusian border by means of referrals. As a result, the ICC Prosecutor may, but need not, as he or she will assess the interests of justice, initiate a preliminary examination of the push-back situation.