



**PERMANENT MISSION
OF THE REPUBLIC OF BELARUS
TO THE UNITED NATIONS**

№ 02-24/1137

The Permanent Mission of the Republic of Belarus to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to forward the comments of the Republic of Belarus on the topics that are currently under consideration of the International Law Commission, namely on:

- Succession of States in respect of State responsibility;
- Immunity of State officials from foreign criminal jurisdiction;
- General principles of law;

The Permanent Mission of the Republic of Belarus to the United Nations avails itself of this opportunity to renew the Secretary-General of the United Nations the assurances of its highest consideration.

Annex as stated.



New York, December 31, 2019

Secretary-General
of the United Nations
New York

Translated from Russian

Succession of States in respect of State responsibility

Belarus appreciates the outcome of the work of the Commission and the Special Rapporteur, Mr. Šturma, on this complex and controversial topic. Like the Special Rapporteur and the Commission, Belarus recognizes that the topic is a highly context-specific and sensitive one and that issues relating to succession in respect of responsibility are generally settled on an ad hoc basis. In this connection, it endorses the priority to be given to agreements between the States concerned and the subsidiary or advisory nature of the draft articles.

Regarding the debate about the form that the outcome of the Commission's work should take, Belarus is of the view that guidelines, conclusions, model language and so forth would be more appropriate than draft articles constituting the basis for an international treaty. At any rate, discussion of this question should not block work on fleshing out the substance of the draft text. As Belarus understands it, the form of the Commission's output will depend, in large part, on the extent to which it contributes to the progressive development of international law. Experience has shown that the conclusion of international treaties on fundamental questions of general international law is highly unlikely.

The Commission and the Special Rapporteur have already touched on some rather interesting issues. In particular, Belarus endorses the idea that the "clean slate" rule should not apply in cases where acts of the predecessor State have caused harm (for example, environmental harm) to the territory or population of the newly independent State.

With regard to national legislation governing the implementation of international treaties, pursuant to article 8, third paragraph, of the Constitution, Belarus acknowledges the primacy of the generally recognized principles of international law and ensures that its legislation complies with them. Act No. 421-Z of 23 July 2008 on international treaties to which Belarus is a party establishes, in article 36, that the country's international treaties must be implemented conscientiously in accordance with international law. The rules of law contained in international treaties to which Belarus is a party are directly applicable, except where it is specified in an international treaty that such application requires the adoption or promulgation of a legal act, and have the force of the legal act whereby Belarus expresses its consent to be bound by the international treaty concerned.

In addition, the majority of laws in Belarus contain a provision on the primacy of the country's international treaties over the relevant law.

Immunity of State officials from foreign criminal jurisdiction

Belarus reaffirms its earlier view regarding the Special Rapporteur's sixth report on this topic and reiterates that, although the Commission has the prerogative to engage in the progressive development of international law, acceptance of its outputs depends directly on the consideration it gives to State positions, including those expressed in the Sixth Committee.

Regarding the seventh report, Belarus agrees fully with the Special Rapporteur that a thorough study of the procedural aspects of the topic will help to strike a balance between the different rights and interests of the international community. It might also be appropriate to include a special set of procedural guarantees applicable to draft article 7, although it is the understanding of Belarus that this article is to be excluded from the draft text.

The balance of rights and responsibilities in the text appears to have shifted significantly at the current stage in favour of the State intending to exercise jurisdiction; that shift should be corrected.

Thus, the requirement contained in draft article 10 for the State of the official to invoke immunity must be balanced against a requirement for the State intending to prosecute to inform the State of the official without delay of said intention; for the procedural mechanism to work, this is absolutely critical.

Belarus is not convinced that the State of the official should also be required to indicate the kind of immunity that is applicable, since, for purposes of foreign criminal jurisdiction, what matters is the existence of immunity, regardless of its source.

The presumption that issues relating to immunity, including the waiver of immunity, must be addressed through a mutual legal assistance mechanism, rather than through the diplomatic channel, does not reflect current practice. Using such a mechanism would also be less efficient, as the web of diplomatic relations is much more extensive and effective than that formed by mutual legal assistance agreements. Finally, it would go against the principle of separation of powers. Since questions of immunity derive from the principle of sovereign equality of States, they are within the purview of the executive branch, which is responsible for the conduct of foreign policy, and cannot be resolved by the courts without taking into account the position of that branch.

With regard to draft article 13, which makes it optional for the forum State to request from the State of the official the information necessary to determine his or her status, Belarus believes that the forum State should be obligated to make such a request. Decisions taken solely on the basis of the reasoning and information of the forum State will raise serious and well-founded questions as to their legitimacy and impartiality. Furthermore, the State of the official has an absolute right to provide such information to the forum State, which in turn is under an obligation to consider that information conscientiously and thoroughly and to take it into account in making its decision.

In addition, the forum State should regard the transfer of criminal proceedings to the State of the official as its primary option; doing so will avoid many legal and political complications. Adjudication by the foreign State should be an alternative scenario, subject to certain conditions.

In view of the significance and sensitivity of the matter, the consultations provided for in draft article 15 must be compulsory, not optional, with the status at least of a procedural obligation.

With regard to national legislation governing immunity from criminal jurisdiction, under article 3, paragraph 1, of the Code of Criminal Procedure, criminal proceedings throughout the territory of Belarus must be conducted in accordance with the Code irrespective of where a crime is committed, unless otherwise provided in the international treaties to which Belarus is a party.

The Code establishes, in article 4, paragraph 2, that persons enjoying diplomatic immunity may be subjected to the procedural actions provided for in the Code only at their request or with their consent. Consent to the conduct of such actions must be requested through the Ministry of Foreign Affairs of Belarus.

Article 204, paragraphs 10 and 11, of the Code states that searches of premises occupied by diplomatic missions and consular posts and by missions and agencies of foreign States and international organizations which, under the international treaties to which Belarus is a party, enjoy diplomatic immunity, and searches of premises housing staff of such missions and agencies and members of their families, may be conducted only at the request or with the consent of the head of the mission or agency concerned and in his or her presence.

The consent of the head of the mission or agency must be requested through the Ministry of Foreign Affairs of Belarus. A procurator and a representative of the Ministry must be present when searches are conducted.

Searches and seizures at premises occupied by diplomatic missions and consular posts and by missions and agencies of foreign States and international organizations which, under the international treaties to which Belarus is a party, enjoy diplomatic immunity, and searches and seizures at premises housing staff of such missions and agencies and members of their families, must be conducted in conformity with the requirements established in article 204, paragraphs 10 and 11, of the Code (Code of Criminal Procedure, art. 210, para. 10).

In accordance with article 34, paragraph 5, of the Code, the procurator who is supervising compliance with the law during the conduct of a pretrial investigation or initial inquiry is authorized to apply to the relevant bodies to waive the immunity from criminal prosecution of persons enjoying such immunity if those persons are liable to charges in the criminal case he or she is handling.

Pursuant to paragraph 6.47 of the Regulations on the Ministry of Foreign Affairs of Belarus, approved by Council of Ministers Decision No. 978 of 31 July 2006, the Ministry monitors the observance of diplomatic and consular privileges and immunities in the territory of Belarus. In so doing, the Ministry is guided by the legislation of Belarus, relevant international treaties to which Belarus is a party and the rules of international customary law.

General principles of law

Belarus considers this to be a very promising topic in that it has not previously been studied in a systematic way, despite the existence of relevant judicial practice, precedent and doctrine. It supports the Commission's efforts to identify and clarify the legal content of fundamental concepts of general international law.

Some members of the Commission have expressed the view that general principles of law have played no significant practical role; that assertion should prompt serious study of the practice of States and international courts. It would be interesting to see, for example, what conclusions the Commission reached in respect of the principle of justice, which is frequently invoked in international practice.

The three draft conclusions proposed by the Special Rapporteur — concerning the scope of the topic (general principles of law as a source of international law), the requirement that such principles be generally recognized and the categories of principles (those derived from national legal systems and those formed within the international legal system) — appear acceptable.

It would be helpful, at some stage of the work on this topic, to draw up an illustrative list of general principles of law. Useful analogies in this regard can be found in the work on peremptory norms of general international law (*jus cogens*). It might also be helpful to follow the practice of using the term “international community” (мировое сообщество), rather than “community of nations” (сообщество наций).

To ensure a better understanding of general principles of law, it would be advisable to include them in the relevant provisions in the Commission’s report, notwithstanding the opinion of the Special Rapporteur set out in paragraph 254 of the report.

At the national level, the Constitutional Court refers to general principles of law when reviewing the laws and regulations of Belarus. The Court has not, however, formulated legal views on general principles of law as a source of international law or on international legal relations.
