

Translated from Russian

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.
