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*Seventy-fourth session of the United Nations General Assembly*

*Agenda item 79 «Report of the International Law Commission on the work of its seventieth session»*

## **Statement by the delegation of the Republic of Belarus**

### **Cluster I**

#### **Crimes against humanity**

- The delegation of Belarus congratulates Dr Sean Murphy and the International Law Commission on conclusion of the work on the draft articles on prevention and punishment of crimes against humanity. The draft is of well-balanced character and, we assume, would be a good starting point for intergovernmental negotiations, which would lead to a treaty. Of particular interest is the detailed mechanism of legal cooperation, which can serve as a model for other treaties, including bilateral ones. Belarus intends to conduct a thorough consideration of the draft articles by all interested state bodies, primarily law enforcement agencies, after which we shall provide our final position on the document.

- Our delegation supports the elaboration of a treaty on the basis of the draft articles, but we assume, however, that this endeavor should be approached in a cautious manner, since the draft articles deal with complex and fundamental issues of international criminal law. We believe that further work on the text should be organized by the UN secretariat under the UN General Assembly aegis with the maximum involvement of criminal law experts. As far as the diplomatic conference on the adoption of the text of the convention is concerned, we consider it productive to organize it on a later stage, after the text has been finalized at the expert level.

- With your permission, I would like to share our preliminary observations on the draft articles.

- In article 2, the list of crimes against humanity contained in article 2, paragraph 1, would be more appropriate to be closed. We understand the reasons for the inclusion of subparagraph (K) as a certain "insurance" against the exclusion from the scope of the Convention of any offence, including the one that developed after the adoption of its text. At the same time, we believe

that the inclusion of an indefinite element in the criminal law document creates certain challenges both for convincing decision-makers to sign the convention, and on later implementation stage.

- While Belarus fully supports the definition of the "slavery", given by the Commission in draft article 2 paragraph 2 subparagraph c, we submit that it would not be imprudent to single out the crime of human trafficking as a separate corpus delicti of the crime against humanity, given that this phenomenon fully meets the criteria of crimes against humanity. We also note, that serious changes occurred after the adoption of the Rome Statute – the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organized Crime was adopted in 2000.

- Guided by the concept of legal clarity, we remain unconvinced of the necessity of inclusion of paragraph 3 into draft article 2. In our opinion, the concept of emergence of precise definitions in international customary law demands additional research and more fundamental conceptualization. In our understanding, after the would-be convention will enter into force, well-established principles of hierarchy between treaties and customary international law, as well as various treaties between themselves and with national legislation, would come into play. Belarus considers that the quality of the document presented by the Commission requires at least taking it as a standard for national legislations and creating international custom.

- Our delegation strongly opposes the departure by the Commission in the commentary 41 from the definition of "gender" under the Rome Statute of the International Criminal Court. This issue is extremely sensitive, and we believe that we should stick to internationally agreed definitions in order to ensure the universality of the future convention. We cannot take note of the relevant comments of the Commission, but note that none of the sources cited (the International Committee of the Red Cross, HRC special rapporteurs, experts, etc.) reflects the position of the states as the main subjects of international law.

- In article 3, we believe that paragraph 1, which refers to the obligation of states not to participate in the crimes against humanity, should either be deleted or re-drafted, based on the following grounds.

- First, the current wording of article 3 paragraph 1 does not distinguish physical persons as subjects of criminal responsibility, and states, being subject to responsibility under international law. There is no doubt that the state is not the subject of the crime and therefore cannot participate in the committing of the crime. As stated in the verdict of the Nuremberg Tribunal, "crimes are committed by men, not by abstract entities". It is understandable that this approach was followed by the conventions on genocide and war

crimes, which do not contain provisions that states should not commit acts regulated by such conventions. This is due to the purposes of concluding such treaties - the prevention and suppression of international crimes through establishing legal and institutional bases for that work, as well as international cooperation of competent national agencies in criminal matters. These treaties did not intend to formulate or specify the provisions of the law of international responsibility. Based on the preamble of the draft articles on crimes against humanity, it also did not aim to formulate rules on international responsibility of states.

- Second, the duty of states to prevent the crimes against humanity presupposes the duty of states to prevent the participation of state agents in committing thereof. It is not by chance that the issues of the international responsibility of states are outside the scope of the draft articles, as defined in article 1.

- Third, if the inclusion of such a substantive article is considered possible, the question arises of the responsibility of international organizations, which also bear international legal responsibility for the breach of obligations arising from peremptory norms of general international law.

- As far as international non-governmental organizations are concerned (draft article 4 paragraph b), we remind that the states normally interact with them under national legislation, with certain notable exceptions (like Geneva Conventions and additional protocols thereto, regarding the ICRC standing under those). Therefore, the duty of States to cooperate with international organizations, stipulated in draft article 4 paragraph b should be limited by relevant treaties. In this regard, we propose to amend article 4 as follows: "Each State undertakes to prevent crimes against humanity through: effective legislative, administrative, judicial or other appropriate preventive measures; cooperation with other subjects of international law".

- We suppose that paragraph 2 of the article 5 is not logical and does not follow from paragraph i of this article. The risk of committing a crime against humanity against the extradited person should be assessed not on the basis of the general human rights situation in the country, but on the basis of information on the mass or systematic crimes defined in article 2 of the draft.

- Our delegation believes that in article 6 paragraph 3 it is more appropriate to use not the general phrase "had reason to know" but the more specific phrase "should have known", as stated in article 28 of the Rome Statute.

- Article 5 paragraph 5 we propose to be specified with the understanding that the official would be criminally liable under the law of the state of his nationality.

- Belarus believes that the elimination of the dispositive element ("if the state deems it appropriate") from article 7, paragraph 1 (b) and (c), would contribute to a more effective prevention of impunity for crimes against humanity. We proceed from the assumption that the as broad as possible list of the grounds for exercising jurisdiction - based on a treaty – are correlated with the seriousness of crimes against humanity. As an alternative, the use of the phrase “if provided for by national law” could be considered. Thus, different approaches to the establishment of jurisdiction will be taken into account to some extent, while maintaining the overall focus of the text – on the maximum effectiveness of the criminal prosecution of persons who have committed crimes against humanity.

- We propose that Article 8 be amended as follows: "Each state shall ensure that its competent authorities conduct a prompt, thorough and impartial investigation of crimes against humanity".

- We propose that article 9, paragraph 1, should read as follows: "Any state in whose territory a person suspected of having committed any offence covered by the present draft articles is located shall detain that person or take other legal measures to ensure his or her presence. Detention and other legal measures, including criminal prosecution or the decision to extradite or transfer, must comply with the law of that state."

- We propose that Article 10 be amended as follows: "The State in whose territory the alleged offender is located, unless it extradites or transfers that person to another state or to a competent international criminal court or tribunal for the purpose of criminal prosecution, shall take its decision in the same manner as in the case of any other offence of a serious nature under the law of that state".

- In order to avoid subjective interpretation in the article 11 paragraph 3, we consider it appropriate to specify the purpose of granting the rights referred to in paragraph 2 of this article — to ensure the protection of the rights of the alleged offender.

- We have some doubts about the expediency of including in the draft article 12, paragraph 3, forms of reparation characteristic for the relations of subjects of international law, such as satisfaction, guarantees of non-repetition.

- The objectives of the future convention would be facilitated by the inclusion in article 13, paragraph 4, of mandatory rather than dispositive wording regarding the use of the draft articles as a legal basis for extradition.

- Article 14, paragraph 6 we propose to read as follows: "Without prejudice to national law, the competent authorities of a state may, without prior request, transmit information relating to crimes against humanity to the competent authority of another state".

- The obligation to cooperate with international mechanisms under article 14, paragraph 9, should, in our view, be formulated more softly or deleted altogether, given the ambiguous status of such evidence-gathering mechanisms in international law.

### **Peremptory norms of international law (jus cogens)**

- Belarus welcomes the work of the Commission and the Special Rapporteur, Mr. Dire Tladi on this topic. In our understanding, the Commission in planning its future work should focus precisely on the fundamental aspects of the normative architecture of international law; on those concepts that are largely perceived in international legal discourse as a kind of axiom, and clarify their legal content.

- In general, we have a positive impression of the draft conclusions, which have become much more substantive and balanced compared to the previous edition. Belarus supports a kind of "procedural" orientation of the draft conclusions, which do not imply an analysis of the content of specific peremptory norms, but propose a methodology for their identification and differentiation from other norms of international law. This approach has proved itself well in the preparation of ILC reports on the identification of customary international law and the interpretation of treaties.

- Belarus will forward its written comments on the draft conclusions by December 2020, as requested by the Commission. At this stage we would like to share some preliminary considerations.

- In conclusion 3 we suggest to use the term "universal human values" or "universal values". In addition, we propose to consider whether the existing peremptory norms of international law represent values in themselves in the context of their function in the system of maintaining peace and security.

- We would also find it useful to reflect more clearly in the commentary to conclusion 3 a position that is implicitly seen to be supported by the Commission. According to this position, peremptory norms of international law are applicable to all subjects of international law, including international organizations. The same comment applies to draft conclusions 17-19, particularly with regard to organizations with supranational powers.

- With regard to conclusion 5, our delegation notes the complexity and ambiguity of the question of whether a treaty could serve as an independent source of peremptory norms of international law. It seems that currently only the UN Charter, by virtue of its article 2, paragraph 6, can be considered as an independent source of peremptory norms of international law, not necessarily established in customary international law at the time of entry

into force of the Charter. In other cases, in our understanding, the rules of the Vienna Convention on the Law of Treaties governing the rights and obligations of third States under treaties are fully applicable. We support the Commission's approach that the issue should ultimately be considered in the context of the relationship between treaty norms and norms of customary international law.

- Belarus shares the Commission's conclusions in the commentary to conclusion 7 on the need for the consent of the vast majority of states from different regions, legal systems and cultural traditions in order for a norm to be recognized as peremptory. We believe that this important observation should be transferred from the commentary directly to draft conclusion 7, perhaps revealing its contents somewhat. It is obvious that the recognition of the norm by all subjects of international law without exception is practically impossible. On the other hand, it is wrong to talk about the sufficiency of recognition by the overwhelming majority of states, which will not take into account the position of dozens of other states.

- In the draft conclusion 10 regarding the relationship between treaties and peremptory norms of international law it addresses an extremely important and promising issue for further elaboration. In this context, the provocative question arises, whether it would be worthwhile to "go beyond" the Vienna Convention on the Law of Treaties to some extent? Undoubtedly, this is a very authoritative document, but it seems that the Commission is capable of more than preparing comments, albeit qualitative, to the certain provisions of the Convention. With regard to peremptory norms of international law, it might be worth investigating the historical evolution of the concept before the adoption of the Vienna Convention. With regard to the draft conclusion, it would seem more appropriate for our delegation to speak not of the treaty as a whole, but of its specific provisions, which are null and void or become so as a result of conflict with a peremptory norm of international law. In the future, the issue should be subject to consideration in the context of the divisibility of treaty provisions. This position is based on the importance of the stability of treaty relations and the principle of good faith, which implies, *inter alia*, that in concluding a treaty, states do not intend to violate existing international law, including peremptory norms – until proven otherwise.

- Based on the above considerations, our delegation does not support paragraph 1 of draft conclusion 11. It seems that the nullity of a treaty as a whole should be questioned only when its object and purpose contradict a peremptory norm of international law. In other cases, as in the example of the Treaty between the Netherlands and the Saramak community cited by the Commission in the commentary to the previous conclusion, it would be

correct to talk about the non-application of a specific norm that is contrary to the peremptory norm, but is not a necessary condition for the fulfillment of the remaining provisions of the treaty. Belarus sees no obstacle to the revision of the presumption of the total nullity of a treaty formulated in the Vienna Convention, some rules of which contradict the peremptory norm of international law, in favor of the presumption of the divisibility of treaty provisions, albeit limited by strict conditions. This approach, in our view, will serve to strengthen the stability of treaty relations.

- In conclusion 14, the question of the nullity of a treaty contrary to the newly arisen jus cogens norm is even more debatable. We presume that such rules, as a general rule, are formed as norms of customary international law. The question of how a “general practice recognized as a legal norm” that directly contradicts an existing treaty could be formed requires further clarification and study. The same considerations apply in general to draft conclusion 14 - it is not entirely clear to us how a general practice, recognized as a legal norm, could be formed, which would contradict the existing peremptory norm of international law.

- Belarus supports the development of an indicative list of peremptory norms of international law, which would be very useful for law enforcement. We acknowledge the complexity of this task. For example, in the list given by the Commission, we consider apartheid as a special case of racial discrimination, and therefore the appropriateness of its separate indication raises doubts. Recognizing the importance of the right to self-determination, we would consider it appropriate to include in the list other principles of international law as reflected in the UN Charter, the 1970 Declaration and the CSCE Final Act.

### **Other decisions and conclusions of the Commission**

- The delegation of Belarus expresses its appreciation to the Commission for the proposed model provisions regarding the provisional application of treaties. We will submit our written comments; at this stage we would like to note that we find these formulations useful.

- Differences in the practice of provisional application are due to various factors, including political or economic feasibility, and particularities of national legal systems. At the same time, those states that, like Belarus, practice the provisional application of treaties, receive at their disposal precise formulations that will ultimately contribute to increasing the stability of treaty relations.

- At the same time, in relation to footnote 2 to paragraph 1 of Appendix A, we draw attention to the incorrect indication of the official name of our

state in the official name of the treaty to which the Republic of Belarus is a party - " The Agreement between the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan and the Kyrgyz Republic on deepening integration in the economic and humanitarian fields. ”

- With regard to two topics that the Commission intends to propose to the General Assembly for inclusion in the long-term program of its work, we have some doubts.

- Firstly, in relation to both topics, we are not convinced that they meet the urgent needs of the world community as a whole.

- Secondly, with regard to reparations, the initiator of the discussion of the topic himself admits that this topic is of a singular and diverse nature, due, rather, to issues of political expediency, rather than legal norms. In addition, already at this stage there are concerns about the Commission going beyond the stated topic - the problems of “the effectiveness of legal remedies” in the sense of international human rights treaties are outlined. It touches on the complex and controversial issue of international law regulating the mutual rights and obligations of states and individuals. The initiator in the explanatory note rejects the topic of compensation for gross and massive violations of human rights, and speaks mainly about compensation in general.

- Regarding the second topic - the fight against piracy and robbery at sea - we do not see the need for additional codification of this sufficiently elaborated topic. The indicated issues are already sufficiently regulated by the 1982 UN Convention on the Law of the Sea, individual treaties within the framework of the International Maritime Organization. The absence of national criminal law on these issues in individual states can hardly serve as a sufficient basis for the development of a treaty.

- We believe that the Commission should focus more on working out issues of general international law, and when identifying new topics, be guided primarily by trends of interest to the entire world community, such as, for example, the right to development in the context of the Sustainable Development Goals, legal aspects of artificial intelligence and other new technologies.