

Constitutional and legal analysis of the Agreement on cooperation between the Ministry of Internal Affairs of the Republic of Belarus and the Federal Service of the National Guard of the Russian Federation (the Rosgvardiya) of November 19, 2020.
(hereinafter referred to as the Agreement)

1. The analysis of the Agreement on the rules set out in the Law "On International Treaties of the Republic of Belarus" of July 23, 2008 №421-3, allows us to refer it to international agreements of an interdepartmental nature (paragraph 11, Part 1, Article 1, Article 9 of the Law). Accordingly, such an international treaty should: clearly define the legal essence of the regulated legal relations; indicate for the benefit of which constitutional and international goals it is directed; contain the functional nature and scope of the powers and actions granted "to ensure state and public security, protection of human and civil rights and freedoms"; avoid legal ambiguity, inconsistency and ambiguity in the wording of its norms.

The Agreement does not meet the specified requirements for an international treaty. Thus, it does not directly follow from the Agreement whether it allows, at the request of the Belarusian side, within the framework of assistance (except for joint exercises, training and similar events), the invitation of the Rosgvardiya's units and military equipment to perform police functions on the territory of the Republic of Belarus, in what quantity, with what weapons and equipment, for how long; does this affect state sovereignty, state security issues, whether the employees of the Rosgvardiya who take part in the dispersal of peaceful protest actions are representatives of the authorities, how they will be equipped, whether they will have insignia and other similar issues.

2. The list of areas of cooperation specified in Article 2 of the Agreement is closed and cannot be expanded. At the same time, the forms of cooperation enshrined in Part 1 of Article 3 of the Agreement do not adequately correspond to the areas of cooperation reflected in the previous article. Part 2 of Article 3 of the Agreement also allows other areas of cooperation that do not cover the content of the Agreement, the list of forms of cooperation is opened.

Of the listed areas of cooperation special attention should be paid to "providing security support measures to counteract crime". The concept of military support is not disclosed in the Agreement, so we can assume that at the request of the Belarusian side the the Rosgvardiya's invitation can be implemented immediately, even without the presence of mass disorder, acts of terrorism, as the concept of crime covers all criminal offences under the Criminal code of the Republic of Belarus. Moreover (it follows from part 1 of article 4 of the Agreement) for its implementation the assumptions of the other contracting party about the need for such actions are sufficient. Military support can be carried out on the initiative of the Rosgvardiya, which allows at any time to introduce a military contingent of a foreign state into the territory of Belarus, both if there is a request for the introduction of troops, and without it. The same purpose is seen from the content of part 2 of article 4: "In urgent cases, requests can be transmitted orally, but no later than 3 days later they must be

confirmed in writing, including using technical means of text transmission." That is, troops can be brought in without a written request from a contracting party, and a written request can be made "at gunpoint". Taking into account the negative public statements of A. Lukashenko about peaceful protesters, which label them as terrorists, and statements of V. Putin about deploying a reserve of law enforcement officers, it becomes obvious for what true purposes the Agreement was concluded.

3. Under the Vienna Convention on the law of treaties which participants are the Republic of Belarus and the Russian Federation¹, a Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in the light of its object and purpose (paragraph 1, article 31). The preamble of the Agreement clearly states that the Ministry of Internal Affairs of Belarus and the Rosgvardiya attach "great importance to the protection of human and civil rights and freedoms" and are based on "generally recognized principles and norms of international law". The principle of respect for human rights and fundamental freedoms is enshrined in the Helsinki Final Act (principle VII). Moreover, the Republic of Belarus and the Russian Federation have ratified the International Covenant on Civil and Political Rights (ICCPR)², which provides for freedom from torture (Article 7), the right to life (Article 6), the right of peaceful assembly (Article 21), and the right to freedom of expression (Article 19). The Human Rights Committee, whose competence is recognized by the Republic of Belarus and the Russian Federation³, has established that the recognition of certain rights imposes on the State the corresponding obligation to respect and ensure their implementation without any discrimination.⁴ In this regard, the obligation to respect implies refraining from taking measures that hinder or hinder the exercise of the right.⁵ As a result, given the object and purpose of the Agreement, as set out in its preamble, the provisions of this international treaty cannot be interpreted in such a way as to lead to a violation of human rights obligations.

4. With regard to the possible entry of Russian troops into the territory of the Republic of Belarus, in accordance with article 2 of the ICCPR, the States parties undertake to respect and ensure to all persons within their territory and subject to

¹ https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=en

² https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en

³ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=en

⁴ UN Human Rights Committee (HRC), CCPR General comment No. 31: The nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [para. 6]; UN Human Rights Committee (HRC), CCPR General comment No. 37: Article 21: right of peaceful assembly, 23 July 2020, CCPR/C/GC/37 [para. 8]

⁵ UN Human Rights Committee (HRC), CCPR General comment No. 31: The nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [para. 6]; UN Human Rights Committee (HRC), CCPR General comment No. 37: Article 21: right of peaceful assembly, 23 July 2020, CCPR/C/GC/37 [para. 23]

their jurisdiction the rights recognized in the Covenant. "Jurisdiction" in this context is not limited to the territory of a State.⁶ That is the scope of the obligations under the ICCPR is not limited to the territory of the States parties.⁷ Actions such as the use of force or detention committed by State officials who operate outside its territory may lead to the people against whom these actions were taken falling under the jurisdiction of that State within the meaning of article 2 of the ICCPR.⁸ Moreover, the conduct of officials, although operating outside the relevant State, can be attributed to this State in accordance with Article 4 of the Articles on State Responsibility adopted within the framework of the UN. Accordingly, the fact that law enforcement officers of the Russian Federation operate on the territory of the Republic of Belarus does not exclude the responsibility of the Russian Federation for violating international law, including human rights, on the territory of the Republic of Belarus.

5. The Constitution also guarantees freedom from torture (article 25), right to life (article 24), freedom of assembly, rallies, street processions, demonstrations and pickets (article 35), freedom of opinion and expression (article 33). Article 21 stipulates that the rights and freedoms of citizens of the Republic of Belarus is the supreme goal of the state. 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 (Article 21). Article 8 prohibits the conclusion of international treaties that contradict the Constitution. Accordingly, the conclusion of an international treaty, which can be used as the legal basis for entering the forces of Rosgvardiya on the territory of the Republic of Belarus to human rights violations (in fact, to do the same thing that makes belarusian militsiya), is contrary not only to the international obligations of the parties, but also infringes the provisions of the Constitution of the Republic of Belarus.

6. The Treaty establishing the Union state of Belarus and Russia not provided the possibility of introducing law enforcement officials and also armed forces on the territory of the state party to suppress protests and rallies, the rule of law. In accordance with Article 2 of the Treaty on the Establishment of the Union State of Belarus and Russia, one of the goals of the Union State is the unwavering observance of fundamental human and civil rights and freedoms in accordance with the generally recognized principles and norms of international law.

7. The Helsinki Final Act also does not provide for the possibility of introducing law enforcement officers, as well as armed forces, into the territory of a State party in

⁶ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*: advisory opinion of 9 July 2004 [para. 109]; UN Human Rights Committee (HRC), CCPR General comment No. 31: *The nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [para. 10]

⁷ UN Human Rights Committee (HRC), CCPR General comment No. 31: *The nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, CCPR/C/21/Rev.1/Add. 13 [para. 10]

⁸ European Court of Human Rights, *Al-Skeini and others v. the United Kingdom*, app. no. 55721/07, 7 July 2011 [para. 136]; Marco Milanovic. *Extraterritorial Application of Human Rights Treaties*. - Oxford University Press, 2011

order to suppress protests and rallies, and to ensure law and order. At the same time, one of the principles that will guide the participating States in their mutual relations is respect for human rights and fundamental freedoms.

8. There is also no possibility of using the CSTO (Collective Security Treaty Organization) forces to suppress peaceful protests and rallies, to ensure law and order on the territory of the state within the framework of the Collective Security Treaty, article 4 of which provides for the provision of military assistance only in the event of aggression against any state party. According to article 1 United Nations General Assembly (UN) Resolution 3314 (XXIX) aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter. A similar definition of aggression is also contained in article 8 bis of resolution RC / Res, adopted at the 2010 Review Conference of the States Parties to the Rome Statute of the International Criminal Court. In this regard, rallies and protests that take place on the territory of the Republic of Belarus do not fall under the generally accepted definition of aggression. As a result, assistance from the CSTO member states under Article 4 of the Collective Security Treaty cannot be provided to the Republic of Belarus. In turn, Article 2 of the Collective Security Treaty stipulates that in the event of a threat to the security, stability, territorial integrity and sovereignty of one or more participating States or a threat to international peace and security, the participating States shall immediately activate the mechanism of joint consultations in order to coordinate their positions, develop and take measures to assist such participating States in order to eliminate the threat. In accordance with article 6 the decision on the use of the forces and means of the collective security system in accordance with Article 2 of the Collective Security Treaty is made by the Heads of State parties. The scope of the principle of territorial integrity in international law is limited to the sphere of relations between States.⁹ The territorial integrity of a State in this context may be violated as a result of the threat or use of force by another State.¹⁰ Accordingly, rallies and protests taking place on the territory of the Republic of Belarus cannot pose a threat to its territorial integrity.

9. As for the threat to international peace and security, this concept is enshrined in Article 39 of Chapter VII of the UN Charter. The UN Security Council (UNSC) determines the existence of any threat to the peace and decides what measures should be taken to maintain or restore international peace and security. The analysis of the UN Security Council resolutions shows that the threat to peace is associated with serious violations of human rights as a result of humanitarian crises, civil wars, heavy

⁹ International Court of Justice, Accordance with international law of the unilateral declaration of independence in respect of Kosovo: advisory opinion of 22 July 2010 [para. 80]

¹⁰ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations: United Nations General Assembly resolution 2625 (XXV); The Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 [art. IV]

human losses, genocide, etc.¹¹ The threat to peace in this regard involves a serious violation of the peremptory norms of general international law. To date, the UN International Law Commission has recognized the following norms as peremptory: the prohibition of aggression, the prohibition of genocide, the prohibition of crimes against humanity, the basic norms of international humanitarian law, the prohibition of racial discrimination and apartheid, the prohibition of slavery, the prohibition of torture, the right of peoples to self-determination.¹² It is obvious that the rallies and protests taking place on the territory of the Republic of Belarus can not pose a threat to international peace and security.

10. Sovereignty, in turn, concerns the independence of the State in internal affairs, as well as in relations with other States.¹³ Rallies and protests taking place on the territory of the Republic of Belarus do not in any way threaten the independence of the Republic of Belarus, either in internal affairs or in relations with other States.

The expression of a civil position through peaceful rallies and protests does not pose a threat to the stability and security of the Republic of Belarus. This, in turn, is confirmed by numerous reliable reports of independent mass media¹⁴, most of which were deprived of accreditation by the Ministry of Foreign Affairs of the Republic of Belarus.¹⁵

11. Thus, the exercise of the right to peaceful assembly, enshrined in Article 21 of the ICCPR, ratified by the Republic of Belarus on the 12 of November 1973¹⁶, does not pose a threat to the security, stability, territorial integrity and sovereignty of the Republic of Belarus or a threat to international peace and security. Therefore, we can say that there are no grounds for providing assistance to the Republic of Belarus from the CSTO member states under Article 2 of the Collective Security Treaty.

¹¹ UN Security Council Resolution 688 (1991) of 5 April 1991 [para. 1, 2]; UN Security Council Resolution 773 (1992) of 23 January 1992 [para. 3, 4]; UN Security Council Resolution 713 (1991) of 25 September 1991 [para. 3, 4]; UN Security Council Resolution 918 (1994) of 17 May 1994 [para. 5, 18]; UN Security Council Resolution 929 (1994) of 22 June 1994 [para. 8, 9, 10]

¹² Report of the International Law Commission on the Work of its Seventy-First Session, A/74/10 (2019), ch. V [p. 208]

¹³ International Court of Justice, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*: judgment of 9 April 1949 [p. 35]; Malcolm N. Shaw, *International law (fifth edition)*. – Cambridge University Press 2003 [p. 192]; International Court of Justice, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*: separate opinion of Judge Alvarez [p. 43]

¹⁴ <https://www.bbc.com/russian/live/news-53698604>; <https://www.bbc.com/russian/news-53961606>; <https://www.dw.com/ru/protesty-v-belarusi-lukashenko-zajavil-o-popytke-zahvata-vlasti/a-54602738>; <https://www.dw.com/ru/protesty-v-belarusi-makron-predostereg-rf-ot-vmeshatelstva/a-54748113>; <https://www.svoboda.org/a/30811681.html>; <https://www.theguardian.com/world/2020/aug/13/belarus-tens-of-thousands-on-streets-challenge-lukashenko>

¹⁵ <https://www.bbc.com/russian/news-53958074>

¹⁶ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

The recognition of the right to peaceful assembly imposes a corresponding obligation on the State to respect and ensure its exercise without discrimination.¹⁷ In this context, the obligation to respect implies refraining from taking measures that hinder or hinder the exercise of the right.¹⁸

12. There is a serious and instructive experience of Russia's failure to fulfill its obligations to Ukraine under the Memorandum on Security Guarantees in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons of the 5th of December 1994. This led to tragic consequences: the armed seizure of the Crimean peninsula, which belongs to Ukraine, fighting on the territory of the Donetsk and Luhansk regions with the participation of Russian troops, the death of thousands of people, a humanitarian disaster, and an ongoing military conflict. A similar Memorandum on security assurances in connection with the accession of the Republic of Belarus to the Treaty on the nonproliferation of nuclear weapons was signed with the participation of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, United States of America on the 5th of December 1994 (hereinafter – the Memorandum), France also signed the Protocol. Under this international treaty, the parties confirmed to the Republic of Belarus their obligations in accordance with the principles of the OSCE Final Act to respect the independence, sovereignty and existing borders of the Republic of Belarus (paragraph 1). They also reaffirmed their commitment to refrain from the threat or use of force against the territorial integrity or political independence, and that none of their weapons will ever be used against the Republic of Belarus except in self-defense or in any other way in accordance with the Charter of the United Nations (paragraph 2 of the Memorandum).

Although the Memoranda themselves and the national legislation of the guarantor States do not contain any fixed mechanisms for enforcing the obligations, their strength lies in the authority and established international legal practice to fulfill the obligations assumed (the principle of *pacta sunt servanda*, enshrined in article 26 of the Vienna Convention on the Law of Treaties).

13. From the provisions of the Regulations on the Ministry of Internal Affairs of the Republic of Belarus, approved by the Decree of the President of the Republic of Belarus of December 4, 2007 №611 (hereinafter-the Regulations) the Ministry of Internal Affairs, within its competence and in accordance with the legislation, has the right to: carry out international cooperation, participate in the development of draft international treaties of the Republic of Belarus, the conclusion of international treaties of the Republic of Belarus, including interdepartmental ones, and provide training services to foreign states (paragraph 9.18).

¹⁷ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en

¹⁸ UN Human Rights Committee (HRC), CCPR General comment No. 37: Article 21: right of peaceful assembly, 23 July 2020, CCPR/C/GC/37 [para. 23]

However, in the field of basic tasks, including the protection of public order and public security, the Ministry of Internal Affairs is not empowered to conclude such international treaties (agreements) related to the implementation of the above tasks, with the right to enter, to use the police force of another state even in order to "mutual desire to strengthen interaction between the Parties, based on the universally recognized principles and norms of international law" (from preamble of the Agreement). At the same time, hiding behind the wording of the preamble, the contracting parties went beyond the limits of the powers granted.

In the Agreement the Ministry of Internal Affairs of the Republic of Belarus have fixed what is not stipulated in any law, decree, government resolution, namely: "protection of public order and public security; "the provision of military support to counter crime"; and others, under article 2 of the Agreement, that is, execution on the territory of the Republic of Belarus of police functions to the armed contingent of a foreign state in peacetime. And even if such a consolidation was established in the laws, the Ministry of Internal Affairs of the Republic of Belarus, another agency could only determine the procedure for its execution within the limits of the powers granted and establish the procedural nature of the actions. Confirmation of the correctness and objectivity of these statements is the fact that there are no references to laws in the Agreement, but there are streamlined, meaningless phrases: "based on generally recognized principles and norms of international law"; "in compliance with the legislation and international obligations of the States Parties", etc.

Thus, it is difficult to imagine a more cynical, unconstitutional act aimed at undermining the sovereignty and security of the Republic of Belarus. It is obvious from the content of the Agreement that it is not aimed at ensuring the rights and freedoms of citizens, including peaceful assembly, expression of their opinions, free and fair elections, and freedom from torture.

International law, its principles and standards, international treaties of the Republic of Belarus, the Constitution of the Republic of Belarus, adopted on the basis of their laws do not allow the use of the armed forces, the national guard troops of the Russian Federation, special forces belonging to the Ministry of Internal Affairs of the Russian Federation, to carry out police functions on the territory of the Republic of Belarus. That is why the Agreement concluded on the 19th of November 2020 between the Ministry of Internal Affairs of the Republic of Belarus and the Federal service of national guard troops of the Russian Federation is unconstitutional.

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