

16-Aug-17

Translated from Spanish

Ministry of Foreign Affairs of the Republic of Guatemala

SISCO File No.: 1400006410

Internal File No.: 302-2010

Department file: DIGRAJUTT/DAJ

(Please refer to the above reference and file numbers)

Memorandum No. 331-2010

Subject: Request for information regarding criminal accountability of United Nations officials and experts on mission

Background

By Memorandum No. 1400006410, the Director-General for International, Multilateral and Economic Affairs hereby transmits note verbale No. LA/COD/50 of the Secretary-General of the United Nations by which the Secretary-General refers to General Assembly resolution 64/110 of 16 December 2009, entitled "Criminal accountability of United Nations officials and experts on mission", also transmitted herewith.

By operative paragraph 15 of the above-mentioned resolution, the General Assembly requests the Secretary-General to report to the Assembly at its sixty- fifth session on the implementation of the resolution, on the basis, inter alia, of information received from Governments.

The Secretary-General would appreciate receiving, by 1 July 2010, any information Guatemala may wish to submit on the Government's implementation of the resolution, in particular paragraphs 3, 4, 5 and 14 thereof .

16-Aug-17

Discussion

Operative paragraphs 3, 4, 5 and 14 of the above-mentioned resolution will be cited and addressed in turn.

Paragraph 3 calls for the establishment of jurisdiction over crimes of a serious nature: “*Strongly urges* all States to consider establishing to the extent that they have not yet done so jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials or experts on mission, at least where the conduct as defined in the law of the State establishing jurisdiction also constitutes a crime under the laws of the host State”.

Some scholars classify crimes as serious, less serious or minor in nature, or as misdemeanors, depending on the applicable penalty. Crimes of a serious nature are the most serious offences under the domestic legal system. Under international law, crimes of a serious nature are punishable crimes that are prohibited under treaties on international human rights law, international humanitarian law and international criminal law. Such crimes include serious violations of human rights and of humanitarian law.

Such crimes are punishable under various treaties and Guatemala’s domestic criminal legislation also deems some of them to be crimes of a serious nature. For example, extrajudicial execution, torture, enforced disappearance and genocide are punishable, respectfully, under articles 132, 201(bis), 201(ter) and 376 of the Penal Code of Guatemala.

Article 4 of the Code stipulates that “Except as provided for in international treaties, this Code shall apply to any person who commits an offence or misdemeanor in the territory of the Republic or in places or vehicles subject to its jurisdiction”.

Article 5 of the Code covers the application of extraterritoriality, stipulating that “This Code shall also apply in the case of:

1. An offence committed abroad by an official in the service of the Republic, if the offender has not been tried in the country where the offence was committed;
2. An offence committed on board a vessel, aircraft or other mode of transport of Guatemala, if the offender has not been tried in the country where the offence was committed;
3. An offence committed abroad by a Guatemalan, if extradition of the offender has been refused;
4. An offence committed abroad against a Guatemalan, if the offender has not been tried in the country where the offence was committed, provided a charge has been brought by or on behalf of the Government Procurator’s Office and the person accused is in Guatemala;

16-Aug-17

5. An offence which, by virtue of a treaty or convention, is punishable in Guatemala, even if the offence was not committed in Guatemalan territory;
6. An offence committed abroad against the security of the State, its constitutional order or its territorial integrity, as well as the forging of the signature of the President of the Republic and the forging of coins or banknotes which are legal tender, bonds and other securities and credit documents”.

These legal provisions demonstrate that Guatemala has indeed established jurisdiction over crimes of a serious nature committed abroad by its nationals and that it must apply such jurisdiction as well to cases involving its nationals serving abroad as United Nations officials or experts.

Furthermore, in conformity with the four Geneva Conventions of 1949, to which Guatemala is a State party, universal jurisdiction has been deemed applicable to violations which the Conventions classify as grave breaches. In such cases, States are obligated to search for alleged perpetrators of such acts “regardless of their nationality” and to bring them before its own courts or hand them over to another Contracting party. Although the Conventions do not explicitly assert the applicability of jurisdiction regardless of where a grave breach was committed, universal jurisdiction is generally understood to apply. While States are not necessarily obligated to try alleged perpetrators, if they do not do so they are required to hand such persons for trial over to another Contracting party, provided such party has made out a *prima facie* case.

Paragraph 4 calls upon States to cooperate with each other and with the United Nations in exchanging information, facilitating the conduct of investigations and prosecuting United Nations officials and experts: “*Encourages* all States to cooperate with each other and with the United Nations in the exchange of information and in facilitating the conduct of investigations and, as appropriate, prosecution of United Nations officials and experts on mission who are alleged to have committed crimes of a serious nature, in accordance with their domestic laws and applicable United Nations rules and regulations, fully respecting due process rights, as well as to consider strengthening the capacities of their national authorities to investigate and prosecute such crimes”.

Paragraph 5 calls upon States to provide mutual assistance in connection with criminal investigations or criminal or extradition proceedings in respect of crimes of a serious nature, in particular in obtaining evidence at the disposal of States; to use information and material obtained from the United Nations for purposes of criminal proceedings; to provide effective protection for victims and witnesses of crimes of a serious nature; and to honour requests by host States for support and assistance in order to facilitate effective investigations of crimes of a serious nature. The paragraph reads as follows:

“5. *Also encourages* all States:

16-Aug-17

(a) To afford each other assistance in connection with criminal investigations or criminal or extradition proceedings in respect of crimes of a serious nature committed by United Nations officials and experts on mission, including assistance in obtaining evidence at their disposal, in accordance with their domestic law or any treaties or other arrangements on extradition and mutual legal assistance that may exist between them;

(b) In accordance with their domestic law, to explore ways and means of facilitating the possible use of information and material obtained from the United Nations for purposes of criminal proceedings initiated in their territory for the prosecution of crimes of a serious nature committed by United Nations officials and experts on mission, bearing in mind due process considerations;

(c) In accordance with their domestic law, to provide effective protection for victims of, witnesses to, and others who provide information in relation to, crimes of a serious nature alleged to have been committed by United Nations officials and experts on mission and to facilitate access by victims to victim assistance programmes, without prejudice to the rights of the alleged offender, including those relating to due process;

(d) In accordance with their domestic law, to explore ways and means of responding adequately to requests by host States for support and assistance in order to enhance their capacity to conduct effective investigations in respect of crimes of a serious nature alleged to have been committed by United Nations officials and experts on mission”.

Guatemala is a State party to the following international conventions regarding mutual legal assistance in criminal matters and multilateral extradition treaties that address such assistance:

1. Treaty on Mutual Legal Assistance in Criminal Matters between the Republics of Costa Rica, El Salvador, Guatemala, Honduras and Panama
2. Treaty concerning Cooperation on Mutual Legal Assistance between the Government of the United Mexican States and the Government of the Republic of Guatemala
3. Convention between the Republic of Peru and the Republic of Guatemala on Legal Assistance in Criminal Matters

16-Aug-17

4. Inter-American Convention on Mutual Assistance in Criminal Matters
5. Convention on Offences and Certain Other Acts Committed on Board Aircraft
6. Convention for the Suppression of Unlawful Seizure of Aircraft
7. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
8. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
9. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
10. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents
11. International Convention against the Taking of Hostages
12. Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance
13. International Convention for the Suppression of the Financing of Terrorism
14. United Nations Convention against Transnational Organized Crime and its Protocols
15. Convention on the Marking of Plastic Explosives for the Purpose of Identification
16. Convention on the Physical Protection of Nuclear Material
17. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
18. Single Convention on Narcotic Drugs
19. International Convention for the Suppression of Terrorist Bombings
20. United Nations Convention against Corruption
21. Inter-American Convention to Prevent and Punish Torture
22. Inter-American Convention on Enforced Disappearances
23. Inter-American Convention against Corruption
24. Inter-American Convention against Terrorism
25. Treaty on Mutual Legal Assistance in Criminal Matters between the Republics of Costa Rica, El Salvador, Guatemala, Honduras and Panama [Duplicate of # 1 on this list]
26. Treaty concerning Cooperation on Mutual Legal Assistance between the Government of the United Mexican States and the Government of the Republic of Guatemala [Duplicate of # 2 on this list]
27. Convention between the Republic of Peru and the Republic of Guatemala on Legal Assistance in Criminal Matters [Duplicate of # 3 on this list]

16-Aug-17

28. Treaty on Cooperation between the Government of the Republic of Guatemala and the Government of the United Mexican States concerning Enforcement of Criminal Sentences
29. Inter-American Convention on Serving Criminal Sentences Abroad
30. Treaty on the Transfer of Convicted Persons between the Republic of Guatemala and the Kingdom of Spain
31. Convention between the Government of the Republic of Guatemala and the Government of the Republic of Cuba concerning Enforcement of Criminal Sentences

Extradition treaties

1. Treaty on Extradition of Criminals between Guatemala and Belgium
2. Additional Convention to the Treaty on Extradition of Criminals between Guatemala and Belgium
3. Additional Protocol to the Additional Convention to the Treaty on Extradition of Criminals between Guatemala and Belgium
4. Treaty on Extradition between Guatemala and Spain
5. Additional Protocol to the Treaty on Extradition between Guatemala and Spain
6. Treaty on Extradition between Guatemala and the United States of America
7. Supplementary Convention to the Treaty on Extradition between Guatemala and the United States
8. Treaty on Extradition between Guatemala and the United Kingdom of Great Britain and Northern Ireland
9. Additional Protocol to the Treaty on Extradition between Guatemala and the United Kingdom
10. Exchange of notes extending the provisions of the Treaty on Extradition between Guatemala and the United Kingdom to certain territories under the mandate of the United Kingdom
11. Treaty on Extradition between Guatemala and the United Mexican States
12. Treaty on Extradition between Guatemala and the Republic of Korea
13. Central American convention on extradition
14. Inter-American convention on extradition

It is also important to note that Guatemala has adopted a law expressly regulating the extradition process. Thus, a non-exhaustive list of national and international instruments demonstrates that Guatemala has adopted legislation focusing on mutual legal assistance such as the exchange of information to facilitate criminal investigations, including crimes of a serious nature and, of course, on extradition.

16-Aug-17

Paragraph 14 refers to “the information provided by Governments in response to its resolutions 62/63 and 63/119, and urges Governments to continue taking the measures necessary for the implementation of those resolutions, including their provisions addressing the establishment of jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as United Nations officials or experts on mission, as well as cooperation among States”.

As indicated above, Guatemala has established that it has jurisdiction over crimes of a serious nature committed abroad by its nationals and that it must also apply such jurisdiction to cases involving its nationals serving abroad as United Nations officials or experts. Articles 40, 43, 52 and, in particular, 53, of the Code of Criminal Procedure establish jurisdiction over crimes committed abroad.

CONCLUSION

In the light of the information provided above, the Department of Legal Affairs considers that Guatemalan domestic law establishes jurisdiction over crimes of a serious nature committed abroad by its nationals and that the provisions of that legislation are complemented by the above-mentioned international treaties to which Guatemala is a State party. The Department also believes that this body of law relating to jurisdiction also applies to Guatemalan nationals accused of serious crimes and that Guatemalan courts would exercise jurisdiction in the case of such nationals serving as United Nations officials or experts.

Signed/:

Irma Rebecca Monzón Rojas

Consulting Attorney

Department of Legal Affairs

Directorate of Legal Affairs,

International Treaties and Translations

26 April 2010

Signed/:

Sonia Regina Martínez de Palencia

Director of Legal Affairs

Directorate of Legal Affairs,

International Treaties and Translations

16-Aug-17

Signed/:

Guillermo Sáenz de Tejada Herrera
Director-General of Legal Affairs,
International Treaties and Translations

[Stamps of the Department of Legal Affairs,
Directorate of Legal Affairs,
International Treaties and Translations; and of the
Directorate of Legal Affairs,
International Treaties and Translations,
Ministry of Foreign Affairs, Guatemala]
