

REPUBLIC OF PARAGUAY

Ministry of Foreign Affairs

DM/AJ/No. 215/2010

The Ministry of Foreign Affairs (Legal Department) presents its compliments to the Permanent Mission of the Republic of Paraguay to the United Nations and has the honour to refer to note MP/UN/NY/MRE/No. 80/10 on the implementation of General Assembly resolution 64/110 entitled “Criminal accountability of United Nations officials and experts on mission”.

The above-mentioned note transmits note LA/COD/50 dated 8 January 2010 from the Secretary-General of the United Nations, in which States Members of the United Nations are requested to provide any information they may consider relevant concerning General Assembly resolution 64/110 entitled “Criminal accountability of United Nations officials and experts on mission”.

In this connection, the Office of the Public Prosecutor, from which we requested information, has stated the following:

In accordance with the provisions of paragraphs 3, 4, 5 and 14 of the above-mentioned resolution, information was requested on:

- Possible jurisdiction of Member States, as defined in the criminal legislation in force, over crimes of a serious nature committed by their nationals while serving as officials or experts on mission, when such conduct constitutes a crime both in the State establishing jurisdiction and in the host State.

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to the United Nations

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- The possibility of strengthening the capacities of national authorities to investigate and prosecute such crimes of a serious nature, in accordance with domestic legislation and applicable United Nations rules and regulations.

- Provision of mutual assistance in extradition proceedings in respect of crimes of a serious nature committed by officials on mission, in particular assistance in obtaining evidence in accordance with domestic law or any treaties or other arrangements on extradition and mutual assistance that may exist between States.

In connection with the first point, it should be emphasized that Paraguayan criminal law will apply to all punishable acts committed in the national territory or on board Paraguayan vessels or aircraft.¹

Consequently, in accordance with the principle “*locus regit actum*”, punishable acts committed in a foreign territory must be judged in the place where they were committed.

Our legal order also provides that Paraguayan criminal law similarly applies to punishable acts committed abroad by a Paraguayan holder of public office in the performance of his or her functions.² In this respect, our criminal legislation reflects the provisions of the Vienna Convention of 24 April 1963 on Consular Relations.³ [Translator’s note: the Spanish text refers, incorrectly, to the Vienna Convention on Diplomatic Relations.]

On this subject, it should be pointed out that, if officials on mission commit punishable acts outside the scope of their functions, they must be prosecuted by the competent authorities of the country in which they are performing their functions.

In this connection, in view of the possibility of officials on mission being prosecuted in the receiving country, it should be noted that they enjoy diplomatic immunity under the international treaties and agreements on the subject.⁴

Regardless of their rank, diplomatic agents may not be subjected to any form of detention, arrest or ill-treatment by the authorities of the receiving State (personal immunity). The receiving State must treat them with due respect and take all appropriate steps to prevent any attack on their person, freedom or dignity. Their private residence enjoys the same inviolability and protection as the premises of the mission (property immunity or inviolability).

Diplomatic agents enjoy full immunity from the criminal jurisdiction of the receiving State, but are not exempt from the jurisdiction of the sending State. They also enjoy immunity from the civil and administrative jurisdiction of the receiving State, except for certain real actions, actions relating to succession and actions relating to professional or commercial activity. Diplomatic agents are not obliged to give evidence as witnesses and no measures of execution may be taken against them.

A diplomatic agent may not waive immunity from jurisdiction, which is a prerogative of the State, but the sending State may do so in an express waiver.

In view of these circumstances, there would be a legal impediment to the prosecution of any such officials who commit a series of punishable acts under cover of their immunity.

¹ Criminal Code of Paraguay, article 6.

² Criminal Code of Paraguay, article 7, paragraph 6.

³ Vienna Convention on Consular Relations [Translator’s note: the Spanish text refers, incorrectly, to the Vienna Convention on Diplomatic Relations.] of 24 April 1963, article 43, paragraph 1. “Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.”

⁴ Vienna Convention on Consular Relations of 24 April 1963. [Translator’s note: the Spanish text refers, incorrectly, to the Vienna Convention on Diplomatic Relations.]

However, without ignoring the immunities enjoyed by a diplomatic agent (which are a legal impediment in the strictly procedural sense), Paraguayan criminal law may apply to punishable acts committed abroad if two conditions are met: (a) the act is criminally punishable at the place where it is committed (principle of double jeopardy); and (b) the perpetrator possessed Paraguayan nationality at the time of the act or acquired it after commission of the act.⁵

In this respect, Paraguayan criminal law adheres to the provisions of paragraph 3 of General Assembly resolution 64/110, allowing this possibility of extending the jurisdiction of the Paraguayan State provided that the above-mentioned requirements are met.

An analysis of the prosecution of officials for such punishable acts of a serious nature must in the first place require that such punishable acts – the conduct attributed to the perpetrator of the act, whatever it is called – be punished by both legislations.

In the second place, it is essential that the person should possess Paraguayan nationality, meaning that officials on mission must necessarily possess that nationality in order for this requirement established in the criminal regulations also to be met.

Lastly, our criminal regulations also establish that, in the case of a conviction, the penalty may never exceed that established by the legislation in force at the place of commission of the act.

With regard to the second point, relating to paragraph 4 of General Assembly resolution 64/110, which encourages all States to cooperate with each other and with the United Nations in the exchange of information and, as appropriate, in prosecuting United Nations officials and experts on mission who are alleged to have committed crimes of a serious nature, it should be noted that our Magna Carta on international relations embodies the principles of solidarity and international cooperation.⁶

These principles are also reflected in countless treaties concluded by our country on international legal cooperation and in our Code of Criminal Procedure.

In accordance with the Constitution of Paraguay, with the Vienna Convention and its protocols, with existing international law and with the laws, the Code of Criminal Procedure and the Criminal Code, on the subject of the competence and jurisdiction of States, as far as immunities are concerned it is considered that, if an official or expert on a United Nations diplomatic mission were to commit an act punishable abroad and

⁵ Paraguayan Criminal Code, article 9. Paraguayan criminal law shall apply to other acts committed abroad only when: (1) at the place where it is committed, the act is criminally punishable; and (2) the perpetrator (a) possessed Paraguayan nationality at the time when the act was committed or (b) if not, was in the national territory and extradition was denied although it would have been legally permissible in view of the nature of the act. The provisions of this paragraph shall also apply when no punitive authority exists at the place of commission of the act. The provisions of article 5, paragraphs 2 and 3, shall also apply in this regard. The penalty may not be harsher than that established in the legislation in force at the place of commission of the act.

⁶ Constitution of the Republic of Paraguay, article 143. International relations. In its international relations, the Republic of Paraguay accepts international law and adheres to the following principles: (1) national independence; (2) self-determination of peoples; (3) legal equality of States; (4) solidarity and international cooperation; (5) international promotion of human rights; (6) freedom of navigation on international rivers; (7) non-intervention; and (8) condemnation of any form of dictatorship, colonialism and imperialism.

considered to be of a serious nature, the courts of receiving States will be competent to apply their respective laws. They must first inform the sending State through the diplomatic channel of the acts performed by the official on mission.

The Vienna Convention on Consular Relations [Translator's note: the Spanish text refers, incorrectly, to the Vienna Convention on Diplomatic Relations.], which was adopted on 24 April 1963 and came into force on 19 March 1967, states in chapter II, section II (Facilities, privileges and immunities relating to career consular officers and other members of a consular post), article 41 (Personal inviolability of consular officers):

“1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

...

3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.”

Article 42 (Notification of arrest, detention or prosecution) states: “In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel.”

Article 43 (Immunity from jurisdiction) states:

“1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.”

In view of this provision, the courts of the receiving State will not be competent to judge acts committed by diplomats in the exercise of their functions but will be competent to judge acts punishable under general law performed by them outside their functions. When such an act has been committed, the receiving State must request the sending State to waive the immunities and privileges enjoyed by the persons in question, so that the relevant investigation may be conducted.

If the receiving State where the punishable act was committed does not conduct investigations to elucidate the case or does not punish the perpetrator of the act (diplomat), the criminal law in force in the sending State may be applied to acts committed abroad by its nationals. Article 8, paragraph 1, of the

Criminal Code (Acts committed abroad against universally protected legal interests) states “Paraguayan criminal law shall also apply to the following acts committed abroad ...7. punishable acts which the Republic, under an international treaty in force, is obliged to prosecute although they were committed abroad”, adding that Paraguayan criminal law will apply only when the perpetrator has returned to the national territory (article 8, paragraph 2, of the Criminal Code).

Article 9, paragraph 1, of the Criminal Code states that “1. Paraguayan criminal law shall apply to other acts committed abroad if: 1. The act is criminally punishable at the place of its commission; and 2. The perpetrator (a) possessed Paraguayan nationality at the time of the commission of the act or acquired it after the commission of the act or (b) not possessing Paraguayan nationality, was present in the national territory and extradition had been refused although it would have been legally permissible in view of the nature of the act. The provisions of this paragraph shall also apply when no punitive authority exists at the place of commission of the act.”

These requirements must be considered when determining the competence of States to apply criminal laws in case of the commission of punishable acts by officials or experts on mission.

In addition, with regard to mutual assistance in investigations by States and, if applicable, the prosecution of United Nations officials and experts on mission, consideration must be given to the provisions of the 1967 Vienna Convention on Consular Relations.

Consequently, for any prosecution, the first step must be for the receiving State or the State where the punishable act was committed to request the sending State to waive the diplomats’ privileges and immunities, so that a criminal investigation can commence. It is suggested that the next step involving cooperation by States in investigations should be to consider the conventions and arrangements concluded between the two States, so that they may cooperate regarding statements or information required.

The third point relates to paragraph 5 of General Assembly resolution 64/110, in which reference is made to mutual 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. In this connection, see article 146 of the Code of Criminal Procedure.

Officials on mission who commit offences outside the scope of their functions may be extradited provided that a request has first been made for a waiver of their immunities, in accordance with the treaty applicable in each case. If no treaty exists, the provisions of the Magna Carta on reciprocity (article 143 of the Constitution) must be followed.

However, in the case of crimes committed by officials on mission within the scope of their functions, the State of origin is fully entitled to apply the rules which it considers relevant to the case.

In the case of international cooperation requests, the procedures for obtaining evidence established in the relevant treaties may be followed:

- Inter-American Convention on Mutual Assistance in Criminal Matters, adopted in Nassau, Bahamas, in 1992. Act No. 2194/03, F.G.E. resolution No. 10 of 4 January 2007. Central authority: Office of the Public Prosecutor.
- Protocol on Mutual Assistance in Criminal Matters, San Luis. Central authority: Ministry of Justice.
- United Nations Convention against Transnational Organized Crime, adopted in Palermo, Italy, in 2000, and its protocols. Central authority: Office of the Public Prosecutor.
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in Vienna, Austria, Act No. 16/90.
- Inter-American Convention against Corruption (Mérida Convention), Organization of American States.
- Agreement on Judicial Cooperation in Criminal Matters between the Government of the Republic of Colombia and the Government of the Republic of Paraguay, 31 July 1997.
- Treaty of Cooperation between the Government of the Republic of Paraguay and the Government of the United Mexican States on Mutual Judicial Assistance in Criminal Matters, 8 March 2005.
- Agreement on Mutual Judicial Assistance in Criminal Matters between the Government of the Republic of Paraguay and the Government of the Republic of Panama.
- Agreement on Judicial Cooperation in Criminal Matters in force between Paraguay and Peru.
- Agreement on Judicial Assistance in Criminal Matters concluded between the Republic of Paraguay and the Republic of Venezuela.

and other instruments.

In accordance with the standards and principles described, the Paraguayan judicial system protects channels of diplomatic communication and, where appropriate, direct communication between authorities responsible for conducting investigations (Office of the Public Prosecutor), so that they can enjoy freedom, independence and security in their work, with respect for the principle of reciprocity.

The Ministry of Foreign Affairs (Legal Department) takes this opportunity to renew to the Permanent Mission of the Republic of Paraguay to the United Nations the assurances of its highest consideration, in the hope that this information fulfils the request made.

Asunción, 15 June 2010