

*Translated from Spanish*

## **Permanent Mission of Ecuador to the United Nations**

### **Brief analysis requested by the United Nations Office of Legal Affairs on the contents of General Assembly resolution 75/132, of 15 December 2020**

#### I. Background

1.1. Request by the United Nations Office of Legal Affairs to Member States, pursuant to General Assembly resolution 75/132, to provide information on provisions relating to the establishment of jurisdiction over crimes, in particular crimes of a serious nature, under existing criminal law committed by their nationals while serving as United Nations officials or experts on mission, as well as those relating to cooperation among States.

1.2. The Office of the General Legal Advice Coordinator requested the Directorate for Cooperation and International Affairs of the Office of the Attorney General to provide information in response to the request from the United Nations Office of Legal Affairs.

1.3. The Office of the Attorney General sent its response by letter No. FGE-DCAI-2021-002762-O of 19 May 2021, in which it reviewed some legal elements and concluded that *“although the country’s statutes establish what are public administration crimes, they do not have specific sections with detailed provisions relating to the establishment of jurisdiction over crimes committed by nationals while serving as United Nations officials or experts on mission”*.

#### II. Legal instrument cited by the Office of the Attorney General<sup>1</sup>

In the above-mentioned letter, the Office of the Attorney General cited the legal instrument that is applicable to its functions and is germane to the request made:

*“Constitution of the Republic of Ecuador:*

*“Art. 167 – The power to administer justice emanates from the people and is exercised by the organs of the judicial branch and by the other organs and functions established in the Constitution”*.

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<sup>1</sup> Letter No. FGE-DCAI-2021-002762-O of 19 May 2021.

*“Art. 169 - The procedural system provides a means for the delivery of justice. Procedural rules will enshrine the principles of simplification, uniformity, efficiency, immediacy, promptness and procedural economy, and shall give effect to due process guarantees. Justice will not be sacrificed owing to the mere omission of formalities”.* (Emphasis added)

*“Art. 194 - The Office of the Attorney General, an autonomous, unique and indivisible body of the judiciary branch, will operate in a decentralized manner and have administrative, economic and financial autonomy. The Attorney General is its highest authority and legal representative and will act in accordance with constitutional principles, rights and due process guarantees”.*

*“Art. 195 - The Office of the Attorney General will conduct, on its own volition or at the request of a party, pre-procedural and procedural criminal investigations. During that process, it will act on behalf of the public, in keeping with the principles of timeliness and minimum criminal intervention, paying special attention to the public interest and the rights of victims. If it finds the allegations warranted, it will bring charges against the alleged offenders before a competent judge, and will lead the prosecution’s effort to substantiate the criminal case. To perform its functions, the Office will organize and lead a comprehensive and specialized investigation, forensic medicine and forensic science system, which will include civilian and police investigators; it will also lead the system for the protection and assistance of victims, witnesses and participants in criminal cases, and perform other duties established by law”.* (Emphasis added)

*“Article 226 - State institutions and their agencies and branches, public servants and persons acting under a State authority will exercise only the powers and authorities vested in them under the Constitution and the law. They will have the duty to coordinate activities to meet their goals and to ensure the enjoyment and exercise of the rights recognized in the Constitution.* (Emphasis added).

#### *Comprehensive Organic Criminal Code*

*“Article 14. The rules of this Code shall apply to: 1. Any offence committed within the national territory 2. Offences committed outside Ecuadorian territory, in the following cases: (a) when the offence generates effects in Ecuador or in places under its jurisdiction; (b) when the criminal offence is committed abroad against one or more Ecuadorian nationals and the case has not been adjudicated in the country where it was committed; (c) when the criminal offence is committed by public servants while performing their official functions or duties; (d) when the criminal offence affects legal property protected by international law, through international instruments ratified by Ecuador, provided that the adjudication of the case has not been initiated in another jurisdiction;*

*and (e) when the offences constitute serious violations of human rights, in accordance with the procedural rules established in this Code 3. Offences committed on board military or merchant vessels or aircraft flying the Ecuadorian flag or registered in Ecuador. 4. Offences committed by servants of the Armed Forces abroad, based on the principle of reciprocity”.*

*“Art. 400.- The following are subject to the criminal jurisdiction of Ecuador: 1. Ecuadorian or foreign nationals who commit an offence in Ecuadorian territory 2. The Head of State and diplomatic representatives of Ecuador, their family and entourage who commit an offence on foreign territory and Ecuadorian consuls who, in the same case, do so in the performance of their consular functions 3. Ecuadorian or foreign nationals who commit an offence on board Ecuadorian-flagged air or sea vessels registered in Ecuador, whether in Ecuadorian national airspace or territorial waters or in the airspace or territorial waters of another State. 4. Ecuadorian or foreign nationals who commit offences against international law or the rights provided for in international conventions or treaties in force, provided that the case has not been adjudicated in another State. In accordance with the international conventions and instruments ratified by the Republic of Ecuador, an exception shall be made for foreign Heads of other States who are in the country, accredited diplomatic representatives residing in Ecuadorian territory and diplomatic representatives of other States who pass through the territory occasionally. This exception extends to the spouse, children, foreign employees and other entourage of the Head of State or of each diplomatic representative, provided that they officially notify the Ministry of Foreign Affairs of the names of such entourage or mission personnel.*

*“Art. 442.- Office of the Public Prosecutor. - The Office of the Public Prosecutor conducts preliminary and in-process criminal investigations and intervenes until the proceedings are completed. The victim must be instructed by the prosecutor about his or her rights and, in particular, about his or her participation in the case” (emphasis added).*

*“Article 443.- Powers of the Office of the Public Prosecutor. - The Office of the Public Prosecutor exercises the following powers: (...) 1. To organize and direct the specialized comprehensive system for investigations, forensic medicine and forensic sciences. 2. To manage the system for the protection and assistance of victims, witnesses and other participants in the process. 3. Issue, in coordination with the entities that support the comprehensive special system for investigations, forensic medicine and forensic sciences or with the competent agency for transit matters, the procedural manuals and technical standards for the performance of investigative functions. 4. To ensure the participation of prosecutors specializing in crimes against sexual and*

*reproductive integrity, violence against women or members of the family nucleus, hate crimes and crimes committed against children, adolescents, young people, persons with disabilities, adults and older adults, and in relevant matters which, owing to their specific nature, require greater protection".*

Other offences defined in section 3 of the Code, entitled "Offences against the efficiency of public administration", include embezzlement, illicit enrichment, bribery, extortion, failure to comply with legitimate decisions of a competent authority, assault or resistance, breaking of seals, influence peddling, offers to engage in influence peddling, usurpation and simulation of public functions, use of public force against orders of authority, front running, offences against the institutional assets of the Armed Forces or the National Police, alteration of evidentiary items, overstepping of mandates in the execution of an act of service, and abuse of power.

From the above-mentioned legal framework, the Office of the Attorney General, as the people's representative in criminal matters, directs the preliminary phase and also acts as a party to the case in criminal proceedings, in that it intervenes until the end of the criminal process, which ends once the sentence becomes enforceable (the right to challenge has been exhausted), through the filing of various motions".

III. Comments by the Office of the General Coordinator of Legal Advice at the Ministry of Foreign Affairs and Human Mobility:

Resolution 75/132 was adopted on 15 December 2020 following the mandate given to " to provide advice on the best way to proceed so as to ensure that the original intent of the Charter of the United Nations can be achieved, namely, that United Nations staff and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station, nor unjustly penalized, without due process." (Third preambular paragraph). -emphasis added.

In that context, the Office of Legal Affairs requested that Member States review the contents of paragraphs 10, 12, 13, 15, 18, 20 and 30 of the above-mentioned resolution.

The Organization urged Member States, in paragraph 9, "to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice (...), considering activities such as sexual exploitation and abuse, fraud, corruption to be criminal activities. (Paragraph 6)

In short, the requested paragraphs refer to:

- On paragraph 10. It urges States to take measures to establish their jurisdiction over such crimes, as known in their existing national criminal laws, committed by United Nations officials or experts on mission, and further urges States and international organizations to provide technical assistance in developing legal measures to States upon request.

From the information mentioned by the Office of the Attorney General, article 14 of the Comprehensive Organic Criminal Code, considered offences outside the national territory:

"Article I The rules of this Code shall apply to: 1. Any offence committed within the national territory 2. Offences committed outside Ecuadorian territory, in the following cases: (a) when the offence generates effects in Ecuador or in places under its jurisdiction; (b) when the criminal offence is committed abroad against one or more Ecuadorian persons and the case has not been adjudicated in the country where it was committed; (c) when the criminal offence is committed by public servants while performing their official functions or duties; (d) when the criminal offence affects legal property protected by international law, through international instruments ratified by Ecuador, provided that the prosecution of the case has not been initiated in another jurisdiction; and (e) when the offences constitute serious violations of human rights, in accordance with the procedural rules established in this Code 3. Offences committed on board military or merchant vessels or aircraft flying the Ecuadorian flag or registered in Ecuador. 4. Offences committed by servants of the Armed Forces abroad, based on the principle of reciprocity". -emphasis added.

Similarly, article 400 establishes criminal jurisdiction in Ecuador over those nationals who (No. 4"

"Art. 400 - Ecuadorians or foreigners who commit offences against international law or the rights provided for in international conventions or treaties in force, provided that they have not been tried in another State are subject to the criminal jurisdiction of Ecuador.

- In paragraph 12, the Organization encourages States to: afford each other assistance in connection with investigations or criminal or extradition proceedings in respect of such crimes in "obtaining evidence" relating to the commission of these offences, "for the purpose of obtaining evidence", in accordance with their national law or any treaties or other arrangements on extradition and mutual legal assistance.
- Facilitate the use of information and material obtained from the United Nations for the purposes of criminal proceedings for the prosecution of these cases.

- Offer protection for victims and witnesses, and others who provide information in relation to the commission of these crimes.
- Respond adequately to requests by host States for support and assistance for effective investigations of these crimes.

Ecuador is a party to numerous multilateral and bilateral extradition and legal assistance agreements in its region and in Europe; There is also a legal framework for the protection of victims and witnesses; and, with regard to legal cooperation, provides ongoing support to other countries.

- In paragraph 13, the Organization recommends that States ensure that their personnel who will serve the United Nations "meet high standards in their conduct and behaviour", and requests the Secretariat to take measures to ensure that all such personnel are properly vetted and investigated.

Under the leadership of the Joint Command of the Armed Forces of Ecuador, military and police personnel undergo training at the Ecuador Peace Missions School Unit before joining the selected personnel who would work in United Nations peace missions on an annual basis. The United Nations office in Ecuador has a civilian affairs department in charge of coordination.<sup>2</sup>

- In paragraph 15, the Assembly invited comments from States on the report of the Group of Legal Experts (resolutions 62/63 of 6 December 2007; and 63/119 of 11 December 2008: 63/119, both entitled "Criminal accountability of United Nations officials and experts on mission").

The resolutions in question are fully related to the resolution under review (75/132), in most of the requests made to States.

It is important to take note, as a State, of the urging from the Organization in those resolutions and in the latest one adopted in 2020, that States "consider establishing, to the extent that they have not yet done so, jurisdiction over crimes, particularly those of a serious nature, as known in their existing national 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". (para. 3)

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<sup>2</sup> This information was provided on an informal basis by a member of the Armed Forces enrolled in UEMPE courses, and was not formally verified with the Armed Forces.

According to the Office of the Attorney General, there is no specific section in the criminal statutes of Ecuador on these crimes committed by United Nations personnel on mission; however, the criminal activities mentioned by the Group of Legal Experts, such as sexual exploitation and abuse, fraud and corruption, are crimes under the Comprehensive Criminal Code.<sup>3</sup>

In addition, since some members of the Armed Forces or the Public Force are reportedly performing functions in peace missions, the Comprehensive Organic Criminal Code, in Section 3, which deals with crimes against the efficiency of public administration, establishes certain criminal offences relating to such personnel. (Arts. 290. Crimes against the institutional assets of the Armed Forces, FFAA; 291. Avoidance of responsibilities of the servants of the Armed Forces; 293. Overstepping of mandates in the performance of an act of service and 294 Abuse of authority).

In the three resolutions of 2007, 2008 and 2020, the Assembly States to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice, without prejudice to the privileges and immunities of such persons and the United Nations under international law, and in accordance with international human rights standards, including due process (para. 2 Res. 63/119, 2008).

This request is of laudable importance because of the respect for the responsibility that any United Nations official on mission must have in the exercise of his or her functions.

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<sup>3</sup> Art. 100 of the Code: Sexual exploitation of persons: Any person who, for his own benefit or that of a third party, sells, lends, takes advantage of or gives in exchange another person to perform one or more acts of a sexual nature shall be liable to 13 to 16 years' imprisonment. If the conduct described is carried out on older adults, children, adolescents, pregnant women, persons with disabilities or catastrophic illnesses, persons at risk or in a situation of vulnerability, or if the victim and the aggressor maintain or have maintained a consensual relationship as a couple, family, conjugal or economic dependency, or if there is a link of civil, military, educational, religious or labour authority, the prison sentence shall be from 16 to 19 years.

170 of the Code. Sexual abuse: (Reformed by art. 36 of Act No. R.O. 107-S, 24-XII-2019): A person who, against the will of another, performs on him/her or forces him/her to perform on him/herself or on another person, an act of a sexual nature, without there being penetration or carnal access, shall be liable to 3 to 5 years' imprisonment. When the victim is under 14 years of age or disabled; when the person lacks the capacity to understand the meaning of the act or for any reason is unable to resist it; or if the victim, as a result of the offence, suffers permanent physical injury or psychological impairment or contracts a serious or fatal disease, shall be liable to 7 to 10 years' imprisonment. If the victim is under 6 years of age, the offender shall be liable to 10 to 13 years' imprisonment.

The criminal offense of procedural fraud is set out in the Code; Election fraud and stock market fraud

Section 3 of the Code, Crimes against the efficiency of public administration, contemplates several criminal offences that deal with acts of corruption: 278. embezzlement; 279. Illicit enrichment; 280 bribery; 281. Concusión; 282. Failure to comply with the lawful decisions of a competent authority; 283. Attack or resistance. 284. Breaking of seals; 285. Influence peddling; 286. Offer to engage in influence peddling. 287. Usurpation and simulation of public functions; 288. Use of public force against an order from an authority and 289. Acting as a front man.

Some important that stand out for their ethics and fairness are those that appear in paragraphs 11 and 13 of resolution 63/119 of 2008 related to the invitation to restore the credibility and reputation of the accused, when the allegations are unfounded; as well as the request to the United Nations, in accordance with the applicable rules of the Organization, not to take any action that would retaliate against or intimidate United Nations officials and experts on mission who report allegations concerning crimes of a serious nature committed by United Nations officials and experts on mission.

- In paragraph 18, the Assembly urges the Secretary-General to bring credible allegations of such cases to the attention of States and to request from States updates on investigations of these cases and the assistance that States may wish to receive for such investigations and prosecutions.

No new information is available.

- In paragraph 20 requests, the Assembly urges States to provide periodic updates on their handling of the allegations and measures to ensure accountability, including disciplinary or criminal proceedings brought in accordance with national laws.

In this regard, it is worth mentioning the affirmation by the Office of the Attorney General that our statutes "do not contain a specific section detailing provisions relating to the establishment of jurisdiction over crimes committed by nationals while serving as United Nations officials or experts on mission".

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