

Translated from Spanish

Ministry of Foreign Affairs

The scope and application of the principle of universal jurisdiction

Reply by Mexico to the request made in General Assembly resolution 72/120

Operative paragraph 3 of resolution 72/120, adopted by the United Nations General Assembly on 7 December 2017 “*Invites* Member States [...] to submit, before 27 April 2018, information and observations on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties and their national legal rules and judicial practice, and requests the Secretary-General to prepare and submit to the General Assembly at its seventy-third session a report based on such information and observations”.

Mexico’s reply to this request is given below:

I. SCOPE AND APPLICATION, INCLUDING INTERNATIONAL TREATIES

- Mexico considers universal jurisdiction to be a useful tool to combat impunity for the most serious offences of international significance. It allows the national courts of a State to exercise jurisdiction with respect to certain offences even if no connection or link with them exists (such as the territory in which they are committed or the nationality of the perpetrator or the victim).
- Mexico notes that, strictly speaking, international treaties expressly provide for universal jurisdiction only with respect to offences which they require States Parties to investigate and prosecute regardless of any link or connection:
 - i. Piracy, regarding which article 100 of the United Nations Convention on the Law of the Sea (acknowledged to represent international customary law) specifies that all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.
 - ii. War crimes consisting of serious violations of the four universally ratified 1949 Geneva Conventions, on the basis of articles 49, 50, 129 and 146 of these Conventions respectively, are to be investigated and prosecuted by States whatever the nationality of the accused.

- Other related international treaties contain other legal concepts different from universal jurisdiction, namely:
 - i. The obligation to extradite or prosecute (*aut dedere aut judicare*) embodied, for example, in the Convention on the Prevention and Punishment of the Crime of Genocide and in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This obligation is not the same as exercise of universal jurisdiction, since the State may under its national laws require some connection with the crime (territoriality, active personality, passive personality) and, if this does not exist, the State will be obliged to extradite the individual to another jurisdiction, using the above-mentioned treaties as the legal basis for extradition.
 - ii. International criminal jurisdiction, as provided in the Rome Statute of the International Criminal Court (ICC), which establishes the Court's complementary competence in the case of the four international crimes of genocide, war crimes, crimes against humanity and the crime of aggression, when the State is unwilling or unable to carry out the investigation or prosecution. In the Court, unlike in foreign courts, the immunities that may attach to the official capacity of a person are not applicable.
- Mexico is a party to all the above-mentioned treaties.

II. DOMESTIC LEGAL PROVISIONS AND JUDICIAL PRACTICE

- The national jurisdiction of criminal courts in Mexico is based on:
 - i. Territoriality, for crimes committed in national territory, in accordance with articles 1 and 5 of the Federal Criminal Code:

“Article 1. This Code shall apply **throughout the Republic** to offences of a federal nature.”

“Article 5. The following offences shall be considered to have been **committed in the territory of the Republic**:

 - I. Those committed by Mexicans or by foreigners on the high seas when on board national vessels;
 - II. Those committed on board a Mexican warship at anchor in port or in the territorial waters of another nation. This includes merchant vessels, if the offender has not been prosecuted in the nation to which the port belongs;

III. Those committed on board a foreign vessel at anchor in a Mexican port or in the territorial waters of the Republic, when the public peace has been disturbed or the offender or injured party was not a crew member. Otherwise the law of reciprocity shall apply;

IV. Those committed on board national or foreign aircraft in Mexican or foreign territory, airspace or territorial waters in similar cases to those mentioned concerning vessels in the previous subparagraphs; and

V. Those committed in Mexican embassies and delegations.”

- ii. Active personality, for offences committed in a foreign territory by a Mexican, provided that: (i) the accused is present in Mexican territory; (ii) the accused has not previously been prosecuted; and (iii) the double criminality requirement is met (i.e. the alleged offence is criminalized both in the country in which it was committed and in the Republic). This echoes article 4 of the Federal Criminal Code, which reads as follows:

“Article 4. **Offences committed in a foreign territory by a Mexican against Mexicans or against foreigners**, or by a foreigner against Mexicans, shall be punished in the Republic, in accordance with federal laws, if the following requirements are met:

- I. The accused is present in the Republic;
- II. The culprit has not received a final sentence in the country in which the offence was committed; and
- III. The alleged offence is criminalized in the country in which it was committed and in the Republic”.

- iii. Passive personality, for offences committed in a foreign territory against Mexicans, provided that the same requirements specified above are met, in accordance with article 4 of the Federal Criminal Code, as follows:

“Article 4. **Offences committed in a foreign territory by a Mexican against Mexicans or against foreigners**, or by a foreigner against Mexicans, shall be punished in the Republic, in accordance with federal laws, if the following requirements are met:

- I. The accused is present in the Republic;
- II. The culprit has not received a final sentence in the country in which the offence was committed; and

III. The alleged offence is criminalized in the country in which it was committed and in the Republic”.

- iv. Protection (or interest) for offences that are initiated, prepared or committed abroad when they produce or are designed to have effects in the national territory or for offences committed in Mexican consulates or against the staff thereof, provided that they have not been prosecuted in the country in which they were committed, in accordance with article 2 of the Federal Criminal Code:

“Article 2. [The Federal Criminal Code] shall also apply:

I. To **offences that are initiated, prepared or committed abroad, when they produce or are designed to have effects in the territory of the Republic (...)**”.

- v. Universal jurisdiction: According to Mexican legislation, national courts may conditionally exercise this type of jurisdiction in two instances:

- a) When an international treaty binding on Mexico provides for universal jurisdiction. As stated above, this applies to piracy covered by the Convention on the Law of the Sea and to war crimes constituting serious violations of the 1949 Geneva Conventions. Article 6 of the Federal Criminal Code states:

“Article 6. When an offence is committed that is not mentioned in this Code but is mentioned in a special law or **in an international treaty binding on Mexico**, that law or treaty shall apply, taking into account the provisions in Book One of this Code and, if appropriate, the pertinent provisions in Book Two [...]”.

The fact that the provisions of Book One of the Code must be taken into account indicates that, in order for universal jurisdiction to apply in this case, the requirements of article 4 of the Federal Criminal Code must be updated to state that: 1) The accused is present in Mexico; 2) there has been no final sentencing of the accused in the country in which the offence was committed; and 3) the offence committed is criminalized in the country in which it was committed and in the Republic.

- (b) When a treaty binding on Mexico stipulates an obligation to extradite or prosecute (*aut dedere aut judicare*) which, as stated above, applies to genocide covered by the Convention on the Prevention and Punishment of the Crime of Genocide and to torture covered by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. On these jurisdictional

grounds, offences committed abroad by or against foreigners may be prosecuted when:

- i. A treaty binding on Mexico stipulates the obligation to extradite or prosecute;
- ii. The requirements of article 4 of the Federal Criminal Code are updated to specify that: 1) the accused is present in the Republic; 2) the accused has not received a final sentence in the country in which the offence was committed; and 3) the alleged offence is criminalized in the country in which it was committed and in the Republic.
- iii. The accused is not being extradited to the requesting State.

These jurisdictional grounds were introduced by the following amendment to article 2, paragraph 1, of the Federal Criminal Code, published in the *Diario Oficial* of the Republic on 28 June 2007;

“Article 2. [The Federal Criminal Code] shall also apply:

I. To **offences that are initiated, prepared or committed abroad, provided that a treaty binding on Mexico stipulates the obligation to extradite or prosecute**, that the requirements established in article 4 of this Code are updated and that the accused is not being extradited to the requesting State.”

The statement of reasons for this reform explains that its purpose is to enable the Mexican authorities to prosecute “those probably guilty of offences committed abroad by or against foreigners” (universal jurisdiction):

“Under the international treaties to which it is a party, Mexico has undertaken to extradite persons against whom judicial proceedings have been initiated or to prosecute those probably guilty of **offences committed abroad by or against foreigners, if they are present in the territory of the Republic**. For the purpose of complying with this obligation, it is proposed to amend section 1 of article 2 of the Federal Criminal Code so as to enable the Mexican authorities to prosecute such offenders.

The proposed paragraph is limited in scope and applies only to **cases in which an international treaty to which Mexico is a party obliges it to extradite or prosecute a fugitive present in the national territory and it is not possible to extradite that person to the requesting State party to the treaty**; it thus ensures that those guilty of terrorism or

of offences with double criminality will be punished, while their human rights are fully respected”.¹

- However, there have so far been no cases in which Mexican courts have prosecuted someone on the basis of universal jurisdiction.

¹ Decree amending and supplementing various articles of the Federal Criminal Code, the Federal Criminal Procedure Code and the Federal Act against Organized Crime concerning Terrorism. Senate, Decision No. SEL/300/2163/03 of 10 September 2003.