

Australian Views on the Scope and Application of the Principle of Universal Jurisdiction

The scope of the principle of universal jurisdiction

Australia recognises universal jurisdiction as a well established principle of international law. We welcome the opportunity to provide our views on the scope and application of the principle.

Universal jurisdiction vests in every State the competence to exercise criminal jurisdiction over those individuals responsible for the most serious crimes of international concern regardless of where the conduct occurs. It provides every State the entitlement to prosecute and punish certain offenders on behalf of the international community.

The principle was first developed at customary international law in relation to piracy to prevent pirates enjoying impunity or safe haven, on the basis that pirates were 'hosti humanis generis' or enemies of all mankind. It has since been extended to include jurisdiction over the crimes of genocide, war crimes, crimes against humanity, slavery and torture.

The nature or exceptional gravity of these crimes renders their suppression a joint concern of all members of the international community. Suspects of these serious crimes should be properly and genuinely investigated, and perpetrators should be prosecuted and punished. This is necessary to enhance the international rule of law, bring justice to victims, and meaningfully contribute to sustainable peace in conflict situations. Impunity for such crimes is unacceptable.

Australia believes that, as a general rule, the State in which a crime took place (the territorial State) and the State of nationality of the perpetrator (the national State) have primary responsibility in the fight against impunity. Each State should prohibit serious crimes under their domestic law, and exercise effective jurisdiction over those crimes when they are committed on their territory or by their nationals. In particular, the territorial State is often best placed to obtain evidence, secure witnesses, enforce sentences, and to deliver the 'justice message' to perpetrators, victims and affected communities. However, it is a fact that many serious crimes of international concern go unpunished in the territorial and national jurisdiction, including through the movement of alleged perpetrators across national borders. Accordingly, the international criminal justice system affords various complementary mechanisms to end impunity and to maintain international peace and security.

One mechanism is for the United Nations Security Council to establish ad hoc tribunals in exercise of its mandate under Chapter VII of the UN Charter. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have both played important roles in the fight against impunity. However, each of these bodies exercises only that geographic, temporal and/or subject-matter jurisdiction that has been afforded to it by the Security Council acting under Chapter VII. As such, they are distinct from the principle of universal jurisdiction.

Another mechanism is the International Criminal Court (ICC). However, it too is distinct from the principle of universal jurisdiction. The ICC exercises that mandate which has been granted to it by States Parties through ratification of the Rome Statute. The ICC is also a court of last resort with jurisdiction to prosecute perpetrators only where a State which has jurisdiction is either unable or unwilling to act.

Australia has been a strong supporter of these bodies as complementary mechanisms in the fight against impunity. However, we acknowledge that these bodies have jurisdictional and practical limitations and will never be able to investigate and prosecute all perpetrators of serious international crimes.

Universal jurisdiction is therefore an important complementary mechanism in our collective system of criminal justice. It ensures that, where a serious crime of international concern has been committed, and other States which have jurisdiction are unable or unwilling to act, and where international courts and tribunals lack the jurisdiction or practical means of prosecuting the perpetrators of grave crimes, then another State may take up the action on behalf of the international community.

The application of the principle of universal jurisdiction

It is of paramount importance that national courts only exercise universal jurisdiction – and indeed all bases of jurisdiction – in good faith and consistently with other principles and rules of international law. This is essential to ensure that the goal of ending impunity does not in itself generate abuses of human rights of the accused or conflict with other existing rules of international law. It is also important that judicial independence and impartiality is maintained to ensure that the principle of universal jurisdiction is not manipulated for political ends.

States must also ensure that their domestic courts uphold their fair trial obligations, as reflected in article 14 of the International Covenant on Civil and Political Rights (1966). This includes the minimum fair trial guarantees, such as the right of the accused persons to be present at their own trial, to defend themselves in person or through counsel of their own choosing, to examine witnesses and have witnesses examined on their behalf and to be tried without undue delay. On the rare occasion where a national court does exercise universal jurisdiction, State practice suggests that it be accompanied by a connecting link between the offence and the forum State, such as the presence of the accused on the territory of the forum State. And where prosecutions do occur, other relevant States should cooperate with the national court to provide all available means of assistance consistently with their international obligations and national practices, including mutual assistance to obtain evidence. By enabling the national court to give effect to the exercise of universal jurisdiction, we all further our shared goal to end impunity.

Implementation of the principle of universal jurisdiction into Australian law

In order to have effect in Australian law, international obligations must be incorporated into Australian domestic law, either through legislation or the common law. The Australian Parliament has ensured that serious crimes of international concern, including genocide, war crimes, crimes against humanity, piracy, slavery and torture (and secondary and inchoate offences relating to these crimes such as attempt, incitement, complicity, aiding and abetting), are comprehensively criminalised under Australian law, and that Australia has the legal capacity to investigate and prosecute those crimes in accordance with the principle of universal jurisdiction.

Australia has an established framework for ensuring that perpetrators of serious crimes of international concern are brought to justice. This framework is based on three pillars: border security (i.e. detecting suspected criminals as they enter Australia), domestic investigation and prosecution; and international crime cooperation (including the provision of mutual legal assistance to foreign countries and tribunals and extradition of suspects).

Trials in Australia will generally only be conducted in the presence of the accused.

Genocide, crimes against humanity, war crimes, and torture offences

The offences of genocide, crimes against humanity and war crimes are prohibited under Division 268 of the *Criminal Code Act 1995* (the Criminal Code). Torture offences are prohibited under Division 274 of the Criminal Code. All of these offences are subject to unrestricted category D jurisdiction, which is defined in section 15.4 as applying whether or not the conduct constituting the alleged offence, or a result of the conduct constituting the alleged offence, occurs in Australia. There is no requirement that the victim or the perpetrator be an Australian citizen, resident or body corporate.

In order to safeguard against inappropriate prosecutions for offences under Divisions 268 and 274, the Attorney-General's consent is generally required before a prosecution can be commenced (sections 268.121 and 274.3). Whilst the consent rules vary depending on the type of offence, the Attorney-General's consent is always required for offences that occur wholly outside Australia. In exercising discretion as to whether the prosecution should proceed, the Attorney-General may have regard to matters including considerations of international law, practice and comity, prosecution action that is being, or might be brought, in a foreign country and other matters of public interest.

Slavery offences

Slavery and associated offences are criminalised under Division 270 of the Criminal Code. Australian courts have jurisdiction over the slavery offence in section 270.3 irrespective of whether the perpetrator was within or outside Australian territory at the time the offences were committed.

Category B jurisdiction applies to the associated offences of sexual servitude (s. 270.6), deceptive recruiting for sexual practices (s.270.7), trafficking in persons (s.271.2 - 271.4) and debt bondage (s.271.8 and s.271.9). This means that, where the conduct constituting those offences occurs outside Australia, Australian courts will only have jurisdiction where the perpetrator is an Australian citizen, an Australian resident or an Australian body corporate (s.15.2).

Piracy offences

Offences under Part IV of the *Crimes Act 1914* criminalise acts of piracy on the high seas, as defined in the *United Nations Convention on the Law of the Sea*. The piracy offences apply where the conduct constituting the offence is performed on the high seas, in places beyond the jurisdiction of any country, or in the coastal sea of Australia (s.52 and ss.53(2)). In these circumstances jurisdiction applies irrespective of the nationality of the perpetrators or the victims, the flag state of the vessels involved, or of any connection with Australia.

The *Crimes (Ships and Fixed Platforms) Act 1992 (Cth)* implements Australia's international legal obligations to prosecute and punish acts of maritime violence as outlined in the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (SUA Convention). Offences under this Act generally extend to acts, matters and things outside Australia and to all persons whatever their nationality or citizenship (s. 5).

In relation to all of the above offences, the general principles of Australian law relating to individual criminal responsibility apply. This includes the relevant excuses, defences and modes of criminal responsibility.