

COMMENTS BY NEW ZEALAND

*on the scope and application of the principle of universal jurisdiction,
including information on the relevant applicable international treaties,
domestic legal rules and judicial practice*

Summary

There are many examples of offences in New Zealand legislation that have some aspect of extra-territoriality. There are, however, very few offences in New Zealand law that carry universal jurisdiction. Those offences that carry universal jurisdiction are found in the Geneva Conventions Act 1958, the International Crimes and International Criminal Court Act 2000 and the Crimes Act 1961. These Acts and the offences that carry universal jurisdiction are discussed further below. To date no prosecutions have been pursued with respect to any of these offences.

Extra-territorial Jurisdiction

New Zealand legislation attributes extra-territorial jurisdiction to a number of offences, usually those that implement international agreements containing obligations to criminalise certain actions and ensure that offenders are prosecuted or extradited.

Although these agreements are often described as creating "universal jurisdiction", New Zealand considers that the extra-territorial jurisdiction assumed under them is different to universal jurisdiction in that limits remain on the circumstances in which jurisdiction may be exercised. In particular, the exercise of jurisdiction is limited to criminal acts that have some link with New Zealand.

For example, the Mercenary Activities (Prohibition) Act 2004 which implements New Zealand's international obligations under the International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989, provides for extra-territorial jurisdiction for "mercenary activities" in section 13:

- (1) *Even if the acts or omissions alleged to constitute an offence occurred wholly outside New Zealand, proceedings may be brought for an offence under any of sections 7 to 12—*
- (a) *if the person to be charged—*
 - (i) *is a New Zealand citizen; or*
 - (ii) *is ordinarily resident in New Zealand; or*
 - (iii) *has been found in New Zealand and has not been extradited; or*

- (iv) is a body corporate, or a corporation sole, incorporated under the law of New Zealand; or
- (b) if any of the acts or omissions is alleged to have occurred on board—
 - (i) a ship registered, or required to be registered, under the Ship Registration Act 1992; or
 - (ii) a ship used as a ship of the New Zealand Defence Force; or
 - (iii) an aircraft registered, or required to be registered, in New Zealand under the Civil Aviation Act 1990; or
 - (iv) an aircraft for the time being used as an aircraft of the New Zealand Defence Force; or
 - (v) an aircraft that is leased to a lessee whose principal place of business is in New Zealand, or who is a New Zealand citizen or a person ordinarily resident in New Zealand; or
- (c) if a person in respect of whom the offence is alleged to have been committed—
 - (i) is a New Zealand citizen; or
 - (ii) is ordinarily resident in New Zealand.

Universal Jurisdiction

New Zealand is party to the Rome Statute of the International Criminal Court (1998), the Geneva Conventions on the Laws of War (1949) and associated protocols, the Convention on the High Seas (1958) and the United Nations Convention on the Law of the Sea (1987). The domestic legislation discussed below implements, *inter alia*, the universal jurisdiction provided for in these conventions.

International Crimes and International Criminal Court Act 2000 – The crimes in sections 9 (genocide), 10 (crimes against humanity) and 11 (war crimes) of the International Crimes and International Criminal Court Act 2000 (“the ICC Act”) carry universal jurisdiction. The universal jurisdiction for these crimes is provided for in section 8(1) of the ICC Act which reads:

“Proceedings may be brought for an offence- ...

- (c) against section 9 or section 10 or section 11 regardless of-
 - (i) the nationality or citizenship of the person accused; or
 - (ii) whether or not any act forming part of the offence occurred in New Zealand; or
 - (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence”

Section 13 of the ICC Act provides that proceedings for an offence against sections 9, 10 and 11 may not be instituted in any New Zealand court without the consent of the Attorney-General. This does not preclude a person charged with an offence under sections 9, 10 or 11 from being arrested or a warrant for his/her arrest being issued and executed. Nor does it preclude the person charged being remanded in custody or on bail.

To date, New Zealand has not pursued any prosecutions under sections 9, 10 or 11 of the ICC Act.

In 2006, an attempt was made to bring a private prosecution under section 8(1) of the ICC Act against Moshe Ya'alon, a former Israeli general who was visiting New Zealand. An arrest warrant for General Ya'alon was issued by a District Court judge in *Ex Parte Application for Issue of Warrant to Arrest Lieutenant General Moshe Ya'alon of Israel* (District Court, Auckland, Civ-2006-004, 27 November 2006). Pursuant to section 13 of the ICC Act, the consent of the Attorney-General was necessary in order to proceed with the prosecution. The Attorney-General declined to give his consent on advice that the evidence against General Ya'alon was insufficient to warrant pursuing a prosecution. The prosecution was permanently stayed by the Attorney-General and arrest warrants were extinguished on 28 November 2006 (*Wakim v Ya'alon* (District Court, Auckland, Civ-2006-004, 27 November 2006, Judge Deobhakta)

Geneva Conventions Act 1958 – Section 3 of the Geneva Conventions Act 1958 provides for universal jurisdiction over grave breaches of the Geneva Conventions or the First Protocol. Similarly to the ICC Act, this Act provides that no one shall be prosecuted for an offence against section 3 without the leave of the Attorney-General. The universal jurisdiction for these offences is provided for in section 3(1) and 3(3) of the Geneva Conventions Act:

(1) Any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the Conventions or of the First Protocol is guilty of an indictable offence.

...
(3) This section applies to persons regardless of their nationality or citizenship.

To date, New Zealand has not pursued any prosecutions under section 3 of the Geneva Conventions Act.

Crimes Act 1961 – Piracy in the Crimes Act has some aspects which carry extra-territorial jurisdiction and some aspects which carry universal jurisdiction. Section 92 of the Crimes Act specifies that acts of "piracy by the law of nations" are subject to universal jurisdiction:

(1) Every one who does any act amounting to piracy by the law of nations, whether that act is done within or outside New Zealand,—

(a) Shall upon conviction thereof be sentenced to imprisonment for life if, in committing piracy, he murders, attempts to murder, or does any act likely to endanger the life of any person:

(b) Is liable to imprisonment for a term not exceeding 14 years in any other case.

(2) Any act that by the law of nations would amount to piracy if it had been done on the high seas on board or in relation to a ship shall be piracy for the purposes of this section if it is done on board or in relation to an aircraft, whether the aircraft is on or above the sea or is on or above the land.

To date, New Zealand has not pursued any prosecutions under section 92 of the Crimes Act.

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