



Note No. 38/2018

The Permanent Mission of Australia to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to the note verbale, reference LA/COD/59/1, and to General Assembly resolution 72/120, requesting information and observations from Member States on “the scope and application of the principle of universal jurisdiction”.

The Permanent Mission of Australia has the honour to convey the **attached** submission outlining the the observations and views of the Commonwealth of Australia on this matter.

The Permanent Mission of Australia to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.



NEW YORK
28 April 2018

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

Australia recognises universal jurisdiction as a well-established principle of international law, and a key element of efforts to ensure accountability for the most serious crimes of international concern. Australia refers to General Assembly Resolution 72/120 and welcomes the opportunity to reaffirm our views on the scope and application of universal jurisdiction. Australia welcomes the inclusion of States Parties' observations in the Secretary-General's report to the General Assembly at its seventy-third session. We are grateful for the ongoing work of the Sixth Committee on this critical issue.

The scope of the principle of universal jurisdiction

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 authority 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 and 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 uphold the international rule of law, ensure that those who commit crimes are brought to justice, 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 jurisdiction and responsibility to hold perpetrators to account. 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. Nonetheless, it is a fact that many serious crimes of international concern go unpunished in the territorial and national jurisdiction, including because alleged perpetrators are allowed to leave the jurisdiction.

The international criminal justice system affords various complementary mechanisms to end impunity and to maintain international peace and security. One mechanism has been the ad hoc tribunals established by the United Nations Security Council 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. They do not operate on the basis of universal jurisdiction. The UN Mechanism for International Criminal Tribunals, which now performs a number of essential functions previously carried out by the ICTY and ICTR, continues its jurisdiction on the same basis as those bodies.

Another mechanism is the International Criminal Court (ICC). However, it too does not operate on the basis of universal jurisdiction. The ICC exercises the mandate 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 to end impunity. However, we acknowledge that these bodies have jurisdictional and practical limitations and cannot investigate and prosecute all perpetrators of serious international crimes.

Universal jurisdiction is therefore an important component of our collective system of criminal justice. It ensures that, where a serious crime of international concern has been committed, and States which have jurisdiction are unable or unwilling to act, and 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 in good faith and consistently with all principles and rules of international law. This is essential to ensure that the goal of ending impunity does not in itself generate abuses of the 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 fair trial obligations, as reflected in article 14 of the *1966 International Covenant on Civil and Political Rights*. This includes the minimum fair trial guarantees, such as the right of 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. 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 legal obligations must be incorporated into Australian domestic 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 accused persons).

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 Commonwealth Criminal Code). Torture is prohibited under Division 274 of the Commonwealth Criminal Code. All of these offences are subject to 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 alleged victim or perpetrator be an Australian citizen, resident or body corporate.

In order to safeguard against inappropriate prosecutions, the Commonwealth Attorney-General's consent is required before a prosecution can be commenced for an offence under Division 268 (s 268.121). For an offence under Division 274, the Attorney-General's consent is required where the conduct constituting the alleged offence occurred wholly outside Australia (s 274.3). In exercising discretion as to whether to consent to a prosecution, 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 slavery-like offences are criminalised under Division 270 of the Commonwealth Criminal Code. Offences under Division 270 are subject to two different forms of jurisdiction. The offence of slavery (s 270.3) is subject to category D jurisdiction. Australian courts will have jurisdiction even where the conduct constituting the alleged offence occurs wholly outside Australia (s 270.3A), although in such cases the Attorney-General's consent will be required for a prosecution to be commenced (s 270.3B).

Other offences under Division 270 are subject to 'category B' jurisdiction (s 270.9). This means that conduct that occurs wholly outside Australia (and not on board an Australian ship or aircraft) will only constitute an offence where the perpetrator is an Australian citizen, resident or body corporate (s 15.2). Category B jurisdiction applies to the slavery-like offences of servitude (s 270.5), forced labour (s 270.6A), deceptive recruiting for labour or services (s 270.7) and forced marriage (s 270.7B). It also applies to certain offences related to trafficking in persons (ss 271.2-271.4), organ trafficking (ss 271.7B-271.7C) and debt bondage (ss 271.8-271.9).

Piracy and other acts of violence at sea

Part IV of the *Crimes Act 1914* establishes two piracy-related offences. First, it criminalises the act of piracy (s 52). Piracy is defined as an act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft, and directed:

- (a) if the act is done on the high seas or in the coastal sea of Australia – against another ship or aircraft or against persons or property on board another ship or aircraft; or
- (b) if the act is done in a place beyond the jurisdiction of any country – against a ship, aircraft, persons or property.

Part IV also establishes the offence of operating a pirate-controlled ship or aircraft (s 53). Jurisdiction for both of these offences applies irrespective of the nationality of the perpetrators or the victims, the flag state of the vessels involved, or of any connection with Australia. However, the Attorney-General's consent is required for Australian authorities to prosecute for an offence against Part IV (s 55).

Part 2.4 of the *Criminal Code Act 1995* extends criminal responsibility. Section 11.4 will apply where a person urges the commission of an offence – under section 11.4(1) that person is guilty of the offence of incitement. Under section 11.2(1) of the Code, a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence.

The *Crimes (Ships and Fixed Platforms) Act 1992* implements Australia's international legal obligations to prosecute and punish acts of maritime violence as outlined in the *1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* and the *1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*. The Attorney-General's consent is required for prosecutions for most offences under the Act (s 30). Prima facie, offences under the Act extend to relevant acts, matters and things outside Australia and to all persons whatever their nationality or citizenship (s 5). However, for most offences, proceedings cannot be commenced unless one or more enumerated elements are present linking the offence to Australia or to a State Party to the relevant international instrument (ss 18 and 29). Such an element would be present where, for example, the ship concerned was an Australian ship or where the alleged offender was a national of Australia or of a State Party to the relevant instrument.

In relation to all of the above offences, the general principles of Australian law relating to individual criminal responsibility apply.