



Note No: 047/2016

The Permanent Mission of Australia to the United Nations presents its compliments to the Office of Legal Affairs of the United Nations and has the honour to refer to notes verbale LA/COD/50/1 and LA/COD/50/2 regarding criminal accountability of United Nations officials and experts on mission.

The Permanent Mission of Australia has the further honour to submit the enclosed response in order to assist with the preparation of the Secretary-General's compilation of information and observations on this topic.

The Permanent Mission of Australia avails itself of this opportunity to renew to the Office of Legal Affairs the assurances of its highest consideration.



NEW YORK

8 JUNE 2016

**Australian Views on Criminal Accountability of United Nations Officials and
Experts on Mission – Implementation of UN General Assembly Resolution
70/114 of 18 December 2015**

*Response to Requests for Information LA/COD/50/1 and LA/COD/50/2 of
31 December 2015*

General Observations

Australia welcomes the important work that the Secretary General and Member States continue to undertake to ensure the accountability of United Nations (UN) officials and experts on mission with respect to criminal acts committed in peacekeeping and other operations. In addition to the impact on victims, serious crimes committed by UN officials and experts on mission are a gross breach of trust. While such crimes are committed by only a small number of officials and experts on mission, this behaviour nonetheless calls into question the reputation, integrity, credibility and impartiality of the entire UN. If our commitment to the rule of law is to be more than rhetoric, the UN and Member States must lead by example to ensure accountability for serious crimes. Immunity should not be mistaken for impunity.

Australia welcomes UN General Assembly Resolution 70/114, which we believe can contribute to increased momentum in tackling this critical issue. We are pleased with the active discussions of the Working Group on this agenda item and look forward to continuing to work closely with Member States through the Working Group this year.

The question of criminal accountability of UN officials and experts on mission is particularly pertinent in light of recent allegations of sexual exploitation and abuse by UN peacekeepers in the Central African Republic and the Democratic Republic of the Congo. Australia condemns in the strongest terms all forms of sexual abuse and exploitation and calls for the full implementation of the UN's zero-tolerance approach.

OP7 – jurisdiction over crimes committed by nationals while serving as UN officials or experts on mission

Australia's *Crimes (Overseas) Act 1964* (the COA) extends the criminal laws of Australia's Jervis Bay Territory (which are substantively similar to the criminal laws of the Australian Capital Territory) extraterritorially for the purpose of ensuring jurisdiction over the criminal behaviour of nationals deployed by Australia to serve as UN officials or experts on mission abroad. The COA extends Australian jurisdiction over Australians who are immune from criminal prosecution in a foreign country by virtue of an agreement between Australia and the foreign country or between the UN (or a UN organ) and the foreign country. For example, the COA would apply extraterritorially to members of the Australian Federal Police (AFP) deployed as UNPOL who are covered by the immunities provided for in the *Convention on the Privileges and Immunities of the United Nations* adopted by the UN General Assembly on 13 February 1946.

Records from the Commonwealth Attorney-General's Department and the Office of the Commonwealth Director of Public Prosecutions indicate that, to date, there have been no prosecutions under the Act.

Australian Defence Force (ADF) members are not covered by the COA, but are covered by separate legislation. Where ADF members serve as UN officials or experts on mission (such as Military Observers), they are subject to a system of military discipline established by the *Defence Force Discipline Act 1982* (DFDA). Persons of the civilian component accompanying a part of the ADF ('defence civilians') can also consent to be subject to the DFDA. As the DFDA has extraterritorial effect, its provisions operate to ensure accountability at all times for ADF members (and consenting persons of the civilian component) deployed outside Australia, including those engaged in UN roles.

Offences under the DFDA can be broadly divided into three categories: unique military offences (such as insubordination), offences with a civilian equivalent (such as theft or assault) and imported criminal offences (known as territory offences). The imported criminal offences incorporate into the DFDA a range of offences criminalised under the *Crimes Act 1914*, the Criminal Code (Schedule to the *Criminal Code Act 1995*) and the criminal laws of the Australian Capital Territory. The incorporation into the DFDA of such offences ensures that Australian military personnel are subject to appropriate criminal accountability mechanisms for a comprehensive range of offences. Ongoing Australian domestic law reform of these incorporated Acts ensures that the accountability of military personnel remains consistent with broader Australian civilian standards. Criminal accountability for all offences under the DFDA is further enhanced by the inclusion of ancillary offences of attempt, incitement, conspiracy and accessory after the fact.

As provided for in the UN model status-of-forces agreement (SOFA), members of national military contingents serving in peacekeeping missions are subject to the exclusive jurisdiction of the sending State. It is Australian practice to seek immunity from local law or prosecution for ADF personnel serving in peacekeeping missions, whether as part of a UN Mission or when carrying out peacekeeping activities requested by nations. In all cases, the DFDA is in place, and applied extraterritorially, to ensure criminal accountability of ADF members and other participants and to ensure that any prosecution of ADF members is undertaken pursuant to the rule of law.

Australia's legislative framework aims to ensure there is no criminal jurisdictional gap where immunities have been granted to Australians in foreign countries.

OP8 - exchange of information and facilitation of investigations and prosecutions

When contributing to UN operations, it is usual practice that the Memorandum of Understanding (MOU) concluded between Australia and the UN for each mission requires members of the Australian contingent to cooperate with the UN in any UN investigations of suspected misconduct by Australian personnel.

Formal legal cooperation between Australia and other countries to facilitate investigation of UN officials and experts on mission is covered by Australia's *Mutual Assistance in Criminal Matters Act 1987* (the Mutual Assistance Act). The Mutual Assistance Act allows Australia to request and provide mutual assistance to any

country. Australia is also a party to 29 bilateral mutual assistance treaties and a number of multilateral treaties which include mutual assistance obligations.

Australia is able to provide assistance to the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the UN Mechanism for International Criminal Tribunals (UNMICT) under the *International War Crimes Tribunals Act 1995*. Australia is also able to provide assistance to the International Criminal Court (ICC) under the *International Criminal Court Act 2002*.

The Mutual Assistance Act only makes provision for mutual assistance to be provided to other countries. While Australia would be open to cooperating with the UN, our current legal frameworks require that any formal request to Australia for mutual assistance would need to be made through another country or through the ICTY, ICTR, UNMICT or ICC.

Outside the formal legal framework of the Mutual Assistance Act, it is possible for Australia to provide some assistance informally. An example of this is police-to-police assistance – cooperation provided by one country's police force to the police force of another country. The AFP reports one instance of providing information to the UN regarding a complaint made against an Australian national deployed overseas as an expert on mission. The complaint was dismissed. We are not aware of any other circumstances involving the accountability of UN officials or experts on mission for which assistance from the AFP has been sought or provided.

Australia's capacity to prosecute Australian nationals for alleged crimes committed whilst serving as UN officials or experts on mission abroad could be compromised in instances where the alleged offender flees to a country with which Australia does not have an extradition relationship, under either a bilateral extradition agreement or other relevant treaty. Australia already has in place a strong domestic framework for receiving and making extradition requests from other countries, which is established by the *Extradition Act 1988*. To complement this legislation, Australia currently has modern bilateral treaties in place with 39 countries, and Australia continues to pursue workable and effective extradition relationships with other countries.

OP9 – assistance with criminal investigations or proceedings, or extradition proceedings

Cooperation between States to facilitate investigation of UN officials and experts on mission would also be covered by the framework of the Mutual Assistance Act and relevant treaties, or informally through police-to-police assistance. Similarly, Australia's domestic laws, and bilateral and multilateral treaties, would facilitate cooperation between States in connection with extradition proceedings involving UN officials and experts on mission. These frameworks are the same as those described above.

OP112 – report of the Group of Legal Experts and further action

Australia welcomes the General Assembly's decision to continue consideration of the report of the Group of Legal Experts (A/60/980, 16 August 2006), in particular its legal aspects during its seventy-third session in a Working Group of the Sixth Committee.

With respect to the question of future actions, Australia continues to support in principle the proposal for a convention that requires Member States to exercise criminal jurisdiction over their nationals participating in UN operations abroad. We hope that in the light of ongoing reports of serious crimes being perpetrated by UN officials and experts, the Working Group will be able to reinvigorate discussions about a convention and have a substantive discussion about the key issues raised in the report of the Group of Legal Experts.

OP15 and OP16 – Secretary General to notify States of credible allegations against nationals and States to provide updates on disciplinary or criminal proceedings

Member States clearly have the primary responsibility for investigating and prosecuting crimes committed by UN officials and experts on mission. Australia believes that it is extremely important for States to report to the UN on the progress and outcome of efforts undertaken to investigate and prosecute such crimes in a timely manner.

Consistent with the recommendations of the High-Level Panel on Peace Operations, it is important that the Secretary-General ensure that credible allegations against nationals are effectively referred to States of nationality. It is the Secretary-General and UN officials that will be best placed to provide such information. We also believe it is essential for the Secretary-General to ensure that referrals to States of nationality are followed up by the UN on a regular basis, and at a senior level.

Australia has not received any notifications from the Secretary-General of credible allegations revealing that a crime may have been committed by Australian United Nations officials or experts on mission.

OP23 – Secretary-General to prepare a compilation of national provisions

In its request of 31 December 2015 (Ref: LA/COD/50/2) the Office of Legal Affairs of the United Nations invited States to submit information regarding the establishment of jurisdiction over their nationals, whenever they serve as United Nations officials or experts on mission in relation to crimes as known in their existing national criminal laws, particularly those of a serious nature.

Australia submits the information provided above in response to Operative Paragraph 7 to the Office of Legal Affairs for inclusion in the Secretary-General's compilation. In addition, Australia excerpts below relevant provisions of the Act and the DFDA.

Practical problems in the implementation of the resolution

Australia is concerned that not a single case of alleged criminal activity perpetrated by UN officials or experts on mission referred by the Secretary General to national jurisdictions has resulted in a conviction. We welcome the UN's request for

information from States about practical problems in the implementation of the resolution.

Excerpts of relevant provisions

Crimes (Overseas) Act 1964

As noted above, the COA extends the criminal laws of Australia's Jervis Bay Territory extraterritorially for the purpose of ensuring jurisdiction over the criminal behaviour of nationals deployed by Australia to serve as UN officials or experts on mission abroad. Key provisions establishing jurisdiction are:

3 Interpretation

foreign country:

- (a) means any country other than Australia or an external Territory (whether or not an independent sovereign State); and
- (b) includes:
 - (i) all the territory and maritime areas over which the country exercises sovereignty or sovereign rights; and
 - (ii) the air space over those areas.

relevant agreement or arrangement means an agreement or arrangement (whether formal or informal) between:

- (a) Australia and the United Nations or an organ of the United Nations; or
- (b) Australia and another country.

3A When this Act applies to a person in relation to an act of the person in a foreign country

Australians undertaking tasks etc. under relevant agreement or arrangement

- (3) This Act also applies to a person in relation to an act of the person in a foreign country if:
 - (a) the person is an Australian at the time the act occurs (the *relevant time*); and
 - (b) the person is, at the relevant time, undertaking a task or project, or performing a function, in the foreign country under a relevant agreement or arrangement; and
 - (c) under, or because of:
 - (i) a relevant agreement or arrangement; or
 - (ii) an agreement or arrangement (whether formal or informal) between the United Nations, or an organ of the United Nations, and the foreign country;

the person is, at the relevant time, not subject to criminal proceedings in the courts of the foreign country in respect of the act.

- (4) This Act also applies to a person in relation to an act of the person in a foreign country if:
- (a) the person is an Australian at the time the act occurs (*the relevant time*); and
 - (b) the person is, at the relevant time, undertaking a task or project, or performing a function, in the foreign country under a relevant agreement or arrangement; and
 - (c) the relevant agreement or arrangement is, at the relevant time, a declared agreement or arrangement; and
 - (d) if, at the relevant time, the regulations provide that the relevant agreement or arrangement is a declared agreement or arrangement only in relation to people who fall within a specified category—the person falls within that category at the relevant time.

4 Application of Australian criminal law to person to whom this Act applies

- (1) If:
- (a) this Act applies to a person in relation to an act of the person in a foreign country; and
 - (b) the act would, if it had occurred in the Jervis Bay Territory, have contravened the criminal laws of the Jervis Bay Territory as in force at the time the act occurred;

the criminal laws of the Jervis Bay Territory, as in force at the time the act occurred, are taken to have applied, at the time the act occurred, to the person in relation to the act and to so apply as laws of the Commonwealth.

- (2) Proceedings for an offence against the laws applied under subsection (1) must not be commenced without the Minister's written consent.
- (3) Before giving a consent under subsection (2), the Minister must consult with the Minister for Foreign Affairs.
- (4) However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence against the laws applied under subsection (1) before the necessary consent has been given.

- (5) If:
- (a) a person is a person to whom this Act applies in relation to an act at the time when the person is convicted of an offence against a law applied under subsection (1); and
 - (b) the person subsequently ceases to be a person to whom this Act applies in relation to the act because of subsection 3A(2);
- the person's ceasing to be a person to whom this Act applies in relation to the act does not affect the validity of the conviction or any sentence imposed in relation to the conviction.

5 Which offences are indictable

The question whether an offence against the laws applied under subsection 4(1) is to be, or may be, prosecuted or dealt with on indictment or summarily shall be determined in accordance with the law that would be applicable in relation to a prosecution under the laws in force in the Jervis Bay Territory if the act alleged to constitute the offence had occurred in the Jervis Bay Territory.

Defence Force Discipline Act 1982 (DFDA)

The DFDA creates a number of offences which are uniquely military in nature. It also creates a number of service offences which have recognisable counterparts in the criminal law such as assault and theft.

It also provides that personnel will be subject to the laws of the Commonwealth and the laws of the Australian Capital Territory as applied in the Jervis Bay Territory:

61 Offences based on Territory offences

- (3) A person who is a defence member or a defence civilian is guilty of an offence if:
- (a) the person engages in conduct outside the Jervis Bay Territory (whether or not in a public place); and
 - (b) engaging in that conduct would be a Territory offence, if it took place in the Jervis Bay Territory (whether or not in a public place).

The provisions have extra-territorial effect, by virtue of which any act which would be an offence under Australian criminal or service law can be prosecuted (either by Australian service tribunals or civilian courts) irrespective of where in the world it was committed. This would include acts done by Defence members and Defence civilians operating as part of a UN Mission.

9 Extra-territorial operation of this Act

The provisions of this Act apply, according to their tenor, both in and outside Australia but do not apply in relation to any person outside Australia unless that person is a defence member or a defence civilian.