International criminal law
& practice – recent
developments for
practitioners
2018 ADLA Conference

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Coverage

- Recent developments in international criminal law
  - Institutional changes
  - Notable cases
  - Judgments from other States
- Recent caselaw and legislation in Australia on international criminal legal topics
  - Extradition and mutual criminal assistance
  - Criminal proceeds and money laundering
  - Breaching UN and Australian sanctions regimes
  - Cybercrime
  - Foreign interference

- Employing weapons, which use microbial or other biological agents, or toxins, whatever their origin or method of production [to be inserted as Art. 8(2)(b)(xvii) and Art. 8(2)(e)(xvi)]
- Employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays [to be inserted as Art. 8(2)(b)(xviii) and Art. 8(2)(e)(xvii)];
- Employing laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices [to be inserted as article 8(2)(b)(xxix) and Art. 8(2)(e)(xviii)].
1. Decides to **activate the Court’s jurisdiction over the crime of aggression** as of 17 July 2018;

2. Confirms that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or proprio motu investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments;

3. Reaffirms paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the **judicial independence** of the judges of the Court;

**State co-operation**
Reparations for victims

Key cases:
- Lubanga
- Katanga
- Al Mahdi

Notable cases from the ICC

- Prosecutor v Al Mahdi (ICC Trial Chamber VIII) (2016) - intentionally directing attacks against religious and historic buildings
- Prosecutor v Ongwen – forced pregnancy
International Criminal Tribunal for Yugoslavia

- Recent cases:
  - Prosecutor v Jadranko Prlić et al (Appeals Chamber)
  - Prosecutor v Ratko Mladić (Trial Chamber I) – joint criminal enterprise
  - Closure of ICTY
  - Assessment

Developments in other States

- Pardon for former Peruvian president Fujimori
- Rwanda v Nteziryayo (Divisional Court of England and Wales) – extradition barred b/c of fair trial & double jeopardy
- Al-Masri v The Chief Military Advocate General (Israel Supreme Court) – defence of superior orders
Art 33(1), Rome Statute of the ICC

Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question;
(b) The person did not know that the order was unlawful; and
(c) The order was not manifestly unlawful.

Developments in Australia on specific topics of international criminal law
Extradition Act 1988 (Cth)

- Traljesic v Bosnia and Herzegovina [2017] FCAFC 70 – s 7(c) (extradition objection)
- New Zealand v Templeton [2017] FCA 745 - s 34(2) (delay in an order for release)
- Ghodskani v US [2018] FCA 14 - no jurisdictional error in decision of Magistrate refusing bail

S 7(c), Extradition Act

For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:

(c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, **by reason of** his or her race, sex, sexual orientation, religion, nationality or political opinions;
S 34(2), Extradition Act

If the magistrate or Judge is satisfied by the person that, because:
(a) the offence in relation to which any indorsed New Zealand warrant in
relation to the person was issued is of a trivial nature;
(b) if that offence is an offence of which the person is accused the
accusation was not made in good faith or in the interests of justice; or
(c) a lengthy period has elapsed since that offence was committed or
allegedly committed;

or for any other reason, it would be **unjust, oppressive or too severe** a
punishment to surrender the person to New Zealand, the magistrate or Judge
shall order that the person be released.

Proceeds of Crime Act 2002 (Cth)

- AFP v Hart; Commonwealth v Yak 3 Investments Pty Ltd/Flying Fighters Pty Ltd [2018] HCA 1 – ss 102, 141
- Higgins [2018] NSWSC 244 – A New Tax System (Family Assistance) (Administration) Act 1999 (Cth)
- Samarakoon [2018] VCC 10 – s 31
- AFP; re Cui [2017] NSWSC 1817 – s 29
- R v Ruzehaji (No 2) [2017] SADC 119 – s 180
- Application under the Proceeds of Crime Act (No 2) [2017] NSWSC 1402 – adjournment for legal aid
S 102, POCA – property orders

If property is forfeited to the Commonwealth under section 92, the court that made the * restraining order referred to in paragraph 92(1)(b) must, if:
(a) a person who claims an * interest in the property applies under section 104 for an order under this section; and
(b) the court is satisfied that:
(i) the applicant had an interest in the property before the forfeiture of the property; and
(ii) the applicant's interest in the property is neither * proceeds of unlawful activity nor an * instrument of unlawful activity; and
(iii) the applicant's interest in the property was lawfully acquired;
make an order:
(c) declaring the nature, extent and value of the applicant's interest in the property; and
(d) either:
(i) if the interest is still vested in the Commonwealth--directing the Commonwealth to transfer the interest to the applicant; or
(ii) directing the Commonwealth to pay to the applicant an amount equal to the value declared under paragraph (c)

S 141(1), POCA – penalty orders

(1) If:
(a) a person is subject to a * pecuniary penalty order; and
(b) the * responsible authority applies to the court for an order under this section; and
(c) the court is satisfied that particular property is subject to the * effective control of the person;
the court may make an order declaring that the whole, or a specified part, of that property is available to satisfy the pecuniary penalty order.
S 330, POCA – third party exception

(4) Property only ceases to be proceeds of an offence or an instrument of an offence:
(a) if it is acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence (as the case requires);

S 42, POCA – revoking restraining orders

(5) The court may revoke the restraining order if satisfied that:
(a) there are no grounds on which to make the order at the time of considering the application to revoke the order; or
(b) it is otherwise in the interests of justice to do so.
S 29, POCA – exclusion

(1) The court to which an application for a * restraining order under section 17, 18 or 19 was made must, when the order is made or at a later time, exclude a specified * interest in property from the order if:
(a) an application is made under section 30 or 31; and
(b) the court is satisfied that the relevant reason under subsection (2) or (3) for excluding the interest from the order exists.

(2) The reasons for excluding a specified * interest in property from a * restraining order are:
(a) for a restraining order under section 17 if the offence, or any of the offences, to which the order relates is a * serious offence—the interest is neither * proceeds nor an * instrument of * unlawful activity; or
(b) for a restraining order under section 17 if paragraph (a) does not apply—the interest is neither proceeds nor an instrument of the offence, or any offence, to which the order relates; or...

(3) If the offence, or each offence, to which a * restraining order relates is a * serious offence that is an offence against section 15, 24, 29 or 31 of the Financial Transaction Reports Act 1988 or section 53, 59, 136, 139, 140, 141, 142 or 143 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006, a further reason for excluding a specified * interest in property from the order is that each of the following requirements is met:
(a) there are no reasonable grounds to suspect that the interest is * proceeds of the offence, or any of the offences;
(b) there is a * suspect in relation to the order, but he or she has not been convicted of, or charged with, the offence, or any of the offences;
c) the conduct in question was not for the purpose of, in preparation for, or in contemplation of, any other * indictable offence, any * State indictable offence or any * foreign indictable offence;
(d) the interest could not have been covered by a restraining order if none of the offences had been serious offences.

S 31, POCA – exclusion applications

(1) A person may apply for an order under section 29 or 29A if a * restraining order that covers property in which the person claims an * interest has been made.

(1A) An application under subsection (1):
(a) must be made to the court that made the * restraining order; and
(b) may be made at any time after the restraining order is made.

(2) However, unless the court gives leave, the person cannot apply if he or she:
(a) was notified of the application for the * restraining order, but did not appear at the hearing of that application; or
(b) appeared at the hearing of that application...
S 180, POCA – examination orders

(1) If a restraining order is in force, the court that made the restraining order, or any other court that could have made the restraining order, may make an order (an examination order) for the examination of any person, including:

(a) a person whose property is, or a person who has or claims an interest in property that is, the subject of the restraining order; or

(b) a person who is a suspect in relation to the restraining order; or

(c) the spouse or de facto partner of a person referred to in paragraph (a) or (b):

about the affairs of a person referred to in paragraph (a), (b) or (c).

(2) The examination order ceases to have effect if the restraining order to which it relates ceases to have effect.

Mutual Assistance in Criminal Matters Act 1987 (Cth)

- Re s 34A of the MACMA; ex parte AFP [2017] WASC 374 - Registration of foreign forfeiture order
S 34A, MACMA

(1) If a proceeds of crime authority applies to a court with proceeds jurisdiction for registration of a foreign order in accordance with an authorisation under this Subdivision, the court must register the order accordingly, unless the court is satisfied that it would be contrary to the interests of justice to do so.

(2) The proceeds of crime authority must give notice of the application:
(a) to specified persons the authority has reason to suspect may have an interest in the property; and
(b) to such other persons as the court directs.

(3) However, the court may consider the application without notice having been given if the proceeds of crime authority requests the court to do so.

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)

- Chief Executive Officer of Australian Transaction Reports and Analysis Centre
  v TAB Limited (No 3) [2017]
  FCA 1296 - ss 81 & 175 - civil penalty orders
(3) In determining the pecuniary penalty, the Federal Court must have regard to all relevant matters, including:
(a) the nature and extent of the contravention; and
(b) the nature and extent of any loss or damage suffered as a result of the contravention; and
(c) the circumstances in which the contravention took place; and
(d) whether the person has previously been found by the Federal Court in proceedings under this Act to have engaged in any similar conduct; and
(e) if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in proceedings under a law of a State or Territory to have engaged in any similar conduct; and
(f) if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in a foreign country to have engaged in any similar conduct; and
(g) if the Federal Court considers that it is appropriate to do so—whether the person has previously been found by a court in proceedings under the Financial Transaction Reports Act 1988 to have engaged in any similar conduct.

(1) A reporting entity must not commence to provide a designated service to a customer if the reporting entity:
(a) has not adopted; and
(b) does not maintain;
an anti-money laundering and counter-terrorism financing program that applies to the reporting entity.
Breaching UN Sanctions Regimes

Recent examples: North Korea, Iran

Regime:
- Charter of the United Nations Act 1945 (Cth)
- Weapons of Mass Destruction (Prevention of Proliferation) Act 1995 (Cth)
- Autonomous Sanctions Act 2011 (Cth)
- Regulations

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If:
(a) a person provides any services to another person; and
(b) the first-mentioned person believes or suspects, on reasonable grounds, that the services will or may assist a WMD program; and
(c) the provision of the services is not authorised by a permit or is in contravention of a condition stated in a permit; and
(d) the Minister has not given a written notice to the first-mentioned person under section 12 stating that the Minister has no reason to believe or suspect that the provision of the services will or may assist a WMD program;

the first-mentioned person commits an offence punishable on conviction by imprisonment for not more than 8 years.
Cybercrime

- Regimes:
  - Privacy Act 1988 (Cth) & commencement of Notifiable Data Breaches Scheme in 2018
  - Cybercrime Act 2001 (Cth)
  - Spam Act 2003 (Cth)
  - Telecommunications (Interception & Access) Act 1979 (Cth)
  - Australian Stock Exchange Continuous Disclosure Rule 3.1
  - Steps for clients

Foreign interference & Espionage

- National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth)
  - Content
  - Relevance of international standards
  - Foreign Influence Transparency Scheme Bill 2017 (Cth)
Lunchtime, almost...

Arthur:
Answers the eternal questions

Arthur:
When will we know all the answers?

Someday after we’ve asked all the questions.