



GHANA

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UNIVERSAL JURISDICTION

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1. INTRODUCTION¹

Jurisdiction over particular crimes. Ghana courts have been able to exercise universal criminal jurisdiction over breaches of the Geneva Conventions and their Additional Protocols since 2009, over trafficking offences incorporating slavery and slave-like practices since 2005, and over slavery and genocide since 1993 (see Section 4 below).

Ghana courts today can exercise universal jurisdiction over ordinary crimes, when committed abroad by non-nationals who are employed by the state (see Section 4.1 below). They can also exercise universal jurisdiction over some crimes under national law of international concern (for example, piracy, hijacking, trafficking in persons and terrorism) (see Section 4.2 below). In addition, Ghana courts can exercise universal jurisdiction over some crimes under international law (for example, slavery and genocide). Universal jurisdiction means that the courts of Ghana can try persons for acts committed outside its territory that are not linked to the state by the nationality of the suspect or the victims or by harm to Ghana's own national interest.

As explained in Section 4.3, Ghana has defined some crimes under international law as crimes under Ghanaian law. This includes the crimes of genocide and slavery, grave and non-grave breaches of the Geneva Conventions and their Protocols and specific crimes that could, if committed in the context of and associated with armed conflict, constitute war crimes (for example, murder, rape and

¹ This report was researched and drafted by Aminta J. Ossom, a 2009 J.D. graduate of Harvard Law School and a Satter Fellow of the Harvard Human Rights Program, with Michelle Dowst, a 2013 J.D. candidate of Harvard Law School, under the supervision of the International Justice Project in the International Secretariat of Amnesty International. Amnesty International wishes to thank the Harvard Human Rights Program and the Harvard Human Rights Satter Fellowship, which provided support for in-country research in conjunction with this report, the Amnesty International Ghana Section for their assistance and accommodation and Dr. Kwadwo Appiagyei-Atua (of the University of Ghana – Legon) for his thoughtful and helpful comments on the current state of Ghanaian law during the drafting stage. In addition, Amnesty International is grateful for the very helpful cooperation and assistance provided by members of the Ministry of Justice Office of International Cooperation, the Ghana Police Service, the Supreme Court, the Ministry of Foreign Affairs and Regional Integration, and the Law Reform Commission as well as the assistance provided by members of the Center for Democratic Development-Ghana, the Commonwealth Human Rights Initiative, the Centre for Human Rights and Civil Liberties, and Sam Okudzeto & Associates, who shared their expertise on the criminal justice system in Ghana. Views included in this report reflect the positions of Amnesty International and may differ from the viewpoints of these institutions and individuals.

Every effort was made to ensure that all the information in this paper was accurate as of 1 September 2012. However, for an authoritative interpretation of Ghanaian law, counsel authorized to practice in Ghana should be consulted. Amnesty International welcomes any comments or corrections, which should be sent to iip@amnesty.org. Amnesty International plans to update and revise this and other papers in the *No Safe Haven Series* in the light of developments in the law.

enforced prostitution). However, apart from the crimes of genocide and slavery and apart from war crimes that are grave and non-grave breaches of the Geneva Conventions and their Protocols, Ghana either has not defined these crimes consistently with the strictest requirements of international law or it has not categorized them as war crimes in line with their treatment under international law. Moreover, it has not provided universal jurisdiction over these crimes, except in the narrow circumstance where a foreigner who is a public officer commits these crimes abroad. Furthermore, it has not defined other crimes under international law – including torture (against adult victims), extrajudicial executions, enforced disappearances, and aggression – as crimes under national law.

Ghanaian legislation defines as offences some specific crimes that could amount to crimes against humanity, such as murder, rape and enslavement, but it does not indicate that these crimes constitute crimes against humanity if committed as part of a widespread or systematic attack against civilians. Except for the crime of enslavement, Ghana has not provided for the exercise of universal jurisdiction over these crimes (see Section 4.3.2 below).

It is not clear whether national courts in Ghana could exercise universal jurisdiction over some crimes under national law of international concern (for example, hostage taking) and over crimes under international law (including torture) found in treaties signed by Ghana, but for which Ghanaian law does not yet expressly authorize universal jurisdiction. Although a Courts Act catchall provision seems to make this possible, there is no known practice indicating that courts would exercise jurisdiction based on this catchall provision alone (see Section 4.2).

Safe haven consequences regarding prosecution. In addition to the failure to define certain crimes under international law as crimes under national law and the failure to provide for universal jurisdiction over many crimes under international law, as explained below in Section 6, there are numerous other obstacles to prosecution in universal jurisdiction cases, including: improperly broad defences, recognition of immunities and amnesties, and political control over decisions to investigate and prosecute.²

Therefore, Ghana is currently a safe haven from prosecution in its courts for foreigners who are responsible for war crimes (except breaches of the Geneva Conventions and their Protocols), crimes against humanity, torture (of adults), extrajudicial executions and enforced disappearances committed abroad. In addition, Ghana is currently a safe haven for prosecution in its courts where the obstacles to prosecution noted above are present.

Safe haven consequences regarding extradition. As explained in Section 7, Ghana is also a safe haven from extradition for war crimes, crimes against humanity, genocide, torture, extrajudicial executions, enforced disappearances, and aggression because Ghanaian legislation has not expressly provided that these crimes are extraditable. Although persons suspected of these crimes under international law could be extradited for ordinary crimes that are components of international crimes (such as murder, rape and abduction), there are a number of obstacles to extradition (see Section 7.1 below). Moreover, there are a number of obstacles to Ghana seeking extradition from foreign states of persons suspected of crimes under international law.

² Other obstacles to prosecution, not specifically related to prosecutions based on universal jurisdiction, such as continuing conflict, violence or insecurity and general economic, social and cultural barriers to access to justice in the state exercising universal jurisdiction, are not addressed in this paper.

Universal civil jurisdiction. As explained below in Section 5, no statute expressly authorizes Ghana to exercise universal civil jurisdiction over torts related to crimes under international law. It is possible that victims can file civil claims in criminal proceedings based on universal jurisdiction arising out of the crimes in those proceedings, but not in stand-alone civil proceedings (see Section 5 below).

Special immigration, police and prosecution units. As explained below in Section 8, Ghana has no immigration unit or consular service specially mandated to screen persons suspected of crimes under international law and to refer them to police or prosecuting authorities for investigation and possible prosecution.

Although Ghana has special police units to investigate particular crimes under national law, such as human trafficking and cross-border financial crime, and crimes of domestic and gender-based violence, Ghana has no special police units to investigate crimes under international law.

Ghana does not have a prosecution unit specially mandated to investigate and prosecute crimes under international law.

Jurisprudence. There are no known cases involving universal jurisdiction (see Section 9).

Recommendations. This paper, which is Number 10 of a series of 193 papers on each UN member state updating Amnesty International's 722-page study of state practice concerning universal jurisdiction at the international and national level in 125 countries published in 2001, makes extensive recommendations for reform of law and practice so that Ghana can fulfil its obligations under international law to investigate and prosecute crimes under international law, to extradite persons suspected of such crimes to another state able and willing to do so in a fair trial without the death penalty or a risk of torture or other cruel, inhuman or degrading treatment or punishment or to surrender them to the International Criminal Court.³

³ Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation*, Index: IOR 53/002 - 018/2001, September 2001 (<http://www.amnesty.org/en/library>); *Universal jurisdiction: A preliminary survey of legislation around the world - 2012 update*, Index: IOR 53/019/2001, October 2011 (<http://www.amnesty.org/en/library/info/IOR53/004/2011/en>). Including this paper, ten of the papers in the series have been published so far (Bulgaria, Burkina Faso, Germany, Ghana, Sierra Leone, Solomon Islands, Spain, Switzerland, Vanuatu and Venezuela) (see Appendix I for list and links).

2. THE LEGAL FRAMEWORK

Very basic information about the country. Ghana is a West African state that became independent of the United Kingdom on 6 March 1957. It was ruled by several military governments until 1992, when an elected government took over. Approaching its twentieth year of uninterrupted democratic rule, it is a member of the Commonwealth, the African Union and the Economic Community of West African States (ECOWAS).

2.1. TYPE OF LEGAL SYSTEM

Ghana has a common law legal system modelled in part on the English legal system. The 1992 Constitution is the supreme law of the land. It states that the laws of Ghana include the provisions of the Constitution, enactments made by or under the authority of the Parliament established by the Constitution, any Orders, Rules and Regulations made by any person or authority under a power conferred by the Constitution, the existing law (preceding the 1992 Constitution) and the common law (which includes English common law, including doctrines of equity, and Ghanaian customary law).⁴ It has both a civilian and a military justice system (see Section 2.3.2 below).

As reflected in the discussions in 2008 during the Human Rights Council's Universal Periodic Review of Ghana, human right experts have stated that there are certain constraints in the Ghanaian legal system that may hinder access to and the speedy administration of justice if universal jurisdiction is exercised. Challenges within the judicial system include delayed trial procedures, reported corruption among law enforcement officers and court personnel and – in some cases where suspects are released without prejudice as a resolution of their prolonged pre-trial detention – and the court has failed to take effective steps to protect victims and witnesses of gender-based crimes and crimes of sexual violence.⁵ In addition, many of Ghana's prisons do not meet international standards for detainees, such as the 1955 UN Standard Minimum Rules for the Treatment of Prisoners, with overcrowding, unsanitary conditions, and prolonged detention being primary

⁴ The Constitution of the Republic of Ghana, 1992 (Act 282) (1992 Constitution), Ch. I, art. 1(2) & Ch. IV, art. 11 (1); See also Victor Essien, *Researching Ghanaian Law*, *Globallex* (<http://www.nyulawglobal.org/globallex/Ghana1.htm>).

⁵ Human Rights Council Working Group on the Universal Periodic Review, Summary Prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1: Ghana, 2 April 2008, A/HRC/WG.6/2/GHA/3 (2008 UPR Summary), paras. 20 - 21. Information provided to Amnesty International by the Commonwealth Human Rights Initiative. Article 14 (4) of the Constitution provides:

“Where a person arrested, restricted or detained under paragraph (a) or (b) of clause (3) of this article is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released wither unconditionally or upon reasonable conditions, including in particular, conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

concerns.⁶ It has also been reported that cases of sexual and gender-based violence are often protracted and difficult to prosecute.⁷ While on the death penalty has not been carried out since 1993, and Ghana is classified as abolitionist in practice, the death penalty remains statutory law and death sentences are still issued.⁸

2.2. STATUS OF INTERNATIONAL LAW

There is no provision in the 1992 Constitution of Ghana that spells out a hierarchy between national law and international conventional and customary law, but Article 75 of the 1992 Ghana provides that treaties must be ratified by Parliament.⁹

Ghana is a dualist country in relation to international law, so traditionally international treaties can be enforced domestically only after they have been directly incorporated into national legislation.¹⁰ However, it is possible that international law principles not directly incorporated into national legislation can be persuasive in Ghana. Article 33 of the Constitution, which provides for judicial protection of human rights, states that “[t]he rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man”.¹¹ In addition, the Government

⁶ 2008 UPR National Report, at para. 64; 2008 UPR Summary, at para. 11. See also Amnesty International, *‘Prisoners are Bottom of the Pile’: The Human Rights of Inmates in Ghana*, Index: AFR 28/002/2012, April 2012 (<http://www.amnesty.org/en/library/info/AFR28/002/2012/en>); Amnesty International, *Ghana: What’s Happening in the Prisons?*, Index: AFR 28/002/2008, May 2008 (<http://www.amnesty.org/en/library/asset/AFR28/002/2008/en/66f0e6ea-1835-11dd-92b4-6b0c2ef9d02f/afr280022008eng.pdf>).

⁷ 2008 UPR Summary, para. 21.

⁸ 2008 UPR Summary, para. 9. See Amnesty International, *Abolitionist and retentionist countries* (<http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>). In 2012, the government adopted a recommendation by the Constitutional Review Commission formally to abolish the death penalty (see Section 2.6 below).

⁹ 1992 Constitution, Ch. VIII, art. 75 (2).

¹⁰ See *New Patriotic Party v. Attorney General (CIBA Case)*, 1 GLR 378, 412 (1997-98), which holds that “[i]nternational laws, including intra African enactments, are not binding on Ghana until such laws have been adopted or ratified by municipal laws”). See also Kwadwo Appiagyei-Atua, ‘Ghana at 50: The Place of International Human Rights Norms in the Courts’, *Ghana Law Since Independence: History, Development and Prospects*, H. Mensa-Bonsu, C. Dowuona-Hammond, K. Appiagyei-Atua, N. Josiah-Aryeh & A. Hammond (eds.), Accra: Black Mask, 2007, pp. 179, 182 - 186. According to the dualist approach, international and national law are two completely separate legal systems. International law would apply within a state only to the extent that it has been adopted by that state’s own national law, not as international law. According to the monist approach, international and national law are part of a single legal system and international law can be directly applied by national courts. See generally, Robert Jennings and Arthur Watts, *Oppenheim’s International Law*, London and New York: Longman, 1992, pp. 53 - 54.

¹¹ 1992 Constitution, Ch. VI, art. 33 (5).

of Ghana has stated that, in the case of a clash between the domestic law and a ratified human rights treaty, “the ratified international instrument takes precedence and may be applied above domestic law”.¹²

Ghana signed the Vienna Convention on the Law of Treaties on 23 May 1969; however, it has not yet ratified the convention.¹³ Nevertheless, Ghana, as a matter of customary international law, is obliged to recognize in all circumstances the supremacy of both conventional international law and customary international law with regard to its national law.¹⁴ This obligation applies to all national law, including constitutions and legislation.¹⁵ Therefore, Ghana, as a matter of customary international law, should undertake any legislative changes necessary to comply with its obligations under treaties and customary international law, as set out in the Recommendations section of this paper.

¹² Committee on the Elimination of Racial Discrimination, Seventeenth periodic reports of State parties due in 2002: Ghana (2001 CERD National Report), 1 October 2001, CERD/C/431/Add.3, para 61.

¹³ State parties to the Vienna Convention on the Law of Treaties (VCLT) are obliged to recognize in all circumstances the supremacy of conventional international law and customary international law with regard to their national law. Vienna Convention on the Law of Treaties, art. 27. As of 29 May 2011, 111 states were parties to the Convention and 15 others – including Ghana – had signed it (http://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en). As recognized in the 1969 Vienna Convention, every international agreement concluded between states in written form and governed by international law in force is binding upon the parties to it and must be performed by them in good faith. In addition, state parties are expressly prohibited from invoking the provisions of their internal law as justification for their failure to perform a treaty. Vienna Convention on the Law of Treaties, art. 26-27.

¹⁴ For more than a century, international court decisions, arbitral awards and public international law experts have not limited the obligation under international law to ensure that national legislation and jurisprudence not be inconsistent with international law to conventional international law. See, e.g., *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)*, I.C.J. Rep. (1988), pg. 34 (noting “the fundamental principle of international law that international law prevails over domestic law”) (citing *Alabama Claims* arbitration award (14 September 1872), reprinted in J.B. Moore, *International Arbitrations*, New York, vol. 1, pp. 495, 653, 1898); Robert Jennings and Arthur Watts, *Oppenheim’s International Law*, 1992, 9th ed., vol. 1, pp. 82 – 86; Malcolm N. Shaw, *International Law*, Cambridge: Cambridge University Press, 4th ed., 1997, pp. 102 - 103; Gerald Fitzmaurice, ‘Law and Procedure of the International Court of Justice’, 1954 - 9 - General Principles and Sources of International Law, *Brit. Y.B. Int’l L.*, 1959, 183; Edwin Borchard, ‘The relation between international law and municipal law’, *Va. L. Rev.*, vol. 27, p. 137.

¹⁵ Annemie Schaus, ‘Article 27 (1969)’, *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, Olivier Corten & Pierre Klein (eds.), Bruxelles: Bruylant-Centre de droit international-Université Libre de Bruxelles, 2006, p.1136 (« L’article 27 de la Convention de Vienne, quant à lui, prescrit certainement, dans l’ordre juridique international, la primauté du droit international sur le droit interne »). Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden: Martinus Nijhoff / Brill, 2009, p. 375 (“Article 27 expressed the principle that on international level international law is supreme”).

2.3. COURT SYSTEM

Ghana has both civilian and military court systems.

2.3.1. STRUCTURE OF THE CIVILIAN COURT SYSTEM

The Ghanaian judiciary is comprised of four levels of civilian courts with jurisdiction over torts and crimes. The first level includes the lower courts, which deal with lesser crimes and civil cases.¹⁶ The three levels of courts dealing with serious crimes constitute the Supreme Courts of Judicature. The first level includes both the Regional Tribunal and High Court, then the Court of Appeal, and finally the Supreme Court.¹⁷ Regional Tribunals have jurisdiction over criminal offences against the state and the public interest as prescribed by law, but they cannot hear civil cases, jury trials or certain other criminal cases.¹⁸ The High Court has both original jurisdiction over criminal matters and appellate jurisdiction over decisions of the lower courts.¹⁹

Appeals from the High Court and Regional Tribunals are heard by the Court of Appeal.²⁰ Appeals from the Court of Appeal are heard by the Supreme Court as of right in criminal and civil matters having passed through the High Court and the Court of Appeal, or with leave of the Court of Appeal or the Supreme Court in other instances.²¹ In addition, the Supreme Court of Ghana has original, exclusive jurisdiction to enforce or interpret provisions of the Constitution. The only exception is that it and the High Court have concurrent jurisdiction in enforcement of the Fundamental Human Rights

¹⁶ At present, the lower courts, including district courts, circuit courts, and circuit tribunals, have jurisdiction over civil matters, summary offences, and over any action that arises out of the Children's Act, 1998. Juvenile courts have the power to hear any matter involving a person below eighteen years of age and, in those instances, exercises the powers of a district court. Circuit courts have jurisdiction over civil suits and over all criminal matters other than treason, offences triable under indictment, and offences punishable by death. Courts Act, 1993 (Act 459) (Courts Act), as amended by Courts (Amendment) Act, 2002 (Act 620), sects. 42 – 50.

¹⁷ 1992 Constitution, Ch. XI, art. 126. Due to frequent historical changes in the structure and hierarchy of the judiciary in Ghana, lower courts have been known by a number of names, including: circuit courts, circuit tribunals, community tribunals, district and juvenile courts. See S.A. Brobbey, *Practice and Procedure in the Trial Courts and Tribunals of Ghana*, Accra: Black Mask, 2000, pg. 7; Courts Act, sect. 39.

¹⁸ 1992 Constitution, Ch. XI, art. 143. Regional Tribunals try in particular economic offences and offences involving fraud, loss of state funds or property. Courts Act, sect. 24.

¹⁹ 1992 Constitution, Ch. XI, art. 140 (1). Courts Act, sects. 15 - 21.

²⁰ 1992 Constitution, Ch. XI, art. 137. Courts Act, sect. 11. An appeal from the Circuit Court in a civil action may also be heard by the Court of Appeal. An appeal from the Circuit Court in a criminal matter may be heard by the High Court. Courts Act, sects. 11, 21, 44.

²¹ 1992 Constitution, Ch. XI, art. 131. Appeals from the Court of Appeal are also heard as of right in civil and criminal matters having passed through the Court of Appeal from a judgment of Regional Tribunals exercising their original jurisdiction. The Court of Appeal must grant leave in other causes or matters, where the matter originated in a court lower than the High Court or a Regional Tribunal. Alternatively, the Supreme Court may grant special leave in any cause or matter, civil or criminal. 1992 Constitution, Ch. XI, art. 131; Courts Act, sect. 4.

and Freedoms specifically outlined in Article 33 of the Constitution.²²

2.3.2. STRUCTURE OF THE MILITARY COURT SYSTEM

Courts-martial, which are convened as needed by the Council of the Armed Forces, have jurisdiction over military officials.²³ They have jurisdiction only over military disciplinary offences, as spelled out by the 1962 Armed Forces Act.²⁴ Military officers who seriously violate the military code may be called to a court-martial with a right to appeal to a court-martial appeals court, an inferior court from which there is no right of appeal to the Superior Courts of Judicature.²⁵ Civilian courts try military officers for civilian crimes, and the 1992 Constitution abolished and prohibits military tribunals from exercising jurisdiction over individuals not in the active armed service for offences under civil law.²⁶

Ghanaian legislation appears to permit the convening of a special military tribunal, which is similar to a court martial, specifically for military offences such as staging or supporting a coup d'état, as spelled out by the Special Military Tribunal Act.²⁷ The special tribunal would have jurisdiction over civilians for these offences.²⁸ However, according to experts on Ghanaian law, the Special Military

²² 1992 Constitution, Ch. XI, arts. 130 (1), 140 (2); Courts Act, sect. 3.

²³ The Armed Forces Council consists of the President or a nominee of the President; the Ministers responsible for Defence, Foreign Affairs, and Internal Affairs; the Chief of Defence Staff, the Service Chiefs and a senior warrant officer or its equivalent in the Armed Forces; and two other presidential appointees acting in consultation with the Council of State. Armed Forces Act, 1962 (Act 105) (Armed Forces Act), sect. 11; 1992 Constitution, Ch. XVII, art. 211.

²⁴ Armed Forces Act, sect. 67. This includes grave breaches of the Geneva Conventions that are also offences under the Armed Forces Act. Geneva Conventions Act, 2009 (Act 780) (Geneva Conventions Act), sect. 2 (2).

²⁵ Armed Forces Act, sects. 90 – 93; Interview with Supreme Court Justice, in Accra, Ghana (27 June 2012).

²⁶ AfriMAP and Open Society Initiative for West Africa (OSIWA), *Ghana: Justice Sector and the Rule of Law*, Dakar: Open Society Initiative for West Africa, 2007, pp. 37 - 38; 1992 Constitution, Ch. V, art. 19 (20).

²⁷ Special Military Tribunal Act, 1982 (P.N.D.C.L. 19) (Special Military Tribunal Act), sects. 1-4.

²⁸ Section 1 (3(b) of the Special Military Tribunal Act includes offences that civilians can commit:

“(3) Despite any other enactment to the contrary, a person commits an offence if that person

(b) directly or indirectly, instigates, commands, counsels, procures, solicits, or in a manner aids, facilitates, encourages or promotes whether by act or presence or otherwise, the assault, molestation or unlawful arrest of another person by a member of the Armed Forces of Ghana; or

(c) does an act for the purpose of aiding, facilitating, encouraging, or promoting the assault, molestation or unlawful arrest of another person by a member of the Armed Forces of Ghana;

(d) uses a member of the Armed Forces of Ghana for any unauthorised purposes or act; or

(e) being a member of the Armed Forces of Ghana uses that position for an unauthorised purpose or act; or

(f) not being a member of the Armed Forces of Ghana parades, whether in military uniform or not, as a member of the Armed Forces; or

Tribunal Act is defunct.²⁹ It is increasingly recognized under international standards that military courts should not have jurisdiction over members of the armed forces or civilians in cases involving human rights violations or crimes under international law (see Section 4.3.1 below for discussion of crimes under international law).

Precedent. As in most common law countries, all courts, including the Supreme Court, are normally bound by the rule of *stare decisis* (binding precedent) on questions of law. However, the Constitution provides that the Supreme Court may depart from its own previous decisions “when it appears right to do so.”³⁰ Within the judicial hierarchy, all courts are bound by the decisions of the Supreme Court, and courts inferior to the Court of Appeal are bound by the decisions of the Court of Appeal.³¹

2.4. OTHER COMPONENTS OF THE JUDICIAL SYSTEM

In addition to the courts, other actors in the judicial system are police and prosecutors, as well as a number of other institutions, discussed in Section 2.6, such as the Commission on Human Rights and Administrative Justice and the Law Reform Commission, that are not formally part of the judicial system, but play an important role regarding law reform.

Immigration screening unit. Ghana does not have a special immigration unit designed to screen persons suspected of crimes under international law; however, in practice, some screening may be carried out by the Ghana Police, Refugee Board, and Immigration Service (See Section 8 below).

Police. Article 200 of the Constitution establishes the Police Service of Ghana, headed by the Inspector General of Police.³² The police have an exclusive mandate to investigate crime for prosecution.³³

There are a number of specialized police units to investigate particular crimes, such as domestic violence, money laundering, trafficking in persons, cyber crime, and tax fraud. There does not appear to be a special police unit or joint police-prosecution unit to investigate crimes under international law (see Section 8 below).

(g) smuggles any thing into or outside the Republic in contravention of an enactment.”

sect. 5 states that criminal procedures for these offences would be under the Armed Forces Act.

²⁹ See, e.g., Interview with Supreme Court Justice, in Accra, Ghana (27 June 2012) (describing the Special Military Tribunal Act as a relic of the pre-constitutional era); Interview with Senior Lecturer in Human Rights and International Development, University of Ghana-Legon Faculty of Law, in Legon, Ghana (13 February 2012) (not recalling any recent application of the Special Military Tribunal Act).

³⁰ 1992 Constitution, Ch. XI, art. 129. See also Courts Act, sects. 2 - 3.

³¹ 1992 Constitution, Ch. XI, arts. 129 (3), 136 (5)

³² 1992 Constitution, Ch. XV, arts. 190, 200, 202.

³³ In addition, police prosecute many crimes in Ghana, excluding serious crimes such as murder and rape, under the ultimate supervision of the Attorney General's Office. AfriMAP and OSIWA, *Ghana: Justice Sector and the Rule of Law 77* (2007).

Prosecuting authorities. Article 88 of the Constitution provides for the joint office of the Attorney General and Minister of Justice (a single official), a cabinet level political official who serves as the principal legal adviser and chief legal representative for the Government of Ghana.³⁴ The Legal Services Act establishes a unit of public lawyers within the Attorney General's Office.³⁵ In practice, a Director of Public Prosecutions directs criminal cases and the Solicitor General handles civil cases in the country.³⁶ Ultimately, however, the Attorney General is responsible for the institution and conduct of all criminal and civil cases in Ghana.³⁷

State attorneys, including officers from the Economic and Organized Crime Office, are not independent and try criminal matters under the ultimate supervision of the Attorney General and Minister of Justice.³⁸ As of the date of this paper, there are no special prosecution, investigation, or joint police-prosecution units to investigate or prosecute crimes under international law (see Section 8 below).

2.5. ROLE OF VICTIMS AND ORGANIZATIONS ACTING IN THE PUBLIC INTEREST IN CRIMINAL PROCEEDINGS

In addition to government prosecutors, legal practitioners acting on behalf of victims or the public interest can initiate criminal prosecutions, though this provision is limited to minor criminal offences not covered in this paper. Police and prosecutors have experts on crimes of sexual violence in the domestic setting, but they do not have experts on crimes against members of marginalized groups, such as minorities and children as victims, witnesses or suspects.

2.5.1. CIVIL CLAIMS IN CRIMINAL PROCEEDINGS

The right to reparation and to civil claims in criminal, as well as in civil, proceedings is discussed in Section 5 below.

2.5.2. CRIMINAL PROCEEDINGS INITIATED BY VICTIMS OR IN THEIR BEHALF

As discussed below, the Attorney General may give legal persons acting on behalf of victims or the public interest the power to conduct criminal prosecutions for minor offences.

2.5.2.1. Criminal proceedings initiated by victims

Victims or their families cannot initiate criminal proceedings alone.

2.5.2.2. Criminal proceedings initiated on behalf of the victims or the public interest

³⁴ 1992 Constitution, Ch. VIII, art. 88.

³⁵ Legal Service Act, 1993 (P.N.D.C.L. 320), sects. 1 - 2.

³⁶ AfriMAP and OSIWA, *Ghana: Justice Sector and the Rule of Law 77* (2007).

³⁷ 1992 Constitution, Ch. VIII, art. 88 (3) - (6).

³⁸ The Economic and Organised Crime Office may, under the authority of the Attorney General and Minister of Justice, prosecute economic and organized crimes, including money laundering and trafficking. Economic and Organised Crime Office Act, 2010 (Act 804), sect. 3.

Legal practitioners representing victims, their families, or the public interest can conduct criminal proceedings if the Attorney General gives permission by written, executive instrument.³⁹ They may do so only for offences not conducted under indictment, which excludes serious crimes relevant to this paper.⁴⁰ Public prosecutors cannot intervene in these private prosecutions.⁴¹

2.5.6. RIGHTS OF VICTIMS IN CRIMINAL PROCEEDINGS

As discussed below, essential rights of victims in criminal proceedings are not expressly guaranteed by law, including notice about their rights, the right to protection at all stages of the proceedings, and the right to participate in proceedings. However, some victims' rights may be respected in practice.

2.5.6.1. Notice of the rights of victims

The right of victims to notice about their rights regarding the investigation, prosecution and appeal is not guaranteed in law and practice.

2.5.6.2. Protection

The right of victims to protection at all stages of the investigation, prosecution and appeal and, if necessary, afterwards is not guaranteed by law. However, such protection may be provided to victims on a case-by-case basis.⁴² Efforts have been made in the past to protect witnesses during high profile cases, for example, through the concealing of identities.⁴³

2.5.6.3. Support

The right to provision of psychological and other support for victims, particularly to people who are often marginalized, such as women, members of minority groups and children, is not guaranteed by law. In practice, a limited number of programs administered by the state⁴⁴ and administered by non-

³⁹ See Criminal and Other Offences (Procedure) Act, 1960 (Act 30) (Criminal Procedure Code), sect. 56(1).

⁴⁰ See Criminal Procedure Code, sect. 58.

⁴¹ See Criminal Procedure Code (Amendment) Act, 2002 (Act 633), sect. 4.

⁴² Interview with Assistant Commissioner of Police and Director of Operations, Ghana Police Service Criminal Investigation Department, in Accra, Ghana (28 June 2012).

⁴³ See AfriMAP and OSIWA, *Ghana: Justice Sector and the Rule of Law* 107 (2007) (discussing the case of Atta Ayai, a notorious armed robber, and generally referring to cases of tip offs involving police, gang members, and other individuals who might seek retribution).

⁴⁴ For example, the Ghana Police Service Domestic Violence and Victim Support Unit offers a clinical psychologist and social welfare officer to work with women and children. In addition, the Ministry of Women and Children's Affairs helps coordinate the provision of social services for women and children victims. Interview with Assistant Commissioner of Police and Director of Operations, Ghana Police Service Criminal Investigation Department, in Accra, Ghana (28 June 2012); Interview with Chief State Attorney, Ministry of Justice Office of International Cooperation, in Accra, Ghana (27 June 2012). See also 2008 UPR National Report, para. 22.

governmental organizations may provide psychological and other support to victims.

2.5.6.4. Notice

The right of victims to notice about all developments in the investigation, prosecution and appeal is not guaranteed by law.⁴⁵ However, in practice victims may gain access to information on cases, including information about proceedings and a copy of the decision, by making a request through the registrar of Court⁴⁶ or by liaising with the office taking up the prosecution, either the Attorney General's Office or the police.⁴⁷

2.5.6.5. Participation

The right of victims to participate in pre-trial, trial and appellate proceedings is not expressly guaranteed by law. In practice, victims regularly attend trial proceedings as complainants or witnesses.

2.5.6.6. Representation

The Constitution provides that parties to court proceedings are entitled to aid in legal representation and the Courts Act gives courts in Ghana the authority to designate legal aid in such proceedings.⁴⁸ The Ghana legal aid scheme, which provides legal representation to indigent clients throughout the country, may cover victims participating in criminal proceedings.⁴⁹

⁴⁵ Section 70 of the Courts Act states:

“(1) A person is not entitled to inspect or to have a copy of the record of evidence given in a case before a Court or to a copy of the Court's notes, except as may be expressly provided by the Constitution, a rule of court or any other enactment.

(2) Where a person affected by a judgment or a court order desires to have a copy of the judgment, order, deposition or any other part of the record, that person shall, on application for the copy, be furnished with it if the cost is paid for, except where the Court for a special reason thinks fit to furnish it free of charge”.

⁴⁶ See Commonwealth Human Rights Initiative and ActionAid International, *Audit of Key Legislation in Ghana for Information Access Opportunities: Report of the Findings*, 2009, pp. 8 - 9.

⁴⁷ Interview with Chief State Attorney, Ministry of Justice Office of International Cooperation, in Accra, Ghana (27 June 2012); Interview with Senior Lecturer in Human Rights and International Development, University of Ghana-Legon Faculty of Law, in Legon, Ghana (13 February 2012).

⁴⁸ See 1992 Constitution, Ch. XXVI, art. 294; Courts Act, sect. 114 (1).

⁴⁹ Section 2 (2) of the Legal Aid Scheme Act, 1997 (Act 542) (Legal Aid Act) states:

“A person is entitled to legal aid

(a) if that person earns the Government minimum wage or less and desires representation in

(i) a criminal matter; or

(ii) a civil matter relating to landlord and tenant, insurance, inheritance with particular reference

2.6. OTHER INSTITUTIONS THAT HAVE A ROLE IN MONITORING THE JUDICIAL SYSTEM OR IN PROPOSING REFORM OF LAW AND PRACTICE

There are a number of institutions that have had a role in recent years in monitoring the judicial system or in proposing reform of law and practice, including the National Reconciliation Commission, the Constitutional Review Commission, the Commission on Human Rights and Administrative Justice, the Council of State, the Ghana Legal Aid Board and Legal Aid scheme and the Law Reform Commission. However, some of these bodies no longer exist and many of the recommendations of these bodies – which are not binding upon the government – have not been implemented. Most of the bodies that still do exist, however, could review the recommendations in this paper and, taking into account those recommendations, urge the government to reform law and practice to enable Ghana to fulfil its responsibilities under international law to investigate and prosecute crimes under international law, including through the use of universal jurisdiction.

National Reconciliation Commission. The National Reconciliation Commission, which operated from 2002 to 2004, sought to establish an accurate and complete historical record of violations and abuses of human rights perpetrated by public institutions and public officers during episodes of unconstitutional government in Ghana.⁵⁰ In 2005, the government endorsed the Commission's recommendations and it subsequently distributed 13.5 billion Ghana cedis in reparation to victims.⁵¹ However, at the date of this paper, many of the recommendations have yet to be implemented. Despite attempts to locate the final report of the National Reconciliation Commission, which was drafted to be a public document, it has not been possible to obtain a full copy of the National Reconciliation Commission report and recommendations.⁵²

Constitution Review Commission. A 2010 Constitution Review Commission presented its final report to the President with two draft bills for constitutional reform in December 2011.⁵³ In 2012, the government issued a white paper adopting several of the Commission's recommendations, including the recommendation formally to abolish the death penalty.⁵⁴ The government noted the

to the Intestate Succession Act, 1985, maintenance of children and any other civil matters as prescribed by Parliament; or

(b) if in the opinion of the Board that person requires legal aid.”

⁵⁰ The Commission's mandate covered human rights violations and abuses committed from 24 February 1966 to 21 August 1969, 13 January 1973 to 23 September 1979, 31 December 1981 to 6 January 1993. The National Reconciliation Commission Act, 2002 (Act 611), sect. 3 (a).

⁵¹ See AfriMAP and OSIWA, *Ghana: Justice Sector and the Rule of Law* 51 (2007).

⁵² The full report was formerly available online at <http://www.ghana.gov.gh/NRC/index.php>, but it is no longer possible to obtain the full report from this site.

⁵³ Republic of Ghana Constitution Review Commission, *Report of the Constitution Review Commission: From a Political to a Developmental Constitution*, 20 December 2011 (<http://www.crc.gov.gh?q=news/2012/07/30/report-constitution-review-commission>).

⁵⁴ Republic of Ghana, White Paper on the Report of the Constitution Review Commission of Inquiry, WP No.1/2012 (<http://www.crc.gov.gh?q=news/2012/07/30/government-white-paper-report-crc>) (CRC National

Commission's recommendation that the President retain the authority to decouple the office of the Attorney General and Minister of Justice, but it stated that a constitutional amendment was not required to implement this recommendation.⁵⁵ Abolition of the death penalty and the guarantee of an independent Attorney General's office are necessary for ensuring a rights-respecting and independent system of justice that could fairly adjudicate crimes under international law in Ghana (see Recommendations section below). As of the date of this paper, the recommendations have not been implemented.

Commission on Human Rights and Administrative Justice (CHRAJ). The 1993 Commission on Human Rights and Administrative Justice has a mandate to promote, protect and enforce fundamental human rights and freedoms and seek administrative justice and fairness for all persons in Ghana. The Commission conducts research, provides public education, and investigates complaints concerning violations of the fundamental human rights enshrined in Chapter Five of the Constitution. The Commission also investigates complaints of corrupt acts, abuses of power, and unfair treatment committed by public officers in the exercise of their duties.⁵⁶

The Commission does not have the power to investigate a matter pending before a court or judicial tribunal, a matter involving the relations or dealings between the Government of Ghana and any other government or international organization, or a matter relating to the exercise of the prerogative of mercy.⁵⁷ The Commission does not have the authority to investigate crimes, which it must refer to the police and public prosecutors to carry forward.⁵⁸

Council of State. The Council of State provides advice to the President⁵⁹ and, on its own initiative, makes recommendations to the President or to any Minister concerning public matters under their authority.⁶⁰ It does not appear to have made any relevant recommendations.

The Law Reform Commission. To promote law reform in Ghana, the Law Reform Commission receives and considers proposals for reforms of law made by other organizations, conducts

White Paper), p. 44.

⁵⁵ CRC National White Paper, p. 15.

⁵⁶ Commission on Human Rights and Administrative Justice Act, 1993 (Act 456) (CHRAJ Act), sect. 7. See also 1992 Constitution, Ch. XVIII, art. 218. The CHRAJ Act also repealed the Ombudsman Act, 1980, and empowered the Commission to investigate any complaint pending before the Ombudsman. CHRAJ Act, sect. 28.

⁵⁷ CHRAJ Act, sect. 8(2). See also 1992 Constitution, Ch. XVIII, art. 219 (2).

⁵⁸ AfriMAP and OSIWA, *Ghana: Justice Sector and the Rule of Law 78* (2007).

⁵⁹ The Council consists of one person who has previously held the office of Chief Justice, one person who has previously held the office of Chief of Defence Staff and of the Armed Forces of Ghana, one person who has previously held the office of the Inspector-General or Police, the President of the National House of Chiefs, one elected representative of each region of Ghana, and eleven other members appointed by Parliament. 1992 Constitution, Ch. IX, arts. 89, 92.

⁶⁰ 1992 Constitution, Ch. IX, art. 91. The Council may appoint committees and outside experts and consultants to assist in the exercise of its mandate. 1992 Constitution, Ch. IX, art. 92 (8) - (9).

comparative research into the legal systems of other countries, and solicits the input of experts.⁶¹ The Commission prepares draft legal reforms and provides advice and assistance to government departments and other authorities or bodies concerned with the law, reporting annually to the Attorney General.⁶² It does not appear that the Commission has made any recommendations regarding the incorporation of crimes under international law into the Ghanaian Criminal Code.

The African Union voluntary self-review initiative and other justice sector surveys. In 2005, African Union member states involved in a voluntary initiative of self-review, the African Peer Review Mechanism, recommended that Ghana adopt a plan to ratify all international human rights treaties to which it is not yet a state party and incorporate more of its ratified human rights treaties into national law.⁶³ The Open Society Initiative for West Africa (OSIWA) and the African Governance Monitoring and Advocacy Project (AfriMAP) made a similar recommendation in 2007, following a comprehensive review of the justice sector and the rule of law in Ghana.⁶⁴ They also made other proposals for legal reform which, as outlined in the Recommendations section below, are necessary to ensure that Ghana courts have the capacity to effectively try crimes under international law.⁶⁵

Prior efforts to incorporate crimes under international law domestically. Although Ghanaian authorities have reported having taken extensive steps to draft a bill to implement the Rome Statute of the International Criminal Court, which would define and punish crimes under international law nationally and facilitate harmonious collaboration between the national justice system and the International Criminal Court,⁶⁶ no implementing legislation has been enacted. It also appears as if

⁶¹ Law Reform Commission Act, 2011 (Act 822) (Law Reform Commission Act), sects. 1-3.

⁶² Law Reform Commission Act, sects. 3 (f), 18, 21. The predecessor Law Reform Commission under a 1975 Decree also reported annually to the Attorney General. In practice, however, the Attorney General could choose to implement or ignore its recommendations. See AfriMAP and OSIWA, *Ghana: Justice Sector and the Rule of Law* 6 (2007).

⁶³ African Peer Review Mechanism, *Country Review Report of the Government of the Republic of Ghana*, Ch. 2 Democracy and Political Governance, 2005, paras. 13 & 54 (<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/00798283-EN-APRM-GHANA-REVIEW-REPORT-JUNE-2005.PDF>).

⁶⁴ AfriMAP and OSIWA, *Ghana: Justice Sector and the Rule of Law* 38 (2007).

⁶⁵ Those recommendations include: repealing the transitional amnesties in the Constitution, which perpetuate impunity for crimes under international law committed during periods of unconstitutional rule in Ghana, separation of the singular position of Attorney General and Minister of Justice to ensure prosecutorial independence, judicial training in international law, and development of a legal framework and adequate police procedures to provide protection for witnesses. See AfriMAP and OSIWA, *Ghana: Justice Sector and the Rule of Law* 38-39, 52, 81, 117 (2007).

⁶⁶ See Remarks by Hon. George Kuntu Blankson, MP and Deputy Majority Chief Whip of the Parliament of the Republic of Ghana on Ghana's Position on the Rome Statute of the International Criminal Court, Parliamentarians for Global Action Regional Roundtable on Implementation of the of the Rome Statute of the ICC (Monrovia, Liberia, 9 February 2011) (<http://www.pgaction.org/pdf/pre/Speech%20Ghana%20Liberia%20Feb%202011.pdf>). See also Godfrey Musila, 'Country Study II: Ghana', *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries*, Max du Plessis and Jolyon Ford (eds.), ISS Monograph Series No. 141, 2008, pp. 37

the government has not undertaken a transparent consultation with civil society to draft such legislation. No copy of a draft has been made public and attempts to obtain copies from various sources have been unsuccessful. Defining crimes under international law as crimes in Ghana, either through the enactment of a comprehensive ICC Act based on the draft ICC bill or through other legislation that effectively defines and punishes crimes under international law, are substantive law reform efforts necessary to ensure that Ghana does not remain a safe haven for perpetrators of crimes under international law (see Recommendations section below).⁶⁷

- 55; 2008 UPR National Report, para. 16.

⁶⁷ Amnesty International's paper, *International Criminal Court: Updated checklist for effective implementation*, Index: IOR 53/009/2010, May 2010 (), spells out what states must and should do to implement their obligations under the Rome Statute and other international criminal law.

3. GEOGRAPHIC JURISDICTION OTHER THAN UNIVERSAL JURISDICTION

There are five forms of geographic jurisdiction: territorial jurisdiction and four forms of extraterritorial jurisdiction (active and passive personality jurisdiction, protective jurisdiction and universal jurisdiction (discussed below in Section 4)). Ghana courts can exercise territorial jurisdiction, active and passive personality jurisdiction, and protective jurisdiction over certain crimes. They cannot exercise active or passive personality jurisdiction or protective jurisdiction over torts.

Territorial jurisdiction. National courts of Ghana may exercise territorial jurisdiction over crimes and torts that occurred in that country's territory if the crimes were committed entirely in Ghanaian territory, in its territorial sea or on board one of its ships or aircraft.⁶⁸ In addition, its courts may exercise objective territorial jurisdiction over conduct constituting a crime that begins abroad where the crime is either completed in Ghanaian territory (object state) or where any essential element of the crime occurs in Ghana or its territory.⁶⁹ Ghana may also exercise subjective territorial jurisdiction when the crime commenced within Ghana, the forum state (subject state), even if the crime was completed outside the state.⁷⁰ The Courts Act does not provide that Ghana can exercise a third form of territorial jurisdiction – effects jurisdiction – which is similar to objective jurisdiction, but differs from it in a crucial respect. Under effects jurisdiction, the forum state would have jurisdiction over a crime or tort where all elements were committed abroad, but the crime or tort had some impact, which could be incidental, in the forum state.

Active personality jurisdiction. The courts of Ghana may exercise active personality jurisdiction, which is jurisdiction over crimes committed abroad by persons who were nationals of Ghana at the time that a crime was committed.⁷¹ There appears to be no civil jurisdiction over crimes committed

⁶⁸ See Courts Act, sect. 56 (1); Criminal Procedure Code, sect. 118. There appears to be no legislation defining geographic jurisdiction over torts.

⁶⁹ See Courts Act, sect. 56 (2), which states:

“When an act which if done within the jurisdiction of a court, would be a criminal offence, is done partly within and partly outside the jurisdiction, every person who within or outside the jurisdiction does or abets any part of the act may be tried and punished as if the act had been done wholly within the jurisdiction.”.

The Criminal Code also provides for national jurisdiction over homicide if injury happens within Ghanaian territory even if the victim ultimately dies outside of Ghana. Criminal Offences Act, 1960 (Act 29) (Criminal Code), sect. 68.

⁷⁰ See Courts Act, sect. 56 (2).

⁷¹ Section 56 (3) of the Courts Act states:

“A citizen of Ghana who –

- (a) while employed in the service of the Republic of Ghana or of any statutory corporation does an act outside of Ghana which if done in Ghana is punishable as an offence, or

by nationals abroad.

Passive personality jurisdiction. The courts of Ghana may exercise passive personality jurisdiction, which is jurisdiction over crimes committed against persons who were nationals of Ghana at the time the offences were committed.⁷² There appears to be no civil jurisdiction over crimes committed against nationals abroad.

Protective jurisdiction. The courts of Ghana may exercise protective jurisdiction, which is jurisdiction over crimes against specific national interests of the state such as disclosing a state secret or counterfeiting an official document.⁷³ There does not appear to be civil jurisdiction over such crimes.

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- (b) does an act outside Ghana which if done in Ghana would constitute the offence of murder, or
 - (c) does outside Ghana an act which if done in Ghana constitutes an offence involving or resulting in the misappropriation, dissipation or loss of
 - i. public funds,
 - ii. government property including damage to government property,
 - iii. property belonging to a statutory corporation including damage to the property of a statutory corporation,
 - (d) does an act on the premises of a Ghanaian diplomatic mission which if done in Ghana would be punishable as an offence,
- commits an offence as if the act constituting the offence was done in Ghana and may, subject to section 46 of the Criminal Procedure Code, 1960 (Act 30), be prosecuted and punished in Ghana.”

Section 46 of the Criminal Procedure Code states:

“Where a person is accused of the commission of an offence at sea or elsewhere out of the Republic which according to the law may be dealt with in the Republic, the offence may, subject to section 118 [stating that trial proceedings offences committed by aliens in territorial waters must be instituted by the Attorney-General in accordance with the Constitution], be enquired into and tried at a place in the Republic to which the accused person is first brought or to which the accused is taken subsequently.”

⁷² The Anti-Terrorism Act, 2008 (Act 762) (Anti-Terrorism Act), sect. 5 (1) (c) states:

“(1) The High Court has jurisdiction for an act which constitutes an offence committed outside this country if the act constitutes an offence in this country where

(c) the act is committed against a citizen of Ghana”.

⁷³ Section 56 (4) of the Courts Act, 1993 (Act 459) provides the courts of Ghana extraterritorial jurisdiction over the following offences against the specific interests of the state: unauthorised disclosure of an official Ghanaian state secret; falsifying or counterfeiting an official seal of the Republic or any currency, instrument of credit, stamp, passport, or public document issued by the Republic or under its authority; and any offence against the security, political independence, or territorial integrity of the Republic of Ghana.

4. LEGISLATION PROVIDING FOR UNIVERSAL CRIMINAL JURISDICTION

As discussed below, national courts in Ghana may exercise universal jurisdiction over ordinary crimes, when committed by foreigners abroad who are employed by the state or a statutory corporation, if the crime is committed in the course of duty of such appointment. In addition, Ghana courts may exercise universal jurisdiction over some crimes under national law of international concern, including piracy, counterfeiting, narcotics trafficking, hijacking, trafficking in persons and terrorism.⁷⁴ The national courts of Ghana may also exercise universal jurisdiction over some crimes under international law, including breaches of the Geneva Conventions and their Protocols, slavery, and genocide. However, Ghana courts cannot exercise universal jurisdiction over the following crimes under international law: most war crimes other than breaches of the Geneva Conventions and their Protocols, crimes against humanity, torture, extrajudicial executions, enforced disappearances and aggression. As noted below, it is not clear whether Ghana courts can exercise universal jurisdiction over some crimes under national law of international concern and crimes under international law, including torture, found in treaties signed by Ghana but which Ghanaian law does not yet define or for which Ghanaian law does not yet authorize universal jurisdiction. Obstacles to the exercise of universal jurisdiction over crimes under international law are discussed below in Section 6.

Definitions. Universal jurisdiction is the *ability* of the court of any state to try persons for crimes committed outside its territory when the crimes committed are not linked to the state by the nationality of the suspect, the nationality of the victims or by harm to the state's own national interests. Sometimes this is called permissive universal jurisdiction. The authority of states to exercise universal jurisdiction is now part of customary international law. Universal jurisdiction is also reflected in treaties, national legislation and jurisprudence concerning crimes under international law, crimes under national law of international concern and ordinary crimes under national law. When a national court exercises this universal jurisdiction specifically over conduct committed abroad amounting to crimes under international law or over crimes under national law of international concern – as opposed to conduct simply amounting to ordinary crimes – the court in fact acts as an agent of the international community enforcing international law rather than as an agent of the state enforcing national law.

Under the related *aut dedere aut judicare* (extradite or prosecute) rule, a state may not shield a person present in territory subject to its jurisdiction suspected of certain categories of crimes. Instead, it is *required* to exercise jurisdiction (which would necessarily include universal jurisdiction

⁷⁴ Section 56 (4) (j) & (m) of the Courts Act also provides for universal jurisdiction over trafficking in obscene publications and interference with an international communications system, canal, or submarine cable, which could also be classified as crimes under national law of international concern.

in certain cases) over the suspect, to extradite the suspect to a state able and willing to exercise jurisdiction or to surrender the suspect to an international criminal court with jurisdiction over the suspect and the crime. As a practical matter, when the *aut dedere aut judicare* rule applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of geographic jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international criminal court.

4.1. ORDINARY CRIMES

Ghana courts can exercise universal jurisdiction over ordinary crimes when they are committed abroad by non-nationals employed by the state or a statutory corporation acting in the course of the duties of such employment.⁷⁵ However, except in the aforementioned circumstance, the courts of Ghana cannot exercise universal jurisdiction over most ordinary crimes, such as murder, assault, rape or kidnapping.

4.2. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN

As indicated in the attached chart, Ghana has signed, but not yet ratified, two international treaties providing for universal jurisdiction over crimes under national law of international concern and it has ratified sixteen of such treaties. As noted below in Chart I, Ghana has defined the crimes listed in fourteen of the following treaties in whole or in part, as crimes under Ghanaian law and it has provided its courts with universal jurisdiction over six of such crimes.

CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN				
CRIME AND TREATY⁷⁶	SIGNED RELEVANT TREATY	RATIFIED/ ACCEDED TO RELEVANT TREATY	DEFINED IN NATIONAL LAW	UNIVERSAL JURISDICTION
Piracy - 1958 High Seas Convention	29 April 1958		Criminal Code, sects. 193 - 94	Courts Act, sect. 56 (4) (b)
Piracy - 1982 UN	10	7 June	Criminal Code,	Courts Act, sect.

⁷⁵ Section 56 (4) of the Courts Act states:

“A person whether a citizen of Ghana or not, is liable to be tried and punished in Ghana for the respective offence if he does an act which if done within the jurisdiction of the courts of Ghana would have constituted any of the following offences:

(l) an offence by or against a person in the employment of the Republic or a statutory corporation while acting in the course of the duties of such employment”.

Jurisdiction over foreign residents and foreigners employed by Ghana for acts done against non-citizens outside Ghana constitutes universal jurisdiction.

⁷⁶ The citations to these treaties, with links, where they exist, are found in Appendix I.

CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN				
CRIME AND TREATY⁷⁶	SIGNED RELEVANT TREATY	RATIFIED/ ACCEDED TO RELEVANT TREATY	DEFINED IN NATIONAL LAW	UNIVERSAL JURISDICTION
Convention on the Law of the Sea	December 1982	1983 (ratified)	sects. 193 -94	56 (4) (b)
Counterfeiting - 1929 Convention		9 July 1964 (acceded)	Criminal Code, sects. 158 - 171	Courts Act, sect. 56 (4) (l) (foreign public officer). **Courts Act, sect. 56 (4) (n) (catchall)
Narcotics Trafficking - 1961 Single Convention, as amended by 1972 Protocol		10 April 1990 (acceded)	Narcotic Drugs (Control, Enforcement and Sanctions) Act, 1990 (P.N.D.C.L. 236) (Narcotics Act), sects. 1 - 6,9 & 11	Courts Act, sect. 56 (4) (i)
Violence on Aircraft - 1963 Tokyo Convention		2January 1974 (acceded)	Criminal Code, sect. 195 Ghana Civil Aviation Act, 2004 (Act 678), sect. 39	Courts Act, sect. 56 (4) (h) (only as it applies to hijacking) Courts Act, sect. 56 (4) (l) (foreign public officer) **Courts Act, sect. 56 (4) (n) (catchall)
Hijacking Aircraft- 1970 Hague Convention	16 December 1970	12 December 1973	Criminal Code, sect. 195	Courts Act, sect. 56 (4) (h)

⁷⁷ Although Ghana is not listed among participants on the UNTS database, several other sources cite Ghana as a state party. See, e.g., International Civil Aviation Organization, Current Lists of Parties to Multilateral Air Law

CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN				
CRIME AND TREATY⁷⁶	SIGNED RELEVANT TREATY	RATIFIED/ ACCEDED TO RELEVANT TREATY	DEFINED IN NATIONAL LAW	UNIVERSAL JURISDICTION
		(ratified) ⁷⁷		
Psychotropic Substances - 1971 Convention	21 February 1971	10 April 1990 (ratified)	Narcotics Act, sects. 1 - 6 & 9	Courts Act, sect. 56 (4) (i) (only as it applies to narcotics trafficking) Courts Act, sect. 56 (4) (l) (foreign public officer) **Courts Act, sect. 56 (4) (n) (catchall)
Attacks on Aviation -- 1971 Montreal Convention		18 July 1975 (acceded)	Criminal Code, sect. 195	Courts Act, sect. 56 (4) (h) (only as it applies to hijacking) Courts Act sect. 56 (4) (l) (foreign public officer) **Courts Act, sect. 56 (4) (n) (catchall)
Internationally Protected Persons - 1973 Convention		25 April 1975 (acceded)	NO	**Courts Act, sect. 56 (4) (n) (catchall)
Hostage Taking -: 1979 Convention		10 November	NO	**Courts Act, sect. 56 (4) (n)

Treaties: Convention for the Suppression of Unlawful Seizure of Aircraft Signed at The Hague on 16 December 1970 (http://www2.icao.int/en/Ieb/List%20of%20Parties/Hague_EN.pdf); United Nations Office on Drugs and Crime, A Review of the Legal Regime against Terrorism in West and Central Africa Working Document, 2008-2009, pg. 98; United Nations General Assembly, Report of the Secretary-General on Measures to Eliminate International Terrorism, A/63/173, 25 July 2008, pp. 28 & 23.

CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN				
CRIME AND TREATY⁷⁶	SIGNED RELEVANT TREATY	RATIFIED/ ACCEDED TO RELEVANT TREATY	DEFINED IN NATIONAL LAW	UNIVERSAL JURISDICTION
		1987 (acceded)		(catchall)
Nuclear Materials - 1979 Convention		30 October 2002 (acceded)	NO	**Courts Act, sect. 56 (4) (n) (catchall)
Attacks on Navigation - 1988 Convention			NO	NO
UN Personnel - 1994 Convention			NO	NO
UN Personnel - 2005 Protocol			NO	NO
Terrorist Bombing - 1997 Convention		6 September 2002 (acceded)	Anti-Terrorism Act, sects. 1-18	Anti-Terrorism Act, sect. 5
Terrorism - 1999 OAU Convention	14 July 1999	6 December 2002 (ratified)	Anti-Terrorism Act, sects. 1-18	Anti-Terrorism Act, sect. 5
Financing Of Terrorism - 1999 Convention	12 November 2001	6 September 2002 (ratified)	Anti-Terrorism Act, sect. 7	Anti-Terrorism Act, sect. 5
Transnational Organized Crime - 2000 UN Convention			NO	NO
Trafficking Of Human Beings - 2000 Protocol			Human Trafficking Act, sects. 1 - 5	Courts Act, sect. 56(4) (c) (women and child victims) Human Trafficking Act, sect. 8 (all victims)
Firearms - 2001			NO	NO

CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN				
CRIME AND TREATY⁷⁶	SIGNED RELEVANT TREATY	RATIFIED/ ACCEDED TO RELEVANT TREATY	DEFINED IN NATIONAL LAW	UNIVERSAL JURISDICTION
Protocol				
Corruption - 2003 AU Convention	31 October 2003	20 July 2007 (ratified)	Criminal Procedure Code, sect. 239	Courts Act, sect. 56 (4) (l) (foreign public officer) **Courts Act, sect. 56 (4)(n) (catchall)
Nuclear Terrorism - 2005 Convention	6 November 2006		Anti-Terrorism Act, sect. 2 (1) (f) & (2)	Anti-Terrorism Act, sect. 5

As Chart I demonstrates, Ghanaian law provides for the exercise of universal jurisdiction over national crimes of international concern found in several treaties including: piracy (defined in the 1958 High Seas Convention and the 1982 UN Convention on the Law of the Sea), narcotics trafficking (defined in the 1961 Single Convention on Narcotic Drugs as amended by the 1972 Protocol and the 1971 Convention on Psychotropic Substances), hijacking of aircraft (defined in the 1963 Tokyo Convention, the 1970 Hague Convention, and the 1971 Montreal Convention), terrorism (defined in the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 OAU Convention on the Prevention and Combating of Terrorism, the 1999 International Convention for the Suppression of the Financing of Terrorism and the 2005 Nuclear Terrorism Convention) and trafficking in persons (defined by the 2000 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children).

The Courts Act provides for universal jurisdiction over piracy, narcotics trafficking, hijacking, and trafficking in women and children by stating that any person, whether a citizen of Ghana or not, is liable to be tried and punished in Ghana for an act done outside Ghana which, if done within the jurisdiction of the courts of Ghana, would have constituted any of the above offences.⁷⁸ Separately,

⁷⁸ Section 56 (4) of the Courts Act states (although not all of these provisions involve universal jurisdiction):

“A person whether a citizen or not, is liable to be tried and punished in Ghana if that person does an act which if done within the jurisdiction of the courts of Ghana would have constituted any of the following offences:

- (a) slave trade or traffic in slaves;
- (b) piracy;
- (c) traffic in women or children;

the Human Trafficking Act states that a person who commits an act that would constitute the offence of trafficking in persons in Ghana – which, unlike the offence defined in the Courts Act, would cover trafficking of adult men – is liable to be tried and punished in Ghana for trafficking in persons.⁷⁹ The Anti-Terrorism Act authorizes the exercise of jurisdiction over offences amounting to terrorism committed outside the country by several classes of people, including persons who are not citizens but are ordinarily resident in Ghana and anyone found present in Ghana after the commission of a terrorist act.⁸⁰ In addition, the Courts Act provides for universal jurisdiction over

- (d) falsification or counterfeiting or uttering of false copies or counterfeits of an official seal of the Republic or any currency or instrument of credit, stamp, passport, or public document issued by the Republic or under its authority;
- (e) genocide;
- (f) an offence against the property of the Republic;
- (g) an offence against the security, territorial integrity or political independence of the Republic;
- (h) hijacking;
- (i) unlawful traffic in narcotics;
- (j) attacks on an international communications system, canal or submarine cable;
- (k) unauthorised disclosure of an official secret of the Republic;
- (l) an offence by or against a person in the employment of the Republic or a statutory corporation while acting in the course of the duties of the employment;
- (m) traffic in obscene publications;
- (n) any other offence which is authorised or required by a convention or treaty to which the Republic is a signatory to be prosecuted and punished in Ghana wherever the offence was committed.”

⁷⁹ Human Trafficking Act, 2005 (Act 694) (Human Trafficking Act), sect. 8. The Act also provides for the extradition of non-citizens convicted of trafficking in persons under the Act. See sect. 35. Although the Courts Act expressly grants universal jurisdiction for trafficking in women and children, it does not address trafficking of adult men. See Courts Act, sect. 56 (4) (c).

⁸⁰ Section 5 (1) of the Anti-Terrorism Act states:

“The High Court has jurisdiction for an act which constitutes an offence committed outside this country if the act constitutes an offence in this country where –

- (a) the person committing the act is
 - (i) a citizen of Ghana or
 - (ii) not a citizen of Ghana but is ordinary resident in this country;
- (b) the act is committed to compel the Government to do or reform from doing an act;
- (c) the act is committed against a citizen of Ghana;
- (d) the act is committed against property outside the country that belongs to the Republic; or
- (e) the person who commits the act is after its commission, found present in Ghana.”.

foreigners working for the state or a statutory corporation who have committed crimes abroad, as long as the crimes were committed in the course of duties carried out for the state.⁸¹ To the extent this applies to acts committed by non-citizens against non-citizens abroad, this would constitute universal jurisdiction and could apply to crimes under national law of international concern defined in national law, but for which Ghanaian law does not expressly authorize universal jurisdiction.

It is not clear whether the courts of Ghana would exercise universal jurisdiction over crimes under national law of international concern found in treaties signed by Ghana, which Ghanaian law has either not yet defined or for which Ghanaian law has not expressly authorized universal jurisdiction. Section 56 of the Courts Act ends with a catchall provision, which states that the courts of Ghana may exercise universal jurisdiction over “any other offence which is authorised or required by a convention or treaty to which the Republic is a signatory to be prosecuted and punished in Ghana wherever the offence was committed.”⁸² Government submissions affirming the primacy of ratified treaties over national law lend credence to the notion that courts could authorize prosecutions based on this catchall provision.⁸³ However, Ghana courts have not yet utilized this provision to exercise universal jurisdiction in practice, and legal observers have stated that the judiciary is conservative by nature, indicating that courts are unlikely to exercise jurisdiction based on this catchall provision alone, particularly if they consider that the definition of the crime in the treaty does not satisfy the requirements of legality under Ghanaian law.⁸⁴

4.3. CRIMES UNDER INTERNATIONAL LAW

Ghana courts may exercise universal jurisdiction over grave breaches of the four 1949 Geneva Conventions, grave breaches of Protocol I, some other war crimes in international armed conflict, violations of common Article 3 to the Geneva Conventions, violations of Protocol II, some other war crimes in non-international armed conflict and genocide. However, they cannot exercise universal jurisdiction over other crimes under international law, including crimes against humanity, torture, extrajudicial executions, enforced disappearances and aggression.

4.3.1. WAR CRIMES

Ghana is a party to the four Geneva Conventions of 1949.⁸⁵ It has ratified Protocols I⁸⁶ and II⁸⁷ to

⁸¹ Courts Act, sect. 56 (4) (l).

⁸² Courts Act, sect. 56 (4) (n).

⁸³ See, e.g., 2002 CERD National Report, para. 61. CERD/C/431/Add.3
1 October 2002.

⁸⁴ See Interview with Senior Researcher, Centre for Democracy and Development – Ghana, in Accra, Ghana (11 January 2012); interview with Representative, Commonwealth Human Rights Initiative, in Accra, Ghana (10 January 2012).

⁸⁵ The Geneva Conventions are:

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (First Geneva Convention)
(<http://treaties.un.org/pages/showDetails.aspx?objid=080000028015847c>), 75 U.N.T.S. 31. (entered into force 21 October 1950);

these conventions. In addition, Ghana has been a party to the Rome Statute of the International Criminal Court (Rome Statute) since 20 December 1999.⁸⁸ As indicated in the charts below, Ghana has also ratified a number of other international humanitarian law treaties with penal provisions or provisions that may give rise to international criminal responsibility.

As discussed below, Ghana has defined grave and non-grave breaches of the Geneva Conventions and their Protocols, as well as some other crimes which could amount to war crimes – including rape, enforced prostitution, slavery and sexual slavery, other offences of sexual violence, torture of children, and the degrading treatment of children – as crimes under national law. In some instances the definitions of these crimes fall short of the strictest requirements of international law. Importantly, except for breaches of the Geneva Conventions and their Protocols, Ghanaian law does not indicate that these crimes, if committed in the context of and associated with armed conflict, constitute war crimes, in line with their treatment under international law.

The courts of Ghana have been able to exercise universal jurisdiction over breaches of the Geneva Conventions and their Additional Protocols since 2009, over slavery since 1993, and over trafficking offences incorporating slavery and slave-like practices since 2005, but it is not clear whether the courts would exercise the universal jurisdiction they possess under Ghanaian law over any other war crimes. For crimes defined in national law, the courts could exercise universal jurisdiction over them if committed by a foreign public officer abroad in the course of duties carried out for the state. In addition, a catchall provision of the Courts Act apparently authorizes Ghana courts to exercise

Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (Second Geneva Convention) (<http://treaties.un.org/Pages/showDetails.aspx?objid=08000002801591b0>), 75 U.N.T.S. 85. (entered into force 21 October 1950);

Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (Third Geneva Convention) (<http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280159839>), 75 U.N.T.S. 135. (entered into force 21 October 1950); and

Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, (Fourth Geneva Convention) (<http://treaties.un.org/Pages/showDetails.aspx?objid=0800000280158b1a>), 75 U.N.T.S. 287. (entered into force 21 October 1950).

⁸⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, (<http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586>), 1125 U.N.T.S. 3. (entered into force 7 December 1978).

⁸⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, (<http://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3cb8>), 1125 U.N.T.S. 609. (entered into force 7 December 1978).

⁸⁸ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference on the Establishment of an International Criminal Court, Rome UN Doc A/CONF.183/9*, 17 July 1998, as corrected by the *process-verbaux* UN Doc C.N.577.1998.TREATIES-8, 10 November 1998, and U.N. Doc. C.N.604.1999.TREATIES-18, 12 July 1999.

jurisdiction over crimes found in treaties to which Ghana is a signatory, whether these crimes have been defined in national law or not. However, there is no prior practice indicating that the courts would exercise universal jurisdiction pursuant to the catchall provision alone (see Section 4.2 above).

4.3.1.1. War crimes in international armed conflict: Grave breaches of the 1949 Geneva Conventions

The four Geneva Conventions of 1949 each contain a list of grave breaches of those conventions prohibiting states parties from committing them against persons protected by those conventions, including wounded and sick members of the armed forces in the field, wounded and sick and shipwrecked members of armed forces at sea, prisoners of war and civilian persons in time of war.⁸⁹ Those breaches have been consolidated without change in substance in Article 8 of the Rome Statute.⁹⁰

Each state party to those conventions undertakes in a common article a two-part obligation: to define grave breaches as crimes under national law and then to exercise universal jurisdiction over persons suspected of committing grave breaches, to extradite them to another state party able and willing to do so or to surrender them to an international criminal court with jurisdiction over them.⁹¹ That common article states in relevant part:

“The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.”⁹²

Ghana has defined grave breaches of the Geneva Conventions as crimes under national law. Ghana has also authorized its courts to exercise universal jurisdiction over grave breaches of the Geneva

⁸⁹ First Geneva Convention, art. 50; Second Geneva Convention, art. 51; Third Geneva Convention, art. 130; Fourth Geneva Convention, art. 147.

⁹⁰ Rome Statute, art. 8 (2) (a).

⁹¹ Although the Geneva Conventions do not expressly state that a state party may satisfy its obligation to extradite or prosecute persons suspected of grave breaches by surrendering a person to an international criminal court with jurisdiction, the drafters of the Conventions intended this result.

⁹² First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146.

Conventions.⁹³

4.3.1.2. War crimes in international armed conflict: Grave breaches of the 1977 Protocol I

Ghana has been a party to Protocol I since 28 February 1978. Protocol I applies to international armed conflict and certain non-international armed conflict.⁹⁴ Article 85 (2) of Protocol I expands the scope of persons protected by the Geneva Conventions.⁹⁵ In addition, Protocol I also lists a number of new grave breaches of that treaty in Articles 11 and 85 (3) to (5). Finally, Protocol I imposes the same two-part obligation on states parties to define these grave breaches of Protocol I as crimes under national law and to try or extradite persons suspected of such grave breaches.

⁹³ Section 1 of the Geneva Conventions Act, 2009 (Act 780) states:

“(1) A person of whatever nationality, commits an indictable offence, if that person, whether within or outside this country commits, aids, abets, or procures any other person to commit a grave breach specified in

(a) article 50 of the First Convention in respect of the Geneva Conventions for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field of August 12, 1949, stated in the First Schedule,

(b) article 51 of the Second Convention in respect of the Geneva Conventions for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at sea, of August 12, 1949, stated in the Second Schedule,

(c) article 130 of the Third Convention in respect of the Geneva Conventions Relative to the Treatment of Prisoners of War, of August 12, 1949, stated in the Third Schedule,

(d) article 147 of the Fourth Convention in respect of the Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, of August 12, 1949, set out in the Fourth Schedule, and

(e) article 11 (4) or paragraphs 2, 3 and 4 of article 85 of the Protocol 1 set out in the Fifth Schedule [. . .]

(4) Where a person commits an offence under this section outside the country, the person may be tried and punished as if the offence were committed in this country.”

Ghana has also defined as crimes all other breaches to the Geneva Conventions and their Protocols, authorizing its courts to exercise universal jurisdiction over them. Section 1 states:

“(3) A person, who in Ghana commits, abets, aids or procures any other person to commit a breach to the Conventions or Protocols not covered under subsection (1) commits an indictable offence and is liable on conviction to a term of imprisonment of not more than fourteen years.

(4) Where a person commits an offence under this section outside the country, the person may be tried and punished as if the offence were committed in this country.”

⁹⁴ Protocol I, art. 1 (4).

⁹⁵ Article 85 (2) of Protocol I protects “persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.”

Ghana has defined grave breaches of that treaty as crimes under its national law by incorporating that treaty by reference.⁹⁶ It has also provided its courts with universal jurisdiction over such grave breaches.⁹⁷

4.3.1.3. War crimes in international armed conflict: 1998 Rome Statute, other treaties and customary international law

In addition to grave breaches of the Geneva Conventions and Protocol I, there are other war crimes in international armed conflict that are defined in the 1998 Rome Statute, in an ever-expanding number of international humanitarian law treaties and in customary international law.

Rome Statute. Article 8 (2) (b) of the Rome Statute defines a broad range of war crimes in international armed conflict. Ghana has defined some of these crimes as crimes under national law. For example, the offences found in Rome Statute Article 8 (2) (b) that are also non-grave breaches of the Geneva Conventions and their Protocols are defined as offences in Ghana's Geneva Conventions Act.⁹⁸ As discussed below, some, but not all, of the remaining offences found in Rome Statute Article 8 (2) (b) are defined in other pieces of Ghanaian legislation, though their definitions do not meet the strictest requirements of international law. It is not clear that the courts of Ghana would exercise universal jurisdiction over these remaining offences.

Outrages upon personal dignity and recruitment of child soldiers. Ghana's Children's Act criminalizes only some of the conduct involving the degrading treatment of children,⁹⁹ but no legislation could be found outlawing the degrading treatment of adults. This falls short of Article 8 (2) (b) of the Rome Statute, which defines "outrages upon personal dignity, in particular humiliating and degrading treatment" of all persons as a war crime under international law.¹⁰⁰ The Children's Act also criminalizes exploitative child labor, which includes any labor that "deprives [a] child of its health, education or development."¹⁰¹ It does not, however, expressly criminalize conscripting or enlisting children under fifteen into the national armed forces nor does it expressly criminalize engaging children to actively participate in hostilities, as in Article 8 (2) (b) of the Rome Statute.¹⁰²

Rape. The Criminal Code defines rape in Ghanaian law as "the carnal knowledge of a female not less than sixteen years without her consent," with carnal knowledge demonstrable by "proof of the least

⁹⁶ See Geneva Conventions Act, 2009 (Act 780), sect. 1 (1) (e).

⁹⁷ See Geneva Conventions Act, 2009 (Act 780), sect. 1 (4).

⁹⁸ Geneva Conventions Act, 2009 (Act 780), sect. 1 (3).

⁹⁹ Children's Act, 1998 (Act 560) (Children's Act), sect. 13.

¹⁰⁰ Rome Statute, art 8 (2) (b) (xxi).

¹⁰¹ Children's Act, sect. 89. Sections 88 and 91 also prohibit engaging children under fifteen in labor at night and engaging of children under eighteen in hazardous work, though neither expressly prohibits the recruitment of children into armed forces or engaging children in hostilities.

¹⁰² See Rome Statute, art. 8 (2) (b) (xxvi).

degree of penetration.”¹⁰³ The offence is termed “defilement” when committed against females under the age of sixteen and simply “carnal knowledge” when committed against those with mental incapacities.¹⁰⁴ Although certain elements of rape in Ghanaian law, including the provision that penetration may be slight, match up with those in the Rome Statute, the exclusion of men and boys as potential victims is a divergence from the offence of rape as a war crime found in Article 8 (2) (b) of the Statute, which includes all persons as potential victims.¹⁰⁵ In addition, the definition of rape in Ghanaian law does not meet the strictest requirements of international law (see Section 4.3.2 below). Moreover, Ghanaian law does not indicate that rape, when committed in the context of and associated with armed conflict, would amount to a war crime.

Enforced prostitution and sexual slavery. The Human Trafficking Act defines and prohibits human trafficking for the purpose of exploitation, which it describes as including “at the minimum, induced prostitution and all other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹⁰⁶ Although this definition encompasses acts akin to offences found in Article 8 (2) (b) of the Rome Statute,¹⁰⁷ Ghanaian law does not expressly indicate that these crimes, when committed in the context of and associated with armed conflict, could constitute war crimes.

Other forms of sexual violence. The Criminal Code identifies “indecent assault” as encompassing other forms of sexual violence not amounting to rape and defilement,¹⁰⁸ which may be comparable to “other forms of sexual violence” in Article 8 (2) (b).¹⁰⁹ However, Ghanaian law on “indecent assault” is narrower than the category of “other forms of sexual violence” found in the Rome Statute (see Section 4.3.2 below). Moreover, Ghanaian law does not specifically indicate that these offences, when committed in the context of and associated with armed conflict, may amount to war crimes.

Indeed, Ghana has not expressly categorized all of the above crimes (except breaches of the Geneva Conventions and Additional Protocols), when committed in the context of and in association with armed conflict, as war crimes in line with their treatment under international law. Moreover, it is unclear whether national courts in Ghana would exercise universal jurisdiction over all of the above crimes. The Geneva Conventions Act provides for universal jurisdiction over both grave and non-grave

¹⁰³ The Criminal Code, sects. 97 - 99.

¹⁰⁴ See Criminal Code, sects. 101, 103.

¹⁰⁵ The Rome Statute does not expressly define what constitutes rape as a war crime. See Rome Statute, art. 8 (2) (b) (xxii). However, the Element of Crimes, a document separate from the Rome Statute written to assist the ICC in the interpretation and application of Rome Statute articles 6-8, does not exclude males as potential victims. Rather, it defines the war crime of rape as an invasion of the body of any persons by conduct resulting in “penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or the anal or genital opening of the victim with any object or any other part of the body.” International Criminal Court, Elements of Crimes, ICC-PIDS-LT-03-002/11_Eng (2011), p. 28.

¹⁰⁶ Human Trafficking Act, sect.1.

¹⁰⁷ See Rome Statute, art. 8 (2) (b) (xxii).

¹⁰⁸ See Criminal Code, sect. 103.

¹⁰⁹ Rome Statute, art. 8 (2) (b) (xxii), as interpreted by the Elements of Crimes, p. 32.

breaches of the Geneva Conventions and their Protocols,¹¹⁰ so Ghana courts are authorized to exercise universal jurisdiction over the war crimes listed in Rome Statute Article 8 (2) (b) that are also found in these instruments. In addition, Ghana courts may exercise universal jurisdiction over “prostitution and all other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs,” which are included as elements within trafficking offences under Ghanaian law.¹¹¹

However, no other legislation could be found expressly providing universal jurisdiction over the remaining crimes defined in Ghanaian law, which are akin to those found in Rome Statute Article 8 (2) (b), such as rape and the degrading treatment of children. This means that, except in the rare circumstance that such offences are committed by foreign public officers in the course of their duties abroad, Ghana courts may not exercise universal jurisdiction over these crimes. Although it is possible that Ghana courts could exercise universal jurisdiction over the offences based on a Courts Act catchall, which allows for universal jurisdiction over offences found in treaties – like the Rome Statute – that Ghana has signed, there is no prior practice to indicate that courts would exercise universal jurisdiction based on this catchall alone (see Section 4.2 above).

Gaps in the Rome Statute. As explained below, there are a number of serious gaps in Article 8 (2) (b) of the Rome Statute, which are covered by other treaties and by rules of customary international law. Although there is no provision in the Rome Statute expressly requiring states parties to provide their courts with universal jurisdiction over these war crimes, states parties recognize that they have a complementarity obligation to exercise their jurisdiction over such crimes.

Other treaties concerning war crimes. The Rome Statute leaves out a number of war crimes in international armed conflict listed in treaties. As the Charts II and III indicate, Ghana has defined some of these crimes as crimes under national law. As discussed below after Chart II, it has defined these war crimes in national law in a manner that is consistent with the strictest requirements of international law. It also indicates that Ghana has authorized its courts to exercise universal jurisdiction over the defined crimes. Chart II identifies war crimes in the Third Geneva Convention and Protocol I that have been omitted from the Rome Statute. Chart III identifies war crimes in international armed conflict in other treaties that have been omitted from the Rome Statute.

¹¹⁰ Geneva Conventions Act, sect. 1 (1) & (4).

¹¹¹ See Human Trafficking Act, sects. 1, 8.

CHART II. WAR CRIMES IN INTERNATIONAL ARMED CONFLICT IN THE THIRD GENEVA CONVENTION AND PROTOCOL I THAT HAVE BEEN OMITTED FROM THE ROME STATUTE

Crime	Treaty	Signed	Ratified/ accessed	Defined in national law (citing any relevant provision)	Universal jurisdiction (citing any relevant provision)
Unjustifiable delay in the repatriation of prisoners of war	Geneva Conv. III, art. 118 ¹¹² and Prot. I, art. 85 (4) (b) ¹¹³	Prot. I: 12 December 1977	Prot I: 28 February 1978 (ratified) GC III: 2 February 1959 (accessed)	Geneva Conventions Act, 2009 (Act 780), S sect. 1 (1) (e)	Geneva Conventions Act, 2009 (Act 780), sect. 1 (4)
Unjustifiable delay in the repatriation of civilians	Prot. I, art. 85 (4) (b) ¹¹⁴	12 December 1977	28 February 1978 (ratified)	Geneva Conventions Act, 2009 (Act 780), sect. 1 (1) (e)	Geneva Conventions Act, 2009 (Act 780), sect. 1 (4)
Launching of an attack against works or installations containing dangerous	Prot. I, art. 85 (3) (c) ¹¹⁵	12 December	28 February 1978	Geneva Conventions Act, 2009 (Act 780),	Geneva Conventions Act, 2009 (Act

¹¹² Third Geneva Convention, Article 118, as well as customary international humanitarian law. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Geneva, International Committee of the Red Cross and Cambridge University Press, 2005, with updates from the ICRC Customary International Humanitarian Law database (<http://www.icrc.org/eng/resources/documents/publication/pcustom.htm>) (*Customary International Humanitarian Law*), Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹¹³ Protocol I, art. 85 (4) (b), as well as customary international humanitarian law. *Customary International Humanitarian Law*, Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹¹⁴ Article 85 (4) (b) of Protocol, as well as customary international humanitarian law. *Customary International Humanitarian Law*, Rule 156 (Serious violations of international humanitarian constitute war crimes).

¹¹⁵ Article 85 (3) (c) and customary international humanitarian law. *Customary International Humanitarian Law*, Rule 156 (Serious violations of international humanitarian constitute war crimes).

CHART II. WAR CRIMES IN INTERNATIONAL ARMED CONFLICT IN THE THIRD GENEVA CONVENTION AND PROTOCOL I THAT HAVE BEEN OMITTED FROM THE ROME STATUTE

Crime	Treaty	Signed	Ratified/ acceded	Defined in national law (citing any relevant provision)	Universal jurisdiction (citing any relevant provision)
forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects		1977	(ratified)	sect. 1 (1) (e)	780), sect. 1 (4)

As Chart II demonstrates, Ghana has defined these war crimes in national law by expressly defining breaches of Article 85, paragraphs 3 and 4, of Protocol I, as well as all other breaches of the Geneva Conventions and their Protocols, as crimes in the Geneva Conventions Act.¹¹⁶ In this respect, the Geneva Conventions Act is a marked improvement over most Commonwealth Geneva Conventions acts, which are usually limited to defining only grave breaches of the Geneva Conventions (and, occasionally, of Protocol I) as crimes under national law over which national courts can exercise universal jurisdiction. Ghana has also authorized its courts to exercise universal jurisdiction over these crimes.¹¹⁷

Other treaties that may impose criminal responsibility. In addition to the Geneva Conventions and Protocol I, there are a number of international humanitarian law treaties applicable during international armed conflict imposing obligations which, if violated, may possibly result in individual criminal responsibility, either under the treaties or because the prohibitions are recognized as part of customary international law. As Chart III indicates, Ghana has not defined violations of these treaties as crimes under national law. For the crimes found in treaties signed or ratified by Ghana but which are not yet defined in Ghanaian law and for which Ghanaian law has not expressly authorized the exercise of universal jurisdiction, it is possible that national courts may exercise universal jurisdiction based on the Courts Act catchall provision, though based on a lack of prior practice, it is unlikely that courts would exercise jurisdiction pursuant to this catchall alone (see Section 4.2 above).

¹¹⁶ Geneva Conventions Act, 2009 (Act 780), sect. 1 (1) (e), (3) (incorporating by reference provisions of these treaties).

¹¹⁷ See Geneva Conventions Act, 2009 (Act 780), sect. 1 (4).

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

Crime	Treaty	Signed	Ratified/ acceded	Defined in national law (citing any relevant provision)	Universal jurisdiction (citing any relevant provision)
Use of poisonous gases or bacteriological weapons	1925 Geneva Protocol		3 May 1967 (acceded) ¹¹⁸	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Harm to protected cultural property	1954 CCP		25 July 1960 (acceded)	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Illegal export of cultural property	1954 CCP		25 July 1960 (acceded)	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Developing, producing and stockpiling bacteriological weapons	BWC 1972	10 April 1972	6 June 1975 (ratified)	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Use of prohibited environmental modification techniques	ENMOD Conv. 1976	21 March 1978	22 June 1978 (ratified)	NO	**Courts Act, 1993 (Act 459), sect. 56 (4)

¹¹⁸ Dates of signatures, accessions and ratifications of all international humanitarian law treaties in this section are the dates indicated in the International Committee of the Red Cross treaty database (<http://www.icrc.org/ihl.nsf/INTRO?OpenView>).

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

					(n) (catchall)
Recruiting, training, financing or protecting mercenaries	Mercenaries - 1977 OAU Convention	8 June 1978	20 July 1978 (ratified) ¹¹⁹	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Use of prohibited conventional weapons	CCW 1980			NO	NO
Use of weapons that injure by non-detectable fragments	CCW Prot. I 1980			NO	NO
Use of prohibited land mines, booby traps and other devices	CCW Prot. II 1980			NO	NO
Use of prohibited land mines, booby-traps and other devices	CCW Prot. II 1980			NO	NO
Use of prohibited incendiary weapons	CCW Prot. III 1980			NO	NO
Use, financing or training of mercenaries	Mercenaries - 1989 Convention			NO	NO
Developing, producing, stockpiling or using prohibited	CWC 1993	14 January 1993	9 July 1997 (ratified)	NO	**Courts Act, 1993 (Act 459), sect. 56 (4)

¹¹⁹ On the AU website, this is date of ratification. However, it also lists date of deposit as 21 August 1978, so one of these dates is not correct.

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

chemical weapons					(n) (catchall)
Use of blinding laser weapons	CCW Prot. IV 1995			NO	NO
Use of prohibited mines, booby-traps and other devices	CCW Prot. II a 1996			NO	NO
Use, stockpiling, production and transfer of prohibited anti-personnel mines	AP Mine Ban Conv. 1997	4 December 1997	30 June 2000 (ratified)	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Harm to cultural property	Hague Prot. 1999 arts. 15 – 20			NO	NO
Recruitment or use of child soldiers	Opt Prot. CRC 2000	24 September 2003		NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Use of prohibited conventional weapons	CCW Amdt 2001			NO	NO
Failure to clear, remove or destroy explosive remnants of war	CCW Prot. V 2003			NO	NO
Use of prohibited cluster munitions	Cluster Munitions 2008	3 December 2008	3 February 2011 (ratified)	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)

Rules of customary international humanitarian law. In addition, there are numerous rules of customary international humanitarian law applicable to international armed conflict not expressly listed in the Rome Statute (in addition to the war crimes listed in Protocol I and other treaties mentioned above) which, if violated, could lead to individual criminal responsibility. Some of these rules are listed in the following chart, indicating whether Ghana has defined violations of these rules as crimes under national law. As Chart IV indicates, Ghana has defined some violations of these treaties – namely those relating to slavery and those found in the Geneva Conventions – in national law. Of these offences, breaches of the Geneva Conventions are defined in national law by incorporating them by reference directly from the Geneva Conventions. Chart IV also indicates that Ghana has authorized its courts to exercise universal jurisdiction over breaches of the Geneva Conventions and over offences related to slavery, but not over the other rules of customary international humanitarian law applicable in international armed conflict which may lead to individual criminal responsibility if violated.

CHART IV. RULES OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW IN INTERNATIONAL ARMED CONFLICT		
Rule of customary international humanitarian law	Defined in national law (citing any relevant provision)	Courts provided with universal jurisdiction (citing any relevant provision)
Slavery ¹²⁰	Criminal Code, 1980 (Act 29), sect. 314.	Courts Act, 1993 (Act 459), sect. 56 (4) (a)
Deportation to slave labour ¹²¹	Criminal Code, 1960 (Act 29), sect. 314.	Courts Act, 1993 (Act 459), sect. 56 (4) (a)
Collective punishments; ¹²²	Geneva Conventions Act, 2009 (Act 780), sect. 1 (3).	Geneva Conventions Act, 2009, (Act 780), sect. 1 (4)
Despoliation of the wounded, sick,	Geneva Conventions Act, 2009 (Act 780), sect. 1	Geneva Conventions Act, 2009, (Act 780),

¹²⁰ *Customary International Humanitarian law*, Rule 94 (Slavery and the slave trade in all their forms are prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹²¹ *Customary International Humanitarian Law*, Rule 95 (Uncompensated or abusive forced labour is prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹²² The prohibition of collective punishments is stated in the Third and Fourth Geneva Conventions as well as Additional Protocols I and II. *Customary International Humanitarian Law*. Rule 103 (Collective punishments are prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹²³ Despoliation of the wounded, sick, shipwrecked, or dead is prohibited in the First, Second, and Fourth Geneva Conventions. Despoliation of the dead is also prohibited in Additional Protocol I. *Customary International Humanitarian law*, Rule 111 (Wounded, sick and shipwrecked must be protected from pillage and ill-treatment);

CHART IV. RULES OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW IN INTERNATIONAL ARMED CONFLICT

Rule of customary international humanitarian law	Defined in national law (citing any relevant provision)	Courts provided with universal jurisdiction (citing any relevant provision)
shipwrecked or dead ¹²³	(3).	sect. 1 (4)
Attacking or ill-treating a <i>parlementaire</i> or bearer of the flag of truce ¹²⁴	NO	NO
Launching an indiscriminate attack resulting in loss of life or injury to civilians or damage to civilian objects ¹²⁵	Geneva Conventions Act, 2009 (Act 780), sect. 1 (3).	Geneva Conventions Act, 2009 (Act 780), sect. 1 (4)
Use of biological weapons ¹²⁶	NO	NO
Use of chemical weapons ¹²⁷	NO	NO
The use of non-detectable fragments ¹²⁸	NO	NO
The use of blinding laser weapons ¹²⁹	NO	NO

Rule 113 (Despoiling or pillaging the dead is prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹²⁴ *Customary International Humanitarian Law*, Rule 67 (*Parlementaires* are inviolable); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹²⁵ The prohibition of indiscriminate attacks is stated in Article 51(4) of Additional Protocol I to the Geneva Conventions. *Customary International Humanitarian Law*, Rule 11 (Indiscriminate attacks are prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹²⁶ *Customary International Humanitarian Law*, Rule 73 (The use of biological weapons is prohibited).

¹²⁷ *Customary International Humanitarian Law*, Rule 74 (The use of chemical weapons is prohibited).

¹²⁸ *Customary International Humanitarian Law*, Rule 79 (The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited).

¹²⁹ *Customary International Humanitarian Law*, Rule 86 (The use of laser weapons that are specifically designed, as their combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited).

By incorporating by reference breaches of the Geneva Conventions and their Additional Protocols into the Geneva Conventions Act, Ghana defines collective punishments, despoliation of the wounded, sick, shipwrecked or dead, and indiscriminate attacks injuring or killing civilians or damaging civilian objects as war crimes in a manner consistent with customary international law.¹³⁰ As set forth in Section 1 (4) of the Act, Ghana courts can also exercise universal jurisdiction over these crimes.

In addition, the Criminal Code defines slave dealing in a manner that is general enough to include the crime of slavery itself,¹³¹ but Ghanaian law does not specifically indicate that slavery and deportation to slave labour committed during armed conflict could constitute war crimes, in line with customary international law.¹³² Chart IV also demonstrates that Ghana has authorized its courts to exercise universal jurisdiction over slave trade and traffic in slaves.¹³³ Ghana has not authorized its courts to exercise universal jurisdiction over the remaining crimes in Chart IV.

4.3.1.4. War crimes in non-international armed conflict: Common Article 3 of the Geneva Conventions, 1977 Protocol II, Rome Statute, other conventional international law and customary international law

¹³⁰ Geneva Conventions Act, 2009 (Act 780), sect. 1(3); *Customary International Humanitarian Law*, Rule 103 (Collective punishments are prohibited); Rule 111 (Wounded, sick and shipwrecked must be protected from pillage and ill-treatment); Rule 113 (Despoiling or pillaging the dead is prohibited); Rule 11 (Indiscriminate attacks are prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹³¹ Section 314 of the Criminal Code states:

(1) Whoever—

- (a) deals or trades in, buys, sells, barterers, transfers, or takes any slave; or
- (b) deals or trades in, buys, sells, barterers, transfers, or takes any person in order that that person may be held or treated as a slave; or
- (c) places or receives any person in servitude as a pledge or security for debt, whether then due and owing or to be incurred or contingent, whether under the name of a pawn or by whatever other name that person may be called; or
- (d) conveys any person, or induces any person to come, to Ghana in order that such person may be dealt or traded in, bought, sold, bartered, or become a slave, or be placed in servitude as a pledge or security for debt; or
- (e) conveys or sends any person, or induces any person to go out of Ghana in order that that person may be dealt or traded in, bought, sold, bartered, transferred, or become a slave, or be placed in servitude as a pledge or security for debt; or
- (f) enters into any contract or agreement with or without consideration for doing any of the acts or accomplishing any of the aforementioned purposes; or
- (g) by any species of coercion or restraint otherwise than in accordance with the Labour Decree, compels or attempts to compel the service of any person,

shall be guilty of second degree felony.

¹³² See *Customary International Humanitarian Law*, Rules 94, 95, 156.

¹³³ Courts Act, sect. 56 (4) (a).

Certain violations of international humanitarian law prohibitions in non-international armed conflict are now recognized as being war crimes entailing individual criminal responsibility. These prohibitions are found, in particular, in common Article 3 of the Geneva Conventions, Protocol II, Article 8 (2) (c) and (e) of the Rome Statute, other conventional international law and customary international humanitarian law.

Common Article 3 of the Geneva Conventions is a mini-convention that protects persons not taking part in hostilities from a broad list of inhumane treatment.¹³⁴ Protocol II “develops and supplements Article 3 common to the Geneva Conventions” with respect to non-international armed conflicts that take place in the territory of a state party to the Protocol.¹³⁵ It addresses conflicts “between [a state party’s] armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out

¹³⁴ Common Article 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

¹³⁵ Protocol II, art. 1 (1).

sustained and concerted military operations and to implement this Protocol.”¹³⁶ It also provides a broad range of protections to often marginalized people. Article 8 (2) (c) of the Rome Statute includes most of the war crimes in common Article 3, and Article 8 (2) (e) contains an extensive, but by no means complete, list of war crimes in non-international armed conflict.

Rome Statute. Ghana has defined some of the war crimes listed in Article 8 (2) (c) and (e) as crimes in national law. Offences found in Article 8 (2) (c) and (e) which are also non-grave breaches of the Geneva Conventions and their Protocols are defined as crimes in the Geneva Conventions Act.¹³⁷ In directly referencing the Geneva Conventions, Ghana has defined these crimes in a manner that is consistent with international law, though its listing of sexual violence offences, drawn from the Geneva Conventions, is not as robust as those offences of sexual violence listed in the Rome Statute.¹³⁸ Ghana has expressly authorized its courts to exercise universal jurisdiction over the crimes found in Article 8 (2) (c) and (e) that are also found in the Geneva Conventions and their Additional Protocols as crimes in non-international armed conflict.¹³⁹ It has not defined the remaining crimes found in Rome Statute Article 8 (2) (c) and (e) as crimes under national law nor has it authorized its courts to exercise universal jurisdiction over these crimes.

Gaps in the Rome Statute. Although serious violations of Protocol II are listed as war crimes in the Statute of the International Criminal Tribunal for Rwanda, many of them are not expressly included in Article 8 (2) (e) of the Rome Statute. For example, intentionally starving the civilian population (Article 14 of Protocol II and customary international humanitarian law) is omitted.¹⁴⁰

Other international humanitarian law treaties. In addition, there are a number of international humanitarian law treaties applicable during non-international armed conflict imposing obligations that, if violated, may possibly result in individual criminal responsibility, either under the treaties or because the prohibitions are recognized as part of customary international law. There are also numerous rules of customary international humanitarian law applicable in non-international armed conflict that, if violated, would result in individual criminal responsibility.

As Chart V indicates, Ghana has not defined violations of these treaties as crimes under national law. Although Ghana courts may be able to exercise universal jurisdiction over the crimes below

¹³⁶ Protocol II, art. 1 (1).

¹³⁷ Geneva Conventions Act, 2009 (Act 780), sect. 1 (1), (3).

¹³⁸ Article 8 (2) (e) (vi) of the Rome Statute prohibits “[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy...enforced sterilization, and any other form of sexual violence also constituting a serious violation” of common Article 3, while Article 4 (2) (e) of Protocol II, which the Geneva Conventions Act incorporates, prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault,” where the phrases “outrages upon personal dignity” and “any form of indecent assault” refer to any form of sexual violence. *See Customary International Humanitarian Law*, Rule 93 (Rape and Other forms of Sexual Violence).

¹³⁹ Geneva Conventions Act, 2009 (Act 780), sect. 1 (4).

¹⁴⁰ *See Customary International Humanitarian Law*, Rule 53 (The use of starvation of the civilian population as a method of warfare is prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

found in treaties to which Ghana is a party or signatory based on a catchall provision in the Courts Act, it is unlikely that Ghana courts would exercise this jurisdiction based on the catchall provision alone (see Section 4.2 above).

CHART V. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING NON-INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, POSSIBLY MAY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

Crime	Treaty	Signed	Ratified or acceded	Definition in national law (citation to any relevant provision)	Universal jurisdiction (citation to any relevant provision)
Harm to protected cultural property	1954 CCP and Hague Prot. 1954		1954 CCP: 25 July 1960 (acceded) Hague Prot: NO	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Recruiting, training, financing or protecting mercenaries	Mercenaries - 1977 OAU Convention	8 June 1978	20 July 1978 (ratified) ¹⁴¹	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Use of certain prohibited conventional weapons	CCW 1980			NO	NO
Use of weapons that injure by non-detectable fragments	CCW Prot. I 1980			NO	NO
Use of prohibited mines, booby-traps and other	CCW Prot. II 1980			NO	NO

¹⁴¹ On the AU website, this is date of ratification. It also lists date of deposit as 21 August 1978, so one of these dates is incorrect.

CHART V. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING NON-INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, POSSIBLY MAY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

Crime	Treaty	Signed	Ratified or acceded	Definition in national law (citation to any relevant provision)	Universal jurisdiction (citation to any relevant provision)
devices					
Use of prohibited incendiary weapons	CCWProt. III 1980			NO	NO
Use, financing or training of mercenaries	Mercenaries - 1989 Convention			NO	NO
Use of prohibited mines, booby-traps and other devices	CCW Prot. II a 1996			NO	NO
Developing, producing, stockpiling and using prohibited chemical weapons	CWC 1993	14 January 1993	9 July 1997 (ratified)	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Use of blinding laser weapons	CCW Prot. IV 1995			NO	NO
Using, stockpiling, producing and transferring prohibited anti-personnel mines	AP Mine Ban Conv. 1997	4 December 1997	30 June 2000 (ratified)	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Harming protected cultural property	Hague Prot. 1999			NO	NO

CHART V. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING NON-INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, POSSIBLY MAY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW

Crime	Treaty	Signed	Ratified or acceded	Definition in national law (citation to any relevant provision)	Universal jurisdiction (citation to any relevant provision)
Recruiting and using child soldiers	Opt Prot. CRC 2000	24 September 2003		NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Using certain prohibited conventional weapons	CCW Amdt 2001			NO	NO
Failing to clear and destroy explosive remnants of war	CCW Prot. V			NO	NO
Use of prohibited cluster munitions	Cluster Munitions 2008	3 December 2008	3 February 2011 (ratified)	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)

Rules of customary international humanitarian law. Finally, there are a number of rules of customary international law applicable in non-international armed conflict, which, if violated, could lead to individual criminal responsibility for war crimes. Some of these rules are listed in Chart VI. The chart indicates that Ghana has defined violations of two of these rules – the prohibitions against slavery and collective punishments – as crimes under national law. The prohibitions against slavery and collective punishments, recognized in Additional Protocol II to the Geneva Conventions,¹⁴² are

¹⁴² *Customary International Humanitarian Law*, Rule 94 (Prohibition of slavery and slave trade is recognized in Additional Protocol II as a guarantee for civilians and persons hors de combat); Rule 103 (Collective punishments are prohibited in Additional Protocol II for civilians and persons hors de combat).

defined in Ghanaian law in a manner that is consistent with international law, as the Geneva Conventions Act criminalizes all violations of the Geneva Conventions and their Additional Protocols.¹⁴³ The chart also indicates that Ghana has authorized its courts to exercise universal jurisdiction over these crimes.

CHART VI. RULES OF CUSTOMARY INTERNATIONAL LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICT WHICH, IF VIOLATED, COULD LEAD TO INDIVIDUAL CRIMINAL RESPONSIBILITY FOR WAR CRIMES

Rule of customary international humanitarian law	Defined in national law (citation to any relevant provision)	Universal jurisdiction (citation to any relevant provision)
Use of biological weapons ¹⁴⁴	NO	NO
Use of chemical weapons ¹⁴⁵	NO	NO
Use of non-detectable fragments ¹⁴⁶	NO	NO
Use of blinding laser weapons ¹⁴⁷	NO	NO
Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage ¹⁴⁸	NO	NO
Making non-defended localities and demilitarized zones the object of	NO	NO

¹⁴³ Geneva Conventions Act, 2009 (Act 780), sect. 1 (1) & (3).

¹⁴⁴ *Customary International Humanitarian Law*, Rule 73 (The use of biological weapons is prohibited).

¹⁴⁵ *Customary International Humanitarian Law*, Rule 74 (The use of chemical weapons is prohibited).

¹⁴⁶ *Customary International Humanitarian Law*, Rule 79 (The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited).

¹⁴⁷ *Customary International Humanitarian Law*, Rule 86 (The use of laser weapons that are specifically designed, as their combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited).

¹⁴⁸ *Customary International Humanitarian Law*, Rule 11 (Indiscriminate attacks are prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹⁴⁹ *Customary International Humanitarian Law*, Rule 36 (Directing an attack against a demilitarized zone agreed upon between the parties to the conflict is prohibited); Rule 37 (Directing an attack against a non-defended locality is prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

CHART VI. RULES OF CUSTOMARY INTERNATIONAL LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICT WHICH, IF VIOLATED, COULD LEAD TO INDIVIDUAL CRIMINAL RESPONSIBILITY FOR WAR CRIMES

Rule of customary international humanitarian law	Defined in national law (citation to any relevant provision)	Universal jurisdiction (citation to any relevant provision)
attack ¹⁴⁹		
Using human shields ¹⁵⁰	NO	NO
Slavery ¹⁵¹	Criminal Code, 1960 (Act 29), sect. 314 (all victims)	Courts Act, 1993 (Act 459), sect. 56 (4) (a) (all victims)
	Geneva Conventions Act, 2009 (Act 780), sect. 1 (3) (victims who are civilians or <i>hors de combat</i>)	Geneva Conventions Act, 2009 (Act 780), sect. 1 (4) (victims who are civilians or <i>hors de combat</i>)
Collective punishments ¹⁵²	Geneva Conventions Act, 2009 (Act 780), sect. 1 (3) (victims who are civilians and <i>hors de combat</i>)	Geneva Conventions Act, 2009 (Act 780), sect. 1 (4) (victims who are civilians or <i>hors de combat</i>)
Use of poison ¹⁵³	NO	NO
Use of toxic gases ¹⁵⁴	NO	NO

¹⁵⁰ *Customary International Humanitarian Law*, Rule 97 (The use of human shields is prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹⁵¹ *Customary International Humanitarian Law*, Rule 94 (Slavery and the slave trade in all their forms are prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹⁵² The prohibition of collective punishments is stated in Additional Protocol II. *Customary International Humanitarian Law*, Rule 103 (Collective punishments are prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

¹⁵³ The Review Conference of the Rome Statute adopted an amendment to Article 8 (2) (e) to make the use of this weapon in non-international armed conflict a war crime. RC/Res.5, Amendments to article 8 of the Rome Statute, adopted at the 12th plenary meeting, on 10 June 2010, by consensus (http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf).

¹⁵⁴ Rome Statute Review Conference, RC/Res.5 (2010).

CHART VI. RULES OF CUSTOMARY INTERNATIONAL LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICT WHICH, IF VIOLATED, COULD LEAD TO INDIVIDUAL CRIMINAL RESPONSIBILITY FOR WAR CRIMES

Rule of customary international humanitarian law	Defined in national law (citation to any relevant provision)	Universal jurisdiction (citation to any relevant provision)
Use of dum-dum bullets ¹⁵⁵	NO	NO

4.3.2. CRIMES AGAINST HUMANITY

Ghana has been a party to the Rome Statute since 1999. The most widely accepted definition of the acts constituting crimes against humanity is found in Article 7 of the Rome Statute.¹⁵⁶ As Chart VII indicates, Ghana has defined some conduct amounting to specific crimes of crimes against humanity as offences under national law. However, Ghanaian law has not defined these crimes to meet the strictest requirements of international law. Ghana courts may exercise universal jurisdiction over enslavement, which is one of the specific crimes against humanity, but Ghana has not expressly authorized its courts to exercise universal jurisdiction over the other crimes that could amount to crimes against humanity. Although it is clear that the national courts in Ghana are able to exercise universal jurisdiction over some conduct amounting to crimes against humanity when committed abroad by a non-national of Ghana in the course of duties carried out for the state, it is not clear that the courts would exercise universal jurisdiction over these crimes in other instances, based on a Courts Act catchall provision, which authorizes the exercise of universal jurisdiction over crimes found in instruments to which Ghana is a signatory, whether the offences are defined in national law or not (see Section 4.2 above).

CHART VII. CRIMES AGAINST HUMANITY

Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
Threshold	Committed as part of a widespread or systematic attack directed against a	[No threshold requirement under national law]	N/A

¹⁵⁵ Rome Statute Review Conference, RC/Res.5 (2010).

¹⁵⁶ For the scope of crimes against humanity, see Machteld Boot, Rodney Dixon & Christopher K. Hall, 'Article 7 (Crimes Against Humanity)', *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Otto Triffterer (ed.), Oxford: Hart, 2nd ed., 2008, p. 183 (3rd ed. forthcoming 2013).

¹⁵⁷ The Elements of Crimes is a document separate from the Rome Statute written to assist the ICC in the interpretation and application of Rome Statute Articles 6 to 8, defining genocide, crimes against humanity and war crimes. International Criminal Court, Elements of Crimes, ICC-PIDS-LT-03-002/11_Eng (2011).

CHART VII. CRIMES AGAINST HUMANITY			
Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
	civilian population, with perpetrator knowledge of the attack		
Murder	Killing one or more persons	Causing the death of another person by any unlawful harm, unless the crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse (Criminal Code, 1960 (Act 29), sect. 47)	Courts Act, 1993 (Act 459), sect. 56 (4) (l) (foreign public officer) **Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Extermination	Killing one or more persons, including by inflicting conditions of life, <i>inter alia</i> , the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population Conduct constituted, or took place as part of, a mass killing of members of a civilian population	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Enslavement	Exercise of any or all the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or imposing on them a similar deprivation of liberty Includes the exercise of power in the course of trafficking in persons,	Identified as “slave dealing,” or dealing, trading in, buying, selling, bartering, transferring, or taking a slave, in the Criminal Code, 1960 (Act 29), sect. 314 Identified as “human trafficking,” or the recruitment, transportation, transfer, harbouring, trading or receipt of persons for the purpose of exploitation (which includes forced labour or services, slavery	Courts Act, 1993 (Act 459), sect. 56 (4) (a) (slave trade or traffic in slaves) Courts Act, 1993 (Act 459), sect. 56 (4) (c) (traffic in women or children) Human Trafficking Act, 2005 (Act 694), sect. 8 (trafficking in persons)

CHART VII. CRIMES AGAINST HUMANITY			
Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
	in particular women and children	or practices similar to slavery, servitude or the forced removal of organs) within and across national borders by the use of threats, force or other forms of coercion, abduction, fraud, deception, the abuse of power or exploitation of vulnerability, or giving or receiving payments and benefits to achieve consent in the Human Trafficking Act, 2005 (Act 694), sect. 1	
Deportation or forcible transfer of population	Deportation or forcible transfer of one or more persons by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law Perpetrator awareness of the factual circumstances establishing lawfulness of victims' presence	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Imprisonment or other severe deprivation of physical liberty	Imprisonment of one or more persons or otherwise severe deprivation of physical liberty, the gravity of this conduct being such that it violates fundamental rules of international law Perpetrator awareness of the factual circumstances establishing the gravity	Intentionally and without consent, detaining a person in a particular place, of whatever extent or character and whether enclosed or not, or compelling a person to move or be carried in any particular direction (Criminal Code, 1960, (Act 29), sect. 88)	Courts Act, 1993 (Act 459), sect. 56 (4) (l) (foreign public officer) **Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)

CHART VII. CRIMES AGAINST HUMANITY			
Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
	of the conduct		
Torture	Intentional infliction of severe pain or suffering, whether physical or mental, upon one or more persons in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions	Adult Victims: **Prohibition in the Constitution but no criminal sanctions (The Constitution of the Republic of Ghana, 1992, sect. 15 (2)(a)).	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
		Child Victims: Identified as “torture or other cruel, inhuman or degrading treatment or punishment including any cultural practice which dehumanises or is injurious to the physical and mental well-being of a child”, in the Children’s Act, 1998 (Act 560), sect. 13.	Courts Act, 1993 (Act 459), sect. 56 (4) (l) (foreign public officer) **Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)

CHART VII. CRIMES AGAINST HUMANITY			
Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
Rape	<p>Invasion of the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or the anal or genital opening of the victim with any object or any other part of the body</p> <p>Invasions committed by force, or by threat or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive</p>	<p>Adult Victims: Carnal knowledge of a female of sixteen years or above without her consent, where carnal knowledge is demonstrable by proof of the least degree of penetration (Criminal Code, 1960 (Act 29), sects. 98 - 99)</p>	<p>Courts Act, 1993 (Act 459), sect. 56 (4) (l) (foreign public officer)</p> <p>**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)</p>

CHART VII. CRIMES AGAINST HUMANITY			
Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
	environment, or committed against a person incapable of giving genuine consent	Child Victims: Identified as “defilement,” which is the natural or unnatural carnal knowledge of any child under sixteen years of age, with or without the child’s consent, where natural or unnatural carnal knowledge is demonstrable by proof of the least degree of penetration, in the Criminal Code, 1960 (Act 29), sects. 99, 101	Courts Act, 1993 (Act 459), sect. 56 (4) (l) (foreign public officer) **Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)

CHART VII. CRIMES AGAINST HUMANITY			
Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
		<p>Victims with Mental Incapacities:</p> <p>Identified as “carnal knowledge,” having carnal knowledge or unnatural carnal knowledge of an idiot, imbecile or a mental patient in or under the care of a mental hospital whether with or without the consent of that other person, in circumstances which prove that the accused knew at the time of the commission of the criminal offence that the other person has a mental incapacity, and where carnal knowledge is demonstrable by proof of the least degree of penetration, in the Criminal Code, 1960 (Act 29), sects. 99, 102</p>	<p>Courts Act, 1993 (Act 459), sect. 56 (4) (l) (foreign public officer)</p> <p>**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)</p>
Sexual slavery	Enslavement (see definition above) where the perpetrator caused the victim to engage in one or more acts of a sexual nature	Identified as “other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery,” in the Human Trafficking Act, 2005 (Act 694), sect. 1 (2)	<p>Courts Act, 1993 (Act 459), sect. 56 (4) (l) (foreign public officer)</p> <p>**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)</p>
Enforced prostitution	Causing one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or	Identified as “induced prostitution” in the Human Trafficking Act, 2005 (Act 694), sect. 1	Courts Act, 1993 (Act 459), sect. 56 (4) (l) (foreign public officer)

CHART VII. CRIMES AGAINST HUMANITY			
Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
	coercion, such as that caused by circumstances identified (see the definition of Rape) above Perpetrator expects to obtain pecuniary or other advantage for or in connection with the acts of a sexual nature	(2)	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Forced pregnancy	Unlawful confinement of a one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Forced sterilization	Deprivation of one or more persons of biological reproductive capacity, neither justified by the medical or hospital treatment of the person or persons concerns nor carried out with their genuine consent	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)
Other forms of sexual violence	An act of a sexual nature against one or more persons or causing such persons to engage in an act of a sexual nature by force, or by threat of force or coercion such as that caused by	Identified as “indecent assault,” forcibly making any sexual bodily contact with another person or sexually violating the body of that other person in a manner not amounting to carnal knowledge or unnatural carnal	Courts Act, 1993 (Act 459), sect. 56(4) (l) (foreign public officer) **Courts Act, 1993 (Act 459), sect. 56

CHART VII. CRIMES AGAINST HUMANITY			
Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
	<p>circumstances identified (see the definition of Rape) above, the gravity of this conduct being equivalent to the sexual crimes listed above</p> <p>Perpetrator awareness of the factual circumstances establishing the gravity of the conduct</p>	<p>knowledge and without consent, in the Criminal Code, 1920 (Act 29), sect. 103.</p>	<p>(4) (n) (catchall)</p>
Persecution	<p>Intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity</p> <p>Targeting based on political, social, racial, national, ethnic, cultural, religious, gender, or other grounds universally recognized as impermissible under international law</p>	NO	<p>**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)</p>
Enforced disappearance	<p>Arrest, detention or abduction of persons by, with the authorization of, support or acquiescence of, a State or political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information</p>	NO	<p>**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)</p>

CHART VII. CRIMES AGAINST HUMANITY			
Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
	<p>on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time</p> <p>Perpetrator awareness that the arrest, detention, or abduction would be following by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of the victim, or such refusal was preceded or accompanied by that deprivation of freedom</p>		
The crime of apartheid	<p>Inhumane acts of a character similar to those referred to [above], committed in the context of an institutionalized regime or systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime</p> <p>Perpetrator awareness of the factual circumstances establishing the character of the act</p>	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)

CHART VII. CRIMES AGAINST HUMANITY			
Threshold/Act	Definition in text of Rome Statute, Article 7 and/or the Elements of Crimes ¹⁵⁷	Definition in national law (citation to any relevant provision)	Universal jurisdiction in national law (citation)
Other inhumane acts	Acts of a similar character [to the above], intentionally causing great suffering, or serious injury to body or to mental or physical health Perpetrator awareness of the factual circumstances establishing the character of the act	NO	**Courts Act, 1993 (Act 459), sect. 56 (4) (n) (catchall)

As discussed below, the definitions of crimes listed in Chart VII under Ghanaian law fall short of the strictest requirements of international law. Importantly, in no instance does Ghanaian law indicate that the crimes listed could constitute crimes against humanity if committed as part of a widespread or systematic attack directed against a civilian population. While it is possible for the national courts in Ghana to try the same acts that constitute crimes against humanity as ordinary crimes in such an instance, prosecuting these offences as ordinary crimes will not reflect the same moral condemnation and, in most instances, elicit equivalent punishment, to the corresponding crimes under international law.

In addition, except for the offence of enslavement, Ghanaian law does not expressly authorize the exercise of universal jurisdiction over these acts. Ghana courts may exercise universal jurisdiction over these crimes when committed abroad by a foreigner who is an employee of the state or a statutory corporation, but this is likely to be a rare circumstance. Also, a catchall in the Courts Act appears to grant national courts the ability to exercise universal jurisdiction over any offence found in an instrument that Ghana has signed, which would include Article 7 offences as defined in the Rome Statute. However, there is no prior practice that indicates the courts would exercise universal jurisdiction based on this catchall provision alone (see Section 4.2 above).

Murder. The definition of murder in the Ghana Criminal Code¹⁵⁸ does not define murder, when committed as part of a widespread or systematic attack against civilians, as a crime against humanity.

Enslavement. The Criminal Code defines slave dealing in a manner that is general enough to include the some forms of the crime of enslavement.¹⁵⁹ In addition, under Ghanaian law, some forms of

¹⁵⁸ See Criminal Code, sect. 47.

¹⁵⁹ See Criminal Code, sect. 314.

enslavement fall under the umbrella of “human trafficking”, which is a crime.¹⁶⁰ However, these definitions do not fully define what constitutes enslavement in a manner consistent with the contemporary definition of slavery under international law, which includes a wide variety of forms.¹⁶¹ In addition, Ghanaian law does not specifically indicate that enslavement, when committed as part of a widespread or systematic attack against civilians, would constitute a crime against humanity. Unlike the other specific crimes listed in Chart VII, Ghana has expressly authorized its courts to exercise universal jurisdiction over enslavement and over trafficking offences that incorporate slavery and slave-like practices.¹⁶²

Imprisonment or other severe deprivation of liberty in violation of the fundamental rules of international law. Imprisonment is defined as an offence in the Criminal Code.¹⁶³ However, the definition of imprisonment in Ghanaian law does not mention that the gravity of the conduct must be such that it violates fundamental rules of international law as in Article 7 of the Rome Statute. Further, Ghanaian law does not provide that imprisonment, when committed as part of a widespread or systematic attack against civilians, is a crime against humanity.

Torture. The Constitution of Ghana recognizes the right of all individuals to be free from torture and any other treatment or punishment that is cruel, inhuman, or degrading.¹⁶⁴ However, Ghanaian law defines torture as a crime only when committed against child victims.¹⁶⁵ Moreover, Ghanaian law does not define what constitutes torture nor does it indicate that torture, when committed as part of a widespread or systematic attack against civilians, is a crime against humanity.

Rape. The Criminal Code defines rape in Ghanaian law as “the carnal knowledge of a female not less than sixteen years without her consent”, with carnal knowledge demonstrable by “proof of the least degree of penetration”.¹⁶⁶ The offence is termed “defilement” when committed against females under the age of sixteen and simply “carnal knowledge” when committed against those with mental incapacities, whether or not these victims seem to consent.¹⁶⁷ Certain elements of rape in the Elements of Crimes are also found in Ghanaian law, including the requirement that the physical penetration may be however slight.¹⁶⁸ Nevertheless, the current definitions in Ghanaian law fail to

¹⁶⁰ See Human Trafficking Act, sect. 1.

¹⁶¹ For example, the Criminal Code and the Human Trafficking Act do not include language expressly recognizing that slavery involves exercising a right to ownership over other persons. Cf. Rome Statute, art. 7 (1)(c), as interpreted by the Elements of Crimes, pg. 6; 1926 Slavery Convention, art. 1. For the broad range of the varieties of contemporary forms of enslavement, see Machteld Boot, Rodney Dixon & Christopher K. Hall, ‘Article 7 (crimes Against Humanity)’, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 191 – 194 and 244 – 247 (2008).

¹⁶² See Courts Act, sect. 56 (4) (a), (c); Human Trafficking Act, sect. 8.

¹⁶³ Criminal Code, sect. 88.

¹⁶⁴ 1992 Constitution, Ch. V, art. 15 (2) (a).

¹⁶⁵ See Children’s Act, sect. 13.

¹⁶⁶ Criminal Code, sects. 97 - 99.

¹⁶⁷ See Criminal Code, sects. 101, 103.

¹⁶⁸ The non-contextual elements of the crime of rape as a crime against humanity are:

account for potential instances of rape where men and boys are victims, including the realities of rape committed during armed conflict and as part of widespread or systematic attacks against civilians, when men and boys are often targeted.¹⁶⁹ The exclusion of men and boys as potential victims is a divergence from the offence of rape as a crime against humanity covered by Article 7 of the Statute and defined in the Elements of Crimes, which includes all persons as potential victims. It also renders rape under Ghanaian law discriminatory and thus inconsistent with international human rights standards.

Under Ghana's national law, a key element of rape is a lack of victim consent, which puts the focus of the crime on the behaviour of the victim instead of the perpetrator. This out of date approach is problematic in that it may not account for a broad range of coercive circumstances recognized by international law during which any apparent consent given by the victim cannot be genuine.¹⁷⁰ A definition of rape and defilement based on "force, threat of force, and coercion," in all its forms, would be more consistent with international law than the definitions under Ghanaian law, which focus on victim consent.¹⁷¹ Furthermore, Ghanaian law fails to define rape, when committed as part

"1. The perpetrator invaded¹⁵ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁶"

Footnote 15 reads: "The concept of "invasion" is intended to be broad enough to be gender-neutral."

Footnote 16 reads: "It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6."

¹⁶⁹ See Dustin A. Lewis, 'Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law,' *Wis. Int'l L.J.* vol. 27, p. 1; Hilmi M. Zawati, 'Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime Against Humanity,' *Torture - Journal on Rehabilitation of Torture Victims and Prevention of Torture*, vol. 17, p. 27.

¹⁷⁰ Ghanaian law does recognize that consent given by those with mental incapacities cannot be genuine. See Criminal Code, sect. 102. However, the law is not flexible enough to account for various other kinds of coercive circumstances recognized in international law such as incidents including threats of force, duress, detention, psychological oppression, abuses of power, and the perpetrator's taking advantage of a coercive environment. See Amnesty International, *Rape and sexual violence: Human rights law and standards in the international criminal court (Rape and sexual violence)*, Index: 53/001/2011, March 2011 (<http://www.amnesty.org/en/library/info/IO53/001/2011/en>), pp. 13 – 28.

¹⁷¹ Age of consent provisions may fail to provide victims' justice if the age of consent is set too low or too high. In Ghana, the law presumes that adolescents above the age of sixteen – a category of individuals at particular risk of coerced sexual abuse – genuinely consent, without provision for a case-by-case analysis of coercion, which would take into account their decreased physicality, social and economic dependence, or limited negotiating power. See Amnesty International, *Rape and sexual violence* 31 – 33 (2011). Article 1 of the Convention on the Rights of the Child defines a child as "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

of a widespread or systematic attack against civilians, as a crime against humanity.

Enforced prostitution and sexual slavery. Under Ghanaian law, “induced prostitution” and some acts amounting to sexual slavery fall under the umbrella of “human trafficking”, which is a crime.¹⁷² However, the concept of “induced prostitution” does not fully reflect the elements of this crime, a key component of which is the coercion of the perpetrator, for the pecuniary or other benefit of the perpetrator or another person, not behaviour imitated by the victim or for the benefit of the victim. Similarly, the concept of “human trafficking” does not fully capture the complete range of sexual enslavement, which does not always include trafficking. Furthermore, Ghanaian law does not indicate that these offences, when committed as part of a widespread and systematic attack against civilians, constitute crimes against humanity.

Other forms of sexual violence. The Criminal Code identifies “indecent assault” as encompassing other forms of sexual violence not amounting to rape and defilement, although the Code limits indecent assault to those assaults committed forcibly,¹⁷³ thus failing to include potential circumstances where threats of force and coercion enable the crime (see discussion of Rape above). Ghanaian law on “indecent assault” is also narrower than the category of “other forms of sexual violence” found in Article 7 of the Rome Statute. “Other forms of sexual violence,” as defined in the Elements of Crimes, include the causing of *any* act of a sexual nature

“by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.”

These examples would cover sexual acts that a perpetrator forced a victim to commit on a third party or as means of humiliation. In contrast, indecent assault under Ghanaian law appears to criminalize only a perpetrator’s sexual contact with or sexual violation of a victim’s body, which would not include other sexual acts the perpetrator forced or coerced the victim to carry out. Ghanaian law also departs from international law by failing expressly to indicate that these offences, when committed as part of a widespread or systematic attack against civilians, are crimes against humanity.

4.3.3. GENOCIDE

Ghana has been a party to the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention) since 24 December 1958.¹⁷⁴ Article II of the Genocide Convention defines genocide as follows:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;

¹⁷² See Human Trafficking Act, sect. 1.

¹⁷³ See Criminal Code, sect. 103.

¹⁷⁴ U.N. G.A. Res. 260 (III), 9 December 1948 ([http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/260\(III\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/260(III))).

- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

Article 6 of the Rome Statute contains a virtually identical definition of this crime. In addition, Article III of the Genocide Convention requires states to make both genocide and four ancillary forms of genocide crimes under national law:

“The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.”

Most of these ancillary forms of genocide are also incorporated in Article 25 (Individual responsibility) of the Rome Statute.

Ghana has defined genocide as a crime in Section 49A of the Criminal Code, with a definition that follows almost exactly the same wording as in Article II of the Genocide Convention.¹⁷⁵ Unlike the Genocide Convention, however, the Criminal Code makes genocide punishable by death,¹⁷⁶ which is contrary to international human rights norms and inconsistent with the repeated calls by the UN General Assembly on states to establish a moratorium on executions with a view to abolishing the

¹⁷⁵ Section 49A (2) of the Criminal Code states:

A person commits genocide where, with intent to destroy, in whole or in part, any national, ethnical, racial, or religious group, that person

- (a) kills members of the group;
- (b) causes serious bodily or mental harm to members of the group;
- (c) deliberately inflicts on the group conditions of life calculated to bring its physical destruction;
- (d) imposes measures intended to prevent births within the group;
- (e) forcibly transfers children of the group to another group.

¹⁷⁶ Criminal Code, sect. 49A (1).

death penalty.¹⁷⁷ Ghana has not defined ancillary crimes of genocide listed in Article III of the Genocide Convention (conspiracy, direct and public incitement, attempt and complicity) as crimes under national law. Ghana has provided its courts with universal jurisdiction over genocide.¹⁷⁸

4.3.4. TORTURE

Ghana has been a party to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) since 7 September 2000.¹⁷⁹ This treaty requires states parties to define acts of torture as a crime under national law (art. 4), to establish jurisdiction over persons suspected of committing acts of torture (which necessarily include rape and other crimes of sexual violence) who are present in their territories if they are not extradited (art. 5 (2)), to take measures to ensure presence for prosecution or extradition (art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (art. 7 (1)).

While the Constitution of Ghana sets forth that no person shall be subjected to torture,¹⁸⁰ Ghana has not defined all torture as a crime. The Children's Act defines torture of children under 18 as a crime.¹⁸¹ However, the Criminal Code does not include torture among its listed crimes, although some of the activities associated with torture, including assault, are defined as crimes in that law.¹⁸² Given the jurisdiction requirement in the Convention against Torture and the Courts Act catchall provision, which provides for jurisdiction where required by treaties to which Ghana is a signatory, the courts of Ghana could possibly exercise universal jurisdiction over torture. However, there is no known practice to indicate that the courts would exercise jurisdiction in this case. Further, it is problematic for potential prosecutions that the torture of adults is not defined as an offence in national law, as is required by the Convention against Torture.

4.3.5. EXTRAJUDICIAL EXECUTIONS

Extrajudicial executions, which are "unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence," constitute "fundamental violations of human rights and an affront to the conscience of humanity."¹⁸³ The UN Principles on the Effective

¹⁷⁷ U.N. G.A. Res. 62/149, 18 December 2007, U.N. G.A. Res. A/RES/63/168, 18 December 2008; U.N. G.A. Res. A/RES/65/206, 21 December 2010; a fourth resolution is expected to be adopted in December 2012.

¹⁷⁸ Courts Act, sect. 56 (4) (e).

¹⁷⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ([http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a3bd1b89d20ea373c1257046004c1479/\\$FILE/G0542837.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a3bd1b89d20ea373c1257046004c1479/$FILE/G0542837.pdf)), UN G.A. Res. 39/46, 10 December 1984.

¹⁸⁰ 1992 Constitution, Ch. V, sect. 15 (2) (a).

¹⁸¹ Children's Act, sects. 1, 13 (1).

¹⁸² Criminal Code, sects. 84 - 87.

¹⁸³ Amnesty International, *"Disappearances" and Political Killings – Human Rights Crisis of the 1990s: A Manual for Action*, Index: ACT 33/01/94, February 1994 (<http://www.amnesty.org/en/library/info/ACT33/001/1994/en>), p. 86; Amnesty International, *14-Point Program for the Prevention of Extrajudicial Executions*, Index: POL 35/002/1993, April 1993 (<http://amnesty.org/en/library/info/POL35/003/1993/en>). For a discussion of universal jurisdiction over extrajudicial executions, see Amnesty International, *Universal jurisdiction: The duty of states to enact and*

Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions make clear that all states must ensure that all persons found in territory subject to their jurisdiction who are suspected of such crimes are either prosecuted in their own courts or are extradited to face trial elsewhere.¹⁸⁴

Extrajudicial executions are not expressly defined as crimes in Ghanaian law. However, these killings could be prosecuted as murder under Section 46 of the Criminal Code,¹⁸⁵ or, if committed during an international armed conflict, as a grave breach of the Geneva Conventions. The courts of Ghana cannot exercise universal jurisdiction over the ordinary crime of murder.

4.3.6. ENFORCED DISAPPEARANCES

Ghana signed on 6 February 2007, but has not yet ratified, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (Disappearance Convention).¹⁸⁶ This treaty requires states parties to define enforced disappearance as a crime under national law (arts. 3, 4 and 6),¹⁸⁷ to establish jurisdiction over persons suspected of enforced disappearance who are present in their territories if they are not extradited (art. 9 (2)), to take measures to ensure presence for prosecution or extradition (art. 10 (1) and (2)) and to submit the case to the competent authorities if they are not extradited (art. 11 (1)).

In addition, Article 7 (1) (i) of the Rome Statute lists enforced disappearance of persons as a crime against humanity, while Article 7 (2) (i) defines enforced disappearances as

“the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with

implement legislation - Ch. Eleven (Extrajudicial executions), Index: 53/014/2001, September 2001
(<http://www.amnesty.org/en/library/info/IOR53/014/2001/en>).

¹⁸⁴ Principle 18 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions declares:

“Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.”

¹⁸⁵ See Criminal Code, sects. 46 - 47.

¹⁸⁶ International Convention for the Protection of All Persons from Enforced Disappearance, U.N. G.A. Res. 61/177, 20 Dec. 2006 (<http://www2.ohchr.org/english/law/disappearance-convention.htm>).

¹⁸⁷ The Convention has defined enforced disappearance in Article 2 as

“the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”.

the intention of removing them from the protection of the law for a prolonged period of time.”

Ghana has not defined enforced disappearance as a crime under national law.¹⁸⁸ However, some acts of this complex crime can be prosecuted under the Criminal Code as an ordinary crime, such as kidnapping.¹⁸⁹ Ghana has not provided its courts with universal jurisdiction over enforced disappearances or over those ordinary crimes.

4.3.7. AGGRESSION

The crime under international law of planning, preparing, initiating or waging aggressive war has been recognized as a crime under international law since it was incorporated in the Nuremberg Charter in 1945.¹⁹⁰ It is expressly listed as a crime in Article 5 of the Rome Statute over which the International Criminal Court shall exercise jurisdiction once a provision is adopted defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.¹⁹¹ The Review Conference on the Rome Statute adopted an amendment to the Rome Statute defining the crime and setting out the conditions under which the Court will exercise its jurisdiction over the crime.¹⁹²

Ghana has not defined the planning, preparation, initiation or waging of an aggressive war as a crime under national law nor has it provided its courts with universal jurisdiction over this crime.

¹⁸⁸ For the scope of Ghana’s obligation to implement this treaty when it is ratified, see Amnesty International, *No impunity for enforced disappearances: Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance*, Index: IOR 51/006/2011, November 2012 (<http://www.amnesty.org/en/library/info/IO51/006/2011/en>).

¹⁸⁹ See Criminal Code, sects. 89 - 90.

¹⁹⁰ Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter), 8 Aug. 1945, art. 6 (a) (“CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]”)

¹⁹¹ Rome Statute, art. 5 (2).

¹⁹² RC/Res.6 (http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

5. JURISDICTION OVER CIVIL CLAIMS FOR REPARATION

There does not appear to be any Ghanaian legislation expressly providing for universal civil jurisdiction, either in civil proceedings or in criminal proceedings. However, as a common law country, Ghana courts can award equitable relief, which includes some forms of reparation, in civil cases and, possibly, with regard to civil claims made in criminal cases. Under the Constitution, English common law, which includes equity, as of independence in 1957, is part of the law of Ghana (see Section 2.1 above).

In civil proceedings and in criminal proceedings, the scope of remedies that can be awarded to victims according to Ghanaian legislation and common law is more limited than the rights of victims to reparation under international law. Under international law and standards, victims of crimes under international law and other human rights violations and abuses are entitled to full reparation, including restitution, rehabilitation, compensation and guarantees of non-repetition.¹⁹³ Under Ghanaian legislation and jurisprudence, victims may obtain compensation and restitution in criminal proceedings. Plaintiffs initiating civil proceedings may obtain damages in the form of monetary compensation. It is also possible that, under the common law, equitable remedies analogous to other forms of reparation are available, but it appears no court has addressed this issue.

5.1. UNIVERSAL JURISDICTION OVER CIVIL CLAIMS IN CIVIL CASES

In contrast to a number of civil law countries and the United States,¹⁹⁴ there is no specific

¹⁹³ With regard to war crimes, see, for example, 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, *reprinted in* Adam Roberts & Richard Guelff, *Documents on the Laws of War*, Oxford: Oxford University Press, 3rd ed., 2000, p. 67. See also Hisakazu Fujita, Isomi Suzuki & Kantato Nagano, *War and the Rights of Individuals, Renaissance of Individual Compensation*, Tokyo: Nippon Hyoron-sha, 1999, p. 31 (expert opinions by Frits Kalshoven); Eric David 49; Christopher Greenwood 59; Protocol I, art. 91 (Responsibility). With regard to crimes under international law and other human rights violations and abuses, see, for example, Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (scope of Article 2 of the ICCPR); Convention against Torture, art. 14; 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and international humanitarian law (Van Boven-Bassiouni Principles), UN Comm'n Hum. Rts Res. E/C.N.4/2005/35, 13 April 2005; GA Res. A/RES/60/147, 16 Dec. 2005; UN Updated set of principles for the protection and promotion of human rights through action to combat impunity (Joinet-Orentlicher Principles), UN Comm'n Hum. Rts Res. E/C.N.4/2005/81, 15 April 2005.

¹⁹⁴ See, for example, Amnesty International, *Universal jurisdiction: The scope of universal civil jurisdiction*, Index: IOR 53/008/2007, July 2007 (<http://www.amnesty.org/en/library/info/IOR53/008/2007/en>) (noting legislative provisions in 25 countries with universal civil jurisdiction, including: Argentina, Austria, Belgium, Bolivia, China, Colombia, Costa Rica, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Myanmar, the Netherlands, Panama, Poland, Portugal, Romania, Senegal, Spain, Sweden, United States and Venezuela). In

legislation in Ghana expressly permitting victims to obtain reparation in civil proceedings based on universal jurisdiction. However, to the extent that civil proceedings based on universal jurisdiction are possible, then equitable remedies would be available in such cases.

5.2. CIVIL CLAIMS IN CRIMINAL PROCEEDINGS

The Criminal Procedure Code provides that victims can receive civil remedies in criminal proceedings (for a description of how the rights of victims in such criminal proceedings generally are implemented, see Section 2.5 above). In these cases, victims are entitled under statute to recover two forms of reparation— restitution and compensation.¹⁹⁵ There is nothing in this legislation suggesting that they cannot recover for civil claims on the same jurisdictional basis as the criminal proceedings, including recovery for civil claims in criminal proceedings based on universal jurisdiction. Therefore, it should be possible for claimants in criminal proceedings based on universal jurisdiction, such as prosecutions for war crimes under the Geneva Conventions Act, to obtain such statutory relief. However, this is not expressly granted and has not occurred in practice.¹⁹⁶

5.3. THE RIGHT TO REPARATION OF VICTIMS IN CIVIL PROCEEDINGS

Ghanaian legislation does not expressly recognize the right of victims of crimes under international law to reparation in civil proceedings. However, Ghanaian law generally provides for two types of remedies in civil proceedings – compensation and equitable remedies such as restitution.

The scope of remedies that can be awarded to victims according to Ghanaian legislation and common law is more limited than the rights of victims under international law and standards. International law remedies include five forms of reparation – restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. Some of these forms of reparation can only be provided by the state where the crime occurred or by the state where the convicted person is a national and, therefore, it would not be possible to include them in a court judgment based on universal jurisdiction. However, some of these forms of reparation – such as providing satisfaction in the form of an apology to the victim or the victim's family – could be provided by the convicted person himself or herself. In Ghana the principal statutory remedy in civil proceedings is monetary compensation (known as damages).¹⁹⁷ In addition, it is possible that Ghana courts may grant

addition to the numerous decisions by US Federal courts awarding civil reparation to victims in civil cases based on universal jurisdiction over the past three decades, courts in other countries have made such awards in civil cases. See, for example, *Ashraf El-Hojouj v. Libya*, Civil Section, first instance regional court in The Hague (Netherlands), 21 March 2012 (<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BV9748>); *Kovač c. Plavšić, Jugement, Tribunal de Grande Instance Paris, France, 14 mars 2011* (awarding approximately 200,000 euros to victims of crimes against humanity).

¹⁹⁵ See Criminal Procedure Code, sects. 145-148, as amended by the Criminal Procedure Code (Amendment) Act, 2002 (Act 633). See also Courts Act, sect. 35. It may be possible, although this question does not appear to have been addressed in any case, that claimants seeking civil reparations in a criminal proceeding based on universal jurisdiction, may obtain equitable relief.

¹⁹⁶ The absence of practice involving civil claims in universal criminal jurisdiction cases can be explained by the absence of prosecutions based on such jurisdiction.

¹⁹⁷ See High Court (Civil Procedure) Rules, 2004 (Constitutional Instrument 47) (High Court Rules), Order 40.

plaintiffs restitution as an equitable remedy under common law, but no court appears to have addressed this question.

5.4. THE RIGHTS OF VICTIMS DURING CIVIL PROCEEDINGS

In general, a number of rights are recognized for victims who are plaintiffs or complainants in civil proceedings. These include the right to participate through the issue and service of legal process, including pleadings, the right to file pre-trial motions, the right to testify at trial, the right to counsel, the right to notice of any orders relevant to the proceedings, and the right to notice of hearing of appeal. The rights of victims in criminal proceedings are discussed in Section 2 (see Section 2.5 above).

5.4.1. NOTICE OF THE RIGHTS OF VICTIMS

The right of victims to notice about their rights regarding the investigation, litigation and appeal, which is essential if victims are to be able to exercise their other rights, is not guaranteed in law and practice.

5.4.2. PROTECTION

With regard to the protection of victims and witnesses in civil proceedings, there is no legislation that expressly provides victims acting as complainants or plaintiffs with protection against possible attempts against their lives or those of their relatives. However, it may be possible that such protection could be provided on a case-by-case basis (see Section 2.5.6.2 above).

5.4.3. SUPPORT

The right of victims to receive psychological and other support, particularly to people who are often marginalized, such as women, members of minority groups and children, is not guaranteed by law. In practice, a limited number of programs administered by the state may provide psychological and other support to victims.¹⁹⁸

5.4.4. NOTICE OF DEVELOPMENTS

By law, victims who are plaintiffs or complainants in civil proceedings are entitled to notice about all developments in the proceedings,¹⁹⁹ but it is not clear to what extent this right is guaranteed in practice.

¹⁹⁸ The Ghana Police Service Domestic Violence and Victim Support Unit offers a clinical psychologist and social welfare officer to work with women and children. In addition, the Ministry of Women and Children's Affairs helps coordinate the provision of social services for women and children victims. Interview with Assistant Commissioner of Police and Director of Operations, Ghana Police Service Criminal Investigation Department, in Accra, Ghana (28 June 2012). See also Interview with Chief State Attorney, Ministry of Justice Office of International Cooperation, in Accra, Ghana (27 June 2012).

¹⁹⁹ For example, the rules of the High Court provide that notice must be given to parties in proceedings, or to their legal representatives, for discovery purposes and to indicate the initiation or amendment of motions and claims, the setting of an action down for trial, the filing of an affidavit, the making of admissions, the appearance of the defendant, the changing of a lawyer or the intention of a party to act in person, and the making of an application for judicial review. See High Court Rules, Orders 9, 16, 19, 23, 29, 34, 35, 55, 75. Notice may also be given, by parties or by the court, to non-parties affected by the litigation. See Order 15.

5.4.5. PARTICIPATION

The right of victims to participate in pre-trial, trial and appellate proceedings is guaranteed. By law, victims who are plaintiffs or complainants are entitled to participate in civil proceedings by pleading, filing motions, and testifying.²⁰⁰

5.4.6. REPRESENTATION

Victims who are plaintiffs or complainants in civil proceedings have a right to legal representation.²⁰¹ The Ghana Legal Aid Scheme provides legal representation to indigent clients throughout the country, which may be granted to victims acting as complainants or plaintiffs in civil proceedings.²⁰²

5.5. OTHER ASPECTS OF CIVIL CLAIMS PROCEDURES

Statutes of Limitations on Civil Claims (see Section 6.3 below).

Immunities (See Section 6.5 below).

²⁰⁰ See High Court Rules, Orders 11, 19. Order 4 (1) states:

“Subject to these Rules, any person may begin and carry on proceedings in person or by a lawyer”.

²⁰¹ See High Court Rules, Orders 4 (1), 72. The Constitution also provides that parties to court proceedings related to the Constitution are entitled to aid in legal representation. See 1992 Constitution, Ch. XXVI, art. 294.

²⁰² The Courts Act gives courts in Ghana the authority to designate legal aid in civil proceedings. Courts Act, sect. 114 (1). Section 2 (2) of the Legal Aid Act states:

“A person is entitled to legal aid

(a) if that person earns the Government minimum wage or less and desires representation in

(i) a criminal matter; or

(ii) a civil matter relating to landlord and tenant, insurance, inheritance with particular reference to the Intestate Succession Act, 1985, maintenance of children and any other civil matters as prescribed by Parliament; or

(b) if in the opinion of the Board that person requires legal aid.”

6. OBSTACLES TO THE EXERCISE OF CRIMINAL OR CIVIL JURISDICTION

As discussed below, there are a number of obstacles to exercising criminal and civil jurisdiction based on universal jurisdiction in criminal and civil cases. These obstacles include: many missing definitions of crimes under international law, some divergences between Ghanaian law and international law in principles of criminal responsibility and defences, immunities, and recognition of amnesties or similar measures of impunity.²⁰³

6.1. FLAWED OR MISSING DEFINITIONS OF CRIMES UNDER INTERNATIONAL LAW, PRINCIPLES OF CRIMINAL RESPONSIBILITY OR DEFENCES

6.1.1. DEFINITIONS OF CRIMES

As indicated above in Section 4, the definitions of grave breaches of the Geneva Conventions under Ghanaian law are consistent with those under international law. The definitions of most other crimes under international law are either missing in national law or are inconsistent with the strictest requirements of international law.

Ghana has not defined war crimes not included in the Geneva Conventions and their Protocols, crimes against humanity, crimes ancillary to genocide, torture (except torture of children), extrajudicial executions, enforced disappearances and aggression as crimes under national law. Although some of the conduct amounting to crimes under international law can be prosecuted as ordinary crimes, such as murder, assault, rape and abduction, this alternative is not entirely satisfactory as it leaves gaps where conduct amounting to crimes under international law is not subject to criminal responsibility under national law. Moreover, a prosecution based on universal jurisdiction for ordinary crimes is not possible in Ghana, except in the very rare circumstance when the act was committed abroad by a non-national serving in public office in Ghana. In addition, conviction for an ordinary crime, even when it has common elements, does not convey the same moral condemnation as if the person had been convicted of the crime under international law and does not necessarily involve as severe a punishment.²⁰⁴

6.1.2. PRINCIPLES OF CRIMINAL RESPONSIBILITY

In Ghana, as in most common law countries, principles of criminal responsibility are found in

²⁰³ As noted above in footnote 2, this paper does not address a whole range of other types of obstacles to justice, including poverty and discrimination, that are not specific to universal jurisdiction.

²⁰⁴ See *Prosecutor v. Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11 *bis* of the Rules of Procedure and Evidence, Case No. ICTR-2005-86-11 *bis*, Trial Chamber (19 May 2006), para. 16, *aff'd*, *Prosecutor v. Bagaragaza*, Decision on Rule 11 *bis* Appeal, Case No. ICTR-05-86-AR11 *bis*, Appeals Chamber (30 August 2006), para. 16.

jurisprudence, though the Criminal Code also codifies many principles of criminal responsibility. As explained below, one principle of criminal responsibility under Ghanaian law falls short of the principles of responsibility required under international law with respect to crimes under international law and the principles that should apply to such crimes. Other principles of criminal responsibility found in Ghanaian law are largely consistent with principles defined in international law.

The primary difference between principles of criminal responsibility found in the laws of Ghana and those principles found in the Rome Statute and other international law instruments is that Ghanaian law does not have an express principle of command and superior responsibility. The principle of superior responsibility in international law is found in Articles 86 (2) and 87 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),²⁰⁵ Article 6 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind²⁰⁶ and Article 28 of the Rome Statute,²⁰⁷ which itself falls short of other international law in some respects. In addition, the Committee against Torture has concluded that superiors cannot escape criminal responsibility for torture committed by their subordinates.²⁰⁸ There does not appear to be jurisprudence or legislation

²⁰⁵ Paragraph 2 of Article 86 (Failure to act) of Protocol I states:

"1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

See also Protocol I, art. 87 (Duty of commanders).

²⁰⁶ Article 6 (Responsibility of superiors) of the Draft Code of Crimes, which was intended to apply both to international and national courts, states:

"The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime."

²⁰⁷ Rome Statute, art. 28 (Responsibility of commanders and other superiors). Although Article 6 (1) (b) of the International Convention for the Protection of All Persons from Enforced Disappearance is modelled on the two-tiered Article 28 of the Rome Statute, Article 6 (1) (c) makes clear that this provision "is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander."

²⁰⁸ Committee against Torture, General Comment 2 (Implementation of article 2 by States parties), U.N. Doc.

recognizing a particular principle of superior responsibility in the laws of Ghana, which is a departure from international law. However, an individual who commands another person to commit a crime is liable under Ghanaian law as an abettor.²⁰⁹

With regard to other principles of individual criminal responsibility, Ghanaian law is roughly similar to Article 25 of the Rome Statute. The common law and the Criminal Code provide for the commission of a crime, individually or jointly (Rome Statute, art. 25 (3) (a)); ordering, soliciting or inducing a crime (Rome Statute, art. 25 (3) (b)); aiding, abetting or otherwise assisting the commission of a crime (Rome Statute, art. 25 (3) (c)); contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose (Rome Statute, art. 25 (3) (d)); and attempting to commit a crime (Rome Statute, art. 25 (3) (f)).²¹⁰ However, there is no express provision in Ghanaian law making it unlawful directly and publicly to incite others to commit genocide (Rome Statute, art. 25 (3) (e)).

6.1.3. DEFENCES

As discussed below, there are a number of defences in Ghanaian law that are broader than defences permitted under international law with respect to crimes under international law or which are not appropriate for such crimes, such as the defences of superior orders, insanity and voluntary intoxication, which could lead to impunity for the worst imaginable crimes.²¹¹

CAT/C/GC/2, 24 January 2008, para. 26.

²⁰⁹ Henrietta J.A.N. Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook*, Accra: Black Mask, 2001, p. 495

²¹⁰ Under common law, those who assist in the commission of a crime, though not present at the scene of the crime, are accessories and those who are present at the crime scene are principals in the second degree. However, the Criminal Code streamlines accessorial liability by classifying all who assist in the commitment of a crime – whether at the scene of the crime or not – as abettors. Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 480 – 90 (2001). Section 20 (1) of the Criminal Code states:

“A person who, directly or indirectly, instigates, commands, counsels, procures, solicits, or in any other manner purposefully aids, facilitates, encourages, or promotes, whether by a personal act or presence or otherwise, and a person who does an act for the purposes of aiding, facilitating, encouraging, or promoting the commission of a criminal offence by any other person, whether known or unknown, certain or uncertain, commits the criminal offence of abetting that criminal offence, and of abetting the other person in respect of that criminal offence.”

Under common law and the Criminal Code, if two or more persons agree or act together with a common purpose in order to commit or abet a crime, they are guilty of conspiracy. See Criminal Code, sect. 23; Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 386 – 458 (2001).

Under the common law and the Criminal Code, an attempt to commit a criminal offence is itself a criminal offence. See Criminal Code, sect. 18 (2); Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 459 – 479 (2001).

²¹¹ This section is not intended to cover the full range of defences to criminal charges under Ghanaian law, but simply to discuss some of the most significant features regarding defences that have implications for prosecutions for crimes under international law based on universal jurisdiction.

Defences – superior orders

Ghanaian jurisprudence holds that superior orders are a partial defence under national law if the accused can show that he or she innocently obeyed a superior who had the legal authority to do the acts commanded.²¹² This defence has been contrary to international law since Nuremberg, although it may properly be taken into account in mitigation of punishment.²¹³ This defence has been excluded in numerous international instruments for more than half a century, including the Nuremberg Charter, Allied Control Council Law No. 10, the ICTY Statute, the ICTR Statute, the Regulation establishing the Special Panels for East Timor, the Statute of the Special Court for Sierra Leone, the Cambodian Law establishing the Extraordinary Chambers and the International Convention for the Protection of All Persons from Enforced Disappearance.²¹⁴ The Committee against Torture has concluded that superior orders can never be a defence to torture.²¹⁵

Defences – mistake of fact

The Criminal Code provides, and Ghanaian jurisprudence holds, that a good faith mistake of fact generally constitutes a complete defence because it demonstrates that the accused had no intention to do an illegal act.²¹⁶

²¹² See Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 170 – 71 (2001); *Republic v. Hagan*, GLR 607, 614 (1968) (holding that a civil servant who accepted a bribe was not innocent and thus could not be exonerated from conviction as an accomplice to accepting a bribe).

²¹³ Amnesty International, *The international criminal court: Making the right choices – Part I: Defining the crimes and permissible defences (ICC: Making the right choices)*, Index: IOR 40/01/1997, January 1997 (<http://www.amnesty.org/en/library/info/IO40/001/1997/en>), Sect. VI.E.6.

²¹⁴ Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter), 8 Aug. 1945, art. 8; Allied Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity (Allied Control Council Law No. 10), 20 Dec. 1945, art. II (4) (b), (published in the Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946); Charter of the International Military Tribunal for the Far East (Tokyo Charter), art. 6; ICTY Statute, art. 7 (4); ICTR Statute, art. 6 (4); Draft Code of Crimes against the Peace and Security of Mankind, art. 5; UNTAET Regulation 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor), 6 June 2000, Sect. 21; Statute of the Special Court for Sierra Leone (Sierra Leone Statute), art. 6 (4); Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006), art. 29; International Convention for the Protection of All Persons from Enforced Disappearance, art. 6 (2).

Article 33 of the Rome Statute permits the defence of superior orders to war crimes, but it is narrowly circumscribed, applicable only to trials in the International Criminal Court and contrary to every other international instrument adopted concerning crimes under international law, including instruments subsequently adopted, such as the Statute of the Special Court for Sierra Leone and the Cambodian Extraordinary Chambers Law.

²¹⁵ Committee against Torture, General Comment 2, U.N. Doc. CAT/C/GC/2, 2008, para. 26.

²¹⁶ See Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 373 – 79 (2001); *Nyameneba & Orbs v. The State*, GLR 723 (1965) (holding that religious individuals possessing “herbs of life” could not be convicted of possessing Indian hemp if they did not know what they possessed was Indian hemp).

The defence of mistake of fact in good faith as laid out in jurisprudence and in the Criminal Code, however, seems to be approximately the same as the defence of mistake of fact in Article 32 (1) of the Rome Statute, which specifically requires a mistake negating the mental element of the crime in order to excuse the crime. To the extent that a mistake of fact has been made in good faith, it will probably negate the mental element of the crime in most instances. However, the Criminal Code also provides that a mistake of fact made in ignorance is also a defence. Such a mistake could well be broader than the defence in the Rome Statute, for example, in instances where the person was wilfully ignorant of the facts even when under a duty to ascertain them before acting or refraining from acting. Article 32 (1) of the Rome Statute provides:

“A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.”²¹⁷

Defences – ignorance of the law

Generally, ignorance of law is not a defence in Ghana.²¹⁸ This is a broader defence than the defence in the Rome Statute, which provides an exception where ignorance of the law negates the mental element of the crime. Article 32 (2) provides:

“A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime or as provided for in article 33.”²¹⁹

Defences – insanity and mental disease or defect

Under Ghanaian law, insanity is not a defence to crime, but it justifies the special verdict of “guilty but insane.” Under Section 30 of the Criminal Procedure Code, this special verdict excuses the accused from punishment, instead permitting the court to impose treatment. A judge or jury can

Section 29 (1) of the Criminal Code, states:

“A person shall not be punished for an act which, by reason of ignorance or mistake of fact in good faith, that person believes to be lawful.”

²¹⁷ For the scope of this defence, see Amnesty International, *ICC: Making the Right Choices – Part I*, Sect. VI.E.6.

²¹⁸ See Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 373 – 379 (2001); *Foli VIII & Others v. The Republic*, GLR 768 (1968) (stating that “the fact, as in this case, that appellants had no intention. . . of violating the law, cannot properly exclude them from the necessary consequences of having broken the law”). Section 29 (2) of the Criminal Code states:

“A person shall not, except as in this Act otherwise expressly provided, be exempt from liability to punishment for an act on the grounds of ignorance that the act is prohibited by law.”

²¹⁹ For the scope of Article 33 (Superior orders and prescription of law) of the Rome Statute, see the discussion of superior orders above in this subsection.

reach the special verdict if it is proven that the accused did not have the capacity to appreciate the nature and legal consequences of the unlawful act because of a disease or defect, or if the act was committed under such a state of delusion that the accused would not appreciate punishment.²²⁰

The special verdict of insanity in Ghanaian law is broader than the defence of insanity in the Rome Statute because it permits an excuse based on the court's assessment that the accused is unfit for punishment, which the Rome Statute does not permit. On the other hand, Ghanaian law does not include an excuse based on a showing that the accused suffered a mental delusion rendering the accused unable to control his or her own actions, which the Rome Statute does include.²²¹ Article 31 (1) (a) of the Rome Statute states:

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law[.]”

Defences – intoxication

The Criminal Code provides, and Ghanaian jurisprudence holds, that intoxication serves as a defence or excuse negating criminal intent. To succeed on this basis, an accused must show that, due to intoxication at the time of the act, he or she did not know the nature of wrongfulness of his or her actions. The accused must also show that the intoxication was caused involuntarily by the malicious or negligent act of a third party or it must be shown that voluntary intoxication rendered the accused temporarily insane. The former is a complete defence. For the latter, the court may return a special verdict of “guilty but insane.”²²²

²²⁰ See Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 19 – 72 (2001) (citing *R. v. Windle*, 2 QB 826, CCA (1952); *R v. Moshie*, GLR 343, CA (1959)); Section 27 of the Criminal Code states:

“Where a person is accused of a criminal offence, the special verdict provided by the Criminal Procedure and other Offences (Procedure) Act, 1960 (Act 30) in the case of insanity is only applicable

- (a) If that person was prevented, by reason of idiocy, imbecility, or a mental derangement or disease affecting the mind, from knowing the nature or consequences of the act in respect of which that person is accused; or
- (b) If that person did the act in respect of which that person is accused under the influence of an insane delusion of a nature that renders that person, in the opinion of the jury or of the Court, an unfit subject for punishment in respect of that act.”

²²¹ See Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 51 (2001), referencing *Abugiri Frafra* alias *Pini Frafra v. The Republic*, 2 GLR 447, CA (1974) (stating “Our law of insanity does not require that the mental delusion should lead to an incapacity to control conduct”).

²²² See Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 73 – 141 (2001); *Ketsiawah v. The State*, GLR 483 (1965) (upholding a conviction where evidence did not show that defendant's

This defence seems to be broader than the defence of intoxication in Article 31 (b) of the Rome Statute. Unlike Ghanaian law, the Rome Statute does not provide for a voluntary intoxication defence based on temporary insanity (although it may be possible that the defence of insanity under the Rome Statute would apply in this case, independently of the intoxication defence). Instead, Article 31 (b) of the Rome Statute only includes a voluntary intoxication defence in very limited circumstances. It provides:

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

(b) The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of the law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk that, as a result of the intoxication, her or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court[.]”

Defences – compulsion, duress and necessity

As Amnesty International has argued, compulsion, duress and necessity should not be *defences* to crimes under international law, but should simply be grounds for *mitigation* of punishment.²²³

intoxication rendered him temporarily insane). Section 28 of the Criminal Code states:

“(1) Except as provided in this section, intoxication is not a defence to a criminal charge.

(2) Intoxication is a defence to a criminal charge if by reason of the intoxication the person charged, at the time of the act complained of, did not know that the act was wrong or did not know what that person was doing and

- a. The state of intoxication was caused without the consent of that person by the malicious or negligent act of another person, or
- b. The person charged was, by reason of intoxication, insane, temporarily or otherwise, at the time of the act.

(3) Where the defence under subsection (2) is established, then

- c. In a case falling under paragraph (a), the accused shall be discharged, and
- d. In a case falling under paragraph (b), the special verdict provided for by the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) in the case of insanity shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed an intention, specific or otherwise, in the absence of which the person charged would not be guilty of the criminal offence.

(5) For the purposes of this section “intoxication” includes as state produced by narcotics or drugs.”

²²³ Amnesty International, *Making the right choices*, Sect. VI.E.3 & 4. The Committee against Torture has recommended that states parties “completely remove *necessity* as a possible justification for the crime of torture”. Concluding observations – Israel, U.N. Doc. CAT/C/ISR/CO/4, 23 June 2009, para. 14 (<http://daccess->

However, in a regrettable political compromise, that has no basis in international criminal law, Article 31 (1) (d) of the Rome Statute permits, in strictly limited circumstances and only in trials before the International Criminal Court, defences of duress in response to threats from another person and of necessity (called “duress”) in response to threats from circumstances beyond a person’s control.²²⁴

Compulsion or duress. Ghanaian law does not expressly provide for the defence of compulsion or duress.²²⁵ This exclusion of duress as a defence is narrower than Rome Statute, which provides in Article 31 (1) (d):

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may be:

(i) Made by other persons, or

(ii) Constituted by other circumstances beyond that person’s control.”

The scope of Article 31 (1) (d) has yet to be interpreted by the International Criminal Court.

<https://www.un.org/doc/UNDOC/GEN/G09/431/65/PDF/G0943165.pdf?OpenElement> (emphasis in original).

²²⁴ Article 31 (1) (d) of the Rome Statute provides that

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

...

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person’s control.”

²²⁵ Instead, duress is a factor that negates consent where consent is an element to a crime. Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 179 (2001).

Necessity. Ghanaian law does not expressly provide for the defence of necessity, although it is possible that this defence may exist based on the English common law as it existed in 1957 at the time of independence.²²⁶

Defences – defence of person or property. The defence in Ghanaian law of self-defence, or defence of person, is consistent with the strictest requirements of international law and what is appropriate for crimes under international law. The Ghana Criminal Code provides, and jurisprudence holds, that defence of a person is a defence to crime in circumstances of extreme necessity. The accused must show that an attack was in progress placing him or herself, or another person, at risk of imminent danger.²²⁷ The accused must also show that there was no other means of defending the person at risk of harm and that the force used to defend the attack was reasonable and proportionate.²²⁸ Deadly force is justified based on these requirements if safe retreat is not possible.²²⁹

Similarly, a property owner or other authorized person may exercise force to defend property rights.²³⁰ However, deadly force in defence of property is not justified, but it may be used in certain circumstances to defend persons on property.²³¹

As Amnesty International has explained, self-defence and defence of others can be defences to crimes under international law in certain limited circumstances, but only when the response is

²²⁶ Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 253 – 261 (2001).

²²⁷ See Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 204 – 230 (2001); *State v. Ampomah*, GLR 262, SC (1960) (quashing the conviction of a defendant who fought off an attack by a group of men, killing one); *Nartey v. The Republic*, GLR 788, CA (1982-83) (discharging a man who, while farming, fought off an attack and killed his attacker). Section 37 of the Criminal Code states:

“For the prevention of, or for the defence of himself or any other person against a criminal offence, or for the suppression or dispersion of a riotous or an unlawful assembly, a person may justify the use of force or harm which is reasonably necessary extending in case of extreme necessity, even to killing.”

²²⁸ See *Republic v. Zinitege*, 1 GLR 1 (1993-94) (upholding the conviction of a defendant whose fatal blow was unreasonable in the circumstances). Regarding reasonableness, the question at issue is the amount and kind of force used, not the type of weapon used. *Bodua alias Kwata v. The State*, GLR 51 (1966).

²²⁹ See *Lamptey alias Morocco v. The Republic*, 1 GLR 165, (1974) (stating “[W]here there is a safe opportunity for retreat killing cannot be justified”); *Torto v. The Republic*, 1GLR 342 (1971) (holding that returning to continue fighting after retreat falls outside the scope of self-defence).

²³⁰ See Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 230-33 (2001); *Abeka & Anor v. The Republic*, GLR 438 (1980) (stating “an accused is entitled to raise as a defence the use of reasonable force in defence of a landed property of which a claim is made in good faith”). Defence of property includes: repelling an intruder who attempts to forcibly and unlawfully enter property, removing a person who refuses to depart in violation of the law, recovering possession of goods unlawfully held, or overcoming an obstruction or resistance to the exercise of a legal property right. Criminal Code, sect. 39.

²³¹ See Henrietta Mensa-Bonsu, *The General Part of the Criminal Law – A Ghanaian Casebook* 231 (2001); however, deadly force may be used to defend persons on disputed property. See *Awaitey and another v. The Republic*, GLR 179 (1978) (stating that the law on self-defence applies in a case where a group of armed assailants attacked a father and son on their farm).

reasonable and proportionate and, if deadly force is used, only when retreat is not possible.²³² Unfortunately, in another political compromise, Article 31 (1) (c) of the Rome Statute provides very broad defences of self, others and property, but these defences apply only in trials before the International Criminal Court.²³³

6.2. PRESENCE REQUIREMENTS IN ORDER TO OPEN AN INVESTIGATION OR REQUEST EXTRADITION

There appear to be no provisions expressly requiring the presence of a suspect in Ghana to initiate a police inquiry into an alleged crime. In addition, there appears to be no provision expressly requiring that a suspect must have been in Ghana at some point after the crime was committed in order for Ghana to make an extradition request for that suspect from a foreign state (see Section 7.1.1.10 below).

The omission of a presence requirement means that the police are able to open an investigation immediately after they learn that a person suspected of committing crimes under international law is on his or her way to Ghana or about to change planes at a Ghana airport. There is no need to wait until the suspect has entered the country on a visit that would be too short to permit an investigation to be completed and an arrest warrant issued and implemented. As Ghana is able to request extradition of a person suspected of a crime committed abroad (see below in Section 7), the absence of a presence requirement means that Ghana could also help shoulder the burden when other states fail to fulfil their obligations to investigate and prosecute crimes under international law.²³⁴ Indeed, this possibility was envisaged as an essential component of the enforcement provisions of the four 1949 Geneva Conventions (and subsequently incorporated in Protocol I to the Conventions), each of

²³² Amnesty International, *ICC: Making the right choices*, Sect. VI.E.5.

²³³ Article 31 (1) (c) of the Rome Statute provides that

“[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

...

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph[.]”

²³⁴ For further information about the shared responsibility model, see Amnesty International, *Improving the effectiveness of state cooperation*, Index: IOR 53/004/2009, October 2009 (<http://www.amnesty.org/en/library/info/IOR53/004/2009/en>). The absence of a presence requirement also means that states can accept cases transferred by an international court, such as the ICTY or ICTR, for crimes under international law more easily by completing an investigation before the transfer and issuing an arrest warrant before the transfer.

which provide that any state party, regardless whether a suspect has ever been in its territory, as long as it “has made out a *prima facie* case,” may request the extradition of someone suspected of grave breaches of those Conventions.²³⁵ If the presence of the suspected perpetrator were to be necessary for an effective investigation in a particular case and the person could not be extradited to Ghana, it is very unlikely that the police would decide to open an investigation.

6.3. STATUTES OF LIMITATIONS APPLICABLE TO CRIMES UNDER INTERNATIONAL LAW

Statutes of limitations in Ghana do not apply to crimes under international law and only to certain civil claims in civil proceedings.

Statutes of limitations applicable to crimes

Ghana has been a party to the 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity since September 2000.²³⁶ Ghana has also been a party to the Rome Statute since December 1999, which provides for the non-applicability of statutes of limitations for crimes under international law listed within the Statute.²³⁷ Independent of conventional international law, states must not apply statutes of limitation to crimes under customary international law.²³⁸ Ghana does not expressly provide for statutes of limitations for crimes generally. Neither is there an express provision for statutes of limitation applicable to crimes under international law.

Statutes of limitation applicable to torts

²³⁵ First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146.

²³⁶ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, entry into force 11 November 1970 (<http://www2.ohchr.org/english/law/warcrimes.htm>).

²³⁷ Rome Statute, art. 29 (Non-applicability of statute of limitations) (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”).

²³⁸ See, for example, Committee against Torture, Concluding observations – Spain, U.N. Doc. CAT/C/ESP/CO/5, 9 December 2009, para. 21 (<http://www.google.co.uk/#hl=en&source=hp&q=%22committee+notes+that+measure+102%22+Spain&btnG=Google+Search&meta=&aq=f&oq=%22committee+notes+that+measure+102%22+Spain&fp=97531010bb3ad556>) (“While it takes note of the State party’s comment that the Convention against Torture entered into force on 26 June 1987, whereas the Amnesty Act of 1977 refers to events that occurred before the adoption of that Act [dating to 1936], the Committee wishes to reiterate that, bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by . . . the statute of limitation.”); *Prosecutor v. Furundzija*, Judgment, International Criminal Tribunal for the former Yugoslavia (10 December 1998), para. 155-15 (no statute of limitations should apply to *jus cogens* prohibition of torture); *Barrios Altos v. Peru*, Judgment, Inter-American Court of Human Rights, 14 March 2001, para. 41 (provisions on prescription with respect to serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance are prohibited). See also Ruth Kok, *Statutory Limitations in International Criminal Law*, London: Blackwell, 2008.

In very limited circumstances, Ghana has a statutory limitation for civil cases involving personal injury.²³⁹ However, there is no express provision for statutes of limitation applicable to torts arising from crimes under international law.

6.4. DOUBLE CRIMINALITY

Ghanaian law does not expressly require that conduct which was committed abroad be a crime both in Ghana and in the place where it was committed (double criminality) for prosecution in Ghana. However, the lack of a requirement of double criminality for the purposes of prosecution must be distinguished from double criminality requirements in the granting of extradition requests (see below in Section 7.1.1.3) and double criminality requirements for the purposes of mutual legal assistance (see below in Section 7.2.2.4).

Whatever the merits may be for requiring double criminality with respect to conduct that only amounts to an ordinary crime, it has no merit when the conduct amounts to a crime under international law, even if the requesting state is seeking extradition to prosecute the person for an ordinary crime when its legislation does not characterize the conduct as a crime under international law. All states have a shared obligation to investigate and prosecute conduct that amounts to crimes under international law, either by doing so in their own courts or by extraditing the suspect to another state or surrendering that person to an international criminal court, and they cannot escape this obligation by refusing to extradite on the basis of double criminality.

6.5. IMMUNITIES

Ghana provides an absolute immunity for the President of the Republic while in office, which would likely apply even if crimes under international law are at issue.²⁴⁰ It also appears that Ghana recognizes diplomatic immunities in statute.²⁴¹ It is not clear whether Ghana recognizes foreign

²³⁹ A statutory limitation applies for proceedings “by or against the Republic as if the Republic were a private individual” and “in respect of matters regulated by customary law.” See Limitation Decree, 1972 (NRCD 54), sect. 30.

²⁴⁰ The Constitution, Ch. VIII, art. 57 states:

. . .

“(4) Without prejudice to the provisions of article 2 of this Constitution, and subject to the operation of the prerogative writs, the President shall not, while in office, be liable for proceedings in any court for the performance of his functions, or for any act done or omitted to be done, or purported to be done, or purported to have been done or purporting to be done in performance of his functions, under this Constitution or any other law.”

(5) The President shall not, while in office as President, be personally liable to any civil or criminal proceedings in court.

(6) Civil proceedings may be instituted against a person without three years after ceasing to be President, in respect of anything done or omitted to be done by him in his personal capacity before or during his term of office notwithstanding any period of limitation except where the proceedings had been legally barred before he assumed the office of President.”

²⁴¹ See Diplomatic Immunities Act, 1962 (Act 148), incorporating Articles 22-24, 27-40 of the Vienna Convention on Diplomatic Relations into Ghanaian law. Article 31 grants complete immunity from criminal

consular, foreign head of state, and other state or official immunities, even if crimes under international law are in issue.²⁴²

According to the Diplomatic Immunities Act, Ghana generally grants diplomats immunity from civil jurisdiction, subject to some limitations,²⁴³ but it is not clear whether civil claims against other foreign officials would be barred by assertions of official immunities.

Amnesty International believes that the judgment of the International Court of Justice in the *Arrest Warrant* case, which concluded that serving heads of state, heads of government and foreign ministers were immune from prosecution in foreign courts, is based on an incorrect analysis of international law.²⁴⁴ Therefore, Amnesty International has urged that this ruling, which is binding only upon the states in that case, should be reversed and hopes that this will be done in the future, as no serving or former official should be able to assert successfully a claim of immunity with respect to the worst possible crimes ever committed. As explained elsewhere,²⁴⁵ there is no convincing basis in customary international law to accord immunity of state officials in or out of office when committing genocide, crimes against humanity and war crimes. Indeed, the International Court of Justice in the *Arrest Warrant* case failed to cite any state practice or *opinio iuris* in this respect.

Instruments adopted by the international community show a consistent rejection of immunity from

jurisdiction and limited immunity from civil jurisdiction for diplomatic officers.

²⁴² Ghana became a state party to the Vienna Conventions on Consular Relations on 4 October 1963 (See Vienna Conventions on Consular Relations, 24 April 1963, http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSO&tabid=2&mtdsg_no=III-6&chapter=3&lang=en#Participants, 56 U.N.T.S. 261 (entered into force 19 March 1967), which provides for consular immunities, although it does not appear that provisions of the Convention have been incorporated into domestic law

²⁴³ Article 31 of the Vienna Convention on Diplomatic Relations, incorporated into Ghanaian law by Section 1 of the Diplomatic Immunities Act, states:

(1) “ . . . [A diplomatic agent] shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

- (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
- (b) An action relating to the succession in which the diplomatic agent is involved as executor, administration, heir or legatee as a private person and not on behalf of the sending State;
- (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”

²⁴⁴ *Democratic Republic of the Congo v. Belgium*, Judgment, I.C.J. Rep. 3 (2001).

²⁴⁵ Amnesty International, *Universal Jurisdiction: Belgian prosecutors can investigate crimes under international law committed abroad*, Index: IOR 53/001/2003, February 2003. See also Amnesty International, *Bringing Power to Justice: Absence of immunity for heads of state before the International Criminal Court*, Index: IOR 53/017/2010, December 2010 (<https://www.amnesty.org/en/library/info/IO53/017/2010/en>).

prosecution for crimes under international law for any government official since the Second World War. Those instruments articulated a customary international law rule and general principle of law. Indeed, several of the international instruments adopted over the past half century were expressly intended to apply both to international and national courts.²⁴⁶ Moreover, even the international instruments establishing international criminal courts envisaged that the same rules of international law reiterated in those instruments applied with equal force to prosecutions by national courts.²⁴⁷

6.6. BARS ON RETROACTIVE APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL LAW OR OTHER TEMPORAL RESTRICTIONS

States have recognized for more than six decades since the adoption of the Universal Declaration of Human Rights that the prohibition of retroactive criminal laws does not apply to retrospective national criminal legislation enacted after the relevant conduct became recognized as criminal under international law.²⁴⁸ Article 15 of the ICCPR, which Ghana has ratified, contains a similar prohibition.²⁴⁹ The Committee against Torture has made clear that national legislation defining torture as a crime under international law can apply to conduct which was considered as torture

²⁴⁶ These instruments include: Allied Control Council Law No.10, art. II (4) (a); U.N. G. A. Res. 95 (i), 11 Dec. 1946; 1948 Genocide Convention, art. IV; 1950 Nuremberg Principles, principle III; 1954 Draft Code of Offences, art. 3; 1973 Apartheid Convention, art. III; 1991 Draft Code of Crimes, art. 13 (Official position and responsibility); 1996 Draft Code of Crimes, art. 6 (Official position and responsibility).

²⁴⁷ Statute of the Special Court for Sierra Leone, art. 6 (Individual criminal responsibility) (2); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 29. For further analysis on this point, see Amnesty International, *Universal Jurisdiction: Belgian court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings*, Index: EUR 53/001/2002, May 2002 (<http://www.amnesty.org/en/library/info/IO53/001/2002/en>).

²⁴⁸ Article 11 (2) of the 1948 Universal Declaration of Human Rights states:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

²⁴⁹ Article 15 of the ICCPR states:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

under international law prior to the enactment of that legislation.²⁵⁰

Thus, nothing in either article or other international law prevents Ghana from enacting legislation incorporating crimes under international law into its law and permitting prosecutions for those crimes committed prior to the legislation entered into force, but after they were recognized as crimes under international law. It is not clear whether national legislation defining crimes under international law as crimes under Ghanaian law is retrospective. However, to that extent that such legislation is retrospective, it is possible that the constitutional prohibition of retrospective criminal law may make such legislation unconstitutional, even if such legislation is permissible under international law.²⁵¹

6.7. *NE BIS IN IDEM*

The principle of *ne bis in idem* (that one cannot be tried twice for the same crime) is a fundamental principle of law recognized in international human rights treaties and other instruments, including the ICCPR, the American Convention on Human Rights, Additional Protocol I and constitutive instruments establishing the ICTY, ICTR and the Special Court for Sierra Leone.²⁵² However, apart from the vertical exception between international courts and national courts, the principle only prohibits retrials after an acquittal by the same jurisdiction.²⁵³ This limitation on the scope of the principle can serve international justice by permitting other states to step in when the territorial state or the suspect's state conducts a sham or unfair trial. It is not clear whether Ghana courts would recognize *ne bis in idem* as a bar to prosecution in Ghana if the person had been tried in a foreign proceeding that was a sham or unfair.²⁵⁴

²⁵⁰ See, for example, Committee against Torture, Concluding observations – Spain, U.N. Doc. CAT/C/ESP/CO/5, 2009, para. 21.

²⁵¹ The 1992 Constitution has a retroactivity provision, which does not expressly exclude crimes under international law. Ch. V, Article 19 (5) states: “A person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence.”

²⁵² ICCPR, art. 14 (7); American Convention on Human Rights, art. 8 (4); Additional Protocol I, art. 75 (4) (h); ICTY Statute, art. 10 (1); ICTR Statute, art. 9 (1); Statute of the Special Court for Sierra Leone, art. 9.

²⁵³ The Human Rights Committee has concluded that Article 14 (7) of the ICCPR “does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.” *A.P. v. Italy*, No. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This limitation was also recognized during the drafting of Article 14 (7) of the ICCPR. See Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, Dordrecht, Martinus Nijhoff, 1987, pp. 316-318; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein, N.P. Engel, 1993, pp. 272-273; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford, Clarendon Press, 1991. The ICTY Trial Chamber in the *Tadić* case reached the same conclusion. *Prosecutor v. Dusko Tadić*, Case No IT-94-1-A, July 15, 1999.

²⁵⁴ The Constitution's double jeopardy provision prohibits re-trials only for those accused who can show that their

6.8. POLITICAL CONTROL OVER DECISIONS TO INVESTIGATE AND PROSECUTE

The Attorney General and Minister of Justice, a single political official, has the final decision as to whether to institute a criminal prosecution in Ghana.²⁵⁵ In their comprehensive review of the justice sector, OSIWA and AfriMap note that this single official's dual political and prosecutorial roles present a potential conflict of interest. They have suggested that in some instances in Ghana the executive may have influenced the progress of particular prosecutions.²⁵⁶ Political interference in the process of justice is contrary to international standards.²⁵⁷

6.9. DISCRIMINATION IN LAW AND PRACTICE

Laws and practices that discriminate on the grounds of, for example, gender, race, religion national, ethnic or social origin, or other status²⁵⁸ can be an obstacle to prosecutions and to access to justice in general.

Failure to guarantee equality before the law for everyone can mean that certain categories of crimes commonly committed against people subject to discrimination, such as women, and crimes of sexual violence, are more likely to go unpunished, making Ghana a safe haven from prosecution in its courts for perpetrators of these crimes.

The Constitution of Ghana prohibits discrimination on the grounds of gender, race, colour, religion or belief, social or economic status, political opinion, occupation, national or ethnic origin.²⁵⁹ The Constitution also provides that every person has a right to "enjoy, practice, profess, maintain and

trial took place in a "competent court". See Ch. V, art. 19 (7).

²⁵⁵ 1992 Constitution, Ch. VIII, art. 88.

²⁵⁶ See AfriMap and OSIWA, *Ghana: Justice Sector and the Rule of Law 77* (2007) (comparing the Alhaji Bamba case and other languishing cases involving alleged ministerial corruption with the case of Malam Ussif Isa, a sports minister who was prosecuted and convicted). In the past, political parties have also argued that prosecutors tried former ministers from opposing parties for harassment purposes rather than for anti-corruption measures. *Ibid.*

²⁵⁷ For example, see the UN Guidelines on the Role of Prosecutors Guideline 12 (a) requires prosecutors to "perform their duties fairly"; Guideline 13 requires prosecutors to "[c]arry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination"; Guideline 13 (b) requires prosecutors to "[p]rotect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect" and Guideline 14 states that "[p]rosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded."

²⁵⁸ See prohibition on discrimination before the law in Article 26 of the International Covenant on Civil and Political Rights. Other characteristics besides gender for which a person might suffer discrimination include age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. See, for example, Article 21 (3) of the Rome Statute.

²⁵⁹ 1992 Constitution, Ch. V, art. 17.

promote any culture, language, tradition or religion”.²⁶⁰ Further, the Constitution requires the government to protect persons with disabilities against discrimination²⁶¹ and prohibit discrimination based on place of origin, circumstances of birth, ethnic origin, gender, religion or belief.²⁶² These constitutional prohibitions against discrimination do apply, as a matter of law, to access to the judicial system.²⁶³ In practice, however, discrimination – particularly on the basis of gender, race, ethnicity or social status – persists,²⁶⁴ which may limit access to justice.

6.10. RESTRICTIONS ON THE RIGHTS OF VICTIMS AND THEIR FAMILIES

As noted above in Section 5.3, victims are not able to obtain the full range of reparations against convicted persons to which they are entitled under international law. In addition, there are a number of significant restrictions on the ability of victims to participate meaningfully in criminal and civil proceedings, including the absence of a legal framework for victim-initiated civil claims based on universal jurisdiction and no legal guarantees of victims’ rights, including to notice of their rights, support, and protection in criminal and civil proceedings (see Sections 2.5 and 5.4 above).

6.11. AMNESTIES

Amnesties and similar measures of impunity for crimes under international law are prohibited under international law.²⁶⁵

Ghana has recognized amnesties barring prosecution for crimes, including crimes under international law, committed in Ghana, but there appears to be no provision in national legislation or

²⁶⁰ 1992 Constitution, Ch. V, art. 26 (1).

²⁶¹ 1992 Constitution, Ch. V, art. 29 (4).

²⁶² 1992 Constitution, Ch. VI, art. 35 (5).

²⁶³ 1992 Constitution, Ch. V, arts. 12, 17 (1) & Ch. VI, arts. 33, 35 (3), 37 (1),

²⁶⁴ See Human Rights Council Working Group on the Universal Periodic Review, Compilation Prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1: Ghana, 4 April 2008, A/HRC/WG.6/2/GHA/2, paras. 11-15. In the past, the CEDAW committee has commented that “women’s ability in practice to [access justice] and to bring cases of discrimination before the courts is limited by factors such as limited information of their rights, lack of assistance in pursuing these rights, and legal costs.” Committee on the Elimination of Discrimination against Women, Concluding comments of the Committee on the Elimination of Discrimination against Women: Ghana, 25 August 2006, CEDAW/C/GHA/CO/5, para. 15.

It has also been reported that access to justice is difficult to obtain for cases of sexual and gender-based violence, which are often protracted and difficult to prosecute. 2008 UPR Summary, para. 21.

²⁶⁵ See, for example, Amnesty International, *Sierra Leone: Special Court for Sierra Leone: denial of right to appeal and prohibition of amnesties for crimes under international law (SCSL: Right to appeal and prohibition of amnesties)*, Index: AI: AFR 51/012/2003, November 2003 (<http://www.amnesty.org/en/library/info/AFR51/012/2003/en>). The Committee against Torture has concluded that amnesties for torture and enforced disappearances are prohibited under international law. Committee against Torture, General Comment 2, U.N. Doc. CAT/C/GC/2, 2008, para. 5. See also Committee against Torture, Concluding observations – Spain, U.N. Doc. CAT/C/ESP/CO/5, 2009, para. 21.

jurisprudence recognizing amnesties granted by foreign states. In Ghana, the Constitution grants an absolute and permanent amnesty for crimes, including crimes under international law, committed by former military governments.²⁶⁶ The judiciary has not struck down – and indeed, it acts in compliance with – this amnesty.²⁶⁷

²⁶⁶ The 1992 Constitution, Ch. XXVI, sect. 299 gives effect to transitional provisions found in Schedule 1, sect. 34, which state:

(1) No member of the Provisional National Defense Council, Provisional National Defense Council Secretary, or other appointees of the Provisional National Defense Council shall be held liable either jointly or severally, for any act or omission during the administration of the Provisional National Defense Council.

(2) It is not lawful for any court or tribunal to entertain any action or take any decision or make any order or grant any remedy or relief in any proceedings instituted against the Government of Ghana or any person acting under the authority of the Government of Ghana whether before or after the coming into force of this Constitution or against any person or persons acting in concert or individually to assist or bring about the change in Government which took place on the twenty-fourth day of February 1966 on the thirteenth day of January, 1972, on the fourth day of June 1979 and on the thirty-first day of December 1981 in respect of any act or omission relating to, or consequent upon –

(a) the overthrow of the government in power before the formation of the National Liberation Council, the National Redemption Council, the Supreme Military Council, the Armed Forces Revolutionary Council and the Provisional National Defense Council; or

(b) the suspension or abrogation of the Constitutions of 1960, 1969 and 1979; or

(c) the establishment of the National Liberation Council, the National Redemption Council, the Supreme Military Council which took office on the ninth day of October 1975, the Supreme Military Council established on the fifth day of July 1978, the Armed Forces Revolutionary Council, or the Provisional National Defense Council; or

(d) the establishment of this Constitution.

(3) For the avoidance of doubt, it is declared that no executive, legislative or judicial action taken or purported to have been taken by the Provisional National Defense Council or the Armed Forces Revolutionary Council or by a member of [these groups] or by any person appointed by [these groups] or by any person appointed by the [these groups] or by any person appointed by [these groups] in the name of either [of these groups] shall be questioned in any proceedings whatsoever and, accordingly, it shall not be lawful for any court or other tribunal to make any order to grant any remedy or relief in respect of any such act.

(4) The provisions of subsection (3) of this section shall have effect notwithstanding that any such action as is referred to in that subsection was not taken in accordance with any procedure prescribed by law.

(5) It is not lawful for any court or tribunal to entertain an action instituted in respect of an act or omission against a person acting or omitting to act, on the instructions or the authority of the Provisional National Defense Council or the Armed Forces Revolutionary Council or a member of [these groups] and alleged to be in contravention of any law, whether substantive or procedural, in existence before or during the administration of the Provisional National Defense Council or the Armed Forces Revolutionary Council.”

²⁶⁷ See AfriMap and OSIWA, *Ghana: Justice Sector and the Rule of Law* 50-52 (2007) (citing *Ekwam v. Pianim*,

Observers have also noted that presidential pardons, granted under the authority of the Constitution's Article 72, could be abused for political, rather than purely judicial, purposes.²⁶⁸

SGGLR 117 (1996-1997) and *Ekwam v. Pienim* (No. 2), SGGLR 120 (19967-1997), where the Supreme Court declined to examine the legality of a sentence handed down by a past military government).

²⁶⁸ See AfriMap and OSWIA, *Ghana: Justice Sector and the Rule of Law* 49 (2007) (recounting a mass presidential pardon given to former ministers accused of conspiracy and corruption).

7. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

As discussed below, there are a number of obstacles to extradition (Section 7.1) and mutual legal assistance (Section 7.2) that may limit the ability of Ghana to obtain and to provide effective cooperation with other states in the investigation and prosecution of crimes under international law. In addition, there are a number of inadequate human rights safeguards governing extradition and mutual legal assistance.

7.1. EXTRADITION

Ghana faces various obstacles, both when seeking extradition of persons suspected of committing crimes under international law (or persons who have been convicted of such crimes but who have not completed their sentences) from other states (active extradition) and when responding to requests by other states for extradition from Ghana of suspects or sentenced persons who have escaped (passive extradition). The legal frameworks for active and passive extradition are explained below and then the obstacles to extradition, whether active or passive, are then described, noting any differences in approach depending on whether the extradition is active or passive (Section 7.1.1). Human rights safeguards or their absence are discussed in Section 7.1.2.

Active extradition. Requests by Ghana for extradition from other countries are generally regulated by bilateral and multilateral treaties, and it does not appear that they can be made in the absence of a treaty. Although the Extradition Act, 1960 (Extradition Act) establishes the legal framework for passive extradition (see below), this law does not explicitly outline the procedure for active extradition. Only Section 15 of the Extradition Act appears to address active extradition, establishing that a person extradited to Ghana may not generally be tried for any previous crime, only for the crime upon which the extradition is grounded, and that a person extradited to Ghana may be released at the discretion of the Minister if that person is not tried within six months.²⁶⁹

Passive extradition. Extradition from Ghana is governed by the 1960 Extradition Act, which anchors and incorporates bilateral and multilateral agreements.²⁷⁰ The Extradition Act sets forth general requirements for extradition, specifically as applied to Commonwealth countries.²⁷¹ There does not appear to be any legislation expressly addressing extradition from Ghana to countries outside of the Commonwealth, although case law indicates that in practice courts look to the Extradition Act to regulate extraditions even to countries outside of the Commonwealth.²⁷² It does not appear that

²⁶⁹ Extradition Act, 1960 (Act 22) (Extradition Act), sect. 15.

²⁷⁰ Extradition Act, sect. 1. As of 1 September 2012, the 1960 Extradition Act governs extradition to and from Ghana, but Amnesty International understands that the Extradition Act may soon be amended or replaced.

²⁷¹ Extradition Act, sect. 3.

²⁷² See *Republic v. Director of Prisons (Ex Parte Yeboah)*, 1 GLR 91 (1984-86) (applying provisions of the Extradition Act, 1960 to an extradition request made by the United States); *State v. Director of Prisons (Ex Parte Schumann)*, GLR 703 (1966) (applying provisions of the Extradition Act, 1960 to an extradition request made by

extradition can be granted in the absence of an agreement.²⁷³ Under the Act, extradition may be made for certain specified serious offences – including murder, rape, and abduction – which, in certain circumstances, could amount to crimes under international law.²⁷⁴ (However, the same reasons that make prosecution of persons for ordinary crimes under national law unsatisfactory when that conduct constitutes crimes under international law – see Section 6.1 above – apply with equal force to extradition.). The Constitution does not clarify which takes precedence in case of a conflict between provisions of the Extradition Act and the requirements of a ratified treaty (see Section 2.2 above for discussion on the status of international law).

Passive extradition – bilateral treaties. Despite repeated requests by Amnesty International to the Ministry of Foreign Affairs and Regional Integration, it has not been possible to locate a complete list of bilateral extradition treaties to which Ghana is a party. However, Ghana is a party to an antiquated bilateral treaty with the United Kingdom²⁷⁵ and that treaty has also been made applicable to the USA.²⁷⁶

Multilateral agreements. As discussed below, Ghana is also a participant in a number of multilateral agreements addressing extradition, including the Economic Community of West African States Convention on Extradition, which covers extradition between fifteen West African member states,²⁷⁷

Germany).

²⁷³ Section 1 of the Extradition Act states:

“(1) Where an arrangement has been made with a country with respect to the surrender to that country of a fugitive criminal, the President may, by legislative instrument, order that this Act shall apply in the case of that country, subject to the conditions, exceptions and qualifications specified in the order, and [Part One] shall apply accordingly.

(2) An order under subsection (1) shall recite or embody the terms of the arrangement, and shall not remain in force for a longer period than the arrangement.

(3) An order under this section shall be laid before Parliament.”

Without a recent list of bilateral extradition treaties or an updated list of countries covered by the Extradition Act, it is not possible accurately to account for how extradition to individual states (including states discussed in this chapter) would be handled in a particular case. According to a senior official in the Ministry of Justice Office of International Cooperation, it is not possible to extradite without a treaty, but deportation is possible.

²⁷⁴ Extradition offences currently include: homicide and similar offences; abduction, rape and similar offences; misappropriations, fraud and similar offences; forgery and similar offences; damage to property and similar offences; piracy and similar offences; perjury and similar offences; slave dealings; offences dealing with dangerous drugs; falsification of currency and similar offences; and any other offence punishable on indictment. The President may, by legislative instrument, amend the list of extradition offences. Extradition Act, sect. 29 & Schedule 1.

²⁷⁵ Extradition treaty between the United Kingdom and Ghana, ratifications exchanged in London, 4 August 1932 (<http://internationalextraditionblog.files.wordpress.com/2011/03/ghana.pdf>).

²⁷⁶ Extradition treaty between the United States and Ghana, T.S. 849; 1931 U.S.T. LEXIS 60; 12 Bevans 482; entered into force 24 June 1935 (<http://internationalextraditionblog.files.wordpress.com/2011/03/ghana.pdf>).

²⁷⁷ Economic Community of West African States Convention on Extradition (ECOWAS Extradition Convention)

and the London Scheme for Extradition within the Commonwealth, which makes recommendations for extradition between fifty-four nations in the Commonwealth.²⁷⁸ Although extradition may be granted to other countries who have signed these agreements, as noted above in Section 2, regulating provisions of these instruments are not enforceable under the laws of Ghana unless they are ratified and incorporated into national legislation.²⁷⁹ However, as a signatory to the ECOWAS Extradition Convention, Ghana has agreed to act in good faith not to defeat the object and purpose of that treaty,²⁸⁰ and, as a member of the Commonwealth, Ghana is encouraged to adopt legislation giving effect to the London Scheme.²⁸¹ Ghana has not amended its legislation since the 1960 Extradition Act to implement either the ECOWAS Extradition Convention or the non-binding London Scheme. Some provisions in these agreements contain obstacles to extradition, such as: exceptions to extradition for military offences, exceptions to extradition for amnesties and *ne bis in idem* prohibitions.

Procedure. The Extradition Act provides that a diplomatic representative or consular officer of a foreign country may make a request to a Ghanaian Minister²⁸² for the surrender of a person

(http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/4ConExtradition.pdf). The fifteen members of ECOWAS are: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

²⁷⁸ London Scheme for Extradition within the Commonwealth (London Scheme), November 2002 (http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf). The 54 members of the Commonwealth are : Antigua and Barbuda, Australia, the Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Cameroon, Canada, Cyprus, Dominica, Fiji Islands, the Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Rwanda, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, United Republic of Tanzania, Vanuatu, and Zambia. The Fiji Islands are currently suspended from the Commonwealth.

²⁷⁹ See 1992 Constitution, Ch. VIII, art. 75 (2).

²⁸⁰ As of 1 September 2012, all attempts by Amnesty International to determine whether Ghana had ratified this treaty in requests for information from ECOWAS, the depository of the treaty, and the Ghanaian Ministry of Foreign Affairs, were unsuccessful (one senior official in this ministry claimed that Ghana had ratified this treaty, but provided no documentary proof). Although for the purposes of determining state responsibility it matters whether Ghana has ratified this treaty or not, it does not matter for purposes of this paper since regardless of the ratification status it has not been implemented in national law and, therefore, cannot be enforced by Ghana courts.

²⁸¹ See London Scheme, para. 22. The London Scheme is a non-binding agreement on principles between Commonwealth nations. Kimberly Prost, 'Cooperation in Penal Matters in the Commonwealth', *International Criminal Law, Volume II: Multilateral and Bilateral Enforcement Mechanisms*, M. Cherif Bassiouni (ed.), Leiden: Martinus Nijhoff Publishers / Brill, 3rd ed., 2008, pp. 414 – 423.

²⁸² The Extradition Act does not specify which Minister is entrusted with this responsibility, only stipulating that he or she is a Minister given this authority by the President. See Extradition Act, sect. 30. According to a senior official in the Ministry of Justice Office of International Cooperation, this is carried out by the Minister of Justice and Attorney General, in consultation with the Ministry of Foreign Affairs.

suspected to be in the territory of Ghana who is accused or convicted of an extradition offence.²⁸³ If the Minister is satisfied that the offence at issue is not of a political character (see Section 7.1.1.4 below), the Minister apparently has complete discretion whether to apply to a District Magistrate for a warrant of arrest for that person or to take no action on the request.²⁸⁴ If the Magistrate is satisfied on the evidence, he or she may issue a warrant for the person sought.²⁸⁵

Alternatively, a Magistrate may issue a warrant for the arrest of a person accused or convicted of an extradition offence based on information or a complaint received by the Magistrate or after other proceedings.²⁸⁶ If a Magistrate issues a warrant for extradition on his or her own initiative, a report of the facts at issue and the evidence on which the warrant is based must be sent back to the Minister, and – within a reasonable time frame established by the Magistrate – the Minister must determine, in his or her complete discretion, whether the warrant should be cancelled and the person sought discharged or whether the warrant should issue.²⁸⁷

Once arrested, the person sought must be brought before a District Magistrate within 24 hours.²⁸⁸ Exercising the same jurisdiction and powers as would be exercised under criminal jurisdiction, the District Magistrate may receive evidence from the person sought to show that the offence at issue is of a political character or is not an extradition offence.²⁸⁹ If this is not proven, the Magistrate must place the person in prison for fifteen days during which time the detained may apply for a writ of *habeas corpus*. At the expiration of this period or another period determined by the Magistrate, or if the Magistrate denies the writ, the person sought may be surrendered to an authorized representative of the foreign country.²⁹⁰

The Extradition Act also provides for the reciprocal backing of arrest warrants, which allows Ghana to execute arrest warrants issued in foreign countries that a District Magistrate has endorsed in Ghana.²⁹¹ A diplomatic representative or consular officer of the country must first make an application for the endorsement and execution of such a warrant.²⁹² Even without an authorized warrant from a foreign country, a Magistrate in Ghana may issue a provisional arrest warrant based on information and evidence which demonstrate to the Magistrate that the person sought is accused

²⁸³ See Extradition Act, sect. 29 & Schedule 1.

²⁸⁴ The Minister may refuse to make an order to a Magistrate if he or she determines the offence to be of a political character. Extradition Act, sect. 7.

²⁸⁵ Extradition Act, sect. 8 (1) (a).

²⁸⁶ Extradition Act, sect. 8 (1) (b).

²⁸⁷ Extradition Act, sect. 8 (2) & (4).

²⁸⁸ Extradition Act, sect. 8 (3).

²⁸⁹ Extradition Act, sect. 9.

²⁹⁰ Extradition Act, sects. 2 (5), 11.

²⁹¹ See Extradition Act, sects. 16 - 18, 22.

²⁹² Once this application is submitted to the appropriate Ghanaian Minister, it is then transferred to the District Magistrate to proceed. Extradition Act, sect. 22.

of an offence that would be punishable under the laws of Ghana had the offence been committed within the jurisdiction of the Magistrate. In this case, the original warrant must be produced and endorsed within a reasonable amount of time determined by the Magistrate or the person sought will be discharged.²⁹³ In circumstances necessitating the reciprocal backing of arrest warrants, a District Magistrate may refuse or place limits on this exercise because the case is trivial in nature, because the application for return was made in bad faith or not otherwise in the interests of justice, or if endorsing the application would be unjust, oppressive, or impose too severe a punishment on the person sought.²⁹⁴

The Extradition Act appears to cover all forms of granting extradition requests by foreign countries, but it is possible that other forms of transfer from Ghana, such as deportation to another country, are covered when the deportation or transfer is a disguised extradition, although there does not seem to be any authoritative judicial decision or executive interpretation on this point.²⁹⁵

7.1.1. OBSTACLES TO ACTIVE AND PASSIVE EXTRADITION

There are a number of obstacles to active and passive extradition to and from Ghana, including: political control over the making or granting of requests, a double criminality requirement and a prohibition of extradition for offences deemed political in character.

7.1.1.1. Political control over the making or granting of extradition requests

Although not explicitly stated in the Extradition Act, in practice requests for extradition by Ghana to a foreign country (active extradition) are made by the Attorney General and Minister of Justice, a political official, in consultation with the Ministry of Foreign Affairs and Regional Integration.

In general, decisions with respect to granting requests by foreign countries to Ghana (passive extradition) are made by the Attorney General and Minister of Justice, a political official.²⁹⁶ When

²⁹³ See Extradition Act, sect. 19.

²⁹⁴ Extradition Act, sect. 21.

²⁹⁵ The difference between deportation and extradition has been explained by the Constitutional Court of South Africa as follows:

“In principle there is a clear distinction between extradition and deportation. Extradition involves basically three elements: acts of sovereignty on the part of two states; a request by one state to another state for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial or sentence in the territory of the requesting state. Deportation is essentially a unilateral act of the deporting state in order to get rid of an undesired alien. The purpose of deportation is achieved when such alien leaves the deporting state's territory; the destination of the deportee is irrelevant to the purpose of deportation. One of the important distinguishing features between extradition and deportation is therefore the purpose of the state delivery act in question.”

Mohamed v. President of the Republic of South Africa, Judgment, Case No. CCT 17/01, Const. Ct. So. Afr., 28 May 2001, para. 29 (citations omitted). See also Clive Nicholls, Clare Montgomery and Julian B. Knowles, *The Law of Extradition and Mutual Assistance – International Criminal Law: Practice and Procedure*, London: Cameron, 2002, Sect. 12.7 (noting that there was a conflict of authority on whether English courts could inquire into the circumstances of a transfer to the United Kingdom and whether it involved an abuse of process).

²⁹⁶ See Extradition Act, sect. 30. Although the Extradition Act does not designate which Minister has this

this Minister orders the issuance of a warrant based on a diplomatic or consular request, his or her discretion is subject to judicial review. However, in cases where the Minister has not ordered a warrant based on a diplomatic or consular request but rather a Magistrate issued the warrant acting on his or her own information, the Minister is able to review the warrant and could determine that the warrant should be cancelled and the person sought discharged without further judicial review (see Procedure above), but there is no detailed statutory criteria governing the exercise of such political discretion.

In addition, past practice with regard to requests for surrender by international criminal courts suggests that political considerations may also hinder extradition from Ghana of individuals suspected of committing crimes under international law. In 2003, Ghana failed to execute an international warrant issued by the Special Court for Sierra Leone for the arrest of former Liberian President Charles Taylor, who was charged with committing war crimes and crimes against humanity that fuelled Sierra Leone's civil conflict.²⁹⁷ Observers attributed Ghana's failure to arrest Taylor, while he was in the country for peace talks, to a political decision made by African heads of state.²⁹⁸ More recently, Ghana has failed to execute international arrest warrants and extradition requests seeking the return of individuals suspected of committing crimes under international law associated with post-election violence in Côte d'Ivoire in 2011.²⁹⁹

7.1.1.2. Nationality

There is no prohibition in Ghanaian law on the extradition of nationals. Moreover, Ghanaian case law affirms that Ghana may extradite its own nationals in order to meet its treaty obligations.³⁰⁰

The non-binding London Scheme provides that a country may refuse to extradite a national or permanent resident of its country to another country in the Commonwealth.³⁰¹ Similarly, the ECOWAS Extradition Convention grants states discretion on whether to extradite their own citizens to

authority – only requiring that it be a Minister designated by the President – in practice, this authority is exercised by the Attorney General and Minister of Justice.

²⁹⁷ See Amnesty International, Special Court for Sierra Leone: Amnesty International calls on the government of Ghana to arrest President Charles Taylor, Index: AFR 51/006/2003, June 2003 (<http://www.amnesty.org/en/library/info/AFR51/006/2003/en>); Amnesty International, Nigeria: No impunity for Charles Taylor, Index: AFR 44/024/2003, August 2003 (<http://www.amnesty.org/en/library/info/AFR44/024/2003/en>), p. 2.

²⁹⁸ See AfriMap and OSIWA, *Ghana: Justice Sector and the Rule of Law 24* (2007).

²⁹⁹ See, for example, Associated Press, 'Ivory Coast Ex-Combatants Flee Ghana Refugee Camp', 26 May 2012.

³⁰⁰ See *Republic v. Director of Prisons (Ex Parte Allotey and Another)*, 2 GLR 480, 486 (1973) (stating that, under the *aut punire aut dedere* principle of international law, the refusal to extradite nationals is generally justified where states will exercise jurisdiction over these nationals; however, this policy does not comport in a case for which Ghanaian courts cannot exercise jurisdiction), affirmed by *Republic v. Director of Prisons (Ex Parte Allotey and Another, No. 2)*, 2 GLR 385, 387 (1974).

³⁰¹ According to this provision, nationality is to be determined at the time of the extradition request. See London Scheme, para. 15 (3).

other West African countries;³⁰² these measures are not enforceable without implementing legislation.

7.1.1.3. Double criminality and territorial jurisdiction

Although the Extradition Act does not contain an express provision requiring double criminality for the granting of extradition requests, a double criminality requirement is implicit in the Act since it only includes offences already listed in the Ghana Criminal Code as extradition offences.³⁰³ Moreover, Ghana courts recognize a common law condition of double criminality in extradition cases.³⁰⁴ Thus it is possible that Ghana may refuse to extradite a suspect for trial or to serve a sentence if the act or omission constituting the offence for which extradition is requested would not also constitute a crime under the laws of Ghana.

In addition, the non-binding London Scheme provides that an extradition offence within the Commonwealth is an offence punishable by at least two years' imprisonment in both the requesting and requested state.³⁰⁵ Similarly, the ECOWAS Extradition Convention, which Ghana has signed, provides that extradition to and from other West African states will not be granted for offences punishable by less than two years' imprisonment both in the requesting and requested state.³⁰⁶ However, neither provision is enforceable under the laws of Ghana without being implementing legislation.

The Extradition Act does not make clear whether Ghana must also have extraterritorial jurisdiction over the act or omission if the requesting state is seeking to exercise extraterritorial jurisdiction.³⁰⁷ In

³⁰² According to this provision, nationality is to be determined at the time of the extradition request. See ECOWAS Extradition Convention, art. 10.

³⁰³ See Extradition Act, Schedule 1.

³⁰⁴ See *Republic v. Director of Prisons (Ex Parte Allotey and Another)*, 2 GLR 480, 486 (1973), affirmed by *Republic v. Director of Prisons (Ex Parte Allotey and Another, No. 2)*, 2 GLR 385, 387-88 (1974); Interview with Supreme Court Justice, in Accra, Ghana (27 June 2012); Interview with Chief State Attorney, Ministry of Justice Office of International Cooperation, in Accra, Ghana (27 June 2012).

³⁰⁵ London Scheme, para. 2 (2).

³⁰⁶ In the case where an extradition request is based on multiple offences, some of which are punished by a deprivation of liberty not reaching two years, the sending state may still grant extradition for the extraditable offence that has a punishment reaching two years. ECOWAS Extradition Convention, art. 3.

³⁰⁷ The ECOWAS Extradition Convention provides that a requested state may refuse to extradite a person for an offence that occurred in its territory. It also provides that a requested state may only refuse extradition on extraterritorial jurisdiction grounds if the offence for which extradition is sought occurs outside the requested states' territory and its law also does not allow prosecution for the same category of offence when committed outside its territory or does not allow for extradition of the offence. ECOWAS Extradition Convention, art. 11.

The London Scheme provides that an otherwise extraditable offence remains so notwithstanding its commission outside the territory of the requesting state where extradition for such offences is permitted under the law of the requested state. London Scheme, para. 2(4). The London Scheme also permits a competent authority to refuse extradition if the offence for which extradition is requested has been committed outside the territory of either the

addition, it does not indicate whether the conduct would have to be criminal in Ghana at the time of the crime's commission, at the time of the extradition request, or when extradition is to take place. (For a more detailed discussion of the concept of double criminality under international law, see Section 6.4 above.)

7.1.1.4. Political offence

The Extradition Act provides that no one will be extradited for an offence that is "of a political character."³⁰⁸ Similarly, the Act prohibits Ghanaian courts and law enforcement agencies from endorsing and executing a foreign arrest warrant if the offence for which the warrant was issued is "of a political character" or if it appears to the designated Minister or a court of competent jurisdiction that the request was in fact made to punish the person sought for an offence of a political character.³⁰⁹ Under Ghanaian case law, one may demonstrate that an offence is of a political character by showing (1) some political disturbance or upheaval or some physical struggle between two opposing political parties for the mastery of the government of the country, which the offence at issue was committed to further; (2) that the offence was committed in association with a political object or with a view to avoiding political persecution or prosecution for political defaults; or (3) other similar activities.³¹⁰ There is no exception in Ghanaian legislation or jurisprudence from the concept of an offence that is "of a political character" for crimes under international law.

Political offence exceptions to extradition are also found in the non-binding London Scheme and the ECOWAS Extradition Convention, both of which apply to Ghana.³¹¹ Including a political offence exception to extradition is not in itself a problem. The problem arises when states fail to define political offences – or, in the case of Ghana, "offences of a political character" – in a manner that expressly excludes crimes under international law.

requesting or requested country and the law of the requested country does not enable it to assert jurisdiction over such an offence committed outside its territory in comparable circumstances. London Scheme, para. 14 (b).

³⁰⁸ Extradition Act, sect. 2 (2).

³⁰⁹ Extradition Act, sect. 23.

³¹⁰ *State v. Director of Prisons (Ex Parte Schumann)*, GLR 703, 709-12, 719-26 (1966) (holding that murders of the mentally ill and sterilizations of Jews committed under the order of the ruling Nazi regime do not constitute offences of a political character as it has not been shown that the victims and appellant were part of a political struggle nor did the appellant proffer that he committed the crimes to avoid political persecution or prosecution). See also *Republic v. Director of Prisons (Ex Parte Yeboah)*, 1 GLR 91, 95-96 (1984-86) (holding that the appellant failed to demonstrate extradition for offences of a political character when he was sought for financial crimes committed abroad wholly unrelated to intelligence gathering activities he claims he carried out in Ghana in the past); *Government of Sierra Leone v. Jumu*, GLR 1058 (1968) (upholding denial of extradition of respondent, a former Sierra Leone military official who demonstrated that his extradition for the minor crime of false imprisonment during a period of political unrest was pretext for a treason charge).

³¹¹ The ECOWAS Extradition Convention provides that extradition will not be granted to another West African nation for a political offence or for "an offence connected with a political offence." ECOWAS Extradition Convention, art. 4. In addition, the London Scheme states that extradition will be precluded within the Commonwealth if the competent authority "is satisfied that the offence is of a political character." London Scheme, para. 12 (a).

There is no internationally agreed definition of what constitutes a political offence.³¹² Some guidance is provided by treaties such as the Genocide Convention, which expressly states that genocide is not a political crime for the purposes of extradition,³¹³ and the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism, both of which exclude the crimes listed from the definition of political offence.³¹⁴ When the offence concerned is a crime under international law, it should not be treated as a political offence for the purposes of extradition. The non-binding London Scheme and the ECOWAS Extradition Convention both exclude some crimes under international law from the political offence exception,³¹⁵ as do treaties imposing *aut dedere aut judicare* obligations

³¹² There is no internationally accepted definition of a political offence. A leading authority on extradition has stated:

“Even though widely recognized, the very term “political offence” is seldom defined in treaties or national legislation, and judicial interpretations have been the principle source for its meaning and its application. This may be due to the fact that whether or not a particular type of conduct falls within that category depends essentially on the facts and circumstances of the occurrence. Thus, by its very nature it eludes a precise definition, which could constrict the flexibility needed to assess the facts and circumstances of each case”.

M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, Dobbs Ferry, New York: Oxford University Press – Oceana, 5th ed., 2007, p. 653 (footnotes omitted).

³¹³ Genocide Convention, art. VII states: “Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.”

³¹⁴ The International Convention for the Suppression of Terrorist Bombing, art. 11, and the International Convention for the Suppression of the Financing of Terrorism, art. 14, state:

“None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives”.

³¹⁵ The ECOWAS Extradition Convention states that the political offence exception does not amend states’ obligations under the Geneva Conventions, its Additional Protocols, and other multilateral international conventions. ECOWAS Extradition Convention, art. 4. The London Scheme, para. 12 (b), states that the political offence exception does not apply to:

“(i) offences established under any multilateral international convention to which the requesting and requested countries are parties, the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or prosecute the person sought;

(ii) offences for which the political offence or offence of political character ground of refusal is not applicable under international law”.

with respect to the crimes defined in those treaties.³¹⁶

7.1.1.5. Military offence

Ghanaian law does not contain any provision expressly barring extradition for purely military offences, such as conduct unbecoming an officer or mutiny.

However, the non-binding London Scheme permits states to refuse extradition within the Commonwealth on the grounds that the offence for which extradition is sought is an offence only under military law or a law relating to military obligations.³¹⁷ Similarly, the ECOWAS Extradition Convention, which Ghana has signed, bars extradition to other West African countries when extradition is sought for an offence under military law that is not also an offence under ordinary criminal law.³¹⁸ Neither the London Scheme nor the ECOWAS Extradition Convention is enforceable in Ghana without implementing legislation.

7.1.1.6. *Ne bis in idem*

The Extradition Act does not expressly prohibit the extradition of a suspect for trial if the person has been previously acquitted or convicted, although this limitation may be implicit in the double jeopardy provision in the Constitution.³¹⁹

The non-binding London Scheme provides that extradition may not be granted to Commonwealth countries if a competent official with authority to grant extradition requests is satisfied that the person sought has been convicted or has been acquitted, whether within or outside the Commonwealth, for the offence for which extradition is sought.³²⁰ Similarly, the ECOWAS Extradition Convention, which Ghana has signed, prohibits extradition to other West African states if competent authorities have passed a final judgment on the person sought for the offences underlying the extradition request.³²¹ The Convention also allows states to refuse extradition if proceedings are pending for the same offences.³²² However, these instruments are not enforceable without implementing national legislation (see discussion above in Section 6.7 regarding the limitations of the *ne bis in idem* prohibition under international law).

³¹⁶ See treaties discussed in Section 4.2 above.

³¹⁷ London Scheme, para. 14 (d).

³¹⁸ ECOWAS Extradition Convention, art. 7.

³¹⁹ See 1992 Constitution, Ch. V, art. 19 (7).

³²⁰ See London Scheme, para. 13(c).

³²¹ This includes situations where competent authorities have decided either not to institute or to otherwise terminate proceedings for the same offences. ECOWAS Extradition Convention, art. 13.

³²² ECOWAS Extradition Convention, art. 12.

7.1.1.7. Non-retroactivity

There is no express prohibition in the Extradition Act of extradition on the basis that the conduct was not a crime under the law of the requesting state or of Ghana at the time it occurred, although this restriction may be implicit in any double criminality requirement read into the Extradition Act (discussed in Section 7.1.1.3 above) and in the non-retroactivity provision of the Constitution.³²³ (See discussion above in Section 6.6 regarding the inapplicability of the prohibition of retroactive criminal law to *national* law enacted after the conduct became criminal under *international* law).

7.1.1.8. Statutes of limitation

There is no express prohibition in the Extradition Act of extradition on the basis that the prosecution would be barred in the requesting state or in Ghana on the basis of a statute of limitation, although it may be implicit in any double criminality requirement read into that Act (discussed in Section 7.1.1.3 above).

The non-binding London Scheme provides that states should refuse extradition to other Commonwealth countries if satisfied that “the passage of time since the commission of the offence” would make extradition unjust, oppressive, or too severe a punishment.³²⁴ In addition, states may refuse extradition under this instrument if the person sought has gained immunity due to a lapse of time, among other reasons.³²⁵

Similarly, the ECOWAS Extradition Convention, which Ghana has signed, prohibits extradition when, according to the law of either state, the person sought has “become immune by reason of lapse of time from prosecution or punishment, at the time of receipt of the request for extradition by the requested [s]tate.”³²⁶ Neither the London Scheme nor the ECOWAS Extradition Convention is enforceable in Ghana without implementing legislation (see discussion above in Section 6.3 regarding the prohibition of statutes of limitations for crimes under international law).

7.1.1.9. Amnesties, pardons and similar measures of impunity

There is no provision in the Extradition Act prohibiting extradition on the basis that the prosecution would be barred in either the requesting state or in Ghana on the basis of an amnesty, pardon or other measure of impunity.

The non-binding London Scheme permits states to refuse extradition on the grounds that the person sought has been given an amnesty.³²⁷ Similarly, the ECOWAS Extradition Convention, which Ghana

³²³ See 1992 Constitution, Ch. V, art. 19 (5). However, the Extradition Act makes clear that extradition may be granted for offences committed before the enactment of the Extradition Act and for offences committed in foreign countries before the Extradition Act was applied to those countries. See Extradition Act, sect. 5.

³²⁴ London Scheme, para. 13 (b) (iii).

³²⁵ London Scheme, para. 14 (b).

³²⁶ ECOWAS Extradition Convention, art. 15.

³²⁷ London Scheme, para. 14 (c).

has signed, prohibits extradition when the requested state has granted an amnesty for the offence and it would have otherwise had competence to prosecute the offence under its own criminal law.³²⁸ However, these instruments are not enforceable under Ghanaian law without implementing legislation (See discussion above in Section 6.10 regarding the prohibition of amnesties and similar measures of impunity).

7.1.1.10. Other obstacles

Ad hoc court. Under the ECOWAS Extradition Convention, which Ghana has signed, extradition to another West African state may be refused if the person sought “has been sentenced, or would be liable to be tried, in the requesting [s]tate by an extraordinary or Ad Hoc Court or Tribunal”.³²⁹ To the extent this provision applies to requests for surrender by *ad hoc* International Criminal Tribunals for the former Yugoslavia and for Rwanda, then the provision is an obstacle to international justice. However, to the extent that it prohibits extradition to a state that has a special court that has replaced an ordinary court with regular procedures, then it is a human rights safeguard.³³⁰ Without being incorporated into national legislation, however, this provision is not enforceable under the laws of Ghana.

Territorial requirement. For active extradition, there is no express requirement under Ghanaian law that an accused has been in Ghana at any point before Ghana can make an extradition request. Therefore, Ghana can play an effective role in enforcing international criminal law by being able to open investigations and seeking extradition of suspects to stand trial in Ghana, even if those suspects have never been to Ghana.

7.1.2. SAFEGUARDS

The Extradition Act expressly provides for only one human rights safeguard discussed below. The Act has a speciality rule, which limits the scope of crimes for which Ghana and other states may exercise extradition to those offences listed in their extradition requests. Aside from this consideration, the Extradition Act does not expressly provide human rights safeguards with respect to the granting or requesting of extradition. However, it is possible that Ghana may refuse extradition in cases where the person to be extradited faces an unfair trial or torture based on the Constitution’s fundamental human rights guarantees.

7.1.2.1. Fair trial

There is no express prohibition in Ghanaian law of the extradition of a suspect or convicted person on the grounds that he or she risks facing an unfair trial, although this may be implied from the fair

³²⁸ ECOWAS Extradition Convention, art. 16.

³²⁹ ECOWAS Extradition Convention, art. 8.

³³⁰ See Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (“Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”).

trial guarantees in the Constitution.³³¹ The only implicit prohibition in Ghanaian law on the surrender of a suspect or convicted person on the grounds that he or she risks facing an unfair trial is found in Section 21 of the Extradition Act. Section 21 provides that a District Magistrate may refuse or place limits on the backing of an arrest warrant issued in a foreign country because it appears to the Magistrate that the case is trivial in nature, because the application for return was made in bad faith or not otherwise in the interests of justice, or if endorsing the application would be unjust, oppressive, or impose too severe a punishment on the person sought.³³²

The non-binding London Scheme provides that extradition is precluded if a competent authority is satisfied that these considerations are at issue;³³³ it also permits states to refuse extradition on the grounds that the person sought has been tried *in absentia*.³³⁴ The ECOWAS Extradition Convention, which Ghana has signed, provides that extradition will not be granted to other West African states if the person sought has not received, or would not receive, “the minimum guarantees in criminal proceedings, as contained in Article 7 of the African Charter on Human and People’s Rights”.³³⁵ The Convention also permits states to refuse extradition on the grounds that the person sought has been tried *in absentia* if the requested state believes that the proceedings leading to the judgment did not satisfy the minimum rights of defendants.³³⁶ This instrument is not enforceable in Ghana without implementing legislation.

7.1.2.2. Torture and other cruel, inhuman or degrading treatment or punishment

There is no express prohibition in Ghanaian law of extradition of a suspect or convicted person on the ground that he or she might face torture or other ill-treatment, although this may be implicit in the Constitution’s prohibition of torture.³³⁷

The non-binding London Scheme does not have this human rights safeguard. Although the ECOWAS Extradition Convention expressly prohibits extradition of a person that has been, or would be, subjected to torture or cruel, inhuman or degrading treatment or punishment,³³⁸ this safeguard is not enforceable in Ghana because it has not been incorporated into national legislation.

7.1.2.3. Death penalty

There is no express prohibition in Ghanaian law of extradition of a suspect or convicted person on

³³¹ See 1992 Constitution, Ch. V, art. 19.

³³² Extradition Act, sect. 21.

³³³ See London Scheme, para. 13 (a) (ii), (b).

³³⁴ See London Scheme, para. 14 (a).

³³⁵ ECOWAS Extradition Convention, art. 5.

³³⁶ However, extradition should be granted if the requesting state guarantees the person sought a retrial safeguarding the rights of defence. ECOWAS Extradition Convention, art. 14.

³³⁷ See 1992 Constitution, Ch. V, art. 15 (2).

³³⁸ ECOWAS Extradition Convention, art. 5.

the grounds that he or she might face the death penalty. Ghana is abolitionist in practice, but it has not yet abolished this penalty (see discussion above in Section 2.1).³³⁹

The ECOWAS Extradition Convention only prohibits extradition on death penalty grounds if the requested state's law does not provide for the death penalty as punishment for the offence.³⁴⁰ The non-binding London Scheme permits refusal of extradition on the same grounds.³⁴¹ However, neither provision is enforceable in Ghana without being incorporated into national legislation.

The death penalty is the ultimate denial of human rights. It is the premeditated and cold-blooded killing of a human being by the state. This cruel, inhuman and degrading punishment is done in the name of justice. It violates the right to life as proclaimed in the Universal Declaration of Human Rights. Amnesty International opposes the death penalty in all cases without exception regardless of the nature of the crime, the characteristics of the offender, or the method used by the state to kill the prisoner.

7.1.2.4. Other human rights safeguards

The Extradition Act does not contain any other human rights safeguards.

The non-binding London Scheme prohibits extradition to Commonwealth countries if a competent authority determines that the request for surrender, although purportedly made for an extradition offence, was in fact made to prosecute or punish the requested person on account of race, religion, sex, nationality, or political opinion.³⁴²

Similarly, the ECOWAS Extradition Convention, which Ghana has signed, does not permit extradition if the request for extradition, though superficially made for an ordinary criminal offence, has in fact been made for the purpose of prosecuting or punishing the person sought on account of race, tribe, religion, nationality, political opinion, sex or status.³⁴³ This provision, which concerns extradition among West African states, is not enforceable in Ghana without implementing legislation.

7.1.2.5. Humanitarian concerns

There is no express provision in Ghanaian law barring extradition because of humanitarian concerns, whether such a decision would be made by a court or a political official.

The non-binding London Scheme does not contain this provision with respect to Commonwealth countries. However, the ECOWAS Extradition Convention, which Ghana has signed, permits states to refuse extradition to other West African states when it would be "incompatible with humanitarian

³³⁹ Amnesty International, *Abolitionist and Retentionist Countries* (<http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>).

³⁴⁰ ECOWAS Extradition Convention, art. 17.

³⁴¹ See London Scheme, para. 15 (2).

³⁴² See London Scheme, para. 13 (a) (i).

³⁴³ ECOWAS Extradition Convention, art. 4 (3).

considerations in view of age or health.”³⁴⁴ This provision is not enforceable under the laws of Ghana because it has not been incorporated into national legislation.

Prohibiting extradition on the basis of humanitarian concerns in certain circumstances can be appropriate. However, it should be noted that this safeguard could be abused, as it was in the *Pinochet* case, particularly if a political official has discretion to deny extradition on this ground.

7.1.2.6. Speciality

The Extradition Act generally limits the scope of crimes for which Ghana may exercise jurisdiction to those listed in its extradition request. An exception can be made, however, if the surrendering country authorizes Ghana courts to exercise jurisdiction for additional offences or if the person sought “having had an opportunity to leave the Republic has not done so within thirty days of final discharge in respect of the offence for which that person was surrendered or has returned to the Republic after leaving it.”³⁴⁵ Likewise in cases of passive extradition, Section 3 of the Extradition Act generally limits the scope of the crimes for which a foreign country may exercise jurisdiction to those listed in its extradition request unless the Ghanaian government authorizes the foreign country to exercise jurisdiction for another offence not listed in the extradition request or if the person sought “having had an opportunity to leave the territory of the [foreign] country, has not done so within thirty days of final discharge in respect of the offence for which that person was surrendered or has returned to the territory of that [foreign] country after leaving it.”³⁴⁶

The ECOWAS Extradition Convention has speciality guidelines both for active and passive extradition,³⁴⁷ and the non-binding London Scheme also has a speciality rule.³⁴⁸ Neither instrument, however, is binding in Ghana.

7.2. MUTUAL LEGAL ASSISTANCE

The Mutual Legal Assistance Act, 2010 provides for the granting of mutual legal assistance in criminal matters between Ghana and the following foreign states and entities: member states of the Commonwealth, member states of the Economic Community of West African States, member states of the African Union, state parties to the United Nations Convention against Corruption, state parties to the African Union Convention on Preventing and Combating Corruption, as well as international assistance to the International Criminal Court.³⁴⁹ According to information provided by a number of

³⁴⁴ ECOWAS Extradition Convention, art. 6.

³⁴⁵ See Extradition Act, sect. 15.

³⁴⁶ Extradition Act, sect. 2 (3) (a); See *Government of Sierra Leone v. Jumu*, GLR 1058, 1061 (1968). In cases where the foreign state alters the description of the offence during the course of proceedings, extradition can only be granted where the offence under its new description would still be extraditable to that state under the Extradition Act. Extradition Act, sect. 2 (3) (b).

³⁴⁷ See ECOWAS Extradition Convention, art. 20.

³⁴⁸ See London Scheme, para. 20.

³⁴⁹ Mutual Legal Assistance Act, 2010 (Act 807) (Mutual Legal Assistance Act), sect. 2 & Schedule 1. The central authority of a foreign state may also seek mutual legal assistance from Ghana on behalf of an accused

sources, including a senior government official, in 2012, the Mutual Legal Assistance Act was amended in part; however all attempts by Amnesty International to obtain copies of the 2012 Act did not succeed.³⁵⁰ Therefore, some aspects of the 2010 Mutual Legal Assistance Act discussed below in Section 7.2 may have been modified. The 2010 Act provides that, in the absence of a standing agreement between Ghana and a foreign state or entity, the Attorney General and Minister of Justice may make an 'administrative arrangement' for up to six months allowing the granting of mutual legal assistance to that foreign state or entity.³⁵¹ The central authority which holds responsibility for the making, granting, and execution of mutual legal assistance requests in Ghana is the Ministry of Justice.³⁵²

Mutual legal assistance – bilateral treaties. Despite repeated requests to the Ministry of Justice, it has not been possible to obtain a complete list of bilateral extradition treaties to which Ghana is a party. However, it is a party to an antiquated bilateral treaty with the United Kingdom that contains limited mutual legal assistance provisions in extradition cases.³⁵³ That treaty has also been made applicable to the USA.³⁵⁴

Multilateral agreements. Ghana is also a party to a number of multilateral agreements with mutual legal assistance provisions, including Protocol I to the Geneva Conventions³⁵⁵ and the Convention against Torture.³⁵⁶ The Constitution does not clarify which takes precedence in case of a conflict

person or a legal representative of an accused person who applies to the central authority of that state for this assistance. Sect. 14.

³⁵⁰ These efforts included written requests to obtain copies of the Act from the government and attempts to locate the legislation from comprehensive legal databases cataloguing Ghanaian law, including Lexis Nexis South Africa and DataCenta.

³⁵¹ This provision is only applicable to cases concerning certain specified serious offences under Ghanaian law. Mutual Legal Assistance Act, sect. 4. Serious offences are the following:

“(a) participation in an organised criminal group, terrorism and terrorist financing, money laundering, human trafficking, people smuggling, rape, defilement, illicit trafficking in stolen and other goods, corruption and bribery, serious fraud, counterfeiting and piracy of products, smuggling, extortion, forgery, insider trading and market manipulation;

(b) murder, grievous bodily harm, armed robbery or theft where there are predicate offences for a serious offence; and

(c) any other similar or related, prohibited activity punishable with imprisonment for a period of not less than twelve months”. Sect. 82.

³⁵² Mutual Legal Assistance Act, sect. 6.

³⁵³ Extradition treaty between the United Kingdom and Ghana, ratifications exchanged in London, 4 August 1932 (<http://internationalextraditionblog.files.wordpress.com/2011/03/ghana.pdf>).

³⁵⁴ Extradition treaty between the United States and Ghana, T.S. 849; 1931 U.S.T. LEXIS 60; 12 Bevans 482; entered into force 24 June 1935 (<http://internationalextraditionblog.files.wordpress.com/2011/03/ghana.pdf>).

³⁵⁵ See Protocol I, art. 88.

³⁵⁶ See Convention against Torture, art. 9.

between provisions of the Mutual Legal Assistance Act and the requirements of these ratified treaties (see Section 2.2). As discussed below, regional organizations to which Ghana belongs also have agreements providing for mutual legal assistance, including the Economic Community of West African States Convention on Mutual Assistance in Criminal Matters (ECOWAS Mutual Assistance Convention),³⁵⁷ which Ghana has signed, and the Scheme Relating to Mutual Assistance in Criminal Matters in the Commonwealth (Harare Scheme).³⁵⁸ Provisions of these instruments are not enforceable in Ghana unless they are directly incorporated into national legislation.³⁵⁹ However, as a signatory to the ECOWAS Mutual Assistance Convention, Ghana has agreed to act in good faith not to defeat the object and purpose of the treaty³⁶⁰, and, as a member of the Commonwealth, Ghana is eligible for legislative drafting assistance by the Commonwealth, which is developing a model law to implement the Harare Scheme, to adopt legislation giving effect to the non-binding Harare Scheme.³⁶¹ Some provisions in these agreements contain inappropriate bars to mutual legal assistance, including: political offence exceptions to mutual assistance, *ne bis in idem* prohibitions and double criminality requirements.

7.2.1 UNAVAILABLE OR INADEQUATE PROCEDURES

As discussed below, Ghanaian law provides for a number of mutual legal assistance procedures, either with regard to requests by Ghana for assistance or with regard to requests by foreign states to Ghana for assistance.

7.2.1.1. Conducting investigations

Ghanaian authorities may request that foreign authorities assist in criminal investigations or seek evidence in their states (for example, through letters rogatory (*commissions rogatoires*) for serious crimes. The law also permits Ghanaian authorities to seek evidence and conduct criminal

³⁵⁷ Economic Community of West African States Convention on Mutual Assistance in Criminal Matters (ECOWAS Mutual Assistance Convention), Annex: Document 5, *Cooperating for Peace in West Africa: an Agenda for the 21st Century*, Anatole Ayissi (ed.), Geneva: United Nations Institute for Disarmament Research, 2001, pp. 55 – 74.

³⁵⁸ Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme), October 2005 (http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/2C167ECF-0FDE-481B-B552-E9BA23857CE3_HARARESCHEMERELATINGTOMUTUALASSISTANCE2005.pdf).

³⁵⁹ See 1991 Constitution, Ch. V, sect. 40 (4).

³⁶⁰ As of 1 September 2012, all attempts by Amnesty International to determine whether Ghana had ratified this treaty in requests for information from ECOWAS, the depository of the treaty, and the Ghanaian Ministry of Foreign Affairs, were unsuccessful. Although for the purposes of determining state responsibility it matters whether Ghana has ratified this treaty or not, it does not matter for purposes of this paper since regardless of the ratification status it has not been implemented in national law and, therefore, cannot be enforced by Ghanaian courts.

³⁶¹ The Harare Scheme is a non-binding agreement on principles between Commonwealth nations. See Kimberly Prost, 'Cooperation in Penal Matters in the Commonwealth', *International Criminal Law, Volume II: Multilateral and Bilateral Enforcement Mechanisms* 423 – 435 (2008).

investigations in territories subject to its jurisdiction at the request of a foreign state.³⁶²

Both the Harare Scheme and the ECOWAS Mutual Assistance Convention, neither of which have yet been implemented in national law, also provide for this type of assistance between nations in the Commonwealth and West African states, respectively.³⁶³

7.2.1.2. Tracing, freezing, seizing and forfeiting assets

The Mutual Legal Assistance Act permits foreign authorities to trace, freeze or seize the proceedings of crime (but not apparently other assets) or forfeit assets (apparently any assets) of a suspect or convicted person.³⁶⁴ The reasons for the discrepancy are not known, but they could impede the forfeiture of assets that were not proceeds of crime for reparation to victims.

Both the non-binding Harare Scheme and the ECOWAS Mutual Assistance Convention, neither of which have yet been implemented in national law, also provide for this type of assistance between Commonwealth nations and West African states, respectively.³⁶⁵

7.2.1.3. Video-conferencing and other special measures to present evidence

The Mutual Legal Assistance Act provides for video-conferencing to present evidence under certain limitations³⁶⁶ and also permits “gather[ing] evidence through the use of technology”.³⁶⁷

Neither the non-binding Harare Scheme nor the ECOWAS Mutual Assistance Convention expressly provide for this type of assistance.

7.2.1.4. Acceptance of foreign official documents

Ghanaian authorities may obtain evidence or documents or other articles produced in evidence in a foreign state and may provide such evidence and documents to foreign states if so requested for serious crimes.³⁶⁸ In addition, both the non-binding Harare Scheme and the ECOWAS Mutual

Assistance Convention provide for this type of assistance between Commonwealth nations and West African states, respectively.³⁶⁹

³⁶² See Mutual Legal Assistance Act, sects. 5, 20 - 27, 43-54.

³⁶³ See Harare Scheme, para. 3; ECOWAS Mutual Assistance Convention, art. 2.

³⁶⁴ Mutual Legal Assistance Act, sects. 5 (q), (r), 55.

³⁶⁵ See Harare Scheme, para. 3; ECOWAS Mutual Assistance Convention, art. 2.

³⁶⁶ See Mutual Legal Assistance Act, sect. 41.

³⁶⁷ Mutual Legal Assistance Act, sect. 5 (k).

³⁶⁸ See Mutual Legal Assistance Act, sects. 5 (p), 68 - 72.

³⁶⁹ See Harare Scheme, para. 3; ECOWAS Mutual Assistance Convention, art. 2.

Ghana has the following procedure for providing copies of official documents:

The Attorney General and Minister of Justice, a political official, must first approve a request by the central authority of a foreign state or the competent authority of a foreign entity for the production of a judicial or official record.³⁷⁰ The request must satisfy the requirements – where relevant – of the Mutual Legal Assistance Act Sections 8 (Content of request for mutual legal assistance), (9) (Requests by foreign States and foreign entities), 18 (Request for identification and location of persons), 19 (Request for service of documents) and 55 to 64 (Request by foreign States for confiscation of proceeds or instrumentalities of crime and related court orders). Even if the request meets these requirements, after giving reasonable notice to the person or authorities concerned, the Attorney General and Minister of Justice has broad discretion whether to apply to the High Court or Circuit Court for an order to execute the request.³⁷¹ Section 15 lists seven grounds for refusal of requests for mutual legal assistance, including that the Minister considers that “compliance with the request would prejudice the security, international relations or other essential public interests of the Republic” (see discussion below in Section 7.2.2).³⁷²

The court can consider any representations made by persons to whom the notice was given and then make the order, instructing the registrar of the court to notify the Ministry about this resolution.³⁷³ Then, as soon as possible after being notified, the Ministry of Justice must authorize the appropriate person, body, or authority to make available either (1) copies of the judicial or official records which are publicly available or (2) copies of judicial or official records which are not publicly available subject to conditions imposed.³⁷⁴

To determine the probative value of a record provided by a foreign state and admitted in evidence for purposes of mutual legal assistance, courts in Ghana may examine the record, receive evidence about how the record was written, recorded, stored or reproduced, and draw a reasonable conclusion from the form or content of the record.³⁷⁵ However, without evidence to the contrary, a document or record produced is considered authenticated if signed or certified by a judge or magistrate or if it bears any seal or stamp of a Minister, government department or other competent authority from the foreign state. It may also be authenticated by the oath of a witness or of an officer of the foreign state or entity that sent the document.³⁷⁶

³⁷⁰ ‘Judicial records’ are judgments, orders and decisions of courts and other documents held by judicial authorities, and ‘official records’ include documents held by government ministries, departments or agencies or prosecution authorities. Mutual Legal Assistance Act, sect. 68 (3).

³⁷¹ Mutual Legal Assistance Act., sects. 68, 82.

³⁷² Mutual Legal Assistance Act, sect. 15 (a).

³⁷³ Mutual Legal Assistance Act., sect. 69 (2).

³⁷⁴ Mutual Legal Assistance Act, sect. 69 (3).

³⁷⁵ The same can be done with a copy of an official record. Mutual Legal Assistance Act, sect. 71.

³⁷⁶ Mutual Legal Assistance Act, sect. 73. Before such documents or records can be used in evidence, the party who intends to present them as evidence must give seven days’ notice and a copy of the items to the party against whom the items will be presented. Sect. 74.

7.2.1.5. Recognition and enforcement of awards of reparation

Ghana has a framework in place for the recognition and enforcement of awards of monetary reparation made to victims in foreign states.³⁷⁷ The Courts Act provides that the President may, by legislative instrument, authorize a reciprocal arrangement in respect of enforcement of judgments made in Ghana and in a foreign country.³⁷⁸ After an arrangement has been established between Ghana and that foreign country, judgments made in foreign courts can be enforced in the Ghana. To be enforced, a judgment creditor must first register the judgment in the courts of Ghana within six years of the judgment.³⁷⁹ A foreign judgment will not be registered, however, if it has already been wholly satisfied or if it could not have been enforced by execution in the country of the original court.³⁸⁰

Ghana also has a bilateral arrangement for recognition of its judgments in the United Kingdom. The United Kingdom's reciprocal enforcement framework, guided by its Administration of Justice Act, 1920 and Foreign Judgments (Reciprocal Enforcement) Act, 1933, provides that judgments made in Commonwealth countries – including monetary reparations – can be recognized and enforced in the United Kingdom. Successive orders in council extended this arrangement to Ghana.³⁸¹ Within this framework, judgments made in Ghana can be enforced in the United Kingdom if the judgments have been registered in the United Kingdom within 12 months of the date of judgment or within a longer period by extension.³⁸²

Neither the non-binding Harare Scheme nor the ECOWAS Mutual Assistance Convention expressly provide for this type of assistance.

7.2.1.6. Procedure for requesting and accepting requests for assistance

The general procedure for a foreign state to request assistance from Ghana is as follows: A competent authority must provide the Ghana Ministry of Justice with sufficient basic information to

³⁷⁷ See Courts Act, 1993 (Act No. 459), sects. 81 - 88. See also High Court Rules, Order 71.

³⁷⁸ The judgment to be enforcement must be final and for a specific sum. Courts Act, sect. 81. Contesting judgment debtors may apply to have the judgment registration set aside for jurisdictional, immunity, and other reasons. Sect. 83.

Without a recent list of reciprocal enforcement arrangements, it is not possible to accurately account for how reciprocal recognition and enforcement of judgments for individual states would be handled in a particular case.

³⁷⁹ Courts Act, sect. 82 (1) - (3).

³⁸⁰ Courts Act, sect. 82 (4).

³⁸¹ See Reciprocal Enforcement of Judgments (Administration of Justice Act, 1920, Part II) (Consolidation) Order, 1984.

³⁸² The judgment to be enforced must be final and for a specific sum. Contesting judgment debtors may apply to have the judgment registration set aside for jurisdictional and other reasons. Administration of Justice Act, 1920, Pt. II, sect. 9.

enable Ghana to comply with the request.³⁸³

Ghana may also volunteer to provide legal assistance without a request, but there do not appear to be any statutory criteria governing this decision.³⁸⁴ In the case of a request to confiscate property believed to be located in Ghana, the request must also include details of the property to be traced, restrained, seized or confiscated, and, in case of temporary transfer, the current location of exhibits required in the case.³⁸⁵

³⁸³ Mutual Legal Assistance Act sects. 8 - 9. These requirements include:

- the identity of the authority or entity initiating the request including contact details;
- the nature of the criminal matter including a summary of the facts if applicable and correlative offences and penalties;
- an indication of whether or not criminal proceedings have been instituted;
- an indication of the purpose for which any evidence, information or material is sought;
- specification of the nature of the assistance required, including details of any particular formality or procedure that the foreign state or entity wishes to be followed in Ghana;
- specification of the period within which compliance with the request is desired with stated reasons;
- where criminal proceedings have not been instituted, the offence which the Central Authority of the foreign state or competent authority of the foreign entity has reasonable grounds to suspect has been, is being or will be committed with a summary of the known facts; and
- any other information that may assist in giving effect to the request.

³⁸⁴ See Mutual Legal Assistance Act, sect. 78.

³⁸⁵ Mutual Legal Assistance Act, sect. 8 (f). Section 55 (1) also states:

“Without limiting section 8, a request for the freezing or seizure of property as proceeds of crime shall be accompanied with

- (a) relevant information available to the Central Authority of that foreign state or the competent authority of that foreign entity that may be required for procedures in Ghana,
- (b) a certificate in respect of the property,
- (c) known details of the property in relation to which the request is sought,
- (d) known details of the location and the estimated value of the property,
- (e) the nexus between the serious offence and the property for which the request is made,
- (f) a certified copy of a restraint or confiscation order made in the foreign state where applicable,
- (g) details of any known third party interests in the property, and
- (h) any other, relevant statement.”

Ghana's Attorney General and Minister of Justice can only make requests for mutual legal assistance to foreign states after consultation with the Minister of Foreign Affairs, another political official.³⁸⁶ However, the Mutual Legal Assistance Act simply requires that this official be consulted. It does not give the Minister of Foreign Affairs a veto, but this official could bring improper political considerations into decisions that should be made by an independent professional prosecutor in accordance with neutral criteria. All requests for assistance – whether made by Ghana or by a foreign state – should be in writing, dated and signed, where possible. However, they can also be made orally in exigent circumstances as long as a request in writing follows as soon as practicable.³⁸⁷ Requests made in writing include those made by electronic device or other agreeable means.³⁸⁸

7.2.2 INAPPROPRIATE BARS TO MUTUAL LEGAL ASSISTANCE

Ghanaian law contains a number of inappropriate bars to mutual legal assistance for crimes under international law. These include political offence exceptions to the provision of mutual legal assistance without express exclusion of all crimes under international law; *ne bis in idem* prohibitions; and the broad discretion of the Attorney General and Minister to turn down in whole or in part mutual legal assistance requests. In addition, regional organizations to which Ghana belongs have agreements providing for mutual legal assistance that contain a number of inappropriate bars to mutual legal assistance, including: political offence exceptions to the provision of mutual assistance without express exclusion of all crimes under international law from consideration as political offences, *ne bis in idem* prohibitions, and double criminality requirements.

7.2.2.1. Nationality

There is no provision in Ghanaian law expressly prohibiting the granting of requests for mutual legal assistance when the person concerned is a Ghanaian national.

Neither the non-binding Harare Scheme nor the ECOWAS Mutual Assistance Convention expressly prohibit the granting of requests for mutual legal assistance on the grounds that the assistance concerns a national of the requested state.

7.2.2.2. Political offence

The Mutual Legal Assistance Act does not permit the making or granting of requests for mutual legal assistance with respect to offences “of a political character” or associated offences or proceedings.³⁸⁹ However, for the purposes of mutual legal assistance, a number of crimes under national law of international concern and crimes under international law would not constitute political offences. Section 15 provides that offences within the scope of international conventions imposing *aut dedere aut judicare* obligations to which both Ghana and the foreign state are parties are not offences of a political character under the Act.³⁹⁰ Thus, grave breaches of the Geneva

³⁸⁶ Mutual Legal Assistance Act, sect. 7 (1).

³⁸⁷ Mutual Legal Assistance Act, sects. 7, 9.

³⁸⁸ Mutual Legal Assistance Act, sect. 7 (4), 9 (3).

³⁸⁹ Mutual Legal Assistance Act, sects. 1 (3) (a), 15 (1) (b).

³⁹⁰ Mutual Legal Assistance Act, sect. 15 (2) (a), (b).

Conventions and of Protocol I and torture would not be considered offences “of a political character,” but only if the other state were a party to the relevant treaties. It also states that offences within the scope of an international convention against terrorism are not offences of a political character.³⁹¹ Nevertheless, there is no exclusion for crimes under international law found in international conventions not imposing *aut dedere aut judicare* obligations or found in international conventions not ratified by Ghana or the foreign state. Therefore, crimes against humanity, war crimes in non-international armed conflict, extrajudicial executions and enforced disappearances would be excluded from the concept of “offences of a political character.”

Similarly, the Harare Scheme allows a requested state to refuse provision of mutual assistance on the grounds that the criminal matter at issue concerns an offence that appears, in the opinion of the requested state, to be of a political character.³⁹² Importantly, the Scheme states that crimes under international law found in treaties that contain an *aut dedere aut judicare* clause are excluded from the political offence exception.³⁹³ Likewise, the ECOWAS Mutual Assistance Convention, which Ghana has signed, permits the refusal of mutual assistance on the basis that the requested state regards the offence as political in nature.³⁹⁴ Unlike the Harare Scheme, however, the Convention fails to define what constitutes an offence “of a political nature” and does not expressly exclude crimes under international law from the political offence exception. It is important to note that neither instrument is enforceable under the laws of Ghana without implementing legislation (See Section 7.1.1.4. above for further discussion of political offences).

7.2.2.3. *Ne bis in idem*

Ghana does not permit the granting of requests for mutual legal assistance where the person concerned has been tried and convicted in a court of competent jurisdiction, even when the prior proceedings were a sham, designed to ensure impunity, or unfair, and even when the crimes at issue were crimes under international law, which states are under a duty to investigate and prosecute.³⁹⁵

The ECOWAS Mutual Assistance Convention, which Ghana has signed, provides that mutual assistance may be refused if it would violate the requested state’s laws on double jeopardy or if the request relates to an offence that is already subject to an investigation or prosecution in the requested state.³⁹⁶

This would constitute an inappropriate bar to mutual assistance if the previous trial was a sham or

³⁹¹ Mutual Legal Assistance Act, sect. 15 (2) (c).

³⁹² Harare Scheme, para. 8 (1) (c).

³⁹³ Both the requesting and requested state must be party to the treaty containing the obligation. See Harare Scheme, para. 8 (4).

³⁹⁴ ECOWAS Mutual Assistance Convention, art. 4 (1) (b).

³⁹⁵ Mutual Legal Assistance Act, sect. 15 (1) (d).

³⁹⁶ Harare Scheme, art. 4 (1) (d). The Convention also permits states to postpone the execution of a request if its immediate execution would interfere with an ongoing investigation or prosecution in the requested state’s territory. Art. 4 (3)

unfair. The principle of *ne bis in idem* (that one cannot be tried twice for the same crime) is a fundamental principle of law recognized in international human rights treaties and other instruments, including the ICCPR, the American Convention on Human Rights, Additional Protocol I and constitutive instruments establishing the ICTY, ICTR and the Special Court for Sierra Leone.³⁹⁷ However, apart from the vertical exception between international courts and national courts, the principle only prohibits retrials after an acquittal by the same jurisdiction.³⁹⁸ This limitation on the scope of the principle can serve international justice by permitting other states to step in when the territorial state or the suspect's state fails to conduct a fair trial.

7.2.2.4. Double criminality

The Mutual Legal Assistance Act states that, in circumstances where a request for mutual legal assistance is in respect of a crime which is not an offence under the laws of Ghana, the Attorney General and Minister of Justice, a political official, will:

“(a) consider details of the relevant conduct underlying the request and the adoption of measures that may be necessary to facilitate the provision of assistance required, and

(b) provide the required assistance in accordance with the laws of the Republic, and on terms and conditions certified by the Minister.”³⁹⁹

Under the non-binding Harare Scheme, requested states may refuse to provide mutual legal assistance on the grounds that the conduct underlying the criminal matter would not constitute an offence under the law of the requested state.⁴⁰⁰ The ECOWAS Mutual Assistance Convention does not contain such a provision.

Whatever the merits may be for requiring double criminality with respect to conduct that only amounts to an ordinary crime, it has no merit when the conduct amounts to a crime under

³⁹⁷ ICCPR, art. 14 (7); American Convention on Human Rights, art. 8 (4); Additional Protocol I, art. 75 (4) (h); ICTY Statute, art. 10 (1); ICTR Statute, art. 9 (1); Statute of the Special Court for Sierra Leone, art. 9.

³⁹⁸ The Human Rights Committee has concluded that Article 14 (7) of the ICCPR “does not guarantee *non bis in idem* with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.” *A.P. v. Italy*, No. 204/1986, 2 November 1987, 2 Selected Decisions of the Human Rights Committee under the Optional Protocol 67, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This limitation was also recognized during the drafting of Article 14 (7) of the ICCPR. See Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff, 1987, pp. 316-318; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein: N.P. Engel, 1993, pp. 272-273; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford: Clarendon Press, 1991. The ICTY Trial Chamber in the *Tadić* case reached the same conclusion. *Prosecutor v. Dusko Tadić*, Case No IT-94-1-A, July 15, 1999.

³⁹⁹ Mutual Legal Assistance Act, sect. 17.

⁴⁰⁰ Harare Scheme, para. 8 (a).

international law, even if the requesting state is seeking extradition to prosecute the person for an ordinary crime when its legislation does not characterize the conduct as a crime under international law. All states have a shared obligation to investigate and prosecute conduct that amounts to crimes under international law, either by doing so in their own courts or by extraditing the suspect to another state or surrendering that person to an international criminal court, and they cannot escape this obligation by refusing to extradite on the basis of double criminality.

7.2.2.5. Jurisdiction

Ghana does not expressly prohibit the making or granting requests for mutual legal assistance because jurisdiction in the requested or requesting state is based on universal jurisdiction or a form of jurisdiction not recognized in the requested state.

Neither the non-binding Harare Scheme nor the ECOWAS Mutual Assistance Convention contains such a prohibition.

7.2.2.6. Amnesty or similar measure of impunity

Ghanaian law does not expressly prohibit the making or granting of requests for mutual legal assistance because a prosecution is barred in either state based on an amnesty, pardon or similar measure of impunity.

Neither the non-binding Harare Scheme nor the ECOWAS Mutual Assistance Convention contains such a prohibition (see discussion above in Section 6.10 regarding the prohibition of amnesties and similar measures of impunity).

7.2.2.7. Other inappropriate bars to mutual legal assistance

International relations and other political considerations. The discretion of the Attorney General and Minister of Justice, a single political official, to refuse a request for mutual assistance on the grounds that the request would prejudice the security, international relations or other essential public interests of Ghana (as permitted under the Mutual Legal Assistance Act)⁴⁰¹ could become an inappropriate bar to mutual legal assistance. The Attorney General and Minister of Justice also have the authority to grant wholly or partly a request for mutual legal assistance “on such terms and conditions he considers appropriate”.⁴⁰² Such grounds are inappropriate when the crimes concerned are crimes under international law, which are crimes against the entire international community. In addition, such broad grounds may be abused under political pressure.

Similarly, the non-binding Harare Scheme gives states discretion to refuse assistance when it appears to a state-appointed authority that compliance would “prejudice the security, international

⁴⁰¹ Mutual Legal Assistance Act, sect. 15 (1) (a). ‘Essential public interests’ include sovereignty, security, national interests, public order, and an excessive burden on Ghana’s resources. Sect. 82.

⁴⁰² Mutual Legal Assistance Act, sect. 10 (1) (a). Although the Minister may delegate some duties under the Mutual Legal Assistance Act to another competent authority or to an authorized public officer, the Minister has ultimate responsibility for mutual legal assistance functions provided by the Act. Sect. 79.

relations or other essential public interests of that country.”⁴⁰³ Likewise, the ECOWAS Mutual Assistance Convention permits refusal of extradition on the grounds that, if granted, the requested state believes it would prejudice a state’s sovereignty, security, and public order.⁴⁰⁴ Such considerations, particularly when made under the discretion of a political official rather than under the discretion of an independent court, could easily be abused.⁴⁰⁵

Comparative procedure. Ghana’s Mutual Legal Assistance Act provides that a person will not be compelled to give evidence – either through the production of a document or in an answer to a question – in Ghana that he or she is not required to give in proceedings in his or her own country or in criminal proceedings in the foreign state or foreign entity requesting mutual legal assistance.⁴⁰⁶

Likewise, the non-binding Harare Scheme states that no person should be compelled to give such evidence which he or she would not be compelled to give in criminal proceedings both in the requesting and requested Commonwealth state.⁴⁰⁷ The Harare Scheme also provides that states may refuse to grant assistance if such assistance would require steps to be taken that could not, under the law of the requested state, be taken in respect of criminal matters arising in that state.⁴⁰⁸ Similarly, the ECOWAS Mutual Assistance Convention provides that mutual assistance may be refused if such assistance would require the giving or gathering of evidence in a manner that does not comport with the requested state’s law and practice.⁴⁰⁹ Such grounds may be inappropriate when the crimes concerned are crimes under international law, which are crimes against the entire international community, except in circumstances where they may safeguard human rights, such as the right to silence and the right not to be compelled to confess guilt.

7.2.3. SAFEGUARDS

Ghanaian law does not expressly prohibit the making or granting of requests for mutual legal assistance on the grounds that the assistance provided could lead to an unfair trial, torture, inhuman treatment, or the death penalty. However, the Mutual Legal Assistance Act prohibits the granting of mutual legal assistance in contravention of the laws of Ghana,⁴¹⁰ which might implicate human rights safeguards guaranteed in the Constitution. The non-binding Harare Scheme also permits

⁴⁰³ Harare Scheme, para. 8 (2) (a).

⁴⁰⁴ ECOWAS Mutual Assistance Convention, art. 4 (1) (a).

⁴⁰⁵ The ECOWAS Convention does not specify what official or body constitutes a “competent authority” with discretion over this consideration. See ECOWAS Mutual Assistance Convention, art. 3. Under the Mutual Legal Assistance Act, this decision is made by the Attorney General and Minister of Justice. A person aggrieved by the refusal to grant a mutual legal assistance request can apply to the High Court for judicial review of this decision. Sect. 15 (4). However, the broad scope of this provision would appear to leave little room for a successful judicial review.

⁴⁰⁶ Mutual Legal Assistance Act, sect. 33,

⁴⁰⁷ Harare Scheme, para. 21.

⁴⁰⁸ Harare Scheme, para. 8 (3).

⁴⁰⁹ See ECOWAS Mutual Assistance Convention, arts. 4 (1) (e), 12, 16 (2).

⁴¹⁰ Mutual Legal Assistance Act, sect. 15 (1) (g).

Commonwealth nations to refuse assistance on constitutional grounds.⁴¹¹ The ECOWAS Mutual Assistance Convention does not contain these safeguards.

The Mutual Legal Assistance Act also includes a safeguard against discrimination and a specialty rule. Further, it allows for judicial review of decisions regarding requests for mutual legal assistance.

7.2.3.1. Fair trial

There is no express prohibition in Ghanaian law on the making or granting of requests for mutual legal assistance on the grounds that the person concerned faces an unfair trial, although this may be implicit in the Constitution's fair trial guarantees.⁴¹²

Neither the non-binding Harare Scheme nor the ECOWAS Mutual Assistance Convention expressly prohibits the making or granting of requests for mutual legal assistance on the grounds that the person concerned faces an unfair trial.

7.2.3.2. Torture and other cruel, inhuman or degrading treatment or punishment

There is no express prohibition in Ghanaian law on the making or granting of requests for mutual legal assistance on the grounds that the person concerned faces torture or other ill-treatment, although this may be implicit in the Constitution's prohibition of torture.⁴¹³

Neither the non-binding Harare Scheme nor the ECOWAS Mutual Assistance Convention expressly prohibits the making or granting of requests for mutual legal assistance on the grounds that the person concerned faces torture or other ill-treatment.

7.2.3.3. Death penalty

There is no express prohibition in Ghanaian law on the making or granting of requests for mutual legal assistance on the grounds that the person concerned faces the death penalty, although Ghana is abolitionist in practice (see Section 7.1.2.3 above).

7.1.2.4. Other human rights safeguards

Specialty. The Mutual Legal Assistance Act limits the purposes for which a foreign state may use the information or evidence obtained to those listed in its mutual legal assistance request unless Ghana's Attorney General and Minister of Justice grants prior, written consent.⁴¹⁴ This provision could be used to safeguard human rights; it could also be abused. The Harare Scheme and the

⁴¹¹ See Harare Scheme, para. 8 (2) (a).

⁴¹² 1992 Constitution, Ch. V, art. 19.

⁴¹³ See 1992 Constitution, Ch. V, art. 15 (2).

⁴¹⁴ Mutual Legal Assistance Act, sect. 12.

ECOWAS Convention also contain specialty rules.⁴¹⁵

Discrimination. The Mutual Legal Assistance Act states that mutual legal assistance will not be provided if there are reasonable grounds to believe that compliance would facilitate prosecution or punishment of a person based on race, color, ethnic origin, gender, religion, creed, nationality or political opinion or would otherwise be prejudicial for these reasons.⁴¹⁶

The Harare Scheme also permits Commonwealth states to refuse assistance on the grounds that such assistance could further discriminatory purposes.⁴¹⁷ The ECOWAS Mutual Assistance Convention, which Ghana has signed, likewise provides that extradition may be refused if there are substantial grounds for believing the request for assistance has been made for discriminatory purposes.⁴¹⁸

Judicial Review. The Mutual Legal Assistance Act states that a person aggrieved by Ghana's refusal to grant mutual assistance in whole or in part may apply to the High Court for judicial review.⁴¹⁹

⁴¹⁵ See Harare Scheme, para. 12. Article 8 of the ECOWAS Mutual Assistance Convention states:

"The requesting Member State shall not, without the consent of the requested Member State use or transfer information or evidence provided by the requested Member State for investigation or proceedings other than those stated in the request. However, in cases where the charge is altered, the material provided may be used in so far as the offence, as charged, is an offence in respect of which mutual assistance may be provided under this Convention."

⁴¹⁶ Mutual Legal Assistance Act, sect. 15 (1) (c).

⁴¹⁷ See Harare Scheme, para. 8 (2) (b).

⁴¹⁸ See ECOWAS Mutual Assistance Convention, art. 4 (1) (c), which states that extradition may be refused if: "there are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting a person on account of that persons' race, sex, religion, nationality, ethnic origin or political opinions, or that that person's position may be prejudiced for any of those reasons."

⁴¹⁹ Mutual Legal Assistance Act, sect. 15 (4).

8. SPECIAL IMMIGRATION, POLICE AND PROSECUTOR UNITS

Special immigration units. Ghana does not have a special immigration unit designed to screen persons suspected of crimes under international law. Such a unit would have a mandate not only to exclude such persons from travel (either when seeking a visa abroad or when arriving at the border), but also to refer their files to police or prosecuting authorities for investigation and, where there is sufficient admissible evidence, prosecution.⁴²⁰ In practice, some screening is conducted by the Ghana Police and immigration officers in the Ghana Immigration Service.⁴²¹ However, no information could be obtained from officials documenting the procedures or methods used by these two agencies to screen persons suspected of such crimes or about what steps were taken when persons suspected of such crimes applied for a visa abroad or were stopped at the border. For example, although authorities indicate that immigration officials may inform the police or make an arrest on their own initiative,⁴²² it is not known whether police or immigration officials arrest suspected perpetrators with a view to exclusion, deportation or referral to prosecutors for the purpose of determining whether they should be prosecuted.

Special police units. Ghana does not have a special police unit, or a joint police and prosecution unit, with a mandate to investigate and prosecute crimes under international law. However, Ghana has established an Anti-Trafficking Unit, a Virtual Crime Analysis Unit and a Commercial Crime Unit, all of which investigate crimes under national law of international concern (such as human trafficking, cross-border financial crime and cyber crime) and a Domestic Violence and Victim Support Unit of the police, which handles domestic and gender-based crimes.

Special prosecution units. Ghana does not have a special prosecution unit, or a special police and prosecution unit, with a mandate to investigate and prosecute crimes under international law. However, Ghana has established an Economic and Organized Crime Office (EOCO), which prosecutes fraud and corruption.

⁴²⁰ A Refugee Board under the Ministry of Interior performs some of these functions, but only for those seeking asylum. See Refugee Act, 1992 (P.N.D.C.L. 305).

⁴²¹ Interview with Assistant Commissioner of Police and Director of Operations, Ghana Police Service Criminal Investigation Department, in Accra, Ghana (28 June 2012); Interview with Chief State Attorney, Ministry of Justice Office of International Cooperation, in Accra, Ghana (27 June 2012).

⁴²² Interview with Assistant Commissioner of Police and Director of Operations, Ghana Police Service Criminal Investigation Department, in Accra, Ghana (28 June 2012).

9. JURISPRUDENCE

There appear to be no cases in Ghana involving universal criminal or universal civil jurisdiction. There also appears to be no relevant jurisprudence on extraterritorial jurisdiction or the scope of crimes under international law.

RECOMMENDATIONS

Ghana should take the following steps to ensure that it is not a safe haven for persons responsible for the worst possible crimes in the world.

1. SUBSTANTIVE LAW REFORM

Ratify, without any limiting reservations, all treaties requiring states to extradite or prosecute crimes under international law, including the International Convention for the Protection of All Persons from Enforced Disappearance and the International humanitarian law treaties listed in Section 4.3 above.

Define the following crimes under international law as crimes under Ghanaian law, ensuring their definitions conform to the strictest requirements of international law, as has been done with breaches of the Geneva Conventions and their Additional Protocols:

war crimes in both international and non-international armed conflict, to the extent that they have not yet been incorporated in national law (see Section 4.3 above detailing the gaps);

crimes against humanity;

crimes ancillary to genocide (See Section 4.3.3 above);

torture, including the torture of adults (see Section 4.3.4 above);

extrajudicial executions; and

enforced disappearances.

Define each of the crimes against humanity listed in Article 7 of the Rome Statute as crimes against humanity under Ghanaian law, if committed as part of a widespread or systematic attack against civilians, in strict accordance with their definition under international law (see Section 4.3.2.).

Modernize the definition of rape under Ghanaian law to incorporate men and boys among potential victims. Delete the requirement of lack of consent and include all coercive circumstances recognized by international law as set forth in the elements of rape in the Elements of Crimes (see Section 4.3.2).

Define principles of criminal responsibility in accordance with the strictest standards of international law and, in particular, ensure that the same strict standards of criminal responsibility apply both to commanders and to other superiors.

Define defences in accordance with the strictest standards of international law and, in particular, exclude as permissible defences of superior orders, duress and necessity, but permit them to be taken into account in mitigation of punishment.

2. STRENGTHENING JURISDICTION

Provide that courts have universal criminal jurisdiction over all conduct amounting to crimes under international law, whether that conduct is currently labelled in Ghanaian law as an ordinary crime or as a crime under international law.

Provide that Ghana has an *aut dedere aut judicare* obligation to extradite a person suspected of crimes under international law when that person is in territory subject to its jurisdiction or to submit allegations to the prosecution authorities for the purpose of prosecution.

Where Ghana has not yet defined such conduct as a crime under national law, ensure that it can extradite a suspect to a country willing and able to prosecute in a prompt and fair trial without the death penalty or other human rights violations.

Ensure that Ghana can open an investigation, issue an arrest warrant and seek extradition of anyone suspected of a crime under international law even if that suspect has never entered territory subject to Ghana's jurisdiction.

However, also ensure that the person suspected of such crimes is in the territory of Ghana subject to its jurisdiction a sufficient time before the start of a trial in order to prepare for trial, in line with the respect of rights of suspects and accused under international law and standards to a fair trial.

Ensure that legislation provides that the first state to exercise jurisdiction, whether universal, extraterritorial or territorial, to investigate or prosecute a person has priority over other states with regard to the crimes unless a second state can demonstrate that it is more able and willing to do so in a prompt and fair trial without the death penalty or other serious human rights violations.

3. REFORM OF PROCEDURE RELATED TO SUSPECTS AND ACCUSED

Establish rapid, effective and fair arrest procedures to ensure that anyone arrested on suspicion of committing crimes under international law will appear for extradition, surrender to an international criminal court or criminal proceedings in Ghana.

Ensure that the rights of suspects and accused under international law and standards related to a fair trial are fully respected.

Ensure that national law provides for the exclusive jurisdiction of civilian courts over all crimes under international law, including crimes committed by members of the armed forces.

Ensure that no one is subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Ensure that the death penalty, which is neither imposed nor carried out, is abolished in law.

4. REFORM OF PROCEDURE RELATED TO VICTIMS

Expressly provide that victims and their families are able to institute criminal proceedings based on universal jurisdiction over crimes under international law through a private prosecution, *actions civiles*, *actio popularis* or similar procedures.

Ensure that victims and their families are able to file civil claims for all five forms of reparation (restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition) in civil and in criminal proceedings based on universal jurisdiction over crimes under international law.

Ensure that victims and their families are fully informed of their rights and of developments in all judicial proceedings based on universal jurisdiction concerning crimes under international law.

Ensure that victims and their families receive support and protection at all stages of the criminal and civil proceedings involving crimes under international law.

5. REMOVAL OF LEGAL, PRACTICAL AND POLITICAL OBSTACLES

A. ELIMINATION OF LEGAL OBSTACLES

Provide that any claimed state or official immunities will not be recognized with regard to crimes under international law or to torts arising from such crimes or to other human rights violations.

Provide that statutes of limitation do not apply to crimes under international law or to torts arising from such crimes or to other human rights violations no matter when they were committed. Abolish any statutes of limitations that apply to such crimes or torts no matter when they were committed.

Provide that the principle of *ne bis in idem* does not apply to proceedings in a foreign state concerning crimes under international law so that Ghana courts can exercise jurisdiction when foreign proceedings were shams that shielded the suspect from justice or were unfair.

Ensure that courts can exercise jurisdiction over all conduct that was recognized under international law as a crime at the time that it occurred even if it occurred before it was defined as a crime under national law.

Provide that amnesties and similar measures of impunity granted by a foreign state with regard to crimes under international law have no legal effect with respect to criminal or civil proceedings.

Set aside transitional amnesty provisions of the Constitution, which contribute to prevailing impunity for crimes under international law committed in Ghana.

B. ELIMINATING PRACTICAL OBSTACLES

1. Improvements in identifying suspects seeking to enter the country

Establish a special immigration unit for screening foreigners seeking to enter Ghana, including immigrants, visa applicants and asylum seekers, to determine whether they are suspected of crimes under international law and to inform police and prosecuting authorities that such persons are suspected of crimes under international law.

Ensure that such a unit cooperates fully with police and prosecuting authorities in a manner that fully respects the rights of all persons to a fair trial.

2. Improvements in investigation and prosecution in the forum state

Establish a special unit of police and prosecutors with responsibility for investigating and prosecuting crimes under international law committed in Ghana or abroad. The establishment of such units for other crimes suggests that it may be affordable and feasible to establish specialized investigation and prosecution units for crimes under international law. These existing police and prosecution units could also provide lessons learned for the creation of special police and prosecution units to investigate and prosecute persons suspected of crimes under international law. One option might be to strengthen the capacity of the Department of Public Prosecution to investigate and prosecute crimes under international law.

Ensure that such a unit:

- has sufficient financial resources;
- has sufficient material resources;
- has sufficient, experienced, trained personnel;
- provides effective training on a regular basis of all staff in all relevant subjects, including international criminal law, human rights and international humanitarian law, as well as issues related to sexual and gender-based violence;
- has staff that are experts in investigating and prosecuting sexual and gender-based violence; and
- has staff that are experts in investigating and prosecuting crimes involving children, whether as victims, witnesses or perpetrators.

3. Ensuring the effective training of all members of the judicial system

Ensure that all judges, prosecutors, defence lawyers and others in the criminal and civil justice systems are effectively trained in relevant subjects, including such matters as issues related to sexual and gender-based violence and issues related to crimes involving children, whether as victims, witnesses or perpetrators.

4. Improving the protection of and support for victims and witnesses

Establish an effective victim and witness protection and support unit, based on the experience of such units in international criminal courts and national legal systems able to protect and support victims and witnesses involved in proceedings in the state, in foreign states and in international criminal courts, including through relocation.

C. ENDING POLITICAL OBSTACLES

Ensure that the criteria for deciding whether to investigate or prosecute crimes under international law are developed in a transparent manner, made public, and decided in close consultation with civil society. Ensure that such criteria are impartial and non-discriminatory and exclude all political considerations.

Ensure that decisions to investigate or prosecute are taken by independent prosecutors or investigating judges in accordance with such neutral criteria, subject to appropriate review by courts,

but not by political officials.

Ensure that decisions on whether to extradite persons suspected of crimes under international law and on whether to provide mutual legal assistance are made in accordance with neutral criteria and exclude all inappropriate criteria, such as double criminality requirements and *ne bis in idem* prohibitions for crimes under international law. Expressly provide that political offence exceptions to extradition and the provision of mutual legal assistance do not include exceptions for crimes under international law.

Amend the Extradition Act to ensure that the final decision whether to extradite or to provide mutual legal assistance is taken by an independent prosecutor or investigating judge, subject to judicial review, and not by a political official.

6. IMPROVING COOPERATION WITH INVESTIGATIONS AND PROSECUTIONS IN OTHER STATES

Ensure that foreign requests from foreign states for mutual legal assistance, including *commissions rogatoires* (commissions rogatory), in investigating and prosecuting crimes under international law do not face unnecessary obstacles or delays, provided that the procedures are fully consistent with international law and standards concerning the right to a fair trial and that cooperation is not provided when there is a risk that it could lead to an unfair trial or the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment.

Ensure that all foreign judgments awarding civil reparations, whether in civil or criminal proceedings, regardless of the basis of geographic jurisdiction, can be recognized and enforced in a simple, speedy and fair procedure, unless the defendant in the foreign proceeding can demonstrate that the proceeding violated international law and standards for a fair trial.

Ensure that other requests for mutual legal assistance by foreign states can be transmitted to Ghana police or prosecutors, without going through cumbersome diplomatic channels, but ensure that such requests are not complied with when there is a risk that it could lead to the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment or unfair trial.

Enhance and improve procedures in the forum state for conducting investigations abroad, including through the use of joint international investigation teams, with all the necessary areas of expertise, and seek to enter into effective extradition and mutual legal assistance agreements with all other states, subject to appropriate safeguards.

Eliminate in law and practice any unnecessary procedural obstacles for foreign states seeking to gather information in territory subject to Ghana's jurisdiction concerning crimes under international law.

Eliminate in law and practice any unnecessary procedural obstacles that would delay or prevent the introduction of admissible evidence from abroad. Exclude any evidence that cannot be demonstrated as having been obtained without the use of torture or other cruel, inhuman or degrading treatment.

Appoint a contact point responsible for crimes under international law who will be responsible for participating in the meetings of the Interpol Expert Meetings on Genocide, War Crimes and Crimes against Humanity and other international and bilateral meetings. Cooperate with Interpol in the maintenance of the database on crimes under international law.

Take steps, in cooperation with other states, to draft, adopt and ratify promptly a new multilateral treaty under UN auspices providing for extradition of persons suspected of crimes under international law and mutual legal assistance with regard to such crimes, excluding inappropriate grounds for refusal and including bars on extradition and mutual legal assistance where there is a risk of the death penalty, torture or other ill-treatment, unfair trial or other human rights violations.

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CCW Prot. III 1980	Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980 (http://www.icrc.org/ihl.nsf/FULL/515?OpenDocument).
CWC 1993	Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993 (http://www.icrc.org/ihl.nsf/FULL/553?OpenDocument).
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