AMNESTY INTERNATIONAL

NO SAFE HAVEN SERIES 6

SOLOMON ISLANDS

END IMPUNITY THROUGH UNIVERSAL JURISDICTION

AMNESTY INTERNATIONAL

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1. INTRODUCTION[1]

Solomon Islands, which gained its independence from the United Kingdom (UK) in 1978, is a member of the Commonwealth and has a common law legal system. It has been able to exercise universal criminal jurisdiction over grave breaches of the 1949 Geneva Conventions since independence. In addition, Solomon Islands can exercise universal jurisdiction over piracy, crimes abroad on foreign aircraft, hijacking and attacks abroad on foreign aircraft. Solomon Islands has defined genocide as a crime, but it has not provided universal jurisdiction over it. It has not defined crimes against humanity, war crimes (apart from grave breaches of the Geneva Conventions), torture, extrajudicial executions or enforced disappearances as crimes under national law.

Therefore, Solomon Islands is currently a safe haven from prosecution in its courts for foreigners who are responsible for genocide, war crimes (apart from grave breaches of the Geneva Conventions), torture, extrajudicial executions and enforced disappearance committed abroad. In addition, foreign commanders and superiors responsible for grave

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[1] This report was researched and drafted by Douglass Hansen and Giulia Tranchina, members of the School of Oriental Studies (SOAS) Human Rights Clinic in London (Lynn Welchman, Director), under the supervision of the International Justice Project in the International Secretariat of Amnesty International. Amnesty International wishes to thank Ken Averre, Barrister, Forbes Chambers, Sydney, Australia (former Public Solicitor of Solomon Islands); Professor Roger Clark at Rutgers University, Camden, New Jersey, USA; Professor Eric Colvin, Faculty of Law, Bond University, Gold Coast, Queensland, Australia; and Dr Jennifer Corrin, Executive Director - Asia Pacific Law Centre for Public, International and Comparative Law and Associate Professor, TC Beirne School of Law, University of Queensland, St. Lucia, Queensland, Australia; Paul Malai Mae, Assistant Lecturer, University of the South Pacific, School of Law, Emalus Campus, Port Vila, Vanuatu, for their thoughtful and helpful comments and suggestions on the report during the drafting stage.

Drafts of this paper were sent to officials from the Director of Public Prosecutions, Ministry of Foreign Affairs, Attorney General's Office, Solomon Islands Law Reform Commission and Public Solicitor's Office on 30 August 2008; 29 September 2009 and 17 November 2009 requesting comments. However, Amnesty International regrets that as of 25 November 2009, none of these officials or institutions replied.

Every effort was made to ensure that all the information in this paper was accurate as of 1 November 2009. However, for an authoritative interpretation of Solomon Islands law, counsel authorized to practice in Solomon Islands should be consulted. Amnesty International welcomes any comments or corrections, which should be sent to ijp@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.

breaches of the Geneva Conventions committed abroad would enjoy impunity in Solomon Islands because the principle of command and superior responsibility has not been included in the Penal Code.

Solomon Islands is also a safe haven from extradition to *any* country for foreigners who are responsible for genocide, war crimes (including grave breaches of the Geneva Conventions, unless the requesting state is a designated Commonwealth state or other designated state), torture, extrajudicial executions and enforced disappearance committed abroad because none of these crimes are listed as extradition crimes. Although persons suspected of other crimes under international law could be extradited to certain designated Commonwealth countries for ordinary crimes, they could not be extradited for crimes under international law, and there are a number of obstacles to extradition. In addition, such persons could not be arrested and surrendered to the International Criminal Court or any other international criminal court.

No statute authorizes Solomon Islands to exercise universal civil jurisdiction, in civil cases, but it is possible to exercise such jurisdiction over civil claims for compensation in criminal proceedings, including those based on universal criminal jurisdiction. Solomon Islands does not have any special immigration unit to screen foreigners with a view to identifying persons suspected of crimes under international law and referring them to police for investigation or a special unit to investigate and prosecute crimes under international law and there are no known cases involving universal jurisdiction. Although a Solomon Islands law reform commission has been reviewing criminal law and criminal procedure, its mandate does not expressly extend to these matters.

This paper, which is Number 5 of a series of 192 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, makes extensive recommendations for reform of law and practice so that Solomon Islands 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.[2]

[2] Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation*, AI Index: IOR 53/002 - 018/2001, September 2001 (http://www.amnesty.org/en/library).

2. THE LEGAL FRAMEWORK

2.1 TYPE OF LEGAL SYSTEM

The Constitution took effect when Solomon Islands became independent in 1978. Section 75 of the Constitution provides Parliament with the authority to legislate and Section 76 provides that until Parliament decides otherwise, the provisions in Schedule 3 to the Constitution determine the status of certain United Kingdom legislation, common law and equity, Solomon Islands customary law and judicial precedent.[3] Section 1 of Schedule 3 to the Constitution provides that all acts of the United Kingdom Parliament in effect on 1January 1961 continue to have effect after independence, with such modifications as are necessary to apply to Solomon Islands, unless inconsistent with the Constitution or modified by Solomon Islands legislation.[4] As provided in Paragraph 2 of Schedule 3 to the Constitution, English common law and equity as they stood at the time of independence

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[3] Const. (1978), sect. 76. That section states:

> "Until Parliament makes other provision under the preceding section, the provisions of Schedule 3 to this Constitution shall have effect for the purpose of determining the operation in Solomon Islands -
>
> *(a)* of certain Acts of the Parliament of the United Kingdom mentioned therein;
>
> *(b)* of the principles and rules of the common law and equity;
>
> *(c)* of customary law; and
>
> *(d)* of the legal doctrine of judicial precedent."

Section 76 of the Constitution is supplemented by Section 5.-(1) of the Solomon Islands Independence Order 1978, which provides:

> "The revocation of the existing Orders shall be without prejudice to the continued operation of any existing laws made, or having effect as if they had been made, under any of those Orders; and the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with Solomon Islands Act 1978(c) and this Order."

[4] Section 1 of Schedule 3 annexed to the Constitution provides:

> "Subject to this Constitution and to any Act of Parliament, the Acts of the Parliament of the United Kingdom of general application and in force on 1st January 1961 shall have effect as part of the law of Solomon Islands, with such changes to names, titles, offices, persons and institutions, and as to such other formal and non-substantive matters, as may be necessary to facilitate their application to the circumstances of Solomon Islands from time to time."

generally continue to apply, without regard to any subsequent legislative modification by the United Kingdom Parliament.[5]

Post-independence English common law and foreign law. Although Paragraph 2 (2) of Schedule 3 to the Constitution states that the principles and rule of common law apply notwithstanding any modifications by the United Kingdom Parliament, Solomon Islands courts frequently cite and often follow post-independence decisions of English courts regarding criminal law principles of responsibility and defences when there is no contrary Solomon Islands legislation (see Section 6.1 below). In addition, Solomon Islands courts frequently cite decisions of courts in other Commonwealth countries, particularly in the South Pacific region, when they consider the legal reasoning persuasive.[6] However, the High Court has made clear that when there is applicable Solomon Islands jurisprudence, there is no need to rely on foreign court decisions:

> "We are fortunate to have cases already decided by our courts on the question of setting aside judgments obtained by default. . . I note that both counsel in this case had appeared in some of those cases mentioned and yet either forgot or ignored to cite those authorities. We must develop and build up our case law in our jurisdiction instead of borrowing authorities from foreign jurisdictions all the time. Once a legal principle had been firmly established in our jurisdiction it serves no point to keep referring to the

---

[5] Paragraph 2 of Schedule 3 to the Constitution states:

> "2.-(1) Subject to this paragraph, the principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands, save in so far as:-
>
> (a) they are inconsistent with this Constitution or any Act of Parliament;
>
> (b) they are inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time; or
>
> (c) in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter.
>
> (2) The principles and rules of the common law and equity shall so have effect notwithstanding any revision of them by any Act of the Parliament of the United Kingdom which does not have effect as part of the law of Solomon Islands."

According to one independent expert, if a United Kingdom court determines after 1978 that pre-1978 English common law decisions were incorrectly decided, then Solomon Island courts are likely to apply the United Kingdom modification of the common law. If, however, a United Kingdom court is developing new law, then Solomon Islands courts will not follow it.

[6] However, Paragraph 4 (1) of Schedule 3 to the Constitution provides: "No court of Solomon Islands shall be bound by any decision of a foreign court given on or after 7th July 1978."

authorities from foreign jurisdictions."[7]

If there is a gap in the Solomon Islands Courts (Civil Procedure) Rules 2007 or the Criminal Procedure Code, the courts will follow as closely as possible the rules and procedures of the High Courts of England.[8]

Statutory criminal law and procedure and common law defences. The Penal Code and Criminal Procedure Code were enacted before independence based on English statutes and common law, with some modifications to reflect the situation in Solomon Islands.[9] In addition, the Solomon Islands Penal Code, like those of Fiji, Kiribati, Nauru, Papua New Guinea and Tuvalu, was influenced by the Griffith Code of 1899 developed for Queensland, Australia.[10] The Penal Code is intended to be an exhaustive statement of the law in the sense that "it describes not only the elements of offences necessary to find a person guilty, but it also establishes any defence in law".[11] However, this statement by the Solomon Island Court of Appeal in the *Hese* case needs to be qualified in at least two respects. First, as both Section 3 of the Penal Code provides and the Court of Appeal in *Hese* recognized, the Code is to be interpreted in accordance with principles of legal interpretation obtain in England "and expressions used in it shall be presumed . . . to be used with the meaning attached to them in English criminal law".[12] Second, as noted below with regard to the defence of necessity,

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[7] *Tozaka v. Hata Enterprises Ltd* [1997] SBHC 102; HCSI-CC 198 of 1996, 3 June 1997 (http://www.paclii.org/sb/cases/SBHC/1997/102.html).

[8] Section 240 of the Criminal Procedure Code provides:

"Practice of High Court in its criminal jurisdiction

240. Subject to the provisions of this Code and of any Rules of Court the practice of the High Court in its criminal jurisdiction shall be assimilated so far as circumstances admit to the practice of Her Majesty's High Court of Justice in its criminal jurisdiction and of Courts of Oyer and Terminer and General Gaol Delivery in England."

[9] Solomon Islands Law Reform Commission, Review of Penal Code and Criminal Procedure Code, Issues Paper 1, November 2008 (Law Reform Commission Issues Paper 1) (http://www.paclii.org/gateway/LRC/SILRC/Docs/Penal_Code_Issues_%20Paper_1.pdf), p. 18. See also Eric Colvin, 'Criminal Responsibility in the South Pacific Codes', 26 Crim. L. J., 2002, p. 98, at p. 99. In contrast, other islands in the Pacific (Cook Islands, Niue, Samoa and Tokelau) followed the New Zealand Stephens Crimes Act 1893, which omits statements of general principle and relies primarily on the common law to supplement provisions in criminal codes; Vanuatu has a criminal code which includes principles of responsibility, but which is different from the Griffith Code. Colvin, 'Criminal Responsibility'.

[10] Law Reform Commission Issues Paper, *supra*, n. 9, at p. 18.

[11] *Hese v. Regina* [2006] SBCA, 31 May 2006. Certain common law offences can still be prosecuted. Penal Code, sect. 2.

[12] Penal Code, sect. 3. *Hese v. Regina* [2006] SBCA, 31 May 2006; see also *Luavex v. Regina* [2007] SBCA13; CA-CRAC 31 of 2006, 18 October, 2007.

even when the Penal Code does not expressly provide for a common law defence, courts may go so far as to interpret the Penal Code as incorporating a common law defence (see Section 6.1 below).

The High Court concluded more than a quarter century ago that the principles of criminal responsibility in the Penal Code also apply to any crime, even if found in separate legislation:

> "In my judgment where there is a comprehensive Code of Solomon Islands dealing with matters such as general rules as to criminal responsibility even, if there is no direct inconsistency, it is incumbent on the Court to apply that Code instead of relying on the common law rules on the basis that the common law rules are "inapplicable or inappropriate" in the circumstances of Solomon Islands. Adapting what this Court said in *Ngena* . . ., it is the intention of the Constitution that the common law rules should "wither away" when the Solomon Islands legislature has legislated for Solomon Islands in relation to any subject. Parliament so legislated comprehensively in relation to the criminal law when it enacted the Penal Code. Thus I also find that the Penal Code is exclusive in relation to the matters dealt with therein, including general rules as to criminal responsibility."[13]

This decision is important because grave breaches of the Geneva Conventions of 1949 are not listed in the Penal Code, but in separate legislation (see Section 4.3.1 regarding war crimes and Section 6.1 regarding defences). In addition, two crimes under national law of international concern, hijacking and attacks abroad on foreign aircraft, are found in separate legislation rather than in the Penal Code (see Section 4.2.2).

In addition, Section 2 of the Penal Code states that,

> "Except as hereinafter expressly provided nothing in this Code shall affect (a) the liability, trial or punishment of the person for an offence against the common law or any other law enforced in Solomon Islands other than this Code."

Common law offences not supplanted by the Penal Code are not addressed in this paper.

2.2 STATUS OF INTERNATIONAL LAW

There is no constitutional provision spelling out the status of customary or conventional international law, but, under English common law, customary international law is part of the common law.[14] That does not necessarily mean, however, that courts may try persons under customary or conventional international law directly without a statutory provision defining the crime and the penalty.[15] For example, Ken Averre, then Public Solicitor, noted that

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[13] *Regina v. Wong Chin Kwee* [1983] SBHC 2; [1983] SILR 78 (14 April 1983).

[14] *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356. *See also Maclaine Watson v. Department of Trade and Industry* [1989] 3 All ER 523.

[15] Although Lord Millet took this view in *Ex Parte Pinochet (No. 3)* [2000] 1 AC 61, 77, it was not the basis of the judgment.

ratification by the Solomon Islands of human rights treaties was not enough to ensure that the obligations in those treaties could be enforced in national courts.[16]

2.3 COURT SYSTEM

The courts of Solomon Islands are organized hierarchically, with the Court of Appeal at the top, followed by the High Courts, Magistrates' Court (with judges sitting at three levels: Principal Magistrate, Magistrate First Class and Magistrate Second Class), and Local Courts. The High Court is a court of first instance which may try any crime or civil case arising in Solomon Islands or, where so provided in law, abroad.[17] The Magistrates' Court is a court of first instance, with the right to hear most criminal and many civil matters arising in Solomon Islands.[18] The geographic jurisdiction of Magistrates' Courts appears to be territorial only, in contrast to the High Courts and the Court of Appeal.[19] Local Courts deal only with certain matters not relevant to this paper between residents of the same island on which the Local Court is located. There are also Customary Land Appeal Courts.

2.4 OTHER ASPECTS OF THE LEGAL FRAMEWORK AND NATIONAL HUMAN RIGHTS INSTITUTIONS

Police. Ordinarily, the role of police is to investigate crimes. However, the police can institute proceedings "either by the making of a complaint or by the bringing before a Magistrate of person who has been arrested without warrant".[20] Prosecutions are conducted by prosecutors.

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[16] At at a public forum organized by the Office of the High Commissioner for Human Rights, he said: "Ratifying a treaty is not enough". . . "We need to have the necessary legislative provisions in order for it to have an effect on our people" Solomon Islands Online, 1 May 2007 (http://www.solomontimes.com/news.aspx?nwID=76).

[17] Criminal Procedure Code, sect. 4 (Power to try offences); sect. 53 (General authority of High Court and Magistrates' Courts). The High Court also hears appeals from the Magistrates' Court and from Customary Land Appeal Courts.

[18] The Magistrates' Court may most crimes, apart from murder or rape. The criminal jurisdiction of the Magistrates' Court is spelled out in the Criminal Procedure Code, Section 4 (Power to try offences); Section 53 (General authority of High Court and Magistrates' Courts); and the Magistrates' Court Act, as subsequently modified by a series of Increase of Jurisdiction Orders issued by the Chief Justice. 2.9.63(LN 68/1963), 8.10.71 (LN69/1971), 3.5.1974 (LN 24/1974), 4.4.75 (LN 11/1975), 21.10.1977 (LN 103/1977), 7.12.1990 (LN 172/1990), 1.2.91 (LN 17/1991), 16.4.93 (LN 77/1993). Civil jurisdiction is defined in Section 19 of the Magistrates' Court Act, as modified by the Magistrates' Court (Amendment) Act, 2007.

[19] Section 4 (Territorial limits of jurisdiction of Magistrates' Courts) of the Magistrate (Magistrates' Court Amendment Act 2007) provides:

> "(1) Principal Magistrates, Magistrate First Class and Magistrates Second Class shall be entitled to sit and exercise jurisdiction throughout Solomon Islands.
>
> (2) The jurisdiction of each Magistrates' Court shall extend over all territorial waters as well as over inland waters."

[20] Criminal Procedure Code, sect. 76 (1).

However, the police may also conduct prosecutions, although consent to prosecute may be required in certain cases. The Director of Public Prosecutions can appoint any advocate or police officer to conduct a prosecution.[21] If the police conduct a prosecution, they do so under the supervision of a prosecutor.[22] Private prosecutions are also possible (see Section 2.5 below).

Public Prosecutors. The Minister of Justice and Legal Affairs, a political official and member of the cabinet, runs the Ministry of Justice and Legal Affairs. The Attorney-General, according to Section 42 of the Constitution, is "principal legal adviser to the Government" and appointed "by the Judicial and Legal Service Commission acting in accordance with the advice of the Prime Minister".[23] In contrast to many other countries, "the Attorney General of the Solomon Islands is a public officer and is not a politician or Minister of the Crown."[24] Although the Attorney General is primarily responsible for handling civil litigation for or against the government, and the Director of Public Prosecutions, the handling of criminal cases, the Attorney General is responsible for determining whether to grant requests for mutual legal assistance from other states and to make requests to other states to provide such assistance to Solomon Islands.

Prosecutorial discretion. In contrast to some states, which apply the principle of legality (obligatory prosecution), Solomon Islands follows the principle of opportunity, which provides that the decision to prosecute is discretionary. This decision whether to prosecute requires

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[21] Criminal Procedure Code, sect. 71 ("The Director of Public Prosecutions may appoint any advocate or police officer to be a public prosecutor either generally or for the purposes of a particular ease.").

[22] Criminal Procedure Code, sect. 74 ("Every police officer conducting a prosecution under the provisions of section 73 [governing prosecutions by police in the Magistrates' Court], and every public prosecutor, shall be subject to the express directions of the Director of Public Prosecutions.").

[23] Section 42 of the Constitution reads:

> "(1) There shall be an Attorney-General whose office shall be a public office and who shall be the principal legal adviser to the Government.
>
> (2) The Attorney-General shall be appointed by the Judicial and Legal Service Commission acting in accordance with the advice of the Prime Minister.
>
> (3) No person shall be qualified to hold the office of Attorney-General unless he is entitled [to] practise in Solomon Islands as an advocate or as a barrister and solicitor.
>
> (4) If the Minister responsible for justice is not a person entitles to practise in Solomon Islands as an advocate or as a barrister and solicitor, the person holding the office of Attorney-General shall be entitled to take part in the proceedings of Parliament as adviser to the Government:
>
> Provided that he shall not be entitled to vote in Parliament or in any election for the office of Prime Minister."

[24] Attorney General' Chambers, Ministry of Justice & Legal Affairs, Honiaral ,Solomon Islands, Solomon Islands Country Report, 2008, p. 4; See also Eric Colvin, "Criminal Procedure in the South Pacific" 8 J. So. Pac. L. , 2004, p. 2004 (Attorney General "is a public servant, not a politician").

application of two tests: (1) the sufficiency of evidence test and (2) the public interest test. The first test

> "will be satisfied if there is a reasonable prospect of the defendant being found guilty. A prima facie case is essential but is not the only matter of consideration for instituting a prosecution. The decision to prosecute requires a careful and detailed evaluation of how strong the case will be when presented in court."[25]

The second test

> "simply involves determining whether, in light of the probable facts and the whole of the surrounding circumstances of the case, the '*public interest*' will be served in pursuing a prosecution. It is *not* the rule that all offences brought to the attention of the Royal Solomon Islands Police Force must be prosecuted.
>
> The factors which can properly be taken into account in deciding whether the '*public interest*' requires a prosecution will vary from case to case. While many public interest factors mitigate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution, such as for example, the seriousness of the offence and the need for deterrence. *In this regard, generally, the more serious the offence the more likely it will be that the matter of public interest will require a prosecution to be pursued.*"[26]

There are at least 19 factors to be taken into account in determining whether a prosecution is in the public interest.[27] Although the first factor listed is the seriousness of the offence, none

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[25] Royal Solomon Islands Police, *Criminal Law in Solomon Islands* (Prosecutions Branch, no date), p. 115.

[26] *Ibid.*, p. 117 (emphasis in the orginal).

[27] These factors, which may be considered alone or in conjunction with others, include:

> "[i] the seriousness or, conversely, the triviality of the alleged offence or that it is of a technical' nature only;
>
> [ii] any mitigating or aggravating circumstances;
>
> [iii] the youth, advanced age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or a victim;
>
> [iv] the alleged offender's antecedents and background, including culture and ability to understand the language;
>
> [v] the degree of culpability of the alleged offender in connection with the offence;
>
> [vi] whether the prosecution would be perceived as counter–productive to the interests of justice;

of the factors expressly states that it is in the public interest, when there is sufficient admissible evidence, to prosecute crimes under international law.

Special immigration, police and prosecution units. As discussed below in Section 8, there are no special police and prosecution units charged with the investigation and prosecution of crimes under international law and there is no immigration unit which screens persons to determine whether they may have committed crimes under international law and to refer that determination to police or prosecutors for investigation and possible prosecution.

Human rights institutions related to criminal justice and reparations. Solomon Islands has recently established a truth commission, which might have a role in monitoring the investigation and prosecution of crimes and in recommending law reform.[28]

[vii] the availability and efficacy of any alternatives to prosecution such as '*Reconciliation*'. . .;

[viii] the prevalence of the alleged offence and the need for deterrence either personal or general;

[ix] whether or not the alleged offence is of minimal public concern;

[x] any entitlement of the victim or other person or body to criminal compensation, reparation or forfeiture, if prosecution action is taken;

[xi] the attitude of the victim of the alleged offence to a prosecution with regard to the seriousness of the alleged offence and whether the complainant's change of attitude has been activated by fear or intimidation. . .;

[xii] the cost of the prosecution relative to the seriousness of the alleged offence;

[xiii] whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so, particularly those dealing with indemnity from prosecution;

[xiv] the necessity to maintain public confidence in such institutions as the Parliament and the courts;

[xv] the outcome of any other prosecution from the same circumstances, including in a civil jurisdiction;

[xvi] whether the prosecution for that class or type of offence has been discouraged by the courts in the course of judicial comment;

[xvii] whether the prosecution will result in hardship to any witness, particularly children;

[xviii] vexatious, oppressive or malicious complaints; and

[xix] whether the prosecution would amount to an 'abuse of process'. . ."

[28] Amnesty International, *Solomon Islands: The Truth and Reconciliation Commission cannot work in*

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

As in England, under the common law, private persons can institute criminal proceedings under the Criminal Procedure Code.29 Private persons may then conduct a private prosecution.30 However, the Director of Public Prosecutions has the power under Section 91 (4) of the Constitution to take over and continue proceedings begun by a private prosecutor or to discontinue them.[31] In particular, the Director of Public Prosecutions has the power under Section 68 (1) of the Criminal Procedure Code to quash any criminal proceeding using his or her power to enter a *nolle prosequi*.[32] In addition, the Director of Public Prosecutions

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isolation, AI Index: ASA 43/001/2009, 29 April 2009 (http://www.amnesty.org/en/library/asset/ASA43/001/2009/en/5bd53b0c-352e-4ddd-aff9-02247288600f/asa430012009en.pdf).

[29] Section 76 of the Criminal Procedure Code governs the institution of criminal proceedings. For the English common law rule see, for example, *Gouriet v. Union of Post Office Workers*, [1978] AC 435, 477; *Rubin v. Director of Public Prosecutions* (1989) 89 Cr App R 44, pp. 47 – 48 ("any member of the public may lay an information").

[30] Section 2 (Interpretation) of the Criminal Procedure Code provides that "'private prosecution' means a prosecution instituted and conducted by any person other than a public prosecutor or a public officer in his official capacity[.]".

[31] Subsection 4 (b) and (c) of Section 91 (Director of Public Prosecution) provides:

> "(4) The Director of Public Prosecutions shall have power in any case in which he considers it desirable to do so -
>
> . . . .
>
> (b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
>
> (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority."

See also Section 72 of the Criminal Procedure Code, which provides that "if any private person instructs an advocate to prosecute in any such case the public prosecutor may conduct the prosecution, and the advocate so instructed shall act therein under his directions."

[32] Subsection 1 of Section 68 (Power of Director of Public Prosecutions to enter nolle prosequi) of the Criminal Procedure Code provides:

> "In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognisances shall be discharged; but such discharge of an accused person shall not operate as a bar to any

determines pursuant to Section 126 of the Criminal Procedure Code whether criminal proceedings against most categories of foreigners can take place.[33] If the court, instead of the Director of Public Prosecutions, dismisses the prosecution on the ground that the charge was frivolous or vexatious, it can require the complainant to pay the costs to the accused.[34]

As the discussion above indicates, there are a number of significant restrictions on private prosecutions and civil claims procedures. Probably for those reasons, there are few private prosecutions in Solomon Islands, apart from prosecutions by government regulatory authorities, such as the Electricity Authority, when authorized by the Director of Public Prosecutions to do so.[35]

In contrast to many common law jurisdictions, victims can submit a claim for civil compensation in criminal proceedings as an alternative to instituting civil proceedings. Such

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subsequent proceedings against him on account of the same facts."

[33] Section 126 (Leave of Director of Public Prosecutions necessary for institution of proceeding against foreigners) of the Criminal Procedure Code reads:

> "(1) Proceedings for the trial of any person, who is not a citizen or person entitled under the provisions of sections 7 or 8 of the Immigration Act to enter and reside in Solomon Islands, for an offence committed within Solomon Islands waters, shall not be instituted in any court except with the leave of the Director of Public Prosecutions and upon his certificate that it is expedient that such proceedings should be instituted.
>
> (2) This section is subject to the following provisions-
>
> . . . .
>
> (c) this section shall not prejudice or affect the trial of any act of piracy as defined by the Law of Nations."

[34] Criminal Procedure Code, sect. 155 ("If on the dismissal of any case any court shall be of opinion that the charge was frivolous or vexatious, such court may order the complainant to pay to the accused reasonable sum as compensation for the trouble and expense to which such person may have been put by reason of such charge in addition to his costs."). Subsection 2 Section 153 (Costs against accused or against a private prosecutor) of the Criminal Procedure Code spell out the procedure for awarding costs:

> "(2) It shall be lawful for a Judge or a Magistrate who acquits or discharges a person accused of an offence, if the prosecution for such offence was originally instituted on a summons or warrant issued on the application of a private prosecutor, to order such private prosecutor to pay to the accused such reasonable costs as to such Judge or Magistrate may seem fit . . .

Subsection 3 defines "private prosecutor" for purposes of Section 153 more broadly than in Section 2 as "any prosecutor other than a public prosecutor."

[35] Electricity Act (Cap 128).

civil claims can be made in the limited number of instances when Solomon Islands courts can exercise universal criminal jurisdiction (see Section 5.2 below).

2.6 PROPOSAL FOR LEGAL REFORM

The Solomon Islands Law Reform Commission (Law Reform Commission), a statutory body established under the Law Reform Commission Act 1994, has begun a comprehensive review of the Penal Code and the Criminal Procedure Code "to simplify the law, eliminate problems in the law, identify more effective laws, and ensure that laws are fair and reflect the needs of the people of Solomon Islands".[36] The Law Reform Commission has explained that since these codes were enacted, "many political, social and legal changes have occurred", noting, in particular, that the codes "need to be assessed to see whether they are consistent with the Constitution and international obligations of Solomon Islands" and "whether they are operating effectively and fairly, and meeting the needs of the people of Solomon Islands".[37]

The Law Reform Commission' review is to take place in three stages. It began its review with the first of a series of issues papers on the two codes (sentencing issues are to be addressed separately), then it entered into a consultation with civil society, which is to be completed on 31 December 2009 (extended from 31 May 2009), and, finally, it is to issue a report with recommendations for reform of the two codes.[38] In addition, the Ministry of Justice and Legal Affairs is drafting an Evidence Bill to change the law about evidence. The Evidence Bill contains provisions regarding crimes of sexual violence, including abolition of the general rule requiring corroboration or warnings for the evidence of sexual assault and limits on the questions that can be asked of victims of such assaults regarding prior sexual history.[39]

Presumably, the component of the review regarding compliance with " international obligations of Solomon Islands" will include compliance both with conventional obligations under international law, such as the 1949 Geneva Conventions, ratified by Solomon Islands, and with customary international law, including customary humanitarian law. However, the Law Reform Commission does not expressly state that these bodies of law would be covered. Moreover, the review is limited in other important respects. First, it does not extend to treaties not ratified by Solomon Islands, such as the Rome Statute of the International Criminal Court (which Solomon Islands signed on 3 December 1998), the International Covenant on Civil and Political Rights or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, even when relevant provisions of those treaties reflect customary international law or general principles of law.

In addition, the review does not expressly extend to obligations under treaties concerning crimes under national law of international concern, where Solomon Islands has enacted

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[36] Law Reform Commission, Issues Paper 1, *supra*, note 9, at p. 18.

[37] *Ibid.*, at pp. 18 – 19.

[38] *Ibid.*, at p. 19.

[39] *Ibid.*

criminal legislation independently of the Penal Code. The Law Reform Commission notes that Solomon Islands has ratified such treaties, including the Supplementary Convention for the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. However, it mentions that such treaties "are relevant to the Penal Code" and "require Solomon Islands to take specific action, including the adoption of legislation, to implement the obligations contained in each convention".[40] In any event, the Law Reform Commission has not limited the scope of comments solicited regarding the review,[41] so it may well be open to suggestions that the review include the question whether those treaties should be implemented in the Penal Code rather than in separate legislation and, possibly, what Solomon Islands should do with respect to implementation of other treaties, if it were to ratify them. In particular, such a review would assist Solomon Islands to fulfil its commitment to the Security Council' Counter-Terrorism Committee to ratify such treaties (see discussion below at Section 4.2).

The review includes the questions of objective and territorial jurisdiction, effects jurisdiction and a very restricted form of universal jurisdiction found in a few states which require some form of link to the forum state (see discussion below of jurisdiction in Sections 3 and 4).

[40] *Ibid.*, at p. 27.

[41] *Ibid.*, at p. 20 (indicating that submissions can "raise issues that have not been identified" in Issues Paper 1).

3. EXTRATERRITORIAL CRIMINAL JURISDICTION OTHER THAN UNIVERSAL JURISDICTION

Under international law, in addition to territorial jurisdiction, national courts can exercise jurisdiction over crimes (or torts) committed by foreigners abroad against other foreigners if one of the following forms of jurisdiction is applicable:

- active personality jurisdiction;
- passive personality jurisdiction;
- protective jurisdiction; or
- universal jurisdiction.

The first three forms of extraterritorial jurisdiction and the crimes that can be prosecuted under each form are discussed below in this section and the fourth, universal jurisdiction, and the crimes subject to this form of jurisdiction, are discussed in the following section.

A preliminary note on territorial jurisdiction

Territorial jurisdiction, the most commonly used form of jurisdiction, is outside the scope of this paper. However, it is useful to note here the scope of this form of jurisdiction since it can include jurisdiction over conduct that occurred outside the national boundaries of the state which is investigating or prosecuting a crime or where the civil tort action is being pursued (forum state). There are two main forms of territorial jurisdiction over crimes where some conduct occurs outside the national boundaries of the forum state: objective and subjective territorial jurisdiction. *Objective territorial jurisdiction* is widely accepted to exist when the conduct constituting the crime begins abroad and the crime is either completed on the territory of the forum state (object state) or any essential element of the crime occurs in the forum state.[42] *Subjective territorial jurisdiction* exists when the crime commenced within the

[42] Ian Brownlie, *Principles of Public International Law*, Oxford, Oxford University Press, 5th ed., 1998, p. 304 (Under the objective territorial principle, "jurisdiction is founded when any essential constituent element of a crime is consummated on state territory"); Robert Jennings and Arthur Watts, *Oppenheim' International Law*, vol. 1, p. 460 ("[O]bjective jurisdiction allows jurisdiction over offences having their culmination within the state even if not begun there."). Such an element in a prosecution for murder could be the death in the state of the court (object state) caused by someone firing across the border from another state or, in a prosecution for conspiracy, a step in the subject state to further the conspiracy agreed in another state. It could also include prosecuting in the object state a person for war crimes suspected of funding or training of armed fighters abroad to fight in the object state.

forum state (subject state), but was completed outside the state.[43]

There is also another, but controversial 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 has 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.[44] In addition, jurisdiction over ships and aircraft registered in the state seeking exercise jurisdiction is often treated as a form of territorial jurisdiction. In any event, such instances are outside the scope of this paper.

The definitions of the forms of geographic jurisdiction are those used in each of the 192 Amnesty International country papers in the *No Safe Haven Series*. Since there is no unanimity among governments or scholars, Amnesty International adopted definitions which seemed to make the most sense and to be clear and consistent with each other.

The basic jurisdictional principle of Solomon Islands is that jurisdiction is territorial.[45] This principle has been inherited from the English legal system.[46] This is certainly the case with regard to the Penal Code. Part III (Territorial Application of this Code), which consists of only two sections, Sections 5 and 6, makes this clear. Section 5 of the Penal Code provides: "subject to the provisions of this Code, this Code shall apply to every place within Solomon

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[43] Brownlie, *supra*, note 42, p. 303 -304 (The subjective application of the territorial principle "creates jurisdiction over crimes commenced within the state, but completed or consummated abroad".); Jennings and Watts, *supra*, note 42, vol. 1, p. 460 ("The subjective application of the principle allows jurisdiction over offences begun within the state but not completed there") (footnote omitted). For example, a person suspected of firing from the subject state across the border into another state could be prosecuted in the subject state for murder even though the death occurred in the neighbouring state. In addition, a person suspected of sending funds from the subject state or training fighters in the subject state to fight abroad could be prosecuted for war crimes in the subject state.

[44] For example, a person could have been tortured abroad and continue to suffer the effects of that torture after entering the forum state.

[45] In *William Douglas McCluskey v. The Attorney General & Others* (Unrep. Civil Case No. 243 of 1993) (cited in *Criminal Law in Solomon Islands*, *supra*, n. 25, at pp. 42-43, Palmer, J.), cited approvingly an Australian treatise on statutory interpretation stating that it was assumed that "parliament will not pass legislation that applies to people in other countries, hence a presumption is adopted by courts that legislation will not have an extraterritorial effect"(*Ibid.* at p. 97) and the judgment in an Australian case, *Jumbunna Coal Mine NL v. Victoria Coal Miners' Assoc.* (1908), 6 CLR 309 at p. 369, stating that "[m]ost statutes, if their general words were taken literally in their widest sense, would apply to the whole world, but they are always read being prima facie restricted in their operation within territorial limits." Judge Palmer concluded, "I do not see why that presumption should not apply in the interpretation of statutes in Solomon Islands especially when the supreme law of the country already has that presumption ingrained in its set-up." *Ibid.*

[46] A leading treatise of English criminal law and procedure states: "The primary basis of English criminal jurisdiction is territorial, it being the function of the English criminal courts to maintain the Queen's peace within her realm." *Archbold: Criminal Pleading, Evidence and Practice* 2008 (2007), para. 2-33.

Islands or within the territorial limits thereof." Therefore, provisions of the Penal Code must be seen as subject only to territorial jurisdiction unless the Code expressly or impliedly states that they have extraterritorial scope. Section 6 of the Penal Code makes clear that Solomon Islands courts can exercise both subjective territorial jurisdiction (where the crime commenced in Solomon Islands but was completed abroad) and objective territorial jurisdiction (where the crime commenced abroad but elements took place in Solomon Islands).[47] However, Solomon Islands has not provided its courts with effects jurisdiction.[48]

There do not appear to be any statutory provisions granting courts active personality, passive personality or protective jurisdiction (see discussion below) and it is doubtful that such jurisdiction exists under the common law. However, as discussed in the following section, there are a few provisions granting courts universal jurisdiction. The Law Reform Commission will address the question of the scope of territorial jurisdiction, but there is no express reference to active or passive personality jurisdiction or protective jurisdiction, although it is possible that it will review the question of implementation of treaty provisions requiring or permitting the use of active and passive personality jurisdiction, whether these provisions would be located in the Penal Code or in separate legislation.[49]

3.1. ACTIVE PERSONALITY JURISDICTION

Active personality jurisdiction is a category of jurisdiction based on the nationality of the suspect or defendant at the time of the commission of the crime or tort.[50] This category of

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[47] Section 6 (Offences committed partly within and partly beyond the jurisdiction) provides:

> "When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done committed partly within and partly within and partly beyond the jurisdiction, every person be beyond the who within the jurisdiction does or makes any part of such act jurisdiction may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction."

[48] Law Reform Commission, Issues Paper 1, *supra*, note 9, at pp. 31 – 32.

[49] *Ibid.*, supra, note 9, at p. 32 (noting that "[i]nternational treaties can require a state to extend its jurisdiction outside of its borders for particular offences.").

[50] This is the approach taken in the International Bar Association Legal Practice Division, Report of the Task Force on Extraterritorial Jurisdiction (October 2008) (IBA Report), p. 144: "The active personality principle, also known as the active nationality principle, permits a state to prosecute its nationals for crimes committed anywhere in the world, if, at the time of the offense, they were such nationals.". For the scope of the active personality principle, see Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation – Ch. One*, AI Index: IOR 53/003/2001, September 2001, Sect. II.B, *supra*, note 2. See also Dapo Akande, *Active Personality Principle*, Antonio Cassese, ed., *The Oxford Companion to International Justice,* Oxford: Oxford University Press, 2008, 229 (criticizing the application of the active personality principle to persons possessing the forum state's' nationality at the time of prosecution, but not at the time of the crime, except when it was a crime under international law; seeing prosecution of persons who became residents of the forum state after the crime as analogous to active personality jurisdiction).

jurisdiction does not include jurisdiction over crimes committed by a foreigner who is not a national, but who is a resident of the country, at the time of the crime, or who subsequently becomes a resident, domiciliary or national of the forum state. Jurisdiction over crimes on such a basis instead falls under the category of universal jurisdiction (see Section 4 below).

There do not appear to be any statutory crimes over which Solomon Islands courts can exercise active personality jurisdiction (jurisdiction over crimes committed by persons who were nationals of Solomon Islands at the time of the crime). There also appears to be no civil jurisdiction over torts committed by nationals abroad.

3.2. PASSIVE PERSONALITY JURISDICTION

Passive personality jurisdiction is a category of jurisdiction based on the nationality of the victim at the time of the commission of the crime or the tort.[51] It does not include crimes committed against someone who became a national, domiciliary or resident of the forum state after the crime was committed. In addition, it also does not apply to crimes committed against a national of a co-belligerent state in an armed conflict who is not a national of the forum state.

There do not appear to be any statutory crimes over which Solomon Islands courts can exercise passive personality jurisdiction (jurisdiction over persons who were responsible for crimes against persons who were nationals of Solomon Islands at the time of the crime). There also appears to be no civil jurisdiction over torts committed against nationals abroad.

3.3. PROTECTIVE JURISDICTION

The category of protective jurisdiction involves jurisdiction over crimes committed against the forum state' own special interests, such as counterfeiting the forum state' currency, treason and sedition.[52]

There do not appear to be any statutory crimes over which Solomon Islands courts can exercise protective jurisdiction (jurisdiction over offences against the specific national interest of Solomon Islands). In each of the offences against public order listed in Part III of the Penal Code (Sections 48 to 63) where there is an extraterritorial component, the wording

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[51] IBA Report, *supra*, n. 50, p.146: "The victim must have been a national of the foreign state, State A, at the time of the crime.". For the scope of the passive personality principle, see Amnesty International, *Universal jurisdiction (Ch. One), supra*, n. 2, at Sect. II.C. See also Dapo Akande, *Active Personality Principle*, Cassese, *supra,* n. 50, at p. 452 (justifying the passive personality jurisdiction on the ground that perpetrators "will often select their victims based on this nationality and will know that the state of nationality has an interest in preventing such acts".).

[52] For the scope of protective jurisdiction, see Amnesty International, *Universal jurisdiction (Ch. One), supra*, n. 2, at Sect. II.D. For a somewhat more restrictive definition, see IBA Report, *supra*, n. 50, p. 149: "[T]he 'protective principle', … recognizes a state' power to assert jurisdiction over a limited range of crimes committed by foreigners outside its territory, where the crime prejudices the state' vital interests". See also Dapo Akande, *Active Personality Principle*, Cassese, *supra,* n. 50, at p. 474 (similar narrow definition).

of the provision appears to require that some element of the crime occur in Solomon Islands. There also appears to be no civil jurisdiction over such conduct.

4. LEGISLATION PROVIDING FOR UNIVERSAL CRIMINAL JURISDICTION

As discussed below, the courts of Solomon Islands may exercise universal jurisdiction over grave breaches of the Geneva Conventions, piracy, crimes aboard foreign aircraft, hijacking of aircraft and attacks on aviation. However, there are no statutory provisions authorizing them to exercise jurisdiction over genocide, crimes against humanity, war crimes (apart from grave breaches of the Geneva Conventions), torture, extrajudicial executions or enforced disappearances.

4.1. ORDINARY CRIMES

There are no statutory provisions authorizing courts to exercise universal jurisdiction over ordinary crimes, such as murder, assault, rape or kidnapping.

4.2. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN

The courts of Solomon Islands can exercise universal jurisdiction over four crimes of international concern identified in treaties providing for or requiring universal jurisdiction: piracy, violence against passengers or crew on board a foreign aircraft, hijacking a foreign aircraft abroad and certain attacks on aviation.[53] As of 1 November 2009, Solomon Islands had not ratified most of the treaties identifying crimes of international concern that provide for or require universal jurisdiction, despite a declaration in 2002 that '"steps are being taken to accede to two international Conventions, namely, the Convention for Suppression of Terrorist Bombings and the Convention for the Suppression of Financing of Terrorism".[54]

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[53] Crimes under international law, including grave breaches of the Geneva Conventions and Protocol I, crimes against humanity, torture, extrajudicial executions and enforced disappearances, are discussed below in Section 4.3.

[54] Report of Solomon Islands on the implementation of resolution 1373 (2001) on counter-terrorism, enclosed with Note verbale dated 23 August 2002 from the Permanent Mission of Solomon Islands to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism, annexed to Letter dated 23 August 2002 from the Chairman of the Security Council Counter-Terrorism Committee, U.N. Doc. S/2002/962, 26 August 2002. As of 1 November 2009,Solomon Islands had neither become a party to these conventions nor enacted legislation implementing them. It also has not submitted the required annual supplemental reports to the Counter-Terrorism Committee for 2003, 2004, 2005, 2006, 2007 or 2008.

4.2.1 AN OVERVIEW: CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN THAT ARE SUBJECT TO UNIVERSAL JURISDICTION IN SOLOMON ISLANDS

The crimes under national law of international concern, most of which are identified in treaties authorizing or requiring states parties to exercise universal jurisdiction, are listed below, where it has been possible to make this determination. There is also an indication of whether Solomon Islands courts can or cannot exercise universal jurisdiction. However, no attempt has been made in this report to determine whether the crime, such as "hostage taking", fully corresponds with each of the crimes covered by the relevant treaty.

For the purposes of this paper, it is sufficient simply to note whether Solomon Islands has implemented, at least in part, the relevant treaty obligation. If so, it is indicated whether the Penal Code expressly defines the conduct, or at least some of the conduct, prohibited in the treaty as a crime or not. The crimes are discussed roughly in chronological order, based on when a crime became generally recognized as subject to universal jurisdiction as with piracy, or when it was the subject of an international or regional treaty provision, regardless when Solomon Islands became a party. Indeed, in some cases, Solomon Islands has not ratified the relevant treaty. Of these crimes, Solomon Islands can exercise universal jurisdiction under the Penal Code over only piracy, violence against passengers or crew on board a foreign aircraft, hijacking a foreign aircraft abroad and certain attacks on aviation.

The crimes and the relevant treaties (protocols are discussed together with the related treaty) discussed below are as follows:

- ***Piracy:*** Customary international law, 1958 Convention on the High Seas and 1982 United Nations Convention on the Law of the Sea;

- ***Counterfeiting:*** 1929 International Convention for the Suppression of Counterfeiting Currency;

- ***Narcotics trafficking:*** 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs;

- ***Violence against passengers or crew on board a foreign aircraft abroad:*** 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention);

- ***Hijacking a foreign aircraft abroad:*** 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention):

- ***Sale of psychotropic substances:*** 1971 Convention on Psychotropic Substances

- ***Certain attacks on aviation:*** 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention):

- ***Attacks on internationally protected persons, including diplomats:*** 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;

- ***Hostage taking:*** 1979 International Convention against the Taking of Hostages;

- ***Theft of nuclear materials:*** 1979 Convention on the Physical Protection of Nuclear Material;

- ***Attacks on ships and navigation at sea:*** 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;

- ***Use, financing and training of mercenaries***: 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries;

- ***Attacks on UN and associated personnel:*** 1994 Convention on the Safety of United Nations and its 2005 Protocol;

- ***Terrorist bombing:*** 1997 International Convention for the Suppression of Terrorist Bombings;

- ***Financing of terrorism:*** 1999 International Convention for the Suppression of the Financing of Terrorism;

- ***Transnational crime - Transnational organized crime:*** 2000 UN Convention against Transnational Organized Crime;

- ***Transnational crime - Trafficking of human beings:*** 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;

- ***Transnational crime – Firearms:*** 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition; and

- ***Nuclear terrorism:*** 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

4.2.2. SPECIFIC CRIMES

Piracy

Piracy is a crime which can be committed only on the high seas or outside the territorial jurisdiction of any state, and, under long-established customary international law, courts of any state can exercise universal jurisdiction over piracy, independently of any treaty. However, one definition has been codified in two treaties providing for universal jurisdiction over this crime. Solomon Islands succeeded to the 1958 Convention on the High Seas on 3 September 1981[55] and ratified the United Nations Convention on the Law of the Sea on 23

[55] Convention on the High Seas (http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf), 29 April 1958 (entered into force 29 Sept. 1962), Arts. 19 (authorizing seizure of pirate ships or aircraft on the high seas), 15 (defining piracy).

June 1997, both of which provide for universal jurisdiction over piracy.[56] Both treaties have an identical definition:

> "Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."[57]

Solomon Islands has provided that piracy is a crime under Section 65 of the Penal Code since 1966. Section 65 (Piracy) of the Penal Code does not expressly define piracy, but incorporates the law of England on piracy in force at the time of the crime:

> "Any person who is guilty of piracy or any crime connected with or relating or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force: Provided that a person convicted of piracy or any crime connected with or relating or akin to piracy who on being so convicted would by the law of England be sentenced to death shall instead of being sentenced to death be sentenced to imprisonment for life."

There do not appear to have been any reported Solomon Islands decisions involving piracy.

Counterfeiting

Solomon Islands has been a party to the 1929 International Convention for the Suppression of Counterfeiting since 3 September 1981.[58] This treaty requires states parties to make

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[56] UN Convention on the Law of the Sea (http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf), 10 Dec. 1982 (entered into force 16 Nov. 1994), arts. 101 (Definition of piracy), 105 (Seizure of a pirate ship or aircraft).

[57] UN Convention on the Law of the Sea, art. 101.

[58] International Convention for the Suppression of Counterfeiting (http://treaties.un.org/Pages/LONViewDetails.aspx?SRC=LONONLINE&id=551&lang=en), 20 April 1929.

counterfeiting of foreign currency and attempts to do so ordinary crimes (Art. 3), to make such crimes subject to extradition (Art. 10) and, if the state party recognizes a general rule of extraterritorial jurisdiction, to prosecute persons suspected of counterfeiting of foreign currency abroad if extradition has been requested and rejected for a reason not connected with the crime (Art. 9).

Solomon Islands has defined some conduct as counterfeiting in Section 365 (Imitation of currency) which applies to "imitation of any currency note or bank note or coin in current use in Solomon Islands or elsewhere". However, it has not expressly given its courts universal jurisdiction over counterfeiting of foreign currency committed outside Solomon Islands and the presumption that legislation is territorially limited suggests that Solomon Islands courts would have no jurisdiction over counterfeiting of foreign currency abroad under this section.

Narcotics trafficking - 1961 Single Convention

Solomon Islands signed the 1961 Single Convention on Narcotics Drugs, as amended by its 1972 Protocol amending the Single Convention on Narcotic Drugs, on 17 March 1982, but as of 25 November 2009, it had not yet ratified it.[59] This treaty requires states parties to define certain conduct concerning narcotic drugs as crimes under national law (Art. 36 (1)) and, if a person suspected of conduct is present in its territory and not extradited to prosecute the suspect (Art. 36 (2) (a) (iv)).

Solomon Islands has defined a range of conduct concerning drugs as crimes under the Dangerous Drugs Act (Cap 98), some of which constitutes conduct prohibited by the 1961 treaty. That act has its origins in a 1941 United Kingdom statute and was last modified in Solomon Islands in 1978. It contains no reference to the 1961 Single Convention on Narcotic Drugs or its 1972 Protocol, although it does refer to the Hague International Opium Convention [60] and Geneva Conventions on Opium and Narcotic Drugs (1 & 2).[61] Solomon Islands has not expressly authorized its courts to exercise universal jurisdiction over these crimes.

Violence against passengers or crew on board a foreign aircraft abroad

Solomon Islands has been a party to the 1963 Convention on Offences and Certain Other

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[59] Single Convention on Narcotics Drugs, 30 March 1961, as amended by Protocol amending the Single Convention on Narcotic Drugs, 1961. Geneva, 25 March 1972.(http://www.unodc.org/pdf/convention_1961_en.pdf).

[60] Hague International Opium Convention (http://www.tc.columbia.edu/centers/cifas/drugsandsociety/background/OpiumConvention.html), 23 January 1912.

[61] International Opium Convention (http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20VI/VI-5.en.pdf), 19.February.1925; International Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20VI/VI-8-a.en.pdf), 13 July 1931.

Acts Committed on Board Aircraft (Tokyo Convention) since 7 July 1978.[62] This treaty authorizes states parties to take measures to ensure persons suspected of violence against passengers or crew on board a foreign aircraft abroad can be extradited or prosecuted (Art. 13 (2)) and to extradite persons suspected of responsibility for such acts or to institute criminal proceedings against them in their own courts (Art. 15 (1)).

In addition to providing in Section 4 (Application of criminal law to offences on aircraft) of the Aircraft (Tokyo, Hague and Montreal) Act for jurisdiction over acts taking place on board a Solomon Islands controlled aircraft while in flight outside the national territory which would be an offence under national law, Solomon Islands has provided in Section 5 (Extension of Solomon Islands local criminal jurisdiction) of that act for jurisdiction over acts on an aircraft (without indicating that it has to be a Solomon Islands controlled aircraft).[63] That section states:

> "For the purpose of conferring jurisdiction, any offence under the law in force in Solomon Islands, being an offence committed on board an aircraft in flight, shall be deemed to have been committed in Solomon Islands."

In addition, Section 8 of this act addresses extradition for crimes committed aboard aircraft (see discussion below in Section 7).

Hijacking a foreign aircraft abroad

As of 25 November 2009, Solomon Islands had neither signed nor ratified the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention).[64] This treaty requires states parties to define seizures of aircraft as crimes under national law (Art. 2), to establish jurisdiction over persons suspected of such seizures who are present in its territory if they are not extradited (Art. 4 (2)), take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and submit the cases to the competent authorities if they are not extradited (Art. 7).

Section 11 (Violence against passengers or crew) of the Aircraft (Tokyo, Hague and Montreal) Act states:

> "Without prejudice to the provisions of section 4 [dealing with offences on board a Solomon Islands controlled aircraft], any act of violence against the passengers or crew

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[62] Convention on Offences and Certain Other Acts Committed on Board Aircraft (http://untreaty.un.org/English/Terrorism/Conv1.pdf), Tokyo, 14 Sept. 1963 (entered into force 4 Dec. 1969).

[63] Article 2 (1) of the Aircraft (Tokyo, Hague and Montreal Conventions) Act makes clear that, "unless the context otherwise requires", the term ""aircraft" means any aircraft; (whether or not a Solomon Islands controlled aircraft") other than military or government aircraft.

[64] Convention for the Suppression of Unlawful Seizure of Aircraft (http://untreaty.un.org/unts/1_60000/24/40/00047980.pdf), The Hague, 15 Dec. 1970 (entered into force 14 Oct. 1973).

> of any aircraft in flight done by any person in connection with the offence of hijacking committed or attempted by him on board such aircraft shall be deemed to have been committed in Solomon Islands and shall constitute an offence punishable under the law in force in Solomon Islands applicable thereto, wherever the act of violence was committed, whatever the State of registration of the aircraft and whatever the nationality or citizenship of the offender."

Although Solomon Islands is not a party to the Hague Convention, it has enacted legislation which would partially implement this treaty if it were to ratify it. Section 10 (Hijacking) of the Aircraft (Tokyo, Hague and Montreal Conventions) Act provides for jurisdiction over foreigners suspected of committing such offences against other foreigners on foreign aircraft outside the territory of Solomon Islands. Subsections 1 to 3 of this section provide:

> "(1) Any person who, being on board an aircraft in flight, unlawfully, by use of force or threats of any kind, seizes the aircraft or exercises control over it shall be guilty of the felony of hijacking and, on conviction be liable to be imprisoned for life.
>
> (2) Subject to subsection (3), in relation to any charge of hijacking or of an attempt to commit hijacking or of being an accomplice to either such hijacking or attempt, the High Court of Solomon Islands shall have jurisdiction to hear and determine the matter whatever the nationality of the accused, whatever the State in which the aircraft is registered and regardless of whether the aircraft is in Solomon Islands or elsewhere.
>
> (3) Where, in relation to any charge of hijacking, the accused is not a citizen of Solomon Islands and the offence is not alleged to have been committed in Solomon Islands, then if—
>
> (a) the aircraft is a military aircraft of another country; or
>
> (b) both the place of take-off and the place of landing of the aircraft are on the territory of a country other than Solomon Islands in which the aircraft is registered,
>
> the High Court of Solomon Islands shall have jurisdiction to hear and determine the matter, so, however, that the court may, if it thinks fit, exercise that jurisdiction only in so far as the High Court thinks necessary to permit the person charged to be transferred for trial to another country claiming jurisdiction in the matter."

1971 Convention on Psychotropic Substances

As of 25 November 2009, Solomon Islands had neither signed nor ratified the 1971 Convention on Psychotropic Substances.[65] The Convention requires each state party, subject to its constitutional limitations, to treat as a punishable offence, any intentional action contrary to a law or regulation adopted in pursuance of its obligations under the Convention,

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[65] Convention on Psychotropic Substances (http://www.unodc.org/pdf/convention_1971_en.pdf), United Nations Conference for the Adoption of a Protocol on Psychotropic Substances, adopted 21 Feb. 1971.

and ensure that serious offences are liable to adequate punishment (Art. 22 (1) (a)) and to prosecute offences committed in their territory and suspects found in its territory, if extradition is not acceptable under that state's law (Art. 22 (2) (b)).

Although Solomon Islands has defined a range of conduct concerning drugs as crimes under the Dangerous Drugs Act (Cap 98), none of it constitutes conduct prohibited by the 1971 treaty. Solomon Islands also regulates the control and distribution of pharmaceuticals under the Pharmacy and Poisons Act (Cap 105). One of the few legislative provisions relating to psychotropic drugs is contained in the Solomon Islands Postal Corporations Act (1996).[66] However, Solomon Islands has not expressly authorized its courts to exercise universal jurisdiction over such psychotropic drug offences.

Certain attacks on aviation

Solomon Islands has been a party to the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) since 13 April 1982.[67] This treaty requires states parties to define certain attacks on aviation as crimes under national law (Art. 3), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 5 (2)), take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and submit the cases to the competent authorities if they are not extradited (Art. 7).

Solomon Islands has partially implemented this treaty. Subsections 1 and 2 of Section 14 (Destroying, damaging or endangering safety of aircraft) of the Aircraft (Tokyo, Hague and Montreal Conventions) provide that it is an offence for any person unlawfully and intentionally to destroy an aircraft, damage it or commit acts of violence on board that are likely to endanger safety of the aircraft in flight or to place a bomb on board and Subsection 3 provides that these subsections

> "apply whether any such act as is therein mentioned is committed in Solomon Islands or elsewhere, whatever the nationality of the person committing the act and whatever the nationality of the person committing the act and whatever the State in which the aircraft is registered."

[66] Solomon Islands Postal Corporations Act (1996), sect. 40(b) (prohibition on the sending of psychotropic drugs).

[67] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (http:untreaty.un.org/English/Terrorism/Conv3.pdf), 23 September 1971 (entered into force 26 January 1973.

Subsections 1 and 3 of Section 15 (Other acts endangering or likely to endanger aircraft) of this act provide that it is an offence to commit certain other acts of damage, destruction or interference likely to endanger safety in flight and Subsection 5 (d) provides that these subsections apply to acts committed outside Solomon Islands when "the act is committed on board a civil aircraft which lands in Solomon Islands with the person who committed the act still on board".

Attacks on internationally protected persons, including diplomats

As of 25 November 2009, Solomon Islands had not yet ratified the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents.[68] This treaty requires states parties to define attacks on internationally protected persons, including diplomats, as crimes under national law (Art. 2), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 3 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 7).

Solomon Islands has not defined an attack on internationally protected persons as a crime and it has not authorized its courts to exercise universal jurisdiction over such attacks.

Hostage taking

As of 25 November 2009, Solomon Islands had neither signed nor ratified the 1979 International Convention against the Taking of Hostages.[69] This treaty requires states parties to define attacks on internationally protected persons, including diplomats, as crimes under national law (Art. 2), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 3 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 7).

Solomon Islands has not defined hostage taking as a crime in the Penal Code and it has not authorized its courts to exercise universal jurisdiction over hostage taking.

Theft of nuclear materials

As of 25 November 2009, Solomon Islands had neither signed nor ratified the 1980 Convention on the Physical Protection of Nuclear Material.[70] This treaty requires states

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[68] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents (http://untreaty.un.org/English/Terrorism/Conv4.pdf), 14 Dec. 1973 (entered into force 20 Feb. 1977).

[69] International Convention against the Taking of Hostages (http://untreaty.un.org/English/Terrorism/Conv5.pdf), 17 Dec. 1979 (entered into force 3 June 1983).

[70] Convention on the Physical Protection of Nuclear Material, Vienna, 26 Oct. 1979

parties to define theft of nuclear material and certain other acts as crimes under national law (Art. 7), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 8 (2)), to take measures to ensure presence for prosecution or extradition (Art. 9) and to submit the cases to the competent authorities if they are not extradited (Art. 10).

Solomon Islands has not defined theft of nuclear material and other acts prohibited in this treaty as crimes in the Penal Code. In addition, it has not authorized its courts to exercise universal jurisdiction over crimes involving nuclear material.

Attacks on ships and navigation at sea

As of 25 November 2009, Solomon Islands had neither signed nor ratified the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.[71] This treaty requires states parties to define attacks on ships and navigation at sea as crimes under national law (Art. 5), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 6 (4)), to take measures to ensure presence for prosecution or extradition (Art. 7 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 10).

Solomon Islands has not defined attacks on ships and navigation at sea as crimes under national law. In addition, it has not authorized its courts to exercise universal jurisdiction over unlawful acts against the safety of maritime navigation.

Use, financing and training of mercenaries

As of 25 November 2009, Solomon Islands had neither signed nor ratified the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.[72] This treaty requires states parties to define the use, financing or training of mercenaries as crimes under national law (Art. 5 (3)), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 9 (2)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 12).

Solomon Islands has not defined the use, financing or training of mercenaries as crimes under national law and it has not authorized its courts to exercise universal jurisdiction over such conduct.

((http://untreaty.un.org/English/Terrorism/Conv6.pdf).

[71] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, entered into force on 1 March 1992 (http://untreaty/un.org/English/Terrorism/Conv8.pdf).

[72] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, U.N. G.A. Res. 44/34, 4 Dec. 1989 (http://www.un.org/documents/ga/res/44/a44r034.htm).

Attacks on UN and associated personnel

As of 25 November 2009, Solomon Islands had neither signed nor ratified the 1994 Convention on the Safety of United Nations and Associated Personnel[73] or its 2005 Protocol.[74] The Convention requires states parties to define attacks on UN and associated personnel as crimes under national law (Art. 9 (2)), to establish jurisdiction over persons suspected of such attacks who are present in its territory if they are not extradited (Art. 10 (4)), to take measures to ensure presence for prosecution or extradition (Art. 13 (1)) and to submit the cases to the competent authorities if they are not extradited (Art. 14). The Protocol expands the scope of protection found in the Convention and incorporates the same obligations.

Solomon Islands has not defined the attacks on UN and associated personnel as crimes in the Penal Code. In addition, it has not authorized its courts to exercise universal jurisdiction over such attacks.

Terrorist bombing

Solomon Islands acceded on 24 September 2009 to the 1997 International Convention for the Suppression of Terrorist Bombings.[75] This treaty requires states parties to define terrorist bombing as a crime under national law (Arts. 4 and 5), to establish jurisdiction over persons suspected of such bombings who are present in its territory if they are not extradited (Art. 6 (4)), to take measures to ensure presence for prosecution or extradition (Art. 7) and to submit the cases to the competent authorities if they are not extradited (Art. 8).

Solomon Islands has not defined terrorist bombing as a crime under national law. In addition, it has not authorized its courts to exercise universal jurisdiction over terrorist bombings.

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[73] Convention on the Safety of United Nations and Associated Personnel, U.N. G. A. Res. 49/59, 9 Dec. 1994 (http://www.un.org/law/cod/safety.htm).

[74] Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, U.N. G.A. Res. 60/42, 8 Dec. 2005 (http://untreaty.un.org/English/notpubl/XVIII-8a_english.pdf).

[75] International Convention for the Suppression of Terrorist Bombings, U.N. G.A. Res. 52/164, 15 Dec. 1997 (http://www.un.org/law/cod/terroris.htm).

Financing of terrorism

Solomon Islands has not yet become a party to the 1999 International Convention for the Suppression of Financing of Terrorism.[76] However, as noted above, it informed the Security Council's Counter-Terrorism Committee in 2002 that steps were being taken to accede to this convention.[77] This treaty requires states parties to define financing of terrorist activities as a crime under national law (Arts. 4 and 5), to establish jurisdiction over persons suspected of such financing who are present in its territory if they are not extradited (Art. 7 (4)), to take measures to ensure presence for prosecution or extradition (Art. 9 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 10 (1)).

Solomon Islands has not defined financing of terrorist activities as a crime. In addition, it has not authorized its courts to exercise universal jurisdiction over financing of terrorist activities.

Transnational crime - Transnational organized crime

Solomon Islands is not a party to the 2000 UN Convention against Transnational Organized Crime.[78] This treaty requires states parties to define certain transnational crimes which involve criminals acting in organized groups as a crime under national law (Arts. 5, 6, 8 and 23), authorizes them to establish jurisdiction over persons suspected of such crimes who are present in its territory if they are not extradited (Art. 15 (4)) and authorizes them to take measures to ensure presence for prosecution or extradition (Art. 16 (9)).

Solomon Islands has not defined transnational organized crime as a crime under national law. In addition, it has not provided its courts with universal jurisdiction over transnational crimes listed in this treaty.

Transnational crime - Trafficking of human beings

Solomon Islands is not a party to the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.[79] This treaty, which incorporates all of the jurisdictional requirements of the UN Convention against Transnational Organized Crime (Art.

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[76] International Convention for the Suppression of Financing of Terrorism, U.N. G.A. Res. 54/109, 9 Dec. 1999 (http://untreaty.un.org/English/Terrorism/Conv12.pdf).

[77] Solomon Islands Note Verbale to Counter-Terrorism Committee, *supra*, note 54.

[78] UN Convention against Transnational Organized Crime, U.N. G.A. Res. 55/25, 15 Nov. 2000 (http://www.unodc.org/pdf/crime/a_res_55/res5525e.pdf).

[79] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, U.N. G.A. Res. 55/25, 15 Nov. 2000, Annex II.

2), requires states parties to define trafficking in human beings as a crime under national law (Art. 3).

Solomon Islands has not defined trafficking in human beings as a crime under national law. In addition, it has not provided its courts with universal jurisdiction over trafficking.

Transnational crime - Firearms

Solomon Islands is not a party to the 2001 Protocol against the Illicit Manufacturing of of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.[80] This treaty, which incorporates all of the jurisdictional requirements of the UN Convention against Transnational Organized Crime (Art. 2), requires states parties to define certain firearms offences as crimes under national law (Art. 5).

Solomon Islands has not defined such offences as crimes under national law. In addition, it has not expressly authorized its courts to exercise universal jurisdiction over firearms offences.

Nuclear terrorism

Solomon Islands is not a party to the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.[81] This treaty requires states parties to define acts of nuclear terrorism as a crime under national law (Arts. 5 and 6), to establish jurisdiction over persons suspected of such financing who are present in its territory if they are not extradited (Art. 9 (4)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 11 (1)).

Solomon Islands has not defined such crimes as crimes under national law. In addition, it has not authorized its courts to exercise universal jurisdiction over nuclear terrorist offences.

4.3. CRIMES UNDER INTERNATIONAL LAW

The courts of Solomon Islands may exercise universal jurisdiction over grave breaches of the four 1949 Geneva Conventions. However, they cannot exercise universal jurisdiction over other crimes under international law, including genocide, crimes against humanity, war crimes other than grave breaches of the Geneva Conventions, torture, extrajudicial executions and enforced disappearances. They may exercise universal jurisdiction over some conduct

[80] Protocol against the Illicit Manufacturing of of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, U.N. G.A. Res. 55/255, 8 June 2001 (http://treaties.un.org/doc/Treaties/2001/05/20010531%2011-11%20AM/Ch_XVIII_12_cp.pdf).

[81] International Convention for the Suppression of Acts of Nuclear Terrorism (http://treaties.un.org/doc/Treaties/2005/04/20050413%2004-02%20PM/Ch_XVIII_15p.pdf).

amounting to such crimes, but only as ordinary crimes, subject to all the restrictions on the exercise of such jurisdiction, including statutes of limitation and prohibitions of retroactive criminal law.

4.3.1. WAR CRIMES

Solomon Islands is a party to the four Geneva Conventions of 1949.[82] However, it has not yet signed or ratified Protocols I[83] and II[84] to these conventions. In addition, Solomon Islands signed the Rome Statute of the International Criminal Court on 3 December 1998, but it has not yet ratified that treaty.[85] The wording of the war crimes included in Article 8 of the Rome Statute, which represents a political compromise, sometimes falls short of customary and conventional international law and, as discussed below, a number of war crimes have been omitted.[86] Although there is no provision in the Rome Statute expressly requiring states

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[82] 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=0800000280158b1a), 75 U.N.T.S. 31. (entered into force 21 October 1951);

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 1951);

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 1951); 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).

[83] 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).

[84] 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).

[85] 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 UN Doc C.N.604.1999.TREATIES-18, 12 July 1999.

[86] The serious shortcomings of Article 8 of the Rome Statute and its omissions have been identified in a number of publications, including: Roberta Arnold, Elizabeth Bennion, Michel Cottier, Knut Dörmann, Patricia Viseur Sellers and Andreas Zimmermann, 'Article 8 (War crimes)', in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers` Notes, Article by*

parties to provide its courts with universal jurisdiction over war crimes listed in Article 8, states parties recognize that they have a complementarity obligation to exercise their jurisdiction – which necessarily includes the jurisdiction that their courts are permitted to exercise under international, as well as national, law - over such crimes. Any state may exercise universal jurisdiction over war crimes in international or non-international armed conflict.[87]

The courts of Solomon Islands have been able to exercise universal jurisdiction over grave breaches of the Geneva Conventions abroad since 1959, before independence, but, as discussed below, Solomon Islands has not defined any other war crimes as crimes in international or non-international armed conflict under its Penal Code or authorized its courts to exercise universal jurisdiction over them.

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.[88] Those breaches, as consolidated without change in substance in Article 8 of the Rome Statute are:

> "Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (i) Wilful killing;
>
> (ii) Torture or inhuman treatment, including biological experiments;
>
> (iii) Wilfully causing great suffering, or serious injury to body or health;
>
> (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

Article, C. H. Beck, Munich; Hart, Oxford; and Nomos, Baden-Baden, 2nd ed., 2008, p. 275; Michael Bothe, 'War Crimes', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones, The Rome Statute of the International Criminal Court: A Commentary, Oxford, Oxford University Press, 2002, p. 379; Anne-Marie LaRosa and Gabriel Chavez Tafur, 'Implementing International Humanitarian Law through the Rome Statute' (forthcoming chapter of book on International Criminal Court edited by Roberto Bellelli); Yves Sandoz, 'Penal Aspects of International Humanitarian Law' in M. Cherif Bassiouni, *International Criminal Law*, Vol.1, Leiden, Martinus Nijhoff Publishers, 2008, p. 293.

[87] Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, Ch. 3, AI Index: IOR 53/005/2001, *supra*, note 2.

[88] First Geneva Convention, art. 50; Second Geneva Convention, art. 51; Third Geneva Convention, art. 130; Fourth Geneva Convention, art. 147.

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages."[89]

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.[90] 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." [91]

Although Solomon Islands does not have a Geneva Conventions Act, the United Kingdom's Geneva Conventions Act 1957 applies to the state under the United Kingdom's Geneva Conventions Act (Colonial Territories) Order in Council, 1959, which applied to the United Kingdom's Solomon Islands Protectorate before it became independent on 7 July 1978.

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[89] Rome Statute, Art. 8 (2) (a).

[90] 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. The *ICRC Commentary* makes clear that the drafters of the Geneva Conventions envisaged that states could satisfy their duty to bring to justice those responsible for grave breaches by transferring suspects to an international criminal tribunal: "[T]here is nothing in the paragraph (First Geneva Convention, Art. 49, para. 2) to exclude the handing over of the accused to an international penal tribunal, the competence of which is recognized by the Contracting Parties. On this point the Diplomatic Conference declined expressly to take any decision which might hamper future developments of international law". ICRC, I *Commentary on the Geneva Conventions of 12 August 1949*, 366 (1952). *See also ICRC Commentary on the Protocols* 975 n. 10 ("The Conventions do not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties . . .").

[91] First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146.

Section 5 of Solomon Islands Independence Order 1978 provides that existing laws shall continue to have effect and Section 3, which provides for the revocations of several orders, does not include the 1959 Order in Council.[92]

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

Solomon Islands has failed to fulfil its obligations under Protocol I to define grave breaches of that treaty as crimes under its national law and to provide its courts with universal jurisdiction over such grave breaches.[93] Article 85 (2) of Protocol I expands the scope of persons protected by the Geneva Conventions.[94] In addition, Protocol I also lists a number of new grave breaches of that treaty in Articles 11[95] and 85 (3) to (5).[96]

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[92] Solomon Islands Independence Order 1978, *supra*, note 1.

[93] Article 85 (1) of Protocol I states that the mandatory "provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section [Repression of breaches of the Conventions and of this Protocol – Articles 85 to 91], shall apply to the repression of breaches and grave breaches of this Protocol."

[94] Article 85 (2) of Protocol I states:

> "Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against 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."

[95] Article 11 of Protocol I provides:

> "1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.
>
> 2. It is, in particular, prohibited to carry out on such persons, even with their consent:
>
> (a) physical mutilations;
>
> (b) medical or scientific experiments;
>
> (c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.
>
> 3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power."

[96] Article 85 (3) of Protocol I states:

"In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);

(d) making non-defended localities and demilitarized zones the object of attack;

(e) making a person the object of attack in the knowledge that he is hors de combat;

(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

(b) unjustifiable delay in the repatriation of prisoners of war or civilians;

(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;

War crimes in international armed conflict: 1998 Rome Statute and customary international law

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

Rome Statute. Article 8 (2) (b) of the Rome Statute defines a broad range of war crimes in international armed conflict.[97] However, there are a number of serious gaps in Article 8 of the

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(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;

(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes."

[97] Article 8 (2) (b) of the Rome Statute lists the following serious violations of the laws and customs applicable in international armed conflict:

"(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

Rome Statute.

Other treaties. The Rome Statute leaves out a number of war crimes in international armed conflict listed in treaties, including:

> unjustifiable delay in the repatriation of prisoners of war (Article 118 of the Third Geneva Convention and Article 85 (4) (b) of Protocol I, as well as customary international humanitarian law);[98]
>
> unjustifiable delay in the repatriation of civilians (Article 85 (4) (b) of Protocol, as well as customary international humanitarian law);[99]
>
> launching of an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects (Article 85 (3) (c) and customary international humanitarian law);[100]
>
> practices of apartheid and other inhuman or degrading practices involving outrages upon personal dignity, based on racial discrimination (Article 85 (4) (c) of Protocol I and customary international humanitarian law).[101]

In addition, there are a number of international humanitarian law treaties applicable during 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.[102]

> (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
>
> (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
>
> (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities."

[98] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Geneva, International Committee of the Red Cross and Cambridge University Press, 2005, Rule 156 (Serious violations of international humanitarian constitute war crimes).

[99] *Ibid.*

[100] *Ibid.*, Rule 156 (Serious violations of international humanitarian constitute war crimes).

[101] *Ibid.*

[102] These treaties, some of which contain penal provisions, include: Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17

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 mentioned above) which, if violated, could lead to individual criminal responsibility, including:

slavery; [103]

deportation to slave labour;[104]

collective punishments;[105]

despoliation of the wounded, sick, shipwrecked or dead;[106]

attacking or ill-treating a *parlementaire* or bearer of the flag of truce;[107]

June 1925; Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Opened for Signature at London, Moscow and Washington, 10 April 1972; Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976; Final Act of the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980; Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980; Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993; Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980 (Amendment article 1, 21 December 2001); Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003; Convention on Cluster Munitions, 30 May 2008.

[103] Henckaerts and Doswald-Beck, *supra*, note 98, Rule 94 (Slavery and the slave trade in all their forms are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

[104] *Ibid.*, Rule 95 (Uncompensated or abusive forced labour is prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

[105] *Ibid.*, Rule 103 (Collective punishments are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

[106] *Ibid.*, Rule 156 (Serious violations of international humanitarian constitute war crimes).

> launching an indiscriminate attack resulting in loss of life or injury to civilians or damage to civilian objects;[108]
>
> use of biological weapons;[109]
>
> use of chemical weapons;[110]
>
> the use of non-detectable fragments; and[111]

the use of binding laser weapons.[112] Solomon Islands has not defined a broad range of war crimes in international armed conflict listed in Article 8 (2) (b) of the Rome Statute as crimes under national law or provided its courts with universal jurisdiction over them. It has also failed to define a number of other war crimes under customary and conventional international humanitarian law as crimes in its national law.

War crimes in non-international armed conflict: Common Article 3 of the Geneva Conventions and 1977 Protocol II

Solomon Islands has not yet implemented common Article 3 of the Geneva Conventions, Protocol II or Article 8 (2) (c) or (e) of the Rome Statute in its national legislation. Therefore, its courts cannot exercise universal jurisdiction in respect of war crimes committed in non-international armed conflicts. This failure leaves an enormous impunity gap. Common Article 3 is a mini-convention that protects persons not taking part in hostilities from a broad range of conduct amounting to inhumane treatment.[113] Protocol II, "which develops and

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[107] *Ibid.*, Rule 67 (*Parlementaires* are inviolable); Rule 156 (Serious violations of international humanitarian constitute war crimes).

[108] *Ibid.*, Rule 11 (Indiscriminate attacks are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

[109] *Ibid.*, Rule 73 (The use of biological weapons is prohibited).

[110] *Ibid.*, Rule 74 (The use of chemical weapons is prohibited).

[111] *Ibid.*, 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).

[112] *Ibid.*, 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).

[113] Common Article 3 provides in part:

> "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

supplements Article 3 common to the Geneva Conventions" with respect to non-international armed conflicts which take place in the territory of a state party to the Protocol "between its 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 sustained and concerted military operations and to implement this Protocol",[114] provides a broad range of protections to vulnerable people.[115] Article 8 (2) (c) of the Rome Statute includes most of the war crimes in common Article 3 and Article 8 (2) (d) contains an extensive, but by no means complete, list of war crimes in non-international armed conflict.[116]

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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 judgement 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. . ."

Article 8 (2) (c) of the Rome Statute omits paragraph 2 of common Article 3, but violations of this provision could lead to individual criminal responsibility. Statute of the International Criminal Tribunal for Rwanda, art. 4 ("The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions . . .").

[114] Protocol II, art. 1.

[115] Protocol II contains fundamental guarantees applicable to all persons who do not take a direct part in hostilities or have ceased to do so (Article 4), protections for persons whose liberty has been restricted for reasons related to the armed conflict (Article 5), provisions requiring prosecution and punishment of criminal offences related to the armed conflict (Article 6), protection and care of wounded, sick and shipwrecked (Article 7), a duty to search for and collect such persons and to protect them (Article 8), protection of medical and religious personnel (Article 9), general protection of persons performing medical duties (Article 10), protection of medical units and transports (Article 11), protection of the red cross emblem (Article 12), protection of the civilian population (Article 13), protection of objects indispensable to the survival of the civilian population (Article 14), protection of works and installations containing dangerous forces (Article 15), protection of cultural objects and places of worship (Article 16), prohibition of forced movement of civilians for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand (Article 17) and the right of relief societies and relief actions to take place (Article 18).

[116] Article 8 (2) (d) of the Rome Statute provides:

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 of the Rome Statute. For example, intentionally starving the civilian population (Article 14 of Protocol II and customary international humanitarian law) is omitted.[117] In addition, there are a number of international humanitarian law treaties

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> "Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
>
> (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
>
> (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
>
> (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
>
> (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
>
> (v) Pillaging a town or place, even when taken by assault;
>
> (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
>
> (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
>
> (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
>
> (ix) Killing or wounding treacherously a combatant adversary;
>
> (x) Declaring that no quarter will be given;
>
> (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
>
> (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict[.]"

[117] See footnote 115, above. See also Henckaerts and Doswald-Beck, supra, note 98, Rule 53 (The use of starvation of the civilian population as a method of warfare is prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

applicable during non-national 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.[118] Finally, there a number of rules of customary international law applicable to non-international armed conflict which, if violated, could lead to individual criminal responsibility for war crimes, including:

use of biological weapons;[119]

use of chemical weapons;[120]

the use of non-detectable fragments;[121]

the use of binding laser weapons;[122]

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

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[118] These treaties, some of which contain penal provisions, include: Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954; Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980; Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980; Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993; Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980 (Amendment article 1, 21 December 2001); Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003; Convention on Cluster Munitions, 30 May 2008.

[119] Henckaerts and Doswald-Beck, *supra*, note 98, Rule 73 (The use of biological weapons is prohibited).

[120] *Ibid.*, Rule 74 (The use of chemical weapons is prohibited).

[121] *Ibid.*, 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).

[122] *Ibid.*, 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).

damage;[123]

making non-defended localities and demilitarized zones the object of attack;[124]

using human shields;[125]

slavery;[126] and

collective punishments.[127].

In addition, there are three weapons (poison, toxic gases and dum-dum bullets) whose use in international armed conflict is a war crime under Article 8 of the Rome Statute, but not if the use is in a non-international armed conflict.[128] However, it is increasingly considered that the use of these weapons in non-international armed conflict is a crime.[129]

4.3.2. CRIMES AGAINST HUMANITY

Solomon Islands signed the Rome Statute on 3 December 1998, but it has not yet ratified this treaty. As discussed below, it has not defined any crimes against humanity as crimes in its Penal Code or authorized its courts to exercise universal jurisdiction over crimes against humanity.

Article 7 (1) of the Rome Statute defines crimes against humanity as follows:

"For the purpose of this Statute, 'crime against humanity' means any of the following

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[123] *Ibid.*, Rule 11 (Indiscriminate attacks are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

[124] *Ibid.*, 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 constitute war crimes).

[125] *Ibid.*, Rule 97 (The use of human shields is prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

[126] *Ibid.*, Rule 94 (Slavery and the slave trade in all their forms are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

[127] *Ibid.*, Rule 103 (Collective punishments are prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

[128] Rome Statute, art. 8 (2) (b) (xvii), (xviii) and (xix).

[129] Belgium, Draft Amendments to the Rome Statute on War Crimes, Assembly of States Parties to the Rome Statute, 29 September 2009 (http://www.icc-cpi.int/NR/rdonlyres/3798777A-F998-4B22-9F3D-5B25940CD299/0/BelgiumCN733EN.pdf) (proposing to amend Article 8 (2) (e) to make the use of these three weapons in non-international armed conflict war crimes).

> acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,"

followed by a list of prohibited acts.[130]

Article 7 (2) (a) defines an attack against a civilian population as follows:

> "'Attack directed against any civilian population` means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

Article 7 (2) (b) through (k) provides more detailed definitions of some of the enumerated acts.

Murder

Article 2 (1) (a) of the Rome Statute identifies, but does not define, murder as a crime against humanity."[131]

Solomon Islands has defined murder and manslaughter as crimes,[132] but it has not characterized them as crimes against humanity or provided its courts with universal jurisdiction over them.

Extermination

Article 7 (1) (b) of the Rome Statute lists and Article 7 (2) (b) defines extermination as follows:

> "`Extermination` includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."[133]

Solomon Islands has not defined extermination as a crime under national law or provided its courts with universal jurisdiction over it.

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[130] Rome Statute, Art. 7 (1).

[131] Rome Statute of the International Criminal Court. For the scope of this crime against humanity, see Machteld Boot, Rodney Dixon and Christopher K. Hall, 'Article 7 (Crimes Against Humanity)', in Triffterer, *supra*, note 86, p. 183.

[132] Penal Code, Part XX (Murder and manslaughter), sects. 199 to 209.

133 Rome Statute, Art. 7 (1) (b) and (2) (b). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* n. 131, at pp. 190-191, 237-243.

Enslavement

Article 7 (1) (c) of the Rome Statute lists and Article 7 (2) (c) defines enslavement as follows:

> "`Enslavement` means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."[134]

Solomon Islands has not defined the crime enslavement (or any of its elements) as crimes under national law and it has not provided its courts with universal jurisdiction over this crime.

Deportation or forcible transfer of population

Article 7 (1) (d) of the Rome Statute lists and (2) (d) defines deportation or forcible transfer of population as follows:

> "`Deportation or forcible transfer of population` means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."[135]

Solomon Islands has not defined deportation or forcible transfer of population as crimes under national law or provided its courts with universal jurisdiction over them.

Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law

Article 7 (1) (e) of the Rome Statute lists imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, but does not define it.[136]

Solomon Islands has not defined imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law as a crime under national law or provided its courts with universal jurisdiction over this crime.

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134 Rome Statute, Art. 7 (1) (c) and (2) (c). For the scope of the crime against humanity of enslavement, which includes all forms of contemporary slavery, servitude and forced or compulsory labour, see Boot, Dixon and Hall, *supra* n. 131 at pp. 191-194, 244-247.

135 Rome Statute, Art. 7 (1) (d) and (2) (d). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* n. 131 at pp. 194-200, 247-251.

136 Rome Statute, Art. 7 (1) (e) .For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* n. 131 at pp. 200-205.

Torture

Article 7 (1) (f) of the Rome Statute lists and (2) (e) defines torture as follows:

> "`Torture` means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person 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"[137]

Solomon Islands has not defined torture as a crime under national law or provided its courts with universal jurisdiction over it.

Rape

Article 7 (1) (g) of the Rome Statute lists rape as a crime against humanity.[138] The first non-contextual element of this crime, as spelled out in the Elements of Crimes, is:

> "The perpetrator invaded [footnote 15] 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."

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

> "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." [footnote 16]

Footnote 16 explains:

> "It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity."

Solomon Islands has defined rape as an ordinary crime in Section 136 of the Penal Code, but it has neither defined it as a crime against humanity nor provided its courts with universal

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[137] Rome Statute, Art. 7 (1) (f) and (2) (e). The scope of the crime against humanity of torture differs in some respects from torture as a war crime and from torture that is neither a crime against humanity nor a war crime. For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* n. 131 at pp. 205-206, 251-255.

[138] Rome Statute, Art. 7 (1) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* n. 131 at pp. 206-211.

jurisdiction over this crime. Section 136 provides:

> "Any person who has unlawful sexual intercourse with a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape."

That definition falls short of the definition of rape as a crime against humanity in the Elements of Crimes, in particular, because it focuses on consent, rather than coercion, and because not all forms of coercion, including taking advantage of a coercive environment, are included.[139]

Sexual slavery

Article 7 (1) (g) of the Rome Statute lists sexual slavery as a crime against humanity.[140] The elements of this crime are spelled out in the Elements of Crimes.

Solomon Islands has not expressly defined sexual slavery in its Penal Code or provided its courts with universal jurisdiction over it.

Enforced prostitution

Article 7 (1) (g) of the Rome Statute lists enforced prostitution as a crime against humanity.[141] The elements of this crime are spelled out in the Elements of Crimes.

Solomon Islands has defined forced prostitution as an ordinary crime in Section 145 (Procuring defilement of woman by threats or fraud or administering drugs) of the Penal Code, but that definition is not fully consistent with the definition of enforced prostitution as a crime against humanity and Solomon Islands has not provided its courts with universal jurisdiction over this crime.

Forced pregnancy

Article 7 (1) (g) of the Rome Statute lists forced pregnancy as a crime against humanity and Article 7 (2) (f) defines it as follows.

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[139] The need for criminal law regarding rape and crimes of sexual violence to ensure "the effective protection of the individual' sexual autonomy" is recognized in *M.C. v. Bulgaria*, Judgment, Appl. No. 39272/98, Eur. Ct. Hum. Rts., 4 December 2003, para. 157.

[140] Rome Statute, Art. 7 (1) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* n. 131 at pp. 211-212.

[141] Rome Statute, Art. 7 (1) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* n. 131 at pp. 212-213.

> "`Forced pregnancy` means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;"[142]

The elements of this crime are spelled out in the Elements of Crimes. Solomon Islands has neither defined forced pregnancy as a crime under national law nor provided its courts with universal jurisdiction over this crime.

Enforced sterilization

Article 7 (1) (g) of the Rome Statute lists enforced sterilization as a crime against humanity, but does not define it. [143] The elements of this crime are spelled out in the Elements of Crimes.

Solomon Islands has neither defined forced pregnancy as a crime against humanity nor provided its courts with universal jurisdiction over it.

Other forms of sexual violence of comparable gravity

Article 7 (1) (g) of the Rome Statute lists other forms of sexual violence as a crime under national law as a crime against humanity, but does not define it. [144] The elements of this crime are spelled out in the Elements of Crimes.

Solomon Islands has neither defined other forms of sexual violence as a crime under national law nor provided its courts with universal jurisdiction over it.

Persecution

Article 7 (1) (h) of the Rome Statute lists "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court" as a crime against humanity while Article 7 (2) (g) defines persecution as follows:

> "`Persecution` means the intentional and severe deprivation of fundamental rights

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[142] Rome Statute, Art. 7 (1) (g) and (2) (f). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra*, n. 131, at pp. 206-216, 255-256

[143] Rome Statute, Art. 7 (1) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* n. 131 at pp. 213-214.

[144] Rome Statute, Art. 7 (1) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra* n. 131 at pp. 214-215.

> contrary to international law by reason of the identity of the group or collectivity;"[145]

Solomon Islands has not defined persecution as a crime under national law nor provided its courts with universal jurisdiction over it.

Enforced disappearance of persons

See Section 4.3.6 below.

Apartheid

As of 25 November 2009, Solomon Islands had neither signed nor ratified the 1973 Convention for the Prevention and Punishment of the Crime of Apartheid (Apartheid Convention).[146] That treaty requires states parties to take legislative or other measures necessary to suppress the crime of apartheid as practised in Southern Africa (Art. IV (a)), obligates them to adopt legislative and judicial measures to bring to justice "in accordance with their jurisdiction" those responsible for this crime whether or not such persons are residents or nationals of the state party or another state or are stateless (Art. IV (b)) and permits the courts of any state party which acquires jurisdiction over a person suspected of this crime to try that person (Art. V).

Apartheid is also listed as a crime against humanity in Article 7 (1) (j) of the Rome Statute and defined, for the purposes of the Statute, in Article 7 (2) (h) as follows:

> "'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."[147]

Solomon Islands has neither defined the crime of apartheid as a crime under national law nor provided its courts with universal jurisdiction over it.

Other inhumane acts

Article 7 (1) (k) of the Rome Statute lists, but does not define, the crime against humanity of "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious

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[145] Rome Statute, Art. 7 (1) (h) and (2) (g). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra*, n. 131, at pp. 216-221, 256-263.

[146] International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973 entry into force 18 July 1976 (http://www.unhchr.ch/html/menu3/b/11.htm).

[147] Rome Statute, Art. 7 (1) (j) and (2) h). For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra*, n. 131, at pp. 227-229, 263-266.

injury to body or to mental or physical health."[148]

Solomon Islands has neither defined other inhumane acts as a crime against humanity nor provided its courts with universal jurisdiction over them.

4.3.3. GENOCIDE

As of 25 November 2009, Solomon Islands had neither signed nor ratified the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention). 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;
>
> (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 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.

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[148] Rome Statute of the International Criminal Court. For the scope of this crime against humanity, see Boot, Dixon and Hall, *supra*, n. 131, at pp. 227-229, 263-266.

Solomon Islands has defined genocide as a crime in Subsection 1 of Section 52 (Genocide) of its Penal Code, with a definition that follows almost exactly the same wording as in Article II of the Genocide Convention.[149] However, it 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. It has not provided its courts with universal jurisdiction over genocide. The permission of the Director of Public Prosecutions is required to institute a prosecution for genocide (see Section 6.8 below).[150]

4.3.4. TORTURE

Solomon Islands has not yet become a party to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (Convention against Torture).[151] 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 who are present in its territory 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

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[149] Subsection 1 of Article 52 (Genocide) of the Penal Code defines the crime as follows:

"Any person who with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, commits any of the following acts:-

(a) killing members of the group;

(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,

is guilty of genocide and shall-

(i) if the offence consists of the killing of any person, be sentenced to imprisonment for life;

(ii) in any other case, be liable to imprisonment for fourteen years and notwithstanding section 24(3) may not be sentenced to pay a fine instead of imprisonment."

[150] Subsection 2 of Section 52 (Genocide) of the Penal Code states: "Proceedings for an offence of genocide shall not be instituted except by or with the consent of the Director of Public Prosecutions."

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

authorities if they are not extradited (Art. 7 (1)).

Solomon Islands has not defined torture as a crime. The Penal Code does not define torture as a crime, although some of the activities associated with torture—including assault, kidnapping, and forced imprisonment—are defined as crimes in the Penal Code.[152] However, the courts of Solomon Islands cannot exercise universal jurisdiction over these ordinary crimes.

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".[153] The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions make clear that states must not only bring to justice persons responsible for such killings in territory under their jurisdiction, but also wherever the killers are located.[154]

Extrajudicial executions are not expressly defined as crimes in the Penal Code. However, these killings could be prosecuted as murder under Section 200 (Murder) of the Penal Code, or, if committed during an international armed conflict, as a grave breach of the Geneva Conventions, but the courts of Solomon Islands cannot exercise universal jurisdiction over the ordinary crime of murder.

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[152] See, for example, Penal Code, Part XX (Murder and manslaughter), Sects. 199 to 209; Part XXII (Offences connected with murder and suicide), Sects. 215 to 218; Part XXIII (Offences endangering life and health), Sections 222 to 226, 229, 231 to 236; Part XXV (Assaults), Sects. 244 to 245, 247; Part XXVI (Offences against liberty), Sects. 248 to 256.

[153] Amnesty International, *14-Point Program for the Prevention of Extrajudicial Executions*, AI Index: POL 35/002/1993 (1993); Amnesty International, *"Disappearances" and Political Killings – Human Rights Crisis of the 1990s: A Manual for Action*, AI Index: ACT 33/01/94, February 1994, 86. For a discussion of universal jurisdiction over extrajudicial executions, see Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation - Ch. Eleven (Extrajudicial executions)*, AI Index: 53/014/2001, September 2001 (http://web.amnesty.org/library/index/engior530142001?OpenDocument).

[154] UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ECOSOC Res. 1989/65, 24 May 1989, Prin. 18. That principle states:

> "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."

4.3.6. ENFORCED DISAPPEARANCES

Solomon Islands has not yet signed or ratified the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[155] This treaty requires states parties to define enforced disappearance as a crime under national law (Arts. 3, 4 and 6),[156] to establish jurisdiction over persons suspected of enforced disappearance who are present in its territory 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)).

There is no crime of enforced disappearance in the Penal Code. However, some acts of this complex crime can be prosecuted under the Penal Code as an ordinary crime, such as kidnapping, but Solomon Islands has not provided its courts with universal jurisdiction over 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 Nuremburg Charter in 1945.[157] 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.[158]

Solomon Islands, however, has not defined the planning, preparation, initiation or waging of an aggressive war as a crime under national law provided its courts with jurisdiction over this crime.

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[155] 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).

[156] 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".

[157] 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 [.]"].

[158] Rome Statute, art. 5 (2).

5. CIVIL JURISDICTION OVER TORTS

There does not appear to be any legislation providing for universal civil jurisdiction in civil proceedings. However, victims of crimes can obtain civil reparations in the form of compensation in criminal proceedings, including proceedings involving the limited number of crimes in the Penal Code where Solomon Islands courts can exercise universal jurisdiction, although it is not clear whether such civil claims can be raised in criminal proceedings based on crimes, such as grave breaches of the 1949 Geneva Conventions, defined under other legislation.

A preliminary note on the right to reparations

The right of victims and their families to recover reparations for crimes under international law, whether during peace or armed conflict, has been confirmed in provisions of a number of international instruments adopted since the Convention against Torture was adopted nearly a quarter century ago in 1984.[159] These instruments do not restrict this right geographically or abrogate it by state or official immunities. They include the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[160] the 1998 Rome Statute of the International Criminal Court[161] and two instruments adopted in April 2005 by the Commission on Human Rights. The first of these two instruments, the 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

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[159] Article 14 of the Convention against Torture provides:

> "1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."

This article requires states parties to guarantee the right of all victims of torture to reparations, regardless of nationality and regardless where the torture was committed. Christopher Keith Hall, *The Duty of Staes Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad,* Eur. J. Int"l L., vol. 18, p. 921 (2007).

[160] GA Res. 40/34, 29 Nov. 1985.

[161] Rome Statute, Art. 75. Its reach is potentially universal as the Security Council can refer a situation involving crimes in any state to the Prosecutor.

Principles),[162] was adopted in December of that year by the UN General Assembly and the second was the UN Updated set of principles for the protection and promotion of human rights through action to combat impunity (Joinet-Orentlicher Principles).[163] Both instruments, which were designed to reflect international law obligations, have been cited by Pre-Trial Chamber I of the International Criminal Court in its determination that the harm suffered by victims of crimes under international law includes emotional suffering and economic loss.[164] Both instruments also recognize that there are five forms of reparations: restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. Most recently, the UN General Assembly adopted in 2006 by consensus the International Convention for the Protection of All Persons from Enforced Disappearance with a very broad definition of the right to reparations.[165] This right is inherent in the right to a remedy, as guaranteed in Article 2 of the International Covenant on Civil and Political Rights (ICCPR), adopted four decades ago in 1966.[166] Indeed, the international community recognized the rights of victims to civil recovery directly against foreign states for war crimes more than a century ago in Article 3 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.[167] Germany, which proposed including Article 3, stated:

> "if . . . individuals injured by breach of the Regulations, could not ask for compensation from the Government, and instead they had to turn against the officer or soldier responsible, they would, in the majority of cases be denied their right to obtain compensation"[.][168]

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[162] UN Comm"n Hum. Rts Res. E/CN.4/2005/35, 13 April 2005; GA Res. A/RES/60/147, 16 Dec. 2005.

[163] UN Comm"n Hum. Rts Res. E/CN.4/2005/81, 15 April 2005.

[164] *Situation of the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Case No. ICC-01/04, Pre-Trial Chamber I, 17 January 2006, para. 115.

[165] UN G.A. Res. 61/177, 20 Dec. 2006, Art. 24.

[166] See Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (no suggestion that the right to a remedy under the ICCPR is geographically restricted).

[167] 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* 67 (Oxford: Oxford University Press 3rd ed. 2000); Hisakazu Fujita, Isomi Suzuki and Kantato Nagano, *War and the Rights of Individuals, Renaissance of Individual Compensation*, Nippon Hyoron-sha Co. Ltd. Publishers (1999), expert opinions by Frits Kalshoven, p. 31; Eric David, p. 49; Christopher Greenwood, p. 59.

[168] Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano, *War and the Rights of Individuals, Renaissance of Individual Compensation*, Nippon Hyoron-sha Co. Ltd. Publishers (1999), expert Opinion by David, Eric, p.51.

5.1. LEGISLATION PROVIDING FOR UNIVERSAL JURISDICTION OVER TORTS IN CIVIL CASES

In contrast to a number of civil law countries and the United States,[169] there is no specific legislation in Solomon Islands permitting victims to obtain reparations in civil proceedings based on universal jurisdiction. In addition, the scope of reparations available to victims of crimes is limited to compensation. Solomon Islands courts are unable to award other forms of reparations to which victims are entitled, such as restitution, rehabilitation, satisfaction and guarantees of non-repetition.

5.2. LEGISLATION PROVIDING FOR RAISING CIVIL CLAIMS IN CRIMINAL CASES

The Penal Code and the Criminal Procedure Code both authorize the payment of compensation in criminal proceedings to certain victims, which means that Solomon Islands permits universal civil jurisdiction to be exercised when the tort constitutes one of the limited number of crimes subject to universal criminal jurisdiction.

Compensation pursuant to the Penal Code. Section 27 of the Penal Code provides:

> "Any person convicted of an offence may be ordered to make compensation to any person injured by his offence and such compensation may either be in addition to or in substitution for any other punishment."

There is no definition of the words "person injured" in either Section 4 (Interpretation) or Section 27 of the Penal Code. One possible interpretation is that the concept of injury is encapsulated by the restrictive definition of the word "harm" in Section 4. That section defines "harm" as "any bodily hurt, disease or disorder whether permanent or temporary" or "harm endangering life". If this interpretation were correct, it would rule out mental harm, which often is the result of crimes under international law, for example, this is the necessary consequence of an enforced disappearance on the family of the "disappeared" person. However, the Solomon Islands High Court has rejected a restrictive reading in *Maenuna v. Regina*, a case involving conspiracy to procure payment of money by false pretences:

> "The ambit of section 27 is to be derived from the words any person injured by his offence. In the absence of any express limitation to the use of the word 'injured' it is to be liberally interpreted and not restrictively defined. Secondly it should be given its meaning as used in common parlance. The Australian Little Oxford Dictionary defines the word 'injure' as 'hurt, harm, impair, do wrong to' and 'injury' as 'wrong, damage, harm'. The word 'injured' accordingly should not be confined to personal injury claims but to include other losses. This must naturally include financial losses incurred by the

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[169] *See, for example,* Amnesty International, *Universal jurisdiction: The scope of universal civil jurisdiction*, 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).

victims arising from the offence of the Defendants."[170]

Compensation awards under the Criminal Procedure Code out of fines. In addition to the general provision regarding compensation under Section 27 of the Penal Code, Section 156 of the Criminal Procedure Code authorizes the court to award part of any fine that has been paid as compensation when the victim would be entitled to such compensation if a civil proceeding were instituted.[171]

Criteria for awarding compensation in criminal proceedings. There is neither an express limit on the amount of compensation which can be awarded under Section 27 of the Penal Code nor any statutory criteria for calculating such compensation. However, the absence of an express limit does not give a magistrate or judge an unfettered discretion in awarding compensation. There are a number of established principles in Solomon Islands jurisprudence (citing approvingly post-independence jurisprudence in English courts), which must be followed when considering civil compensation in criminal proceedings.[172]

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[170] *Maenuna v. Regina* [2004] SBHC 128; HCSI-CRAC 121, 300, 305, 374, 375 of 2003 (8 December 2004). *See also Dausabea v. Regina* [2009] SBCA 11; CA-CRAC 20 of 2008 (26 March 2009) (upholding a sentence containing a compensation order in a fraudulent conversion case).

[171] Section 156 of the Criminal Procedure Code states:

> "(1) Whenever any court imposes a fine, or confirms on appeal, revision or otherwise a sentence of fine, or a which a fine forms part, the court may, when passing judgement, order the whole or any part of the fine recovered to be applied-
>
> *(a)* in defraying expenses properly incurred in prosecution;
>
> *(b)* in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is in the opinion of the court recoverable by civil suit.
>
> (2) If the fine is imposed in a case which is subject t no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal is presented, before the decision or discontinuance of the appeal.
>
> (3) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the court shall account any sum paid or recovered as compensation under section."

[172] In *Maeuna v. Regina*, *supra*, n. 170, the High Court rejected a contention that the amount of compensation could not exceed the amount of a fine for the crime and, in effect, confirmed that compensation was civil, rather than criminal, in nature. After noting that the Penal Code did "not impose any limits as to the amount of compensation which the court could order", it concluded that "it would not be appropriate to impose any limits. A compensation order is different from a fine." This point is made clear in a decision by the English Court of Appeal in *Regina v. Vivian* [1979] 1 All ER 48, [1979] 1 WLR 291, 68 Cr App R 53, [1979] RTR 106, 143 JP 102, cited by the High Court in *Maeuna v. Regina.* The English Court of Appeal noted that "[t]his question of compensation and the principles which should be applied have come before the court on previous occasions" and referred in particular the judgment of Lord Scarman in *R. v Inwood* [1975] 60 Cr App R 70 at 73, explaining that compensation orders in criminal proceedings were an abbreviated and expedited substitute for a civil proceeding:

> "Compensation orders were not introduced into our law to enable the convicted to buy themselves

First, "before considering whether to impose a compensation order or not, it is important to establish by evidence the amount of the victim's loss, if not agreed by the Defendants".[173] Second, in determining the amount of the victim's loss, the court does not have unfettered discretion and may not 'simply pluck a figure out of the air".[174] The court must consider evidence concerning whether the claimants had suffered any loss and, if so how much.[175]

Third, the Solomon Islands High Court has held that "[a] compensation order is only useful where the victims are identifiable".[176] This requirement limits the ability of the court to award compensation to a fund representing a far-flung class of victims without ready access to the court who could make individual claims against the fund, without being limited by a short deadline in a sentencing hearing, or to award compensation to a non-governmental organization which could use the compensation to provide other forms of reparations to victims.

Fourth, the Solomon Islands High Court has applied an unfortunate principle in English jurisprudence that a compensation order should not be made unless it is "realistic" in the sense that the court is satisfied that the offender either has the means available, or will have the means to pay the compensation within a reasonable time.[177] The court should raise this two-pronged issue of compensation *sua sponte* if it has not been raised by counsel.[178] To

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> out of the penalties for crime. Compensation orders were introduced into our law as a convenient and rapid means of avoiding the expense of resort to civil litigation when the criminal clearly has means which would enable the compensation to be paid. One has to bear in mind that there is always the possibility of a victim taking civil proceedings, if he be so advised."

[173] *Maeuna v. Regina*, *supra*, n. 170 (*citing Regina v. Vivian* [1979] 1 All ER 48, [1979] 1 WLR 291, 68 Cr App R 53, [1979] RTR 106, 143 JP 102).

[174] *Ibid.* (quoting the English Court of Appeal in *Regina v. Swann* 6 Cr AppR (S) 22, CA, which noted that the effect of the amendments of the original provisions by the Criminal Justice Act 1982 was "slightly to reduce the obligation which was laid down in Vivian's' case," but that "there [was] nothing new in these statutory provisions which indicates that a trial judge, when considering compensation should simply pluck a figure out of the air.").

[175] *Ibid.* (quoting *Horsham Justices, ex parte Richards*, 82 Cr AppR 254 DC, Neill LJ, who said at p. 993: "...in my judgment the court has no jurisdiction to make a compensation order without receiving any evidence where there are real issues raised as to whether the claimants have suffered any, and if so what, loss"). See also *R v Watson* (12 Cr.App.R.(S) 508 CA).

[176] *Maeuna v. Regina*, *supra*, n. 170.

[177] *Maeuna v. Regina*, *supra*, n. 170. (noting the absence of any submission "to suggest that any of the Appellants was not able to pay up or that they do not have sufficient movable or immovable property which could be levied against to recover the said amount."). Compensation orders have frequently been set aside for lack of sufficient inquiry into means. *See, for example, R. v Phillips* [1989]10 Cr.App.R. (S) 419, [1989] Crim LR 160; *R. v. Watson*, [1991] 12 Cr App R(S) 508, [1991] Crim LR 307; *R. v. Hewitt*,12 Cr App R (S) 466, 155 JP 243.

[178] In *R v Hewitt*, 12 Cr.App.R (S) 466, 155 JP 243, it was stated that if a court makes a substantial compensation order without a proper enquiry into the defendant' means, it is the duty of counsel to point out that such an order should not be coupled with an immediate custodial sentence without an inquiry. The court emphasized that a determination that the convicted person have the means to pay before

avoid the problem that the information about the convicted person's' means is usually within that person's knowledge, rather than the prosecutor's', it has been suggested that the court could indicate a provisional figure and then shift the burden to the convicted person to provide information about his or her means; if that person remains silent, inferences can be drawn.[179]

The rationale for the means test is that if a compensation order were made where its effect would be to subject the convicted person when released from custody to a financial burden which he or she would not be able to meet from his or her available resources, it might encourage him to commit further offences. Whatever the merit of such an approach with ordinary crimes – and it does not appear to be a requirement in civil cases seeking damages, it would deprive the victims of crimes under international law of their right to full reparation. When the crimes have been committed by a state official, the state should then ensure that an award of full compensation is paid if the convicted official cannot. In addition, the requirement that the convicted person have the ability to pay the compensation within a reasonable time means that if the convicted person's financial position improves, then the victims would be denied recovery from someone able to pay.[180]

5.3. RESTRICTIONS ON CIVIL CLAIMS PROCEDURES

In summary, victims and their families are not able to obtain reparations based on universal civil jurisdiction in a civil action. There are numerous conditions which restrict the ability of victims to obtain compensation in criminal proceedings. In any event, the scope of civil reparations which can be awarded in criminal proceedings is limited to compensation.

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issuing a compensation order "is of particular importance when immediate custodial sentences are imposed". *Ibid.*

[179] *R. v Phillips*, [1989] 10 Cr App R (S) 419, [1989] Crim LR 160.

[180] Indeed, one English Court of Appeals judgment even went so far as to deny an award of compensation in a case where the convicted person would not be able to sell his equity in a house until his children reached a certain age. *R. v Phillips*, [1989] 10 Cr App R (S) 419, [1989] Crim LR 160.

6. OBSTACLES TO THE EXERCISE OF CRIMINAL OR CIVIL JURISDICTION

As discussed below, there are numerous obstacles to exercising criminal and civil jurisdiction based on universal jurisdiction in criminal and civil cases. These obstacles include flawed or missing definitions of crimes under international law, the failure to include superior and command responsibility, inclusion of inappropriate defences; statutes of limitations applicable to crimes under international law, immunities for certain officials and political control over decisions whether to prosecute.

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

Definitions of crimes - general

As indicated above, the definitions of genocide in the Penal Code (apart from the omission of ancillary crimes of genocide) and grave breaches of the Geneva Conventions are consistent with international law. However, Solomon Islands has not defined other war crimes, crimes against humanity, torture, extrajudicial executions or enforced disappearances as crimes under national law. Instead, persons in Solomon Islands suspected of such crimes can only be prosecuted for ordinary crimes and if the conduct amounts to an ordinary crime. Although some of the conduct amounting to crimes under international law can be prosecuted as ordinary crimes, 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 Solomon Islands. 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.

The fundamental distinction between crimes under international law, which are an attack on the entire international community, and ordinary crimes under national law, which are a concern of the state where the crime was committed, was vividly demonstrated in the decision by the International Criminal Tribunal for Rwanda (ICTR) in 2006, to refuse to transfer a case involving charges of genocide to Norway, where the accused would have faced only a charge of murder as an ordinary crime. The Trial Chamber explained:

> "In this case, it is apparent that the Kingdom of Norway does not have jurisdiction (*ratione materiae*) over the crimes as charged in the confirmed Indictment. In addition,

> the Chamber recalls that the crimes alleged – genocide, conspiracy to commit genocide and complicity in genocide – *are significantly different in term of their elements and their gravity from the crime of homicide*, the basis upon which the Kingdom of Norway states that charges may be laid against the Accused under its domestic law. The Chamber notes that the crime of genocide is distinct in that it requires the '"intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"'. This specific intent is not required for the crime of homicide under Norwegian criminal law. Therefore, in the Chamber's view, the *ratione materiae* jurisdiction, or subject matter jurisdiction, for the acts alleged in the confirmed Indictment does not exist under Norwegian law. Consequently, Michel Bagaragaza's alleged criminal acts cannot be given their full legal qualification under Norwegian criminal law, and the request for the referral to the Kingdom of Norway falls to be dismissed."[181]

The Appeals Chamber affirmed, stating that it fully appreciated that

> ". . . Norway's proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat with due gravity the alleged genocidal nature of the acts underlying his present indictment. However, in the end, *any acquittal or conviction and sentence would still only reflect conduct legally characterized as the 'ordinary crime' of homicide*. . . . Furthermore, *the protected legal values are different.* The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives."[182]

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[181] *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 (emphasis added).

[182] *Prosecutor v. Bagaragaza*, Decision on Rule 11 *bis* Appeal, Case No. ICTR-05-86- AR11 *bis*, Appeals Chamber, 30 August 2006, para. 16 (emphasis added). Norway has since amended its Penal Code to permit its courts to exercise universal jurisdiction over genocide, crimes against humanity and war crimes. Amendment to the General Civil Penal Code, LOV-2005-05-20-28, entered into force on 7 March 2008; See 'National implementation of international humanitarian law: Biannual update on national legislation and case law July–December 2008', 91 Int'l Rev. Red Cross, 2008, p. 185.

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Definitions of crimes - genocide

As discussed above, the definition of genocide as a crime in Subsection 1 of Section 52 (Genocide) of its Penal Code follows almost exactly the same wording as in Article II of the Genocide Convention. However, Solomon Islands 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. Finally, it has not provided for universal jurisdiction over genocide.

Definitions of crimes - war crimes

Solomon Islands has provided its courts with universal jurisdiction over grave breaches of the Geneva Conventions since independence, but it has not defined any other war crimes as crimes in international or non-international armed conflict under its Penal Code or authorized its courts to exercise universal jurisdiction over them (see Section 4.3.1 above).

Definition of crimes – crimes against humanity

Solomon Islands has not defined crimes against humanity as crimes under national law or authorized its courts to exercise universal jurisdiction over them (see Section 4.3.4 above).

Definition of crimes – torture

Torture has not been defined as a crime under Solomon Islands law and national courts cannot exercise universal jurisdiction over this crime (see Section 4.3.4 above).

Definition of crimes – extrajudicial executions

As discussed above in Section 4.3.5, extrajudicial executions are not expressly defined as crimes in the Penal Code. However, these killings could be prosecuted as murder, or, if committed during an international armed conflict, as a grave breach of the Geneva Conventions, but the courts of Solomon Islands cannot exercise universal jurisdiction over the ordinary crime of murder.

Definition of crimes – enforced disappearances

There is no crime of enforced disappearance in the Solomon Islands Penal Code, although some acts of this complex crime can be prosecuted under the Penal Code as an ordinary crime, such as kidnapping. However, Solomon Islands has not provided its courts with universal jurisdiction over ordinary crimes (see Section 4.3.6 above).

Principles of criminal responsibility

As noted above in Section 2, the courts follow the laws of Solomon Islands, their own common law and the English common law at the time of independence (1978) and without regard to any subsequent legislative modification. No attempt has been made in this paper or others in the *No safe haven* series to discuss general principles of criminal responsibility, such as concepts of *mens rea* and *actus reus*. Instead, it is simply noted that the Solomon

Islands Penal Code, like the common law in most countries, does not have a principle of command or superior responsibility.[183] As explained below, the failure to include this principle in the Penal Code means that commanders and superiors responsible for grave breaches of the Geneva Conventions and genocide will enjoy impunity in Solomon Islands.[184]

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),[185] Article 6 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security

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[183] Ilias Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law*, Manchester University Press, 2003, p. 95.

[184] Principles of criminal responsibility in the Penal Code apply to any crime, whether listed in the Penal Code or in separate legislation, such as grave breaches of the Geneva Conventions of 1949. See *Regina v. Wong Chin Kwee* [1983] SBHC 2; [1983] SILR 78 (14 April 1983).

[185] Paragraph 2 of Article 86 (Failure to act) of Protocol I reads:

> "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."

Article 87 (Duty of commanders) of Protocol I reads:

> "1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
>
> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
>
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."

of Mankind[186] and Article 28 of the Rome Statute,[187] which itself falls short of other international law in some regards.

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[186] 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."

[187] Article 28 (Responsibility of commanders and other superiors), which largely reflects customary international law, but falls short by articulating a lesser standard of criminal responsibility for civilian superiors and applies only in trials in the International Criminal Court, provides:

> "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
>
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
>
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

Defences

As discussed below, there are some defences in the Penal Code to crimes in that Code which are broader than defences permitted under international law with respect to crimes under international law or are wholly inappropriate with regard to such crimes that could lead to impunity for the worst imaginable crimes, such as duress.[188] The only crime under international law listed in the Penal Code is genocide. However, the defences in the Penal Code apply to any crime, whether listed in the Penal Code or in separate legislation, such as grave breaches of the Geneva Conventions of 1949.[189] The Penal Code does not include one defence – superior orders – which should never be a defence to crimes under international law. No attempt has been made in this paper or in others in the *No safe haven* series to discuss all defences or in depth, but only to highlight the main grounds for exclusion of criminal responsibility that might be relevant to crimes under international law.

Defences – superior orders

There is no defence of superior orders in the Solomon Islands Penal Code or in English common law.[190] This defence has been contrary to international law since Nuremberg, although it may properly be taken into account in mitigation of punishment.[191] 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 and the Cambodian Law establishing the Extraordinary Chambers.[192]

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[188] This section is not intended to cover the full range of defences to criminal charges under Solomon Islands Penal Code, but simply to indicate some of the most significant features regarding defences that have implications for prosecutions for crimes under international law based on universal jurisdiction.

[189] *Regina v. Wong Chin Kwee* [1983] SBHC 2; [1983] SILR 78 (14 April 1983).

[190] *R v Clegg* (1995) 1 AC 482 (Lord Lloyd of Berwick) (stating "There is no such general defence [superior orders] known to English law" and citing approvingly the judgment by the High Court of Australia in *A v. Hayden (No. 2)* (1984) 156 C.L.R. 532, followed by the Privy Council in *Yip Chiu Cheung v. The Queen* [1994] 3 W.L.R. 514).

[191] Amnesty International, *The international criminal court: Making the right choices – Part I: Defining the crimes and permissible defences*, AI Index: IOR 40/01/1997, 1 January 1997, Sect. VI.E.6.

[192] Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter), 8 Aug. 1945, Art. 8 ("The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."); 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) ("The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."), (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

Defences – mistake of fact

Section 10 (Mistake of fact) of the Penal Code provides:

> "(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject."

Thus, the defence has both a subjective element (honest belief)[193] and an objective element (reasonable belief).[194] A mistake of fact based on intoxication has been held sufficient to prevail using this defence.[195] In addition, Section 10 has been held to apply when the

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("*Responsibility of Accused.* Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."); ICTY Statute, Art. 7 (4) ("The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."); ICTR Statute, Art. 6 (4) ("The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires."); 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.

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.

[193] See *Criminal Law in Solomon Islands*, *supra*, note 25, p. 439 ("For this defence to apply, a person *must* commit the offence under an honest and reasonable, but mistaken, belief in the existence of any state of things that relates to the commission of the offence.") (emphasis in the original) (citing *R. V. Yoka Kiok*, Unreported decision, SC 607/70, Papua New Guinea, and other cases, post independence, in England and in Papua New Guinea).

[194] See *Criminal Law in Solomon Islands*, *supra*, note 25, p. 439 ("Therefore, the test to be applied is whether an ordinary or reasonable person in the circumstances of the defendant would have held such a '"reasonable belief'.) (citing *R. V. Yoka Kiok*, Unreported decision, SC 607/70, Papua New Guinea, and other cases, post independence, in England and in Papua New Guinea).

[195] *Regina v Kama* [1996] SBHC 17; HC-CRC 007 of 1995, 29 March 1996 (entry into house while

accused was acting in "an honest but mistaken belief that it was necessary to do what he did to defend himself".[196] The defence of mistake of fact as laid out in, however, seems to be broader than the defence of mistake of fact in Article 32 (1) of the Rome Statute. 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."[197]

Defences – ignorance of the law

Section 7 (Ignorance of the law) of the Penal Code provides:

> "Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence."[198]

There appear to be no reported cases in Solomon Islands interpreting Section 7.[199] This defence seems to have roughly the same scope as the defence of mistake of law in Article 32 (2) of the Rome Statute. Article 32 (2) excludes the defence of mistake of law, except to the extent that it negates the mental element of the crime:

> "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".[200]

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intoxicated mistaking it for the house of someone who had given the accused permission to enter sufficient defence to charge of unlawful entry at night under Penal Code 182 (2)).

[196] *Regina v Nawaia* [1995] SBHC 25; HC-CRC 024 of 1994 (24 April 1995) (rejecting the prosecution argument that Section 10 applied only to negate an element of an offence rather than to establish a defence).

[197] For Amnesty International's view on the scope of this defence, see *Making the Right Choices – Part I*, *supra*, note 191, Sect. VI.E.6.

[198] See Attorney-General's Reference No. 1 of 1995 [1995] 4 All ER 21 and *Evans v. Bartlam* [1937] AC 473; [1937] 2 AllER 654; *Criminal Law in Solomon Islands*, *supra*, n. 25, p. 430 (citing these authorities).

[199] There are a number of cases simply citing the common law doctrine that ignorance of the law is no excuse, with out citing section 7. See, for example, Regina v Tafilanga Snr [2007] SBHC 98; HCSI-CRC 329 of 2005 (11 September 2007); *Regina v A'aron* [1999] SBHC 128; HC-CRC 014 of 1998 (4 November 1999).

[200] Article 33 (Superior orders and prescription of law) of the Rome Statute provides for a limited defence of superior orders with respect to war crimes, but only in trials before the International Criminal Court (see discussion above in this section regarding this defence).

Defences – insanity and mental disease or defect

The defence of insanity in Section 12 of the Penal Code appears to be similar to this defence in the Rome Statute and, although modelled on the traditional defence of insanity in the common law, it differs somewhat from it. That section provides:

> "Subject to the express provisions of this Code and of any other law in force a person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission:
>
> Provided that a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

Although the express wording of the defence of insanity in the Penal Code would appear to be narrower than the ground for excluding criminal responsibility in Article 31 (1) (a) of the Rome Statute because the incapacity of understanding must be based solely on a mental disease and not on either a mental disease or defect, under the common law of England a disease of the mind includes "any disease which affects the functioning of the mind – whether its cause be organic or functional, and whether its effect be permanent or intermittent – so long as it was operative at the time of the offence".[201] Article 31 (1) (a) of the Rome Statute states:

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[201] Andrew Ashworth, *Principles of Criminal Law*, Oxford: Oxford University Press, 4th ed., 2003, pp. 209 – 210; see also R. v. Sullivan, [1984] AC 156 (Lord Diplock); Glanville Williams, *Criminal Law: The General Part*, London, Stevens, 2nd ed., 1961, p. 447 (congenital defects). Although Solomon Islands courts have addressed the scope of the term "disease of the mind", they do not appear to have expressly addressed the question whether that term includes congenital defects, but they have repeatedly referred to common law decisions when interpreting it. *See Regina v Suraihou* [1993] SBHC 8; HC-CRC 033 of 1992 (1 February 1993) (A "mental disease affecting the accused' mind" is likely to be interpreted in a similar way to a "disease of the mind".) The latter term was defined in *R v Quick & Paddison* (1973) 57 Cr App R 722 [[1973] 3 WLR 26; [1973] 3 All ER 347; [1973] QB 910; [1973] Crim L R 434], a pre-independence English case cited in *Criminal Law in Solomon Islands*, *supra*, note 25, p. 442. In that case, Lawton LJ, delivering the judgment of the Court, stated at pages 734 – 735:

> "Our task has been to decide what the law means now by the words "disease of the mind". In our judgment, the fundamental concept is of a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease. Such malfunctioning, unlike, that caused by a defect of reason from disease of the mind, will not always relieve an accused from criminal responsibility. A self – induced incapacity will not excuse […] nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals whilst taking insulin. From time to time difficult border line cases are likely to arise. When they do, the test suggested by the New Zealand Court of Appeal in COTTLE . . . is likely to give the correct result, viz. can this mental condition be fairly regarded as amounting to or producing a defect of reason from disease of the mind?"

> "[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' conduct:
>
> (a) The person suffers from a mental disease or defect that destroys that person' 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[.]"[202]

The defence of insanity in Section 12 of the Penal Code is largely based on the traditional defence of insanity under the common law in what is known as the M'Naughten rules.[203] It differs slightly from that rule in two respects, but not all of these differences in wording will lead to different results in actual cases. First, Section 12 uses the terms "capacity to understand" and "capacity to know", while the English common law refers to actual knowledge.[204] Second, as its wording would suggest and as Solomon Islands jurisprudence confirms, in contrast to the English common law, Section 12 does not involve the narrow concept of legal wrongfulness, but rather the broader concept of moral wrongfulness.[205] This approach, however, does not seem appropriate with respect to crimes under international law.[206] In one respect, Section 12 retains a fundamental flaw found in the English common law defence as it puts the onus on the accused to prove insanity, not just the burden to raise

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[202] Article 31 (1) (a) provides that

> "1. In 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[.]"

[203] Those rules state that

> "to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act that he was doing: or, if he did know it, that he did not know he was doing what was wrong."

M'Naughten's Case, (1843) 10 CL and Fin 200.

[204] *Ibid*.

[205] Although the M'Naughten rules simply use the term "wrong", in subsequent English jurisprudence, "wrong" has often been restrictively interpreted as "legally wrong". *R. v. Windle*,[1952] 2 QB 826 (England). Other English courts, as well as Australian courts, have interpreted "wrong" more broadly as "morally wrong". *Stapleton v. R.* (1952) 86 CLR 358 (Australia). A Solomon Islands court has expressly followed the *Stapleton* interpretation. *Regina v Suraihou* [1993] SBHC 8; HC-CRC 033 of 1992 (1 February 1993).

[206] As a leading authority on the common law has stated, the Australian approach would include someone who failed to appreciate that the conduct was morally wrong, usually including the situation where the accused "believes that he must, for some distorted reason, do the act". Ashworth, *supra*. note 201, p. 210. It is far too common for those who commit crimes under international law to have delusional views that the crimes they are committing are fully consistent with morality.

the defence.[207] This shift of the burden to the accused is inconsistent with the right to be presumed guilty unless and until the accused is proved guilty beyond a reasonable doubt.[208]

Defences – intoxication

Section 13 of the Penal Code provides for relatively limited defence of involuntary intoxication, as well as temporary insanity as a result of intoxication, but also provides that intoxication can be taken into account with respect to intentional crimes in determining whether the accused had the required intent to commit the crime. That section states:

> "(1) Save as provided in this section intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such an act or omission was wrong or did not know what he was doing and –
>
> (a) the state of intoxication was caused without his consent 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 such act or omission.

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[207] *Regina v Suraihou* [1993] SBHC 8; HC-CRC 033 of 1992 (1 February 1993) ("The onus of proof where the defence of insanity has been raised, is on the defence. The burden of proof is on the balance of probabilities: See *R -v- Oliver Smith* (1911) 6 Cr. App. R. 20 and *R -v- Carr-Briant* (1943) 29 Cr. App. R. 76.").

[208] In contrast, Articles 66 and 67 of the Rome Statute fully protect the right to be presumed innocent and not to have any reversal of that burden. Article 66 (Presumption of innocence) states:

> "1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
>
> 2. The onus is on the Prosecutor to prove the guilt of the accused.
>
> 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt."

Paragraph 1 (i) of Article 67 (Rights of the accused) provides:

> "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
>
> . . .
>
> Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal."

(2) Where the defence under the preceding subsection is established, then in a case falling under paragraph (a) thereof the accused shall be discharged and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

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

For the purpose of this section '"intoxication"' shall be deemed to include a state produced by narcotics or drugs."[209]

Section 13 largely embodies the English common law rules concerning intoxication excluding voluntary intoxication as a defence, but taking it into account in determining whether the accused had formed the requisite intention with respect to an intentional crime.[210]

However, Section 13 differs from the English common law in several respects. Under that section, intoxication can be taken into account whether the intoxication was voluntary or involuntary and that section does not limit consideration of intoxication to whether the accused had formed a specific intent with respect to a limited number of crimes, including murder.[211] In contrast to the defence of insanity in Section 12, the burden of proof remains on the prosecutor once the defence has been raised to prove that the accused did know what he or she was doing or that it was wrong.[212] The defence of intoxication differs from the defence in Article 31 (1) (b) of the Rome Statute.[213] That provision of the Rome Statute

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[209] For cases applying Section 13, see *Surilamo v Regina* [2007] SBCA 11; CA-CRAC 7 of 2007 (16 October 2007) ("the prosecution had established beyond reasonable doubt that although drunk the appellant did form the intention to stab, to kill or cause grievous bodily harm to the deceased");*Regina v Motui* [1998] SBHC 95; HCSI-CRC 20 of 1997 (11 June 1998) (rejecting the defence of intoxication to a charger of murder because "this Accused was still in possession of his faculties, he was aware of what was going on, he knew what he was doing and that he intended to do what he did"); *Regina v Iro* [1995] SBHC 29; HC-CRC 066 of 1993 (10 March 1995) (intoxication did not negate intent); *R. v. Kauwai* (1980-1981) SILR 108.

[210] *Surilamo v Regina* [2007] SBCA 11; CA-CRAC 7 of 2007 (16 October 2007) (intoxication can be taken into account in determining intention "whether the intoxication is self induced or not") (citing *Regina v Iro* [1995] SBHC 29; HC-CRC 066 of 1993 (10 March 1995)). See also See also *Regina v. Toleni* [2005] SBHC 175; HCSI-CRC 183 of 2004 (20 May 2005) (intoxication can be taken into account in determining whether the accused was incapable of forming the specific intent for murder). For the English common law decisions, see, for example, *Director of Public Prosecutions v. Beard*, 14 Cr App R 159; [1920] AC 479 (England); *Director of Public Prosecutions v. Majewski* [1977] AC 443; *Attorney-General for Northern Ireland v. Gallagher* (1961) 45 Cr App R 316 [[1961] 3 WLR 619; [1961] 3AllER 299] (United Kingdom); *Ruse v. Read*, (1949) 33 Cr App R 67 (England).

[211] The limitation to certain crimes has been criticized by scholars. *See* Glanville Williams, *Textbook of Criminal Law*, London: Stevens and Sons, 2nd ed., 1983, pp. 428-30; Ashworth, *supra*, n. 201, p. 214.

[212] *R. v. Warren Godfrey Motui*, Unreported, Criminal Case No. 20 of 1997, Palmer, J., p. 9.

[213] Article 31 (1) (b) of the Rome Statute states that

excludes voluntary intoxication as a defence unless the accused became "voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime".

Defences – compulsion, duress and necessity

In Solomon Islands, duress (called compulsion in jurisprudence) is a defence to all crimes, including crimes under international law, subject to a number of conditions which limit its scope. As noted below, duress should never be a defence to crimes under international law, but only a factor to be taken into account in mitigation of punishment.

Duress (compulsion). The concept of duress is now seen as taking two forms: duress (involving a threat by another person) and duress of circumstances (involving compulsion by human circumstances). Duress in either form is an excuse for committing criminal conduct, not a justification.[214]

These two defences should be distinguished from a similar defence of necessity (compulsion by natural causes) discussed below. However, duress by circumstances and necessity are often used interchangeably. The defences of duress and necessity have been the subject of intense academic and judicial controversy with regard to ordinary crimes under national law for decades, before and after the Solomon Islands became independent in 1978.[215] In addition, there has been a similar debate with regard to duress and crimes under international law. The reasons why duress should not be a defence to such crimes, but simply a factor to be taken into account in mitigation of punishment, are discussed below in this

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> "[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' conduct:
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> …
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> (b) The person is in a state of intoxication that destroys that person' 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, 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, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court[.]"

[214] *England: R. v. Hasan* [2005] UKHL 22, para. 18 ("Duress is now properly to be regarded as a defence which, if established, excuses what would otherwise be criminal conduct" - citing *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653.).

[215] No attempt has been made in this paper to discuss these controversies, which continue to rage with regard to its appropriateness, scope and terminology, or to address the full range of complexities of the defence and its application in matters far removed from crimes under international law, such as the issues related to marital coercion and decisions regarding surgery. Some of examples of commentaries on duress with respect to ordinary crimes include: Ashworth, *supra*, note 201, pp. 221 – 231; Jeremy Horder, 'Self-defence, necessity and duress: Understanding the relationship', 11 Can. J. L. & Juris., 1998, p. 143; A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and doctrine*, Oxford, Hart Publishing, 2nd ed., 2003, pp. 591 - 603.

subsection. Although the defence of duress is defined in the Solomon Islands Penal Code, its scope is subject to considerable judicial interpretation. Solomon Islands courts take into account significant developments in rapidly shifting English common law and law reform proposals since independence, but Solomon Islands often takes a different approach. Therefore, this paper notes some of the more important differences between the defence in Solomon Islands and in England.

Penal Code. The starting point with regard to the defence of duress in Solomon Islands is Section 16 of the Penal Code, which provides for a narrowly restricted defence of duress:

> "A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence."

Under Section 16, the defence is not available unless the following elements are established:

- the crime must be committed by two or more offenders;
- the compulsion to do or omit the act must apply during the whole of the time it is being done or omitted;
- the compulsion must be threats on the part of the other offender or offenders;
- the threats must be instantly to kill the accused or to do grievous bodily harm if the accused refuses; and
- threats of future injury are not sufficient.

However, as indicated by the Solomon Islands Court of Appeal in the *Hese* case in 2006, common law principles can also be considered in interpreting this provision.[216]

Applicable to all crimes in the Penal Code. Section 16 applies to *any* crime in the Penal Code, including genocide and murder.[217] As noted above, provisions in the Penal Code defining criminal responsibility also apply to grave breaches of the Geneva Conventions, which are defined as crimes in separate legislation. The availability of the defence of duress to murder and to killings that constitute genocide or grave breaches of the Geneva Conventions is in marked contrast to the English common law rule adopted after independence excluding this defence to murder. Under the English common law, the defence

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[216] *Hese v. Regina* [2006] SBCA 7, 31 May 2006 (upholding the High Court taking into account a post-independence House of Lords decision in interpreting the scope of Section 16).

[217] *Regina v Oeta* [2004] SBHC 123; HC-CRC 173 of 2003 (3 June 2004) (accused acquitted of murder).

of duress has not been applicable to murder since 1987 (when the House of Lords overturned its 1977 pre-independence decision to the contrary),[218] attempted murder (since 1992)[219] and, possibly, some forms of treason[220] and conspiracy.[221]

Burden on the prosecution. In Solomon Islands, once the defence has raised the issue, the burden is on the prosecutor to disprove the defence beyond a reasonable doubt. In England, the burden on the prosecution to disprove a defence of duress beyond a reasonable doubt is a heavy one.[222]

Threats. Section 16 of the Solomon Islands Penal Code makes clear that the threat must have been made by a co-perpetrator or co-perpetrators.[223] Section 16 requires that the threat be "instantly to kill . . . or do . . . grievous bodily harm if [the accused] refuses". The Court of Appeal explained in *Keoja v. R.* that "[t]he fact that only a threat of 'instant' death will suffice is emphasised by the provision that the threat of future injury will not be enough to found the defence."[224] The compulsion must exist "during the whole of the time in which [the act] is being done or omitted". The threat need not be express, but it can be implicit.[225] The threat must be directed against the accused, not a third party.[226] According to the Court of Appeal, the crime must have been carried out solely because of the threat, not partly because of the threat.[227]

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[218] *R. v. Howe* [1987] AC 417 (overruling its own decision in *Director of Public Prosecutions v. Lynch* [1977] AC 653). The Privy Council had held in *Abbott v. R* [1977] AC 755 that duress was not a defence for the principal in murder. See also *R. v. Hasan* [2005] UKHL 22, para. 21.

[219] *R. v. Gotts* [1992] 2 AC 412.

[220] *R. v. Hasan* [2005] UKHL 22, para. 21 (citing *R. v. Howe* [1987] AC 417).

[221] Law Commission, Homicide, Murder, Manslaughter and Infanticide (Report) [2006] EWLC 304 (6), 28 November 2006).

[222] *R. v. Hasan* [2005] UKHL 22, para. 20 (noting that "the defence of duress is peculiarly difficult for the prosecution to investigate and disprove beyond reasonable doubt" and citing the United Kingdom Law Commission report, Legislating the Criminal Code: Offences against the Person and General Principles (1993, Law Com. No 218, Cm 2370, para. 33)).

[223] *Kejoa v Regina* [2006] SBCA 6; CA-CRAC 028 & 031 of 2005 31 May 2006; *Hese v. Regina* [2006] SBCA 7, 31 May 2009.

[224] *Kejoa v Regina* [2006] SBCA 6,; CA-CRAC 028 & 031 of 2005 (31 May 2006).

[225] *Regina v Oeta* [2004] SBHC 123; HC-CRC 173 of 2003 (3 June 2004) ("Although there was no direct evidence of threats of shooting or killing coming from the lips of the Suspect, the overwhelming evidence from the Prosecution witnesses and these two Defendants was that such threat was present throughout without it having been spoken or expressed.").

[226] Penal Code, sect. 16; *Kejoa v Regina* [2006] SBCA 6; CA-CRAC 028 & 031 of 2005 (31 May 2006).

[227] *Kejoa v Regina* [2006] SBCA 6; CA-CRAC 028 & 031 of 2005 (31 May 2006) ("The presence of some other motive to commit the crime may well deprive the offender of the defence. Those words of the

There does not appear to be a requirement under English law that the threat have been made by any particular person. Under English common law, the threat "must be to cause death or serious injury".[228] The threat must be reasonably believed to be imminent and immediate.[229] In contrast to Solomon Islands law, the threat can be directed against persons other than the accused, but, in that case, the defence would be duress by circumstances.[230] English common law provides that "the criminal conduct which it is sought to excuse has been directly caused by the threats which are relied upon".[231] Unlike Solomon Islands, there can be other factors causing the crime as well as the threats.[232]

Reasonableness of belief in threat and in response of accused. Solomon Islands courts do not appear to have expressly addressed the question whether the accused reasonably believed the threat as the cases where the defence was asserted the issue was whether there was a threat or not and the nature of the threat. However, the giving way to the threat must be reasonable.[233] Under the common law in England, both the accuser's belief in the threat and the accuser's response must be reasonable.[234]

Need to avoid joining violent criminal organizations where threats might be made. The Solomon Islands Court of Appeals held in the *Kejoa* case in 2006 that the defence of duress is not necessarily precluded if the accused has voluntarily joined a criminal organization based on violence, but it is a significant factor:

> "Given the terms of s.16 it could not be held here that such defence was not open as a matter of law in those circumstances. Rather the joining of such an association, and continuing to follow its practices, could be material facts, when determining

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statute narrow the scope of operation of the defence considerably.").

[228] *R. v. Hasan* [2005] UKHL 22, para. 21 (citing *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653).

[229] *R. Hasan* [2005] UKHL 22, para. 27 (criticizing the views of one scholar as weakening "the requirement that execution of a threat must be reasonably believed to be imminent and immediate if it is to support a plea of duress").

[230] *Ibid.*, para. 21 ("The threat must be directed against the defendant or his immediate family or someone close to him" or "to a person for whose safety the defendant would reasonably regard himself as responsible.").

[231] *Ibid.*

[232] *Valderrama-Vega* [1985] Crim. L. R. 220.

[233] *Regina v Oeta* [2004] SBHC 123, 3 June 2004 (stating that the question was "whether such fear was that which a man of reasonable firmness sharing the characteristics of the Defendants would not have given way to the threats as did the Defendant" - adopting the objective test in *R. v. Howe*).

[234] *R. v. Hasan* [2005] UKHL 22, para. 21 (determination whether duress is available as a defence depends on "reasonableness of the defendant's perceptions and conduct and not, as is usual in many other areas of the criminal law, with primary reference to his subjective perceptions").

> whether or not there was compulsion in the relevant sense. Given the use of the words "only because" in the section, the fact that the accused had voluntarily joined such an organization would be a very material consideration. The prosecution could negative the operation of the defence on the facts by establishing that the act constituting the offence was done because of membership of the association and not only because of the general threat that failure to obey rules could result in death. Whether or not there was compulsion in the relevant sense would be a question of fact to be determined by the tribunal of fact and the membership of the association would be a very material consideration."[235]

In the *Hese* case decided the same day, the Court of Appeals further explained:

> "If he had, without compulsion, joined such an organization and either he had given an undertaking that he would obey orders, or when he joined he knew or must have foreseen that he would have to obey such orders, under penalty of death or grievous bodily harm if he did not do so, he cannot be heard to say that he was compelled within the meaning of section 16 of the Code and that he is exonerated from liability. Similarly if he subsequently could have left but did not do so he would not be able to rely on the defence because he was not 'compelled' to s[t]ay and obey the order. Again if he did not know initially that the organization carried out such acts of violence but failed to leave the organization when he did know and could have left, he will not be able to rely on the defence of compulsion for subsequent acts."[236]

In contrast, under English common law, the defence is not available if the accused voluntarily joined a criminal organization knowing that he or she would be exposed to threats to commit crimes.[237]

Need to take evasive action. The defence of duress would not be available in Solomon Islands if one failed to take opportunity to take evasive action to avoid having to commit the crime.[238] The common law rule is the same: "The defendant may excuse his criminal conduct on grounds of duress only if, placed as he was, there was no evasive action he could reasonably have been expected to take."[239]

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[235] *Kejoa v Regina* [2006] SBCA 6, 31 May 2006); Hese v. Regina [2006] SBCA, 31 May 2006 (mere voluntary membership in a criminal organization engaged in violence not sufficient to negate defence).

[236] *Hese v. Regina* [2006] SBCA, 31 May 2006.

[237] *R. v. Hasan* [2205] UKHL 22, para. 38 ("If a person voluntarily becomes or remains associated with others engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse any act which he is thereafter compelled to do by them.").

[238] *Kejoa v Regina* [2006] SBCA 6, 31 May 2006 (citing *R. v. Hasan* [2205] UKHL 22).

[239] *R. v Hasan* [2005] UKHL 22, para. 21 (criticizing weakening of this safeguard in recent years), para. 23 ("no warrant for relaxing the requirement that the belief [in threat] must be reasonable as well as genuine"); *R. v. Howe* [] (reasonable and genuine belief).

Necessity. There is no defence of necessity expressly listed in the Penal Code, but the Court of Appeal in *Luavex v. Regina* in 2007 interpreted the definitions of certain crimes, including murder and manslaughter as possibly incorporating a supposed common law defence of necessity:

> "It must be said at once that the Penal Code of Solomon Islands contains no express provision recognising any such doctrine or defence. Like many of the other criminal codes in the Pacific, Africa and elsewhere, the purpose and effect of these codifications is to preclude resort to the common law for the purpose of determining questions of criminal responsibility (Part IV of Solomon Islands Penal Code) as well as of substantive offences. . .
>
> On the other hand, it does seem to us plainly arguable that, as Mr. Dunning in the carefully researched argument he submitted to us, the Penal Code may have preserved the substance of the common law "defence" of necessity, if there is one. It may well have done so through the presence in the Code of the word 'unlawful', or derivatives of it, in sections defining elements of offences, such as murder (Code section 200) and manslaughter (Code, section 199). See Code, section 3, providing that the Code is to be interpreted in accordance with principles of legal interpretation obtaining in England, 'and expressions used in it shall be presumed ... to be used with the meaning attaching to them in English criminal law ...' To demonstrate that the common law recognizes a defence of necessity, Mr. Dunning took us to passages in Hale' Pleas of the Crown; R v Dudley & Stephens (1884) 14 QBD 273; and Re A (Children) [2001] 2 WLR 480, 533, 558 – 573, and elsewhere. See also Tilonko v AG of Natal [1907] AC 93, at 95.
>
> Assuming that the doctrine or defence is available, the questions are what it is, and how it could be applied here to exempt the appellant from criminal responsibility. In his reasons for judgment in Re A (above), Brooke LJ at 573, acted on the views on this subject of Sir James Stephen. According to that learned author, there are three requirements for its application. They are that: (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; and (iii) the evil must not be disproportionate to the evil avoided."[240]

It appears clear from the wording of the Court of Appeal judgment that it did not determine that the Penal Code did incorporate a defence of necessity, but that it simply asked whether, if such a defence did exist, would that defence apply in this case. It concluded that even if the defence did exist and if the three-part Stephen test was required to make out the defence, that defence did not apply in the case before it:

> "Applying these requirements or rules to the present case has the consequence that the attempt to invoke the doctrine of necessity here inevitably fails. The act on which the appellant was tried and of which he was convicted was murder; that is, the killing here of four men with the intention of causing their deaths or of inflicting grievous harm. What

[240] *Luavex v Regina* [2007] SBCA 13; CA-CRAC 31 of 2006 (18 October 2007).

> was the 'inevitable and irreparable evil' that that act of killing was needed to avoid? The submission that was put was that it was the saving of the people of Gizo from the depredations of the Black Sharks [a criminal gang]. . .[I]t was also said that the evil inflicted by means of those killings was not disproportionate to the evil of permitting the Black Sharks to continue with activities [murders, rapes and robberies] in the area. . .
>
> Law and order had broken down in many parts of Guadalcanal at the time. It does not follow that the four victims of these killings were personally responsible for that state of affairs, or that their behaviour was so disruptive and dangerous to other people in Gizo that the only available method of stopping it was by killing one or all four of those individuals without allowing them to speak in their defence. Throughout history, the activities of self-appointed vigilante groups have been notorious for killing the wrong people at the wrong place and time. If the appellant and his group were exercising some kind of quasi-military discipline or justice, they ought to have extended its benefit to these victims before simply killing them out of hand. . . Their conduct was not such as to call for their peremptory elimination from the face of the earth as a matter of "necessity" whether "reasonable" or otherwise."[241]

Despite the authorities cited by the Solomon Islands Court of Appeal, as a general rule, necessity is not a defence under English common law.[242]

Inappropriateness of defence to crimes under international law. 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.[243] However, in a regrettable political compromise, 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.[244]

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[241] *Ibid.*

[242] *Howe* [1987] A.C. 653; *Dudley and Stephens*, (1884) 14 Q.B.D. 273 (rejecting a defence of necessity). The limited exception of medical necessity in the unique circumstances in *Re A (Conjoined Twins: Surgical Separation)*, [2000] 4 All ER 961, has no application to crimes under international law. It is possible, however, that Solomon Islands courts might in a future case look to other common law jurisdictions, such as those of Australia and Canada, where a common law defence of necessity has been recognized in certain circumstances.

[243] *Making the right choices*, *supra*, n. 191, Sect. VI.E.3 and 4.

[244] 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' conduct:
>
> ...

The defence of compulsion in Section 16 of the Penal Code appears to be narrower than the ground of duress in Article 31 (1) (d) for excluding responsibility. However, the scope of Article 31 (1) (d) has yet to be interpreted by the International Criminal Court.

Defences – defence of person or property

In contrast to other defences, which are defined in the Penal Code, the Penal Code expressly provides that defences of self-defence, defence of others and defence of property are those in the English common law, subject to Constitutional and statutory provisions.

Statutory provisions regarding defence of person or property. Section 17 of the Penal Code provides:

> "Subject to any express provisions in this Code or any other law in operation in Solomon Islands, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law."

The first relevant provision is Section 4 of the Constitution, which basically restates the English common law rule that depriving someone of his or her life when acting in self-defence, defence of others and defence of property does not violate the victim's' right to life, provided that the use of force in defence was reasonable:

> "A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable:-
>
> (a) for the defence of any person from violence or for the defence of property."

However, Section 204 of the Penal Code limits the scope of the defences of self-defence, defence of others and defence of property, but provides that in certain circumstances, an excessive use of force will simply reduce the crime from murder to manslaughter:

> "Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely: –
>
> (a) that he was deprived of the power of self-control by such extreme provocation given by the person killed as is mentioned in the next succeeding section; or

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(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."

> (b) that he was justified in causing some harm to the other person, and that, in causing harm in excess of the harm which he was justified in causing, he acted from such terror of immediate death or grievous harm as is in fact deprive him for the time being of the power of self control."

Defence of person. The burden in Solomon Islands is on the prosecution to disprove the defences of self-defence and defence of person once the defence has raised them.[245] Solomon Islands courts interpret the defences of self-defence and defence of persons in the same manner:

> "There is no doubt that the principles of the common law of England link both self defence and the defence of another. Each defence contains identical elements. The difference between them is merely the identity of the person being rescued. The defences constitute an unqualified defence to murder."[246]

In both defences, the belief in the danger must be reasonable:

> "Justification, for present purposes, is that state of affairs where the accused forms a belief (not a pretended belief) in a necessity for him to defend another from actual imminent physical danger of grievous harm or death."[247]

The Fiji Court of Appeal for the Solomon Islands in the 1980 *Ome* case cited approvingly "the comprehensive description of self defence" in the 1971 Privy Council judgment in *Palmer v. Reginam.*[248] In that case, the Privy Council explained:

> "It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a

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[245] *R. v. Cawa* [2005] SBHC 18 (self-defence) (citing *Zecevic v DPP* (Vic) Wilson, Dawson and Toohey, JJ., pp. 661; 652, 174)).

[246] *Regina v Saea* [2007] SBHC 121; HCSI-CRC 426 of 2005 (17 August 2007).

[247] *R v Ome* [1980] SBFJCA 3; [1980-1981] SILR 27 (27 June 1980) (citing *Palmer v. Reginam* (1971) 2 W.L.R. 831 at 843– 844).

[248] *Palmer v. Reginam* (1971) 2 W.L.R. 831 at 843– 844).

> necessity of defence. Of all these matters the good sense of a jury will be the arbiter. . . If there has been no attack then clearly there will have been no need for defence. If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self-defence, where the evidence makes its raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self-defence."[249]

Defence of property. There do not appear to be any decisions by Solomon Islands courts involving a defence *solely* of property, not also involving defence of person. However, in *obiter dicta* the High Court, after reviewing English court decisions prior to 1967 when the common law concerning defences of person and property was replaced by Section 3 of the Criminal Law Act, indicated that defence of property would be successful now only in exceptional cases.[250] Before that date, the common law rule was that a person had the right to defend property by such force as is necessary, a matter of fact to be decided on a consideration of all the surrounding facts."[251]

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 reasonable and proportionate and, if deadly force is used, only when retreat is not possible.[252] Unfortunately, in another political compromise, the Rome Statute provides very broad defences of self, others and property, but these defences apply only in trials before the

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[249] Citing *Palmer v. Reginam* (1971) 2 W.L.R. 831 at 843 – 844). The High Court of Solomon Islands in the subsequent 2005 *Cawa* case adopted the formulation of the English common law rule used in a post-independence Australian court decision in the *Zecevic* case:

> "The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in that form, the question is one of general application and is not limited to cases of homicide. Where homicide is involved some elaboration may be necessary."

R. v. Cawa [2005] SBHC 18 (citing *Zecevic v. DPP* (1987) 61 ALJR 375 Wilson, Dawson and Toohey, JJ., pp. 661; 652, 174)).

[250] *R v Zamagita & 6 Others* [1986] SBHC 24; [1985-1986] SILR 223 (19 September 1986) ("But it is only in the most extreme circumstances of clear and very serious danger that a court would hold, these days, that a man was entitled to kill simply to defend his property, as there are many other effective remedies available.").

[251] *Chisam v. R.* (1963) 47 CAR 130; *Hussey's case* (1924) 18 CAR 160.

[252] Amnesty International, *Making the right choices*, *supra*, n. 191, Sect. VI.E.5.

International Criminal Court.[253]

It is not clear whether the defence of defence of person or property in Section 17 of the Penal Code, which incorporates principles of English common law, is broader than the ground of defence of person or property in Article 31 (1) (c) of the Rome Statute.

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 Solomon Islands to initiate an investigation of a crime. The powers of the police to investigate and arrest are defined by the Criminal Procedure Code and they do not require presence of a suspect in order to open an investigation.[254] For example, Section 8 of Chapter 47 (Civil Aviation) provides that the Aviation Minister may investigate "any...incident," without including any presence requirements.[255]

However, Section 10 (2) (d) of the Constitution guarantees the right of the accused to be present at trial.[256] That right necessarily includes the right to be present sufficiently in

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[253] Article 31 (1) (c) of the Rome Statute provides that

> "[i]n In 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' conduct:
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> ...
>
> (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[.]"

[254] See Criminal Procedure Code, Part I (Preliminary); Part II (Powers of courts); Part III (General provisions).

[255] Subsection 1 of Section 8 (Investigation of accidents or Incidents) of the Aviation Act states:

> "The Minister may make regulations providing for the investigation of any accident or incident arising out of or in the course of air navigation arising in or over Solomon Islands or occurring elsewhere to aircraft registered in Solomon Islands."

[256] Subsection 2 (d) of Section 10 of the Constitution reads:

> "Every person who is charged with a criminal offence –
>
> . . .

advance of the trial in order to be able to prepare an effective defence.[257]

The absence of a presence requirement means that the police are able to open an investigation immediately as soon as they learn that a person suspected of grave breaches of the Geneva Conventions or other crimes subject to universal jurisdiction is on his or her way to Solomon Islands or about to change planes at a Solomon Islands 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. If Solomon Islands were able to request extradition of a person suspected of a crime committed abroad (see below in Section 7), the absence of a presence requirement would mean that it could also help shoulder the burden when other states fail to fulfil their obligations to investigate and prosecute crimes under international law.[258] Indeed, this possibility was envisaged as an essential component of the enforcement provisions of the four 1949 Geneva Conventions, each of which provide that any state party, regardless whether a suspect had ever been in its territory, as long as it "has made out a *prima facie* case", may request extradition of someone suspected of grave breaches of those Conventions.[259] 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 Solomon Islands, 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 apply to certain crimes under international law and to civil claims in civil proceedings. It is not clear whether either of these statutes of limitations apply to civil claims made in a criminal proceeding.

Statutes of limitations applicable to crimes

Contrary to the customary and international law prohibition of statutes of limitation for crimes under international law, such as genocide, crimes against humanity and war crimes, Solomon Islands has a two-year statute of limitations for genocide. It also has a one-year statute of limitations applicable to some crimes of sexual violence.[260] However, there does not appear

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(d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice[.]"

[257] Article 14 (3) (b) of the ICCPR, which reflects fundamental principles of the right to a fair trial, guarantees that every person charged with a criminal offence is entitled"[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing."

[258] 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.

[259] First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146.

[260] Penal Code, sect. 143.

to be any statute of limitations for other crimes in the Penal Code, in the Geneva Conventions Act 1957, made applicable to Solomon Islands under the Geneva Conventions Act (Colonial Territories) Order in Council 1959, or in other legislation. There also was no statute of limitations under the English common law as of 1978. Nevertheless, it is possible that Solomon Islands courts would take into consideration other factors, such as abuse of process and the right to a speedy trial, in deciding whether to permit a prosecution to proceed a long time after a crime occurred, but there is no reported jurisprudence regarding genocide.

In contrast to civil claims in Solomon Islands courts, which are subject to a general statute of limitations (see below in this subsection), there is no general statute of limitations applicable to all crimes.[261] Section 53 of the Penal Code expressly spells out limitation periods for treason and certain other crimes, including genocide, defined as a crime in Section 52 (Genocide) of the Penal Code, to two years after the date of the crime occurred.[262] Solomon Islands is not yet a party to the 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity, [263] but the two-year statute of limitations for genocide is contrary to the customary international law prohibition of statutes of limitation for genocide, crimes against humanity and war crimes.[264]

In the absence of other limitation periods applicable to crimes, it is not clear what tolling principles exist in Solomon Islands criminal law which could suspend application of the two-year statute of limitations period for genocide in certain circumstances.[265] It is possible that a Solomon Islands court would take into account the same factors considered in civil claims (see below in this section), but no jurisprudence or commentary has been found on this point.

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[261] Minor offences – those with a maximum penalty of six months and/or a $100 fine – are time-barred six months after they were committed. Ruth Kok, *Statutory Limitations in International Law*, Cambridge University Press, 2008, p. 58 (citing Mark Findlay, *Criminal Laws of the South Pacific: Text and materials on criminal law in the South Pacific*, Buffalo, New York, William S. Hein and Co., Inc. 1997).

[262] Subsection 1 of Section 53 (Limitations as to trial for treason, misprision of treason, or treasonable felonies) of the Penal Code provides:

> "A person cannot be tried for treason, or for any of the felonies defined in the four last preceding sections, unless the prosecution is commenced within two years after the offence is committed."

[263] 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).

[264] See, for example, Ruth Kok, *Statutory Limitations in International Criminal Law* , London: Blackwell, 2008; Amnesty International, *The Prohibition of Statutory Limitations for Crimes under International Law* (forthcoming 2010).

[265] In contrast to the very limited tolling provisions regarding tort claims, the Penal Code is silent on the question of tolling principles and *Criminal Law in Solomon Islands* does not address the subject.

Statutes of limitation applicable to torts

Solomon Islands also has a statutory limitation for civil cases which is applicable to all actions, including actions involving personal injury.[266] There are several tolling principles which might extend the limitations period in a limited number of cases.

Section 5 of the Solomon Islands Limitations Act provides that, "[e]xcept as otherwise provided in this Act, no action shall be brought, nor any arbitration shall commence, after the expiration of six years from the date on which the cause of action accrued," Section 7 of the Solomon Islands Limitations Act contains a six-year statute of limitations period for commencing an action based on personal injury from the date of the injury or the date when the person injured learned of the injury.[267] Section 2 defines an action.[268] That definition is

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[266] Limitations Act (1984), art. 2. This legislation is similar in some respects to the United Kingdom Limitation Act 1939 (subsequently amended in 1980), which it replaced. Limitations Act (1984), art. 43.

[267] Section 7 (Limitation for personal injuries) of the Limitations Act reads:

> "(1) In this section and in section 8-
>
> . . .
>
> (b) 'personal injury' includes any disease and any impairment of a person' physical or mental condition.
>
> (2) No action shall be brought, nor any arbitration shall commence, to recover damages for personal injuries after the expiration of six years from-
>
> (a) the date on which the cause of action accrued; or
>
> (b) the date of knowledge (if later) of the person injured.
>
> (3) If the person injured dies before the expiration of the period mentioned in subsection (1), no such action shall be brought, nor such arbitration shall commence-
>
> (a) as respects the cause of action surviving for the benefit of his estate by virtue of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934; or
>
> (b) as respects the cause of action surviving for the benefit of a person referred to in section 2 of the Fatal Accidents Act 1846 after the expiration of six years from-
>
> (i) the date of death; or
>
> (ii) the date of the knowledge of the personal representative, if the action or arbitration relates to the cause of action referred to in paragraph (a), or the date of knowledge of the person for whose benefit the action is brought or the arbitration is commenced, in respect of the cause of action referred to in paragraph (b), whichever is later[.]"

limited to "an original proceeding" and it excludes a criminal proceeding. However, neither the Penal Code nor the Limitations Act indicate whether the civil claim in a criminal proceeding should be seen as a original proceeding, as part of the criminal proceeding or something different which is not subject to either limitation period. Civil claims which are subject to such limitations period may survive the death of the victim. An executor of a deceased victim may recover, but generally not more than six years from the time of death or the time the litigating party became aware of the death of the victim.[269]

Chapter IV of the Limitations Act does allow for extensions of such statutory limitations in limited circumstances, most of which are not relevant to crimes under international law.[270] However, Section 24 (Limitation not affected by subsequent inability or disability) of Chapter 18 could cause hardship if the Limitations Act were held to apply to civil claims in criminal proceedings based on universal jurisdiction when victims of grave breaches of the 1949 Geneva Conventions were unable to bring an action in the state where the crime occurred or of the suspect's' nationality and only had an opportunity to do so when the suspect entered Solomon Islands after the limitation period had elapsed.[271] If the Limitation Act applies to such claims, two provisions in that legislation might extend the limitations period if one of the acts used was enforced disappearance, a continuing crime. Section 17 provides that "where the cause of action is founded on a continuing wrong, a fresh cause of action shall be deemed to accrue on each day the wrong continues". Section 32 extends the limitation period in case of fraud, concealment or mistake and then the limitation period does "not begin to run until the plaintiff has discovered such fraud, concealment or mistake, or could with reasonable diligence have discovered it". Such provisions would assist a family of the disappeared person.

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[268] Section 2 of the Limitations Act reads:

> " In this Act, unless the context otherwise requires-
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> 'action' means an original proceeding that lies in a court under any law for the enforcement of a legal right, or for the redress of any legal wrong or legal injury or breach of a legal duty, or for any other legal relief and includes-
>
> (a) an action as defined in the Rules of Court; or
>
> (b) a suit as defined in the Magistrates' Courts Act,
>
> but shall not include a criminal proceeding[.]"

[269] Section 7 (3) of the Limitations Act governs actions brought on behalf of a person who has died since the personal injury.

[270] Limitations Act, sects. 25 to 28, 30 and 31.

[271] Limitations Act, sect. 24.

6.4. DOUBLE CRIMINALITY

Although some crimes under the Penal Code with an extraterritorial component require double criminality, such as the possession of goods stolen abroad, there do not seem to be any requirements that the double criminality apply to the *prosecution* of crimes over which Solomon Islands courts can exercise universal jurisdiction: piracy (which takes place on the high seas), grave breaches of the Geneva Conventions, violence against passengers and crew on board a foreign aircraft abroad, hijacking a foreign aircraft abroad or certain attacks on aviation. However, as noted below in Section 7, dual criminality is a requirement with regard to granting of *extradition* requests.

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

Solomon Islands recognizes diplomatic and consular immunities, including immunities from arrest and civil suit. However, it does not appear to have recognized in legislation any other claimed state or official immunities with respect to crimes or torts committed abroad.[272] In addition, on 19 September 2003, Solomon Islands entered into an impunity agreement with the USA agreeing not to surrender US nationals to the International Criminal Court.[273]

Solomon Islands is not a party to the Vienna Convention on Diplomatic Relations, but it is a party to the Vienna Convention on Consular Relations, which provide immunities to foreign diplomats and consular officers, respectively. Even though Solomon Islands has not ratified the Vienna Convention on Diplomatic Relations, it has incorporated many of the provisions of this treaty in the Diplomatic Privileges and Immunities Act. It has also done the same for

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[272] However, members of foreign armed forces stationed in Solomon Islands, such as the Regional Assistance Mission to Solomon Islands (RAMSI), have immunity from legal proceedings in Solomon Islands courts "in relation to actions of the visiting contingent or its members that are taken in the course of, or are incidental to, official duties". An act to make provisions for the requesting of international assistance for the restoration of law and order in Solomon Islands, and for matters connected therewith or incidental thereto, No. 1 of 2003 (Facilitation of International Assistance Act, 2003.

[273] Agreement between the Government of the United States of America and the Government of Solomon Islands regarding the Surrender of Persons to the International Criminal Court, 19 September 2003 (http://www.amicc.org/usinfo/administration_policy_BIAs.html#countries). For an explanation why such an impunity agreement is contrary to international law, see Amnesty International, *International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements*, IOR 40/030/2002, October 2002; _____, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes*, IOR 40/025/2002, August 2002.

consular officials in the Consular Relations Act.

The judgment of the International Court of Justice in the *Arrest Warrant* case is based on incorrect notions of law. Therefore, Amnesty International has urged that this ruling should be reversed and hopes that this will be done in the future, as immunity should not be granted in the case of the worst possible crimes ever to be committed. As explained elsewhere,[274] there is no convincing basis in customary international law to accord immunity of state officials while in office when committing genocide, crimes against humanity and war crimes. Indeed, recognition in national courts of claims of immunities by foreign officials for such crimes against the entire international community invariably means impunity since the state asserting the claim almost never will submit the case to its own prosecuting authorities for the purpose of prosecution. It has further noted that the International Court of Justice's' reasoning 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 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 to national courts, including the 1945 Allied Control Council Law No. 10, the 1946 General Assembly resolution on the affirmation of the principles of international law recognized by the Charter of the Nuremberg Tribunal, the 1950 Nuremberg Principles prepared by the International Law Commission, the Draft Code of Offences against the Peace and Security of Mankind of 1954 and the 1991 and 1996 Draft Codes of Crimes against the Peace and Security of Mankind. 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.[275]

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

States have recognized for at least six decades since the adoption of the Universal Declaration of Human Rights that the prohibition of retroactive criminal laws does not apply to national criminal legislation enacted after the relevant conduct became recognized as criminal under international law.[276]

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[274] *UNIVERSAL JURISDICTION: Belgian prosecutors can investigate crimes under international law committed abroad*, AI Index: IOR 53/001/2003 (http://www.amnesty.org/en/alfresco_asset/a50d5cdf-a508-11dc-a92d-271514ed133d/ior530012003en.html) (last visited 12 June 2008), p. 10.

[275] 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*, AI Index: EUR 53/001/2002, 1 May 2002 (http://www.amnesty.org/en/library/info/IOR53/001/2002/en).

[276] Article 11 (2) of the 1948 Universal Declaration of Human Rights declares:

Article 15 of the ICCPR, which Solomon Islands has not yet ratified, contains a similar provision.[277]

Thus, nothing in either article prevents Solomon Islands 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.

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.[278] However, apart from the vertical exception between international courts and national courts, the principle only prohibits retrials after an acquittal by the same jurisdiction.[279] This limitation on the scope of the principle can serve international justice by

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> "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."

[277] Article 15 of the ICCPR reads:

> "(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."

[278] 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.

[279] 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 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*

permitting other states to step in when the territorial state or the suspect's state fails to conduct a fair trial. There does not appear to be any provision in the Penal Code which would prevent a Solomon Islands court from exercising universal jurisdiction in such circumstances.

6.8. POLITICAL CONTROL OVER DECISIONS TO INVESTIGATE AND PROSECUTE

In normal circumstances, the Director of Public Prosecutions has independent control over criminal prosecutions.[280] However, contrary to the UN Guidelines on the Role of Prosecutors, Section 91 (7) of the Constitution overrides this independence in certain politically sensitive cases. In any case which "in any way concerns the defence, security or international relations of Solomon Islands", the Director of Public Prosecutions must inform the Minister of Justice and must "act in accordance with any directions that Minister may give to him".[281] Although it might be possible for the Director of Public Prosecutions to seek judicial review of any such interference with his or her independence, it is quite possible that a court would defer to the determination of the of Minister of Justice that a case involving a crime under international law or a crime of international concern listed in a treaty authorizing or requiring Solomon Islands to investigate or submit for prosecution a case would necessarily in some way concern the defence, security or international relations of Solomon Islands. Whether the court could still decide that a determination by the Minister in the case to proceed with or

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Committee: Its Role in the Development of the International Covenant on Civil and Political Rights, Oxford, Clarendon Press, 1991.

The Trial Chamber in the *Tadić* case reached the same conclusion:

> "The principle of *non-bis-in-idem*, appears in some form as part of the international legal code of many nations. Whether characterized as *non-bis-in-idem*, double jeopardy or autrefois acquit, autrefois convict, this principle normally protects a person from being tried twice or punished twice for the same acts. This principle has gained a certain international status since it is articulated in Article 14 (7) of the International Covenant on Civil and Political Rights as a standard of fair trial, but it is generally applied so as to cover only double prosecution in the same State."

Prosecutor v. Dusko Tadic, Case No IT-94-1-A, July 15, 1999.

[280] Section 74 (Public prosecutors and police officers to be subject to directions of Director of Public Prosecutions) of the Criminal Procedure Code provides: "Every police officer conducting a prosecution under the provisions of section 73, and every public prosecutor, shall be subject to the express directions of the Director of Public Prosecutions."

[281] Section 91 (7) of the Constitution states:

> "In the exercise of the powers conferred on him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority. Provided that, where in any case in any way concerns the defence, security or international relations of Solomon Islands, the Director of Public Prosecutions shall bring the matter to the attention of the Minister responsible for justice and shall, in the exercise of his powers in relation to that case, act in accordance with any directions that Minister may give to him."

dismiss the proceeding or to seek a particular sentence was contrary to the Constitution, other national law or international law is not clear. There should be no political interference in the process of justice whatsoever.[282]

6.9. RESTRICTIONS ON THE RIGHTS OF VICTIMS AND THEIR FAMILIES

As noted above in Section 5.4, victims are not able to obtain the full range of reparations against convicted persons to which they are entitled under international law.

6.10. AMNESTIES

Amnesties and similar measures of impunity for crimes under international law are prohibited under international law.[283]

Section 10 (6) of the Constitution provides a complete protection for those who have been pardoned.[284] In addition, it does not bar pardons for crimes under international law and it does not state whether a pardon granted by a foreign state would be recognized. Unless this provision is interpreted as excluding such situations, it could, in certain cases, lead to impunity, for example, if the pardon occurred before the trial for a crime under international law.

There have been at least two amnesty laws. The first, in 2000 provided an amnesty for criminal acts involving politically motivated violence. However, it excluded human rights violations:

> "The amnesty or immunity referred to in this section does not apply to any criminal acts done in violation of international humanitarian laws, human rights violations or abuses or which have no direct connection with the circumstances referred to in subsection (2)(a),

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[282] Political decisions to prosecute could, in some instances, be inconsistent with the UN Guidelines on the Role of Prosecutors. For example, 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."

[283] 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*, AI Index: AFR/012/2003, 31 October 2003.

[284] Section 10 (6) of the Constitution reads:

> "No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence."

(b) or (c) of this section."[285]

The second, in 2001 was similar and it contained an identical exclusion of human rights violations.[286]

[285] The amnesty barred criminal prosecutions for any criminal acts committed by members of the Isatambu Freedom Movement related to forceful evictions from the Province of Guadalcanal between 1 January 1998 and 15 October 2000 and members of the Malaita Eagle Force in retaliation for these evictions, as well as by members of the joint para-military/Malaita Eagle Force between 5 June 2000 and 15 October 2000. Amnesty Act 2000, Sect. 3 (5) (http://www.paclii.org/sb/legis/num_act/aa2000111/).

[286] The amnesty barred criminal prosecutions for any criminal acts committed by members of the Isatambu Freedom Movement on Guadalcanal in connection with the Marau conflict from 1 January 1999 to 7 February 2001 and by members of the Marau Eagle Force on Guadalcanal in retaliation against the acts committed by Isatambu Freedom Movement on Marau between 10 June 2000 and 7 February 2001. Amnesty Act 2001, No. 3 of 2001, 2 April 2001, Sect. 3 (5) (http://www.paclii.org/sb/legis/num_act/aa2001111/).

7. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

7.1 EXTRADITION

As discussed below, there are a number of obstacles to extradition and mutual legal assistance that may limit the ability of Solomon Islands to provide effective cooperation with other states in the investigation and prosecution of crimes under international law. Requests by Solomon Islands for extradition from other countries are generally regulated by bilateral or multilateral treaties. The law also contain a number of significant obstacles to extradition and to mutual legal assistance.

Extradition to Solomon Islands

Section 16 of the Extradition Act expressly provides for extradition from another country to Solomon Islands only with respect to "a person accused or convicted of an offence in Solomon Islands", apparently excluding all extraterritorial crimes.[287] In addition, this section is limited to extradition to Solomon Islands from two groups of states: designated Commonwealth countries and other designated states (treaty states). The procedure for designating Commonwealth countries and other states is found in Sections 3 and 4 of the Extradition Act.[288] In contrast to extradition from Solomon Islands to another country, which is limited to certain "extraditable offences" (see following paragraph), Section 16 applies to "an offence". Therefore, there appear to be no limitations to particular offences with respect to extradition to Solomon Islands, provided that they were committed in Solomon Islands. Section 16 appears to cover all forms of extradition to Solomon Islands from another country, but it is possible that other forms of transfer to Solomon Islands, such as deportation from 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

[287] There is an element of ambiguity in this phrase. It probably means that the offence had to take place in Solomon Islands. However, a possible reading is that the person had to be accused in Solomon Islands of an offence or convicted in Solomon Islands of an offence. This alternative reading would permit Solomon Islands to request the extradition of someone who had been convicted in Solomon Islands on the basis of universal jurisdiction of grave breaches of the Geneva Conventions committed abroad, but who had escaped to a foreign country.

[288] Amnesty International requested the Solomon Islands authorities to provide an up-to-date list of the countries which have been designated as Commonwealth countries or designated foreign states, but, as of 25 November 2009, it had not received this information.

interpretation on this point.[289]

Extradition from Solomon Islands

Solomon Islands has a somewhat complicated statutory framework governing extradition from Solomon Islands to other countries which is set forth in the Extradition Act. That act provides slightly different rules for designated Commonwealth countries and for other designated states (treaty states) (see previous paragraph).[290] Part A of the Schedule (Description of extraditable offences) to the Extradition Act expressly provides for extradition of persons suspected of committing certain ordinary crimes, piracy, violence against passengers and crew on board a foreign aircraft abroad, hijacking of foreign aircraft abroad and certain attacks on aviation abroad.[291] It does not expressly provide for extradition of persons

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[289] 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 May, 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).

[290] Laws of Solomon Islands, Ch. 59 (Extradition), sect. 2.

[291] Subsection 1 of Section 7 (Authority to proceed) of the Extradition Act provides:

"Subject to the provisions of this Act relating to provisional warrants, no person shall be dealt with thereunder except in pursuance of an Order of the Minister (in this Act referred to as an 'authority to proceed'), issued in pursuance of a request made to the Minister by or on behalf of the Government of the designated Commonwealth country or treaty State in which the person to be extradited is accused or was convicted.

DESCRIPTION OF EXTRADITABLE OFFENCES

A. 1. Murder of any degree.

2. Manslaughter.

3. An offence against the law relating to abortion.

4. Maliciously or wilfully wounding or inflicting grievous bodily harm.

5. Assault occasioning actual bodily harm.

6. Rape.

7. Unlawful sexual intercourse with a female.

8. Indecent assault.

9. Procuring, or trafficking in, women or young persons for immoral purposes.

10. Bigamy.

11. Kidnapping, abduction or false imprisonment, or dealing in slaves.

12. Stealing, abandoning, exposing or unlawfully detaining a child.

13. Bribery.

14. Perjury or subordination of perjury or conspiring to defeat the course of justice.

15. Arson.

16. An offence concerning counterfeit currency.

17. An offence against the law relating to forgery.

18. Stealing, embezzlement, fraudulent conversion, fraudulent false accounting, obtaining property on credit by false pretences, receiving stolen property or any other offence in respect of property involving fraud.

19. Burglary, housebreaking or any similar offence.

20. Robbery.

21. Blackmail or extortion by means of threats or by abuse of authority.

22. An offence against bankruptcy law or company law.

23. Malicious or wilful damage to property.

24. Acts done with the intention of endangering vehicles, vessels or aircraft.

25. An offence against the law relating to dangerous drugs or narcotics.

26. Piracy.

suspected of genocide, grave breaches of the Geneva Conventions or other crimes under international law.

However, Part B of this schedule lists as extraditable offences: "Extradition offences established under multilateral international conventions to which both the requesting and requested parts of the Commonwealth are parties." Therefore, unless the state requesting extradition is a Commonwealth state which is a party to the Geneva Conventions, a person suspected of grave breaches of those treaties would enjoy impunity from prosecution for these crimes in both Solomon Islands and in the requesting state. In addition, persons responsible for genocide who had not been prosecuted within the two-year statute of limitations, war crimes other than grave breaches, crimes against humanity, torture or other crimes under international law would enjoy a safe haven from prosecution in Solomon Islands and from extradition for those crimes to other countries, regardless whether those countries were designated Commonwealth states or designated treaty states. They might still face extradition for lesser offences, but extradition for those offences might be barred for a range of reasons, including statutes of limitation (see below).

The powers of arrest for the purpose of extradition are spelled out in Section 18 of the Criminal Procedure Code.[292]

Despite the ratification of treaties with *aut dedere aut judicare* provisions, there is no express provision in the Extradition Act requiring submission of cases to the prosecuting authorities if a person suspected of crimes listed in those treaties is not extradited.

The Extradition Act appears to cover all forms of extradition from Solomon Islands to other countries. However, there does not seem to be any authoritative judicial decision or

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27. Revolt against the authority of the master of a ship or the commander of an aircraft.

28. Contravention of import or export prohibitions relating to precious stones, gold and other precious metals.

29. Any offence or attempt to commit an offence under the Aircraft (Tokyo, Hague and Montreal Conventions) Act.

[292] Subsection g of Section 18 (Arrest by police officer without warrant) of the Criminal Procedure Code states:

> "Any police officer may, without an order from a Magistrate and without a warrant, arrest-
>
> . . .
>
> (g) any person whom he suspects upon reasonable grounds of having been concerned in any act committed at any place out of Solomon Islands which, if committed in Solomon Islands, would have been punishable as an offence, and for which he is, under the Extradition Act, or otherwise, liable to be apprehended and detained in Solomon Islands[.]"

executive interpretation whether the Extradition Act would preclude Solomon Islands deporting or otherwise transferring someone from Solomon Islands to another country when the deportation or transfer is a disguised extradition.[293]

7.1.1. INAPPROPRIATE LIMITS ON SOLOMON ISLANDS EXTRADITION REQUESTS

Requests for extradition to Solomon Islands from designated Commonwealth countries and certain other designated countries are made by the Minister, a political official, not by an independent professional prosecutor or court, and apply only to offences committed in Solomon Islands.

7.1.1.1. POLITICAL CONTROL OVER SOLOMON ISLANDS EXTRADITION REQUESTS

Requests for extradition to Solomon Islands from designated Commonwealth countries and designated states are made under paragraph 1 of Section 16 (Extradition of persons to Solomon Islands and certain restrictions upon proceedings against them) of the Extradition Act by a Minister (not specified in the Extradition Act, but presumably the Minister of Justice and Legal Affairs), a political official, not by the Director of Public Prosecutions or by a court. The minister grants "authority to proceed" to the courts under Section 7 of the Extradition Act.

7.1.1.2. PRESENCE AND SOLOMON ISLANDS EXTRADITION REQUESTS

There is no express requirement under Section 16 (1) of the Extradition Act that an accused has ever been in Solomon Islands at any point before the extradition request can be made, but that provision applies only to "an offence in Solomon Islands".[294] See Discussion above at the beginning of Section 7.1 about the ambiguity of this phrase.

7.1.2. INAPPROPRIATE BARS TO GRANTING EXTRADITION REQUESTS

As explained below, a political official has almost complete discretion to deny a request for extradition, extradition can be denied on the ground of double criminality, the offence being a political offence (largely undefined) and *ne bis in idem* (even if the trial abroad was a sham or unfair trial).

7.1.2.1. POLITICAL CONTROL OVER THE GRANTING OF EXTRADITION REQUESTS

Section 7 of the Extradition Act provides that persons may only be extradited pursuant to an order of the Minister (not specified in this chapter, but presumably the Minister of Justice and Legal Affairs), a political official, rather than pursuant to a court order. However, although the Minister's discretion appears to be broad, he or she may not issue an extradition order if that order "could not lawfully be made, or would not in fact be made, in accordance with the provisions of this Act".

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[293] See footnote 289, *supra*.

[294] That paragraph applies to "a person accused or convinced of an offence in Solomon Islands". It is clear that the phrase "in Solomon Islands" applies to "a person accused . . . in Solomon Islands" not to a person who has been accused of an offence "committed in Solomon Islands".

7.1.2.2. NATIONALITY
There is no prohibition in the Extradition Act on the extradition of nationals.

7.1.2.3. DOUBLE CRIMINALITY AND TERRITORIAL JURISDICTION
Under Section 5 (2) (b) of the Extradition Act, Solomon Islands may not extradite a suspect for trial or to serve a sentence unless "the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of Solomon Islands if it took place within Solomon Islands, or, outside Solomon Islands". This double criminality requirement does not make clear whether Solomon Islands would have to have had extraterritorial jurisdiction over the act or omission if the requesting state was seeking to exercise extraterritorial jurisdiction. However, Section 5 (2) of the Extradition Act states that the mental elements of the crimes in the two states need not be the same and Section 5 (3) makes clear that extraditable offences include a range of crimes of accessory responsibility. Nevertheless, as noted above in Section 6.4, this double criminality requirement could prevent Solomon Islands from extraditing a person accused or convicted of war crimes (other than grave breaches of the Geneva Conventions), crimes against humanity, torture or enforced disappearance whenever the act or omission did not constitute an offence under Solomon Islands law. In most, but not all, instances only some acts or omissions would be crimes under Solomon Islands law.7.1.2.4. Political offence

Section 6 (1) (a) of the Extradition Act prohibits extradition when "the offence of which that person is accused or was convicted is an offence of a political character", but it does not define an offence of a political character. It excludes assassinations of heads of government of certain states, but it does not make clear that crimes under international law are not crimes of a political character.[295] The failure to define an offence of a political character is problematic since there is no internationally agreed definition of this term or of political offences.[296] 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, and the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999

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[295] Section 6 (4) of the Extradition Act provides that an offence of a political character does not "include an offence against the life or person of the head of any designated Commonwealth country or treaty State or any related offence described in subsection (3) of section 5".

[296] There is no internationally accepted definition of the term. 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 Extradtion:United States Law and Practice, Oxford University Press – Oceana*, 5th ed. 2007), p.653 (footnotes omitted).

International Convention for the Suppression of the Financing of Terrorism, both of which exclude the crimes listed in those treaties from the definition of political offence. In addition to genocide, it can be argued that when the political offence is also a crime under international law, it fits the exception for offences that are non-political. Moreover, other treaties implicitly exclude this possibility by imposing a try or extradite obligation with respect to the crime.[297] Although not directly addressing this question, the 1950 Convention relating to the Status of Refugees (Article 1F) excludes from its application persons suspected of crimes under international law.[298]

7.1.2.5. MILITARY OFFENCE

Although there is no provision in the Extradition Act expressly excluding military offences, none of the offences listed in the Schedule are military offences.

7.1.2.6. *NE BIS IN IDEM*

Under Section 6 (2) of the Extradition Act, Solomon Islands may not extradite a suspect for trial if the person has been previously acquitted or convicted.[299] For the reasons why the *ne bis in idem* prohibition should not apply to extradition in a case involving crimes under international law, see Section 6.7 above.

7.1.2.7. NON-RETROACTIVITY

There is no provision in the Extradition Act expressly prohibiting extradition on the basis that

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[297] Genocide Convention, art. VII ("Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition."). Other treaties implicitly do so by imposing an extradite or try obligation (see treaties discussed in Section 4.2 above).

[298] Article 1.F reads:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations."

[299] Subsection 2 of Section 6 (General restrictions on extradition) of the Extradition Act states:

> "A person accused of an offence shall not be extradited under this Act to any designated Commonwealth country or to any treaty State, or be committed to or kept in custody for the purpose of his extradition, if it appears, as provided in subsection (1), that if charged with that offence in Solomon Islands he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction."

the conduct was not a crime under the law of the requesting state or Solomon Islands at the time it occurred, although it may be implicit in the dual criminality requirement in Section 5. For the reasons why prohibitions of retroactive criminal legislation do not apply to *national* law with respect to conduct before enactment which already was criminal under *international* law, see Section 6.6 above.

7.1.2.8. STATUTES OF LIMITATION

There is no provision in the Extradition Act expressly prohibiting extradition on the basis that the prosecution would be barred in the requesting state or in Solomon Islands on the basis of a statute of limitation, although it may be implicit in the dual criminality requirement. For the reasons why statutes of limitation are prohibited under international law with respect to crimes under international law, see Section 6.3 above.

7.1.2.9. AMNESTIES, PARDONS AND SIMILAR MEASURES OF IMPUNITY

There is no provision in Extradition Act prohibiting extradition on the basis that the prosecution would be barred in either the requesting state or in Solomon Islands on the basis of an amnesty, pardon or other measure of impunity. For the reasons why such measures are prohibited under international law with respect to crimes under international law, see Section 6.10 above.

7.1.3. SAFEGUARDS

Section 6 (1) (a) of the Extradition Act prohibits extradition when the request "(though purporting to be made on account of the extraditable offence), is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, or political opinions" and (b) prohibits extradition when the person sought "might, if extradited, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions". There is no other fair trial safeguard in Chapter 59.

7.1.3.1. FAIR TRIAL

There is no express prohibition in the Extradition Act on extradition of a suspect or convicted person from Solomon Islands to another country on the ground that he or she might face the risk of torture or other ill-treatment. However, extradition is prohibited where the person concerned could face the death penalty.

7.1.3.2. TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

There is no express prohibition in the Extradition Act on extradition of a suspect or convicted person on the ground that he or she might face the risk of torture or other ill-treatment.

7.1.3.3. DEATH PENALTY

Section 11 (4) provides that the minister making the decision regarding the request shall make no order under this section in respect of a person who is accused or convicted of an extraditable offence, if that person could be, or has been, sentenced to death for that offence in the country or State by which the request for his extradition is made".

7.1.3.4. OTHER HUMAN RIGHTS SAFEGUARDS

There are no other human rights safeguards in the Extradition Act.

7.1.3.5. HUMANITARIAN CONCERNS

There is no express provision in the Extradition Act barring extradition because of humanitarian concerns, whether that decision is made by a court or a political official. Such a safeguard, particularly if the decision is made by a political official instead of an independent and impartial court, could be abused, as it was in the *Pinochet* case.

7.1.3.6. SPECIALITY

Section 5 (3) of the Extradition Act limits the scope of the crimes for which the requesting state may exercise jurisdiction to those listed in the extradition request, as lesser included offence or another extraditable offence if the minister approves.

7.2. MUTUAL LEGAL ASSISTANCE

Mutual legal assistance is governed primarily by the Mutual Assistance in Criminal Matters Act 2002 (Mutual Assistance Act) and the Money Laundering and Proceedings of Crime Act 2002 (Money Laundering Act), but the Attorney General has broad discretion to request or grant such assistance independently of the Mutual Assistance Act. The treaties listing crimes permitting or requiring Solomon Islands to extradite or prosecute persons suspected of certain crimes include provisions requiring Solomon Islands to provide mutual legal assistance to other states parties. To the extent that these treaties are considered part of the common law of Solomon Islands (see Section 2 above) such provisions may be binding on officials, but there does not appear to be any definitive jurisprudence or executive interpretation on this question.

7.2.1 UNAVAILABLE OR INADEQUATE PROCEDURES

The Mutual Assistance Act, which Section 2 makes clear applies "to mutual assistance in criminal matters between Solomon Islands and any foreign State" (in contrast to extradition, which is limited to certain designated Commonwealth and other states) and the Money Laundering Act, appear to cover most forms of mutual legal assistance that would be requested by other states or provided by Solomon Islands to them. However, the Mutual Assistance Act is not the exclusive provision governing mutual legal assistance and the Attorney-General has broad discretion under Section 5 to request or to provide such assistance even if it is not provided for in this act.[300] The Money Laundering Act applies only to money laundering of property that was derived from acts or omissions which violate

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[300] Section 5 of the Mutual Assistance Act provides:

> "Nothing in this Act shall be taken to limit -
>
> (a) the power of the Attorney-General apart from this Act, to make requests to foreign States or act on requests from foreign States for assistance in investigations or proceedings in criminal matters;
>
> (b) the power of any other person or court, apart from this Act, to make requests to foreign States for forms of international assistance other than those specified in section 6; or
>
> (c) the nature or extent of assistance in investigations or proceedings in criminal matters which Solomon Islands may lawfully give to or receive from foreign States."

Solomon Islands law or would do so if it were to take place in Solomon Islands and the crime would carry a sentence of one year or more.[301] Therefore, it would apply to money laundering in connection with the following crimes committed abroad genocide, grave breaches of the Geneva Conventions, piracy, violence against passengers or crew on board a foreign aircraft, hijacking a foreign aircraft and certain attacks on aviation.[302]

Four sections of the Mutual Assistance Act deal with recognition of foreign judgments. Section 12 expressly permits the Attorney General to apply to the High Court to issue a restraining order with regard to assets believed to be in Solomon Islands on the request of a foreign state pursuant to criminal proceedings commenced in that state and Section 13 authorizes the Attorney General to apply to the High Court for registration of a foreign restraining or confiscation order. However, it is not clear whether Section 13 applies to requests made pursuant to civil, as well as criminal, proceedings. Section 14 authorizes the Attorney General to apply for an order pursuant to the Money Laundering Act to assist a foreign state in locating proceeds of crime believed to be in Solomon Islands. Section 15 authorizes the Attorney General to agree on the reciprocal sharing with a foreign state of property seized.

7.2.2 INAPPROPRIATE BARS TO MUTUAL LEGAL ASSISTANCE

Section 5 of the Mutual Assistance Act gives the Attorney General almost unfettered discretion to request or provide mutual legal assistance, so most obstacles in that act can be circumvented.

7.2.3. SAFEGUARDS

The only safeguard expressly included in the Mutual Assistance Act is a rule of specialty in Section 17 which precludes the use of information, articles or other things obtained by a foreign state pursuant to a request under the act being "used in any investigation or proceeding other than the investigation or proceeding disclosed in the request, unless the Attorney-General consents after consulting with the foreign State". There are no human rights safeguards in the Mutual Assistance Act which would preclude Solomon Islands requesting or

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[301] Section 17 (1) provides that

> "[a] person commits the offence of money laundering if the person -
>
> (a) acquires, possesses or uses property, knowing; or having reason to believe that it is derived directly or indirectly from acts or omissions -
>
> (i) in Solomon Islands which constitute an offence against any law of Solomon Islands punishable by imprisonment for not less than twelve months;
>
> (ii) outside Solomon Islands which, had they occurred in Solomon Islands, would have constituted an offence against the law of Solomon Islands arid punishable by imprisonment for not less than twelve months[.]"

[302] Therefore, it would appear to cover money laundering in connection with genocide committed abroad, even though Solomon Islands cannot exercise universal jurisdiction over this crime.

providing mutual legal assistance when the requesting or provision of such assistance could lead to human rights violations, including unfair trial, torture or ill-treatment and the death penalty. For example, there it would appear that there is nothing in the Mutual Assistance Act would prevent Solomon Islands requesting information from another state which had been obtained by torture, although there may be other provisions of Solomon Islands law, such as the Constitution, which provide such safeguards. In any event, Section 5 of the Mutual Assistance Act gives the Attorney General almost unfettered discretion to request or grant mutual legal assistance completely independent of that act.

8. SPECIAL IMMIGRATION, POLICE OR PROSECUTOR UNITS

There is no special immigration unit with a mandate to screen persons seeking to enter Solomon Islands with a view to identifying persons suspected of crimes under international law and referring their cases to the police for investigation.

There is no special police or prosecution unit with a mandate to investigate and prosecute crimes under international law. However, Solomon Islands has established a special joint government-NGO unit to deal with criminal justice issues, but this unit has no direct role in investigating or prosecuting crimes. In 2002, Solomon Islands established a Combined Law Agency Group (CLAG). In its 2002 letter to the Counter Terrorism Committee, Solomon Islands Ambassador to the UN stated:

> "CLAG' mission is to facilitate the sharing of information and resources among the different agencies in combating crimes in Solomon Islands. Its objectives are to provide timely exchange and sharing of information, enhance communication and coordination efforts, develop strategies and develop common training and human resources development.
>
> The agency is focusing on certain crime related activities which impact on other agencies. It is composed of members from the government, non-governmental organisations (NGOs) and law enforcement authorities. it holds regular meetings, where specific law and order problems and concerns and solutions to them are addressed."[303]

It has not been possible to obtain information from the Solomon Islands authorities concerning whether there are special police or prosecution units to investigate other serious crimes, such as money laundering, drug trafficking, smuggling, piracy, trafficking in persons, cybercrime and terrorist offences.

[303] Note verbale, 23 August 2002, *supra*, note 54.

9. JURISPRUDENCE

There appear to be no cases in Solomon Islands involving universal jurisdiction or relevant jurisprudence involving extraterritorial jurisdiction or the scope of crimes under international law.

RECOMMENDATIONS

Solomon Islands 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.

Substantive law:

Ratify, without any limiting reservations, all treaties defining crimes under international law or requiring states to extradite or prosecute crimes under international law, including:

Protocols I and II to the four Geneva Conventions of 1949;

Rome Statute of the International Criminal Court;

International humanitarian law treaties listed in Section 4.3 above;

Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity;

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and

International Convention for the Protection of All Persons from Enforced Disappearance.

Define crimes under conventional and customary international law, where this has not yet been done, as has been done with genocide and grave breaches of the Geneva Conventions, as crimes under national law, including:

crimes against humanity;

war crimes in both international and non-international armed conflict;

torture;

extrajudicial executions; and

enforced disappearances,

in accordance with the strictest standards of international law.

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 superior orders, duress and necessity, but permit them to be taken into account in mitigation of punishment.

Jurisdiction:

Provide that courts have universal criminal jurisdiction over conduct amounting to crimes under international law, whether that conduct is currently labelled in Solomon Islands law as an ordinary crime or as a crime under international law.

Provide that Solomon Islands has an *aut dedere aut judicare* obligation to extradite a suspect in territory subject to its jurisdiction (unless that person would face risk of the death penalty, torture or other ill-treatment or unfair trial) or submit allegations to the prosecution authorities for courts can exercise universal criminal and civil jurisdiction over that conduct.

Ensure that Solomon Islands can open an investigation, issue an arrest warrant and seek extradition from any state of anyone suspected of a crime under international law even if that suspect has never entered territory subject to Solomon Islands jurisdiction.

However, also ensure that the person suspected of such crimes is in territory of Solomon Islands subject to its jurisdiction a sufficient time before the start of a trial in order to prepare for trial.

Ensure that legislation provides that the first state to exercise jurisdiction, whether universal 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.

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 or criminal proceedings in Solomon Islands.

Ensure that the rights of suspects and accused under international law and standards related to a fair trial are fully respected by ratifying the International Covenant on Civil and Political Rights and incorporating all internationally recognized fair trial guarantees in national law.

Ensure that no one is subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Procedure related to victims:

Strengthen the provisions in the Penal Code and Criminal Procedure Code regarding private prosecutions to ensure that victims and their families are able to institute criminal proceedings based on universal jurisdiction over crimes under international law through private prosecutions, in particular by imposing strict criteria to be fulfilled before the Director of Public Prosecutions can take over a private prosecution in such cases that reflect the strong public interest in bringing perpetrators of crimes under international law to justice.

Ensure that victims and their families are able to file civil claims for all five forms of reparations (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.

Removal of legal, practical and political obstacles:

Legal -

Provide that any claimed state or official immunities will not be recognized with regard to crimes under international law or to torts amounting to such crimes or to other human rights violations.

Amend the Penal Code and the Limitations Act to provide that statutes of limitation do not apply to crimes under international law or to torts amounting to 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.

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 crime under national law.

Expressly 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.

Political –

Revise, in a transparent manner in close consultation with civil society, the public interest test to ensure that the criteria for deciding whether to investigate or prosecute crimes under international law are neutral, exclude all political considerations and are based on the strong public interest in ensuring that perpetrators of crimes under international law are brought to justice.

Amend the Section 91 (7) of the Constitution to ensure that decisions to investigate or prosecute are taken by the Director of Public Prosecutions in accordance with such neutral criteria, subject to appropriate review by courts, but not by the Minister of Justice, a political official.

Amend the Extradition Act to ensure that decisions whether to request extradition of persons suspected of crimes under international law and to provide mutual legal assistance are made

in accordance with neutral criteria and human rights safeguards and exclude all inappropriate criteria, such as the prohibition of the extradition of nationals.

Practical –

Improvements in investigation and prosecution in the forum state –

Create a special unit of police, prosecutors and investigating judges with responsibility for investigating and prosecuting crimes under international law committed abroad.

Ensure that such a unit:

- has sufficient financial resources, which should be comparable to the resources devoted to other serious crimes, such as "terrorism", organized crime, trafficking in persons, drug trafficking, cyber crimes and money laundering;
- has sufficient material resources;
- has sufficient, experienced, trained personnel; and
- provides effective training on a regular basis of all staff in all relevant subjects, including international criminal law, human rights and international humanitarian law

Where no special immigration unit exists for screening foreigners seeking to enter Solomon Islands, including immigrants, visa applicants and asylum seekers, to determine whether they are suspected of crimes under international law, such a unit should be established.

Ensure that such an immigration unit keeps police and prosecuting authorities promptly and fully informed in a manner that fully respects the rights of all persons to a fair trial.

Ensure that all judges, prosecutors, defence lawyers and others in the criminal and civil justice systems are effectively trained in relevant subjects.

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 Solomon Islands, in foreign states and in international criminal courts, including through relocation.

Improvements in cooperation with investigations and prosecutions in other states

Amend the Mutual Legal Assistance in Criminal Matters Act 2002 and the Money Laundering and Proceeds of Crime Act 2002 to ensure that foreign requests from foreign states for mutual legal assistance, including *commissions rogatoires* (commissions rogatory), in investigating and prosecuting crimes under international law and in seeking civil reparations for torts amounting to such crimes or to other human rights violations 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 the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment or an unfair trial.

Ensure that other requests for mutual legal assistance by foreign states can be transmitted

directly to Solomon Islands police or prosecutor directly, 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.

Improve procedures in Solomon Islands 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 Solomon Islands 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.

Join Interpol and 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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I WANT TO HELP

WHETHER IN A HIGH-PROFILE CONFLICT OR A FORGOTTEN CORNER OF THE GLOBE, **AMNESTY INTERNATIONAL** CAMPAIGNS FOR JUSTICE, FREEDOM AND DIGNITY FOR ALL AND SEEKS TO GALVANIZE PUBLIC SUPPORT TO BUILD A BETTER WORLD

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Activists around the world have shown that it is possible to resist the dangerous forces that are undermining human rights. Be part of this movement. Combat those who peddle fear and hate.

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END IMPUNITY THROUGH UNIVERSAL JURISDICTION

States where genocide, crimes against humanity, war crimes, torture, enforced disappearances and extrajudicial executions occur often fail to investigate and prosecute those responsible.

Since the International Criminal Court and other international courts can only ever bring a handful of those responsible to justice, it falls to other states to do so through universal jurisdiction.

This paper is one of a series on each of the 192 Members of the United Nations.

Each one is designed to help lawyers and victims and their families identify countries where people suspected of committing crimes under international law might be effectively prosecuted and required to provide full reparations. The papers are intended to be an essential tool for justice and can be used by police, prosecutors and judges as well as by defence lawyers and scholars.

Each one also provides clear recommendations on how the government concerned can bring its national law into line with international law.

The series aims to ensure that no safe haven exists for those responsible for the worst imaginable crimes.

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