AMNESTY INTERNATIONAL

NO SAFE HAVEN SERIES 8

VANUATU

END IMPUNITY THROUGH UNIVERSAL JURISDICTION

CAMPAIGN FOR INTERNATIONAL JUSTICE

AMNESTY INTERNATIONAL

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Cover photo: Architect's rendering of the proposed new Supreme Court Hall of Justice of Vanuatu, by kind permission of Whitefield, McQueen, Irwin, Alsop. Commencement of the construction of these plans was pending approval by the Government of Vanuatu at the date of publication.

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CONTENTS

1. INTRODUCTION[1]

In the light of the high rate of impunity of persons responsible for crimes under international law who travel the world freely, the *No Safe Havens* series papers are issued with the aim to ensure that no safe haven exists for those responsible for the worst imaginable crimes prohibited by international law, including war crimes, crimes against humanity, genocide, torture and enforced disappearance. Each paper 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 reparation. The papers are intended to be a tool for justice that can be used by police, prosecutors and judges as well as by defence lawyers and scholars. Further, recommendations are made to each country as to how to ensure its obligations are met and such prosecutions and orders for reparation are provided for.

Vanuatu, previously known as the New Hebrides, became independent of joint administration by both the United Kingdom of Great Britain and Northern Ireland, and France,[2] on 30 July 1980.[3]

On 12 July 2011, Vanuatu acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[4] and on 2 December 2011, Vanuatu acceded to the Rome

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[1] This report was researched and drafted by William Mosse, under the supervision of the International Justice Project in the International Secretariat of Amnesty International, and with the assistance of the Asia-Pacific Programme of Amnesty International. Amnesty International wishes to thank Professor Eric Colvin, University of the South Pacific, Dr Jennifer Corrin, Centre for Public, International and Comparative Law, and TC Beirne School of Law, and Ken Averre, Forbes Chambers, Sydney, for providing advice and comments on drafts of this paper. In addition, Amnesty International is grateful for the very helpful cooperation and assistance provided by members of the Vanuatu government's Department of Strategic Policy Planning & Aid Coordination and the Vanuatu Law Commission. Special thanks are extended to Association of Vanuatu NGOs. Advice was requested from the Vanuatu Law Society, the Office of the Attorney General in Vanuatu, the Chief Justice of Vanuatu, Vanuatu's Public Prosecutor, the Vanuatu Permanent Mission to the United Nations in New York, and the Vanuatu government's Ministry of Foreign Affairs, Ministry of Justice and Ministry of Internal Affairs, though no information was received.

Every effort was made to ensure that all the information in this paper was accurate as of 16 September 2012. However, for an authoritative interpretation of Vanuatu law, counsel authorized to practice in Vanuatu 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..

[2] Protocol between Great Britain and France respecting the New Hebrides, February 1906; New Hebrides Order, 1922, annexing protocol between Britain and France respecting New Hebrides, 6 August 1914.

[3] Ntumy M.A., *South Pacific Legal Systems*, University of Hawaii Press, Honolulu, 1993, p. 366.

[4] United Nations Treaty Collection Website, Chapter IV, Part 9, accessed 5 March 2012 (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en).

Statute of the International Criminal Court.[5] However, as of 16 September 2012, Vanuatu has not yet implemented national legislation in line with its obligations under these treaties.[6]

Vanuatu courts may currently exercise universal jurisdiction over certain crimes under national law of international concern, including piracy and hostage taking (see Box 1: What is universal jurisdiction?). Vanuatu legislation provides for universal jurisdiction over only two crimes under international law, grave breaches of the Geneva Conventions in certain circumstances, and slave trading. However, it is possible that Vanuatu may also be able to exercise universal jurisdiction over a very limited form of crimes against humanity. Vanuatu courts cannot exercise universal jurisdiction over any other crimes under international law, including genocide. Its courts may not exercise universal jurisdiction over ordinary crimes.

In addition to the failure to define certain crimes under international law as crimes under national law – war crimes in most cases, crimes against humanity, genocide, torture and other cruel, inhuman and degrading treatment, extrajudicial executions and enforced disappearances – and to provide for universal jurisdiction over these crimes, there are numerous other obstacles to prosecution, including: the lack of a principle of superior criminal responsibility, improper defences, statutes of limitation, immunities, and bars on retrospective application of international criminal law in national law.

Therefore, Vanuatu is currently a safe haven from prosecution in its courts for foreigners who are suspected of crimes under international law, including: genocide, war crimes (apart from, in certain circumstances, grave breaches of the Geneva Conventions – see Section 4), crimes against humanity, torture, extrajudicial executions and enforced disappearance committed abroad and where the obstacles to prosecution noted are present.

Box 1: What is universal jurisdiction?

Universal jurisdiction is the *ability* of the court of any state to try persons for crimes committed outside its territory which are not linked to the state by the nationality of the suspect or the victims or by harm to the state's own national interests. Sometimes this rule is called permissive universal jurisdiction. This rule is now part of customary international law, although it is also reflected in treaties, national legislation and jurisprudence concerning crimes under international law, ordinary crimes of international concern and ordinary crimes under national law. When a national court is exercising jurisdiction over conduct amounting to crimes under international law or ordinary crimes of international concern committed abroad, as opposed to conduct simply amounting to ordinary crimes, the court is really acting as an agent of the international community enforcing international law.

[5] United Nations Treaty Collection Website, Chapter XVIII, Part 10, accessed 5 March 2012 (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en).

[6] On 5 March 2012, the Public Affairs Unit of the International Criminal Court stated in a telephone call that they were not aware of any public statement from Vanuatu regarding the domestic implementation of the Rome Statute of the International Criminal Court. On 16 September 2012 a senior Vanuatu government official stated in an email that no implementing legislation for either treaty had been passed, *infra* n. 14.

Under the related *aut dedere aut judicare* (extradite or prosecute) rule, a state may not shield a person suspected of certain categories of crimes. Instead, it is *required* either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime. As a practical matter, when the *aut dedere aut* judicare rule applies, the state where the suspect is found must ensure that its courts can exercise all possible forms of geographic jurisdiction, including universal jurisdiction, in those cases where it will not be in a position to extradite the suspect to another state or to surrender that person to an international criminal court.

In addition, Vanuatu is also a safe haven from extradition for war crimes (apart from, in certain circumstances, grave breaches of the Geneva Conventions – see Section 4), crimes against humanity, genocide, torture and other cruel, inhuman and degrading treatment, extrajudicial executions and enforced disappearances. There is a high possibility that Vanuatu would not be able to extradite on the basis of some such conduct, because Vanuatu has not defined these crimes. Although persons suspected of crimes under international law could be extradited for ordinary crimes, they could not be extradited for crimes under international law (other than slave trading and, in certain circumstances, grave breaches of the Geneva Conventions), and there are a number of obstacles to extradition. Further, Vanuatu has not yet carried out its obligation to implement the Rome Statute of the International Criminal Court. Therefore, there does not seem to be any express legal authority to arrest and surrender such persons to the International Criminal Court, or to any other international criminal court.

In relation to universal civil jurisdiction, there is currently no statute expressly authorizing Vanuatu to exercise universal civil jurisdiction in civil cases. Victims and their families or heirs of the victims can file civil claims in criminal proceedings based on universal jurisdiction arising out of the crimes in that case.

Vanuatu has no special immigration facility to screen for persons suspected of crimes under international law and to refer them to police or prosecuting authorities for investigation and possible prosecution. Vanuatu has a special police unit, the Transnational Crime Unit, to investigate particular crimes, such as terrorism and money laundering, but no special unit or other facility to investigate and prosecute crimes under international law.

There are no known cases in Vanuatu involving universal jurisdiction.

This paper, which is Number 8 of a series of 193 papers on each UN member state updating Amnesty International's 722-page study of state practice concerning universal jurisdiction at the international and national level in 125 countries published in 2001, makes extensive recommendations for reform of law and practice so that Vanuatu 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.[7]

[7] Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation*, Index: IOR

53/002 - 018/2001, September 2001 (http://www.amnesty.org/en/library). Seven of the papers in the series have been published so far (Bulgaria, Burkina Faso, Germany, Solomon Islands, Spain, Switzerland and Venezuela) (see Appendix I for list and links), and two further papers are scheduled for publication in late 2012 (Ghana and Sierra Leone).

2. THE LEGAL FRAMEWORK

2.1. TYPE OF LEGAL SYSTEM

Vanuatu is not explicitly a common law country, owing largely to its mixed colonial inheritance, with English and French aspects.[8] However, in practical terms, it operates as a common law jurisdiction, employing English common law.[9] Article 95 (2) of the Constitution states that:

> "Until otherwise provided by Parliament, the British and French laws in force or applied in Vanuatu immediately before the Day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible taking due account of custom".[10]

Queen's Regulation No. 2 of 1976 provided that "so far as circumstances admit … the statutes of general application in force in England on the 1st day of January 1976" were to be applied in the New Hebrides.[11] Therefore, the statutory law in force in England at this date, to the extent that it is not "expressly revoked or incompatible with … independent status", is still in force in Vanuatu. There appears to be no such cut off date for English common law and equity, meaning that the common law and equity in force in England on the day of independence, 30 July 1980, will have binding force in Vanuatu.[12] It is unclear what the result would be where pre-independence English and French laws conflict.

Vanuatu has no separate military justice system.

The Working Group on the Universal Periodic Review expressed concerns in 2009 about the justice system that are relevant in determining whether Vanuatu police, prosecutors and judges will be able to exercise universal jurisdiction effectively and fairly:

> "The CCA [Common Country Assessment] stated that the police force is weak, many court cases

[8] Findlay, M. Criminal Laws of the South Pacific, Suva: The Institute of Justice and Applied Legal Studies (1996), p. 18.

[9] *Ibid.*, at 18: "Judges...have taken the view that where there is a gap in regional legislation, then it should be filled by English common law...There is no mention in the Penal Code...that common law should apply. After independence...both the English and the French law applied where it was not inconsistent or in conflict with current statute law or it has been repealed. In practice common law procedures are applied even though common law offences and defences probably do not have impact."

[10] Constitution of the Republic of Vanuatu, art. 95 (2).

[11] Queen's Regulation No. 2 of 1976, cited in Ntumy, *supra* n. 3, 368.

[12] See also: Farran S, *A Microcosm of Comparative Law: the Overlay of Customary, French and English Family Law in Present Day Vanuatu*, (2004) Oxford U. Comparative L. Forum 4 (http://ouclf.iuscomp.org/articles/farran.shtml#fn**sym, at note 6, accessed 9 Feb 2012).

are overdue, there is a lack of appropriate laws to protect women and children, and inadequate staff within the Public Prosecutor's and Public Solicitor's Offices. The capacity, neutrality and independence of the judiciary needs further enhancement. Abuse of power and of public offices continues, as well as the manipulation of the laws designed to prevent such behaviour".[13]

According to a senior Vanuatu government official, as of 16 September 2012 no steps had been taken to address these concerns since the Common Country Assessment in 2002, and the Working Group on the Universal Periodic Review's restatement of them at Vanuatu's Universal Periodic Review in 2009.[14]

2.2. STATUS OF INTERNATIONAL LAW

Article 2 of the 1980 Constitution provides that: "The Constitution is the supreme law of the Republic of Vanuatu". Article 16 of the Constitution provides that "Parliament shall make laws by passing bills", and that "when a bill has been passed by Parliament it shall be presented to the President of the Republic who shall assent to it within 2 weeks". The Constitution does not provide for international treaties, or other international law, to be enforceable in Vanuatu courts. Article 26 of the Constitution provides several circumstances under which "treaties negotiated by the Government shall be presented to Parliament for ratification", including where the treaty requires "amendment of the laws of the Republic of Vanuatu".

Vanuatu is a dualist state, so conventional (treaty) and customary international law cannot be directly enforced by Vanuatu courts, but can only be enforced if they have been incorporated in national legislation.[15] Nevertheless, Vanuatu, as a matter of customary international law, is obliged to recognize in all circumstances the supremacy of both conventional international law and customary international law with regard to its national law.[16] This obligation applies to all national law, including constitutions and legislation.[17]

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[13] Human Rights Council, Working Group on the Universal Periodic Review, Fifth session, Geneva, 4 – 15 May 2009, A/HRC/WG.6/5/VUT/2, 9 March 2009, para. 26.

[14] On 16 September 2012 Amnesty International received, following enquiries, an email addressing some of the points in this paper from a senior Vanuatu government official.

[15] According to the dualist approach, international and national law are two completely separate legal systems. International law would apply within a state only to the extent that it has been adopted by that state's own national law, not as international law. According to the monist approach, international and national law are part of a single legal system and international law can be directly applied by national courts. See generally, Robert Jennings and Arthur Watts, *Oppenheim's International Law*, London and New York: Longman, 1992, pp. 53-54.

[16] For more than a century, international court decisions, arbitral awards and public international law experts have not limited the obligation under international law to ensure that national legislation and jurisprudence not be inconsistent with international law to conventional international law. See, for example, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)*, I.C.J. Rep. (1988), p. 34 (noting "the fundamental principle of international law that international law prevails over domestic law") (citing *Alabama Claims* arbitration award, 14 September 1872, reprinted in J.B. Moore, *International Arbitrations*, New Cork, vol. I, pp. 495, 653, 1898); Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 1992, 9th ed., vol. 1, pp. 82 – 86; Malcolm N. Shaw,

Therefore, Vanuatu, as a matter of customary international law, should undertake any legislative changes necessary to comply with its obligations under treaties and customary international law, as set forth in the recommendation section at the end of this paper.

2.3. COURT SYSTEM

There are only civilian courts in Vanuatu. There are four levels of ordinary courts:

- Island Courts;
- the Magistrates' Court;
- the Supreme Court; and
- the Court of Appeal.

Island Courts have jurisdiction over minor crimes[18] and civil cases not relevant to this paper.[19] Appeals from Island Courts are to the Magistrates' Court.[20]

The Magistrates' Court has jurisdiction throughout the whole of Vanuatu.[21] Subject to the provisions of any other act or law, the Magistrates' Court has jurisdiction to hear and determine in a summary way criminal proceedings for an offence for which the maximum punishment does not exceed imprisonment for two years.[22] However, a senior magistrate may on application or at his or her discretion hear and determine in a summary way criminal proceedings for an offence for which the maximum punishment does not exceed imprisonment for 10 years, though a senior magistrate must

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International Law, Cambridge, Cambridge University Press, 4th ed., 1997, pp. 102 - 103; Gerald Fitzmaurice, 'Law and Procedure of the International Court of Justice', 1954-9 - General Principles and Sources of International Law, Brit. Y.B. Int'l L., 1959, 183; Edwin Borchard, 'The relation between international law and municipal law', Va. L. Rev., vol. 27, p. 137.

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

[18] Island Courts Act [Cap 167] of 1983, s. 11 ("In the exercise of its criminal jurisdiction, an island court shall not impose a fine in excess of VT 24,000 [265.48 USD at 26 March 2012] or impose a sentence of imprisonment in excess of 6 months").

[19] Island Courts Act, s. 12 ("[I]n the exercise of its civil jurisdiction an island court shall not award compensation or damages in excess of VT 50,000 [553.10 USD at 26 March 2012]").

[20] Island Courts Act s. 22 (1).

[21] Judicial Services and Courts Act [Cap 270], s. 12 (2).

[22] Judicial Services and Courts Act, s. 14 (2).

not impose a sentence greater than imprisonment for five years.[23] The Magistrates' Court has jurisdiction to try all civil proceedings in which the amount claimed or the value of the subject matter does not exceed VT 1,000,000 [11,061.95 US dollars at 26 March 2012], except claims relating to permanent physical damage to a person.[24] A magistrate may reserve for the consideration of the Supreme Court in a case to be stated by the magistrate any question of law which may arise on the hearing of any criminal or civil proceedings.[25]

The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings.[26] Anyone who considers that a provision of the Constitution has been infringed in relation to him or her may, without prejudice to any other legal remedy available to him or her, apply to the Supreme Court for redress.[27] Subject to the provisions of any other act, the Supreme Court has jurisdiction to hear and determine appeals from judgments of the Magistrates' Court on a question of law, a question of fact, or on a question of mixed law and fact.[28] The Supreme Court has power at any time to review the conviction of a person by the Magistrates' Court, whether or not there has been an appeal against the conviction.[29] A Supreme Court judge may reserve for the consideration of the Court of Appeal in a case to be stated by the judge any question of law which may arise on the hearing of any criminal or civil proceedings.[30] The Supreme Court is the final court of appeal for the determination of questions of fact that have been appealed from lower courts. However, in such cases an appeal lies to the Court of Appeal from the Supreme Court on a question of law if the Court of Appeal grants leave.[31]

The Court of Appeal has jurisdiction to hear and determine appeals from judgments of the Supreme Court on questions of both fact and law where the case originated in the Supreme Court, but on questions of law alone where the case originated in a lower court. The Court of Appeal has the powers and jurisdiction of the Supreme Court, may review the procedure and the findings (whether of fact or law) of the Supreme Court, and may substitute its own judgment for the judgement of the Supreme Court. Any judgment of the Court of Appeal has full force and effect, and may be executed and enforced, as if it were an original judgment of the Supreme Court.[32]

Precedent. Though Vanuatu is not explicitly a common law country, in practice it operates as a common law jurisdiction (see Section 2.1 above). As in most common law countries, all courts, apart

[23] Judicial Services and Courts Act, s. 14 (4).

[24] Magistrates' Court (Civil Jurisdiction) Act [Cap 130], s. 1 (a).

[25] Judicial Services and Courts Act, s. 17 (1).

[26] Constitution of the Republic of Vanuatu, art. 49 (1); Judicial Services and Courts Act, s. 28 (1).

[27] Constitution of the Republic of Vanuatu, art. 53 (1).

[28] Judicial Services and Courts Act, s. 30 (1).

[29] Judicial Services and Courts Act, s. 31 (1).

[30] Judicial Services and Courts Act, s. 31 (5).

[31] Judicial Services and Courts Act, s. 30 (4).

[32] Judicial Services and Courts Act, ss. 30 (4) & 48.

from the highest court in the land (in this case the Court of Appeal), are bound by the rule of *stare decisis* (binding precedent). Other than the highest court, a court can only disregard one of its previous rulings or a ruling of a higher court if it can distinguish the factual situation in the two cases.

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

In addition to the courts, other actors in the judicial system are police and prosecutors, as well as a number of other institutions, including the ombudsman (see Section 2.6 below).

Police. Among other things, the Police Force of Vanuatu shall be employed for "the prevention and detection of offences and the production of offenders before the Courts".[33] Section 35 of the Police Act states that "[i]t shall be the duty of every member to … collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice and to apprehend all persons that he is legally authorised to apprehend and for whose apprehension sufficient ground exists".[34] It is unclear if any investigatory functions sit outside of the Police Force of Vanuatu. There is no special police unit to investigate crimes under international law, but the Police Force of Vanuatu has established a "Transnational Crime Unit" to investigate crimes of a transnational nature (see Section 8 below).

Prosecutors. According the Constitution,

> "[t]he function of prosecution shall vest in the Public prosecutor, who shall be appointed by the President of the Republic on the advice of the Judicial Service Commission. He shall not be subject to the direction or control of any other person or body in the exercise of his functions".[35]

For discussion of the independence of the Public Prosecutor, see Section 6.8 below. There are no special prosecution units in Vanuatu.

Immigration screening unit. There is no immigration unit that 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. There is, however, a liaison officer from the TCU (Transnational Crime Unit) located within the Department of Immigration. This unit carries out similar functions with regard to certain crimes of a transnational character (see Section 8 below).

National institutions. Articles 61 – 65 of the Constitution of the Republic of Vanuatu establish the position of Ombudsman,[36] and the detail of this role is expanded in the Ombudsman Act of 1998.[37] Article 11 of the Ombudsman Act sets out the functions of the Ombudsman, including to "enquire

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[33] Police Act [Cap 105], s. 4 (2) (d).

[34] Police Act, s. 35 (3).

[35] Constitution of the Republic of Vanuatu, art. 55.

[36] Constitution of the Republic of Vanuatu, arts. 61 – 65.

[37] Ombudsman Act [Cap 252] of 1998.

into any conduct on the part of any government agency", and to "enquire into any defects in any law or administrative practice appearing from any matter".[38]

During Vanuatu's Universal Periodic Review at the UN Human Rights Council in 2009, Vanuatu committed itself to the establishment of a national human rights institution, commission, or unit. Vanuatu tied this to the provision of technical assistance, but stated at the time that it had already begun discussions with some international partners regarding such assistance.[39] In September 2012, representatives of the Office of the High Commission of Human Rights visited Vanuatu to try to speed up the establishment of a national human rights institution.[40] There is no deadline for the creation of a national human rights institution so far and it is not clear what powers any established body might have.

Despite the passage of the Law Commission Act of 1980,[41] a law reform commission was not set up in the decades following Vanuatu's independence.[42] In September 2008, however, the Vanuatu Attorney General, in a speech to the Australasian Law Reform Agencies Conference, set out plans for the creation of such a commission,[43] and, in 2011, a Bill for the Law Commission (Amendment) Act of 2011 was tabled in the Vanuatu Parliament.[44] The bill proposed that the amended act would provide, in Section 7, that the function of the Commission would be "to receive [a] proposal for the review of a particular area of law and critically examine that area of law and report back to the Minister on the result of the examination". The purpose of carrying out the examination would include the determination of whether the relevant law "reflects distinctive concepts of custom law, common law and civil law legal systems and reconcile them where necessary", or "is to be changed to consider modern conditions, approaches and concepts".[45] The Law Reform Commission was operational by 07 May 2012 at latest, as at this date Amnesty International was given their contact details for consultation on this paper. The Vanuatu Ministry of Justice and Community Services

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[38] *Ibid*. s. 11 (a) & (b).

[39] Report on the Working Group of the Universal Periodic Review, Vanuatu, 4 June 2009, A/HRC/12/14, para. 25; Report on the Working Group of the Universal Periodic Review, Vanuatu, Addendum, 24 September 2009, A/HRC/12/14/Add.1, para. 48; Report of the Human Rights Council on its Twelfth Session, 25 February 2010, A/HRC/12/50, para. 582.

[40] Asia Pacific Forum, "Briefing Paper: APF Partnerships in the Pacific", October 2012.

[41] Law Commission Act of 1980 [Cap 115].

[42] Mr Alatoi Ishmael Kalsakau, Attorney General of Vanuatu, "The Birth and Rebirth of Law Reform Agencies: The Establishment of Vanuatu's Law Reform Commission", 11 September 2008, Australasian Law Reform Agencies Conference.

[43] *Ibid*.

[44] Vanuatu Daily Post, "Vanuatu's Law Commission Act advanced", posted on 12 December 2011, accessed 01 March 2012: http://www.dailypost.vu/content/vanuatu%E2%80%99s-law-commission-act-advanced.

[45] *Ibid*.

states on the Vanuatu government website that it has responsibility for the Law Reform Commission.[46]

According to the Vanuatu Ministry of Justice and Community Services website, in order to implement key international human rights conventions that Vanuatu has ratified, the Ministry, in 2009, formed the National Children's Committee, and the National CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) Committee. The Ministry also works with various civil society Partners, such as the National Council of Women, Women's Centre, Vanuatu Disable Society, Disability Advocacy, Save the Children, UNICEF, UNIFEM, and UNDP, with regard to issues of Human Rights, Good Governance and Anti-Corruption. This work includes signed Annual Work Plans for the implementation of Vanuatu's obligation under United Nations human rights conventions.[47]

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

In addition to government prosecutors, victims, individuals or legal persons acting on their behalf, and individuals or legal persons acting on behalf of the public interest can initiate criminal prosecutions.

2.5.1. CIVIL CLAIMS IN CRIMINAL PROCEEDINGS

See Section 5 for a comprehensive discussion of civil claims in criminal proceedings.

2.5.2. CRIMINAL PROCEEDINGS INITIATED BY VICTIMS OR IN THEIR BEHALF

As discussed below, any person, including victims, individuals or legal persons acting on their behalf, and individuals or legal persons acting on behalf of the public interest can initiate criminal prosecutions.[48]

2.5.2.1. Criminal proceedings initiated by victims

Victims or their families can initiate criminal proceedings. They may do so for all crimes.[49]

Any individual can initiate proceedings by making a complaint. This appears to be no different than if a proceeding is initiated by the Public Prosecutor. A judicial officer (judge or magistrate), on receiving such a complaint, must draw up charges unless there is no evidence of a crime.[50] The case

[46] Government of Vanuatu website, Ministry of Justice and Community Services page, accessed on 2 March 2012: (http://www.governmentofvanuatu.gov.vu/index.php?option=com_content&view=article&id=90&Itemid=195).

[47] Government of Vanuatu website, Ministry of Justice and Community Services page, accessed 28 March 2012 (http://www.governmentofvanuatu.gov.vu/index.php?option=com_content&view=article&id=90&Itemid=195).

[48] Criminal Procedure Code of 1981 [Cap 136], ss. 34 & 35.

[49] Criminal Procedure Code of 1981 [Cap 136], ss. 34 & 35 (1).

[50] Criminal Procedure Code of 1981 [Cap 136], s. 35.

is prosecuted by a private prosecutor (usually a solicitor instructed by the complainant) or by the complainants themselves.[51]

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

Any person, including individuals or legal persons, can initiate criminal proceedings on behalf of the victims or on behalf of the general public interest.[52]

2.5.3. RIGHTS OF VICTIMS IN CRIMINAL PROCEEDINGS

The Public Prosecutor Act of 2003 states that the Public Prosecutor must have regard to "the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime".[53] This is not elaborated further in legislation, and appears to be the full extent to which victims' rights are protected in legislation.

2.5.3.1. Notice

The right of victims to notice about all developments in the investigation, prosecution and appeal does not appear to be guaranteed in the Criminal Procedure Code.

2.5.3.2. Support

The provision of psychological and other support for victims, particularly groups at risk, such as women and children, does not appear to be guaranteed in the Criminal Procedure Code.

2.5.3.3. Participation

The right of victims to participate in pre-trial, trial and appellate proceedings does not appear to be guaranteed in the Criminal Procedure Code.

2.5.3.4. Representation

The right of victims to legal representation does not appear to be guaranteed in the Criminal Procedure Code.

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[51] *McGreal v Moses – Sentence* [2012] VUSC 107; Criminal case 135 of 2009 (9 April 2012); *Aru v Salmon* [1998] VUSC 56; Criminal Case No 013 of 1998 (18 September 1998).

[52] Criminal Procedure Code of 1981 [Cap 136], ss. 34 & 35; A senior Vanuatu government official stated in an email that a legal as well as a natural person can initiate proceedings by making a complaint, *supra* n. 14.

[53] Public Prosecutor Act of 2003, [Cap 293], s. 8 (2) (c).

2.6. PROPOSALS FOR LEGAL REFORM

None of the law enforcement or law reform bodies discussed in this section appear to have made any proposals for reform of law or practice relevant to universal jurisdiction in Vanuatu. On 12 July 2011, Vanuatu acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[54] On 2 December 2011, Vanuatu acceded to the Rome Statute of the International Criminal Court.[55] As of 16 September 2012, it appears that no implementing legislation has been proposed to bring Vanuatu's domestic legislation in to line with its obligations under these treaties.[56]

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[54] United Nations Treaty Collection Website, Chapter IV, Part 9, accessed 5 March 2012 (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en).

[55] United Nations Treaty Collection Website, Chapter XVIII, Part 10, accessed 5 March 2012 (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en).

[56] On 5 March 2012, an official of the Public Affairs Unit of the International Criminal Court stated in a telephone conversation with Amnesty International representatives that the unit was not aware of any public statement from Vanuatu regarding the domestic implementation of the Rome Statute of the International Criminal Court. On 16 September 2012 a senior Vanuatu government official confirmed in an email to Amnesty International that no implementing legislation for either treaty had been passed, *supra* n. 14.

3. GEOGRAPHIC JURISDICTION OTHER THAN UNIVERSAL JURISDICTION

There are five forms of geographic jurisdiction: territorial jurisdiction and four forms of extraterritorial jurisdiction: active and passive personality jurisdiction, protective jurisdiction and universal jurisdiction (discussed below in Section 4). Vanuatu courts can exercise territorial jurisdiction, as well as active personality and protective, but not passive personality, jurisdiction.

Territorial jurisdiction. The basic jurisdictional principle of the Vanuatu is that jurisdiction is territorial. Section 1(1) of the Penal Code states: "The criminal law of the Republic shall apply to any act done or omitted within its territory".[57] Therefore, it appears that 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, as with regard to the active personality provision discussed below. Section 2 (a) of the Penal Code makes clear that Vanuatu's courts can exercise both subjective territorial jurisdiction (where the crime commenced in Vanuatu but was completed abroad), and objective territorial jurisdiction (where the crime commenced abroad but elements took place in Vanuatu). However, no alien may be tried unless arrested within the territory of, or extradited to, the Republic (see discussion below in Section 6.2).[58] Section 3 of the Penal Code extends subjective and objective jurisdiction to include attempt and complicity.[59]

There appears to be no provision for a third form of territorial jurisdiction – *effects jurisdiction* – which is similar to objective jurisdiction, but differs from it in a crucial respect. Under effects

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[57] Penal Code [Cap 135], s. 1 (1).

[58] 2. Offences partly or wholly abroad

The criminal law of the Republic shall apply –

(a) to any offence of which an element has taken place within the territory of the Republic;

(b) to any offence against the external security of the Republic or of counterfeiting the current money of the Republic, wherever committed:

Provided that no alien may be tried for an offence against the criminal law of the Republic solely by virtue of this section unless he has been arrested within the territory of the Republic or has been extradited to it.

[59] 3. Complicity and attempts

The criminal law of the Republic shall apply –

(a) to any act or omission within the territory of the Republic constituting complicity or attempt in relation to an offence against the criminal law of the Republic beyond such territory which is also an offence punishable by the law of the place in which it is or is intended to be committed;

(b) to any such act or omission beyond its territory in relation to an offence or intended offence within its territory.

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.

Active personality jurisdiction. The courts of Vanuatu can exercise active personality jurisdiction (jurisdiction over crimes committed abroad by persons who were nationals of Vanuatu at the time of the crime), provided that the act or omission is also regarded as criminal in the jurisdiction where it was committed. [60] It is possible to bring a civil claim in a criminal case (see Section 5), so there would appear to be civil jurisdiction over crimes committed by nationals abroad if brought during a criminal prosecution. There is no legislation providing for civil jurisdiction over torts committed by nationals abroad when bringing a civil claim outside a criminal prosecution.

Passive personality jurisdiction. The courts of Vanuatu do not appear to be able to exercise passive personality jurisdiction (jurisdiction over crimes committed abroad against persons who were nationals of Vanuatu at the time of the crime). There is no legislation providing for civil jurisdiction over crimes committed against nationals abroad.

Protective jurisdiction. Vanuatu courts can exercise protective jurisdiction (jurisdiction over crimes against specific national interests of Vanuatu).[61] It is unclear whether there is civil jurisdiction over such crimes.

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[60] 4. Offences abroad:

(1) Any citizen may be prosecuted within the Republic for an offence against the criminal law of the Republic in respect of any act or omission committed by him beyond the Republic which had it been committed within the Republic would have constituted an offence against such law, if such act or omission constituted a corresponding offence under the law of the place where it was committed.

(2) The penalty imposed upon conviction of a person under subsection (1) shall not be more severe than the corresponding penalty prescribed by the law of the place in which the act or omission was committed.

(3) Subsection (1) shall not apply if such person has been prosecuted in respect of such act or omission in the place in which it was committed, whatever the result of such prosecution.

(4) No criminal proceedings shall be brought against any person under the provisions of subsection (1) without the consent in writing of the Public Prosecutor.

[61] Section 2. (Offences partly or wholly abroad) of the Penal Code provides:

"The criminal law of the Republic shall apply –

(a) to any offence of which an element has taken place within the territory of the Republic;

(b) to any offence against the external security of the Republic or of counterfeiting the current money of the Republic, wherever committed:

Provided that no alien may be tried for an offence against the criminal law of the Republic solely by virtue of this section unless he has been arrested within the territory of the Republic or has been extradited to it."

4. LEGISLATION PROVIDING FOR UNIVERSAL CRIMINAL JURISDICTION

For the definition of universal jurisdiction, see Section 1, Box 1.

As discussed below, Vanuatu courts may not exercise universal jurisdiction over ordinary crimes, but may do so over certain crimes under national law of international concern, including piracy and hostage taking. Vanuatu legislation provides for universal jurisdiction over only two crimes under international law, those being grave breaches of the Geneva Conventions, given certain conditions are met, and slave trading (though it is possible that Vanuatu may also exercise universal jurisdiction over a limited form of crimes against humanity). However, Vanuatu courts cannot exercise universal jurisdiction over any other crimes under international law, including genocide.

4.1. ORDINARY CRIMES

Vanuatu courts cannot exercise universal jurisdiction over ordinary crimes, such as murder, assault, rape or kidnapping, unless they are also grave breaches of the Geneva Conventions.[62]

4.2. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN

As indicated in Chart I below, Vanuatu is a state party to seven out of a total of 21 international treaties providing for universal jurisdiction over crimes under national law of international concern. There are none of these that Vanuatu has signed but not yet ratified. It has defined the crimes listed in 15 of those treaties, in whole or in part, as crimes under national law, and it has provided its courts with universal jurisdiction over 14 such crimes.

CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN

CRIME AND TREATY[63]	SIGNED RELEVANT TREATY	RATIFIED/ ACCEDED TO RELEVANT TREATY	DEFINED IN NATIONAL LAW	UNIVERSAL JURISDICTION
1. Piracy - 1958 High Seas Convention	No, as of 14/11/2012	No, as of 14/11/2012	s. 145 Penal Code [Cap	s. 5 Penal Code [Cap 135][64]

[62] Geneva Conventions Act [Cap 150], ss. 4 & 5; see also Section 4.3.1.1.

[63] The citations to these treaties, with links, where they exist, are found in Appendix II.

[64] s. 5 Penal Code [Cap 135], International offences:

> "(1) The criminal law of the Republic shall apply to piracy, hijacking of aircraft, traffic in persons, slave trading and traffic in narcotics committed within or beyond the territory of the Republic.

CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN				
CRIME AND TREATY[63]	**SIGNED RELEVANT TREATY**	**RATIFIED/ ACCEDED TO RELEVANT TREATY**	**DEFINED IN NATIONAL LAW**	**UNIVERSAL JURISDICTION**
			135]	
2. Piracy - 1982 UN Convention on the Law of the Sea	10/12/1982	10/08/1999	s. 145 Penal Code [Cap 135]	s. 5 Penal Code [Cap 135][65]
3. Counterfeiting - 1929 Convention	No, as of 14/11/2012	No, as of 14/11/2012	s. 142 Penal Code [Cap 135]	No
4. Narcotics Trafficking: 1961 Single Convention, as amended by 1972 Protocol	No, as of 14/11/2012	No, as of 14/11/2012	Dangerous Drugs Act [Cap 12][66] s. 5 Penal Code [Cap 135]	s. 5 Penal Code [Cap 135][67]
5. Offences on Aircraft – 1963 Tokyo Convention		31/01/1989	s. 146 Penal Code [Cap 135][68]	s. 5 Penal Code [Cap 135] [69]
6. Hijacking Aircraft- 1970 Hague Convention		22/02/1989	s. 146 Penal Code [Cap 135][70]	s. 5 Penal Code [Cap 135] [71]

(2) No alien may be tried in the Republic for such an offence committed abroad unless he has been arrested in the Republic and his extradition has not been applied for, and the Public Prosecutor has consented in writing to his prosecution."

[65] *Ibid.*

[66] Vanuatu has defined a range of conduct concerning drugs as crimes under the Dangerous Drugs Act [Cap 12], some of which constitutes conduct prohibited by the 1961 treaty.

[67] Vanuatu has provided for universal jurisdiction over traffic in narcotics in s. 5 Penal Code [Cap 135], though this is not explicitly defined; *supra,* n. 64.

[68] Vanuatu has defined a range of conduct concerning offences on aircraft in s. 146 – "Hijacking of Aircraft" – of the Penal Code [Cap 135], much of which is regulated by the Convention.

[69] *Supra*, n. 64.

[70] Vanuatu has defined a range of conduct concerning hijacking aircraft in s. 146 – "Hijacking of Aircraft" – of

CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN				
CRIME AND TREATY[63]	**SIGNED RELEVANT TREATY**	**RATIFIED/ ACCEDED TO RELEVANT TREATY**	**DEFINED IN NATIONAL LAW**	**UNIVERSAL JURISDICTION**
			s. 33 Counter Terrorism and Transnational Organised Crime Act [Cap 313]	
7. Psychotropic Substances: 1971 Convention	No, as of 14/11/2012	No, as of 14/11/2012	s. 2(311) Dangerous Drugs Act [Cap 12][72]	s. 5 Penal Code [Cap 135][73]
8. Attacks on Aviation – 1971 Montreal Convention		06/11/1989	s. 146 Penal Code [Cap 135][74]	s. 5 Penal Code [Cap 135] [75]
9. Internationally Protected Persons - 1973 Convention	No, as of 14/11/2012	No, as of 14/11/2012	s. 29 Counter Terrorism and Transnational Organised Crime Act [Cap	s. 48 Counter Terrorism and Transnational Organised Crime Act [Cap 313][76]

the Penal Code [Cap 135], much of which is regulated by the Convention.

[71] *Supra*, n. 64; s. 33 Counter Terrorism and Transnational Organised Crime Act [Cap 313] limits jurisdiction under that provision to forms of geographic jurisdiction other than universal jurisdiction.

[72] Vanuatu has defined offences involving psychotropic substances, some of which may be provided for in the Convention, as crimes under national law. Section 2 (311) of the Dangerous Drugs Act prohibits "Any psychotropic drug, as defined by the United Nations International Narcotic Control Board, except when separately specified in the Sale of Medicines Act [Cap 48]".

[73] Vanuatu has not explicitly provided for universal jurisdiction over the crimes defined in the convention, but has provided for universal jurisdiction over "traffic in narcotics" under section 5 of the Penal Code. This may cover some offences regulated by the convention; *supra*, n. 64.

[74] Vanuatu has defined a range of conduct concerning attacks on aviation in s. 146 – "Hijacking of Aircraft" – of the Penal Code [Cap 135], much of which is required by the Convention.

[75] *Supra*, n. 64.

[76] Section 48 (b) (i) gives Vanuatu jurisdiction where the crime "is committed by … a citizen of any country who is ordinarily resident in Vanuatu", and section 48 (b) (iv) gives jurisdiction where the crime "is committed by a person who is, after the commission of the offence, present in Vanuatu".

CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN				
CRIME AND TREATY[63]	**SIGNED RELEVANT TREATY**	**RATIFIED/ ACCEDED TO RELEVANT TREATY**	**DEFINED IN NATIONAL LAW**	**UNIVERSAL JURISDICTION**
			313]	
10. Hostage Taking: 1979 Convention	No, as of 14/11/2012	No, as of 14/11/2012	s. 30 Counter Terrorism and Transnational Organised Crime Act [Cap 313]	s. 48 Counter Terrorism and Transnational Organised Crime Act [Cap 313][77]
11. Nuclear Materials - 1979 Convention	No, as of 14/11/2012	No, as of 14/11/2012	s. 32 Counter Terrorism and Transnational Organised Crime Act [Cap 313]	s. 48 Counter Terrorism and Transnational Organised Crime Act [Cap 313][78]
12. Attacks on Navigation - 1988 Convention		18/02/1999	No	No
13. Mercenaries - 1989 Convention	No, as of 14/11/2012	No, as of 14/11/2012	No	No
14. UN Personnel - 1994 Convention	No, as of 14/11/2012	No, as of 14/11/2012	No	No
15. UN Personnel - 2005 Protocol	No, as of 14/11/2012	No, as of 14/11/2012	No	No
16. Terrorist Bombing - 1997 Convention	No, as of 14/11/2012	No, as of 14/11/2012	s. 27 Counter Terrorism and Transnational Organised Crime Act [Cap 313]	s. 48 Counter Terrorism and Transnational Organised Crime Act [Cap 313][79]
17. Financing of Terrorism - 1999		31/10/2005	s. 6(1) Counter Terrorism and	s. 48 Counter Terrorism and

[77] *Ibid.*

[78] *Ibid.*

[79] *Ibid.*

CHART I. CRIMES UNDER NATIONAL LAW OF INTERNATIONAL CONCERN				
CRIME AND TREATY[63]	**SIGNED RELEVANT TREATY**	**RATIFIED/ ACCEDED TO RELEVANT TREATY**	**DEFINED IN NATIONAL LAW**	**UNIVERSAL JURISDICTION**
Convention			Transnational Organised Crime Act [Cap 313]	Transnational Organised Crime Act [Cap 313][80]
18. Transnational Organized Crime - 2000 UN Convention		04/01/2006	s. 28 Counter Terrorism and Transnational Organised Crime Act [Cap 313]	s. 48 Counter Terrorism and Transnational Organised Crime Act [Cap 313][81]
19. Trafficking of Human Beings - 2000 Protocol	No, as of 14/11/2012	No, as of 14/11/2012	s. 102 Penal Code [Cap 135][82] ss. 34-38 Counter Terrorism and Transnational Organised Crime Act [Cap 313][83]	s. 5 Penal Code [Cap 135] [84] s. 48 Counter Terrorism and Transnational Organised Crime Act [Cap 313][85]
20. Firearms - 2001 Protocol	No, as of 14/11/2012	No, as of 14/11/2012	No	No
21. Nuclear Terrorism - 2005 Convention	No, as of 14/11/2012	No, as of 14/11/2012	No	No

[80] *Ibid*.

[81] *Ibid*.

[82] Section 102 of the Penal Code makes it a crime to "engage in any traffic in persons".

[83] Sections 34 – 38 of the Counter Terrorism and Transnational Organised Crime Act deal with offences relating to "people trafficking".

[84] *Supra*, n. 64.

[85] *Supra*, n. 76.

4.3. CRIMES UNDER INTERNATIONAL LAW

Vanuatu courts may exercise universal jurisdiction over slave trading, over grave breaches of the four 1949 Geneva Conventions but only if the acts constituting the breach also constitute a crime under domestic Vanuatu law, and possibly over a limited form of crimes against humanity. However, they cannot exercise universal jurisdiction over other crimes under international law, including grave breaches of the four 1949 Geneva Conventions if the acts constituting the grave breach are not ordinary crimes under Vanuatu law, grave breaches of Protocol I, other war crimes in international armed conflict, violations of common Article 3 to the Geneva Conventions, violations of Protocol II, other war crimes in non-international armed conflict, many or all crimes against humanity, genocide, torture, extrajudicial executions, enforced disappearances and aggression.

4.3.1. WAR CRIMES

Vanuatu is a party to the four Geneva Conventions of 1949,[86] and it has ratified Protocols I[87] and II[88] to these conventions. In addition, Vanuatu has been a party to the Rome Statute of the International Criminal Court (Rome Statute) since 2 December 2011.[89] As indicated in the charts below, Vanuatu

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[86] 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).

[87] 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).

[88] 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).

[89] 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

has also ratified a number of other international humanitarian law treaties with penal provisions or provisions that may give rise to international criminal responsibility.

As the charts also indicate, Vanuatu has defined slavery and slave trading as crimes under national law. However, it has not defined any other war crimes as crimes under national law. The courts of Vanuatu may exercise universal jurisdiction over grave breaches of the Geneva Conventions (provided the acts constituting the breach also constitute an ordinary crime under Vanuatu law), and slave trading, but not over any other war crimes.

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

The four Geneva Conventions of 1949 each contain a list of grave breaches of those conventions prohibiting states parties from committing them against persons protected by those conventions, including wounded and sick members of the armed forces in the field, wounded and sick and shipwrecked members of armed forces at sea, prisoners of war and civilian persons in time of war.[90] Those breaches have been consolidated without change in substance in Article 8 of the Rome Statute.[91]

Each state party to those conventions undertakes in a common article a two-part obligation: (1) to define grave breaches as crimes under national law and (2) then to exercise universal jurisdiction over persons suspected of committing grave breaches, or 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.[92] 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

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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.

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

[91] Rome Statute, art. 8 (2) (a).

[92] 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.

> High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."[93]

Vanuatu has defined grave breaches of the Geneva Conventions by reference to the conventions themselves, but only gives them criminal status to the extent that the acts that constitute the grave breach also constitute domestic crimes under the Penal Code or any other law.[94] Vanuatu has authorized its courts to exercise universal jurisdiction over grave breaches of the Geneva Conventions provided that they meet this condition.[95] This may lead to impunity for grave breaches.

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

Vanuatu has been a party to Protocol I since 28 February 1985. Protocol I applies to international armed conflict and certain non-international armed conflict.[96] Article 85 (2) of Protocol I expands the scope of persons protected by the Geneva Conventions.[97] In addition, Protocol I also lists a number of new grave breaches of that treaty in Articles 11 and 85 (3) to (5). Finally, Protocol I imposes the same two-part obligation on states parties (1) to define these grave breaches of Protocol I as crimes under national law and (2) to try or extradite persons suspected of such grave breaches. Vanuatu has not fulfilled its obligations under Protocol I to define grave breaches of that treaty as crimes under its national law. It has not provided its courts with universal jurisdiction over such grave breaches.

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

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

Rome Statute. Article 8 (2) (b) of the Rome Statute defines a broad range of war crimes in international armed conflict. Vanuatu has defined the crimes of slavery and slave trading in its Penal

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

[94] S4 Geneva Conventions Act [Cap 150]:

> "(1) Any grave breach of any of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act [CAP. 135] or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu…"

[95] S5 Geneva Conventions Act [Cap 150].

[96] Protocol I, art. 1 (4).

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

Code, which may overlap with the crime of sexual slavery in Article 8 (2) (b) of the Rome Statute,[98] but other than this, Vanuatu has not yet defined any of these war crimes as crimes under national law. It can exercise universal jurisdiction over slave trading,[99] but other than this it has not authorized its courts to exercise universal jurisdiction over these crimes.[100]

Gaps in the Rome Statute. There are a number of serious gaps in Article 8 (2) (b) of the Rome Statute, which are covered by other treaties and by rules of customary international law. Although there is no provision in the Rome Statute expressly requiring states parties to provide its courts with universal jurisdiction over war crimes, states parties recognize that they have a complementarity obligation to exercise their jurisdiction over such crimes.[101]

Other treaties concerning war crimes. The Rome Statute leaves out a number of war crimes in international armed conflict listed in other international treaties. As the following two charts indicate, Vanuatu has not defined any of these war crimes as war crimes under national law. Vanuatu has also not authorized its courts to exercise universal jurisdiction over these other war crimes.

Chart II identifies war crimes in the Third Geneva Convention and Protocol I that have been omitted from the Rome Statute. Chart III identifies war crimes in other international treaties that have been omitted from the Rome Statute.

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

Crime	Treaty	Signed	Ratified/ acceded	Defined in national law (citing any relevant provision)	Universal jurisdiction (citing any relevant provision)
Unjustifiable delay in the repatriation of	Geneva Conv. III[102] and	No	27/10/1982	No	No

[98] Penal Code, ss. 102 & 5.

[99] *Ibid*, s. 5.

[100] According to Amnesty International email correspondence with a senior Vanuatu government official, as of 16 September 2012 no legislation had been enacted to incorporate the crimes listed in the Rome Statute in to domestic Vanuatu law, *supra* n. 14.

[101] Review Conference of the Rome Statute, Kampala Declaration, ICC RC/Decl.1, 01 June 2010, para. 5.

[102] Third Geneva Convention, art. 118, as well as customary international humanitarian law; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Geneva, International Committee of the Red Cross and Cambridge University Press, 2005, Rule 156 (Serious violations of international

CHART II. WAR CRIMES IN INTERNATIONAL ARMED CONFLICT IN THE THIRD GENEVA CONVENTION AND PROTOCOL I THAT HAVE BEEN OMITTED FROM THE ROME STATUTE					
Crime	**Treaty**	**Signed**	**Ratified/ acceded**	**Defined in national law (citing any relevant provision)**	**Universal jurisdiction (citing any relevant provision)**
prisoners of war	Prot. I, art. 85 (4) (b) [103]		(a)		
Unjustifiable delay in the repatriation of civilians	Prot. I, art. 85 (4) (b) [104]	No	28/02/1985 (a)	No	No
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	Prot. I, art. 85 (3) (c) [105]	No	28/02/1985 (a)	No	No

Other treaties that may impose criminal responsibility. In addition to the Geneva Conventions and Protocol I, there are a number of international humanitarian law treaties applicable during international armed conflict imposing obligations which, if violated, may possibly result in individual

humanitarian law constitute war crimes).

[103] Protocol I, art. 85 (4) (b), as well as customary international humanitarian law. *Customary International Humanitarian Law*, *supra*, n. 102, Rule 156 (Serious violations of international humanitarian law constitute war crimes).

[104] Article 85 (4) (b) of Protocol I, as well as customary international humanitarian law. *Customary International Humanitarian Law*, *supra*, n. 102, Rule 156 (Serious violations of international humanitarian law constitute war crimes).

[105] Article 85 (3) (c) of Protocol I and customary international humanitarian law. *Customary International Humanitarian Law*, *supra*, n. 102, Rule 156 (Serious violations of international humanitarian law constitute war crimes).

criminal responsibility, either under the treaties or because the prohibitions are recognized as part of customary international law. As the following chart indicates, Vanuatu has not defined violations of these treaties as war crimes under national law. It also indicates that Vanuatu has not authorized its courts to exercise universal jurisdiction over them.

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

Crime	Treaty[106]	Signed	Ratified/ acceded	Defined in national law (citing any relevant provision)	Universal jurisdiction (citing any relevant provision)
Use of poisonous gases or bacteriological weapons	1925 Geneva Protocol	No	No	No	No
Harm to protected cultural property	1954 CCP	No	No	No	No
Illegal export of cultural property	1954 CCP	No	No	No	No
Developing, producing and stockpiling bacteriological weapons	BWC 1972	No	12/10/1990 (a)	No	No
Use of prohibited environmental modification techniques	ENMOD Conv. 1976	No	No	No	No
Use of prohibited conventional weapons	CCW 1980	No	No	No	No

[106] See Appendix III for treaty abbreviations.

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW					
Use of weapons that injure by non-detectable fragments	CCW Prot. I 1980	No	No	No	No
Use of prohibited land mines, booby traps and other devices	CCW Prot. II 1980	No	No	No	No
Use of prohibited land mines, booby-traps and other devices	CCW Prot. II 1980	No	No	No	No
Use of prohibited incendiary weapons	CCW Prot. III 1980	No	No	No	No
Developing, producing, stockpiling or using prohibited chemical weapons	CWC 1993	No	16/09/2005 (a)	No	No
Use of blinding laser weapons	CCW Prot. IV 1995	No	No	No	No
Use of prohibited mines, booby-traps and other devices	CCW Prot. II a 1996	No	No	No	No
Use, stockpiling, production and transfer of prohibited anti-personnel mines	AP Mine Ban Conv. 1997	04/12/1997	16/09/2005	No	No
Harm to cultural property	Hague Prot. 1999 Arts. 15 – 20	No	No	No	No

CHART III. INTERNATIONAL HUMANITARIAN LAW TREATIES APPLICABLE DURING INTERNATIONAL ARMED CONFLICT IMPOSING OBLIGATIONS WHICH, IF VIOLATED, MAY POSSIBLY RESULT IN INDIVIDUAL CRIMINAL RESPONSIBILITY, EITHER UNDER THE CONVENTIONS OR BECAUSE THE PROHIBITIONS ARE RECOGNIZED AS PART OF CUSTOMARY INTERNATIONAL LAW					
Recruitment or use of child soldiers	Opt Prot. CRC 2000	16/09/2005	26/09/2007[107]	No	No
Use of prohibited conventional weapons	CCW Amdt 2001	No	No	No	No
Failure to clear, remove or destroy explosive remnants of war	CCW Prot. V 2003	No	No	No	No
Use of prohibited cluster munitions	Cluster Munitions 2008	No	No	No	No

None of the above war crimes have been incorporated into Vanuatu's law.

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, the Geneva Conventions or their Protocols, or the other treaties mentioned in Chart III which, if violated, could lead to individual criminal responsibility. Some of these rules are listed in Chart IV, indicating whether Vanuatu has defined violations of these rules as war crimes in international armed conflict. As the following chart indicates, Vanuatu has defined slavery and slave trading as crimes under national law, and has authorized its courts to exercise universal jurisdiction over slave trading, but has neither defined as crimes, nor provided for universal jurisdiction over, breaches of the other rules listed below.

[107] Vanuatu has made a declaration, but this does not interfere with the substance of the protocol (http://www.icrc.org/ihl.nsf/NORM/126445D895CE074BC1257089004E7A90?OpenDocument).

CHART IV. RULES OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW IN INTERNATIONAL ARMED CONFLICT		
Rule of customary international humanitarian law	**Defined in national law (citing any relevant provision)**	**Courts provided with universal jurisdiction (citing any relevant provision)**
Slavery [108]	S102 Penal Code [Cap 135] of 2006 lists slavery as a crime, but gives no specific definition. S5 Penal Code [Cap 135] of 2006 lists slave trading as a crime but gives no specific definition.	S5 Penal Code [Cap 135] of 2006 provides for universal jurisdiction over the crime of slave trading.
Deportation to slave labour[109]	No	No
Collective punishments[110]	No	No
Despoliation of the wounded, sick, shipwrecked or dead[111]	No	No
Attacking or ill-treating a *parlementaire* or bearer of the flag of truce[112]	No	No
Launching an indiscriminate attack resulting in loss of life or injury to	No	No

[108] *Customary International Humanitarian Law*, *supra*, n. 102, Rule 94 (Slavery and the slave trade in all their forms are prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

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

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

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

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

CHART IV. RULES OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW IN INTERNATIONAL ARMED CONFLICT		
Rule of customary international humanitarian law	**Defined in national law (citing any relevant provision)**	**Courts provided with universal jurisdiction (citing any relevant provision)**
civilians or damage to civilian objects[113]		
Use of biological weapons[114]	No	No
Use of chemical weapons[115]	No	No
The use of non-detectable fragments[116]	No	No
The use of blinding laser weapons[117]	No	No

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

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

Common Article 3 is a mini-convention that protects persons not taking part in hostilities from a broad list of inhumane treatment. Protocol II, "which develops and supplements Article 3 common to the Geneva Conventions" with respect to non-international armed conflicts which take place in

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

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

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

[116] *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).

[117] *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).

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",[118] provides a broad range of protections to vulnerable people. Article 8 (2) (c) of the Rome Statute includes most of the war crimes in common Article 3, while Article 8 (2) (e), contains an extensive, but by no means complete, list of war crimes in non-international armed conflict.

Rome Statute. Vanuatu has defined the crimes of slavery and slave trading in its Penal Code, which may overlap with the crime of sexual slavery in Article 8 (2) (e) (vi) of the Rome Statute,[119] but other than this, Vanuatu has not yet defined any of the war crimes listed in Article 8 (2) (c) & (e) as crimes in national law. Vanuatu can exercise universal jurisdiction over slave trading,[120] but other than this it has not expressly authorized its courts to exercise universal jurisdiction over these crimes.

Gaps in the Rome Statute. Although serious violations of Protocol II are listed as war crimes in the Statute of the International Criminal Tribunal for Rwanda, many of them are not expressly included in Article 8 (2) (e) of the Rome Statute. For example, intentionally starving the civilian population (Article 14 of Protocol II and customary international humanitarian law) is omitted.[121]

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

As Chart V indicates (see below), though Vanuatu has ratified several of these treaties, it has not defined violations of any of them as war crimes under national law. Vanuatu has also not authorized its courts to exercise universal jurisdiction over violations of these treaties.

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[118] Protocol II, art. 1.

[119] Penal Code, ss. 102 & 5.

[120] *Ibid*, s. 5.

[121] See also *Customary International Humanitarian Law*, *supra*, n. 102, Rule 53 (The use of starvation of the civilian population as a method of warfare is prohibited); Rule 156 (Serious violations of international humanitarian law constitute war crimes).

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

Crime	**Treaty**[122]	**Signed**	**Ratified or acceded**	**Definition in national law** (citation to any relevant provision)	**Universal jurisdiction** (citation to any relevant provision)
Harm to protected cultural property	1954 CCP and Hague Prot. 1954	No	No	No	No
Use of certain prohibited conventional weapons	CCW 1980	No	No	No	No
Use of weapons that injure by non-detectable fragments	CCW Prot. I 1980	No	No	No	No
Use of prohibited mines, booby-traps and other devices	CCW Prot. II 1980	No	No	No	No
Use of prohibited incendiary weapons	CCWProt. III 1980	No	No	No	No
Use of prohibited mines, booby-traps and other devices	CCW Prot. II a 1996	No	No	No	No
Developing, producing, stockpiling and using prohibited	CWC 1993	No	16/09/2005 (a)	No	No

[122] See Appendix III for treaty abbreviations.

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

Crime	**Treaty**[122]	**Signed**	**Ratified or acceded**	**Definition in national law** (citation to any relevant provision)	**Universal jurisdiction** (citation to any relevant provision)
chemical weapons					
Use of blinding laser weapons	CCW Prot. IV 1995	No	No	No	No
Using, stockpiling, producing and transferring prohibited anti-personnel mines	AP Mine Ban Conv. 1997	04/12/1997	16/09/2005	No	No
Harming protected cultural property	Hague Prot. 1999	No	No	No	No
Recruiting and using child soldiers	Opt Prot. CRC 2000	16/09/2005	26/09/2007	No	No
Using certain prohibited conventional weapons	CCW Amdt 2001	No	No	No	No
Failing to clear and destroy explosive remnants of war	CCW Prot. V	No	No	No	No
Use of prohibited cluster munitions	Cluster Munitions 2008	No	No	No	No

Rules of customary international humanitarian law. Finally, there are a number of rules of customary international law applicable in non-international armed conflict which, if violated, could lead to individual criminal responsibility for war crimes. Some of these rules are listed in the Chart VI. It indicates, that Vanuatu has defined slavery and slave trading as crimes under national law, and authorized its courts to exercise universal jurisdiction over slave trading. However, Vanuatu has neither defined as crimes, nor provided for universal jurisdiction over, breaches of the other rules listed below.

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

Rule of customary international humanitarian law	Defined in national law (citation to any relevant provision)	Universal jurisdiction (citation to any relevant provision)
Use of biological weapons[123]	No	No
Use of chemical weapons[124]	No	No
Use of non-detectable fragments[125]	No	No
Use of blinding laser weapons[126]	No	No
Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage[127]	No	No

[123] *Customary International Humanitarian Law*, *supra*, n. 102, Rule 73 (The use of biological weapons is prohibited).

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

[125] *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).

[126] *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).

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

CHART VI. RULES OF CUSTOMARY INTERNATIONAL LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICT WHICH, IF VIOLATED, COULD LEAD TO INDIVIDUAL CRIMINAL RESPONSIBILITY FOR WAR CRIMES		
Rule of customary international humanitarian law	Defined in national law (citation to any relevant provision)	Universal jurisdiction (citation to any relevant provision)
Making non-defended localities and demilitarized zones the object of attack[128]	No	No
Using human shields[129]	No	No
Slavery[130]	S102 Penal Code [Cap 135] lists slavery as a crime, but gives no specific definition. S5 Penal Code [Cap 135] lists slave trading as a crime but gives no specific definition.	S5 Penal Code [Cap 135] provides for universal jurisdiction over the crime of slave trading.
Collective punishments[131]	No	No
Use of poison[132]	No	No

[128] *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 law constitute war crimes).

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

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

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

[132] The Review Conference of the Rome Statute adopted an amendment to Article 8 (2) (e) to make the use of this weapon in a non-international armed conflict a war crime. RC/Res.5, *Adopted at the 12th plenary meeting, on 10 June 2010, by consensus* (Advance version, 16 June 2010 13:00) (http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf).

CHART VI. RULES OF CUSTOMARY INTERNATIONAL LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICT WHICH, IF VIOLATED, COULD LEAD TO INDIVIDUAL CRIMINAL RESPONSIBILITY FOR WAR CRIMES		
Rule of customary international humanitarian law	Defined in national law (citation to any relevant provision)	Universal jurisdiction (citation to any relevant provision)
Use of toxic gases[133]	No	No
Use of dum-dum bullets[134]	No	No

4.3.2. CRIMES AGAINST HUMANITY

Vanuatu has been a party to the Rome Statute since 2 December 2011. The most widely accepted definition of the acts constituting crimes against humanity is found in Article 7 of the Rome Statute.[135] As discussed below, Vanuatu has defined the crimes of slavery and slave trading in its Penal Code, which may overlap with the crimes of enslavement and sexual slavery in Article 7 of the Rome Statute, and it may exercise universal jurisdiction over slave trading. It is possible that Vanuatu may exercise universal jurisdiction over a limited form of crimes against humanity through a 1964 French statute, but even if this is the case, this falls far short of international standards. Other than this, Vanuatu has not defined crimes against humanity as crimes in its Penal Code nor authorized its courts to exercise universal jurisdiction over crimes against humanity.

CHART VII. CRIMES AGAINST HUMANITY				
Threshold/act	**Article 7 (1)**	**Article 7 (2)**	**Elements of crimes**	**Universal jurisdiction**
Threshold	No	No		
Murder	No	No	Vanuatu has not defined murder as a crime at all, but the penal code does include the ordinary crime	No

[133] *Ibid.*

[134] *Ibid.*

[135] For the scope of crimes against humanity, see Machteld Boot, Rodney Dixon and Christopher K. Hall, "Article 7 (Crimes Against Humanity)", in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers` Notes, Article by Article*, C. H. Beck, Munich; Hart, Oxford; and Nomos, Baden-Baden, 2nd ed., 2008, p. 183.

CHART VII. CRIMES AGAINST HUMANITY				
Threshold/act	**Article 7 (1)**	**Article 7 (2)**	**Elements of crimes**	**Universal jurisdiction**
			of intentional homicide.[136]	
Extermination	No	No	No	No
Enslavement	No	No	The crimes of slave trading[137] and slavery[138] are listed in the penal code, but the elements are not defined.	Universal jurisdiction is provided for regarding the offence of slave trading.[139]
Deportation of forcible transfer of population	No	No	No	No
Imprisonment or other severe deprivation of physical liberty	No	No	No	No
Torture	No	No	No	No
Rape	No	No	No [140]	No

[136] Penal code, s. 106.

[137] Penal Code, s. 5 (1).

[138] Penal Code, s. 102.

[139] Penal Code, s. 5 (1).

[140] Vanuatu has not defined rape as a crime against humanity, but only as an ordinary crime. However, this definition falls short of international standards in several respects, for instance by confining rape to a "person who has sexual intercourse with another person". Section 90 of the Penal Code states:

"Rape defined

Any person who has sexual intercourse with another person –

(a) without that person's consent; or

(b) with that person's consent if the consent is obtained –

(i) by force; or

(ii) by means of threats of intimidation of any kind; or

CHART VII. CRIMES AGAINST HUMANITY				
Threshold/act	**Article 7 (1)**	**Article 7 (2)**	**Elements of crimes**	**Universal jurisdiction**
Sexual slavery	No	No	The crimes of slave trading[141] and slavery[142] are listed in the penal code, but the elements are not defined.	Universal jurisdiction is provided for regarding the offence of slave trading.[143]
Enforced prostitution	No	No	No	No
Forced pregnancy	No	No	No	No
Forced sterilization	No	No	No	No
Other forms of sexual violence	No	No	No	No
Persecution	No	No	No	No
Enforced disappearance	No	No	No	No
The crime of apartheid	No	No	No	No
Other inhumane acts	No	No	No	No

(iii) by fear of bodily harm; or

(iv) by means of false representation as to the nature of the act; or

(v) in the case of a married person, by impersonating that person's husband or wife;

commits the offence of rape. The offence is complete upon penetration."

For the scope of the crime of rape under international law, see Amnesty International, *Rape and sexual violence: Human rights law and standards in the International Criminal Court*, Index: 53/001/2011, March 2011.

[141] Penal Code, s. 5 (1).

[142] Penal Code, s. 102.

[143] Penal Code, s. 5 (1).

4.3.2.1. Law No. 64-1326 and the *Barbie* case

Article 95 (2) of the Vanuatu Constitution states that French laws in place on Vanuatu's day of independence, 30 July 1980, continue to apply "to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu…"[144] (for further explanation see Section 2.1 above).[145] In 1964, France adopted the following law:

> Law No. 64-1326 declaring the imprescriptibility of crimes against humanity.
>
> *Sole article*. Crimes against humanity, as defined by the United Nations' Resolution of February 13, 1946 taking account of the definition of crimes against humanity figuring in the Charter of the International Tribunal of August 8, 1945 [the Nuremberg Charter], are imprescriptible by their nature.[146]

In the 1983 *Barbie* case, the French Court of Cassation interpreted this law to mean that crimes against humanity, as defined in the Nuremberg Charter, could be prosecuted in France "whatever the date and place of their commission" – the law provided for universal jurisdiction over such crimes.[147] Though the Court of Cassation made this ruling after the date of Vanuatu's independence, it was interpreting a statute predating this event. This may provide for universal jurisdiction over a very limited form of crimes against humanity in Vanuatu.

There are, however, various limitations on the definition of crimes against humanity contained in these sources that fail to meet international law as it has developed in the ensuing decades (see the first part of this section). For instance, the definition of crimes against humanity contained in the Nuremberg Charter appears to require a nexus between the prohibited acts and an armed conflict.[148] Further, the French Court of Cassation ruled that such crimes must be committed "in the name of a State practising a hegemonic political ideology".[149] It should be noted, however, that the latter limitation (which has been highly criticised[150]) was introduced by the Court of Cassation, and is not

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[144] *Supra*, n. 10.

[145] In email correspondence with Amnesty International dated 16 September 2012 a senior Vanuatu government official stated that "it is not possible in practice to argue pre-independence French Law in Vanuatu Courts", *supra* n. 14, but provided no further information regarding how this statement is compatible with Article 95 (2) of the Vanuatu Constitution, see *supra*, n. 10, and Section 2.1 above.

[146] *Journal Officiel de la République Française* [J.O.] Dec. 29, 1964; cited in Wexler LS, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 Colum. J. Transnat'l L., 1994-1995, p. 289.

[147] *Barbie* case, Court of Cassation, Judgment, 6.10.1983 (*Barbie* I); cited *ibid*, Wexler p. 337.

[148] Cryer R, Friman H, Robinson D, Wilmhurst E, *An Introduction to International Criminal Law and Procedure*, CUP, Cambridge, 2nd Ed., 2010, p. 231.

[149] *Barbie* case, Court of Cassation, Judgment, 20.12.1985 (*Barbie* III); cited *ibid*, Cryer p. 74.

[150] e.g. Wexler, *supra*, n. 146; *ibid*, Cryer p. 74.

included in the formal sources,[151] so may not be applicable in Vanuatu courts.

4.3.3. GENOCIDE

Vanuatu has neither signed, nor ratified the 1948 Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[152] 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 of the Genocide Convention requires states to make both genocide and four ancillary forms of genocide crimes under national law:

> "The following acts shall be punishable:
>
> (a) Genocide;
>
> (b) Conspiracy to commit genocide;
>
> (c) Direct and public incitement to commit genocide;
>
> (d) Attempt to commit genocide;
>
> (e) Complicity in genocide."

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

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[151] *Ibid*, Cryer p. 74.

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

Vanuatu has not defined genocide as a crime, which could lead to impunity. Vanuatu also 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. Vanuatu has not provided its courts with universal jurisdiction over genocide. It should be noted, however, that Vanuatu law does recognise genocide by excluding it as a political offence for the purpose of extradition (see Section 7.1.4.4). Some aspects of genocide such as intentional homicide, threats to kill or sedition (inciting hostility or ill will between classes of persons) may amount to crimes in Vanuatu.[153]

4.3.4. TORTURE

Vanuatu has been a party to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) since 12 July 2011.[154] This treaty requires state 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 their territories if they are not extradited (Art. 5 (2)), to take measures to ensure presence for prosecution or extradition (Art. 6 (1) and (2)) and to submit the cases to the competent authorities if they are not extradited (Art. 7 (1)).

Vanuatu has not defined torture as a crime. However, some of the activities associated with torture – including intentional assault – are defined as crimes in that law.[155] The courts of Vanuatu cannot exercise universal jurisdiction over ordinary crimes, including those associated with torture.

4.3.5. EXTRAJUDICIAL EXECUTIONS

Extrajudicial executions, which are "unlawful and deliberate killings, carried out by order of a government or with its complicity or acquiescence", constitute "fundamental violations of human rights and an affront to the conscience of humanity".[156] The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions make clear that all states must ensure that all persons found in territory subject to their jurisdiction who are suspected of such crimes are either prosecuted in their own courts or are extradited to face trial elsewhere.[157]

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[153] Penal Code, ss106, 115 and 65.

[154] 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.

[155] Penal Code, s. 107.

[156] Amnesty International, *14-Point Program for the Prevention of Extrajudicial Executions*, Index: POL 35/002/1993 (1993); Amnesty International, *"Disappearances" and Political Killings – Human Rights Crisis of the 1990s: A Manual for Action*, Index: ACT 33/001/1994, 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)*, Index: 53/014/2001, September 2001 (http://web.amnesty.org/library/index/engior530142001?OpenDocument).

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

Extrajudicial executions are not expressly defined as crimes in the Vanuatu Penal Code or any other legislation. However, these killings could be prosecuted as intentional homicide under Section 106 of the Penal Code, or, if committed during an international armed conflict, possibly as a grave breach of the Geneva Conventions (see Section 4.3.1.1). The courts of Vanuatu cannot exercise universal jurisdiction over the ordinary crime of intentional homicide but they can over grave breaches of the Geneva Conventions as long as certain conditions are met (see Section 4.3.1.1).

4.3.6. ENFORCED DISAPPEARANCES

On 6 February 2007 Vanuatu signed, but has not yet ratified, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (Disappearance Convention).[158] This treaty requires states parties to define enforced disappearance as a crime under national law (Arts. 3, 4 and 6),[159] to establish jurisdiction over persons suspected of enforced disappearance who are present in their territories if they are not extradited (Art. 9 (2)), to take measures to ensure presence for prosecution or extradition (Art. 10 (1) and (2)) and to submit the case to the competent authorities if they are not extradited (Art. 11 (1)).

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

> "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

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

> "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."

[158] 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).

[159] 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".

4.3.7. AGGRESSION

The crime under international law of planning, preparing, initiating or waging aggressive war has been recognized as a crime under international law since it was incorporated in the Nuremberg Charter in 1945.[160] 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.[161] The Review Conference on the Rome Statute adopted an amendment to the Rome Statute defining the crime and setting out the conditions under which the Court will exercise its jurisdiction over the crime.[162]

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

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[160] 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").

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

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

5. CIVIL JURISDICTION OVER TORTS

Vanuatu has authorized its courts to exercise universal civil jurisdiction in criminal proceedings if there is universal criminal jurisdiction for the relevant acts, but there does not appear to be any legislation providing for universal civil jurisdiction in civil proceedings.

Under international law and standards, victims of crimes under international law and other human rights violations and abuses are entitled to full reparation, including restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.[163]

5.1. UNIVERSAL JURISDICTION OVER TORTS IN CIVIL CASES

In contrast to a number of civil law countries and the United States,[164] there is no specific legislation in Vanuatu permitting victims to obtain reparations in civil proceedings based on universal jurisdiction.

5.2. CIVIL CLAIMS IN CRIMINAL PROCEEDINGS

Victims and their families or heirs of the victims can bring civil claims in criminal proceedings.[165]

There is nothing to suggest that they cannot recover for civil claims in such proceedings on the same jurisdictional basis as the criminal proceedings, which includes universal jurisdiction for a very limited number of crimes (see Section 4).

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

[164] See, for example, Amnesty International, *Universal jurisdiction: The scope of universal civil jurisdiction*, IOR 53/008/2007, July 2007 (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).

[165] Criminal Procedure Code [Cap 136], ss. 213 – 217; Civil Procedure Rules 2002, 16.21.

5.3. REPARATION AND PROTECTION OF VICTIMS AND WITNESSES

Vanuatu legislation does not expressly recognise the right to reparation for victims of crimes under international law. The scope of reparation that can be awarded to victims according to Vanuatu law appears to be more limited than the rights of victims under international law and standards to five forms of reparation: restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition. Although some of these forms of reparation could only be provided by the state where the crime occurred or by the convicted person's state, and, therefore, could not be included in a court judgment based on universal jurisdiction, it is important to note that some of these forms of reparation could be provided by the convicted person, such as providing satisfaction in the form of an apology to the victim or to the victim's family. As explained below, where such forms of reparation are available under Vanuatu law (e.g. compensation, satisfaction etc), some of these forms of reparation are statutory, while others are regulatory or equitable (see below for a brief explanation of equitable remedies as they exist in certain common law jurisdictions).

Sections 42 and 43 of the Vanuatu Penal Code both make reference to the power of the Court to issue an order for "the payment of costs, damages, or compensation, or for the restitution of any property", though they do not enumerate these powers.[166] Section 54 of the Penal Code provides that the court may order the "restitution of … property to the person lawfully entitled to possession thereof".[167] It would appear that compensation is provided for in Vanuatu legislation, but the restitution provided for in the provisions discussed is restricted to restitution of property. The Civil Procedure Rules 2002,[168] however, contain procedural rules relating to court orders used in civil proceedings that may allow for some other forms of reparation in line with international standards. These may include the "restoration of liberty" – rules 16.3-16.7 provide for a "'claim for release' (formerly known as a writ of habeas corpus)".[169]

A further form of court order is discussed in rule 14.48 of the Civil Procedure Rules 2002: the "Order to do or not do an act".[170] The scope of such an order is not defined, but it would appear to be fairly broad. For instance, in the 1998 *de Robillard* case, the Supreme Court recognised a court order that had been given by a lower court ordering individuals not to leave Vanuatu until the relevant issues were resolved.[171] This appears to be the same remedy as the equitable remedy of *ne exeat regno* (a legal method of preventing someone from leaving a given jurisdiction) under English common law and equity.[172] The common law and equity of England and Wales, as they stood at

[166] Penal Code, ss. 42 & 43.

[167] Penal Code, s. 54.

[168] Civil Procedure Rules 2002

[169] Civil Procedure Rules 2002, rules 16.3 – 16.7.

[170] Civil Procedure Rules 2002, rule 14.48.

[171] *de Robillard v Hudson & Co* [1998] VUSC 1; Civil Appeal Case 002 of 1998 (8 January 1998).

[172] *Felton v Calis* (1969) 1 Qb 200. Of course, this remedy must be granted subject to human rights standards to avoid any abuse that could deny the right to freedom of movement.

independence (30 July 1980), and "Until otherwise provided by Parliament, [shall] continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu" (for further discussion of the applicability of pre-independence law see Section 2.1 above).[173] It is possible, therefore, that the "Order to do or not to do an act" is an expression of the Vanuatu courts' ability to implement equitable remedies, as available under English common law and equity. Such equitable remedies as were available in English law at the time of independence were extremely broad and may well permit some of the forms of reparation given under international law and standards, for example, satisfaction in the form of ordering of an apology to the victim or to the victim's family.[174] It is also possible that the ability to bring civil claims in criminal proceedings (Section 5.2 above) would allow victims of crimes to request such remedies in criminal proceedings, including criminal proceedings based on universal jurisdiction. In the 1993 *Lin Schiow Her* criminal case, the court ordered an individual not to leave the jurisdiction until the relevant issues were resolved,[175] and in the following 1994 *Lin Shiow Her* criminal case the breach of this order was held to be in contempt of court.[176] No criminal provision has been found providing for such an order, so it is possible that this is an example of the equitable remedy of *ne exeat regno*, as with regard to the *de Robillard* case above, but here being used in a criminal case. However, no definitive statement about the scope of equitable relief in such circumstances can be provided until a court rules on the scope of civil relief that can be awarded in a criminal proceeding based on universal jurisdiction.

With regard to the protection of victims and witnesses, Vanuatu law does not appear to provide witnesses, victims and their relatives with protection against possible attempt against their lives or against other forms of harm.

5.4. OTHER ASPECTS OF CIVIL CLAIMS PROCEDURES

Statutes of limitation on civil claims (See Section 6.3 below.)

Immunities (See Section 6.5 below.)

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[173] Constitution of the Republic of Vanuatu, Article 95 (2). See discussion in Section 2.1 above.

[174] Rogers states that, under English law: "the court has the power … to grant a mandatory injunction by virtue of which the defendant is actually ordered to take positive action to rectify the consequences of what he has already done", W.V.H. Rogers, *Winfield & Jolowicz: Tort* 1075 (Gloucester: Sweet & Maxwell 18th ed. 2010); e.g. *Redland Bricks Ltd v Morris* [1970] A.C. 652.

[175] *Public Prosecutor v Lin Schiow Her* [1993] VUSC 15 (3 December 1993)

[176] *Public Prosecutor v Lin Shiow Her* [1994] VUSC 4; [1980-1994] Van LR 695 (24 January 1994).

6. OBSTACLES TO THE EXERCISE OF CRIMINAL OR CIVIL JURISDICTION

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, principles of criminal responsibility and defences, statutes of limitation applicable to crimes under international law, immunities, prohibitions of retrospective application of criminal law and possible recognition of foreign amnesties or similar measures of impunity.

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

6.1.1. DEFINITIONS OF CRIMES

As indicated above in Section 4, the only crimes under international law defined in Vanuatu law are certain grave breaches of the Geneva Conventions, slavery and slave trading. The definitions of these crimes in national law are inconsistent with international treaty law and customary international law. Grave breaches of the Geneva Conventions are defined in the *Geneva Conventions Act* by reference to the conventions themselves, but are only given criminal status in so far as the acts that constitute the grave breach also constitute a domestic crime under some other provision of Vanuatu law, thus leaving out much conduct that is not defined as a crime under Vanuatu law (see Section 4.3.1.1).[177] Though slavery and slave trading are listed as crimes in the Vanuatu *Penal Code 2006*, their elements are not defined.[178]

Vanuatu has not defined any other crimes under international law as crimes under national law. Instead, persons in Vanuatu suspected of such crimes can only be prosecuted for ordinary crimes, and only 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, such as intentional homicide (there is no crime of murder), intentional assault, rape and kidnapping, 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 Vanuatu. In addition, conviction for an ordinary crime, even when it has common elements, does not convey the same moral condemnation as if the

[177] Geneva Conventions Act [Cap 150], s. 4:

> "(1) Any grave breach of any of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act [CAP. 135] or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu…".

[178] Penal Code, ss. 5 & 102.

person had been convicted of the crime under international law and does not necessarily involve as severe a punishment. [179]

6.1.2. PRINCIPLES OF CRIMINAL RESPONSIBILITY

The principles of criminal responsibility are found in Part 1 of the Penal Code 2006.[180] As explained below, the principle of superior responsibility has been omitted, but the other main principles of criminal responsibility under this law are largely consistent with principles as defined in international law.

There are a number of differences between principles of criminal responsibility in the law of Vanuatu and in the Rome Statute and other international law. 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),[181] Article 6 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind[182] and Article 28 of the Rome Statute (which itself falls short of other international law in some respects)[183]. In addition, the Committee against Torture has

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

[180] Penal Code, ss. 1 – 58.

[181] 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."
>
> See also Protocol I, art. 87 (Duty of commanders).

[182] 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."

[183] Rome Statute, art. 28 (Responsibility of commanders and other superiors).

concluded that superiors cannot escape criminal responsibility for torture committed by their subordinates.[184]

The principle of superior responsibility does not appear to exist in the law of Vanuatu.[185]

With regard to other principles of individual criminal responsibility, the Vanuatu law is roughly similar to Article 25 of the Rome Statute. The Vanuatu Penal Code includes the following principles of criminal responsibility:

- the commission of a crime, individually or jointly (Rome Statute, art. 25 (3) (a)) (Vanuatu includes the principles of individual criminal responsibility and complicity);[186]
- ordering, soliciting or inducing a crime (Rome Statute, art. 25 (3) (b)) (Vanuatu includes the principles of counselling, procuring, inciting and soliciting a crime);[187]
- aiding, abetting or otherwise assisting the commission of a crime (Rome Statute, art. 25 (3) (c)) (Vanuatu includes the principles of aiding, counselling and procuring an offence);[188]
- contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose (Rome Statute, art. 25 (3) (d)) (Vanuatu includes the principles of complicity, co-offenders and conspiracy);[189] and
- attempting to commit a crime (Rome Statute, art. 25 (3) (f) (Vanuatu includes the principle of attempt).[190]

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

[184] Committee against Torture, General Comment 2 (Implementation of article 2 by States parties), U.N. Doc. CAT/C/GC/2, 24 January 2008, para. 26.

[185] Penal Code, ss. 1 – 58 (as above).

[186] Penal Code, ss. 16 (individual criminal responsibility); 30 (complicity – aiding, counselling or procuring the commission of a criminal offence).

[187] Penal Code, ss. 30 (complicity – aiding, counselling or procuring the commission of a criminal offence); 35 (inciting and soliciting commission of an offence).

[188] Penal Code, s. 30 (complicity – aiding, counselling or procuring the commission of a criminal offence).

[189] Penal Code, ss. 29, 30, 31 and 32 (conspiracy, complicity, co-offenders and punishment of co-offenders and accomplices).

[190] Penal Code, s. 28 (attempts).

Vanuatu has not defined genocide as a crime, or provided that it is unlawful to directly and publicly incite others to commit genocide (Rome Statute, art. 25 (3) (e)).

With regard to the mental element of crimes, in contrast to Article 30 of the Rome Statute, which requires that crimes be committed with intent and knowledge, the Vanuatu Penal Code is broader in that it provides with respect to intentional crimes that "[n]o person shall be guilty of a criminal offence unless he intentionally does an act which is prohibited by the criminal law and for which a specific penalty is prescribed."[191] In addition, in certain circumstances, recklessness results in criminal responsibility, which would cover some grave breaches of the Geneva Conventions where the mental element is recklessness.[192]

6.1.3. DEFENCES

As discussed below, there are a number of defences in Vanuatu law that are broader than defences permitted under international law with respect to crimes under international law or which are inappropriate for such crimes, such as superior orders, or which are broader than provided in international law or appropriate for such crimes, such as intoxication and defence of person or property, which could lead to impunity for the worst imaginable crimes.[193]

Defences – superior orders

Vanuatu law provides that superior orders are a defence under national law. Section 22 of the Penal Code states that: "No criminal responsibility shall attach to an act performed on the orders of a superior to whom obedience is lawfully due, unless such order was manifestly unlawful or the accused knew that the superior had no authority to issue such order."[194] Though examined in the *Sokomanu* and *Simon* cases, the scope of the term "manifestly unlawful" has not been clearly

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[191] Penal Code, s. 6 (1). See also s. 16 (2), which provides: "Subject to any special provision of law, criminal responsibility shall attach to any person who intentionally commits each of the acts or omissions which are the elements of a criminal offence with the intention of causing the result which completes it."

[192] Section 6 (2) and (3) of the Penal Code provides:

> "(2) No person shall be guilty of a criminal offence unless it is shown that he intended to do the very act which the law prohibits; recklessness in doing that act shall be equivalent to intention. (3) A person shall be considered to be reckless if –
>
> (a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk; and
>
> (b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present."

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

[194] Penal Code, s. 22.

defined by Vanuatu courts.[195] Given that this defence is prohibited under international law (see below) then its use, even with qualifying elements, risks impunity."

Invoking superior orders as a defence has been contrary to international law since Nuremberg, although it may properly be taken into account in mitigation of punishment.[196] This defence has also been excluded in numerous international instruments for more than half a century, including the Nuremberg Charter, Allied Control Council Law No. 10, the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute, the International Criminal Tribunal for Rwanda (ICTR) Statute, the Regulation establishing the Special Panels for East Timor, the Statute of the Special Court for Sierra Leone, the Cambodian Law establishing the Extraordinary Chambers and the International Convention for the Protection of All Persons from Enforced Disappearance.[197] The Committee against Torture has concluded that superior orders can never be a defence to torture.[198]

Although the defence of superior orders with respect to crimes under international law is, in itself contrary to international law, it also suffers from another defect. This defence has been interpreted by the Vanuatu Supreme Court in the 1994 *Lin Shiow Her* case in a manner that is fundamentally flawed as it puts the onus on the accused to prove the existence of superior orders, not just the burden to raise the defence.[199] This shift of the burden to the accused is inconsistent with the right to be presumed innocent until proven guilty beyond a reasonable doubt.[200] In addition, this decision

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[195] *Public Prosecutor v Sokomanu* [1988] VUSC 1; [1980-1994] Van LR 420 (1 January 1988); *Public Prosecutor v Simon* [2003] VUSC 58; Criminal Case No 043 of 2002 (27 January 2003).

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

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

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

[198] Committee against Torture, General Comment 2, *supra*, n. 184, para. 26.

[199] *Public Prosecutor v. Lin Shiow Her* [1994] VUSC 4; [1980-1994] Van LR 695 (24 January 1994) ("The burden on the defendants to establish their defence is on a balance of probabilities: see Section 10 of the Penal Code CAP 135").

[200] 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. Similarly, Article 14 (2) of the International Covenant on Civil and Political Rights (ICCPR), to which Vanuatu has been a State party since 21 November 2008, provides that "[e]veryone

appears to be contrary to Sections 8, 9,[201] and 22 of the Penal Code, which make no mention of this reversal of the burden of proof with regard to this defence, and to contradict earlier case law of the Supreme Court.[202]

Defences – mistake of fact

Section 12 of the Vanuatu Penal Code, "[m]istake of fact, reasonable belief", provides:

> "A mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent."[203]

This defence has been interpreted by the Vanuatu courts as having both a subjective and objective element – the mistaken belief must be both "genuine" and "reasonable".[204]

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charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

[201] Sections 8 and 9 of the Vanuatu Penal Code state that:

> "8. General rule as to burden of proof
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> (1) No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous.
>
> (2) In determining whether a person has committed a criminal offence, the court shall consider the particular circumstances of the case and shall not be legally bound to infer that he intended or foresaw the natural or probable consequences of his actions.
>
> (3) If the prosecution has not so proved the guilt of the accused, he shall be deemed to be innocent of the charge and shall be acquitted forthwith.
>
> 9. Burden of proof in certain cases
>
> Unless otherwise expressly provided by law, the burden shall rest upon the prosecution to disprove beyond reasonable doubt any plea of provocation, compulsion, coercion, self-defence, necessity, consent, accident or mistake of fact which has been sufficiently raised by the defence as an issue."

[202] *Public Prosecutor v Sokomanu* [1988] VUSC 1; [1980-1994] Van LR 420 (1 January 1988) states that the "…prosecution must prove that he either realised the act was manifestly unlawful or that his superior had no authority to give such an order."

[203] Since 29 December 1990. *Leodoro v Public Prosecutor* [1990] VUCA 11; APPEAL No 9 of 1990 (9 July 1990) states: "The amendment of this section of the Penal Code came into force on 29 December 1990... Prior to the amendment the "belief" had only to be genuine. It did not then have to be reasonable."

[204] *Public Prosecutor v Frank* [2004] VUSC 63; Criminal Case 004 of 2004 (23 July 2004) states:

The defence of mistake of fact as laid out in the Vanuatu Penal Code appears to be narrower than the defence of mistake of fact in Article 32 (1) of the Rome Statute since it requires that the mistaken belief be both genuine and reasonable. 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."[205]

The International Criminal Court has, however, not determined as of 16 September 2012, what is required for a mistake of fact to negate the mental element of the crime. Under Vanuatu law, both elements of reasonableness and genuineness must always be present, meaning that it may sometimes be harder for the defendant to establish this defence.

There are potential problems with the defence of mistake of fact as defined in Vanuatu case law with regard to the burden of proof. The Supreme Court has stated in the 2004 *Frank* case that "…the accused must satisfy the Court that the defence of honest and reasonable mistake is 'sufficiently raised'" before "…the prosecution must negative the defence … beyond a reasonable doubt…". This case was cited by the Court of Appeal in the 2004 *Ishmael* case.[206] A decision by the Supreme Court in the 1994 *Lin Shiow Her* case has offered an even more problematic interpretation, seemingly in contradiction to both Sections 8, 9[207] and 12 of the Vanuatu Penal Code, and subsequent jurisprudence, stating in relation to the defence of mistake of fact that "…wherever a defendant has the burden of establishing a defence, then he discharges that burden on a balance of probabilities."[208] As noted above with regard to the defence of superior orders, this shift of the burden to the accused is inconsistent with the right to be presumed innocent until proven guilty beyond a reasonable doubt.

Section 11 (2) of the Vanuatu Penal Code, regarding "[i]gnorance of… fact" rather than "[m]istake of fact", states that: "[i]n all cases in which it is necessary for the accused to have knowledge of certain facts in order to form a criminal intention, the burden shall rest upon the prosecution to prove that the accused was aware of such facts." The case law of the Supreme Court in the 1996 *Swanson* case confirms that the burden of proof rests with the prosecution, and states that (as

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> "…the prosecution must negative the defence by proving beyond a reasonable doubt that either:
>
> (i) the accused did not genuinely believe [that the complainant consented]; or
>
> (ii) the belief of the accused [that the complainant consented] [i.e. a reasonable man standing in the shoes of the accused would not have believed that the complainant consented]."

This test is cited again in *Ishmael v Public Prosecutor* [2005] VUCA 1; Criminal Appeal Case 04 of 2004 (3 May 2005).

[205] For Amnesty International's view on the scope of this defence, see *Making the Right Choices – Part I*, *supra*, n. 196, Sect. VI.E.6.

[206] *Public Prosecutor v Frank* [2004] VUSC 63; Criminal Case 004 of 2004 (23 July 2004); *Ishmael v Public Prosecutor* [2005] VUCA 1; Criminal Appeal Case 04 of 2004 (3 May 2005).

[207] *Supra*, n. 201.

[208] *Public Prosecutor v Lin Shiow Her* [1994] VUSC 4; [1980-1994] Van LR 695 (24 January 1994).

opposed to Section 12 above) the test for knowledge is purely subjective.[209] The relationship between Section 12 mistake of fact and Section 11 (2) ignorance of fact is unclear.

Defences – ignorance of the law

Section 11 (1) of the Vanuatu Penal Code provides: "Ignorance of the law shall be no defence to any criminal charge." The Vanuatu Courts seem to have applied this provision exactly as stated and with no obvious exceptions.[210]

This defence seems to be narrower than 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."[211]

The defence as provided for in the Vanuatu Penal Code does not contain the exception with regard to the negation of the mental element of the crime, so it may be harder to employ this defence under Vanuatu law. However, it would appear that if the mistake of law were to negate the mental element of the crime, the defendant would not be guilty of the crime, even though this is not specified in the Vanuatu statute, so the exception given in the Rome Statute may not be substantively different from the Vanuatu law.

Defences – insanity and mental disease or defect

The defence of insanity in Section 20 of the Vanuatu Penal Code appears to be more restrictive than this defence in the Rome Statute. Section 20 (2) provides that the deprivation of the power of

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[209] *Public Prosecutor v Swanson* [1997] VUSC 37; Criminal Case No 007 of 1996 (1 October 1997) – "I must also bear in mind that:

> *"In all cases in which it is necessary for the Accused to have knowledge of certain facts in order to form a criminal intention, the burden shall rest upon the prosecution to prove that the Accused was aware of such facts""* (Section 11(2) Penal Code Act CAP 135).

In that regard, indeed, it is to be reminded that where knowledge is required to be proved, the subjective test is to be applied, but not the objective test."

[210] *Public Prosecutor v Ijeh* [2010] VUSC 44; Criminal Case 48 of 2010 (9 June 2010); *Public Prosecutor v Mogeror* [2007] VUSC 83; Criminal Case 33 of 2007 (8 August 2007).

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

reason must go "…beyond a[n]… absence of self-control",[212] while Article 31 (1) (a) of the Rome Statute provides that a person shall not be criminally responsible if they suffer from a "…mental disease or defect that destroys that person's… capacity to control his or her conduct…"[213] However, in the 2003 Supreme Court decision in the *Sablan* case, the defence of insanity was proved on the basis that "…the defendant has a mental disorder or deficiency which leads to an absence of self control…", which appears to be essentially the same as the defence in Article 31 (1) (a) of the Rome Statute.[214]

Section 20 (1) of the Vanuatu Penal Code states "Every person accused of a criminal offence shall be presumed sane until the contrary is proved; the burden of such proof shall lie upon the accused on the balance of probabilities." This 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 the defence.[215] This shift of the burden to the accused is inconsistent with the right to be presumed innocent until proven guilty beyond a reasonable doubt.[216]

Defences – intoxication

Section 21 of the Vanuatu Penal Code provides for a broader defence of voluntary intoxication than Article 31 (1) (b) of the Rome Statute.[217] This section provides that voluntary intoxication shall

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[212] Penal Code, s. 20.

[213] Article 31 (1) (a) of the Rome Statute provides that:

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

[214] *Public Prosecutor v Sablan* [2003] VUSC 37; Criminal Case No 020 of 2003 (3 July 2003).

[215] *Public Prosecutor v Sablan* [2003] VUSC 37; Criminal Case No 020 of 2003 (3 July 2003) ("The defendant is also informed that he has the onus to prove the defence of insanity on the balance of probability").

[216] 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.

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

> "[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
>
> …
>
> (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that

constitute a defence to any offence charged "in which criminal intention is an element and the intoxication was of so gross a degree as to deprive the accused of the capacity to form the necessary criminal intention".[218] Vanuatu jurisprudence has recognised voluntary intoxication as a valid defence.[219]

The wording of the defence of voluntary intoxication in the Vanuatu statute goes beyond the defence provided for in the Rome Statute, which precludes the defence of intoxication where "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 [such] conduct". This breadth of the defence of intoxication under the Vanuatu statute may lead to impunity for the worst crimes against international law.

Section 20 (4) of the Vanuatu Penal Code states that "Involuntary intoxication shall for the purposes of the criminal law be deemed to be a mental disease", and as such involuntary intoxication is incorporated into the defence of insanity (see above).

Section 21 (1) of the Vanuatu Penal Code states: "... the onus of proof thereof on the balance of probabilities shall lie on the accused". This is a fundamental flaw as it puts the onus on the accused to prove intoxication, not just the burden to raise the defence.[220] This shift of the burden to the accused is inconsistent with the right to be presumed innocent until proven guilty beyond a reasonable doubt.[221]

Defences – compulsion, duress and necessity

As Amnesty International has argued, compulsion, duress and necessity should not be *defences* to

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> 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[.]"

[218] Section 21 of the Vanuatu Penal Code states that:

> "**...**(1) Voluntary intoxication shall not constitute a defence to any charge unless the offence charged is one in which criminal intention is an element and the intoxication was of so gross a degree as to deprive the accused of the capacity to form the necessary criminal intention; the onus of proof thereof on the balance of probabilities shall lie on the accused.
>
> (2) For the purpose of this section, intoxication means the impairment of the mental or physical faculties of a person arising from the taking of any foreign substance."

[219] For an in depth analysis and successful use of the defence of voluntary intoxication see *Public Prosecutor v Tanfield* [1994] VUSC 24; Criminal Case 1 of 1993 (10 January 1994).

[220] *Public Prosecutor v Tanfield* [1994] VUSC 24; Criminal Case 1 of 1993 (10 January 1994) ("Whenever the onus of proof lies on an accused, he discharges it if he proves the element of his defence on a balance of probabilities...").

[221] 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.

crimes under international law, but should simply be grounds for *mitigation* of punishment.[222] 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.[223]

Compulsion or duress. Compulsion is not a defence to crimes under international law in Vanuatu, but rather provides for a diminution of criminal responsibility. Section 26 of the Vanuatu Penal Code provides:

> "(1) Criminal responsibility shall be diminished in the case of an offence committed by a person acting –
>
> (a) under actual compulsion or threats, not otherwise avoidable, of death or grievous harm;
>
> (b) under the coercion of a parent, spouse, employer or other person having actual or moral authority over such person.
>
> (2) Criminal responsibility shall not be diminished under subsection (1) if the person acting has voluntarily exposed himself to the risk of such compulsion, threats or coercion."

There appears to be little or no jurisprudence in the Vanuatu courts referring to diminution of responsibility due to coercion or compulsion.

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[222] *Making the right choices*, *supra*, n. 196, Sect. VI.E.3 and 4. The Committee against Torture has recommended that states parties "completely remove *necessity* as a possible justification for the crime of torture." Concluding observations – Israel, U.N. Doc. CAT/C/ISR/CO/4, 23 June 2009, para. 14 (http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/431/65/PDF/G0943165.pdf?OpenElement) (emphasis in original).

[223] Article 31 (1) (d) of the Rome Statute provides that

> "[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
>
> …
>
> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
>
> (i) Made by other persons; or
>
> (ii) Constituted by other circumstances beyond that person's control."

The provision for compulsion and coercion in Section 26 of the Vanuatu Penal Code is certainly narrower than the defence of duress in Article 31 (1) (d) of the Rome Statute in that it is merely a mitigating factor rather than a full defence. It is also narrower in that it does not provide for "other circumstances beyond that person's control", but merely for threats from another individual, and it excludes diminution of responsibility if a person has voluntarily exposed themselves to a risk of compulsion. However, the provisions of Section 26 appear to be wider than those present in the Rome Statute in that they include diminution for criminal responsibility for "coercion [by] a parent, spouse, employer or other person having actual or moral authority over such person", they do not include the necessity for the threat to be of "imminent" harm, and they do not include the stipulation that the coerced person "does not intend to cause a greater harm than the one sought to be avoided". The scope of Article 31 (1) (d) of the Rome Statute has yet to be interpreted by the International Criminal Court.

Necessity. There is no general defence of necessity in the Vanuatu penal code. Though the defence of "self-defence necessity" is included in the Vanuatu penal code at s. 23 (see *defence of person or property* directly below), this term is misleading as it does not involve "necessity", but only "self-defence".

Defences – defence of person or property

The defences in the Vanuatu Penal Code of self-defence, defence of others and defence of property are broader than the strictest requirements of international law or what is appropriate for crimes under international law. Section 23 of the Vanuatu Penal Code – "Self-defence necessity, prevention of offences etc" provides:

> "(1) No criminal responsibility shall attach to an act dictated by the immediate necessity of defence of the person acting or of another, or of any right of himself or another, against an unlawful action, provided that the means of defence be not disproportionate to the seriousness of the unlawful action threatened.
>
> (2) Without prejudice to the generality thereof, subsection (1) shall apply to the intentional killing of another in defence of an attack causing a reasonable apprehension of death, grievous harm, rape or sodomy.
>
> (3) No criminal responsibility shall attach to an act, not being an act to which subsection (1) applies, done in necessary protection of any right of property, in order to protect the person acting or another, or any property from a grave and imminent danger, provided that the means of protection used be not disproportionate to the severity of the harm threatened.
>
> (4) No criminal responsibility shall attach to the use of such force as is reasonable in the circumstances for the purpose of –
>
> (a) preventing the commission of an offence (not being an offence against the person acting); or
>
> (b) effecting or assisting the lawful arrest of any offender or suspected offender or any person unlawfully at large."

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.[224] Unfortunately, in another political compromise, Article 31 (1) (c) of the Rome Statute provides very broad defences of self, others and property, but these defences apply only in trials before the International Criminal Court.[225]

Section 23 (1) of the Vanuatu Penal Code is in line with international law to the extent that self defence and defence of others may only be employed as a defence where the use of force as a means of defence is proportionate. In the 1997 *Massing* case in the Supreme Court the defence failed as the force used was deemed to be disproportionate.[226] The defence is, however, broader than that which is appropriate for crimes under international law as, as well as defence of self and others, it includes "…defence of any right of himself or another" – Section 23 (1) – and defence of "…any right in property" – Section 23 (3). Each of these points was discussed by the Supreme Court in the 2004 *Boe* case, where the defence was successfully employed on each point.[227] It is also to be noted that there is no provision regarding retreat within the Vanuatu Penal Code. The broad nature of these defences in Vanuatu law, which include defence of rights and property, not just self and others, may lead to impunity for the worst crimes.

The 2004 *Boe* case stated that the "…burden of proof shifted from the prosecution to the defendant upon him relying on section 23 (1) of the Act", and went on to state that the defendant "…had to prove [the defence] beyond reasonable doubt". As discussed above in defences (e.g. superior orders), this shift of the burden to the accused appears to contradict sections 8 and 9 of the Vanuatu Penal Code, and is inconsistent with the right to be presumed innocent until proven guilty beyond a reasonable doubt.

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[224] Amnesty International, *Making the right choices*, *supra*, n. 196, Sect. VI.E.5.

[225] 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's 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[.]"

[226] *Public Prosecutor v Massing* [1997] VUSC 34; Criminal Case No 004 of 1997 (19 September 1997).

[227] *Public Prosecutor v Boe* [2006] VUSC 41; Criminal Case 46 of 2004 (4 April 2006).

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

There appears to be no general provision expressly requiring the presence of a suspect in Vanuatu, either at some point after the crime, or when the first official action takes place, in order to initiate a police inquiry or a formal investigation of a crime. However, with regard to certain crimes under national law of international concern, one of a number of criteria must be met in order to commence proceedings. One of these criteria (though there are others that will suffice if this is not met) is that the act or omission "is committed by a person who is, after the commission of the offence, present in Vanuatu".[228] The absence of a general provision suggests that there is no presence requirement to open an investigation for crimes other than those specifically noted here. There is no requirement in the Extradition Act that the suspect must have been in Vanuatu at all in order to make an extradition request.[229]

The omission 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 committing crimes under international law is on his or her way to Vanuatu or about to change planes at a Vanuatu 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. Regarding the request by Vanuatu for extradition of a person suspected of a crime committed abroad (see below in Section 7), the absence of a presence requirement means that Vanuatu could also help shoulder the burden when other states fail to fulfil their obligations to investigate and prosecute crimes under international law.[230] Indeed, this possibility was envisaged as an essential component of the enforcement provisions of the four 1949 Geneva Conventions (and subsequently incorporated in Protocol I to the Conventions), each of 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.[231]

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[228] Counter Terrorism and Transnational Organised Crime Act [Cap 313], s. 48 (b) (iv).

[229] Extradition Act [Cap 287].

[230] For further information about the shared responsibility model, see Amnesty International, *Improving the effectiveness of state cooperation,* 13 October 2009 (http://www.amnestyusa.org/document.php?id=ENGIOR530042009&lang=e).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.

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

6.3. STATUTES OF LIMITATION APPLICABLE TO CRIMES UNDER INTERNATIONAL LAW

Statutes of limitation in Vanuatu appear to apply to all crimes, including crimes under international law. There are also statutes of limitation applicable to civil claims in civil proceedings.

Statutes of limitation applicable to crimes

Vanuatu has neither signed, nor ratified, the 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity.[232] As explained earlier, it ratified the Rome Statute on 2 December 2011, but has not yet enacted any implementing legislation.[233] Independently of conventional international law, states must not apply statutes of limitation to crimes under international law. [234] Section 15 of the Vanuatu Penal Code is a statute of limitations, providing that prosecutions for crimes carrying a sentence of at least ten years must be commenced within 20 years and for crimes carrying a sentence of between three months and ten years, prosecutions must be commenced within five years.[235] Although grave breaches of the Geneva Conventions are defined as crimes in the Geneva Conventions Act, not the Penal Code, it appears that Section 15 would apply to grave breaches. There appear to be no exceptions applicable to crimes under international law.

Statutes of limitation applicable to torts

Vanuatu has a limitation on applying for civil compensation for torts of six years.[236]

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[232] 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).

[233] Rome Statute, art. 29 (Non-applicability of statute of limitations) ("The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations").

[234] See, for example, Committee against Torture, Concluding observations – Spain, U.N. Doc. CAT/C/ESP/CO/5, 6 -7 (http://www.google.co.uk/#hl=en&source=hp&q=%22committee+notes+that+measure+102%22+Spain&btnG=Google+Search&meta=&aq=f&oq=%22committee+notes+that+measure+102%22+Spain&fp=97531010bb3ad556) (While it takes note of the State party's comment that the Convention against Torture entered into force on 26 June 1987, whereas the Amnesty Act of 1977 refers to events that occurred before the adoption of that Act [dating to 1936], the Committee wishes to reiterate that, bearing in mind the long-established *jus cogens* prohibition of torture, the prosecution of acts of torture should not be constrained by . . . the statute of limitation.") ; *Prosecutor v. Furundzija*, Judgment, International Criminal Tribunal for the former Yugoslavia, 10 December 1998, para. 155-15 (same); *Barrios Altos v. Peru*, Judgment, Inter-American Court of Human Rights, 14 March 2001, para. 41 (provisions on prescription with respect to serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance are prohibited). See also Ruth Kok, *Statutory Limitations in International Criminal Law* , London: Blackwell, 2008.

[235] Penal Code, s. 15 (a) and (b)."

[236] Limitation Act [cap 212], s. 3.

6.4. DOUBLE CRIMINALITY

With regard to the two crimes under international law over which Vanuatu may exercise universal jurisdiction, slave trading (see Sections 4.3.1 and 4.3.2 above),[237] and certain grave breaches of the Geneva Conventions (see Section 4.3.1.1 above),[238] there is no requirement that conduct which was committed abroad be a crime both in Vanuatu and in the place where it was committed (double criminality). This is distinct from double criminality with regard to the granting of extradition requests and requests for mutual legal assistance (discussed in Section 7).

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

Vanuatu recognizes diplomatic and foreign consular, and various other types of state or official immunities, including the discretion to confer immunities and privileges upon representatives of international organisations, even if crimes under international law are in issue.[239] There appears to be no specific provision for head of state immunity.

Civil claims against foreign officials are barred by assertions of official immunities, except in three specific circumstances, including: "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions".[240] It appears that official immunities will bar civil claims where the official acted in an official capacity.

Amnesty International believes that the judgment of the International Court of Justice in the *Arrest Warrant* case, which concluded that serving heads of state, heads of government and foreign ministers were immune from prosecution in foreign courts, is based on an incorrect analysis of international law.[241] Therefore, Amnesty International has urged that this ruling, which is binding only upon the states in that case, should be reversed and hopes that this will be done in the future,

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[237] Penal Code, s. 5.

[238] Geneva Conventions Act, ss. 4 – 6.

[239] Diplomatic Privileges and Immunities Act [Cap 143].

[240] *Ibid*, Schedule 1, art. 31 (1) (c); in addition, arts. 31 (1) (a) & (b) contain the following exceptions to civil immunity:

> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legates as a private person and not on behalf of the sending State.

[241] *Democratic Republic of the Congo v. Belgium*, Judgment, I.C.J. Rep. (2001).

as no serving or former official should be able to assert successfully a claim of immunity with respect to the worst possible crimes ever committed. As explained elsewhere,[242] there is no convincing basis in customary international law to accord immunity of state officials in or out of office when they are suspected of having committed genocide, crimes against humanity or war crimes. Indeed, the International Court of Justice in the *Arrest Warrant* case failed to cite any state practice or *opinio iuris* in this respect.

Instruments adopted by the international community show a consistent rejection of immunity from prosecution for crimes under international law for any government official since the Second World War. Those instruments have articulated a customary international law rule and general principle of law. Indeed, several of the international instruments adopted over the past half century were expressly intended to apply both to international and national courts.[243] 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. [244]

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

States have recognized for more than six decades since the adoption of the Universal Declaration of Human Rights that the prohibition of retroactive criminal laws does not apply to retrospective national criminal legislation enacted after the relevant conduct became recognized as criminal under international law.[245] Article 15 of the ICCPR, which Vanuatu ratified in 2008, contains a similar

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[242] *Universal jurisdiction: Belgian prosecutors can investigate crimes under international law committed abroad*, 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. See also Amnesty International, *Bringing Power to Justice: Absence of immunity for heads of state before the International Criminal Court*, Index: IOR 53/017/2010, December 2010 (https://www.amnesty.org/en/library/info/IOR53/017/2010/en).

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

[244] Statute of the Special Court for Sierra Leone, art. 6 (Individual criminal responsibility) (2); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 29. For further analysis on this point, see Amnesty International, *Universal Jurisdiction: Belgian court has jurisdiction in Sharon case to investigate 1982 Sabra and Chatila killings*, Index: EUR 53/001/2002, 1 May 2002.

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

> "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."

prohibition.[246] The Committee against Torture has made clear that national legislation defining torture as a crime under international law can apply to conduct which was considered as torture under international law prior to the enactment of that legislation.[247]

Thus, nothing in either article or other international law prevents Vanuatu 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. Section 5 (2) (f) of the Vanuatu Constitution states that "no-one shall be convicted in respect of an act or omission which did not constitute an offence known to written or custom law at the time it was committed", and Section 5 (2) (g) states that "no-one shall be punished with a greater penalty than that which exists at the time of the commission of the offence".[248] It appears that the expression "written or custom law" applies only to domestic Vanuatu law. If this is so, Section 5 (2) (f) of the Constitution may be inconsistent with international law to the extent that it would appear to prevent prosecution under any legislation defining crimes under international law as crimes under Vanuatu law that was enacted after the crimes were committed even when the conduct was criminal under international law. No jurisprudence on the scope of these two constitutional provisions has been located.

6.7. *NE BIS IN IDEM* – DOUBLE JEOPARDY

The principle of *ne bis in idem* or double jeopardy (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.[249] However, apart from the vertical exception between international courts and national courts, the principle only prohibits retrials after an acquittal by the same jurisdiction.[250] This limitation on

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[246] 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."

[247] See, for example, Committee against Torture, Concluding observations – Spain, *supra*, n. 234.

[248] Constitution of the Republic of Vanuatu, ss. 5 (2) (f) & 5 (2) (g).

[249] 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.

[250] 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

the scope of the principle can serve international justice by permitting other states to step in when the territorial state or the suspect's state conducts a sham or unfair trial.

Section 5 (2) (h) of the Vanuatu Constitution states that "no person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he could have been convicted at his trial".[251] These broad provisions seem to suggest that an individual previously acquitted in a sham trial in another jurisdiction could not be tried in Vanuatu for the same offence. However, there is so far no authoritative determination by a Vanuatu court that this constitutional prohibition would indeed apply to judgments of foreign courts.

6.8. POLITICAL CONTROL OVER DECISIONS TO INVESTIGATE AND PROSECUTE

Section 55 of the Vanuatu Constitution states:

> "The function of prosecution shall vest in the Public prosecutor [sic], who shall be appointed by the President of the Republic on the advice of the Judicial Service Commission. He shall not be subject to the direction or control of any other person or body in the exercise of his functions".[252]

Although Section 48 (2) of the Constitution states that the "Judicial Service Commission shall not be subject to the direction or control of any other person or body in the exercise of its functions",[253] it should be noted that the Minister responsible for justice sits as the Chairman of the Judicial Services Commission.[254] It is not clear what impact this has upon the independence of the Public Prosecutor with regard to government influence.[255] Although the President is the head of state,[256] executive power sits with the Prime Minister and the Council of Ministers.[257]

Protocol 67, UN Doc. CCPR/C/OP/2, UN Sales No. E.89.XIV.1. This limitation was also recognized during the drafting of Article 14 (7) of the ICCPR. See Marc J. Bossuyt, *Guide to the* "Travaux Préparatoires" *of the International Covenant on Civil and Political Rights*, Dordrecht, Martinus Nijhoff, 1987, pp. 316-318; Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl am Rhein, N.P. Engel, 1993, pp. 272-273; Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, Oxford, Clarendon Press, 1991. The ICTY Trial Chamber in the *Tadić* case reached the same conclusion. *Prosecutor v. Dusko Tadic,* Case No IT-94-1-A, July 15, 1999.

[251] Constitution of the Republic of Vanuatu, s. 5 (2) (h).

[252] Constitution of the Republic of Vanuatu, s. 55.

[253] Constitution of the Republic of Vanuatu, s. 48 (2).

[254] Constitution of the Republic of Vanuatu, s. 49 (1).

[255] According to a senior Vanuatu government official, *supra* n. 14, no political official can affect a decision by the Public Prosecutor to investigate or prosecute in a particular case, but that does not lessen the concern that the Chair of the Judicial Services Commission is a political official.

[256] Constitution of the Republic of Vanuatu, s. 33.

[257] Constitution of the Republic of Vanuatu, s. 39 (1).

Political interference in the process of justice is contrary to international standards.[258]

6.9. RESTRICTIONS ON THE RIGHTS OF VICTIMS AND THEIR FAMILIES

As noted above in Section 5.3, it is unclear to what extent victims are able to obtain the full range of reparations against convicted persons to which they are entitled under international law. In addition, there are a number of significant restrictions on the ability of victims to participate meaningfully in criminal and civil proceedings (see Section 5 above).

6.10. AMNESTIES

Amnesties and similar measures of impunity for crimes under international law are prohibited under international law.[259]

Section 5 (2) (h) of the Vanuatu Constitution states that "no person who has been pardoned ... shall be tried again for the same offence or any other offence of which he could have been convicted at his trial".[260] It is not clear whether this provision applies to those pardoned in other jurisdictions who are being prosecuted in Vanuatu based on universal jurisdiction.

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[258] 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."

[259] 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*, Index: AFR 51/012/2003, 31 October 2003. The Committee against Torture has concluded that amnesties for torture and enforced disappearances are prohibited under international law. Committee against Torture, General Comment 2, *supra*, n. 184, para. 5. See also Concluding observations – Spain, U.N. Doc. CAT/ESP/CO/5, para. 21, 9 December 2009.

[260] Constitution of the Republic of Vanuatu, s. 5 (2) (h).

7. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

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

7.1. EXTRADITION

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

Requests by Vanuatu for extradition from other countries (active extradition), and extradition from Vanuatu to other countries (passive extradition), are regulated by statute, and potentially by bilateral or multilateral treaties, but can take place even in the absence of a treaty.[261] No bilateral extradition treaties, however, have been entered into, and no multilateral treaties dealing exclusively with extradition.[262] Vanuatu, is, however, a member of the "London Scheme for Extradition within the Commonwealth",[263] an "informal scheme… which [Commonwealth] member states can chose to

[261] Extradition Act 2002 [Cap 287].

[262] Amnesty International email correspondence with a senior Vanuatu government official, 16 September 2012, *supra* n. 14.

[263] The London Scheme for Extradition within the Commonwealth: including the amendments agreed at Kingstown in November 2002 (http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf). The London Scheme is a non-binding agreement on principles between Commonwealth nations. Kimberly Prost, 'Cooperation in Penal Matters in the Commonwealth', *International Criminal Law, Volume II: Multilateral and Bilateral Enforcement Mechanisms*, M. Cherif Bassiouni (ed.), Leiden: Martinus Nijhoff Publishers / Brill, 3rd ed., 2008, pp. 414 – 423. The 54 members of the Commonwealth are : Antigua and Barbuda, Australia, the Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darusasalam, Cameroon, Canada, Cyprus, Dominica, Fiji Islands, the Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papau New Guinea, Rwanda, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom, United Republic of Tanzania, Vanuatu, and Zambia. Fiji was suspended in 2009.

participate in which aim[s] to facilitate the provision of [extradition] between [Commonwealth] countries".[264] Participants are expected to incorporate the extradition procedures outlined in the scheme into their domestic legal systems, which Vanuatu has done, with some variations,[265] in the 2002 Extradition Act.[266] As explained below in Section 7.1., the provisions of the London Scheme contain various flaws, for instance, giving states the discretion to refuse to extradite on the basis that the individual concerned is a national or permanent resident of the requested state.[267] Although the London Scheme is not legally binding on Vanuatu courts and officials in international or domestic law it is likely to be taken into account in interpreting the Extradition Act. Therefore, this paper notes a number of provisions in the London Scheme that could lead to impunity for crimes under international law which should not be implemented by Vanuatu in law or practice.

The Extradition Act provides four different legal regimes for extradition: (1) to Commonwealth countries, (2) to South Pacific countries, (3) to treaty countries, and (4) to comity countries.[268] Comity countries are defined as those that do not fit into any other category.[269] The Extradition Act gives considerable detail regarding the domestic Vanuatu procedure for passive extradition, but the procedure for active extradition is not clear.

The lack of binding extradition treaties to which Vanuatu is party, combined with the presence of the Extradition Act on the statute books, means that Vanuatu's extradition procedures are binding in domestic, but not international, law.

The Extradition Act appears to cover all forms of granting extradition requests by foreign countries, but it is possible that other forms of transfer from Vanuatu, such as deportation from another country, are not covered when the deportation or transfer is a disguised extradition, although there does not seem to be any authoritative judicial decision or executive interpretation since independence on this point.[270]

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[264] Commonwealth website, accessed 29 March 2012: http://www.thecommonwealth.org/Internal/190714/190928/international_agreement_between_countries/.

[265] For example, the London Scheme, *supra*, n. 263, para. 2 (2), describes an extradition offence as any offence "which is punishable in the requesting and requested country by imprisonment for two years or a greater penalty", whereas the required time period under the Extradition Act, *supra*, n. 261, s. 3 is "a period of not less than 12 months".

[266] Extradition Act 2002 [Cap 287].

[267] London Scheme, *supra*, n. 263, para. 15 (3); for further discussion of nationality provisions as an obstacle to extradition see Section 7.1.1.2 below.

[268] Extradition Act, parts 3-6.

[269] Extradition Act, s. 2 (1).

[270] 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

7.1.1. OBSTACLES TO ACTIVE AND PASSIVE EXTRADITION

There are a number of obstacles to active and passive extradition.

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

Requests for extradition by Vanuatu to a foreign country (active extradition) appear to be made by the Attorney General. Section 58 of the Extradition Act states: "If the Attorney General intends to seek a person's extradition to Vanuatu… ". This is just mentioned in passing, however, and no further information on this procedure is provided, or regarding any other officials that may be able to initiate such a request.

Though decisions with respect to granting requests to Vanuatu by foreign countries (passive extradition) are commenced by a magistrate, the authority to proceed, and the final determination of whether to surrender an individual for extradition, are made by the Attorney General,[271] taking into account such potentially political factors as "the national interest of Vanuatu". [272] Furthermore, regarding extradition requests from comity countries, the decision whether to designate the country an extradition country, and on what terms, is taken by a Government minister. [273]

The independence of the Attorney General is guaranteed by the 1998 State Law Office Act, which, further, provides that the President of the Republic and the Judicial Service Commission make decisions regarding the appointment and removal of the Attorney General. [274] Although Section 48

> 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).

[271] Extradition Act, ss. 6, 9 and 17.

[272] Extradition Act, s.17 (2) (k).

[273] Extradition Act, s. 44.

[274] State Law Office Act [Cap 242], s. 11:

> "(1) The Attorney General must carry out his or her obligations under the Constitution, this Act or any other enactment or at common law independently and shall provide legal advice to the Government accordingly.
>
> (2) The Attorney General is not to be subject to the direction of any other person or body in the exercise of his or her functions."

There are also other statutory guarantees of the independence of the Attorney General in the methods of appointment and removal – note s. 7:

(2) of the Constitution states that the "Judicial Service Commission shall not be subject to the direction or control of any other person or body in the exercise of its functions",[275] it should be noted that the Minister responsible for justice sits as the Chairman of the Judicial Services Committee.[276] It is not clear what impact this has upon the independence of the Attorney General with regard to government influence. Although the President is the head of state,[277] executive power sits with the Prime Minister and the Council of Ministers.[278]

According to a senior Vanuatu government official, extradition decisions made by the Attorney General are subject to judicial review, but extradition decisions made by a Magistrate or Judge are not.[279]

7.1.1.2. Nationality

Extradition of Vanuatu nationals is not prohibited, but may be refused under Sections 17 (2) (d) and 60 (2) (a) of the Extradition Act. However, under Section 60 a Vanuatu national may be prosecuted in Vanuatu for crimes committed outside Vanuatu for which another country has requested his or her surrender. This is, however, subject to the Public Prosecutor finding there is enough evidence to prosecute, and giving consent.[280] Alternatively, under Section 62 of the Extradition Act, Vanuatu may, in certain circumstances, surrender a national for trial in another country on the basis that he or she will be returned to Vanuatu to serve the sentence.[281]

> "The Attorney General shall be appointed by the President on the advice of the Judicial Service Commission"

And s9:

> "(3) The Attorney General may only be removed from office by the President on the advice of the Judicial Service Commission for disability, bankruptcy, neglect of duty, incompetence or misconduct.
>
> (4) Subject to the provisions of any other enactment the salary, and any allowances and other entitlements of the Attorney General shall be determined by the Judicial Service Commission."

[275] Constitution of the Republic of Vanuatu, s. 48 (2).

[276] Constitution of the Republic of Vanuatu, s. 49 (1).

[277] Constitution of the Republic of Vanuatu, s. 33.

[278] Constitution of the Republic of Vanuatu, s. 39 (1).

[279] Email correspondence with Amnesty International, 16 September 2012, *supra*, n. 14.

[280] Extradition Act, s. 60.

[281] Extradition Act, s. 62 (2) states:

> "Vanuatu may surrender the person to the requesting country for the purpose of being tried in the requesting country for the offence for which extradition is sought if:
>
> (a) the law of the requesting country permits the transfer of convicted offenders to Vanuatu; and
>
> (b) Vanuatu is satisfied that if the person is convicted the person will be returned to Vanuatu to serve the

7.1.1.3. Double criminality and territorial jurisdiction

Section 3 of the Extradition Act states:

> "(1) An offence is an extradition offence if:
>
> (a) it is an offence against a law of the requesting country for which the maximum penalty is imprisonment, or other deprivation of liberty, for a period of not less than 12 months; and
>
> (b) the conduct that constitutes the offence, if committed in Vanuatu, would constitute an offence in Vanuatu for which the maximum penalty is imprisonment, or other deprivation of liberty, for a period of not less than 12 months."

Therefore, crimes under international law which can be prosecuted in Vanuatu (and the requesting state) will be subject to extradition proceedings, but extradition for other crimes under international law will not be possible, potentially leading to impunity for some of the worst crimes imaginable, including genocide (see Section 4.3.3 above). Additionally, Section 17 (2) (g) of the Extradition Act goes on to state that extradition may not be granted if "the offence ... was committed outside the territory of the requesting country and the law of Vanuatu does not provide for jurisdiction over an offence of that kind committed in similar circumstances outside its territory", potentially leading to further impunity.[282]

This double criminality requirement does not indicate whether the conduct would have to be criminal at the time of the crime, at the time of the extradition request or at the time the extradition is to take place.

For the reasons why this double criminality rule has no place with regard to crimes under international law, see Section 6.4.

7.1.1.4. Political offence

Vanuatu does not have a mandatory exception to extradition of persons suspected of committing a political offence. However, this is grounds for an "extradition objection" under section 4 of the

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> sentence imposed..."

[282] The non-binding London Scheme provides:

> "A request for extradition may be refused in the discretion of the competent authority of the requested country if -
>
> . . .
>
> (b) the offence for which extradition is requested has been committed outside the territory of either the requesting or requested country and the law of the requested country does not enable it to assert jurisdiction over such an offence committed outside its territory in comparable circumstances[.]"

London Scheme, para. 14 (b).

Extradition Act.[283] The term "extradition objection" is not defined in the Extradition Act, and no relevant case law was located.

Including a political offence exception to extradition is not in and of itself a problem. The problem arises when states fail to define the term in a manner which expressly excludes crimes under international law since there is no internationally agreed definition of what constitutes a 'political offence'.[284] 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 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 potential political offence is also a crime under international law, it fits the exception for offences that are non-political. Moreover, other treaties implicitly exclude the possibility of the relevant crime being a political offence by imposing a try or extradite obligation with respect to that crime.[285] 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.[286]

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[283] Extradition Act, s. 4. The non-binding London Scheme states that extradition will be precluded within the Commonwealth if the competent authority "is satisfied that the offence is of a political character." London Scheme, para. 12 (a). However, the London Scheme, para. 12 (b), states that the political offence exception does not apply to:

> "(i) offences established under any multilateral international convention to which the requesting and requested countries are parties, the purpose of which is to prevent or repress a specific category of offences and which imposes on the parties an obligation either to extradite or prosecute the person sought;
>
> (ii) offences for which the political offence or offence of political character ground of refusal is not applicable under international law".

[284] 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).

[285] 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, such as the Convention against Torture, implicitly do so by imposing an extradite or try obligation (see treaties discussed in Section 4.2. above). If an offence must be tried, it cannot fit within any exception, including the political offence exception.

[286] Article 1.F reads:

Vanuatu defines the term "political offence" in Section 2 of the Extradition Act, and expressly excludes the "offence of genocide", as well as any offence

> "(i) that is constituted by conduct of a kind referred to in a multilateral treaty to which Vanuatu is a party; and
>
> (ii) for which parties have an obligation to extradite or prosecute",

as well as a number of other offences,[287] none of which are crimes under international law. Therefore, war crimes (except for war crimes in international humanitarian law treaties), crimes against humanity and enforced disappearances are not expressly excluded from the definition of political offences. It is worth noting that Vanuatu has been a party to the 1984 Convention against Torture since 12 July 2011 (see Section 4.3.4), so any offences covered by this treaty will be excluded from definition as a political offence.

7.1.1.5. Military offence

Vanuatu law does not contain any provision expressly barring extradition for purely military offences, such as conduct unbecoming an officer or mutiny. Section 4 of the Extradition Act does, however, provide that if an "offence is an offence under the military law, but not also under the ordinary criminal law, of Vanuatu", this is grounds for an extradition objection.[288]

7.1.1.6. *Ne bis in idem* – Double jeopardy

Vanuatu law provides that Vanuatu may extradite a suspect for trial if the person has been previously acquitted or convicted, but this is grounds for an extradition objection.[289] See discussion above in Section 6.7 regarding the limitations of the *ne bis in idem* (double jeopardy) prohibition under international law.

> "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."

[287] Extradition Act, s. 2.

[288] The non-binding London Scheme permits states to refuse extradition within the Commonwealth on the grounds that the offence for which extradition is sought is an offence only under military law or a law relating to military obligations. London Scheme, para. 14 (d).

[289] Extradition Act, s. 4 (g).

7.1.1.7. Non-retroactivity

There is no provision of Vanuatu law expressly prohibiting extradition on the basis that the conduct was not a crime under the law of the requesting state or Vanuatu at the time it occurred, although it may be implicit in the double criminality requirement in Vanuatu law (see Section 7.1.1.3 above). See discussion above in Section 6.6 regarding the inapplicability of the prohibition of retroactive criminal law to *national* law enacted after the conduct became criminal under *international* law.

7.1.1.8. Statutes of limitation

There is no provision in Vanuatu law expressly prohibiting extradition on the basis that the prosecution would be barred in the requesting state or in Vanuatu on the basis of a statute of limitation, but Section 4 (f) of the Extradition Act provides that if "under the law of the requesting country or Vanuatu, the person has become immune from prosecution or punishment because of lapse of time..." this is grounds for an extradition objection.[290] It may also be implicit in the double criminality requirement in Vanuatu law (see Section 7.1.1.3 above). See discussion above in Section 6.3 regarding the prohibition of statutes of limitations for crimes under international law.

7.1.1.9. Amnesties, pardons and similar measures of impunity

There is no provision in Vanuatu law prohibiting extradition on the basis that the prosecution would be barred in either the requesting state or in Vanuatu on the basis of an amnesty, pardon or other measure of impunity. However, Section 4 (f) of the Extradition Act provides that if "under the law of the requesting country or Vanuatu, the person has become immune from prosecution or punishment because of ... amnesty or any other reason" this is grounds for an extradition objection.[291] See discussion above in Section 6.10 regarding the prohibition of amnesties and similar measures of impunity for crimes under international law.

7.1.1.10. Other obstacles

One positive aspect of the Extradition Act is that there is no requirement that an accused has ever been in Vanuatu at any point before the extradition request can be made.

7.1.2. SAFEGUARDS

There are no effective human rights safeguards with regard to extradition. What safeguards there are are entirely discretionary, not mandatory. Moreover, there is not even a discretionary ground for refusal of extradition if the person would face an unfair trial.

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[290] Extradition Act, s. 4 (f). The non-binding London Scheme provides that states should refuse extradition to other Commonwealth countries if satisfied that "the passage of time since the commission of the offence" would make extradition unjust, oppressive, or too severe a punishment. London Scheme, para. 13 (b) (iii). In addition, states may refuse extradition if the person sought has gained immunity due to a lapse of time, among other reasons. In addition, states may refuse extradition if the person sought has gained immunity due to a lapse of time, among other reasons. London Scheme, para. 14 (c).

[291] Extradition Act, s. 4 (f). The non-binding London Scheme permits states to refuse extradition on the grounds that the person sought has been given an amnesty. London Scheme, para. 14 (c).

7.1.2.1. Fair trial

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 an unfair trial, nor even a discretionary ground for refusal.[292]

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

Vanuatu has been party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) since 12 July 2011 (see Section 4.3.4 above). Article 3 (1) of the Convention against Torture states that: "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

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, though the Attorney General has the discretion to refuse extradition if the given person has been subject to such treatment by the requesting state in the past.[293] Such a person may possibly, however, be prosecuted in Vanuatu.[294]

7.1.2.3. Death penalty

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 death penalty. However, Section 17 (2) (e) of the Extradition Act (emphasis added) states:

> "The Attorney General *may* refuse to order that the person be surrendered if:
>
> ...
>
> the offence for which surrender has been ordered is punishable by death in the requesting country *but not in Vanuatu* and the requesting country has not given a sufficient undertaking that the penalty either will not be imposed or, if imposed, will not be carried out."[295]

It should be noted that although there appears to be no provision in Vanuatu law, constitutional or otherwise, explicitly barring the death penalty, there are no offences for which Vanuatu imposes this

[292] The non-binding London Scheme permits states to refuse extradition on the grounds that the person sought has been tried *in absentia*. London Scheme, para. 14 (a).

[293] Extradition Act, ss. 17 (2) (g) & 60 (2) (b).

[294] Extradition Act, s. 60 (2) (c).

[295] The non-binding London Scheme permits the requested state the discretion to decline extradition on death penalty grounds if the requested state's law does not provide for the death penalty as punishment for the offence. London Scheme, para. 15 (2).

penalty.[296] Therefore, the Attorney General would have the discretion to refuse extradition in any such case. Such a person may possibly be prosecuted in Vanuatu.[297]

7.1.2.4. Other human rights safeguards

There are some other human rights safeguards in the Extradition Act regarding extradition, for instance on discrimination regarding "…race, religion, nationality, political opinions, sex, status…",[298] or if the defendant would be "…liable to be tried or sentenced in the requesting country by an extraordinary or ad hoc court or tribunal".[299] These safeguards are not absolute, but are either grounds for an extradition objection by any person (see Section 7.1.1.4 above), or are at the discretion of the Attorney General. The Vanuatu Constitution prescribes various fundamental rights, but states that these are: "…subject to any restrictions imposed by law on non-citizens…".[300]

7.1.2.5. Humanitarian concerns

There is no express provision in Vanuatu law 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.[301]

7.1.2.6. Speciality

Although the Extradition Act does not expressly limit the scope of the crimes for which the requesting state may exercise jurisdiction to those listed in the extradition request, the Attorney

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[296] Amnesty International, Abolitionist and retentionist countries (http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries).

[297] Extradition Act, s. 60 (2) (e).

[298] Extradition Act, s. 4 (b). The non-binding London Scheme provides:

> "The extradition of a person sought also will be precluded by law if -
>
> (a) it appears to the competent authority that:
>
> (i) the request for extradition although purporting to be made for an extradition offence was in fact made for the purpose of prosecuting or punishing the person on account of race, religion, sex, nationality or political opinions, or
>
> (ii) that the person may be prejudiced at trial or punished, detained or restricted in personal liberty by reason of race, religion, sex, nationality or political opinions."

London Scheme, para. 13 (a) (i) and (ii).

[299] Extradition Act, s. 17 (2) (i).

[300] Constitution of the Republic of Vanuatu, art. 5 (1).

[301] BBC, "Pinochet 'unfit to face trial'", 12 January 2000 (http://news.bbc.co.uk/1/hi/uk/599526.stm).

General may refuse extradition if the requesting state declines to agree to this limitation.[302]

7.2. MUTUAL LEGAL ASSISTANCE

As discussed below, there are a number of multilateral extradition treaties with mutual legal assistance provisions, including Protocol I to the Geneva Conventions[303] and the Convention against Torture.[304] In addition, there are mutual legal assistance treaties which usually require such assistance to be provided if the law of the requested state allows it, but not expressly requiring the requested state to enact such legislation if it does not exist. Vanuatu has no such bilateral mutual legal assistance treaties.[305]

Regional organizations to which Vanuatu belongs also have agreements providing for mutual legal assistance, including the non-binding Scheme Relating to Mutual Assistance in Criminal Matters in the Commonwealth (Harare Scheme).[306] As discussed below, the Harare Scheme has a number of provisions that could lead to impunity and that should not be implemented in law or practice by Vanuatu.

It should be noted that under the Mutual Assistance in Criminal Matters Act [Cap 285] the Attorney General has the discretion to refuse any request for mutual legal assistance if in her or his opinion "it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted."[307]

7.2.1. UNAVAILABLE OR INADEQUATE PROCEDURES

There are a number of mutual legal assistance procedures in Vanuatu that are unavailable or inadequate, either with regard to requests by Vanuatu for assistance or with regard to requests by foreign states to Vanuatu for assistance, including the conduct of investigations, and tracing of assets.

7.2.1.1. Conducting investigations

The law of Vanuatu, notably the Mutual Assistance in Criminal Matters Act, does not appear to

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[302] Extradition Act, s. 17 (2) (c). The non-binding London Scheme has a specialty rule. London Scheme, para. 20.

[303] Protocol I, art. 88.

[304] Convention against Torture, art. 9.

[305] Information received by Amnesty International from a senior Vanuatu government official on 6 September 2012, *supra*, n. 14.

[306] Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme), October 2005 (http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/2C167ECF-0FDE-481B-B552-E9BA23857CE3_HARARESCHEMERELATINGTOMUTUALASSISTANCE2005.pdf). The Harare Scheme is a non-binding agreement on principles between Commonwealth nations. *See* Kimberly Prost, 'Cooperation in Penal Matters in the Commonwealth', *International Criminal Law, Volume II: Multilateral and Bilateral Enforcement Mechanisms* 423 – 435 (2008).

[307] Mutual Assistance in Criminal Matters Act [Cap 285], s. 10 (h).

permit Vanuatu's police, prosecutors or investigating judges to conduct criminal investigations in territory subject to the jurisdiction of a foreign country, and does not appear to permit the police, prosecutors or investigating judges of foreign countries to conduct criminal investigations in territory subject to the jurisdiction Vanuatu.[308]

7.2.1.2. Tracing, freezing, seizing and forfeiting assets

The law of Vanuatu permits its own and foreign authorities to trace, freeze, seize or forfeit assets of a suspect or convicted person, though the process for tracing assets is somewhat unclear both in Vanuatu and abroad.[309]

Tracing – Vanuatu authorities are authorised to issue a search warrant for property within Vanuatu on the basis of a request from a foreign country.[310] Search warrants authorise the authorities "to enter the land or premises; and … to search the land or premises for that thing…". The authorities may issue a "production order" compelling a person having control of a document to produce it.[311] Production orders may be authorised in relation to requests from foreign states.[312] The authorities may issue a "monitoring order" directing a financial institution to provide information,[313] but there is no specific provision regarding a request from a foreign country. It is unclear what would happen in this instance, though the 2001 Vanuatu Supreme Court civil case *Kazacos v Pacific International Trust Co* appears to permit the compulsory production of information from a financial institution.[314]

Vanuatu authorities are able to "request the appropriate authority of [a] foreign country to obtain a warrant or other instrument" authorising "a search for a thing relevant to [a] proceeding or investigation".[315] As there appear to be no measures authorising the request of an equivalent to either a "production order" or a "monitoring order", it is not clear how broadly this may be interpreted. In the 1997 *Swanson* case the Vanuatu Supreme Court describes a request made to the United Kingdom Attorney General, by the Vanuatu Attorney General, "for … assistance in obtaining by search and seizure *if necessary*" the required objects (emphasis added), possibly implying the use of other methods if appropriate.[316]

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[308] Mutual Assistance in Criminal Matters Act.

[309] The non-binding Harare Scheme provides for a limited form of this type of assistance between Commonwealth nations in extradition cases. Harare Scheme, para. 3.

[310] Mutual Assistance in Criminal Matters Act, ss. 19 & 20.

[311] Proceeds of Crime Act [Cap 284], s. 82A (4).

[312] Proceeds of Crime Act, s. 82D.

[313] Proceeds of Crime Act, s. 82H.

[314] *Kazacos v Pacific International Trust Company Ltd* [2001] VUSC 46; Civil Case 044 of 1998 (7 May 2001).

[315] Mutual Assistance in Criminal Matters Act, s. 18 (2) (a).

[316] *Public Prosecutor v Swanson* [1997] VUSC 37; Criminal Case No 007 of 1996 (1 October 1997)

Freezing – Vanuatu authorities are authorised to request a "restraining order" to freeze assets in another country "in connection to a serious offence" or to "terrorist property",[317] and to "make arrangements for the enforcement of a foreign restraining order, in connection with a serious offence or terrorist property, against property that is believed to be located in Vanuatu".[318]

Seizing – The Vanuatu authorities are authorised to seize any specific thing found as the result of a search requested by a foreign country,[319] as well as to seize any other thing found in the search and believed "to be relevant to the proceeding or investigation in the foreign country or to provide evidence about the commission of a criminal offence in Vanuatu…".[320] Vanuatu authorities are authorised to request such a seizure by a foreign country.[321]

Forfeiture – Vanuatu authorities are authorised to request the enforcement in a foreign country of "a forfeiture order in connection with a serious offence" or "in connection with terrorist property",[322] or of a "pecuniary penalty order in connection with a serious offence".[323] Vanuatu authorities are authorised to enforce "a foreign forfeiture order, in connection with a serious offence or terrorist property", or "a foreign pecuniary penalty order, in connection with a serious offence", if the property is believed to be in Vanuatu.[324]

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

Vanuatu permits its own and foreign authorities to use video-conferencing and other special measures to present evidence.[325]

7.2.1.4. Acceptance of foreign official documents

Vanuatu has the following procedure for requesting official copies of official documents:

> "The Attorney General may request the appropriate authority of a foreign country to arrange, for a proceeding or investigation in a criminal matter in Vanuatu, for:
>
> …

[317] Mutual Assistance in Criminal Matters Act, ss. 38 (1) (c) & 39 (1) (b); Proceeds of Crime Act, ss. 52 & 65.

[318] Mutual Assistance in Criminal Matters Act, s. 40 (3); Proceeds of Crime Act, ss. 52 & 65.

[319] Mutual Assistance in Criminal Matters Act, s, 20 (1) (.b)

[320] Mutual Assistance in Criminal Matters Act, s. 21.

[321] Mutual Assistance in Criminal Matters Act, s. 18.

[322] Mutual Assistance in Criminal Matters Act, s. 38 (1); Proceeds of Crime Act, s. 20 (1); Counter Terrorism and Transnational Organised Crime Act [Cap 313], ss. 19 & 20.

[323] Mutual Assistance in Criminal Matters Act, s. 38 (1) (b); Proceeds of Crime Act, s. 28 (1)

[324] Mutual Assistance in Criminal Matters Act, s. 40; Proceeds of Crime Act, ss .20 (1) & 28 (1); Counter Terrorism and Transnational Organised Crime Act, ss. 19 & 20.

[325] Mutual Assistance in Criminal Matters Act, ss. 11 (2), 15 (2) & 55 (1) (c).

a document or other article in the foreign country to be produced under the law of that country."[326]

The Attorney General may authorise the production of official copies of documents and their transmission to a foreign country.[327] Once this is done, a judge may "require the document to be produced to him or her", and must then "send it, or a copy of it certified by the Judge to be a true copy, to the Attorney General."[328] The means of transferring the document or copy to the foreign country authorities is not spelled out.

7.2.1.5. Recognition and enforcement of awards of reparations

A person who wishes to enforce a foreign judgment in Vanuatu can do so by filing a claim in the Supreme Court.[329] Section 13.5 of the Civil Procedure Code permits the enforcement of foreign judgments awarding civil reparations for a fixed amount, but this appears to be limited to the enforcement of an award of compensation, and does not include the enforcement of other forms of relief, such as restitution of property, which could be held in Vanuatu.

7.2.2. INAPPROPRIATE BARS TO MUTUAL LEGAL ASSISTANCE

There are a number of potential inappropriate bars to mutual legal assistance with regard to crimes under international law. These include the Attorney General having the discretion to refuse a request for mutual legal assistance on the basis that the offence is not a crime under Vanuatu law, or that Vanuatu has not provided for universal jurisdiction over the offence.

7.2.2.1. Nationality

There appears to be no restriction on Vanuatu permitting the granting of requests for mutual legal assistance when the person concerned is a national of Vanuatu.[330]

7.2.2.2. Political offence

Vanuatu does not permit the granting of requests for mutual legal assistance with respect to political offences or associated offences (in contrast, see discussion in Section 7.1.1.4 above). This term does not expressly exclude crimes under international law.[331] There appears to be no provision

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[326] Mutual Assistance in Criminal Matters Act, s. 11 (1) (b). See also Harare Scheme, para. 3.

[327] Mutual Assistance in Criminal Matters Act, s. 12 (2).

[328] Mutual Assistance in Criminal Matters Act, s. 14 (1).

[329] Civil Procedure Rules (No.49 of 2002), Part 13, rule 13.5.

[330] The non-binding Harare Scheme does not expressly prohibit the granting of requests for mutual legal assistance on the grounds that the assistance concerns an offence alleged to have been committed by a national of the requested state.

[331] Mutual Assistance in Criminal Matters Act, ss. 8 (a) & (b). The non-binding Harare Scheme allows a requested state to refuse provision of mutual assistance on the grounds that the criminal matter concerns an offence that appears, in the opinion of the requested state, to be of a political character. Harare Scheme, para. 8 (1) (c). Importantly, the Scheme states that crimes under international law whose parent treaties contain an *aut*

covering political offences with regard to the making of requests for mutual legal assistance by Vanuatu.

For an explanation of the issues surrounding political offences, see Section 7.1.1.4 above.

7.2.2.3. *Ne bis in idem* – Double jeopardy

Vanuatu does not permit the granting of requests for mutual legal assistance where the person concerned has previously been tried and convicted, or acquitted, in a court for the same act or omission, even when the proceedings were a sham or unfair.[332] There appears to be no provision prohibiting the making of requests for mutual legal assistance under such circumstances.

7.2.2.4. Double criminality

Vanuatu law does not prohibit, but gives the discretion to the Attorney General to permit, or not, the granting of requests for mutual legal assistance on the ground that the conduct was not criminal in both Vanuatu and the requesting state.[333] This provision permits the Vanuatu Attorney General to decline to provide mutual legal assistance in cases involving crimes under international law not included in the criminal law of Vanuatu, including all war crimes other than grave breaches of the Geneva Conventions where certain conditions are met, slavery, and slave trading (see Section 4 above). There appears to be no provision requiring double criminality with regard to the making of requests for mutual legal assistance by Vanuatu.

Despite the discretion given to the Attorney General on this matter in Section 10 (a) of the Mutual Assistance in Criminal Matters Act (described in the above paragraph), in the 2008 *PKF Chartered Accountants* case, the Vanuatu Court of Appeal interpreted the Act in a manner which would completely prohibit the granting of requests for mutual legal assistance on the ground that the conduct was not criminal in both Vanuatu and the requesting state.[334] The court notes that Section 20 (2) (a) of the Act states that a warrant may be issued only if the investigation involves a "serious offence", and "Section 1 of the Act define[s a] 'serious offence' as an offence 'against the law of another country constituted by an act or omission that, had it occurred in Vanuatu, would have constituted an offence'." Though the Court of Appeal does take a wide interpretation of the definition of a "serious crime", referring to offences "which are in substance the same as the equivalent offences under" Vanuatu law, under this reading serious obstacles are likely regarding provision of mutual legal assistance in cases involving crimes under international law not included in the criminal law of Vanuatu, including all war crimes other than grave breaches of the Geneva Conventions where certain conditions are met, slavery, and slave trading (see Section 4 above).

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dedere aut judicare clause are excluded from the political offence exception. Both the requesting and requested state must be party to the treaty containing the obligation. See Harare Scheme, para. 8 (4).

[332] Mutual Assistance in Criminal Matters Act, s. 8 (e). There is no such bar in the non-binding Harare Scheme.

[333]Mutual Assistance in Criminal Matters Act, s. 10 (a). Under the non-binding Harare Scheme, requested states may refuse to provide mutual assistance on the grounds that the conduct underlying the criminal matter would not constitute an offence under the law of the requested state.

[334] *PKF Chartered Accountants v Supreme Court* [2008] VUCA 32; [2009] 3 LRC 254 (25 July 2008).

7.2.2.5. Jurisdiction

Vanuatu law does not prohibit, but gives the discretion to the Attorney General to permit, or not, the granting of requests for mutual legal assistance when jurisdiction in the requesting state is based on universal jurisdiction or a form of jurisdiction not recognized in Vanuatu.[335] This provision would permit the Attorney General to refuse to provide mutual legal assistance with regard to all crimes under international law, except grave breaches of the Geneva Conventions where certain conditions are met, and slave trading, on the basis that Vanuatu has not provided its courts with universal jurisdiction over them (see Section 4 above). There appears to be no prohibition on the making of requests for mutual legal assistance by Vanuatu where the jurisdictional basis for the request does not exist in the requested state.

It is not clear if the Court of Appeal ruling in the *PFK Chartered Accountants* case (see Section 7.2.2.4 above) would completely prohibit Vanuatu from providing mutual legal assistance when jurisdiction in the requesting state is based on universal jurisdiction or a form of jurisdiction not recognized in Vanuatu.

7.2.2.6. Amnesty or similar measure of impunity.

Vanuatu appears not to prohibit the granting of requests for mutual legal assistance when a prosecution is barred in either state based on an amnesty, pardon or similar measure of impunity (see Section 6.10 above).

7.2.2.7. Other inappropriate bars to mutual legal assistance

There are other inappropriate bars to granting requests for mutual legal assistance, including the discretion of the Attorney General to refuse the request on the basis that if the crime had been committed in Vanuatu the person responsible could not be prosecuted "by reason of lapse of time".[336] Statutes of limitation have no place with regard to crimes under international law (see Section 6.3 above).

7.2.3. SAFEGUARDS

Some human rights safeguards are in place, but most are only at the discretion of the Attorney General, and not mandatory, such as the option to refuse to provide mutual legal assistance that would lead to the death penalty, torture or other ill-treatment, unfair trial, or other human rights violations.[337] The discretionary nature of these safeguards may lead to the occurrence of such human rights violations.

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[335] Mutual Assistance in Criminal Matters Act, s. 10 (b). There is no such jurisdictional prohibition in the non-binding Harare Scheme.

[336] Mutual Assistance in Criminal Matters Act, s. 10 (c).

[337] The non-binding Harare Scheme also permits Commonwealth nations to refuse to provide assistance on constitutional grounds. Harare Scheme, para. 8 (2) (a).

7.2.3.1. Fair trial

While there is no express prohibition in Vanuatu law on making or granting requests for mutual legal assistance on the ground that the defendant might face the risk of an unfair trial, the Attorney General does have discretion to refuse assistance if she or he believes that "the provision of the assistance would result in manifest unfairness".[338]

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

While there is no express prohibition in Vanuatu law on making or granting requests for mutual legal assistance on the ground that the defendant might face the risk of torture or other ill-treatment, the Attorney General does have discretion to refuse assistance if she or he believes that "the provision of the assistance would result in … a denial of human rights".[339]

7.2.3.3. Death penalty

Although there is no express prohibition in Vanuatu law on granting requests for mutual legal assistance on the ground that the defendant might face the death penalty, the Attorney General expressly has the discretion to refuse assistance on this basis.[340]

7.2.3.4. Other human rights safeguards

There are other human rights safeguards in Vanuatu law with regard to granting requests for mutual legal assistance, one of which is mandatory. Assistance must be refused if in the Attorney General's opinion "there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions".[341] It should also be noted (as referenced above) that the Attorney General has the discretion to refuse assistance if in her or his opinion "the provision of the assistance would result in manifest unfairness or a denial of human rights".[342]

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[338] Mutual Assistance in Criminal Matters Act, s. 10 (f). The non-binding Harare Scheme does not expressly prohibit the making or granting of requests for mutual legal assistance on the grounds that the person concerned faces an unfair trial.

[339] Mutual Assistance in Criminal Matters Act, s. 10 (f). The non-binding Harare Scheme does not expressly prohibit the making or granting of requests for mutual legal assistance on the grounds that the person concerned faces torture or other ill-treatment.

[340] Mutual Assistance in Criminal Matters Act, s. 9. The non-binding Harare Scheme does not expressly prohibit the making or granting of requests for mutual legal assistance on the grounds that the person concerned faces the death penalty.

[341] Mutual Assistance in Criminal Matters Act, s. 8 (c). The non-binding Harare Scheme permits Commonwealth states to refuse assistance on the grounds that such assistance could "facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions or would cause prejudice for any of these reasons to any person affected by the request". Harare Scheme, para. 8 (2) (b).

[342] Mutual Assistance in Criminal Matters Act, s. 10 (f).

8. SPECIAL IMMIGRATION, POLICE AND PROSECUTOR UNITS

Vanuatu has a liaison officer in its immigration unit with responsibility to screen people seeking to enter the country suspected of committing transnational crimes. It has a special law enforcement unit with responsibility to monitor and enforce matters relating to such transnational crimes, but it has no express mandate with respect to crimes under international law. There is no special prosecution unit with responsibility for crimes under international law.

Special immigration units. Vanuatu does not have any special immigration unit designed to screen persons suspected of crimes under international law with a view, not merely to exclude such persons (either when seeking a visa abroad or when arriving at the border), but also to refer their files to police or prosecution authorities for investigation and, where there is sufficient admissible evidence, to prosecute.

However, according to the 2007 Vanuatu Country report to the Security Council Counter-Terrorism Committee:

> "A liaison officer from the TCU [Transnational Crime Unit – see below] is located within the Department of Immigration. Background/security checks on applicants are conducted by the TCU utilizing internal resources and those available through the PTCCC [Pacific Transnational Crime Coordination Centre] and AFP [Australian Federal Police] channels".[343]

It should be noted, however, that the responsibilities of the liaison officer do not appear to cover the screening of persons suspected of crimes under international law (see below).

Special police units. Vanuatu does not have a special police unit, or a special joint police and prosecution unit with a mandate to investigate and prosecute crimes under international law.

However, the Police Force of Vanuatu has established a Transnational Crime Unit (TCU).[344] It has also established a Financial Intelligence Unit (FIU). The FIU has extensive powers to monitor and enforce matters relating to financial transactions, including with regard to financing of terrorism offences. For example, the FIU may apply to the Court to issue an order to prevent a transaction, or to issue a warrant for search and seizure.[345]

The TCU does not appear to have been established on a statutory basis. It is part of the regional Pacific Transnational Crime Network (PTCN). According to the website of the Samoan Ministry of the Prime Minister and Cabinet:

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[343] Security Council Counter-Terrorism Committee, Country Report, Vanuatu, 2007, p.15, S/2007/139.

[344] Asia/Pacific Group on Money Laundering and Offshore Group of Banking Supervisors, Vanuatu, 2nd Joint Mutual Evaluation Report, March 2006, p.7; Security Council Counter-Terrorism Committee, Country Report, Vanuatu, 2007, p.8, S/2007/139.

[345] Financial Transactions Reporting Act of 2000 (as amended) [Cap 268], ss. 12 – 15.

> "Transnational Crime Units in the Pacific were established from the Pacific Transnational Crime Team Network (PTCN) in 2002 with the support from the Australian Government after September 11, to counter transnational crimes in the Pacific when Pacific Governments recognized the changing nature of crimes and the increased impact of transnational crimes such as drugs/arms trafficking, terrorism, money laundering, human smuggling and people trafficking etc. in the Pacific Region".[346]

According to Platypus Magazine in 2009:

> "the Pacific Transnational Crime Network, [is] an AFP [Australian Federal Police] initiated program which has helped 10 Pacific Island nations to work together with the AFP and the US Asia-Pacific counter-drug organisation, Joint Interagency Task Force West, to investigate and prevent crime.
>
> The Pacific Transnational Crime Network (PTCN) was formed in July 2002 in response to the emergence of significant transnational crime. The AFP identified an opportunity to use the strong relationships it had established throughout the Pacific region to extend those partnerships into the creation of a Pacific-owned transnational crime law enforcement entity.
>
> …
>
> The TCUs collect, collate, analyse and disseminate tactical law enforcement intelligence to identify, target and investigate transnational crime. All TCUs are well resourced and are small, discrete entities.
>
> The TCUs use a database developed and implemented by the AFP for processing and managing information, and a secure communications platform to exchange information and intelligence.
>
> All TCU staff receive training by the AFP's Learning and Development teams in law enforcement intelligence, investigations, surveillance and operations security.
>
> The Joint Interagency Task Force (JIATF) West is also supporting training for TCUs, and agencies such as the Pacific Islands Forum secretariat conduct training programs.
>
> The AFP provided the TCUs with vehicles, office equipment and furniture, and all have similar surveillance equipment".[347]

According to the Asia/Pacific Group on Money Laundering, the Vanuatu TCU is responsible for: "conducting investigations involving money laundering and terrorist financing offences, the identification and seizure of criminal proceeds, and conducting investigations in cooperation with

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[346] Website of the Samoan Ministry of the Prime Minister and Cabinet (http://www.mpmc.gov.ws/tcu.html).

[347] Platypus Magazine, Edition 102, July2009, pp. 3 – 4 (www.afp.gov.au/~/media/afp/pdf/3/3-july-09-ptcn.ashx).

foreign jurisdictions".[348] This does not appear, however, to be an exhaustive list of responsibilities. Unfortunately, further information regarding the Vanuatu TCU does not appear to be easily available, but its work does not appear to include the investigation of crimes under international law.

Special prosecution units. There appear to be no special prosecution units in Vanuatu.

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[348] Asia/Pacific Group on Money Laundering and Offshore Group of Banking Supervisors, Vanuatu, 2nd Joint Mutual Evaluation Report, March 2006, p. 7.

9. JURISPRUDENCE

There is no Vanuatu jurisprudence regarding universal jurisdiction.

10. RECOMMENDATIONS

Based on the analysis in this paper, Vanuatu 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, including war crimes, crimes against humanity, genocide, torture and enforced disappearance.

10.1. Substantive law

Amnesty International recommends that the Vanuatu authorities, in particular the Ministry of Foreign Affairs and the Ministry of Justice and Community Services:

1. Ratify, without any limiting reservations, all treaties requiring states to extradite or prosecute crimes under international law, including:

> Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes against Humanity; and
>
> International Convention for the Protection of All Persons from Enforced Disappearance, making declarations pursuant to Articles 31 and 32 recognising the jurisdiction of the Committee on Enforced Disappearances to receive communications from individuals and other states parties.

2. Define crimes under international law as crimes under national law, including:

> genocide;
>
> crimes against humanity;
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> war crimes in both international and non-international armed conflict, including properly defining grave breaches of the 1949 Geneva Conventions (see Section 4.3.1.1);
>
> torture;
>
> extrajudicial executions; and
>
> enforced disappearance,

in accordance with the strictest standards of international law. When incorporating the war crimes provisions of the Rome Statute into domestic law, Vanuatu must ensure that, as a party to the 1977 optional protocols to the Geneva Conventions, those war crimes defined in the protocols but absent from the Rome Statute are included in the domestic war crimes legislation (see Sections 4.3.1.2 – 4.3.1.4). Vanuatu should also ensure that war crimes defined in other international humanitarian law instruments or in customary international law are defined in national law in accordance with such definitions.

3. Define principles of criminal responsibility in accordance with the strictest standards of international law and, in particular, Vanuatu must 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 superior orders as a permissible defence, but permit it to be taken into account in mitigation of punishment.

10.2. Jurisdiction

Amnesty International recommends that the Vanuatu authorities, and in particular the Ministry of Justice and Community Services:

1. Provide that courts have universal criminal and civil jurisdiction over conduct amounting to crimes under international law.

2. Provide that Vanuatu has an *aut dedere aut judicare* obligation to extradite a suspect in territory subject to its jurisdiction or to submit allegations to the prosecution authorities for the purpose of prosecution.

Where Vanuatu has not yet defined such conduct as a crime under national law, ensure that its courts can exercise universal criminal and civil jurisdiction over that conduct directly under international law.

3. Ensure that the Vanuatu authorities can open an investigation, issue an arrest warrant and seek extradition of anyone suspected of a crime under international law even if that suspect has never entered territory subject to Vanuatu's jurisdiction.

However, also ensure that a person suspected of such crimes has sufficient time in territory subject to Vanuatu's jurisdiction before the start of a trial in order to prepare for trial.

4. 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.

10.3. Procedure related to suspects and accused

Amnesty International recommends that the Vanuatu authorities, and in particular the Ministry of Justice and Community Services:

1. 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 Vanuatu.

2. Ensure that the rights of suspects and accused under international law and standards related to a fair trial are fully respected.

3. Ensure that no one is subjected to torture or other cruel, inhuman or degrading treatment or punishment.

10.4. Procedure related to victims

Amnesty International recommends that the Vanuatu authorities, and in particular the Ministry of Justice and Community Services:

1. Clarify that under Sections 34 and 35 of the Criminal Procedure Code victims and their families are able to institute criminal proceedings based on universal jurisdiction over crimes under international law through private prosecutions, *actions civiles*, *actio popularis* or similar procedures.

2. 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.

3. 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.

10.5. Removal of legal, practical and political obstacles:

Legal **–**

Amnesty International recommends that the Vanuatu authorities, and in particular the Ministry of Justice and Community Services:

1. 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.

2. 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.

3. Provide that the principle of *ne bis in idem* (double jeopardy) does not apply to sham or unfair proceedings in a foreign state concerning crimes under international law. Vanuatu authorities should either issue an authoritative interpretation of Section 5 (2) (h) of the Vanuatu Constitution declaring it does not apply to such proceedings, or Vanuatu should amend this constitutional provision.

4. 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. Vanuatu authorities should either issue an authoritative interpretation of Sections 5 (2) (f) & (g) of the Vanuatu Constitution declaring that they do not preclude such jurisdiction, or Vanuatu should amend these constitutional provisions.

5. 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. Regarding pardons, Vanuatu authorities should either issue an authoritative interpretation of Section

5 (2) (h) of the Vanuatu Constitution declaring that it does not apply to pardons for crimes under international law made in other jurisdictions, or Vanuatu should amend this constitutional provision.

Political –

Amnesty International recommends that the Vanuatu authorities, and in particular the Ministry of Justice and Community Services:

1. Ensure that the criteria for deciding whether to investigate or prosecute crimes under international law are developed in a transparent manner in close consultation with civil society, made public, are neutral and exclude all political considerations.

2. Ensure that decisions to investigate or prosecute are taken by independent prosecutors in accordance with such neutral criteria, subject to appropriate review by courts, but not by political officials.

3. Ensure that decisions whether to extradite persons suspected of crimes under international law and to provide mutual legal assistance are made in accordance with neutral criteria and exclude all inappropriate criteria, such as the discretionary ground to refuse the extradition of nationals.

4. Ensure that the final decision whether to extradite or to provide mutual legal assistance is taken by an independent prosecutor or investigating judge, subject to judicial review, and not by a political official.

Practical –

Improvements in investigation and prosecution in the forum state

Amnesty International recommends that the Vanuatu authorities, in particular the Ministry of Foreign Affairs, the Ministry of Justice and Community Services, the Department of Immigration and the Vanuatu Police Force:

1. Ensure there is a system in place by which some members of the police force and some prosecutors have responsibility for investigating and prosecuting crimes under international law committed abroad. One option that might be considered would be to extend the remit of the Transnational Crime Unit (TCU) to cover crimes under international law, as a large amount of infrastructure is already in place within this unit.

Ensure that such a system:

- 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.

Vanuatu should work to extend the remit of the regional Pacific Transnational Crime Network (PTCN) in such a manner.

2. No special immigration unit exists for screening foreigners seeking to enter Vanuatu, including immigrants, visa applicants and asylum seekers, to determine whether they are suspected of crimes under international law. Some system to achieve this should be established. Given that a liaison officer from the TCU is located within the Department of Immigration, consideration could be given to mobilizing the TCU for such a task.

3. Ensure that such a unit or system cooperates fully with police and prosecuting authorities in a manner that fully respects the rights of all persons to a fair trial.

4. Ensure that all judges, prosecutors, defence lawyers and others in the criminal and civil justice systems are effectively trained in international criminal law and standards.

5. Establish an effective victim and witness protection and support unit or system, 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 Vanuatu, in foreign states and in international criminal courts, including through relocation.

Improvements in cooperation with investigations and prosecutions in other states

Amnesty International recommends that the Vanuatu authorities, and in particular the Ministry of Foreign Affairs, the Ministry of Justice and Community Services and the Vanuatu Police Force:

1. Ensure that foreign requests from foreign states for mutual legal assistance, including *commissions rogatoires* (commissions rogatory), in investigating and prosecuting crimes under international law do not face unnecessary obstacles or delays, provided that the procedures are fully consistent with international law and standards concerning the right to a fair trial and that cooperation is not provided when there is a risk that it could lead to the imposition of the death penalty, torture or other cruel, inhuman or degrading treatment or punishment or an unfair trial.

2. Amend Section 13.5 of the Civil Code permitting the enforcement of foreign judgments awarding civil reparations for a fixed amount, which appears to be limited to the enforcement of an award of compensation, to permit enforcement of other forms of relief, such as restitution of property, which could be held in Vanuatu, whether in civil or criminal proceedings, unless the defendant in the foreign proceeding can demonstrate that the proceeding violated international law and standards for a fair trial.

3. Ensure that other requests for mutual legal assistance by foreign states can be transmitted directly to the police, prosecutor or investigating judge, 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.

4. Improve procedures in Vanuatu for conducting investigations abroad, including through participation in joint international investigation teams, with all the necessary areas of expertise. This could be as simple as the participation of one Vanuatu member of a Pacific team, along the lines of

the Pacific Transnational Crime Network (PTCN). Vanuatu should seek to extend the remit of the PTCN in such a manner. Vanuatu should seek to enter into effective extradition and mutual legal assistance agreements with all other states, subject to appropriate safeguards.

5. Eliminate in law and practice any unnecessary procedural obstacles for foreign states seeking to gather information in territory subject to the forum state's jurisdiction concerning crimes under international law.

6. 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.

7. 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. Since Vanuatu can only participate as an observer in Interpol meetings, Vanuatu should consider the possibility of joining Interpol.

8. Cooperate with Interpol in the maintenance of the database on crimes under international law.

9. 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.

BIBLIOGRAPHY

NATIONAL LAW

Constitution

Constitution of the Republic of Vanuatu (http://www.parliament.gov.vu/constitution.html)

General

Vanuatu laws database (http://www.paclii.org/databases.html#VU).

Legislation

Consolidated legislation 2006
(http://www.paclii.org/vu/indices/legis/consol_act2006/Consolidation2006_Alphabetical.html).

Island Courts Act [Cap 167] (http://www.paclii.org/vu/legis/consol_act/ica164/).

Judicial Services and Courts Act [Cap 270] (http://www.paclii.org/vu/legis/consol_act/jsaca280/).

Magistrates' Court (Civil Jurisdiction) Act [Cap 130]
(http://www.paclii.org/vu/legis/consol_act/mcja403/).

Police Act [Cap 105] (http://www.paclii.org/vu/legis/consol_act/pa75/).

Ombudsman Act [Cap 252] (http://www.paclii.org/vu/legis/consol_act/oa114/).

Law Commission Act [Cap 115] (http://www.paclii.org/vu/legis/consol_act/lca173/).

Criminal Procedure Code [Cap 136] (http://www.paclii.org/vu/legis/consol_act/cpc190/).

Public Prosecutor Act [Cap 293] (http://www.paclii.org/vu/legis/consol_act/ppa218/).

Penal Code [Cap 135] (http://www.paclii.org/vu/legis/consol_act/pc66/).

Geneva Conventions Act [Cap 150] (http://www.paclii.org/vu/legis/consol_act/gca208/).

Dangerous Drugs Act [Cap 12] (http://www.paclii.org/vu/legis/consol_act/dda180/).

Counter Terrorism and Transnational Organised Crime Act [Cap 313]
(http://www.paclii.org/vu/legis/consol_act/ctatoca523/).

Extradition Act [Cap 287] (http://www.paclii.org/vu/legis/consol_act/ea149/).

Diplomatic Privileges and Immunities Act [Cap 143] (http://www.paclii.org/vu/legis/consol_act/dpaia363/).

Limitation Act [Cap 212] (http://www.paclii.org/vu/legis/consol_act/la133/).

State Law Office Act [Cap 242] (http://www.paclii.org/vu/legis/consol_act/sloa152/).

Mutual Assistance in Criminal Matters Act [Cap 285] (http://www.paclii.org/vu/legis/consol_act/maicma384/).

Proceeds of Crime Act [Cap 284] (http://www.paclii.org/vu/legis/consol_act/poca160/).

Financial Transactions Reporting Act [Cap 268] (http://www.paclii.org/vu/legis/consol_act/ftra335/).

Pre Independence French Legislation

Law No. 64-1326 declaring the imprescriptibility of crimes against humanity, *Journal Officiel de la République Française* [J.O.] Dec. 29, 1964; cited in Wexler LS, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 Colum. J. Transnat'l L., 1994-1995, p.289.

JUDICIAL DECISIONS AND COURT RULES OF PROCEDURE

Vanuatu Cases

McGreal v Moses – Sentence [2012] VUSC 107; Criminal case 135 of 2009 (9 April 2012) (http://www.paclii.org/vu/cases/VUSC/2012/107.html).

Aru v Salmon [1998] VUSC 56; Criminal Case No 013 of 1998 (18 September 1998) (http://www.paclii.org/vu/cases/VUSC/1998/56.html).

de Robillard v Hudson & Co [1998] VUSC 1; Civil Appeal Case 002 of 1998 (8 January 1998) (http://www.paclii.org/vu/cases/VUSC/1998/1.html).

Public Prosecutor v Lin Schiow Her [1993] VUSC 15 (3 December 1993) (http://www.paclii.org/vu/cases/VUSC/1993/15.html).

Public Prosecutor v Lin Shiow Her [1994] VUSC 4; [1980-1994] Van LR 695 (24 January 1994) (http://www.paclii.org/vu/cases/VUSC/1994/4.html).

Public Prosecutor v Sokomanu [1988] VUSC 1; [1980-1994] Van LR 420 (1 January 1988) (http://www.paclii.org/vu/cases/VUSC/1988/1.html).

Public Prosecutor v Simon [2003] VUSC 58; Criminal Case No 043 of 2002 (27 January 2003) (http://www.paclii.org//cgi-bin/disp.pl/vu/cases/VUSC/2003/58.html?query=%22manifestly%20unlawful%22)

Leodoro v Public Prosecutor [1990] VUCA 11; APPEAL No 9 of 1990 (9 July 1990) (http://www.paclii.org/vu/cases/VUSC/1990/6.html).

Public Prosecutor v Frank [2004] VUSC 63; Criminal Case 004 of 2004 (23 July 2004) (http://www.paclii.org/vu/cases/VUSC/2004/).

Ishmael v Public Prosecutor [2005] VUCA 1; Criminal Appeal Case 04 of 2004 (3 May 2005) (http://www.paclii.org/vu/cases/VUCA/2005/1.html).

Public Prosecutor v Swanson [1997] VUSC 37; Criminal Case No 007 of 1996 (1 October 1997) (http://www.paclii.org/vu/cases/VUSC/1997/37.html).

Public Prosecutor v Ijeh [2010] VUSC 44; Criminal Case 48 of 2010 (9 June 2010) (http://www.paclii.org/vu/cases/VUSC/2010/44.html).

Public Prosecutor v Mogeror [2007] VUSC 83; Criminal Case 33 of 2007 (8 August 2007) (http://www.paclii.org/vu/cases/VUSC/2007/83.html).

Public Prosecutor v Sablan [2003] VUSC 37; Criminal Case No 020 of 2003 (3 July 2003) (http://www.paclii.org/vu/cases/VUSC/2003/37.html).

Public Prosecutor v Tanfield [1994] VUSC 24; Criminal Case 1 of 1993 (10 January 1994) (http://www.paclii.org/vu/cases/VUSC/1994/24.html).

Public Prosecutor v Massing [1997] VUSC 34; Criminal Case No 004 of 1997 (19 September 1997) (http://www.paclii.org/vu/cases/VUSC/1997/34.html).

Public Prosecutor v Boe [2006] VUSC 41; Criminal Case 46 of 2004 (4 April 2006) (http://www.paclii.org/vu/cases/VUSC/2006/41.html).

Kazacos v Pacific International Trust Company Ltd [2001] VUSC 46; Civil Case 044 of 1998 (7 May 2001) (http://www.paclii.org/vu/cases/VUSC/2001/46.html).

PKF Chartered Accountants v Supreme Court [2008] VUCA 32; [2009] 3 LRC 254 (25 July 2008) (http://www.paclii.org/vu/cases/VUCA/2008/32.html).

French Cases

Barbie case, Court of Cassation, Judgment, 6.10.1983 (*Barbie* I).

Pre Independence English Cases

Felton v Calis (1969) 1 Qb 200.

Redland Bricks Ltd v Morris [1970] A.C. 652.

Rules of Court

Civil Procedure Rules 2002 (http://www.paclii.org/vu/rules/CPRules2002/CPRMain.html).

GOVERNMENT DOCUMENTS

Mr Alatoi Ishmael Kalsakau, Attorney General of Vanuatu, speech: "The Birth and Rebirth of Law Reform Agencies: The Establishment of Vanuatu's Law Reform Commission", 11 September 2008, Australasian Law Reform Agencies Conference.

Vanuatu declaration regarding the 2000 Optional Protocol to the Convention on the Rights of the Child (http://www.icrc.org/ihl.nsf/NORM/126445D895CE074BC1257089004E7A90?OpenDocument).

SECONDARY SOURCES

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

Ntumy M.A., *South Pacific Legal Systems*, University of Hawaii Press, Honolulu, 1993.

Findlay, M. Criminal Laws of the South Pacific, Suva: The Institute of Justice and Applied Legal Studies (1996).

Farran S, *A Microcosm of Comparative Law: the Overlay of Customary, French and English Family Law in Present Day Vanuatu*, (2004) Oxford U. Comparative L. Forum 4 (http://ouclf.iuscomp.org/articles/farran.shtml#fn**sym).

Vanuatu Daily Post, "Vanuatu's Law Commission Act advanced", posted on 12 December 2011, accessed 01 March 2012 (http://www.dailypost.vu/content/vanuatu%E2%80%99s-law-commission-act-advanced).

Government of Vanuatu website, Ministry of Justice and Community Services page (http://www.governmentofvanuatu.gov.vu/index.php?option=com_content&view=article&id=90&Itemid=195).

Wexler LS, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 Colum. J. Transnat'l L., 1994-1995.

Cryer R, Friman H, Robinson D, Wilmhurst E, *An Introduction to International Criminal Law and Procedure*, CUP, Cambridge, 2nd Ed., 2010.

W.V.H. Rogers, *Winfield & Jolowicz: Tort* 1075 (Gloucester: Sweet & Maxwell 18th ed. 2010).

Website of the Samoan Ministry of the Prime Minister and Cabinet (http://www.mpmc.gov.ws/tcu.html).

Platypus Magazine, Edition 102, July2009, pp. 3 – 4 (www.afp.gov.au/~/media/afp/pdf/3/3-july-09-ptcn.ashx).

INTERNATIONAL AGREEMENTS

Protocol between Great Britain and France respecting the New Hebrides, February 1906; New Hebrides Order, 1922, annexing protocol between Britain and France respecting New Hebrides, 6 August 1914.

The London Scheme for Extradition within the Commonwealth: including the amendments agreed at Kingstown in November 2002 (http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf).

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

INTERNATIONAL DOCUMENTS

Human Rights Council, Working Group on the Universal Periodic Review, Fifth session, Geneva, 4 – 15 May 2009, A/HRC/WG.6/5/VUT/2, 9 March 2009.

Report on the Working Group of the Universal Periodic Review, Vanuatu, 4 June 2009, A/HRC/12/14.

Report on the Working Group of the Universal Periodic Review, Vanuatu, Addendum, 24 September 2009, A/HRC/12/14/Add.1.

Report of the Human Rights Council on its Twelfth Session, 25 February 2010, A/HRC/12/50.

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

Asia Pacific Forum, "Briefing Paper: APF Partnerships in the Pacific", October 2012.

UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

Security Council Counter-Terrorism Committee, Country Report, Vanuatu, 2007, S/2007/139.

Asia/Pacific Group on Money Laundering and Offshore Group of Banking Supervisors, Vanuatu, 2nd Joint Mutual Evaluation Report, March 2006.

APPENDIX I – LIST OF PAPERS IN THE *NO SAFE HAVEN* SERIES PUBLISHED SO FAR

Bulgaria (http://www.amnesty.org/en/library/info/EUR15/001/2009/en);

Burkina Faso (http://www.amnesty.org/fr/library/info/AFR60/001/2012/fr)

Germany (http://www.amnesty.org/en/library/info/EUR23/003/2008/en);

(https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/ALEMANIA%20LA%20LUCHA%20CONTRA%20LA%20IMPUNIDAD%20A%20TRAVES%20DE%20LA%20JURISDICCION%20UNIVERSAL?CMD=VEROBJ&MLKOB=27141201313) (Spanish)

Ghana (to be published in December 2012)

Sierra Leone (to be published in December 2012)

Solomon Islands (http://www.amnesty.org/en/library/info/ASA43/002/2009/en);

Spain (http://www.amnesty.org/es/library/info/EUR41/017/2008/es) (Spanish only);

Sweden (http://www.amnesty.org/en/library/info/EUR42/001/2009/en);

Vanuatu (to be published December 2012)

Venezuela (http://www.amnesty.org/en/library/info/AMR53/006/2009/en); (http://www.amnesty.org/es/library/info/AMR53/006/2009/es) (Spanish)

APPENDIX II – FULL NAMES OF TREATIES LISTED IN CHART I

- ***Piracy:*** 1958 Convention on the High Seas (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21&lang=en) and 1982 United Nations Convention on the Law of the Sea (http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en);

- ***Counterfeiting:*** 1929 International Convention for the Suppression of Counterfeiting Currency (http://treaties.un.org/Pages/LONViewDetails.aspx?SRC=LONONLINE&id=551&lang=en);

- ***Narcotics trafficking:*** 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-18&chapter=6&lang=en);

- ***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) (http://www.icao.int/icao/en/leb/StatusForms/);

- ***Hijacking a foreign aircraft abroad:*** 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (http://www.icao.int/icao/en/leb/StatusForms/);

- ***Sale of psychotropic substances:*** 1971 Convention on Psychotropic Substances (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6&lang=en);

- ***Certain attacks on aviation:*** 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) (http://www.icao.int/icao/en/leb/StatusForms/);

- ***Attacks on internationally protected persons, including diplomats:*** 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-7&chapter=18&lang=en);

- ***Hostage taking:*** 1979 International Convention against the Taking of Hostages (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-5&chapter=18&lang=en);

- ***Theft of nuclear materials:*** 1979 Convention on the Physical Protection of Nuclear Material (http://www.iaea.org/Publications/Documents/Conventions/cppnm_status.pdf);

- ***Attacks on ships and navigation at sea:*** 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (http://www.imo.org/About/Conventions/StatusOfConventions/Documents/status-x.xls);

- ***Use, financing and training of mercenaries:*** 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-6&chapter=18&lang=en);

- ***Attacks on UN and associated personnel:*** 1994 Convention on the Safety of United Nations (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8&chapter=18&lang=en) and its 2005 Protocol (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8-a&chapter=18&lang=en);

- ***Terrorist bombing:*** 1997 International Convention for the Suppression of Terrorist Bombings (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-9&chapter=18&lang=en);

- ***Financing of terrorism:*** 1999 International Convention for the Suppression of the Financing of Terrorism (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en);

- ***Transnational crime - Transnational organized crime:*** 2000 UN Convention against Transnational Organized Crime (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en);

- ***Transnational crime - Trafficking of human beings:*** 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en);

- ***Transnational crime – Firearms:*** 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang=en); and

- ***Nuclear terrorism:*** 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XVIII~15&chapter=18&Temp=mtdsg3&lang=en).

APPENDIX III – LIST OF ABBREVIATIONS OF IHL TREATIES LISTED ON CHARTS III AND V

1925 Geneva Protocol Geneva	Protocol of 17 June 1925 for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (http://www.icrc.org/ihl.nsf/FULL/280?OpenDocument).
1954 CCP	Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954 (http://www.icrc.org/ihl.nsf/FULL/400?OpenDocument), art. 28.
Hague Prot. 1954	Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954 (http://www.icrc.org/ihl.nsf/FULL/410?OpenDocument).
BWC 1972	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 (http://www.icrc.org/ihl.nsf/FULL/450?OpenDocument), art. IV
ENMOD Conv. 1976	Convention on the prohibition of military or any hostile use of environmental modification techniques, 10 December 1976 (http://www.icrc.org/ihl.nsf/FULL/460?OpenDocument), art. IV
CCW 1980	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 (http://www.icrc.org/ihl.nsf/FULL/500?OpenDocument).
CCW Prot. I 1980	Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980 (http://www.icrc.org/ihl.nsf/FULL/505?OpenDocument).
CCW Prot. II 1980	Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980 (http://www.icrc.org/ihl.nsf/FULL/510?OpenDocument).
CCW Prot. III 1980	Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980 (http://www.icrc.org/ihl.nsf/FULL/515?OpenDocument).
CWC 1993	Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993 (http://www.icrc.org/ihl.nsf/FULL/553?OpenDocument).
CCW Prot. IV	Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995

1995	(http://www.icrc.org/ihl.nsf/FULL/570?OpenDocument).
CCW Prot. II a 1996	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) (http://www.icrc.org/ihl.nsf/FULL/575?OpenDocument).
AP Mine Ban Conv. 1997	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 (http://www.icrc.org/ihl.nsf/FULL/580?OpenDocument).
Hague Prot. 1999	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 (http://www.icrc.org/ihl.nsf/FULL/590?OpenDocument).
Opt Prot. CRC 2000	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000 (http://www.icrc.org/ihl.nsf/FULL/595?OpenDocument).
CCW Amdt 2001	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) (http://www.icrc.org/ihl.nsf/FULL/600?OpenDocument).
CCW Prot. V 2003	Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003 (http://www.icrc.org/ihl.nsf/FULL/610?OpenDocument).
Cluster Munitions 2008	Convention on Cluster Munitions, 30 May 2008 (http://www.icrc.org/ihl.nsf/FULL/620?OpenDocument).

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