



# Operation Murambatsvina: A Crime Against Humanity

**An Independent Legal Opinion whether the 2005 Operation  
Murambatsvina Forced Evictions constituted a crime against  
humanity under the Rome Statute**

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COHRE Africa Programme  
Centre on Housing Rights and Evictions  
83 rue de Montbrillant  
1202 Geneva  
Switzerland  
Tel: + 41.22.734.1028  
Fax: + 41.22.733.8336  
E. [cohre@cohre.org](mailto:cohre@cohre.org)  
W. [www.cohre.org](http://www.cohre.org)

Zimbabwe Lawyers for Human Rights  
6<sup>th</sup> Floor, Beverley Court  
Cnr. Nelson Mandela Ave/4<sup>th</sup> Street  
Harare  
Zimbabwe  
Tel: ++263 4 251 468  
E : [atsunga2002@yahoo.com](mailto:atsunga2002@yahoo.com)  
W : [www.zlhr.org.zw](http://www.zlhr.org.zw)

# Operation Murambatsvina: A Crime Against Humanity

This report contains an Independent Legal Opinion on the question of:

“Are the activities conducted during Operation Murambatsvina crimes against humanity within the meaning of Article 7 of the Rome Statute?”

*Prepared by Martin Westgate, Barrister  
with the assistance of Oxford Pro Bono Publico Group, University of Oxford  
for the Centre on Housing Rights and Evictions and Zimbabwe Lawyers for Human Rights*

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## Preface: Time to Prosecute

With little warning, in May 2005, the Government of Zimbabwe launched a mass evictions and demolitions campaign, called 'Operation Murambatsvina', in many urban centres of Zimbabwe. While described and justified by the Government as a measure to rid the cities of 'illegal activities', it led to the displacement of hundreds of thousands of people, destruction of homes, businesses and property, widespread loss of livelihoods and the injury and deaths of some residents. The active, violent phase of this operation lasted into July 2005, though some evictions continue even today.<sup>1</sup>

The human rights of the victims were given no consideration, and the evictions were heavily criticised by African and international human rights organisations and governments for violating international human rights law. There was insufficient grounds for the evictions, due process was not followed and many of the victims were rendered homeless or without adequate alternative shelter. The evictions were also labelled a crime against humanity. In a media release on 21 June 2005, the Centre on Housing Rights and Evictions (COHRE) stated for instance that:

The evictions in Zimbabwe may constitute a crime against humanity since the Statute of the International Criminal Court clearly prohibits the deportation and forcible transfer of population under certain conditions that appear to be present in the Zimbabwean operation. According to the Rome Statute, deportation or forcible transfer of population is the forced displacement of person from the area in which they are lawfully present, without any grounds permitted under international law, and in the context of a widespread and systematic attack against civilians. Our sources appear to confirm that this is what is taking place in Zimbabwe right now.

It was noted that the Security Council could thus "direct the prosecutor of the International Criminal Court to investigate and prosecute the serious crimes committed in Zimbabwe".

Field research by Zimbabwe Lawyers for Human Rights (ZLHR) and COHRE has confirmed the extent of the suffering of victims of Operation Murambatsvina, popularly called 'Operation Tsunami'. The majority of persons visited in the wake of the evictions were staying out in the open. Some were forced to live with relatives, rent from others at very high prices, or had been allocated makeshift, temporary stands. A significant number also fled to rural areas, though some have returned to the urban centres due to the chronic lack of food and livelihood opportunities in the countryside. To give but one example, among many persons interviewed was a woman who had previously built two cottages to house the orphans she had in her care and to provide rental income to pay for food and school fees. During the operation, the police came and ordered her to "destroy the houses or else". She hired someone to destroy her property as she was too old to do it on her own, and now owes that man 700000 ZD (290 USD at the real unofficial exchange rate; USD 2800 at official exchange rate). She has built a new house, but has had to rent it out to get money for food, with the result that she sleeps outside.

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<sup>1</sup> See for example, '200 families displaced in fresh Murambatsvina style demolitions in Glen Norah', *SW Radio Africa* [online news service] (15 June 2006), <http://www.swradioafrica.com/news150606/glennorah150606.htm>

In the months following the eviction, Mrs. Anna Tibaijuka, the current head of UN-Habitat, was appointed by the UN Secretary General to investigate Operation Murambatsvina. Mrs. Tibaijuka concluded that there had been clear violations of both national legislation and international human rights law. She made a range of recommendations, which included halting evictions, implementing a humanitarian response consistent with human rights, undertaking a participatory review of legislation and by-laws, holding the perpetrators of the evictions criminally accountable, providing compensation to the victims, ensuring security of tenure in land reform and granting full citizenship to former migrant workers. The UN was asked to mobilise international assistance and work with the AU and SADC to promote internal and international dialogue. She also criticised the Government's follow-up to the crisis - a programme called Operation Garikai, which was meant to provide stalls and plots to those rendered homeless and unemployed. She described this policy as being top-down and supply-driven. She was also sceptical as to whether the national government, already in a deep financial crisis, could fund the rebuilding programme or facilitate access to credit.

ZLHR and Human Rights Trust of South Africa also filed an application for provisional measures with the African Commission on Human and Peoples' Rights on behalf of those who had been evicted. In November 2005, the Commission responded with a resolution that urged the Government of Zimbabwe to "cease the practice of forced evictions throughout the country, and to adhere to its obligations under the *African Charter on Human and Peoples' Rights*" and "implement without further delay the recommendations ... recommendations in the July 2005 Report of the UN Special Envoy on Human Settlement Issues".

In the two years intervening since Operation Murambatsvina, the Special Envoy's recommendations have for the most part not been implemented. In March 2007, the Advisory Group on Forced Evictions to Executive Director of UN-Habitat reported in Nairobi that in,

In the wake of *Operation Murambatsvina* and Zimbabwe's economic crisis, millions of evictees continue to face poverty, malnutrition, starvation and disease. In June 2005, the Government of Zimbabwe launched Operation Garikai/Hlalani Kuhle (Better Life) to provide housing to many of those who lost homes under Operation Murambatsvina. However, over one year after the programme was launched, the Government had built approximately 3,325 houses, to accommodate those left homeless from the destruction of approximately 92,460 structures. At least 20 percent of the houses were earmarked for civil servants, police and soldiers, while some victims of Operation Murambatsvina were provided small plots of land without assistance with which to build homes. Furthermore, many of the homes designated as "built" are not finished, do not have water and sanitation facilities, and have not been allocated. In fact, even if a victim of Operation Murambatsvina was able to access a home through the highly corrupt allocation process, the majority of victims would not be able to afford the homes.<sup>2</sup>

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<sup>2</sup> *Forced Evictions – Towards Solutions?*, Second Report of the Advisory Group on Forced Evictions to Executive Director of UN-Habitat (Nairobi: UN-Habitat, 2007), Reported Case 9: Various Areas in Zimbabwe.

In this context, COHRE and ZLHR decided that the lack of genuine effort by the Zimbabwean authorities to take action against those responsible for Operation Murambatsvina, and their failure to provide redress to the victims, meant that it was time to revisit the question of crimes against humanity and ensure renewed attention by the international community, including but not necessarily limited to the UN Security Council and the ICC. Moreover, the UN Special Envoy's analysis of crimes against humanity was cursory and her hope that those responsible would be prosecuted under national laws has not been realised.<sup>3</sup> A full independent legal opinion was therefore commissioned by our organisations and is presented in this report.

The legal opinion concludes that:

For reasons that are developed more fully below we conclude that the available evidence does disclose grounds to believe that a crime against humanity may have been committed under both of the following Articles of the Rome Statute:

Article 7(1)(d) – deportation or the forcible transfer of population.

Article 7(1)(k) - Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

and

The result is that a prosecution could be commenced before the International Criminal Court subject to a reference being made by the United Nations Security Council.

In these circumstances, we believe it is incumbent upon the Security Council to take action and refer Operation Murambatsvina to the ICC Prosecutor for investigation in accordance with Article 13 of the Rome Statute. This situation clearly is one in which crimes against humanity appear to have been committed. While the required test of the crimes being also a “threat to the peace, breach of the peace, or act of aggression” under Chapter VII of the UN Charter may be largely a political question for the Security Council, we are certain it is met given that the evictions were of significant severity, accelerated the mass migration of Zimbabweans to neighbouring countries and constitute a threat to future peace in the region if the situation in Zimbabwe continues to deteriorate.<sup>4</sup> In our view, therefore, the magnitude of the crimes against humanity committed during Operation Murambatsvina, demand that that the international community provide an adequate and proportionate response. It is incumbent upon the Security Council to send a message to the victims of Operation Murambatsvina that the crimes committed against them will not go unpunished. Moreover, as experience has shown elsewhere, pressure from international tribunals can lead political actors to negotiate over demands to halt and redress crimes against humanity.

COHRE and ZLHR also note that there have been calls for referral of Zimbabwean officials to the ICC for other crimes against humanity. Zimbabwean Archbishop Pius Ncube of Bulawayo together with Cardinal Wilfred Napier, President of the Southern African Bishop's Conference, have called the politicisation of food aid in Zimbabwe, in which food aid is only

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<sup>3</sup> Paragraph (i) of the Executive Summary, Recommendation 11 and paragraph 6.7.

<sup>4</sup> Even though the actual crimes occurred within the territory of one State, this has not been a barrier in the past to Chapter VII declarations, such as in Somalia and Bosnia. See Gareth Evans, “International Law and the United Nations: The Use of Military Force”, Heinrich Boell Foundation, 5<sup>th</sup> Annual Foreign Policy Conference, *The Role of International Law and the United Nations in a Globalizing World*, Berlin, 24 June 2004.

given to government supporters, a crime against humanity, and they have called for the international community to act.<sup>5</sup> The International Bar Association has similarly called for a referral to the International Criminal Court for a number of acts, including the evictions and politicisation of food aid, as well as imprisonment of opposition leaders, rape, abduction and torture.<sup>6</sup>

At the same time, prosecutions could also be commenced in States where courts have universal jurisdiction over crimes against humanity. The most notable possibility is South Africa where a prosecution could be launched if the perpetrator was visiting or residing in South Africa, or a victim is ordinarily resident in South Africa, and the National Prosecution Authority granted their consent to the prosecution proceeding.<sup>7</sup> Other possible jurisdictions include the Netherlands, Germany, Spain, Germany and to a lesser extent Belgium.

COHRE and ZLHR also continue their call on the Zimbabwean Government and the international community to implement all of the recommendations of the UN Special Envoy's report, and for all political actors in Zimbabwe, including the opposition, to develop and implement adequate plans for the restitution of land and housing to victims of Operation Murambatsvina and the provision of aid and resettlement where required. We pledge our ongoing support to all organisations who are working to achieve this, and which are striving for a future in which basic human rights are guaranteed, protected and promoted in Zimbabwe.

*Jean du Plessis*  
*Executive Director, COHRE.*

*Arnold Tsunga*  
*Executive Director, ZLHR*

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<sup>5</sup> See *Crime Against Humanity: The Case for Urgent Action on Zimbabwe*, Sokwanele Civic Action Support Group, 17 October 2005.

<sup>6</sup> See Mark Ellis, 'Indict Zimbabwe's demagogue', *International Herald Tribune*, 27 December 2005.

<sup>7</sup> See the Implementation of the Rome Statute of International Criminal Court Act 2002 and Amsterdam International Law Clinic, *Possibilities for Criminal and State Responsibility in Relation to the Murambatsvina Case*, 2006.

## **Executive Summary of Legal Opinion**

A. Operation Murambatsvina (Operation Restore Order) took place between the end of May and July 2005. In that time hundreds of thousands of people were forcibly evicted from homes and businesses that they had built up and occupied, sometimes for a number of years. The numbers affected may be as high as 700,000.

B. A report by UN Special Envoy, Anna Tibaijuka was highly critical of the operation and made a number of recommendations. One of the issues touched by the UN Report was whether the evictions constituted a crime against humanity for the purposes of Article 7 of the Statute of the International Criminal Court. The report concluded that with the available evidence this would be difficult to sustain, and any argument about the applicability of the Article would be acrimonious and protracted and would “serve only to distract the attention of the international community from focussing on the humanitarian crisis facing the displaced who need immediate assistance.”

C. It is difficult to evaluate the Special Envoy’s reasoning on this issue as it was based in part on a confidentially obtained legal opinion. However, since the available evidence suggests that little effort has been made to meet her recommendations - the need for assistance is acute and there is no evidence of any effective redress within Zimbabwe - it is therefore apt to revisit the question of whether the operation falls within Article 7.

D. As the extensive analysis in the legal opinion makes clear, we conclude that the available evidence does disclose grounds to believe that two crimes against humanity may have been committed under both of the following Articles of the Rome Statute: deportation or the forcible transfer of population (Article 7(1)(d)) and other inhumane acts (Article 7(1)(k)). The result is that a prosecution could be commenced before the International Criminal Court subject to a reference being made by the United Nations Security Council.

E. We have not attempted to identify any particular individual or individuals who are or might be responsible. We do not currently have the necessary facts at our disposal and it is not the purpose of this opinion. It is sufficient for present purposes to note that perpetrator must know, at least in a general sense, that his or her act is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan.

### **Background**

F. The operation took place against a background of rapid urban growth in Zimbabwe in the years since independence in 1980. By 2004, Zimbabwe had developed a large informal rental sector, with some settlements, and it was estimated that the informal economy accounted for some 40 per cent of employment. Central and local government largely adopted a relaxed approach to the enforcement of planning control and this was placed on a statutory footing.

G. In May 2005 the Government embarked on a radical solution sharply at odds with their previous approach. This became Operation Murambatsvina. The evidence available does not give any indication that this was preceded by any consultation or debate or any attempt to

evaluate the seriousness of the situation, assess alternatives or discuss the situation with those who were later to become victims. In addition, a number of evicted vendors had valid licences and some destroyed properties had been erected in compliance with the relevant building regulations and had been paying taxes and possibly utility bills. Some of those who were evicted also appear to have held leases directly from central or local government.

H. The operation was executed with great speed and brutality. It is described in the UN Report as being carried out in “military style” and as executed in a “militaristic manner”. In at least one case the evictions took place (Porta Farm) in breach of a court order. The true numbers dispossessed will never be known but extrapolating from 2002 census data about average household size 569,685 people were made homeless and 97,614 people lost their main source of livelihood. Of those affected, a large number were children and six people were killed. It is not known how many were seriously injured.

I. The Government of Zimbabwe prepared a detailed response to the UN Report arguing that it was intended to be the precursor to Operation Garikai/Hlalani Kuhle, described as a housing construction programme and an enabling environment for small and medium businesses. Actual progress with this operation has been very slow. The Government of Zimbabwe also claims that the numbers of those affected have been grossly exaggerated – though the census data, which formed the basis for the UN Special Envoy’s estimates, indicates otherwise. The Government accepted that a number of people returned to rural areas but has denied that these were made homeless. Government officials have also claimed that the structures were illegal under Zimbabwean Law and the occupiers were given the opportunity to dismantle them. The Government justified the evictions on a number of grounds, including the apparent need: to stem disorderly or chaotic urbanisation; to minimise the threat of major disease outbreaks; to stop economic crimes; to eliminate the parallel market and fight economic sabotage; to reduce high crime levels; and to arrest social ills, among them prostitution.

### **Crimes against humanity**

J. The Rome Statute establishes a permanent international criminal court with jurisdiction over what are described as “the most serious crimes of concern to the international community as a whole”. Zimbabwe is not party to the Statute, but the Court would have jurisdiction under Article 13(b) of the Statute if the United Nations Security Council referred the matter to the prosecutor in a situation in which “one or more [crimes against humanity] appears to have been committed”. The Security Council may make a reference if a “threat to the peace, breach of the peace or act of aggression exists” (Article 39 of the UN Charter).

### **Deportation or forcible transfer of population**

K. Article 7 of the Rome Statute lists a number of “crime against humanity” which must be involve widespread or systematic attack directed against any civilian population, with knowledge of the attack. “Deportation or forcible transfer of population” is listed and defined in Article 7 (2)(d) as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”. This article, as well as international jurisprudence, recognises that forced displacement can include forcible transfer within a State.

L. We conclude that Operation Murambatsvina, did involve a forcible transfer of population, the first requirement to be proved. While it is clear that many individuals demolished their own homes that cannot affect whether or not this was a forced transfer: the displacement may be by expulsion or “*other coercive acts*”. Those who demolished their homes did so under threat that if they did not do so then they would be destroyed by the authorities. None of them did so voluntarily and the UN Report expressly states that they did so out of fear. Some of them seem to have been conducted under the direct supervision of the police. While some victims did stay on the site of their demolished homes, many thousands did not and they either moved back to rural areas or tried to stay with friends (see statement of facts above). Even for the victims who stayed, they lost their homes and it seems that many had no rural home to which to return.

M. Concerning the requirement of lawful presence of the victims, we consider this criteria met. The reason given by the Zimbabwean government (and partly endorsed by the UN Report) for holding that the victims were not lawfully present is the claim that they were trading without a relevant consent or were occupying structures erected illegally, without the grant of planning consent. But the phrase “the area in which they are lawfully present” describes physically being in a place - a geographical unit – and is not the same as residence or even possession, or other activities carried out on land. The term “lawfully present” is directed to the right of States to control entry into their territory. This is clear from consideration of the history of the recognition of forcible transfer as a crime against humanity and also has a similarly settled meaning in numerous international instruments. It is evident from the drafting history of Article 7(d) that the focus was on State territory; no discussion was initiated over the narrow question of lawful occupation under domestic law.

N. Would a more technical, narrow approach be the correct one? Answering this question would require a closer look at the relevant planning legislation under which the victims were purportedly removed. Section 32 of the Planning Act provides that if it appears to any local planning authority that any development is in contravention of the Planning Act, then the local planning authority is empowered to serve on the owner of the land, or anyone else potentially affected, an Enforcement Order. The Enforcement Order must state the nature of the contravention, and specify the action required to be taken. Such actions may include the demolition of any building. The notice period for the Enforcement Order must be at least one month and a person on whom the order is served is entitled to appeal such an order. An appeal then suspends the operation of the Enforcement Order. A second type of order, known as a Prohibition Order, is also available under section 34 of the Act. It must be issued by the local planning authority at or after an Enforcement Order, but before the Enforcement Order becomes operative. The effect of the Prohibition Order is to order that operations in contravention of the Planning Act cease, pending the Enforcement Order becoming operative. The Zimbabwean local government authorities could therefore have issued a Prohibition Order to prevent the continuation of illegal trading once the Enforcement Order was issued. The Prohibition Order could not, however, have been used to authorise demolitions.

O. However, even if these provisions had been complied with in full, the effect would not have been that the individuals were unlawfully present in the area, even under the law of Zimbabwe. The Act does not purport to control anybody’s presence on land, still less in an area. Instead it controls use and development of particular land. Very often the person

present (e.g. a tenant) and the developer will be different people. The development can be controlled or regulated by an Enforcement Order, but the Order is again not directed to the occupier's presence. This was the form that the enforcement order here in fact took. Moreover, the authorities failed to comply with the enforcement regime and no valid Enforcement Orders were served. Despite this, the military-style demolitions began on 25 May 2005. In addition, some of those evicted were in possession of valid permits and leases issued by the local authority or by the then Ministry of Local Government and National Housing or by both institutions and some of these persons obtained court orders prohibiting State authorities from proceeding with the evictions.

P. We consider that the effect of the above means that the occupiers were lawfully present because there was nothing making their presence unlawful. Even if we are wrong about this, the body charged with enforcing planning control was the local authority and not the military. If the local authority decided to tolerate the development then the military would not be entitled to evict them. As against the military they would be lawfully present..

Q. Was 'Operation Murambatsvina' committed "as part of a widespread or systematic attack directed against any civilian population", as required by Article 7. This is defined in 7(2)(a) as meaning "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack". In this case, there was a course of conduct involving the multiple commission of acts: there were numerous occasions on which there was a forcible transfer of population or inhumane acts (see below). Equally, we do not think there can be much doubt that the facts, as we have taken them to be, constitute an "attack". This need not be a military attack. International Criminal Tribunal for Rwanda held in *Prosecutor v Akayesu* that, "An attack may also be non-violent in nature, like imposing a system of apartheid ... or exerting pressure on the population to act in a particular manner". The attack at issue in Operation Murambatsvina was pursuant to a 'state or organizational policy'. The operation was announced by governmental officials and was carried out by the police and military. There is no doubt that the State itself actively promoted and implemented it. The victims were clearly a civilian population. The attacks were also widespread or systematic. It was a large scale action directed simultaneously at multiple victims. This reasoning holds good even if the government figures are adopted.

R. An ingredient of the offence is that the displacement must have taken place "without grounds permitted under international law". We also note that the requirement is not that the evictions actually be lawful under international law, but rather that they be without grounds permitted under international law. The question of forced eviction has generally arisen in the context of a claim that it violates human rights and therefore international human rights law is the most relevant branch of international law to consider. International human rights law on the topic can be summarised in the following propositions:

- Forced transfer is prima facie a violation of international law. It interferes with a variety of universally recognised fundamental rights.
- Such transfer can be justified in some exceptional circumstances where it is necessary to fulfil a legitimate purpose.
- Any transfer must be proportionate to the aim sought to be achieved. Not only does this mean that the aim must be sufficiently serious to warrant the harm caused by the

- evictions, but also that the State must properly evaluate the alternatives and take adequate steps to mitigate or minimise the harm caused to that which is truly necessary.
- The force used must be proportionate. The State cannot resort to torture or other violent methods or forms of cruel, inhuman and/or degrading treatment.
  - The transfer must not be arbitrary or discriminatory.
  - The evictions must be preceded by appropriate procedural safeguards adequately involving the affected persons, including but not limited to genuine consultation and due process of law.

This approach is derived from numerous sources, including the African Charter on Human and Peoples' Rights and UN resolutions supported by Zimbabwe.

S. Is there any justification for these evictions likely to be recognised under international law? While the clearance of unauthorised development may be capable of being an aim, in principle justifying some forced displacement, the circumstances here are likely to have amounted to inhuman and degrading treatment. The safeguards required under international customary and treaty law were not met and the evictions were not proportionate. It is important not to lose sight of the scale of the operation. Countervailing benefits of great weight will be necessary to justify the degree of suffering caused. Mass operations such as this are much more than the sum of their parts. They involve the destruction of communities and their support networks. They also place such great pressure on relief agencies and other resources that these become rapidly overwhelmed. The impact of such evictions is much greater than in the case of isolated evictions. The evidence in this case shows:

- No systematic attempt by the government to evaluate what harm was in reality being caused by the targeted homes and businesses, and equally no attempt realistically to assess what harm would be caused by the eviction operation.
- There does not appear to have been any attempt by the government to pursue or even consider less drastic alternatives such as regularising at least some of the developments.
- The operation was carried out in a blanket fashion, without due consideration for the well-being of the individuals concerned. Evidence of this includes particular negative impacts on the elderly, the sick and children.
- In fact it can be seen that the operation was wholly disproportionate. There was massive human suffering but it is difficult to identify what benefits have been produced.
- No adequate measures were taken to mitigate the impact of the Operation. Legal remedies were inadequate, due to both insufficient legal aid (which is provided primarily by NGOs and not by the State), and a compromised judiciary.
- The procedural obligations implicit in proportionality and explicitly required by international law were not followed.

T. We conclude that Operation Murambatsvina clearly failed to comply with the requirements of international law regarding forced evictions. This conclusion was also reached in the UN Report.

### **Causing great suffering, or serious injury to body or to mental or physical health**

U. The Rome Statute defines 'other inhumane acts' as those of a similar character to those listed in Article 7(1), which intentionally causes great suffering, or serious injury to body or

to mental or physical health. The Elements of Crimes of the International Criminal Court requires that the following elements be established:

- The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
- Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
- The perpetrator was aware of the factual circumstances that established the character of the act.
- The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

V. The intentional infliction of harm is an element of the offence but we do not deal with that expressly; this is a matter which will have to be judged in relation to each Defendant. But intention does not involve any subjective desire or wish that the harm be suffered. It is enough that acts are done intentionally that objectively have that result or at least that that would be the inevitable result even if it was not directly aimed at or desired.

W. The language of 7(1)(k) shows that this is a ‘catch all’ provision. It is intended to deal with behaviour that is not expressly enumerated in the specific crimes in the preceding subparagraphs (a) to (j), but the conduct must be similar in character to these other paragraphs. The conduct must cause great suffering or serious injury to body or to mental or physical health. On the basis of the UN Report there is clear evidence of suffering and injury sufficient to meet the threshold. In *Prosecutor v Kupreskić* (International Criminal Tribunal for the Former Yugoslavia) it was held that “[i]nhumane acts under Article 5(i) of the Statute are intentional acts or omissions which infringe fundamental human rights causing serious mental or physical suffering or injury of a gravity comparable to that of other crimes covered by Article 5”, and that the interpretation of ‘other inhumane acts’ can “be identified in international standards on human rights”. Some of the international human rights violations have already been noted above.

X. We therefore hold that the requirement of an inhuman causing great suffering or serious injury is likely to be met. We also contend that the Operation will be seen to be of a character similar to other acts in Article 7.

## **Conclusion**

Y. We have reached the clear view that, on the facts as we have taken them to be, there are good grounds to believe that offences may have been committed under both Article 7(1)(d) and 7(1)(k) of the Rome Statute. We are more confident in our conclusion under 7(1)(d) but still think an argument under 7(1)(k) is sustainable. We hesitate under that paragraph because of the requirement that the infliction of suffering be intentional. The ordinary rule is that a Defendant is taken to intend the normal consequences of their actions, but this paragraph does carry overtones of deliberateness and it is possible that some higher test may be involved. But we do consider that the facts amount to the infliction of “great suffering, or serious injury to body or to mental or physical health”.

# Legal Opinion

## **Are the activities conducted during Operation Murambatsvina crimes against humanity within the meaning of Article 7 of the Rome Statute?**

*Prepared by Martin Westgate, Barrister  
with the assistance of Oxford Pro Bono Publico Group, University of Oxford*

*for the Centre on Housing Rights and Evictions and Zimbabwe Lawyers for Human Rights*

### **1. Introduction**

1. ‘Operation Murambatsvina’ (Operation Restore Order<sup>1</sup>) took place between the end of May and July 2005. In that time hundreds of thousands of people were forcibly evicted from homes and businesses that they had built up and occupied, sometimes for a number of years. The numbers affected may be as high as 700,000. Group evictions are not unknown in Zimbabwe or elsewhere where they are sometimes adopted in response to uncontrolled slum developments. We explain below that such evictions frequently violate international human rights law, but even by these standards Operation Murambatsvina stands out. It took place on a vast scale, without any real notice and caused immense human suffering. The measures were widely condemned both nationally and internationally. The government claimed that the object was to remove illegal development and to combat a variety of attendant economic social and public health problems.<sup>2</sup>

2. On 18 July 2005, a UN Special Envoy, Anna Tibaijuka, presented a report of a fact finding mission to assess the scope and impact of the operation. This important document was highly critical of the operation and made a number of recommendations. The factual summary on which this opinion is based is largely drawn from this Report (referred to below as the UN Report<sup>3</sup>). We have also taken into account the responses made by the Zimbabwe Government.<sup>4</sup> We have not attempted to decide the issues on which the Special Envoy’s report and the Government account differ and we base our conclusions on the assumption that the account set out in the UN Report would be made out.

3. One of the issues touched by the UN report was whether the evictions constituted a crime against humanity for the purposes of Article 7 of the Statute of the International Criminal Court.<sup>5</sup> The report concluded that with the available evidence this would be difficult to sustain, any argument about the applicability of the Article would be acrimonious

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<sup>1</sup> Literally “clear out rubbish”.

<sup>2</sup> See particularly Response (n. 4 below), paras 2.3.2-3.

<sup>3</sup> Reference is also made to a report prepared by Action Aid in August 2005 and following up on some of its consequences: The impact of operation Muambatsvina/Retore Order in Zimbabwe. This is referred to as the ‘Action Aid report’.

<sup>4</sup> Published in August 2005 and referred to herein as the ‘Response’.

<sup>5</sup> Rome Statute for the Establishment of an International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/Conf 183/9; (1998) ILM 999 2187 UNTS 90 (‘Statute’ or ‘Rome Statute’).

and protracted and would “serve only to distract the attention of the international community from focussing on the humanitarian crisis facing the displaced who need immediate assistance”. The Special Envoy expressed the hope that those responsible would be brought to book under national laws<sup>6</sup>.

4. It is difficult to evaluate the Special Envoy’s reasoning on this issue as it was based in part on a confidentially obtained legal opinion that has not been disclosed. However, it is possible to assess what progress has been made in meeting her other recommendations. The operation took place over a year ago. The available evidence suggests that for many the need for assistance is still acute but there is no evidence of any effective redress within Zimbabwe,<sup>7</sup> and it is notable that human rights defenders working on the issue of forced evictions are being targeted for harassment.<sup>8</sup> It is therefore apt to revisit the question whether the operation falls within Article 7.

5. We have been asked by COHRE to examine whether offences may have been committed under the Rome Statute. COHRE is an international non-governmental organisation which focuses on economic, social and cultural rights, and specifically on the right to adequate housing. COHRE has registered offices in Brazil, Ghana, Thailand, Australia, the United States, the Netherlands and Switzerland. COHRE has official consultative status with the Economic and Social Council of the United Nations (UN), the African Union (AU), the Organisation of American States (OAS), and the Council of Europe (CoE).

6. For reasons that are developed more fully below we conclude that the available evidence does disclose grounds to believe that a crime against humanity may have been committed under both of the following Articles of the Rome Statute:<sup>9</sup>

6.1 Article 7(1)(d) – deportation or the forcible transfer of population.

6.2 Article 7(1)(k) - Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

7. The result is that a prosecution could be commenced before the International Criminal Court subject to a reference being made by the United Nations Security Council<sup>10</sup>

8. We have not attempted to identify any individual or individuals who are or might be responsible<sup>11</sup>. We do not currently have the necessary facts at our disposal to make any

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<sup>6</sup> Paragraph (i) of the Executive Summary, Recommendation 11 and paragraph 6.7.

<sup>7</sup> See for example the Amnesty International Report published in September 2006: *No justice for the victims of forced evictions* - <http://web.amnesty.org/library/Index/ENGAFR460052006>

<sup>8</sup> See for example, FIDH Observatory for the Protection of Human Rights Defenders, *Steadfast in Protest*, 2006 Annual Report and FIDH, Death threats - ZWE 002 / 0507 / OBS 042, available at [http://www.fidh.org/article.php?id\\_article=4279](http://www.fidh.org/article.php?id_article=4279)

<sup>9</sup> All references to Article numbers are, except where stated otherwise, to this Statute.

<sup>10</sup> Such a reference is necessary because Zimbabwe is not a party to the Statute. Despite this Article 13(b) provides for the Court to exercise jurisdiction where: “A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or convention establishing the International Criminal Court”.

<sup>11</sup> Where it is necessary to refer to a hypothetical person who might be liable we use the term “a defendant”.

judgment about individuals and it is not the purpose of this opinion to do so. It is therefore unnecessary to examine the mental element (*mens rea*) that would have to be established for there to be a successful prosecution. It is sufficient for present purposes to note that perpetrator must know, at least in a general sense, that his or her act is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan.<sup>12</sup> We discuss all of these terms below.

9. It is also important to recognise that a Defendant need not be the actual perpetrator. Article 25 extends liability to those who order the commission of the crime or assist in its commission. In addition, Article 28 establishes the principle of ‘superior responsibility’, whereby military commanders or other high-ranked officials may be held accountable for the acts or omissions of those under their command if they failed to take all necessary and reasonable measures within their power to prevent or repress the commission of crimes. This is subject to detailed further requirements about knowledge.<sup>13</sup>

## 1.1 Factual background

10. The operation took place against a background of rapid urban growth in Zimbabwe in the years since independence in 1980. There has been a particularly large expansion of the informal economy. By 2004, it was estimated that this accounted for some 40% of employment as a whole (UN report para 1.4.3).

11. Part of the response of central and local government had been to adopt a relaxed approach to the enforcement of planning control and this was placed on a statutory footing in 1994. The process is described in the UN report at para 2.2:

By the mid 1990s, the major cities of Zimbabwe began to witness rising unemployment. Government provided the impetus for the ascendance of the informal sector through a series of policies. These included reducing regulatory bottlenecks to allow new players to enter into the production and distribution of goods and services, supporting indigenous

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<sup>12</sup> *Prosecutor v Rutaganda* (Judgement) ICTR-96-3 (6 December 1999) [71], *Prosecutor v Musema* (Judgement) ICTR 96-13-A (27 January 2000) [206].

<sup>13</sup> Rome Statute (n. 5 above). Article 28 reads as follows:

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

business development and black empowerment, and relaxing physical planning requirements. Statutory Instrument 216 of 1994 of the Regional Town and Country Planning Act effectively allowed for the development of non-residential activities in residential areas. Many activities such as hairdressing, tailoring, book-binding, wood or stone carving were deregulated. Similarly, small and medium enterprises employing 5-10 people in such areas as welding, carpentry, tin-smithing, shoe repair and small scale car repair were accorded special consent. While these latter activities were subject to local planning permission, Statutory Instrument 216 sent a clear signal to local authorities of the government's desire to promote the informal economy in residential areas. Statutory Instrument 216 was a centrally driven policy that was not espoused by all local authorities as it was perceived as taking away part of their powers to regulate and control the development process within their respective jurisdictions. However, as the economic crisis continued unabated, Statutory Instrument 216 provided a pretext for many local authorities, including the City of Harare, to turn a blind eye to what could best be described as an explosion of the informal economy.

## 12. The result was

[F]lea markets, vending stalls and home-based service industries, cities and towns throughout Zimbabwe witnessed the growing phenomenon of street hawkers and makeshift stands, many of which were supplying the same range of goods sold by stores in front of which they plied their business.

However, a number of vendors were evicted despite the fact that they had valid licences and some properties were destroyed despite the fact that they had been erected in compliance with the relevant building Regulations. They had been paying taxes and possibly also water and electricity bills. No consideration also seems to have been given to their rights to livelihood, which should have included a proper investigation of the situation, examination of alternatives to eviction, due process and the provision of, or facilitation of access to, alternative places to sell goods and services.

13. The UN report also describes the pattern of urban housing growth. Since 1980 the urban population in Zimbabwe has grown at a rate of up to 6-8 per cent per annum. As would be expected, this has placed a serious strain on local government capacity in terms of planning, environmental management and provision of basic services [UN Report para 2.1]. However, unlike in many developing countries, Zimbabwe did not see a significant growth in urban slums and squatter settlements. The UN report sees this as partly the product of the fact that among other things, there was no ready supply of public land in the areas surrounding the cities since this was occupied by private farms, an issue that raises its own acute problems outside the scope of this advice.

## 14. But what it led to was the development of an informal rental sector:

Unable to squat on public land, low-income urban dwellers resorted to what is commonly referred to as "backyard extensions" of legal dwellings. These extensions, many of which were built with durable building materials and on serviced plots, proliferated as a form of affordable rental housing catering to effective demand by the majority of the urban population and providing a source of much needed income for their owners [para. 2.4].

15. It is our understanding that most of the residential occupiers evicted in operation Murambatsvina fell within this category. That is they were in occupation under a tenancy or some other similar agreement with a person having the right, subject to planning restriction, to grant it. This type of “backyard tenancy” had by the time of the operation become the dominant source of housing for low income families. In addition to this group, it also seems that at least some of those who were evicted held leases directly from central or local government [UN report Para 6.3.5].

16. Local authorities were encouraged to turn a blind eye to this in the same way as they tolerated informal non-residential development. Indeed it was unrealistic for them to do anything else. The standards mandated by the Regional Planning Acts were impossibly high. Indeed their real purpose had never been actually to secure satisfactory housing conditions for the black population but to shore up minority rule in pre-independence days. The Zimbabwe National Housing Policy recognised this.

17. We have described above some pragmatic responses to uncontrolled urban development. But for many in the formal sector these developments were unpopular. Illegal trading was said to undermine legitimate business and a proliferation of informal business and development was said to not only change urban character for the worse but also to encourage crime and disease.

18. In May 2005 the Government embarked on a radical solution sharply at odds with the more relaxed approach that had prevailed before then. This became Operation Murambatsvina (Operation Restore Order). The documents that we have seen (mainly the UN Report) do not give any indication that this was preceded by any process of consultation or debate at any level and we work on the basis there was none. We have seen no evidence of any attempt by the government to evaluate the seriousness of the situation, or to assess alternatives, or to discuss the situation with those who were later to become the victims of the operation. The UN Report notes that the Government Technical Team asserted that people had been consulted because their monthly bills included a fine for illegal structures [p. 60].

19. The operation commenced on about 17 May 2005. Its avowed aim was to clear informal business and residential development, initially in Harare but later it spread to other cities and ‘urban areas’ throughout the country.

20. On 19 May 2005 Ms Sekesai Makwavarara the chair of the Harare Commission announced:

City authorities will embark on the clean-up in conjunction with the Zimbabwe Republic Police to enforce the bylaws and to stop all forms of illegal activity... The Operation Restore Order is going to be a massive exercise that will see to the demolition of illegal structures and removal of all activities at undesignated areas.

21. No specific details were given about how this would be achieved.

22. On 24 May 2005 the Harare authority issued a notice in the Harare Herald purportedly under the Regional Town and Country Planning Act. It related to “all residential properties in Greater Harare for illegal developments” and was addressed to “the owners occupiers and

users of such stands/properties”. It described the following breaches of the Act: “unauthorised erection and use of illegal structures...mostly used for human habitation purposes and other illegal businesses” The operative part was:

[Y]ou are ordered to cease using the illegal structures or immediately apply for regularisation. Demolish all illegal structures or plots erected without approved plans” and to remove the debris. The order states it will come into operation on 20 June 2005” [The operative date is missing from the copy at p. 91 of the UN report].

23. Arrests of traders took place between 21 and 24 May. On 27 May 2004 evictions started in Harare and quickly spread elsewhere.

24. The operation was executed with great speed and brutality. It is described in the UN report as being carried out in “military style” [1.1] and as executed in a “militaristic manner” [7.1]. It was conducted by central government authorities, including the military. It involved the bulldozing, smashing and burning of structures housing many thousands of poor urban dwellers [1.2]. “Substantial housing stock has been destroyed and the informal sector has been virtually wiped out, rendering individuals and households destitute” [3.2]. The operation destroyed the infrastructure for entire communities with all that that entails. The “non residential” buildings demolished included at least one mosque [Action Aid report] and an orphanage (UN para 3.6.7).<sup>14</sup>

25. Occupiers were made to demolish their own structures under the supervision of the police. There are reports that those who did not do so quickly enough were beaten.

26. Some individuals were swept up in the evictions despite the fact that they had licences to remain. In at least one case the evictions took place (Porta Farm) in breach of a court order granted in November 2004 and even though the authorities were reminded of the order and the police were shown copies. About 12,000 people were evicted in this incident alone and many of them moved. On 30 June 2000 the Special Envoy met 1,000 of them sleeping in the open.

27. The bare facts of the operation are striking and give an indication of the scale. According to the UN report figures, across the country as a whole:

27.1. The government’s own figures, provided to the special envoy [UN Report Para 3.2.2] reveal that 92,460 housing structures were demolished directly affecting 133,534 households. A further 32,538 structures of small, micro and medium sized enterprises were demolished.

27.2. The true numbers dispossessed will never be known but extrapolating from 2002 census data about average household size 569,685 people were made homeless and 97,614 people lost their main source of livelihood. In fact there seems to have been a still greater overlap between loss of housing and loss of livelihood than is implied by this

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<sup>14</sup> The Zimbabwe Response (n. 4 above) denies the alleged impact on small businesses. On the contrary they claim that the operation allowed these to be “registered, re-located and re-organised” so as to create a more health working environment [para 3.4.6].

figure. In the Action Aid study 70 per cent of households were involved in the informal economy. 70 per cent of respondents had lost shelter and 76 per cent their livelihoods.<sup>15</sup>

27.3. Of those affected, a large number were children (83,530 under 4, 113,000 between 5 and 11, and 109,000 aged 12-18).

27.4. Six people were killed [UN para 6.5.1] and it is not known how many were seriously injured requiring hospital treatment if it had been available.<sup>16</sup>

28. All this was achieved in a little over a month between about 17 May 2005 and 9 July 2005.

29. In addition to the direct impact on evicted households and businesses there are substantial indirect impacts the true extent of which is difficult to assess. It includes the loss of rental income to the backyard landlords (many of whom were retired civil servants who depended on the income), the loss of public income for authorities that had taxed the informal vendors, and loss of a market for businesses and farmers.

30. The UN report summarises the position as follows [para. 3.7]:

While arbitrary evictions are being documented and monitored worldwide by UN-HABITAT and its partners, and such evictions are underway in several African countries, Operation Restore Order has rendered people homeless and economically destitute on an unprecedented scale. Most of the victims were already among the most economically disadvantaged groups in society, and they have now been pushed deeper into poverty and have become even more vulnerable. The scale of suffering is immense, particularly among widows, single mothers, children, orphans, the elderly and the disabled persons. In addition to the already significant pre-existing humanitarian needs, additional needs have been generated on a large scale, particularly in the shelter, water, sanitation and health sectors.

And at paragraph 7.1:

[T]he unplanned and over-zealous manner in which the Operation was carried out has unleashed chaos and untold human suffering. It has created a state of emergency as tens of thousands of families and vulnerable women and children are left in the open without protection from the elements, without access to adequate water and sanitation or health care, and without food security. Such conditions are clearly life-threatening. In human settlements terms, the Operation has rendered over half a million people, previously housed in so-called substandard dwellings, either homeless or living with friends and relatives in overcrowded and health-threatening conditions. In economic terms, the Operation has destroyed and seriously disrupted the livelihoods of millions of people

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<sup>15</sup> The Action Aid report adopts somewhat lower figures overall. At para 1.1 it states: "It is estimated that over 55,000 households in 52 sites across the country and between 250,000 - 500,000 have been rendered homeless, or forced to migrate to the rural areas". The scale of the operation is so great that this difference, while significant, has no impact on the conclusions reached in this opinion. The government figures are lower still. They claim that of the 92,460 housing structures demolished, most were occupied by only 1 or 2 people. [UN Report, 3.2.2].

<sup>16</sup> The Response (n. 4 above) denies that the authorities were directly accountable for any deaths but accepts that there were some fatalities when structures were being demolished by their occupiers [para 31.1.13]

who were coping, however poorly, with the consequences of a prolonged economic crisis.

31. Aggravating elements include:

31.1. The operation started with little or no warning. It seems to have taken place from about 17 May 2005. The first public announcement was on 19 May 2005 but even then no real detail was given. When the local authority in Harare issued a notice giving a semblance of compliance with the statutory provisions the authorities did not even wait for the notice to expire. At Porta Farm (see above) where the evictions were in breach of a Court Order, just over 24 hours notice was given to 12,000 people.

31.2. The army was involved in the evictions.

31.3. Many of those affected had been in occupation for many years. Whether or not the laws under which the action was purportedly taken have lapsed, the occupiers are likely to have had every expectation that they would not be enforced against them, at least not at such short notice. That expectation was further encouraged by the fact that many of them paid taxes and other bills.

31.4. No adequate provision was made to allow for alternative accommodation or help for those evicted, not even for highly vulnerable groups<sup>17</sup> including the elderly the sick or disabled, children and pregnant women.<sup>18</sup> The foreseeable consequence was suffering on a huge scale. Voluntary services were overwhelmed and a substantial number of those affected did not have friends or family with whom they could stay. Even if they could those relatives or friends could ill afford to help them.<sup>19</sup> By the time of the UN report some 114,000 (20 per cent) were thought still to be living in the open, often in the ruins of their former home. The remainder had been forced to move on: 20 per cent to rural areas, 30 per cent had moved to stay temporarily with family or friends and 30 per cent sought refuge in churches or elsewhere [UN para 3.3].

31.5. The operation was planned to start at the onset of winter when it was known that the effect would be to expose many of the victims without shelter.

31.6. The manner in which the evictions were carried out was calculated to de-humanise and cause a loss of dignity. This is from the Action Aid report:

Humiliation and loss of dignity as a direct result of the operation was also reported. Prior to the demolition exercise, it is reported and accounted by respondents that the authorities would move around marking what they deemed as illegal structures using

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<sup>17</sup> Sheridan Bartlett, *Urban Children and the Physical Environment*, City University of New York and the International Institute for Environment and Development (London), found that “the impacts of eviction for family stability and for children’s emotional well-being can be devastating; the experience has been described as comparable to war for children in terms of the developmental consequences”.

<sup>18</sup> There was a proposed re-construction project – Operation Garikai – but it proved ineffective – see the UN Report at para 4.3 and the follow-up report of the Action Aid study below.

<sup>19</sup> The UN report considered that they were “without a doubt taxing the capacity of their host in meeting their basic needs” (para. 3.4).

paint. The marked buildings were to be destroyed. Such actions resemble a war situation.  
[p. 7]

31.7. The operation impacted particularly harshly on vulnerable groups. Women and children are more vulnerable to abuse and school drop out rates have increased. [Action Aid p. 7]. Street children had been rounded up and transferred to transit camps or over crowded centres for delinquents where there were insufficient resources to provide for their care [UN 4.3].

31.8. There was evidence that children had been separated from their families but no provision had been made to re-unite them [UN 3.6.7].

31.9. The UN report found evidence of lack of access to basic health services. Children were reported to have died from respiratory diseases [UN 3.6.4]. About a quarter of the adult Zimbabwean population suffers from HIV/AIDS. The immediate effect of the operation was to disrupt their access to health care and to increase the risk of further infection [UN 3.6.5]. The Action Aid report found that approximately 15% of surveyed households reportedly had lost ARV treatment as a result of the operation. Of these, 35% were households that had mentioned hosting chronically ill individual(s). [page 7]

31.10. Traders had their property and stock confiscated or destroyed. In some cases this seems to have been auctioned without any accounting for the proceeds.

31.11. The informal market economy was the main source of food for many of the affected residents. The operation happened when there were already acute food shortages. Over half (54 per cent) of the respondents in the Action Aid study reported that they had become food insecure as a result. The UN report noted that staples were in short supply and many people had been displaced to areas that were already food insecure.

32. The Government of Zimbabwe prepared a detailed response to the UN Report, published in August 2005. As explained above this opinion does not attempt to adjudicate between the two reports.. The views expressed about the applicability of Article 7 of the Rome Statute are largely on the basis that the UN findings are substantiated. But the main elements of the Government response are these:

32.1. It is a mistake to look at the operation as isolation. It was, and was always intended to be the precursor to Operation Garikai/Hlalani Kuhle. This is described in the response as a massive housing construction programme designed to deliver decent and affordable accommodation as well as providing an enabling environment for small and medium businesses. When announced the operation was intended to involve Z\$3 trillion in seed money. Actual progress with the operation has been slow. By 24<sup>th</sup> November 2005 3144 houses had been provided nationally.<sup>20</sup> In May 2006, the Government gave evidence to the African Commission on Human and Peoples' Rights to the effect that 3,325 housing units had been completed and made available to those affected. In September 2006, Amnesty International published a report on the continuing impact of

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<sup>20</sup> Speech by President Mugabe at the launch of the occupation of Cowdray Park Houses Bulawayo.

the impact of the operation – *No justice for the victims of forced evictions*. It concluded that several thousand people were still living in makeshift shelters.

32.2. The Government of Zimbabwe claims that the numbers of those affected have been grossly exaggerated [Response para 3.1.16]<sup>21</sup>. It states that most of the structures removed were one-room structures, which were extremely small in surface area. It therefore argues that, they could not have been housing an average of five people, the number used in the Special envoy’s report. They claim that the true figures for those made “temporarily homeless” from the major cities are shown by the numbers present in transit centres visited by the UN Envoy. These total only 2695 (Harare 1,077; Bulawayo 892; and Mutare 726).<sup>22</sup> In addition they accept that a number of people returned to rural areas but deny that these were made homeless “clearly all those who voluntarily decided to go to their homes in the rural areas cannot possibly be classified as homeless” [Response para 3.4.3].

32.3. The structures were illegal under Zimbabwean Law and the occupiers were given the opportunity to dismantle them before the operation started.

33. The Government offers a range of justifications for the operation:

33.1. to stem disorderly or chaotic urbanisation and the problems that hinder the Government and local authorities from enforcing national and local authority by-laws from providing service delivery, water, electricity, sewage and refuse removal;

33.2. to minimise the threat of major disease outbreaks due to overcrowding and squalor;

33.3. to stop economic crimes especially illegal black market transactions in foreign currency;

33.4. to eliminate the parallel market and fight economic sabotage;

33.5. to reorganise micro-, small and medium enterprises;

33.6. to reduce high crime levels by targeting organized crime syndicates;

33.7. to arrest social ills among them prostitution which promotes the spread of HIV/AIDS and other communicable diseases;

33.8. to stop the hoarding of consumer commodities, and other commodities in short supply; and

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<sup>21</sup> This point is discussed in the UN report at para 3.2.2. The government’s response is based on an assertion that the numbers occupying the relevant structures were 1 or 2 on average. The report describes this as “highly improbable”.

<sup>22</sup> Response (n. 4 above), para 3.4.2.

33.9. to reverse the environmental damage and threat to water sources caused by inappropriate and unlawful urban settlements.<sup>23</sup>

## 1.2 The Rome Statute and Crimes Against Humanity

34. The Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002. It establishes a permanent international criminal court (the ICC) having jurisdiction over what are described as “the most serious crimes of concern to the international community as a whole”. The statute specifies genocide (Article 6) Crimes against humanity (Article 7), and war crimes (Article 8).

35. Zimbabwe is not party to the Statute. Nevertheless, the Court would have jurisdiction under Article 13(b) if the United Nations Security Council referred to the prosecutor “[a] situation in which one or more [crimes against humanity] appears to have been committed” . The Security Council may make a reference if a “threat to the peace, breach of the peace or act of aggression exists” (Article 39 of the UN Charter).

36. Article 7 of the Rome Statute provides (so far as relevant):

(1) “For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

(2) For the purpose of paragraph 1:

“(a) Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; ...

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<sup>23</sup> Response, *ibid.* para. 15–16.

“(d) Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law; ...

“(g) Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; ....

37. Article 9 of the Rome Statute provides for the basic offences to be further elucidated by elements of crimes to be adopted by a two-thirds majority of the members of the Assembly of States Parties. The elements cannot change the substance of the offences in the statute and are described in Article 9 as being to “assist the Court in the interpretation and application of articles 6, 7 and 8”.

38. ‘Elements of Crimes’ were adopted on 18 September 2002.<sup>24</sup> They describe the following elements in respect of the crime against humanity of “deportation or forcible transfer of population”:

38.1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

38.2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

38.3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.

38.4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

38.5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>25</sup>

### **1.3 About the authorities and methodology used in this Opinion**

39. The definitions of crimes against humanity in the Rome Statute are a codification of customary international law and we have borne in mind that their essential feature is the desire to prohibit only crimes “which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied ... endangered the international community or shocked the conscience of mankind”.<sup>26</sup>

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<sup>24</sup> Elements of Crimes’ adopted by the Assembly of States Parties to the International Criminal Court (9 September 2002) ICC Doc ICC-ASP/1/3 [hereinafter ‘Elements of Crimes’]

<sup>25</sup> Ibid. p. 118.

<sup>26</sup> R. Dixon ‘Crimes Against Humanity’, in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court, Observers; Notes, Article by Article* (Nomos Verlagsgesellschaft Baden-Baden, 1999), p. 123.

40. We accept that such a crime cannot lightly or easily be attributed but equally something does not cease to be a crime if, like forced evictions, it is commonplace or difficult to eradicate.<sup>27</sup>

41. Among other sources we have drawn on the caselaw of the International Criminal Tribunal for the Former Yugoslavia (hereinafter 'ICTY') and the International Criminal Tribunal for Rwanda (hereinafter 'ICTR') (hereinafter collectively referred to as the '*ad hoc* tribunals'). These cases must be treated with some caution because the ingredients of the offences they deal with are different.<sup>28</sup> However they form part of the developing corpus of learning on customary international law and contain important statements of the applicable international standards.

42. We turn to consider the ingredients of the offence under Article 7. We concentrate our attention on Article 7(1)(d) (deportation and forcible transfer) and 7(1)(k) (other inhumane acts) and examine the component parts of the offences in turn.

43. 7(1)(d) requires the following elements to be shown:

43.1.1. That there has been a deportation or forcible transfer.

43.1.2. That the persons so moved were lawfully present in the area from which they were transfer.

43.1.3. That the transfer was conducted as part of a widespread or systematic attack against a civilian population and

43.1.4. It was without lawful grounds under international law.

## 2. Deportation or forcible transfer of population

44. Article 7 (2) (d) defines 'deportation or forcible transfer of population', as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law".<sup>29</sup>

45. This involves the following questions. They can be considered separately but they are related to one another, particularly issues 2 and 3.

45.1. To what types of transfer does the statute apply?

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<sup>27</sup> See the numerous recent examples given in Malcolm Langford and Jean du Plessis, *Dignity in the Rubble – Human Rights Law and Forced Evictions*, COHRE Working Paper, June 2005.

<sup>28</sup> The main differences are that Article 5 of the ICTY Statute requires a nexus between the crime and 'an armed conflict, whether international or internal in character' and 'does not require explicitly that the crime be part of a widespread or systematic attack'. Article 3 of the ICTR Statute does not require this but demands that the crime be committed 'on national, political, ethnic, racial or religious grounds'. This is not required under the Rome Statute (or under customary international law).

<sup>29</sup> Rome Statute (n. 5 above), Article 7.

45.2. Is there evidence here that persons were displaced “from the area” where they were present (lawfulness is considered below).

45.3. Were they transferred by “expulsion or other co-ercive acts”.

46. International law recognises a distinction between deportation, being the forced removal of people from one country to another, and forcible transfer being the “compulsory movement of people from one area to another within the same State”.<sup>30</sup> Deportation properly so called has been a crime against humanity since at least the Charter of the Nuremberg Trials (Article 6(c)) but the crime of forcible transfer has been slower to emerge<sup>31</sup>. In *Krstić*<sup>32</sup> about 25 000 Bosnian Muslim civilians were forcibly bussed outside the enclave of Srebrenica to the territory under Bosnian Muslim control, but within Bosnia-Herzegovina. The transfer was compulsory and was carried out “in furtherance of a well organised policy whose purpose was to expel the Bosnian Muslim population from the enclave”.<sup>33</sup> The Chamber concluded that the civilians transported from Srebrenica were not subjected to deportation but to forcible transfer, a crime against humanity.

47. Article 7 covers both concepts, so long as the other elements of the offence are present. This is clear from the wording of the Article itself and is the view taken in academic discussion of the Article: “given the common distinction between deportation as forcing persons to cross a national frontier and transfer as forcing them to move from one part of the country to another without crossing a national frontier, and given the basic presumption that no words in a treaty should be seen as surplus, it is likely that the common distinction was intended”.<sup>34</sup>

48. It remains to be seen whether there was actually a transfer in this case and if so, whether it was forced. These are questions touched on by the UN report in its summary of the legal issues. The preliminary opinion (not disclosed but summarised in the report) was guarded on both points (at p. 65):

The second issue is related to forced expulsions of people from their homes. According to the legal opinion obtained, this would be countered by the fact that for many people, police threats were imagined rather than real. This would be evidenced by the fact that some people demolished their own structures out of fear, the threat of hefty fines, or to salvage building materials even before the police had arrived. Meanwhile, there were others, who, after demolitions, chose to remain on their demolished property, making it difficult to make a case for systematic forced expulsion. Apart from their relatively small

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<sup>30</sup> M.C. Bassiouni *Crimes Against Humanity in International Criminal Law* (2<sup>nd</sup> edn, The Hague: Kluwer 1999), p. 312. See also The *Krstić* decision (n. 32 below) of the Trial Chamber of the ICTY which stated that that ‘deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacement within a State’ under customary international law.’

<sup>31</sup> It was first codified in Article II(c) of the 1973 Apartheid Convention. Internal displacement is also prohibited within international humanitarian law, where the forcible transfer of a population during wartime constitutes a war crime under paragraphs 2(b)(viii) and (e)(viii) of Article 8 of the Statute, as well as the Fourth Geneva Convention and the Second Additional Protocol thereto.

<sup>32</sup> *Prosecutor v Krstić*, ICTY IT-98-33 (2 August 2001) [531].

<sup>33</sup> *Ibid.* [527].

<sup>34</sup> CK Hall in R Dixon ‘Crimes Against Humanity’ in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court, Observers; Notes, Article by Article* (Nomos Verlagsgesellschaft Baden-Baden 1999), p. 136.

numbers, even evictees sent to camps could be said to have voluntarily opted to do so as the other alternative was to remain out in the open, and many had chosen or were seen to be using this option. After all, not everyone went to the camps, it would be argued.

49. We do not think this caution is justified on the facts as we have taken them to be. It is clear that many individuals demolished their own homes but that cannot affect whether or not this was a forced transfer. The opinion seems to us to focus too closely on expulsion rather than considering the alternative limb of “*other co-ercive acts*”. As Hall notes: “considering the recent history of international displacement of people, ‘expulsion or other coercive acts’ must include the full range of coercive pressures on people to flee their homes, including death threats, destruction of their homes, and other acts of persecution, such as depriving members of a group of employment, denying them access to schools and forcing them to wear a symbol of their religious identity.”<sup>35</sup>

50. Those who demolished their homes did so under threat that if they did not do so then they would be destroyed by the authorities. In some cases they did so themselves (rather than leaving it to the authorities) so that they could salvage the building materials. None of them did so voluntarily and the Report expressly states that they did so out of fear. Indeed these self-demolitions appear to have been responsible for injuries leading to at least one death. Some of them seem to have been conducted under the direct supervision of the police. It is hard to characterise this as anything other than a co-ercive act.

51. The second point taken is that victims cannot be displaced if they stay where they are. This point can only hold good for those who did stay. Many thousands did not and they either moved back to rural areas or tried to stay with friend (see statement of facts above). These people were displaced. It might be argued that the fact that a substantial minority did remain demonstrates that this was not a forced transfer as all. The victims lost their homes but whether they stayed or went was a matter of their own choice. We do not think this is a sustainable line of defence. In its response to the UN Report the Government asserted that most Zimbabweans have a home in a rural area. This reflects the pre-independence model where black settlement in the towns was prevented. Against that background the inevitable result for most would be that if their homes were demolished in the city then they would have to move out of the area. The mere fact that some did not do so does not affect this. They may quite literally have had nowhere else to go or the circumstances elsewhere may have been so unacceptable that they were left with no choice but to stay behind.

52. In light of the foregoing, we conclude that Operation Murambatsvina, as described herein, did involve a forcible transfer of population under Article 7(2)(d) of the Rome Statute.

## 2.1 ‘Lawfully Present’

53. Article 7(2)(d) of the Rome Statute provides that ‘[d]eportation or forcible transfer of population’ means “forced displacement of the persons concerned by expulsion or other coercive acts **from the area in which they are lawfully present**, without grounds permitted under international law.”

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<sup>35</sup> Hall, ‘Crimes Against Humanity’, *ibid.* p. 162.

54. This section considers the meaning of the term ‘lawfully present’. There is room for argument about what law should be applied in determining this question. Should it be exclusively Zimbabwean Law, or International Law, or a combination of the two? A settled practice has developed in interpreting some international instruments that key terms have an “autonomous meaning”; that is they have a meaning independent of the definitions in the laws of the individual member states. Otherwise the member states could define core terms in such a way that they could avoid liability. That would be inconsistent with the idea that international norms should have a general application. Even where terms are primarily defined by reference to national law, that cannot override mandatory international rules and those prevail in the case of conflict<sup>36</sup>

55. Fortunately it is unnecessary to get into a detailed discussion of this topic. For present purposes we can assume that the relevant question falls to be decided according to Zimbabwean Law. We do not need to consider whether this is consistent with International law but in all relevant respects we think that it is. Applying this standard we consider that the occupiers were lawfully present.

56. It is convenient to start with the contrary argument. The reason given by the Zimbabwean government<sup>37</sup> for saying that the victims were not lawfully present is the claim that they were trading without a relevant consent or they were occupying structures erected illegally without the grant of planning consent. Specifically it is claimed that they failed to leave despite being served with a notice under section 32(6) of the Regional Town and Country Planning Act (discussed below). Reference is also made in the Response to other municipal by-laws but they are all said to have much the same effect. The position is encapsulated in paragraph 3.5.13:

The evictions carried out in Zimbabwe were neither unlawful nor arbitrary and were carried out in accordance with the relevant city by-laws that regulate the putting up of structures in any city in Zimbabwe. Illegal and unplanned structures are prohibited by these laws.

57. We think that this adopts altogether too narrow an approach to the term “lawfully present”. It treats it as synonymous with the term “may lawfully be evicted” but for reasons we will explain we do not think that can be what Article 7 contemplates. Even if it does, the victims were still lawfully present for these purposes.

### **Lawfully present – a broad territory--based approach**

58. The words “lawfully present” do not stand alone. They form part of the phrase “the area in which they are lawfully present” and it is this phrase that needs to be construed. Lawful presence is not an abstract question but is related to the area from which the victims are deported or forcibly removed. They must be lawfully present in that area. Each of these words must be given their full meaning and the phrase is not at all easy to apply. Presence describes physically being in a place, no more and no less. It is not the same as residence or even possession, nor is it synonymous with other activities that the individual might carry

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<sup>36</sup> See e.g. UN Human Rights Committee ‘General Comment 27: the Rights of Minorities: Freedom of Movement’ UN Doc CCPR/C/21/Rev.1/Add.5 Article 12 cited below at note 84.

<sup>37</sup> See generally the Response (n. 4 above), section 3.5.0.

out on land – such as running a stall or business. Equally, the term “area” suggests a coherent geographical unit of some size. It is not apt to cover an individual parcel of land. When a person is evicted from a house or a shop it makes little sense to describe this as excluding them from the area of that house or shop. For example, Harare is an area. Individual stands, stalls or plots are not.

59. The term lawful is also problematic in this context, related as it is to presence. Even assuming that presence for these purposes includes the possession of an individual plot in what sense must the presence be lawful? The term “lawfully present” assumes a kind of absolute or objective status but rights to possess or use property can rarely be described in this way. They are nearly always relative and so the question is lawful as against whom? This is as true of Roman Dutch Law as it is of English Common Law.<sup>38</sup> Article 7(1)(d) cannot be intended to mean that a perpetrator can take advantage of the fortuitous fact that the victims were liable to be evicted by somebody else even though that other person was content with the position and had no intention of taking action.

60. These difficulties lead to the suggestion that lawfully present in is fact intended to capture a different concept altogether from individual rights to possess or use land. It is directed to the right of states to control entry into their territory rather than the domestic rules that they happen to adopt from time to time to regulate possession and use. There are several pointers to this being the correct interpretation.

60.1. The first is a consideration of the history of the recognition of forcible transfer as a crime against humanity. As noted above in connection with transfer, the law has progressed from treating deportation across international boundaries as potentially a crime to including internal transfers in certain circumstances.<sup>39</sup>

60.2. So understood, the term lawfully present ceases to present a conceptual difficulty, at least in connection with deportation cases. In this context the term has a settled meaning and this or cognate expressions appear in numerous international instruments where they refer to the presence of a national of one state in the territory of another. They often relate to freedom of movement or expulsion – both matters which are intimately concerned with forced transfers or deportations. Examples are:

60.2.1. Article 12 of the International; Covenant on Civil and Political Rights referred to above: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”<sup>40</sup>.

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<sup>38</sup> See e.g. Silderbergs and Schoemans Law of Property 4<sup>th</sup> edn Durban.

<sup>39</sup> The development is traced in Bassiouni (n. 30 above), pp. 312-26.

<sup>40</sup> In interpreting this provision, the Human Rights Committee has held that: “[t]he question whether an alien is “lawfully” within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory to restrictions, provided they are in compliance with the State’s international obligations: UN Human Rights Committee, *General Comment 27: the Rights of Minorities: Freedom of Movement* UN Doc CCPR/C/21/Rev.1/Add.5, Article 12. See also UN Human Rights Committee *Celepli v Sweden* [1994] IHRL 53 where a person was lawfully present in Sweden despite being subject to restrictions on where he could live.

60.2.2. Article 2 of Protocol No 4 of the European Convention on Human Rights reads: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence”

60.2.3. The Geneva Convention relating to the Status of Refugees, Article 32 restricts the ability of a state to expel a refugee “lawfully in” their territory.

60.2.4. Article 1 of the European Convention on Social and Medical Assistance reads: “Each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are **lawfully present in any part of its territory** to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance ... provided by the legislation enforce from time to time in that part of its territory.” The match here with the Rome Statute is almost exact but a right to such assistance is obviously not defeated by something like liability to a possession order.

60.3. We have not overlooked the fact that, lawfully present in this sense will normally relate to a state or territory rather than an area, which is the term used here. But we do not think that suggests a contrary interpretation. Individuals might be admitted to part of the territory of a State and not another. But in any event the reference to an area in this paragraph is there to emphasise the scope of the prohibition on transfer (i.e. it includes internal displacements). Somebody lawfully present in the area will necessarily be lawfully present in the state and it is not necessary to spell this out or repeat it.

60.4. One of the leading authors in this field, M. Cherif Bassiouni, appears to understand the provision in this way. He says “similarly the inclusion of lawfully present” permits a state to deport one who, under the domestic laws of that state, is not afforded the right to remain in that state”<sup>41</sup>.

61. It is not only the language of the provision that leads us to this conclusion. We reach it after a consideration of the object of the Rome Statute itself. The preamble affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. The parties have naturally been concerned to ensure that lawful action, internationally recognized as such, should not accidentally be caught by over-wide drafting of Article 7. The drafting history of the provision shows that this exercised a number of delegations and various specific proposals were put forward qualifying the forced transfer provision so as to make clear that lawful deportation was permitted. This is the report of the preparatory committee for March/April- August 1996 (para 95):

Some delegations expressed the view that deportation required further clarification to exclude lawful deportation under national and international law. There were proposals to refer to discriminatory and arbitrary deportation in violation of international legal norms, deportation targeting individuals as members of a particular ethnic group,

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<sup>41</sup> Bassiouni, *Crimes Against Humanity in International Criminal Law* (n. 30 above), p. 326.

deportation without due process of law, deportation or unlawful confinement of a civilian population or deportation resulting in death or serious injury.

62. These concerns were later reflected in the international law proviso in Article 7(1)(d). The focus on due process is also instructive and we will return to that when considering lawfulness under Zimbabwean Law. But none of these concerns were directed to the narrow question of lawful occupation under domestic law. This is hardly surprising given the wide sweep and overall purpose of Articles 6 to 8. National rules governing rights to occupy and use land are characteristically highly technical. They reflect the particular social and economic circumstances of their time and place. It would be strange if the applicability of fundamental and universal rules of international criminal law were made to depend on such ephemeral and local rules. Obviously those rules have their place in deciding whether a transfer is lawful by international standards and any international tribunal is bound to respect the local knowledge and expertise reflected in them when deciding whether or not action is justified. But except in this sense these rules are not a matter of “concern to the international community as a whole”.

63. The definition of lawfully present does not serve any necessary limiting object if it is understood more widely as covering rights of occupation of specific premises. On the contrary, it would be liable to remove from protection groups who are most in need of it. The UN Report noted here that the victims were those “already among the most economically disadvantaged groups in society”<sup>42</sup> see above and this will normally be the case. Marginal developments will disproportionately house the disaffected or those most likely to oppose the existing regime. There is little political capital in protecting their interests and it is all too easy for laws to be applied selectively removing their right to occupy, or declaring their possession unlawful as a precursor to clearance.

64. This interpretation does not lead to any undesirable or absurd consequences. There are already ample limiting features in the ingredients of this particular offence without the need to introduce a further hurdle of technical legal possession. The legitimate interest of states to conduct urban development is amply recognised in the procedures prescribing evictions in the International Covenant on Economic, Social and Cultural Rights and the treaty-monitoring body’s General Comments (see below under International Law). As will be seen these standards confer protection even on those whose possession is illegal. A narrow approach to “lawfully present” in Article 7 would produce an absurd result in that legality of possession would be decisive in international criminal law whereas it is of no real importance in international human rights law. The interpretation argued for above avoids this.

65. It is notable that the UN Report was equivocal on this point despite taking the clear view that the developments were illegal – p. 65 (added emphasis):

Firstly, with the exception of a few cases, there is general agreement that the building of shacks and extensions without approval, and hawking in streets without licences, were not lawful. Therefore **arguably** these evictees were not lawfully present in the areas under current Zimbabwean laws. As already discussed above, the strong legal case lies in the argument that it was the procedure of the exercise that did not provide adequate notices as required by law and not in the lawfulness of the occupation.

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<sup>42</sup> UN Report, para 3.7.

66. In its response the Zimbabwe Government took the point about lawful presence but the main focus was on lawfulness as a matter of international law; that is the comments were directed to the proviso that the forced transfer must be “without grounds permitted under International law”:

It needs to be brought to the fore that the persons affected were not entitled legally to be at such places. The issue of illegal forced evictions falls away. To say that the Government of Zimbabwe erred in the wake of massive violations of the law would be tantamount to encouraging future violations. Despite the fact that the Government made it clear that international law does not prohibit forced evictions carried out in accordance with the law, the report still creates the impression that the evictions such as those carried out under the Operation are illegal under International Law (para 3.5.12).

67. We return then to the question whether the victims were lawfully present under this standard. If the meaning of this phrase that we favour is the right one then this question answers itself. It is not suggested that the victims were not lawfully present in the Zimbabwean State or any part of it in the sense we have described.

### **Lawfully present – a narrow approach**

68. What though if a more technical approach is the right one and one has to ask whether the laws of Zimbabwe made the victim’s possession of a particular plot of land illegal in some way? This requires a closer look at the Planning Acts under which the victims were purportedly removed. The Zimbabwean authorities have not sought to rely on any other statutory authority<sup>43</sup> and in particular they have not argued that the occupiers were unlawfully in possession of the land they occupied in the sense that they were liable to eviction by the owner. As we noted above most of them held backyard tenancies.

69. Section 24 of the Regional Town and Country Planning Act (referred to below as the Planning Act) is headed “Control of Development” and it contains the central prohibition. It reads “unless permitted in terms of a development order and subject to this act and any such development order no person shall carry out any development other than [certain specified types of development that do not apply]”. Development is broadly defined as building operations on land or changing the use of land. Section 26 sets out detailed requirements for an application for a permit for planning permission and section 27 allows such a permit to be issued retrospectively (described as regularisation).

70. Section 32 of the Planning Act provides that if it appears to any local planning authority, that any development is in contravention of the Planning Act, then the local planning authority is empowered to serve on the owner of the land, or anyone else potentially affected, an Enforcement Order.<sup>44</sup> The Enforcement Order must state the nature of the contravention, and specify the action required to be taken,<sup>45</sup> and may require the demolition of any building.<sup>46</sup> The notice period for the Enforcement Order must be at least one month

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<sup>43</sup> Some powers might exist but they have not relied on them.

<sup>44</sup> Planning Act s 32 (1).

<sup>45</sup> Ibid. section 32(1)(a), (b).

<sup>46</sup> Ibid. section 32(2)(c).

from the date on which the order is served<sup>47</sup> and a person on whom the order is served is entitled to appeal such an order in terms of section 38 of the Planning Act. An appeal then suspends the operation of the Enforcement Order.<sup>48</sup> By section 32(6) where an Enforcement Order “will affect a substantial number of persons in a particular area” then the planning authority may publish it in a newspaper and that is deemed to constitute service.

71. A second type of order, known as a Prohibition Order, is also available under section 34 of the Planning Act. A Prohibition Order must be issued by the local planning authority at the same time or after the issuing of an Enforcement Order, but before the Enforcement Order becomes operative. The effect of the Prohibition Order is to order that operations in contravention of the Planning Act (and which are the subject of the Enforcement Order) cease, pending the Enforcement Order becoming operative.<sup>49</sup>

72. The Zimbabwean local government authorities could therefore have issued a Prohibition Order to prevent the continuation of illegal trading once the Enforcement Order was issued (assuming an Enforcement Order was validly issued). The Prohibition Order could not, however, have been used to authorise demolitions under the Planning Act.

73. If a person breaches an Enforcement Order then that is an offence, and the authority are then given powers themselves to secure compliance with the order. That would empower them to demolish any unauthorised development [s. 37].

74. Even if these provisions had been complied with in full it would not have the effect that the individuals were unlawfully present in the area even under the Law of Zimbabwe and even taking a narrow meaning of lawfully present.

75. The Act does not purport to control anybody’s presence on land still less in an area. Instead it controls use and development over particular land where a person (the developer) has carried out unlawful development. Very often the person present (e.g. a tenant) and the developer will be different people. The development can be controlled by an Enforcement Order but the Order is again not directed to the occupier’s presence in the area but instead directs the developer to take action to remove the development. This was the form that the enforcement order here in fact took.

76. Even if the Act did purport to control presence it is doubtful whether it could properly be described as unlawful for the purposes of Article 7(1)(d). The Act prevents somebody from carrying out development without a permit but that development can be regularised and no penalty is incurred until after the authority serves an enforcement order. Thus ‘unlawful presence’ cannot occur under the Planning Act until a valid Enforcement Order is issued and the addressees fail to comply.

77. There is no doubt that the authorities in this case failed to comply with the enforcement regime and no valid Enforcement Orders were served. In most of the country there were no such orders at all. In Harare, on 24 and 26 May 2005, the City of Harare issued an

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<sup>47</sup> Ibid. section 32(3).

<sup>48</sup> Ibid. section 32(3).

<sup>49</sup> Ibid. section 34(1).

Enforcement Order in one of the local newspapers.<sup>50</sup> In terms of section 32 of the Planning Act, this notice is required to provide at least one month's notice, before any action can be taken. Despite these requirements, the 'military-style' demolitions began on 25 May 2005.<sup>51</sup>

78. Some of those evicted were in possession of valid permits and leases issued by the local authority or by the then Ministry of Local Government and National Housing or by both institutions.<sup>52</sup> Some of these persons obtained court interdicts prohibiting State authorities from proceeding with the evictions. These interdicts were apparently ignored and the evictions and demolitions continued notwithstanding.

79. Thus, for all of these reasons, the evictions and demolitions carried out in Operation Murambatsvina were not in accordance with the Planning Act and are therefore inconsistent with Zimbabwean domestic law.

80. We consider that the effect of the above means that the occupiers were lawfully present because there was nothing making their presence unlawful. If we are wrong about this then we also think that the fact that the evictions were unlawfully carried out under Zimbabwean Law means that the occupiers were lawfully present for the purposes of Article 7(1)(d). We reach this conclusion because rights to be present on land are, for all relevant purposes here, relative. Thus the body charged with enforcing planning control was the local authority and not the military. If the local authority decided to tolerate the development then the military would not be entitled to evict them. As against the military they would be lawfully present. It follows that if the term lawfully present refers to an individual right to occupy or possess land then the term must be recast as meaning "lawfully entitled to resist displacement by the person seeking to do so"<sup>53</sup>. That was the case here because the position was never reached where the local authority (or anybody else) had the right to exclude the victims. There being no other basis on which it is alleged they had no right to be there, they were lawfully present.

## **2.2 Are the acts part of a widespread or systematic attack directed against a civilian population?**

81. This section considers whether 'Operation Murambatsvina' was committed "as part of a widespread or systematic attack directed against any civilian population", as required by Article 7. As elsewhere in this opinion the analysis is based on the assumption that the findings of the UN Envoy are valid insofar as the extent of the Operation and the way it was conducted are concerned.

82. An "attack directed against any civilian population" is defined in 7(2)(a) as meaning "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack".

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<sup>50</sup> UN Report, para 58. Note that the enforcement order appears to have been published twice, on 24 and 26 May 2005. Page 96 of the Report contains a copy of the order published on 26 May 2005.

<sup>51</sup> Ibid. para. 12.

<sup>52</sup> Ibid. paras. 57–58.

<sup>53</sup> Indeed the position in Roman/Dutch law is stronger still. Eviction/ejection and destruction of property may only follow a lawful order by a competent authority. An occupier can properly assert that their occupation is lawful unless lawfully declared not to be.

83. There are several elements that need to be disentangled but we have little doubt that each of them can be demonstrated here.

84. There was a course of conduct involving the multiple commission of acts within Article 7(1). Multiple instances of the same kind of act will suffice and there is little doubt that that happened here. There were numerous occasions on which there was a forcible transfer of population as discussed above.

85. Equally, we do not think there can be much doubt that the facts, as we have taken them to be, constitute an “attack”. This need not be a military attack.<sup>54</sup> And as the ICTR held in *Prosecutor v Akayesu*: “An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared as a crime against humanity in Article 1 of the Apartheid Convention of 1973, or **exerting pressure on the population to act in a particular manner**, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner” (added emphasis).<sup>55</sup>

86. The attack was pursuant to a ‘state or organizational policy’. This requirement of a state or organisational policy is not found in the Statutes of the ad hoc Tribunals and has been criticised as exceeding what is required to amount to a crime against humanity under customary international law.<sup>56</sup> The ‘Elements of Crimes’ say that the State or organisation must actively promote or encourage such an attack against a civilian population. Whatever the precise content, this element it is made out here. The operation was announced by governmental officials and was carried out by the police and military, there is no doubt that the State itself actively promoted and implemented it.

87. The victims were clearly a civilian population. This term is intended to describe non-combatants or those who are not taking any active part in hostilities. This applies here and the contrary has not been claimed with any vigour. The Government of Zimbabwe claims that some were members of the uniformed forces<sup>57</sup> but they were not exercising any military duties at the time. The population against which the action was taken remained civilian in character at all times.

88. Finally we consider that the attacks were widespread or systematic. There is some academic debate about whether the terms really are disjunctive, despite the apparently clear use of the word “or”<sup>58</sup> We do not need to get into this because in our view both limbs are satisfied.

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<sup>54</sup> Elements of Crimes (n 24 above), 518.

<sup>55</sup> *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) [581], *Prosecutor v Rutaganda* (n 12 above), [70], *Prosecutor v Musema* (n 12 above), [205]. See also *Prosecutor v Semanza* (Judgement) ICTR-97-20-T (15 May 2003) [332], *Prosecutor v Kamuhanda* (Judgement) ICTR-95-54A-T (22 January 2004) [661] where it was held that: ‘An attack does not necessarily require the use of armed force, it could also involve other forms of inhumane mistreatment of the civilian population.’

<sup>56</sup> A Cassese ‘Crimes against Humanity’ in A Cassese P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press Oxford 2002) 353, 375–76.

<sup>57</sup> Response (n. 4 above), 20.

<sup>58</sup> Robinson (n. 4 above), 48–51. His argument is that the policy element constitutes a lower threshold test compared to the other two.

89. Action is ‘widespread’ where it involves massive, frequent, large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims. It is ‘systematic’ if it is thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.<sup>59</sup>

90. Operation Restore Order met both these definitions. It was a large scale action directed simultaneously at multiple victims. 569 685 people were rendered homeless in numerous cities of Zimbabwe. The operation was organised and conducted on the basis of a common State policy (the policy was announced by governmental officials) and involved substantial public resources (it was carried out by the police and the military).

91. This reasoning holds good even if the government figures are adopted. They claim that some 6,000 people were displaced but this is still likely to be considered widespread and certainly systematic.

### 2.3 The compatibility of the evictions with international law

92. An ingredient of the offence is that the displacement must have taken place “without grounds permitted under international law”. It seems that the intention here is that the prosecution must demonstrate an absence of justification rather than this being a defence to be raised as such by any Defendant. The position is therefore unlike that in some other international human rights instruments where the state has to justify a *prima facie* interference (see for example under Article 8 of the ECHR).

93. We also note that the requirement is not that the evictions actually be lawful under international law but that they be without **grounds** permitted under international law. As we note below, much of the international law protection in this field is procedural in nature. It is possible to argue that the proviso is intended to mean that a substantive violation of international law norms is necessary rather than a breach of procedural protection. We do not investigate this in detail because the operation here violated both substantive and procedural requirements. But in any event our view is that the substantive/procedural distinction is unsound in this context. In human rights terms the procedural requirements are imposed, not as an ancillary matter, but as an essential aspect of respect for the individuals concerned. Where these requirements are breached then the action taken is without grounds in international law.

94. This proviso qualifies the definition of deportation or transfer. It is that that has to be justified under international law and not the fact that it formed part of a widespread or systematic attack. In fact it is hard to see how that could ever be justified in international law terms and in that sense the proviso might be seen as unnecessary. What it does is emphasise that that Article 7(1)(d) is not intended to cover every transfer of population. As we will see below, international law recognises that in some circumstances such transfers, even forcible ones can be justified. However, experience also shows that the potential for abuse is huge and forced evictions have often happened on the basis of flimsy justification.<sup>60</sup>

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<sup>59</sup> Ibid [580]; *Prosecutor v Rutaganda* (n 12 above) [69], *Prosecutor v Musema* (n 12 above) [204].

<sup>60</sup> Numerous recent examples of forced collective expulsions are gathered in Langford and Du Plessi – below and in the final report of the Special Rapporteur Mr Al Khasawneh into human rights and population transfer.

95. The question of forced eviction has generally arisen in the context of a claim that it violates human rights and it is in this context that the international law position has been mainly articulated. The position has now been reached where there is a consistent and clear stand apparent from these materials and this holds good under a variety of international instruments. As a very broad generalisation this can be summarised in the following propositions:

95.1. Forced transfer is prima facie a violation of international law. It interferes with a variety of universally recognised fundamental rights.

95.2. Such transfer can be justified in some exceptional circumstances where it is necessary to fulfil a legitimate purpose.

95.3. However, where such a transfer is proposed then international law demands that:

95.3.1. The transfer be proportional to the aim sought to be achieved. Not only does this mean that the aim must be sufficiently serious to warrant the harm caused by the evictions but the state must properly evaluate the alternatives and take adequate steps to mitigate or minimise the harm caused to that which is truly necessary.

95.3.2. The force used must be proportionate. The state cannot resort to torture or violent methods.

95.3.3. The transfer must not be arbitrary or discriminatory.

95.3.4. The evictions must be preceded by appropriate procedural safeguards adequately involving the affected persons.

96. These propositions are supported by numerous sources. The position is developed in detail in the Declaration of international Law Scholars on Forced Relocations<sup>61</sup> where the authors explain that “forced relocation is a particularly egregious violation of international law because it implicates a variety of fundamental human rights including the right to liberty and security of the person, the right to be free from arbitrary detention or exile, the right to be free from arbitrary interference with one’s privacy, family and home, the right to freedom of movement and residence, and the right to human dignity. While loss of property is not an element of forced relocation claims, it is an unfortunate and inevitable consequence of such acts”.

97. The authors also examine a series of reports and other documents establishing the position in customary international law. Of particular interest is Guiding Principles on Internal Displacement U.N. Doc. E/CN.4/1998/53/Add.2. At paragraph 7 it sets out the following procedural obligations:

1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement

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<sup>61</sup> Originally written and submitted for *Doe v. Unocal*, 110 F.Supp.2d 1294 (C.D. Cal. 2000)

altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.

The authorities undertaking such displacement shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons, that such displacements are effected in satisfactory conditions of safety, nutrition, health and hygiene, and that members of the same family are not separated.

If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:

A specific decision shall be taken by a State authority empowered by law to order such measures;

Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;

The free and informed consent of those to be displaced shall be sought;

The authorities concerned shall endeavor to involve those affected, particularly women, in the planning and management of their relocation;

Law enforcement measures, where required, shall be carried out by competent legal authorities; and

The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected.

98. To similar effect is the Report of the Representative of the Secretary-General, Mr Francis Deng, adopted by the Commission on Human Rights.<sup>62</sup> The report provides an overview of the rights that are engaged when there is arbitrary displacement and transfer of population. These rights are subject to restrictions and derogation under certain grounds, but there are also safeguards that the restricting authority must meet as well. The safeguards are summarised in the conclusions of the Deng Report as follows:

[D]isplacement of persons should not be discriminatory and may be undertaken exceptionally and only in the specific circumstances provided for in international law, with due regard for the principles of necessity and proportionality. Displacement should last no longer than absolutely required by the exigencies of the situation. Displacement caused by, or which can be reasonably expected to result in genocide, 'ethnic cleansing', apartheid and other systematic forms of discrimination, or torture and inhuman and degrading treatment is absolutely prohibited and might entail individual criminal responsibility of the perpetrators under international law ... Prior to carrying out any displacement, authorities should ensure that all feasible alternatives are explored in order to avoid, or at least minimize, forced displacement. ... Persons to be displaced should have access to adequate information regarding their displacement, and the procedures of compensation and relocation, as well as effective remedies, and, where appropriate, compensation for loss of land or other assets ... Where these guarantees are absent, such measures would be arbitrary and therefore unlawful.<sup>63</sup>

We do not propose to go through a lengthy analysis of the cases that support this approach but we refer to some examples that illustrate the principles.

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<sup>62</sup> UNHCHR Res 1997/39, *Legal Aspects Relating to the Protection against Arbitrary Displacement*, UN Doc E/CN.4/1998/53/Add.1 (11 February 1998).

<sup>63</sup> *Ibid.* para IV, 3–4.

## The African Charter of Human and Peoples' Rights<sup>64</sup>

99. Zimbabwe ratified the *African Charter on Human and Peoples' Rights* on 30 May 1986. It does not expressly provide for a right to protection against forced eviction but that was held to be implicit by Judicial Commission of Inquiry in *SERAC v Nigeria*<sup>65</sup>. That case involved the violation of the rights of the Ogoni people in connection with the exploitation of oil reserves in Ogoniland. It was alleged that the government condoned unlawful action by the oil companies and directly participated by making state forces available. Among other things it was alleged that Nigerian security forces "have attacked, burned and destroyed several Ogoni villages and homes".

100. The Commission upheld the complaint. It derived a right to shelter from other express rights to family life, property and health and at paragraphs 61 and 63 said:

At a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs.<sup>66</sup> Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies.<sup>67</sup> The right to shelter even goes further than a roof over ones head. It extends to embody the individual's right to be let alone and to live in peace- whether under a roof or not.

The particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions. The African Commission draws inspiration from the definition of the term "forced evictions" by the Committee on Economic Social and Cultural Rights which defines this term as "the permanent removal against their will of individuals, families and/or communities from the homes and/or which they occupy, without the provision of, and access to, appropriate forms of legal or other protection"<sup>68</sup>. Wherever and whenever they occur, forced evictions are extremely traumatic. They cause physical, psychological and emotional distress; they entail losses of means of economic sustenance and increase impoverishment. They can also cause physical injury and in some cases sporadic deaths.... Evictions break up families and increase existing levels of homelessness.<sup>69</sup> In this regard, **General Comment No. 4 (1991)** of the Committee on Economic, Social and Cultural Rights on the right to adequate housing states that "all

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<sup>64</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), 21 ILM 58 [ 'African Charter'].

<sup>65</sup> Done at the 30<sup>th</sup> Ordinary Session, held in Banjul, The Gambia from 13<sup>th</sup> to 27<sup>th</sup> October 2001.

<sup>66</sup> Scott Leckie, "The Right to Housing" in A. Eide, C. Krause and A. Rosas, *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff), pp. 107-123, at 113

<sup>67</sup> *Ibid.* pp. 113-114

<sup>68</sup> See General Comment No.7 (1997) on the right to adequate housing (Article 11.1): Forced Evictions

<sup>69</sup> *Ibid.* p. 113

persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats" (E/1992/23, annex III. Paragraph 8(a)). The conduct of the Nigerian government clearly demonstrates a violation of this right enjoyed by the Ogonis as a collective right".

### **UN Human Rights Commission (now Council)<sup>70</sup>**

In addition, Zimbabwe has committed itself to a number of resolutions of the former UN Human Rights Commission (now Human Rights Council), including Resolution 1993/77, Resolution 1998/9, and Resolution 2004/28, and Zimbabwe was a sitting member of the Commission when the last resolution was passed. In each of these resolutions, Zimbabwe recommitted itself to a prohibition on forced evictions, recognising that forced evictions constitute a "gross violation of a broad range of human rights".<sup>71</sup>

### **International Covenant on Civil and Political Rights**

101. Zimbabwe deposited its instrument of ratification for the ICCPR on 13 May 1991.

102. Article 17 of the ICCPR states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, *home* or correspondence, nor to unlawful attacks on his honour and reputation". [emphasis added]

103. Home in this context can include a home unlawfully established.<sup>72</sup> In its Concluding Observations on Israel (1998) UN Doc CCPR/C/79/Add 93, the UN Human Rights Committee dealt with the demolition of "illegally" constructed Arab homes and concluded that this was a breach of both article 12 (freedom of movement) and 17:

The Committee deplores the demolition of Arab homes as a means of punishment. It also deplores the practice of demolitions, in part or in whole, of "illegally" constructed Arab homes. The committee notes with regret the difficulties imposed on Palestinian Families seeking to obtain legitimate construction permits. The committee considers the demolition of homes to conflict directly with the obligation of the state party to ensure without discrimination the right not to be subjected to arbitrary interference with one's home (art 17) the freedom to choose one's residence (art 12) and equality of all persons before the law and equal protection of the law.

104. There is an obvious parallel here between the difficulty in obtaining permits and the difficulties facing migrants to cities in Zimbabwe, who had no practical ability to find land where they could settle and build housing without a breach of planning control.

105. The term 'arbitrary' has the effect that even though an interference is lawful in accordance with domestic law, it will not satisfy this Article if it is not reasonable. The UN Committee said in its general comment 16 at para 4:

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<sup>70</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), 21 ILM 58 ['African Charter'].

<sup>71</sup> UN ECOSOC Res 2004/28, UN Doc E/C.4/RES/2004/28 (2004) [1].

<sup>72</sup> The ECHR has reached the same position. See for example the discussion in the decision of the English House of Lords in *LB Harrow v Qazi* [2004] AC 983.

The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objections of the convention and should be, in any event, reasonable in the particular circumstances

106. Article 7 of the ICCPR also contains a prohibition against “torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”.

107. As we shall see, group evictions may cross the threshold of inhuman and degrading treatment.

### **European Convention on Human Rights**

108. This is regional instrument and so is not directly applicable to the situation in Zimbabwe. However, its provisions use similar language to the ICCPR and the African Charter. The caselaw of the ECtHR provides an important source of learning on how these provisions apply in the context of forced evictions. The provisions that are of particular importance are Article 3 – inhuman and degrading treatment and Article 8 – right to respect for home and private life. The latter provides:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

109. Forced transfer and a refusal to permit return have been found on numerous occasions to amount to a breach of Article 8 (see e.g. *Cyprus v Turkey* 4 EHRR 482, and 15 EHRR 509, *Mentes and others v Turkey* 26 EHRR, *Akdivar v Turkey* 23 EHRR).

110. In *Selçuk and Asker v Turkey*, 26 EHRR 477, the European Court of Human rights also held that the evictions amounted to inhuman and degrading treatment for the purposes of Article 3. The Court held:

74. The Commission found the burning of the applicants’ homes in their presence to be acts of violence and deliberate destruction in utter disregard for their safety and welfare, depriving them of most of their personal belongings and leaving them without shelter and assistance. It noted in particular Mr Asker’s age and infirmity and the traumatic circumstances surrounding the burning of his house, which put him and his wife in danger from smoke and flames as they tried to save their belongings, and the fact that Mrs Selçuk had been induced to plead with CO Cömert who had insulted and pushed her. It accordingly found that the applicants had been subjected to inhuman and degrading treatment.

75. Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in

absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation (see, *inter alia*, the above-mentioned Aksoy judgment, p. 2278, § 62).

76. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see, for example, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 39, § 100, and p. 43, §§ 108–09).

77. The Court refers to the facts which it finds to be established in the present case (see paragraphs 27, 28, 30 and 57 above). It recalls that Mrs Selçuk and Mr Asker were aged respectively 54 and 60 at the time and had lived in the village of İslamköy all their lives (see paragraph 8 above). Their homes and most of their property were destroyed by the security forces, depriving the applicants of their livelihoods and forcing them to leave their village. It would appear that the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes; inadequate precautions were taken to secure the safety of Mr and Mrs Asker; Mrs Selçuk's protests were ignored, and no assistance was provided to them afterwards.

78. Bearing in mind in particular the manner in which the applicants' homes were destroyed (see the above-mentioned Akdivar and Others judgment, p. 1216, § 91) and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3.

79. The Court recalls that the Commission made no finding as regards the underlying motive for the destruction of the applicants' property. However, even if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as a discouragement to others, this would not provide a justification for the ill-treatment.

111. Paragraph 79 is particularly noteworthy in the context of the present case. The government would no doubt argue that this could not be inhuman or degrading treatment because the operation, whatever its shortcomings, was carried out in order to improve the living and working conditions of the population overall. This paragraph demonstrates that that is not decisive, and may not be particularly relevant to the operation of Article 3<sup>73</sup>. What matters more is the extent and gravity of the harm to which the person was subjected and their vulnerability.

112. Where the facts are such that the Article 3 threshold is met then Article 3 cannot be justified. Article 8 can be justified on the grounds set out in Article 8(2). Again the test is

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<sup>73</sup> A parallel can be drawn with detention cases – for example *Price v United Kingdom* where a disabled woman was held in appalling conditions. The Court (para. 34) found there to be a breach despite the lack of any intention to humiliate or debase her.

one of proportionality, which can only be satisfied where the authorities have adopted a fair procedure.

The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see *Buckleley*, cited above, pp. 1292-93, § 76, *Chapman v. the United Kingdom* [GC], no. 27138/95, ECHR 2001-I, § 92).<sup>74</sup>

## **The International Covenant on Economic Social and Cultural Rights**

113. Zimbabwe became a State Party to the ICESCR on 13 August 1991. Article 11(1) of the ICESCR reads: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

114. The CESCR, in its General Comment 4 on the right to adequate housing, stated at paragraph 18 that “[t]he Committee considers that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”<sup>75</sup> As we have seen this was adopted and applied by the Commission in *SEAC v Nigeria* (above).

115. The CESCR elaborates on the prohibition on forced evictions in General Comment 7. It defines a forced eviction as:

[T]he permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.<sup>76</sup>

116. However, General Comment 7 also makes clear that where an eviction is lawful in principle then States should ensure that the following procedural protections are provided:

[A]n opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to

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<sup>74</sup> *Connors v United Kingdom* Appn 66746/01, 27 May 2004, para. 83

<sup>75</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 4, The right to adequate housing*, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), Article 11 (1).

<sup>76</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 7, Forced evictions, and the right to adequate housing*, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), para. 3.

all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.<sup>77</sup>

117. In addition, “[e]victions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.”<sup>78</sup>

## 2.4 Conclusion on international law grounds

118. Is there any justification for these evictions likely to be recognised under international law? We are prepared to work on the assumption that the clearance of unauthorised development is capable of being an aim, in principle justifying some forced displacement<sup>79</sup> but the circumstances here are likely to have amounted to inhuman and degrading treatment (a point we address more fully under paragraph 7(1)(k) below. The safeguards required under customary international law were not met and the evictions were not proportionate.

119. It is important not to lose sight of the scale of the operation. Countervailing benefits of great weight will be necessary to justify the degree of suffering caused. In one sense this is simply the impact of individual evictions multiplied. But mass operations like this are much more than the sum of their parts. They involve the destruction of communities and their support networks and place such great pressure on relief agencies and other resources that they are overwhelmed and the individual impact is much greater than in the case of isolated evictions. The position is described in the Report of the Secretary General: Guidelines on International Events and Evictions: U.N. Doc. E/CN.4/Sub.2/1995/13 (1995):

[A]lthough some evictions are unavoidable and, under the law, acceptable and reasonable: The human cost of forced evictions, such as the loss of a secure, neighbourly environment and social network critical for survival, the breaking up of communities, the lack of access to employment and the loss of culturally or traditionally significant sites, can be so harsh and demeaning that any justification for evictions must be evaluated in these terms and in accordance with generally recognized principles of international law.

120. But mass evictions can also be different in principle in an important sense. The victims are treated not as individuals whose rights to dignity and individual respect fall to be respected but as objects or members of a class to be cleared away. The literal meaning of operation Mumbatsvina expresses this vividly: “operation clear out rubbish”.

121. Against this background the evidence shows:

121.1. No systematic attempt by the government to evaluate what harm was in reality being caused by the developments and equally no attempt realistically to assess what

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<sup>77</sup> Ibid. para. 15.

<sup>78</sup> Ibid. para. 16.

<sup>79</sup> Although a number of the governments specific justifications may well be unfounded in fact – for example the alleged linkage between the developments and crime of the spread of HIV/AIDS.

harm would be caused by the operation. To the extent that any thought was given to this it seems that the humanitarian impact was hopelessly underestimated as is demonstrated by extremely slow progress in housing construction since July 2005.

121.2. There does not appear to have been any attempt by the government to pursue or even consider less drastic alternatives such as regularising at least some of the developments.

121.3. The operation was carried out in a blanket fashion without consideration of individuals. Swept up in the programme were the elderly, the sick and children.

121.4. In fact it can be seen that the operation was wholly disproportionate. The citations from the UN report speak of massive human suffering but it is difficult to consider what benefits have been produced.

121.5. No adequate measures were taken to mitigate the impact of the operation. The UN Report notes that the State had not made adequate arrangements for alternative accommodation. Legal remedies were also inadequate, due to both insufficient legal aid (which is provided primarily by NGOs and not by the State), and a compromised judiciary.

121.6. The operation fails altogether when one considers the procedural obligations implicit in proportionality and required by international law. The failure is so complete that we do not need to examine the obligation in any detail. There was no attempt to engage with the victims at all whether individually or through their representatives beyond a defective notice in the newspaper.

122. We conclude that Operation Murambatsvina clearly failed to comply with the requirements in international law regarding forced evictions. This conclusion was also reached in the UN Report (paras. 59-62).

### **3. Article 7 (1)(k) of the Rome Statute and the requirement of “causing great suffering, or serious injury to body or to mental or physical health”**

123. The Rome Statute defines ‘other inhumane acts’ as those “of a similar character [to those listed in Article 7(1), from (a) to (j)] intentionally causing great suffering, or serious injury to body or to mental or physical health”.

124. There is no direct caselaw on this provision. Some guidance can be obtained from the *ad hoc* Tribunals but as we have explained elsewhere this must be treated with caution because the context and wording is significantly different in their constituent documents. In particular it must be recalled that the ICTY and ICTR Statutes did not include ‘forced transfer of population’ within the crime against humanity of ‘deportation’, although such forced transfers are now considered to be a crime against humanity in the case law of those tribunals.

125. The Elements of Crimes<sup>80</sup> of the International Criminal Court, as adopted by the Assembly of States Parties to the International Criminal Court, expands upon the definition of ‘other inhumane acts’ to require that the following elements be established:

- 125.1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
- 125.2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.<sup>81</sup>
- 125.3. The perpetrator was aware of the factual circumstances that established the character of the act.
- 125.4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
- 125.5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

126. The intentional infliction of harm is an element of the offence but we do not deal with that expressly in this section other than to make some general comments on the context of the term intention. As we have explained above when dealing with *mens rea*, this is a matter which will have to be judged in relation to each Defendant. Since we are concerned with the more general question whether there is evidence that the crimes may have been committed, rather than who the defendants would be, that is outside the scope of this opinion. We limit ourselves to observing that the term intention does not involve any subjective desire or wish that the harm be suffered.<sup>82</sup> It is enough that acts are done intentionally that objectively have that result (see *Delalić* - below) or at least that that would be the inevitable result even if it was not directly aimed at or desired.

127. The language of 7(1)(k) shows that this is a “catch all” provision, intended to deal with behaviour that is not expressly enumerated in the specific crimes in paragraphs (a) to (j). It is deliberately left open to avoid the risk that conduct worthy of criminal condemnation escapes through the unforeseen gaps in the preceding paragraphs. The commentators on this, and analogous provisions all agree that this is the right approach.<sup>83</sup>

128. However, there are important limiting features which emerge from the clear wording of the paragraph:

129. The conduct amounting to an inhumane act must be similar in character to the preceding paragraphs. That is similar in kind and gravity. This wording is also found in the ICTY and ICTR statutes. However, the preceding list of crimes in those cases were different

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<sup>80</sup> ‘Elements of Crimes’ (n. 24 above), p. 124.

<sup>81</sup> There is a footnote in the ‘Elements of Crimes’ at this point (ibid. p 124) which reads as follows: “It is understood that “character” refers to the nature and gravity of an act”.

<sup>82</sup> A causal reading of one of the ICTY judgments might suggest that this was the case but the passage cannot bear this weight. There is no reason why intention should not be given its ordinary meaning.

<sup>83</sup> See Otto Triffterer’s *Commentary to the Rome Statute of the International Criminal Court; Prosecutor v Kupreskić et al* (Judgment) ICTY-IT-9-16-T (14 January 2000) [‘*Kupreskić*’] [563]; *Prosecutor v Kordić et al* (Judgment) ICTY-IT-95-14/2-A (17 December 2004) [‘*Kordić Appeals*’] [117]; *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998) [‘*Akayesu*’] [585].

in that they did not include forcible transfer of population. In this context this is a significant difference. Those Tribunals have arrived at the conclusion that forced transfer is a crime against humanity by analogy with deportation. The ICC does not have to take that step. It is required under paragraph (k) to consider whether, among other things, a postulated crime is similar in character to such a transfer. It ought to follow that in this respect the ICC can bring a wider range of acts within the scope of the crime. At all events a restrictive argument based on factual similarity with the decisions of the *ad hoc* Tribunals is not available. The obvious point here is that if, for example the victims were not lawfully present (as to which see the discussion above) then the acts would be sufficiently similar to fall within this paragraph provided the other ingredients were met.

130. The conduct must cause great suffering or serious injury to body or to mental or physical health. This is not an ingredient in the ICTR or ICTY statutes although a comparable level of severity may be implicit in the term “inhumane acts”.<sup>84</sup> However, wilfully causing great suffering or serious injury to body or health is a breach of the Geneva Conventions and so this phrase has been considered by the ICTY in the context of Article 2 of its statute, which includes grave breaches of that convention. In the *Delalić et al* judgment<sup>85</sup> the Tribunal stated that the “causing great suffering” includes moral suffering, and can thus be both mental and physical.<sup>86</sup> To wilfully cause “great suffering or serious injury to body or health”, according to the Tribunal,

[C]onstitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence.<sup>87</sup>

131. There is a debate about whether this can also extend to acts that violate respect for human dignity.<sup>88</sup> We do not think it is necessary to resolve this. On the basis of the UN Report there is clear evidence of suffering and injury sufficient to meet the threshold. For these purposes we rely on the following statement from *Krstić* judgment, in the specific context of crimes against humanity:

The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. In line with the *Akeyasu* Judgment, the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life. In subscribing to the above case-law, the

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<sup>84</sup> The position reached in *Kupreskić*, *ibid.*...

<sup>85</sup> *Prosecutor v Delalić et al* (Judgment) ICTY IT-96-21-T (24 June 1999), reprinted in ILM 38 (1999) [‘*Delalić et al*’], para. 509.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Delalić* [442, 544] Considers that it can. M. Boot *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia Antwerp-Oxford-New York 2002), p. 157 and *Kordić Appeals* (n. 83 above) that it cannot.

Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.<sup>89</sup>

132. The Article also requires that the suffering or injury, as the case may be, caused by an inhumane act. The ad hoc Tribunals have drawn inspiration from human rights principles in defining this.

133. So in *Kupreskić* it was held that “[i]nhumane acts under Article 5(i) of the Statute are intentional acts or omissions which infringe fundamental human rights causing serious mental or physical suffering or injury of a gravity comparable to that of other crimes covered by Article 5.”<sup>90</sup> The Tribunal added that:

[L]ess broad parameters for the interpretation of “other inhumane acts” can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity. Thus, for example, serious forms of cruel or degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity: inhuman or degrading treatment is prohibited by the United Nations Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights, of 1950 (Article 3), the Inter-American Convention on Human Rights of 9 June 1994 (Article 5) and the 1984 Convention against Torture (Article 1). Similarly, the expression at issue undoubtedly embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IVth Convention of 1949 and Article 17(1) of the Additional Protocol II of 1977), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights), as well as the enforced disappearance of persons (prohibited by General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994). Plainly, all these, and other similar acts, must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5.<sup>91</sup>

134. The Tribunal continued further that:

[C]ertainly, in order to assess the seriousness of an act or omission, consideration must be given to all the factual circumstances of the case. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex, and health, and the physical, mental, and moral effects of the act or omission upon the victim. While there is no requirement that the suffering imposed by the act have long term effects on the victim, the fact that an act has had long term effects may be relevant to the determination of the seriousness of the act.<sup>92</sup>

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<sup>89</sup> *Prosecutor v Krstić* (Judgment) ICTY IT-98-33 (2 August 2001) [488].

<sup>90</sup> *Kupreskić* (n. 83 above) [818].

<sup>91</sup> *Ibid* [566].

<sup>92</sup> *Prosecutor v Vasiljević* (Judgment) ICTY IT-98-32-T (29 November 2002) [324], *Prosecutor v Blagojević* (Judgment) ICTY IT-02-60-T (17 January 2005) [623].

135. Article 7(1)(k) clearly requires a high threshold of severity to be met. However, we think this is met here on the facts as we have taken them to be. None of the cases in the ICTY or ICTR are really comparable on the facts but as we have suggested above it is important not to underestimate the impact of a mass forced programme like this one. We have already explained some of the international human rights violations that this will involve and we think a valuable comparison can be made with the circumstances in which the ECHR would find a breach of Article 3 of the ECHR. A number of the features of *S v Turkey* have resonance here and there are additional aggravating features. So:

135.1. The action was deliberately targeted against a vulnerable section of the population, among who were still more vulnerable groups such as children, the sick and elderly. This might not be persecution within the meaning of paragraph (h) but it shares many of its characteristics.

135.2. The eviction happened at a time and in circumstances calculated to cause immense disruption and suffering. This has been outlined in setting out the facts above but some key points are that the entire commercial and domestic infrastructure on which the occupiers depended was destroyed, the victims were deprived of shelter with no notice.

135.3. Victims were deprived of ready access to medical care when many of them had urgent need of it.

135.4. There are examples of brutality. We do not think these can be dismissed as unfortunate incidental or unintended effects. Any operation like this was bound to involve incidents like these.

135.5. The consequences of the evictions, such as people having to sleep in open air with nocturnal winter temperatures as low as 8° C,<sup>93</sup> inadequate access to water and sanitation,<sup>94</sup> and reported deaths among displaced children due to respiratory infections,<sup>95</sup>.

136. We therefore think that the requirement of an inhuman causing great suffering or serious injury is likely to be met. We also think that the operation will be seen to be of a character similar to other acts in Article 7. In particular:

136.1. The acts are very close to a forced transfer even if they fall short of being a breach of 7(1)(d), if the very narrow argument was accepted that that the occupiers were unlawfully present or the fact that some victims felt forced to stay in the rubble of their homes.

136.2. We have noted above that the acts were part of a state directed programme having many of the characteristics of persecution (paragraph h).

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<sup>93</sup> Ibid. 34.

<sup>94</sup> Ibid. 37.

<sup>95</sup> Ibid. 38.

136.3. The significant level of suffering, contributed to by the failure of the government to make alternative provision, taken together with the fact that the evictions were unlawful as the government must have realised also suggest that the acts will be seen as comparable in gravity to acts under article 7(1)(k).

## 4. Conclusion

137. The Rome Statue is a relatively young provision and there has been much debate about the precise boundaries of the offences that it creates. We have reflected some of that debate in this opinion although we have to acknowledge that much detail has been lost in an effort to keep this opinion within a relatively manageable length. However, we have been able to reach the conclusion that the core elements of the offences are clear, even in the apparently controversial areas such as “lawful presence”. We have reached the clear view that on the facts as we have taken them to be there are good grounds to believe that offences may have been committed under both Article 7(1)(d) and 7(1)(k). We are more confident in our conclusion under 7(1)(d) but still think an argument under 7(1)(k) is sustainable. We hesitate under that paragraph because of the requirement that the infliction of suffering be intentional (see above). The ordinary rule is that a Defendant is taken to intend the normal consequences of their actions but this paragraph does carry overtones of deliberateness and it is possible that some higher test is involved. But we do consider that the facts amount to the infliction of “great suffering, or serious injury to body or to mental or physical health”.

138. However, it is also right to record what we have not concluded. We have noted several times that we have worked on the basis that the UN Report is materially correct. This is not because we think there can be no answer to it or because we disregard the Government’s response but because of the limited function of this opinion. It is not to decide whether or not offences against the Rome Statute have been committed but to say whether, as a matter of law, there are grounds for considering that they may have been. Still less has it been the function of this opinion to single out particular individuals as potential Defendants. In those circumstances we think it is the right approach to start with the findings of the Special Envoy and to apply the definitions in the Rome Statute to those.