



**Possibilities for Criminal & State Responsibility in  
Relation to the Murambatsvina Case**

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Helen Dobby  
Stephan Hollenberg

Supervised by:  
Jann Kleffner

**Amsterdam International Law Clinic**

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## **1. Introduction**

This report was commissioned at the request of Zimbabwe Watch. The objective of the report is to assess the possibilities for prosecution of the violations committed in Zimbabwe during the Murambatsvina Operation. We were requested to provide a balanced assessment of the potentiality of a case being brought outside of the Republic of Zimbabwe. The report examines two spheres of responsibility: (i) individual criminal responsibility and (ii) the responsibility of Zimbabwe as a State.

Firstly, it must be established that an international crime has been committed. With regards to an assessment of the relevant crime to be alleged, the client requested that the present report build upon a prior report's assessment. The report in hand will also provide an evaluation of an alternate charge.

Secondly, the report will examine jurisdictional issues. The client requested that particular attention be paid to the possibility of bringing a case within South Africa. The report will also focus on other States that may exercise jurisdiction over the crimes committed. An argument will be made for the exercise of universal jurisdiction over, and the duty to prosecute for, international crimes. The jurisdictional capabilities of the International Criminal Court (ICC) will then be discussed, and a case will be made for the triggering of the jurisdiction of the ICC.

Thirdly, the report will focus on the individual criminal responsibility of the perpetrator. Those grounds which may be raised to preclude the invocation of that responsibility will be discussed. The issue of State immunity before foreign jurisdictions and specifically of incumbent leaders will be analysed.

Finally, the report will examine how Zimbabwe, as a State, may be held responsible for the violations. The report will assess those international obligations that may be said to have been breached, and the attribution of those breaches to Zimbabwe. The specific issue of the requirements for the invocation of the responsibility by another State will be critiqued.

## 2. Summary of the Facts

On the 19<sup>th</sup> of May 2005 the Chairperson of the Harare Commission, Sekesai Makwavarara, made the first official announcement of Operation Murambatsvina, which is also known as Operation Restore Order. The Harare Commission is currently running the affairs of the City of Harare despite the fact that there is a pending application to the High Court questioning its authority to do so. The Commission itself was appointed by Ignatious Chombo, the Minister of Local Government, Public Works and Urban Development, leading one Zimbabwean newspaper to comment that “President Mugabe, through the Minister of Local Government, Public Works and National Housing, Ignatious Chombo, is now effectively in control of the City of Harare.”<sup>1</sup> In her speech she said that it is “a programme to enforce bylaws to stop all forms of illegal activities.” The illegal activities alleged as justification for the Operation are, *inter alia*, “vending, traffic control, illegal structures, touting/abuse of commuters by rank marshals, street-life/ prostitution, vandalism of property infrastructure, stock theft, illegal cultivation . . .”<sup>2</sup>

Five days after this speech, the people of the City of Harare were told to demolish illegal structures by the 20<sup>th</sup> of June 2005. In disregard of this deadline and without warning, a massive military operation started in Harare and other cities on the 25<sup>th</sup> of May. The army and the police started to destruct flea markets and ‘illegal’ houses. By June, the Operation targeted practically every town in Zimbabwe.<sup>3</sup>

The sites that were affected had an urban character and the people were told to go back to their rural origins. However, many of those affected did not have any rural origins to go back to. As a consequence of the massive Operation thousands of people were left homeless and

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<sup>1</sup> Operation Murambatsvina <[http://en.wikipedia.org/wiki/Operation\\_Murambatsvina](http://en.wikipedia.org/wiki/Operation_Murambatsvina)> assessed 28 March 2005.

<sup>2</sup> UN Special Envoy on Human Settlements Issues in Zimbabwe, ‘Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina’ (Report) (18 July 2005) p 95, citing The Saturday Herald (28 May 2005) p 5.

<sup>3</sup> UN Special Envoy on Human Settlements Issues in Zimbabwe, ‘Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina’ (Report) (18 July 2005) p 12.

without any viable form of livelihood. The conditions that they were forced to live in as a result of the forced evictions caused those affected great suffering.<sup>4</sup>

### **3. The Crimes**

In order to invoke the international responsibility of those responsible for Operation Murambatsvina it must first be established that an international crime has been committed. For the purpose of establishing this fact it is appropriate to give reference to the Rome Statute of the International Criminal Court (hereinafter ICC Statute).<sup>5</sup> This Statute provides a definition of those crimes that are considered to be ‘crimes against humanity’. Those responsible for commissioning such crimes can be held responsible for their actions on the international plane. It is generally recognized within criminal law that crimes comprise of a physical (the *actus reus*) and a psychological element (the *mens rea*). The requisite *actus reus* and *mens rea* differs for each crime. The burden of proof to establish the guilt of the accused is always on the prosecutor as the accused is always presumed innocent until proven guilty.<sup>6</sup>

#### **3.1. The Forcible Transfer of Population**

The forcible transfer of population constitutes a crime against humanity under Article 7 (1) (d) ICC Statute.

The crime is defined as follows:

Article 7 (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:

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<sup>4</sup> UN Special Envoy on Human Settlements Issues in Zimbabwe, ‘Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina’ (Report) (18 July 2005) p 36.

<sup>5</sup> Rome Statute for the Establishment of an International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 999 2187 UNTS 90 (ICC Statute).

<sup>6</sup> Ibid. Article 66. The burden of proof is one beyond reasonable doubt. Ibid

- (d) Deportation or forcible transfer of population.

Article 7 (2) For the purpose of paragraph 1:

“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;

### **3.1.1. The *Actus Reus***

It should be noted that the violation alleged should be a forcible transfer rather than deportation. Deportation involves a forced inter-state movement whereas a forcible transfer can occur within the territory of one State. However, this will not create a meaningful difference in terms of the consequences of a successful prosecution.<sup>7</sup> The elements of the crime under Article 7 (1) (d) have been discussed in greater depth by the Oxford Pro Bono Publico Group (hereinafter OPBPG).<sup>8</sup> The four main definitional issues relevant to the case in hand may be summarised as follows:

- 1) The extent to which the transfer was coercive.
- 2) Whether the population was ‘lawfully present’.
- 3) The extent to which the forcible transfer was part of a ‘widespread and systematic’ attack directed against the civilian population.
- 4) Whether there exists any grounds under international law which would render such transfer lawful.

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<sup>7</sup> Oxford Pro Bono Publico Group, ‘Are the Activities Conducted During Operation Murambatsvina Crimes Against Humanity Within the Meaning of Article 7 of the Rome Statute?’ (International Law Opinion) (University of Oxford, Oxford 2005) p 15, citing M Cherif Bassiouni *Crimes against Humanity in International Criminal Law* (2nd ed Kluwer The Hague 1999) p 312.

<sup>8</sup> Oxford Pro Bono Publico Group, ‘Are the Activities Conducted During Operation Murambatsvina Crimes Against Humanity Within the Meaning of Article 7 of the Rome Statute?’ (International Law Opinion) (University of Oxford, Oxford 2005).

### *3.1.1.1. The Extent to which the Transfer was Coercive*

It must be evidenced on the facts that the transfer was in fact coerced. The Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina (hereinafter UN Report)<sup>9</sup> highlights some evidential difficulties in ascertaining the forcible and coercive nature of the transfer. This report points to the fact that some people destroyed their own homes. However, it has been argued that for the crime of forcible transfer of population it is the object of the policymakers, rather than necessarily the actions of those carrying out the evictions on the ground, which entails the violation.<sup>10</sup> Accordingly, it is irrelevant who actually destroyed the properties. The UN report also notes that following the destruction of their properties some people remained present on the territory. However, the facts would still seem to support a claim that a large section of Zimbabwe's urban population was forcibly evicted from their properties and from their settlement areas. The fact that a minority of people remained on the land should not defeat a claim that the Zimbabwean Government's policy resulted in a widespread and systematic forcible transfer of population.

### *3.1.1.2. Whether the Population was 'Lawfully Present'*

In order to fulfil the definitional requirements of the crime it must be established that the persons transferred were in fact 'lawfully present'. The OPBPG concludes that this should be interpreted as meaning lawfully present in accordance with, 'Zimbabwean domestic law to the extent that it is consistent with Zimbabwe's international obligations.'<sup>11</sup> The defence may centre their argument on the fact that many people had established their occupation unlawfully and that they were not valid leaseholders. It has been noted that some people were in possession of valid leases and were therefore lawfully present. Consideration should also be given to the possibility that some people may have acquired legal title through their continued occupation of the lands. This legal title may be acquired through the common law doctrine of easement by prescription. Even if there were insufficient people possessing such

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<sup>9</sup> UN Special Envoy on Human Settlements Issues in Zimbabwe, 'Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina' (Report) (18 July 2005) p 36.

<sup>10</sup> Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Allen Lane Penguin Press London 1999) p 312.

<sup>11</sup> Oxford Pro Bono Publico Group, 'Are the Activities Conducted During Operation Murambatsvina Crimes Against Humanity Within the Meaning of Article 7 of the Rome Statute?' (International Law Opinion) (University of Oxford, Oxford 2005) p 20.

valid legal title in order to satisfy the criteria that the transfer be ‘widespread’ it could nevertheless amount to a crime against humanity based on the systematic nature of the transfer.<sup>12</sup>

An argument can be made to demonstrate that those affected were ‘lawfully present’ despite a lack of legal title. The UN Report concludes that a strong case may be brought on the unlawfulness of the procedure of the Operation. Although Zimbabwean law requires that sufficient notice be given prior to an eviction, the evictions were instigated before the expiration of that notice period.<sup>13</sup> In this regards it could be argued that the victims were in fact ‘lawfully present’ until the notice period had lapsed.

The Zimbabwean Government also adopted policies that contradicted the domestic Statutes that were later relied upon to justify the evictions.<sup>14</sup> It can be argued that this contravenes the principle of legality. This principle provides that the law must be certain before it can be used against an individual. Therefore, if there remained doubts as to the lawfulness of the presence of those affected, it should not be used against them to defeat their claims.

### *3.1.1.3. The Extent to which the Attacks were ‘Widespread and Systematic’*

It must be established that the ‘attack’ was in fact widespread or systematic in nature. This requirement has been drafted in order to bar random or isolated acts from being classified as crimes against humanity. As the evictions took place on a widespread scale and occurred as part of a governmental public policy this would seem to suggest that this definitional requirement should not pose any substantial evidential difficulties. The OPBPG report raised the question of whether the definition of the crime required an ‘attack’ on the civilian population in addition to the forcible transfer. However, the report concludes that the acts of forcible transfer of population constitute the attack itself.<sup>15</sup> This appears to be the correct

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<sup>12</sup> See para 2.1.1.3.

<sup>13</sup> UN Special Envoy on Human Settlements Issues in Zimbabwe, ‘Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina’ (Report) (18 July 2005) p 65.

<sup>14</sup> *Ibid.*, pp 24 – 25.

<sup>15</sup> Oxford Pro Bono Publico Group, ‘Are the Activities Conducted During Operation Murambatsvina Crimes Against Humanity Within the Meaning of Article 7 of the Rome Statute?’ (International Law Opinion) (University of Oxford, Oxford 2005) p 29.

interpretation. The attack must also be directed against the civilian population. As the Operation targeted civilian settlements this criteria has been satisfied.

#### *3.1.1.4 Whether there Exists any Grounds under International Law which would Render such Transfer Lawful*

It must also be considered whether there exists, under international law, any other grounds that would render the evictions lawful.<sup>16</sup> International human rights law proscribes certain limited exceptions that can render lawful acts that would otherwise be deemed unlawful. The International Covenant for Civil and Political Rights 1966 (hereinafter ICCPR) provides that there are certain permissible reasons for an interference with a person's freedom of movement and the right to choose their own residence.<sup>17</sup> Article 12 (1) of the ICCPR provides that everyone shall have the right to liberty and movement and freedom to choose his or her residence. Restrictions may be placed on these rights only if they are provided by law and are necessary to protect national security, public order or public health.<sup>18</sup> The Government has sought to justify the evictions based on political rhetoric to the effect that the evictions were necessary to fight public criminality and to tackle public health issues such as the spread of HIV/AIDS.<sup>19</sup> However, the Zimbabwean Government could not claim that the forced evictions are justifiable as they did not comply with the procedural protections required to legitimise an otherwise illegal act of forcible transfer.<sup>20</sup> Article 4 of the International Covenant on Economic, Social and Cultural Rights 1966 (hereinafter ICESCR) states that limitations may be placed on the enjoyment of Covenant rights only in so far as this may be compatible with the nature of the right and provided that the limitations are enacted solely for the purpose of promoting the general welfare in a democratic society. However, the UN Committee on Economic, Social and Cultural Rights have stated that State sponsored '[e]victions should not result in individuals being rendered homeless or vulnerable to the

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<sup>16</sup> Article 7 (2) (d) ICC Statute.

<sup>17</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1979) 999 UNTS 171 (ICCPR) article 12 (3).

<sup>18</sup> *Ibid.*, article 12 (3).

<sup>19</sup> UN Special Envoy on Human Settlements Issues in Zimbabwe, 'Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina' (Report) (18 July 2005) p 66.

<sup>20</sup> UN Committee on Economic, Social and Cultural Rights 'General Comment' No. 7 para 3.

violation of other human rights'.<sup>21</sup> Therefore, in consideration of the many people left homeless, the evictions cannot be justified under the ICESCR.

### **3.1.2. The *Mens Rea***

The psychological element required under section 7 (1) (d) in order for the action to amount to a crime is that the accused had knowledge of the act. More specifically, it would have to be established that the policymakers, against whom the charge may be made, had knowledge of the plan to transfer the urban population. The 'Elements of Crimes' adopted by the Assembly of State Parties to the ICC Statute<sup>22</sup> states that this knowledge requirement should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack. In the case of an emerging widespread or systematic attack, the test for knowledge is satisfied if the perpetrator intended to further such an attack. It must be noted that the 'Elements of Crimes' document is not in itself legally binding and does not modify the Statute. However, the ICC Statute provides that the Court may refer to the 'Elements of Crimes' in its interpretation and implementation of the Statute.<sup>23</sup>

### **3.2. Inhumane Acts**

In relation to the evictions the most appropriate charge would be under Article 7 (2) (d) and this should be alleged against the policy makers. However, as an argument to be made in the alternate, the ICC Statute contains a 'catch all' provision in Article 7 (2) (k) which concerns "other inhumane acts".<sup>24</sup> This latter provision may be of particular relevance for the purpose of establishing the responsibility of the police and military commanders who supervised the eviction process.

The crime is defined thus:

Article 7 (2) (d)            Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

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<sup>21</sup> Ibid. para 16.

<sup>22</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, 158.

<sup>23</sup> Article 9 ICC Statute.

<sup>24</sup> Article 7 (2) (k) ICC Statute.

### 3.2.1. The *Actus Reus*

The inhumane acts must be committed, as part of a widespread or systematic attack directed against the civilian population.<sup>25</sup> Applying the same reasoning as stated above, this contextual requirement would also be met in relation to this charge. The ‘Elements of Crimes’ states that ‘similar character’ is to be understood as referring to the nature and gravity of the act.<sup>26</sup> Therefore, the crime alleged must be of a nature equivocal in seriousness to the other crimes against humanity enumerated in Article 7 of the ICC Statute. It could be argued that the destruction of people’s homes and forcible evictions is ‘inhumane’ treatment akin perhaps to persecution. It is not necessary to establish that the perpetrators themselves believed the acts to be inhumane. It is an objective standard to be determined by the Court.<sup>27</sup>

### 3.2.2. The *Mens Rea*

Article 7 (2) (k) affords that it must be established that the perpetrator intended to cause great suffering. The defence is likely to seek to argue that the suffering caused was not intentional on the part of the accused. The Government has also sought to justify the evictions based on policy grounds pertaining to public order, morality and health.<sup>28</sup> Within the ICC Statute intent is defined as follows:

Article 30

Mental element

1...

2. For the purposes of this article, a person has intent where:

- (a) In relation to conduct, that person means to engage in the conduct;
- (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

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<sup>25</sup> Article 7 (2) (k) ICC Statute.

<sup>26</sup> International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000) Art 7 (1) (k) n30.

<sup>27</sup> Ibid., General Introduction 4.

<sup>28</sup> See Government of Zimbabwe, ‘Response by Government of Zimbabwe to the Report by the UN Special Envoy on Operation Murambatsvina/Restore Order’

<<http://www.un.org/dpi/ngosection/Response%20by%20the%20Government%20of%20Zimbabwe.pdf>>  
assessed 10 April 2006.

The 'Elements of Crimes' states that the existence of intent and knowledge may be inferred from the relevant facts and circumstances.<sup>29</sup> A compelling argument can be made that even if the perpetrators did not intend to cause great suffering it nevertheless was a foreseeable consequence of the course of action. The affected population were given only a few days notice of their eviction and insufficient alternative housing was provided. Therefore it may be argued that great suffering was a consequence that would occur in the ordinary course of events. If it can be established that the suffering was foreseeable to the perpetrators, and that they nonetheless proceeded with the course of action, the requisite intent may be construed.

## **4. Jurisdiction**

Once it has been established that a crime has been committed it is then necessary to establish under whose jurisdiction a case may be brought. As a general principle, the State on whose territory a crime has been committed has jurisdiction over that crime. This is referred to as the territoriality principle.<sup>30</sup> However, in certain circumstances other States may also exercise jurisdiction, for instance on the basis of the nationality of the perpetrator (the nationality principle) or of the victim (the passive personality principle), or regardless of any nationality link (universal jurisdiction).<sup>31</sup> As the crimes alleged are to be levelled at the current regime it is unlikely that a prosecution will be instigated within Zimbabwe. It is therefore necessary to establish the jurisdiction of other States over the crimes.

### **4.1. Universal Jurisdiction**

A State, other than that State on whose territory or by, or against whose nationals the crime has been committed, may in certain circumstances exercise universal jurisdiction over the crime.<sup>32</sup> A distinction can be made between conditional and absolute universal jurisdiction.<sup>33</sup>

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<sup>29</sup> International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000) General Introduction 3.

<sup>30</sup> A Cassese, *International Law* (2nd edn Oxford University Press Oxford 2005) p 451.

<sup>31</sup> M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn Kluwer Law International The Hague 1999) p 228.

<sup>32</sup> Ibid.

<sup>33</sup> G Sluiter 'Implementation of the ICC Statute in the Dutch Legal Order' (2004) 2 J. Int'l Crim. Just. 158, 177.

If a State exercises conditional jurisdiction then a linking factor is required between the crime and the State seeking to exercise jurisdiction. Usually this requires that the suspect must be present within the country that is bringing the charges.<sup>34</sup> Under absolute universal jurisdiction the presence of the suspect is not necessary to bring a case.<sup>35</sup> There is some debate as to whether absolute jurisdiction is in compliance with international law.<sup>36</sup>

#### **4.1.1. The Effect of Statute of the International Criminal Court upon Universal Jurisdiction**

The ICC Statute limits jurisdiction to offences committed within the territory of State parties or to crimes committed by nationals of State parties. It has been proposed that the ICC Statute constrains the exercise of jurisdiction by State parties to those circumstances reflected in the Statute.<sup>37</sup> However, it may be argued that the complementary nature of the ICC encapsulates the idea that national criminal jurisdictions are given priority in the repression of ICC crimes, regardless of the jurisdictional basis that a State may claim. This is made clear in Articles 18 and 19 of the Rome Statute, both of which allows States other than the territorial State or the State of active or passive nationality to request a deferral to their investigations of persons within their jurisdiction (Article 18 (2)) or to challenge the admissibility of a case (Article 19 (2)(b)). Indeed, a considerable number of States Parties have adopted implementing legislation, which allow them to exercise universal jurisdiction over ICC crimes.<sup>38</sup>

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Max du Plessis 'Africa and the International Criminal Court',  
<<http://www.csvr.org.za/confpaps/duplessis.htm#note21>> assessed 12 April 2006.

<sup>38</sup> See for instance, Australia: Section 268.117 (1) of the International Criminal Court (Consequential Amendments) Act 2002. No. 42, 2002, entered into force 28 June 2002; Belgium: Article 6 (1)(1bis) of the Law of 17 April 1878 (Code of Criminal Procedure), as amended on 7 August 2003; Canada: Section 8 (b) of the Crimes Against Humanity and War Crimes Act, assented to 29 June 2000; Costa Rica: Article 7 of the Penal Code as amended by Law 8272 of 2 May 2003, published and entered into force on 22 May 2002; Croatia: Article 10 (2) of the Law on the Application of the Statute of the International Criminal Court, November 2003; Germany: Section 1 of the Code of Crimes against International Law, 26 June 2002; Malta: Article 5 (1)(d) in conjunction with Article 54A of the Penal Code as amended by Act XIV 2002.13 of 13 December 2003; The Netherlands: Section 2 (1)(a) of the Wet houdende regels met betrekking tot ernstige schendingen van het

## **4.2. The Case for Universal Jurisdiction over Crimes Against Humanity**

The principle of universal jurisdiction over crimes against humanity as a customary international law norm has been justified on a number of grounds.

### **4.2.1. *Erga omnes* Principle**

It has been argued that the obligation not to commit crimes against humanity is an *erga omnes* obligation. That means that it is an obligation owed to the international community as a whole.<sup>39</sup> The International Court of Justice (ICJ) stated in the *Barcelona Traction* case that certain obligations concerned with the core ‘rights of the human person’ have this *erga omnes* status and that all States may act upon violations of these rights.<sup>40</sup> It can be reasoned that this principle applies to crimes against humanity. It may also be inferred that only through the exercise of universal jurisdiction are States enabled to act on behalf of the international community to respond to the violations.<sup>41</sup> If States could not prosecute crimes against humanity, the violation of an obligation owed to them as members of the international community would go unpunished. This line of reasoning was applied by the French Court of Appeal when dispelling a challenge to the legitimacy of the capture of Klaus Barbie by French Officials in Guyana.<sup>42</sup>

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internationaal humanitair recht (Wet internationale misdrijven / International Crimes Act), 19 June 2003; New Zealand: Section 8 (1)(c) of the International Crimes and International Criminal Court Act, commenced 1 October 2000; Portugal: Article 5 of the Lei penal relativa às violações do Direito Internacional Humanitário, annexed to Lei 31/2004 Adapta a Legislação Penal Portuguesa ao Estatuto do Tribunal Penal Internacional, tipificando as condutas que constituem crimes de violação do Direito Internacional Humanitário, 22 July 2004; South Africa: Section 4 (2)(b) and (c) of the Implementation of the Rome Statute of the International Criminal Court Act, 2002, came into effect on 16 August 2002.

<sup>39</sup> M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd Edition Kluwer Law International The Hague 1999) p 211.

<sup>40</sup> *Barcelona Traction, Light and Power Company, Limited* (Second Phase) I.C.J. Reports 1970, p 32 (para. 33).

<sup>41</sup> Kaul ‘Preconditions to the Exercise of jurisdiction’ in Casesse, Gaeta, Jones (ed) *The Rome Statute of the International Criminal Court* (OUP, Oxford 2002) vol 1, p 590.

<sup>42</sup> *Barbie* (1998), 89 ILR, pp 125-130.

## 4.2.2. Universal Jurisdiction for Crimes Against Humanity based on Customary and Conventional International Law

In order to establish the right to exercise universal jurisdiction over crimes against humanity analogies may be drawn with other crimes over which universal jurisdiction may be exercised on the basis of customary and conventional international law.

### 4.2.2.1. Customary International Law

In domestic courts, the customary law nature of universal jurisdiction has been applied as the basis for exercising jurisdiction over crimes of piracy and slavery. The argument is made that the exercise of universal jurisdiction over these crimes is justified on the basis that the successful prosecution of these crimes is of importance to the international community as a whole, and therefore all States should be able to prosecute those responsible. An analogy is drawn between these crimes and crimes against humanity to infer that all States must be able to exercise jurisdiction over these crimes to ensure that they do not go unpunished.<sup>43</sup> This reasoning was applied in the *Eichmann case*<sup>44</sup> to justify Israel's exercise of jurisdiction over the crimes against humanity committed by Eichmann during the Holocaust.<sup>45</sup>

### 4.2.2.2. Conventional International law

The exercise of universal jurisdiction is permitted under conventional international law over crimes such as hostage taking, terrorism and aircraft hijacking.<sup>46</sup> It can be argued that as the

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<sup>43</sup> Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Allen Lane Penguin Press London 1999) p 220.

<sup>44</sup> *A-G of Israel v Eichmann* (1962) ILR pp28, 26 (District Court), p 277 (Supreme Court).

<sup>45</sup> Robertson criticizes this judgement as he argues the Israeli courts could have used alternative reasoning and he doubts whether the analogy is truly resonant. He reasons that crimes of piracy occur beyond jurisdictions and this justifies the exercise of universal jurisdiction. However, this line of reasoning has been recognized and courts are unlikely not to follow it should it be alleged as the outcome is a desirable one. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Allen Lane Penguin Press , London 1999) p 221.

<sup>46</sup> See International Convention Against the Taking of Hostages, 4 Dec.,1979, UN GA Res. 34/146, 34 UN GAOR Supp (No 39), UN Doc. A/C.6/34.23; Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 Dec., 1970, 22 UST 1641. 565, TIAS No. 7192 UNTS 177; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, Sept. 23, 1971, 24 UST 565, TIAS, No. 7570, 974 UNTS 177; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons

international community as a whole has an interest in the prosecution of the perpetrators of these crimes universal jurisdiction may be exercised. Therefore, to justify the exercise of universal jurisdiction over crimes against humanity an analogy may be drawn with the aforementioned crimes.

#### 4.2.2.3. *Analogy with Universal Jurisdiction over War Crimes*

Another approach is to draw an analogy with war crimes as it is undeniable that universal jurisdiction may be exercised over these crimes under customary<sup>47</sup> and conventional<sup>48</sup> international law. The comparison of the nature of crimes against humanity with war crimes has recently been made by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case.<sup>49</sup>

To conclude, an argument can be made to assert that all States have the right to exercise jurisdiction over crimes against humanity in this case the forcible transfer of the civilian population in Zimbabwe.

#### 4.2.3. **Territorial Nexus**

In practice, however, national courts rarely issue criminal indictments for violations when there is no territorial nexus between the issuing State and the defendant. For example in the *Pinochet* case the English courts considered that they were able to exercise jurisdiction due to Pinochet's presence in London.<sup>50</sup> Other States have investigated and prosecuted individuals for international crimes who were present on their territory on the basis of universal jurisdiction (e.g. Nzapali and Afghan cases in the Netherlands; war crimes and genocide

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Including Diplomatic Agents, Dec. 14, 1973, 28 UST 1975, TIAS No 8532, 1035 UNTS 167, GA Res. 3166, 27 UN GAOR Supp (No 10), UN Doc A/Res/3166 (1974).

<sup>47</sup> References to universality can be found in 22 Trial of the Major War Criminals Judgment 461 (1948), 41 AJIL 172, 216 (1947); The Charter and Judgment of the Nuremberg Trial, UN Doc. A/CN.4/5 (1949). Jurisprudence providing support for universal jurisdiction over war crimes can be found in: *In re List (The Hostages Case)* IMT 1241; *Almelo Trial* 1 Law Reports of the Trials of War Criminals 35 (1949) 42; *In re Eisentrager* 14 Law Reports of the Trials of War Criminals 8 (1949) 15; *Demjanjuk v Petrovsky*, 776 F. 2d 571 (6th Cir. 1985).

<sup>48</sup> Common Articles with regards to Grave Breaches of the four Geneva Conventions of August 12 1949.

<sup>49</sup> *Prosecutor v Tadic (Judgement)* ICTY (14 July 1997) para 73.

<sup>50</sup> *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* [2000] 1 AC 147 (HL).

prosecutions in Germany and Switzerland for crimes committed in the former Yugoslavia and Rwanda etc.) There have, however, been certain attempts to issue criminal indictments without the presence of the accused in the jurisdiction of the issuing State. Notable examples include: the Belgian prosecutor's indictments of Ariel Sharon and the Foreign minister of the Democratic Republic of the Congo; the French prosecutor's indictment of Qaddafi and a Serbian court's indictment of Tony Blair.<sup>51</sup> All of these attempts have failed and have met with some criticism.

### **4.3. South African Universal Jurisdiction**

South Africa is a party to the ICC Statute and has passed implementing legislation. This is the Implementation of the Rome Statute of the International Criminal Court Act 2002<sup>52</sup> (hereinafter Implementation Act). Implementing legislation is required under South African law in order to give effect to international treaties such as the ICC statute. It must be noted that the Courts do not have an absolute power to try crimes committed outside of South African territory. The Implementation Act grants to the South African Courts jurisdiction over crimes against humanity committed outside of the territory under certain circumstances. When a person commits a crime in such circumstances the crime is deemed to have been committed within South African territory.<sup>53</sup> There are four grounds which permit the exercise of such jurisdiction contained in section 4 (3) Implementation Act:

- 1) If the person committing the crime(s) is a South African citizen; or
- 2) If the person is not a South African citizen but is ordinarily resident in the Republic; or
- 3) If the person after the commission of the crime is present in the territory of the Republic; or
- 4) If the person has committed the crime against a South African citizen or against a person ordinarily resident in the Republic.

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<sup>51</sup> Sands, *Lawless World: Making and Breaking Global Rules* (Penguin Books London 2006) p 51-52.

<sup>52</sup> Act No. 27 Government Gazette 18 July 2002 No. 23642 <http://www.info.gov.za/acts/2002/a27-02/>

<sup>53</sup> Section 4 (3) Implementation Act.

Section 4(2) – (4) of the Implementation Act extends the extra-territorial effect of the South African Court’s jurisdiction to cases in which the victim is a South African national or when the perpetrator, a non-South African, is present within the territory of South Africa. It is to be noted that in South Africa’s ICC Statute implementing legislation the drafters have favoured the territorial nexus approach with respect to the exercise of jurisdiction.<sup>54</sup> Therefore, the exercise of jurisdiction is limited to one of the four pre-conditions established within the South African legislation. The South African Implementation Act also provides that no case may be brought without the consent of the National Director.<sup>55</sup>

#### **4.3.1. South African State Practice with Regard to Universal Jurisdiction**

In September 2003, a South African farmer with property interests in Zimbabwe attempted to bring a claim against Mugabe for alleged crimes against humanity.<sup>56</sup> However, the National Prosecuting Authority, NPA, declined to prosecute in this case. The priority crimes litigation unit concluded that the case ‘did not fall within the mandate of the statute’.<sup>57</sup> The unit had conferred with the chief prosecutor for the ICC who agreed with the unit’s assessment. The complaint related to the actions taken by Mugabe against white farmers in Zimbabwe. It appears that the NPA and ICC prosecutor did not consider those actions to amount to a crime against humanity. Although an action may fall within the parameters of the ICC Statute, it may still not be considered a crime against humanity after consideration of the gravity of the breach. This interpretation does not necessarily preclude a case from being brought with regards to the Murambatsvina case as the facts of the incidents differ.

#### **4.4. Other Countries’ Jurisdictions**

South Africa is not the only State that could exercise universal jurisdiction over the crimes committed in Zimbabwe. Consideration must also be given to other States that have

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<sup>54</sup> Section 4 (3) Implementation Act.

<sup>55</sup> Article 5 (1) Implementation Act.

<sup>56</sup> Angela Quintal ‘Farmer who Wanted Mugabe Tried in SA Dies’ Independent Online

<[http://www.int.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=vn20051004065805351C622130](http://www.int.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20051004065805351C622130)> assessed 23 April 2006.

<sup>57</sup> Ibid.

established universal jurisdiction over crimes against humanity. Some States have demonstrated a propensity to exercise jurisdiction. Therefore, the practice and legislation of those States will be examined.

#### **4.4.1. African Universal Jurisdiction Practice**

In Senegal an attempt was made to exercise jurisdiction over crimes committed in another territory. In February 2000 a Senegalese court tried to bring charges of torture and crimes against humanity against Hissene Habre, Chad's former dictator.<sup>58</sup> In March 2001 Senegal's Court of First Appeals ruled that he could not be tried in Senegal for crimes committed in Chad. Despite the failure of the case it was the first time an African was charged by another African country. This may be used to encourage African jurisdictions establish this practice within their legal culture.

#### **4.4.2. Western States' Jurisdiction Examples**

##### *4.4.2.1. Germany*

The 2002 Code of Crimes Against International Law (CCAIL) establishes universal jurisdiction over war crimes and crimes against humanity.<sup>59</sup> This enables Germany to prosecute anyone accused of committing these international crimes regardless of where they are located and whether they have any connection to Germany.<sup>60</sup> Although it is not required that there is a link to Germany, the public prosecutor can exercise discretion in those cases in which there exists no such link. The prosecutor can defer those cases either to an

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<sup>58</sup> See further Sharp 'Prosecutions, Development and Justice: The Trial of Hissene Habre' (2003) 13 Harvard Human Rights Journal, p. 147.

<sup>59</sup> See Völkerstrafgesetzbuch (VStGB) v. 30.6.2002 (BGBl. I S.2254) [Act to Introduce the Code of Crimes Against International Law of 26 June 2002] (Ge.), translated at <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf> (June 26, 2002) by the German Federal Ministry of Justice; see also Max Planck Institute for Foreign and International Criminal Law, Draft of an Act to Introduce the Code of Crimes against International Law, at <http://www.iuscrim.mpg.de/forsch/legaltext/VStGBengl.pdf> (Dec. 28, 2001) (English translation and explanation of the CCAIL).

<sup>60</sup> A I Morgan 'U.S. Officials' Vulnerability to "Global Justice": Will Universal Jurisdiction Over War Crimes Make Traveling for Pleasure Less Pleasurable?' (2005) 57 Hasting L.J. 423, 424.

international court or to a State that does have a link to the crime, defendant or victim.<sup>61</sup> The universal jurisdiction of Germany is dependent on the State that has “primary jurisdiction” being unwilling to investigate the case.<sup>62</sup> The State in which the crimes were committed would be considered to have ‘primary jurisdiction’. In this case that State would be Zimbabwe. Therefore, the continued unwillingness of Zimbabwe to prosecute those responsible helps to strengthen the case that Germany can and should exercise jurisdiction. Germany should also be encouraged to make a referral of the case to the ICC based upon the prosecutor’s obligation to defer the case to an international court.

#### 4.4.2.2. *Belgium*

Previously Belgium recognised the most extensive grounds to permit the exercise of universal jurisdiction. In 1993, Belgium criminalized “certain violations of the 1949 Geneva Conventions and 1977 Additional Protocols, regardless of where such crimes were committed.”<sup>63</sup> From 1999, this included genocide and crimes against humanity.<sup>64</sup> State officials were not immune from prosecution.<sup>65</sup>

The exercise of universal jurisdiction was not limited by the requirement of a link between Belgium and the perpetrator, victim or the act. A number of cases have been successfully brought before the Belgian Courts.<sup>66</sup> However, other States began to object to the wide

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<sup>61</sup> N Roht-Arriaza ‘The Pinochet Effect: Transnational Justice in the Age of Human Rights’ (2005) 191.

<sup>62</sup> A I Morgan ‘U.S. Officials’ Vulnerability to “Global Justice”: Will Universal Jurisdiction Over War Crimes Make Traveling for Pleasure Less Pleasurable?’ (2005) 57 Hastings L.J. 423, 444. Citing, M Ratner & P Weiss, *Litigating Against Torture: The German Criminal Prosecution*, Center for Constitutional Rights, at <http://www.ccr-ny.org/v2/viewpoints/viewpoint.asp? ObjID=Ezqt1ejl5g&Content=536> assessed Mar. 17, 2005.

<sup>63</sup> S R Ratner, ‘Belgiums War Crimes Statute: A Postmortem’ (2003) 97 Am. J. Int’L. 888, 889. Citing, loi du 16 juin 1993 relative à la répression des infractions graves Conventions Internationales de Genève du 12 août 1949 et aux protocoles I et II du 8 juin 1977, additionnels à ces Conventions. June 16, 1993, *Moniteur Belge* [M.B.], aug. 5, 1993.

<sup>64</sup> *Ibid.* Citing loi relative à la répression des violations graves de droit international humanitaire, Feb. 10, 1999, M.B., Mar.23, 1999.

<sup>65</sup> *Ibid.* art. 5

<sup>66</sup> In 2001, the Government tried two Rwandan nuns and two Rwandan men for their roles in the nation's genocide. The defendants were each convicted and sentenced to prison terms of between twelve and twenty years. S R Ratner, ‘Belgiums War Crimes Statute: A Postmortem’ (2003) 97 Am. J. Int’L. 888, 889.

universal jurisdiction possibilities. The USA began to protest vociferously against the Belgian law in March 2003 after an investigation of, *inter alia*, George H. W. Bush, Dick Cheney and Colin Powell was requested for their alleged commission of war crimes during the 1991 Gulf War.<sup>67</sup> As a reaction to diplomatic pressure Belgium has amended its law. From August 2003 the exercise of universal jurisdiction is only possible if the defendant or victim is a citizen or resident of Belgium. Cases brought against heads of State, heads of government, foreign ministers, and individuals whose immunity is recognized by customary international law, or by a treaty to which Belgium is a party, are barred.<sup>68</sup>

#### 4.4.2.3. *The Netherlands*

In the Netherlands there is a special team of investigators for international crimes. The Dutch Supreme Court in the *Bouterse* case gave a judgment on the legality of absolute universal jurisdiction. In that case the Court held that if the Netherlands wants to exercise universal jurisdiction there has to be a nexus to the crime such as the presence of the suspect in the territory. This condition is now also laid down in the Dutch International Crimes Act.<sup>69</sup> The *Nzapali* case constitutes the first successful prosecution in the Netherlands based on the exercise of universal jurisdiction.<sup>70</sup> Nzapali had fled from the former Zaire to the Netherlands, where he was prosecuted on the basis of the Torture Convention Implementation Act. Other examples of the use of universal jurisdiction are the cases against two former members of the former Afghan security service Khad, who are now living in the Netherlands and are suspected of torture in the 1980s.<sup>71</sup>

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<sup>67</sup> S R Ratner, 'Belgium's War Crimes Statute: A Postmortem' (2003) 97 Am. J. Int'l L. 888, 890. Citing BBC News, Mar 19, 2003, available at <<http://news.bbc.co.uk/1/hi/world/europe/2863273.stm>. Said Powell: "We have cautioned our Belgium colleagues that... this kind of legislation... makes it hard for us to go to places, it puts you at such easy risk."

<sup>68</sup> C Davidson 'Tort au Canadian: A Proposal for Canadian Tort Legislation on Gross Violations of International Human Rights and Humanitarian Law' (November 2005) Vanderbilt Journal of Transnational Law, p 1448.

<sup>69</sup> Wet Internationale Misdrijven art 2 (1a), [Law Containing Rules Concerning Serious Violations of International Humanitarian Law].

<sup>70</sup> W Ferdinandusse, 'Prosecuter v. N. Case No. AO7178' (2005) 99 Am. J. Int'l L. 686, 688.

<sup>71</sup> Ibid.

#### 4.4.2.4. Spain

Spain can exercise universal jurisdiction over genocide, terrorism and over any other crime which, under an international treaty, Spain is obligated to prosecute.<sup>72</sup> The question that arises in the present case is whether Spain is under a treaty obligation to prosecute for crimes against humanity. In the *Scilingo*, case the Spanish courts applied somewhat complex reasoning to grant themselves jurisdiction over the crimes against humanity allegedly committed.<sup>73</sup> The Court held that until October 2004, when the Spanish Penal Code was amended to provide for crimes against humanity, they were provided for within the context of the crime of genocide. Therefore, they reasoned that until that date the Genocide Convention could be utilised to grant them jurisdiction over all crimes against humanity. This shows that the Spanish courts are open to arguments for their exercising jurisdiction over crimes against humanity. However, Tomuschat is critical of this judgement. He argues that there exists no comprehensive international treaty that would make it incumbent on States to prosecute crimes against humanity according to the principle of universal jurisdiction.<sup>74</sup> As Spanish law requires that there be a international treaty obligation to prosecute before universal jurisdiction may be exercised it could be argued that this requirement is met by the duty to prosecute as inferred from the ICC Statute.<sup>75</sup> This would then allow Spain to exercise universal jurisdiction over the crimes alleged.

#### 4.4.3. Practical Considerations

The EU and the UN have placed travel bans on Mugabe and his regime leaders. This would therefore serve to frustrate the exercise of jurisdiction based on the presence of the accused if the crimes are alleged against high-ranking officials.

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<sup>72</sup> C Tomuschat, 'Issues of Universal Jurisdiction in the Scilingo Case' (2005) 3 J. Int'l Crim. Just. 1074, 1076. Citing article 23(4)(a), (b) and (g), Ley Orgánica del Poder Judicial, LOPJ. 23 (4). Igualmente será competente la jurisdicción española para conocer de los hechos cometidos por españoles o extranjeros fuera del territorio nacional susceptibles de tipificarse, según la Ley penal española, como alguno de los siguientes delitos:

- a. Genocidio.
- b. Terrorismo.

...

g. Y cualquier otro que, según los tratados o convenios internacionales, deba ser perseguido en España.

<sup>73</sup> C Tomuschat, 'Issues of Universal Jurisdiction in the Scilingo Case' (2005) 3 J. Int'l Crim. Just. 1074, 1077.

<sup>74</sup> Ibid.

## **5. The Duty for States to Prosecute Crimes Against Humanity**

It may be argued that there exists a duty to prosecute crimes against humanity. This argumentation may be used to compel South Africa, or other jurisdictions, to prosecute the crimes committed. Although the South African Implementation Act, provides that no prosecution may be instituted without the consent of the National Director,<sup>76</sup> this does not necessarily imply a broad discretionary power in light of the argument for a duty to prosecute.

### **5.1. Duty to Prosecute in Statute of the International Criminal Court**

In order to establish the duty to prosecute crimes against humanity under international law consideration may be given to the wording of the Preamble to the ICC Statute. It is recalled that it is the duty of all States to exercise jurisdiction over those responsible for international crimes.<sup>77</sup> The Preamble does not create legally binding obligations for State Parties; it is merely hortatory. Still the Preamble may be cited as authoritative support for the proposition that there exists a duty to prosecute, and it was in fact relied upon by Lord Hutton in the *Pinochet* case.<sup>78</sup>

### **5.2. Duty to Prosecute under Customary International Law**

Some scholars argue that for international crimes, such as crimes against humanity, there exists a general duty of States to either prosecute those crimes or to extradite those responsible to another jurisdiction that is able and willing to prosecute. It is argued that this duty is a rule of customary international law and therefore binding upon all States.<sup>79</sup> The UN General Assembly's 'Principles of International Co-operation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against

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<sup>75</sup> See para 6 of the Preamble to the ICC Statute.

<sup>76</sup> Article 5 (1) Implementation Act.

<sup>77</sup> Para 6 of the Preamble to the ICC Statute.

<sup>78</sup> *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* [2000] 1 AC 147 (HL).

<sup>79</sup> M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn Kluwer Law International The Hague 1999) p 219, also citing Mueller 'International Criminal Law: Civitas Maxima: An Overview' (1983) 15 Case W. Res. J. Int'l L. 1; De Vattel *The Law of Nations* 54-55 (Joseph Chitty ed. 1855); Grotius *De Jure Belli Ac Pacis* Bk. 2 Ch. XXI (1624).

Humanity'<sup>80</sup> emphasizes that States are under a duty to prosecute or to extradite those accused of committing crimes against humanity. Resolutions of the UN General Assembly cannot create legal obligations *per se*, however, they may be part of a broader customary process. In order for a resolution to be passed by the General Assembly it must be voted for by a two-thirds majority.<sup>81</sup> As the General Assembly is comprised of the majority of the international community a resolution passed by this body must be indicative of the attitude of the international community towards the duty to prosecute. It can therefore be regarded as evidence that the duty exists under customary international law.

### **5.3. Duty to Prosecute under Conventional International Law**

Further support for the existence of a duty to prosecute international crimes<sup>82</sup> may be drawn from conventional international law. Certain treaty provisions provide for the legal duty of State Parties to prosecute international crimes.<sup>83</sup> As crimes against humanity are also considered international crimes a duty to prosecute may be inferred by virtue of analogous reasoning.

### **5.4. Statutory Limitations and the Duty to Prosecute**

Statutory limitations bar criminal proceedings after a specified amount of time has elapsed between the alleged commission of the crime and the instigation of proceedings. The UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968 seeks to remove impediments to successful prosecutions of crimes against humanity by preventing Statutory limitations from being relied upon to bar

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<sup>80</sup> UNGA Res. 3074 (XXVIII), 28 UN GAOR Supp. (No. 30) at 78, UN Doc. A/9030, Dec. 3 1973.

<sup>81</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art.18.

<sup>82</sup> This duty in relation to other crimes is usually governed by the terms of extradition treaties. For international crimes, however, such treaties may not be required as no issue of double criminality arises. It can be argued that crimes against humanity are recognized as criminal by all States.

<sup>83</sup> See for example the Common Articles on Grave Breaches in the four Geneva Conventions August 12 1949; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 Dec 1984 1465 UNTS 85 Art. 5 (2).

proceedings.<sup>84</sup> The Convention is based upon an assumption that successful prosecutions of crimes against humanity are imperative. This presupposes the importance of a duty to prosecute. Article 29 of the ICC Statute also provides for the non-applicability of statutory limitations emphasizing the importance of prosecuting heinous crimes. In the *Barbie* case<sup>85</sup> the French Court also upheld the norm that statutes of limitations do not apply to war crimes and crimes against humanity. From the authorities cited we can infer the importance attached by the international community to the prosecution of crimes against humanity

### **5.5. Duty to Prosecute under Human Rights Treaties**

Furthermore, a duty to prosecute may derive from human rights treaties. Article 2 (3) of the ICCPR states that State Parties shall undertake to ensure that victims of rights violations ‘shall have an effective remedy’. The Human Rights Committee has repeatedly held that this provision imposes a duty on States to investigate and to prosecute rights violations.<sup>86</sup> It has been argued that in cases of crimes against humanity only prosecution can properly be regarded as an ‘effective’ remedy.<sup>87</sup>

In the *Velasquez Rodriguez Case* the Inter-American Court stated that the duty to ensure rights implied an affirmative obligation on States, and that this included a duty to investigate and prosecute those responsible for human rights violations.<sup>88</sup> Therefore, if a State does not investigate and, where appropriate, prosecute, it is in breach of its obligations assumed under human rights treaties. Treaties can only create obligations for State Parties within their own territory; they cannot have extra-territorial effect. Accordingly, States must ensure human rights to those within their territory. It follows then that they must investigate alleged violations of the human rights of those within their territory. Therefore, in order to apply this line of argumentation to, for example, South Africa, it must be evidenced that victims of the

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<sup>84</sup> M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd edn Kluwer Law International The Hague 1999) pp 224-225.

<sup>85</sup> *Barbie* (1998), 89 ILR, pp125,

<sup>86</sup> See *Bleier v. Uruguay* (1982), UN Doc A/37/40; *Baboeram v. Suriname* (1985), UN Doc A/40/40.

<sup>87</sup> Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Allen Lane Penguin Press London 1999) p 231.

<sup>88</sup> *Velasquez Rodriguez Case* (29 July 1988), HRLJ 9, p 212.

incident have since become ordinarily resident in the territory of South Africa. Once this can be established it can be shown that South Africa has an obligation to ensure the rights of those victims and this, in turn, might be said to create an obligation to investigate and prosecute.

## **6. The International Criminal Court: Complementary Jurisdiction**

As has been argued, it can be shown that there exists a duty to investigate and prosecute crimes against humanity. Primarily this argument may be used to lobby governments to encourage them to initiate a prosecution. If States continue to refrain from prosecuting these crimes despite their ability to do so they may be considered unwilling to prosecute. This may be used to establish the jurisdiction of the ICC over the crimes alleged.

### **6.1. Complementary under the Statute of the International Criminal Court**

Article 1 of the ICC Statute states that the jurisdiction of the ICC shall be ‘complementary to national criminal jurisdictions’. It is intended that national courts, which may exercise jurisdiction over the crimes alleged, shall act first and that recourse to the ICC shall only be had when the domestic courts are inactive. This principle is established by Article 17 (1) (a) of the ICC Statute, which provides that a case is inadmissible before the ICC when, ‘it is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unable or unwilling to carry out the investigation or prosecution.’ Article 17 (1) (b) further provides that a case is not admissible before the ICC if, ‘it has been investigated by a State and a decision not to prosecute has been made, unless this decision resulted from the unwillingness or inability of the State genuinely to prosecute.’

#### **6.1.1. Unwillingness**

A State will be deemed to be unwilling to prosecute if it has acted in a manner that, in the circumstances, is inconsistent with an intent to bring the person to justice.<sup>89</sup> The discretion of a State in its decision not to prosecute is somewhat restricted when a duty to prosecute can be established. If a decision not to prosecute was made for political reasons, this can easily be

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<sup>89</sup> Article 17 (2) ICC Statute. See further Holmes ‘Complementarity: National Courts versus the ICC’ in Casasse, Gaeta, Jones (eds) *The Rome Statute of the International Criminal Court* (OUP Oxford 2002) vol 1 p 674.

construed as being inconsistent with an intent to bring that person to justice. Therefore, that State can be shown to be unwilling within the meaning of the ICC Statute thus triggering the jurisdiction of the ICC.

### **6.1.2. Inability**

The ICC Statute sets a relatively high threshold to measure inability. Article 17 (3) states that an inability to prosecute will be determined if there is a total or substantial collapse or unavailability of the national judicial system or it is unable to gather evidence, obtain the accused or otherwise carry out its proceedings. It is intended that national courts should, whenever possible, exercise jurisdiction and initiate proceedings against those accused of international crimes.

## **6.2. South Africa**

The ICC Statute cannot create obligations for non-State parties.<sup>90</sup> Therefore, as Zimbabwe is not a State Party to the ICC Statute the ICC cannot be determined to have jurisdiction over the crimes by virtue of Zimbabwe's failure to prosecute. South Africa is a party to the Statute, therefore, whenever South Africa can exercise jurisdiction and furthermore its duty to prosecute the crimes may be established, its subsequent failure to act may be determined to constitute an unwillingness to prosecute. This unwillingness can then trigger the jurisdiction of the ICC.<sup>91</sup> In South Africa's implementing legislation the idea of the complementary role of the ICC has been contemplated. Article 3 (e) provides that when South Africa is unable or unwilling to prosecute it undertakes to co-operate fully with the ICC. This includes an obligation to surrender the accused to the Court if that perpetrator is present within South Africa.

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<sup>90</sup> Vienna Convention on the Law of Treaties 1969 (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) article 34.

<sup>91</sup> Article 17 (2) ICC Statute.

### **6.3. The International Criminal Court**

The ICC may also exercise jurisdiction over crimes committed in the territory of non-State parties to the Statute or over nationals of non-State Parties in the following two circumstances.

#### **6.3.1. *Ad hoc* Jurisdiction**

A non-State party to the ICC Statute can consent to the jurisdiction of the ICC on an *ad hoc* basis.<sup>92</sup> However, it is extremely unlikely that Zimbabwe would consent to this under the current circumstances given that it is the current regime that stands accused of the alleged crimes. If there is a regime change it may be that the subsequent government would be willing to grant the ICC jurisdiction on an *ad hoc* basis.

#### **6.3.2. Security Council Referral**

The ICC may also exercise jurisdiction over non-State parties following a referral of the case to the Court by the UN Security Council.<sup>93</sup> This referral must be taken under Chapter VII of the Charter of the United Nations 1945 (hereinafter UN Charter) following a determination that the ongoing situation represents a threat to international peace and security.<sup>94</sup> This is essentially a political rather than a legal question, and is left largely to the discretion of the UN Security Council.

In March 2005 the UN Security Council referred its first case to the ICC.<sup>95</sup> This referral relates to the situation in the Darfur region of Sudan. The Security Council was very slow to make this referral despite the gravity of the situation. A *realpolitiek* impediment to the referral of cases to the ICC is the opposition to the Court held by certain permanent members of the Security Council. If one of the five permanent members (UK, USA, China, Russia or France) vote against a motion for referral this acts as a veto and prevents any action being taken. However, an abstention does not count as a veto and the motion can be carried. Therefore, China and the USA were able to abstain from voting in the Darfur referral,

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<sup>92</sup> Article 12 (3) ICC Statute.

<sup>93</sup> Article 13 (b) ICC Statute.

<sup>94</sup> Article 39 UN Charter.

<sup>95</sup> UNSC Res. 1593 (31 March 2005) UN Doc S/RES/1593.

allowing it to go ahead whilst maintaining their opposition to the Court. The Security Council is of course a highly politically charged organ so if any of the members have strong political or economic links with Zimbabwe it is unlikely the referral would be made.

#### **6.4. Prosecutorial Discretion**

It remains to be noted that the prosecutor for the ICC retains prosecutorial discretion.<sup>96</sup> Therefore, even after a referral has been made the prosecutor may still decide not to investigate. In making a decision to investigate, the Prosecutor shall consider whether there is a reasonable basis to believe that a crime has been committed and whether, when taking into account the gravity of the crime and the interests of the victims, there are nonetheless reasons to believe an investigation would not serve the interests of justice.<sup>97</sup> Similarly, upon investigation the Prosecutor may decline to prosecute if he or she concludes that there is not a sufficient legal or factual basis to warrant an issuance of a warrant or when the prosecution is deemed not to be in the interests of justice.<sup>98</sup> Those factors that are to be considered when determining what serves the interest of justice include, ‘the gravity of the crime, the interests of the victim, the age and infirmity of the alleged perpetrator and his or her role in the alleged crime.’<sup>99</sup> The Prosecutor cannot be compelled by States to act in a particular way subject to one exception contained in Article 16 of the ICC Statute. This provision bars an investigation or prosecution for twelve months subsequent to a request by the UN Security Council for the Court not to proceed.<sup>100</sup>

### **7. Responsibility under the Statute of the International Criminal Court**

#### **7.1. Individual Criminal Responsibility**

The grounds under which the individual responsibility of the accused is to be invoked must be established prior to a prosecution. It is important to establish what role the accused took in

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<sup>96</sup> Article 53 ICC Statute.

<sup>97</sup> Article 53 (1) (a) and (c) ICC Statute.

<sup>98</sup> Article 53 (2) (a) and (c) ICC Statute.

<sup>99</sup> Article 53 (2) (c) ICC Statute.

<sup>100</sup> See further Sands, *Lawless World: Making and Breaking Global Rules* (Penguin Books London 2006) p 57.

his or her participation in the crime alleged. The level of involvement of the accused in the commission of the crime may also be taken into account in sentencing.

### **7.1.1. Committing the Crime**

Under Article 25 ICC Statute anyone who commits a crime incurs individual responsibility. The term ‘commits’ suggests a physical act and that the perpetrator must take some active role. This provision would be relevant should the charge of inhumane acts be levelled at those implementing the eviction policy on the ground.

### **7.1.2. Ordering the Crime**

Individual criminal responsibility is also incurred if it can be established that the accused ordered the commission of a crime.<sup>101</sup> It has been argued that, with respect to the alleged crime of a ‘deportation or forcible transfer of population’, it may only be appropriately alleged against political leaders. This line of reasoning considers that it is the objective of the policymakers that breaches international law rather than necessarily the actions of those carrying out the operations.<sup>102</sup> It would, therefore, have to be charged against high-level officials, most notably Mugabe. In order to satisfy the evidential requirements it would have to be proven that the accused in fact ordered the crime and that he or she had the requisite intent.<sup>103</sup>

## **7.2. Command Responsibility**

Article 28 ICC Statute establishes the criminal responsibility of superiors for the actions of their subordinates.<sup>104</sup> Superiors shall be held responsible when their subordinates have committed crimes notwithstanding the fact that the superior did not order them to commit these crimes. This is so when it is established that the superior either acquiesced to their

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<sup>101</sup> Article 25 (3) (b) ICC Statute.

<sup>102</sup> Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (Allen Lane Penguin Press London 1999) p 312.

<sup>103</sup> Article 30 (2) ICC Statute discussed more fully previously with regards to the alleged violation.

<sup>104</sup> Article 28 (a) ICC Statute establishes the responsibility of military commanders and Article 28 (b) refers to non-military superior subordinate relationships.

commission or were negligent in their duty to prevent them. This charge may be appropriate to allege if the defence argues that the subordinates acted against orders, perhaps by starting the evictions before they were supposed to i.e. before the notice period had expired. If this claim has any evidentiary basis, responsibility could still be attributed to the superiors on the basis of their failure to prevent their subordinates from carrying out the actions. It is not a standard of strict liability. A superior will be held responsible only when they either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing the crime.<sup>105</sup> The crimes must also concern activities that were within the effective responsibility and control of the superior. It must be demonstrated that the superior failed to take all reasonable measures within his or her power to prevent or repress their commission.<sup>106</sup> In relation to the charge of forcible transfer of a population, it may be difficult to argue that the subordinates themselves could actually commit this crime as it may only relate to policymakers. The subordinate responsibility would be more relevant when considering the charge of inhumane acts. The superiors could be held responsible for the actions of their subordinates during the forcible evictions.

### **7.3. Grounds to Exclude Responsibility**

The ICC statute provides circumstances that preclude the actions from entailing the criminal responsibility of the accused.<sup>107</sup>

#### **7.3.1. Mental Capacity**

Article 31 of the ICC Statute contains certain grounds for excluding criminal responsibility relating to the circumstances and physical well-being of the accused at the time they were alleged to have committed the crime. Most pertinently perhaps is Article 31 (1) (a) which

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<sup>105</sup> Article 28 (b) (i) ICC Statute. The drafters appear to have borrowed from the jurisprudence of the ICTY in relation to this standard of knowledge. See re actual knowledge: *Prosecutor v Blaskic*, Judgment, Trial Chamber May 3 2000, para. 307; *Prosecutor v Delalic et al*, Judgment, Trial Chamber, November 16, 1998, para. 386; *Prosecutor v Baglishema*, Judgment, Trial Chamber, June 7, 2001, para. 46. See re constructive knowledge: *Prosecutor v Delalic et al*, Judgment, Appeals Chamber, February 20 2001, para. 235, 239; *Prosecutor v Kordic*, Judgment, Trial Chamber, February 26, 2001, para. 437.

<sup>106</sup> Article 28 (b) (ii) and (iii) ICC Statute.

<sup>107</sup> Articles 31-33 ICC Statute.

excludes responsibility where the accused has a mental disease or defect which impairs his or her capacity to appreciate the unlawfulness of his or her conduct. Mugabe could possibly seek to allege senility should he face charges. It is up to the Court to determine the applicability of such grounds.<sup>108</sup>

### **7.3.2. Mistake of Fact or Law**

A mistake of fact or law on the part of the accused shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.<sup>109</sup> The provision relating to a mistake of fact may be pertinent should the crime of inhumane treatment be alleged. The defence may seek to exclude responsibility based on an argument that the accused mistakenly believed that there was in fact sufficient alternative housing. This could serve to negate the requirement of intent to cause suffering. In respect of the charge of forcible transfer of a population, the fact that the accused may claim to have believed the evictions to be lawful, a mistake of law, would be irrelevant as it would not negate the intent. The intent required for this crime is merely the knowledge of the act, which would remain the same regardless of the legality of the transfer.

### **7.3.3. Superior Orders**

Article 33 (1) of the ICC Statute provides that the fact that a crime has been committed by a person pursuant to an order of a Government or a superior shall not relieve that person of criminal responsibility unless:

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

This provision is especially relevant should military or police commanders be charged with committing 'inhumane acts' under Article 7 (1) (k) of the ICC Statute. It is less likely that high-ranking officials could be relieved of criminal responsibility under Article 33.

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<sup>108</sup> Article 31 (2) ICC Statute.

<sup>109</sup> Article 32 ICC Statute.

## **8. Immunity for Representatives of the State**

State immunity serves to bar proceedings from being instigated against incumbent heads of state and specified governmental leaders. This means that foreign States are precluded from exercising jurisdiction over those who enjoy this protection.

### **8.1. Immunity before Domestic Courts**

The rationale behind State immunity lays in the concept that all States are equal and sovereign, therefore national courts in other States can not exercise their jurisdiction over other States. From this State immunity other immunities have been devised for certain representatives of the State. For example, the so called ‘Big Three’ (Head of State, Head of Government and Minister of Foreign Affairs) enjoy full immunity from criminal jurisdiction. It is reasoned that without this immunity, political leaders would be seriously impaired in exercising their official functions, as they could constantly run the risk of criminal indictment. The rule of immunity of the ‘big three’ was held to represent customary international law by the ICJ in the *Arrest Warrant* case.<sup>110</sup> The Court held that the functions of a Minister of Foreign Affairs are such that, throughout the duration of his or her office, when abroad he or she enjoys full immunity from criminal jurisdiction and inviolability. The question is whether there are any possible exceptions to this immunity. It is often argued that with regard to certain grave violations, the immunity will not be upheld. But the ICJ in the *Arrest Warrant* case held, after careful examination of State practice, that ‘it ha[d] been unable to deduce from this [State] practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crime against humanity.’<sup>111</sup> The ICJ also stated that when the official capacity has ceased to exist the suspect can be prosecuted for acts committed before or after the period he or she held such an official capacity, and for acts committed during this period but in a private

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<sup>110</sup> *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) (Merits) [2000-2002] ICJ Rep 2002.

<sup>111</sup> *Ibid.* para. 58.

capacity.<sup>112</sup> It is to be noted that the traditional approach taken by the ICJ in this case has received some scholarly criticism.<sup>113</sup>

Another important case with regard to immunity is the *Pinochet* case.<sup>114</sup> Pinochet the former leader of Chile, was arrested in the UK because Spain asked for his extradition. The House of Lords in the UK, held that the immunity of a former leader shall continue to exist only for those acts performed by such a person in the exercise of his functions. The Court held that official functions can never include grave criminal acts as for instance torture. The Dutch Court of Appeals, in the *Bouterse* case, came to the same conclusion when it said that ‘the commission of very grave criminal offences [...] cannot be regarded as part of the official duties of a head of State’.<sup>115</sup> It could be argued that this rationale should also apply to incumbent leaders and that they should not be shielded from prosecution for international crimes. Currently, however, it is likely that State immunity would continue to preclude the exercise of jurisdiction over incumbent leaders in national courts.

The case of *Al-Adsani v. UK* involved the question of the liability of the UK following the dismissal by the English Courts of a claim for damages for acts of torture allegedly committed by the Government of Kuwait. The Kuwaiti Government invoked sovereign immunity to bar proceedings before the English Courts. The European Court of Human Rights held that the UK could not be held liable a, “while national courts had in some cases shown some sympathy for the argument that States were not entitled to plead immunity where there had been a violation of human rights norms with the character of *jus cogens*<sup>116</sup>, in most cases (including those cited by the applicant in the domestic proceedings and before the Court) the

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<sup>112</sup> D Vandermeersch ‘Prosecuting International Crimes in Belgium’ (May 2005) *Journal of International Criminal Justice*, p. 418, citing A. Cassese, *International Criminal Law* (Oxford University Press Oxford 2003) pp 266-273.

<sup>113</sup> Sands, *Lawless World: Making and Breaking Global Rules* (Penguin Books London 2006)

<sup>114</sup> *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte* [2000] 1 AC 147 (HL).

<sup>115</sup> L. Zegveld ‘The Bouterse Case’ (2001) *Netherlands Yearbook of International Law*, p 113, citing para. 4.2. of the *Bouterse* judgement of the Amsterdam Court of Appeal.

<sup>116</sup> *Jus cogens* or peremptory norms form a special category of norms. These norms are regarded as being on the top of the hierarchy of norms. Although often invoked outside its original context, their origin is to be found in treaty law. States can not make a treaty that deviates from norms with that character. It is still very unclear what norms can be regarded as *jus cogens*. This makes it difficult to invoke this special character.

plea of sovereign immunity had succeeded.” This case can be distinguished from the case at hand as it involves civil rather than criminal liability. However, the *Al-Adsani* case demonstrates that the plea of immunity by incumbent leaders is still a very forceful argument before national courts.

## **8.2. Political Sensitivity**

Next to the judicial problems, as discussed above, one has to bear in mind the political sensitivity surrounding this subject. If charges are brought against an incumbent leader the issue may be more politically sensitive than when charges are brought against a former leader of a State. Certainly, the political branch would be more reticent to allow such a case to go ahead. The principle of State immunity, in which governments are protected from prosecution in foreign jurisdictions for actions taken in a governmental rather than commercial capacity, is politically weighted allowing the protection of the government of the day to take precedent over the protection of other rights and interests.

## **8.3. Immunity Before International Courts**

The rules concerning immunity are different when the jurisdiction is exercised, not by other States, but by international courts or tribunals. Article 27 ICC Statute states that a suspect’s official capacity shall in no case exempt that person from criminal responsibility under the Statute. That means that whether the actions committed were done in an official capacity is irrelevant and cannot operate as a defence. The Statute further provides that immunities, attached under national or international law, shall not bar the Court from exercising its jurisdiction over a person. The International Tribunals such as the tribunals for Yugoslavia, Rwanda and Sierra Leone also do not recognize such immunities and are able to prosecute persons in an official capacity. Therefore, if a case is brought before the ICC the defence cannot claim that State immunity precludes the Court from exercising jurisdiction.

## **9. State Responsibility**

Aside from individual criminal responsibility a case may be made to invoke the responsibility of Zimbabwe as a State. A State is internationally responsible for the breach of its international obligations.<sup>117</sup> A different legal regime operates to moderate the responsibility of States.

### **9.1. International Obligation**

A State can incur responsibility for the breach of its international obligations.<sup>118</sup> It must be established that Zimbabwe has in fact breached an international obligation. It could be established that Zimbabwe breached obligations assumed under human rights treaties. Zimbabwe is a party to both the ICCPR and ICESCR. Article 11 of the ICESCR provides that State Parties recognize the right of everyone to an adequate standard of living including adequate housing. Furthermore, Article 12 of the ICESCR states that State Parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. As the evictions left thousands of people homeless, and as a result they suffered both physically and mentally, it can be shown that these obligations have been breached. Article 12 of the ICCPR provides for the right of persons to liberty of movement and the freedom to choose their own residence. The forceful evictions can be shown to be in breach of this obligation.

### **9.2. Attribution**

In order to invoke the responsibility of a State it must be established that the breach of the international obligation is attributable to the State.<sup>119</sup> As reflected in Article 4 of the ILC

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<sup>117</sup> International Law Commission 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) ( ILC Articles) art 1.

<sup>118</sup> Art 1 ILC Articles; *Corfu Channel* (United Kingdom v Albania) (Merits) ICJ Rep 1949, p. 4, at p. 23. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) (Merits) ICJ Rep 1986, p. 14, at pp. 283, 149, para. 292. *Gabcikovo-Nagymaros Project* (Hungary v Slovakia) ICJ Rep 1997, p. 7 at p. 38, para. 47.

<sup>119</sup> See Article 2 (a) ILC Articles; *Phosphates in Morocco* (Preliminary Objections) PCIJ Series 1938 A/B, No.74 10

Articles and recognised in international jurisprudence, the conduct of any State organ is to be considered as an act of the State.<sup>120</sup> Similarly, the actions of an entity that is empowered to exercise elements of governmental authority shall be considered as an act of the State.<sup>121</sup> The Harare Commission was appointed by Ignatious Chombo, the Minister of Local Government, Public Works and Urban Development.<sup>122</sup> It could be argued that the Harare Commission is an organ of the State or alternatively, and perhaps more appropriately, that it has been empowered to exercise governmental functions. Therefore, the actions of the Commission would be attributable to the State. There is a pending application to the High Court questioning the authority of the Harare Commission to manage the city of Harare.<sup>123</sup> Should there be any question of the Commission overstepping its mandate, it is an established principle of international law that any act of a State organ, or an entity empowered to exercise governmental authority, shall be considered as an act of the State even if the organ or entity exceeds its authority or contravenes instructions.<sup>124</sup> Therefore, even if it can be shown that the Harare Commission lacks proper authorisation this need not render its actions unattributable to the State

### **9.3. Invoking State Responsibility**

When a State has violated any of its international obligations that State incurs responsibility *per se*. Injured States can invoke the responsibility of Zimbabwe. A State can only be regarded as injured if the obligation breached by Zimbabwe is owed to that State.<sup>125</sup> The Articles on State Responsibility include a possibility for non-injured States to invoke responsibility.<sup>126</sup> The Articles on State Responsibility are not in the form of a treaty. They are adopted by the General Assembly of the United Nations and are not binding on States as such. They are only legally binding when the particular provision represents a codification of an

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<sup>120</sup> See for example *German Settlers in Poland*, 1923, PCIJ, Series B, No 6, 35-36; *Ellectronica Sicula S.p.A.* (ELSI) ICJ Reports 1989 15; *Lotus case*, PCIJ Series 1927 A, No. 10, 24.

<sup>121</sup> See Article 5 ILC Articles; *Hyatt International Corporation v. Government of the Islamic Republic of Iran* (1985) 9 Iran-USCTR 72, 88-94.

<sup>122</sup> [http://en.wikipedia.org/wiki/Operation\\_Murambatsvina](http://en.wikipedia.org/wiki/Operation_Murambatsvina), assessed 12 April 2006.

<sup>123</sup> Ibid.

<sup>124</sup> Article 7 ILC Articles.

<sup>125</sup> See article 42 ILC Articles.

<sup>126</sup> See article 48 ILC Articles.

existing rule of customary law. The Articles can also be used as evidence of law given their being drafted by the International Law Commission and following their adoption by the General Assembly. However, Article 48, providing for non-injured States is probably not of a customary nature but instead is regarded as a progressive development of the law. Under the rule proposed under Article 48 a State, other than the injured State, can present a claim against the violating State. This is the case when the obligation breached is owed to the international community as a whole. According to the commentary on the articles of State Responsibility this “provision intends to give effect to the International Court’s statement in the *Barcelona Traction* case”.<sup>127</sup> The Court in that case stated, with regard to obligations owed to the international community as a whole, that, in view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>128</sup> Examples of these obligations, given by the Court, are the prohibitions on genocide, acts of aggression and respect for certain human rights principles. As yet no non-injured State has invoked the responsibility of another State based upon this proposition. This suggests that it cannot be taken to be representative of customary law, although the international courts do seem to favour its existence.

#### **9.4. Dispute Mechanism**

Although State responsibility is entailed by virtue of the breach, it may be desirable to have a forum in which to make a presentation of the claim. The most appropriate means to invoke the claim may be to bring the case before an international dispute mechanism, such as the ICJ. For this to occur however Zimbabwe must consent to the jurisdiction of the ICJ, as Zimbabwe has not made a declaration in which it recognizes the compulsory jurisdiction of the ICJ.<sup>129</sup> It is unlikely that Zimbabwe would grant such consent. Another difficulty is that a State would have to bring the case against Zimbabwe and be prepared to act as the applicant State. So far no non-injured State has ever brought a claim before the ICJ based on this *erga omnes* violation principle. This is due to a combination of factors, including the political and

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<sup>127</sup> ILC, Commentaries on the draft articles on Responsibility of States for Internationally Wrongful Acts, adopted by the General Assembly as A/RES/56/83, on 12 December 2001, p. 321.

<sup>128</sup> *Barcelona Traction, Light and Power Company, Limited* (Second Phase) I.C.J. Reports 1970, p 32 (para. 33).

<sup>129</sup> See article 36 para. 2 of the Statute of the International Court of Justice.

economic costs of international litigation combined with the fact that States are usually guided by self-interest.