

**ARE THE ACTIVITIES CONDUCTED DURING OPERATION
MURAMBATSVINA CRIMES AGAINST HUMANITY WITHIN THE
MEANING OF ARTICLE 7 OF THE ROME STATUTE?**

International Law Opinion

Oxford Pro Bono Publico Group

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EXECUTIVE SUMMARY

1. Oxford Pro Bono Publico has been requested to assist in the preparation of an opinion considering whether the evictions that have taken place in various towns and cities in Zimbabwe in the context of ‘Operation Murambatsvina’ (Operation Restore Order) constitute crimes against humanity as defined in the Statute of the International Criminal Court¹ (hereinafter ‘the Statute’).
2. Article 7 of the Rome Statute provides that:
 - (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:
[...]
(d) Deportation or forcible transfer of population;
[...]
 - (2) For the purpose of paragraph 1:
[...]
(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;
3. To determine whether there has been a violation of Article 7 of the Rome Statute, a number of questions need to be answered in the affirmative. These are:
 - 3.1. Whether there was, in fact, a ‘deportation or forcible transfer of population’ in Zimbabwe in Operation Murambatsvina, through ‘expulsion or other coercive acts’.
 - 3.2. Whether the persons subject to the ‘deportation or forcible transfer’ were ‘legally present’ in the area from which they were removed;
 - 3.3. Whether the acts in question constituted a ‘widespread or systematic attack directed against any civilian population’?

¹ 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 [hereinafter ‘Statute’ or ‘Rome Statute’].

3.4. Whether there are grounds under international law under which the deportation or forcible transfer could take place.

4. On the question of whether there was in fact a deportation or forcible transfer of population as defined in the Statute, it is concluded herein that the requirements of the Statute, namely, that there be the transfer of one or more persons and that such transfer be coerced or forced, have been met insofar as the factual situation as detailed in this opinion is correct. Because the transfers were executed without the consent of the individuals concerned and a range of coercive measures were employed, it is reasonable to conclude that the acts fall within the range of practices proscribed in the Rome Statute. Zimbabwe would therefore have to establish whether the impugned acts fall under the international law exceptions allowing for a forcible transfer of population.
5. On the question of whether the forcible transfer of population was committed as part of widespread or systematic attack directed against any civilian population it is concluded herein that the requirements of the Statute have been fulfilled. Taking into consideration the size of and the manner in which the Operation was conducted, it is reasonable to conclude that it constituted an attack both widespread and systematic against a civilian population. Furthermore, the orchestration of the Operation has led to the conclusion that it was conducted pursuant to a State policy to commit such attack.
6. On the question of whether those subject to forcible transfer were 'legally present', the word 'lawfully' in 'lawfully present' requires that the laws that define the legality or illegality of one's presence in a particular area comply with the principle of legal certainty. In terms of the case law of the European Court of Human Rights, the laws in question must be sufficiently precise to allow the individual to foresee, to a degree that is reasonable in the circumstances, the consequences of his or her actions. In the present case, while the Housing and Planning Acts are themselves sufficiently clear, the Zimbabwean government's actions in largely ignoring this legislation after independence, and adopting contrary policies, arguably undermined the requirement of reasonable foreseeability and thus the principle of legal certainty. This, in turn, undermines the Zimbabwean government's case that the evictees were unlawfully present in the areas in which they had settled.

7. If, however, the preceding argument is not accepted, and a narrow reading of 'lawfully present' is adopted, it appears that most of those subject to evictions in Operation Murambatsvina were not lawfully present within the meaning of the Rome Statute.
8. It may, however, be possible to argue that since the Planning Act has not been enforced for a significant period, that the doctrine of abrogation through disuse, renders the Act void. However, no definite opinion on this issue is expressed herein, and it has been mentioned merely to draw attention to the doctrine for further consideration by a specialised Zimbabwean constitutional lawyer. Should it be decided that the doctrine is still operable in Zimbabwe, then those subject to the evictions were, arguably, 'lawfully present' since there was no legislation prohibiting their settlement in the area.
9. Even if it is accepted that most of those evicted were not 'lawfully present', many of those evicted were 'lawfully present' within the meaning of the Rome Statute. Those evicted should therefore be constituted as those who were 'lawfully present' and those who were not for the purposes of the Rome Statute. The Rome Statute does not require that all of those in a group of displaced persons be lawfully present' and it would therefore appear to be sufficient to constitute those lawfully present as a separate group.
10. Moreover, since the Zimbabwean authorities did not seek to distinguish between these two groups in carrying out Operation Murambatsvina, it could be argued that they should not be permitted to rely on that distinction for the purposes of asserting the legality of the evictions and demolitions under the Rome Statute.
11. Zimbabwean legislation regulating evictions is consistent with international law. The evictions, however, were not carried out consistently with Zimbabwean law.
12. On the question of whether, assuming that a forcible transfer of population as defined in the Rome Statute has occurred, Zimbabwe might be able to invoke one of the international law exceptions allowing for such forcible transfers in exceptional circumstances, it is concluded herein that the requirements under international law allowing for the limitation of these individuals' rights to mobility, namely, that they be temporary, necessary and proportional to the threat, have not been met.

INTRODUCTION

13. Oxford Pro Bono Publico has been requested to assist in the preparation of an opinion considering whether the evictions that have taken place in various towns and cities in Zimbabwe in the context of ‘Operation Murambatsvina’ (‘Operation Restore Order’ or ‘Operation’) constitute crimes against humanity as defined in the Statute of the International Criminal Court² (hereinafter ‘the Statute’).
14. Zimbabwe is not party to the Statute. Therefore, according to Article 12 of the Statute,³ and given that nationality-based jurisdiction thereunder is extremely unlikely, it is assumed herein the International Criminal Court (hereinafter ‘the Court’) does not already have jurisdiction over alleged crimes committed on the territory of Zimbabwe. Nevertheless, the Court may still exercise its jurisdiction if, according to Article 13 (b) of the Statute, ‘[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’; this occurred in 2005 with regard to the situation in the Sudan.⁴
15. For the Security Council to refer a case to the Court acting under Chapter VII, it must first determine that a ‘threat to the peace, breach of the peace or act of aggression exists’ as required under Article 39 of the UN Charter. Such a determination constitutes a prerequisite for the activation of Chapter VII. An overview of prior Security Council practice demonstrates that there have been situations where it has found certain human rights violations to constitute a threat to international peace and security. For example, in 1991 the Security Council

² 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 [hereinafter ‘Statute’ or ‘Rome Statute’].

³ *ibid* at Article 12, which reads as follows:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.

2. In the case of Article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State or registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

⁴ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593.

determined that the consequences of the repression of the Kurdish population in Northern Iraq, in particular the refugee flows and cross-border incursions, constituted a threat to the peace.⁵ In the case of Somalia, the Security Council determined that ‘the magnitude of the human tragedy ... constitutes a threat to international peace and security’.⁶ Furthermore, both in the cases of Rwanda and Eastern Zaire, the Security Council found the threat to the peace in the ‘magnitude of the humanitarian crisis’.⁷ It should be emphasised, however, that all these findings were in the context of internal armed conflicts. The Security Council itself has stated that ‘the deliberate targeting of civilian populations or other protected persons and the committing of widespread violations of international humanitarian law and human rights law in situations of armed conflict may constitute a threat to international peace and security’.⁸ Nevertheless, there have been examples where the Security Council has exercised its Chapter VII powers in the context of human rights violations in the absence of an internal armed conflict: with both Southern Rhodesia⁹ and South Africa, the Security Council found that a threat to international peace and security existed despite no actual armed conflict,¹⁰ although other motivating factors animated the passing of these resolutions.¹¹

16. Therefore, although the lack of armed conflict makes it unlikely that the Security Council might consider the situation in Zimbabwe to constitute a threat to the peace, such a finding would not be unprecedented.

Rome Statute of the International Criminal Court

17. Article 7 of the Rome Statute provides that:

⁵ UNSC Res 688 (5 April 1991) UN Doc S/RES/688.

⁶ UNSC Res 794 (3 December 1992) UN Doc S/RES/794.

⁷ UNSC Res 929 (22 June 1994) UN Doc S/RES/929 (Rwanda); UNSC Res 1078 (9 November 1996) UN Doc S/RES/1078 (Zaire).

⁸ UNSC Res 1296 (19 April 2000) UN Doc S/RES/1296; UNSC Res 1314 (11 August 2000) UN Doc S/RES/1314.

⁹ UNSC Res 217 (20 November 1965) UN Doc S/RES/217; UNSC Res 221 (9 April 1966) UN Doc S/RES/221.

¹⁰ UNSC Res 418 (4 November 1977) UN Doc S/RES/418.

¹¹ For an overview of Security Council practice, see J Frowein and N Krisch ‘Article 39’ in B Simma (ed) *The Charter of the United Nations, A Commentary* (2nd edn Oxford University Press Oxford 2002) 717–29.

- (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:

[...]

- (e) Deportation or forcible transfer of population;

[...]

- (2) For the purpose of paragraph 1:

[...]

- (e) “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;

18. To determine whether there has been a violation of Article 7 of the Rome Statute, a number of questions need to be answered in the affirmative. These are:

18.1. Whether there was, in fact, a ‘deportation or forcible transfer of population’ in Zimbabwe in Operation Murambatsvina, through ‘expulsion or other coercive acts’.

18.2. Whether the persons subject to the ‘deportation or forcible transfer’ were ‘legally present’ in the area from which they were removed;

18.3. Whether the acts in question constituted a ‘widespread or systematic attack directed against any civilian population’?

18.4. Whether there are grounds under international law under which the deportation or forcible transfer could take place.

19. This opinion will examine each of these questions in turn.

About the Authorities and Methodology Used in this Opinion

20. The expansive rule of interpretation regarding the Rome Statute’s definition of ‘crimes against humanity’ and ‘deportation or forcible transfer’, as well as the understanding thereof as a codification of customary international law, were articulated by jurist Rodney Dixon, and were respected throughout the drafting of this opinion:

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” is, without dispute, the essential feature of crimes against humanity. It should guide the interpretation of the elements of these crimes.

Consequently, the definition of crimes against humanity contained in article 7 of the Statute accords with the traditional conception of crimes against humanity under customary international law. The long line of recognised authorities and practices that underpin the customary law position must be drawn upon to interpret the elements of crimes against humanity under the Statute.¹²

21. Although the case law 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’) is extensively referred to throughout this opinion, there are certain institutional and practical differences between the *ad hoc* tribunals and the Court which merit brief consideration.
22. The first consideration is the difference between the subject matter jurisdiction of the *ad hoc* tribunals and the Court. 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’¹³, both of which differ from the Statute. Article 3 of the ICTR Statute requires that the crime be committed ‘on national, political, ethnic, racial or religious grounds’,¹⁴ whereas such requirement is only demanded under customary international law for the crime of persecution and is not required under the Statute. This difference in emphasis should be borne in mind when considering judgements from the *ad hoc* tribunals.
23. Article 7 of the Statute clearly requires, as a component of crimes against humanity, that the acts be done ‘pursuant to or in furtherance of a State or organizational policy to commit such attack’.¹⁵ However, the *Tadić* decision of the ICTY observed that there was no particular motive requirement for crimes against humanity in

¹² 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) 123.

¹³ Statute of the International Criminal Tribunal for the former Yugoslavia UNSC Res 827 (25 May 1993), UN Doc S/RES/827 (1993).

¹⁴ Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955 (1994).

¹⁵ Article 7(2)(a) of the Statute.

general (the act of ‘persecution’ has a motive requirement built into its definition).¹⁶ Furthermore, subsequent to the adoption of the Rome Statute, the Appeals Chamber of the ICTY in the *Kunarać* judgement held that the policy component was not, from the standpoint of customary international law, an element of crimes against humanity at all.¹⁷

24. One can therefore reasonably infer that the case law of the *ad hoc* tribunals has gravitated towards broadening the concept of crimes against humanity and has even, on some aspects, appeared to diverge from the text of Article 7 of the Rome Statute.¹⁸ The distinction is immaterial for the case at hand, given that the Government of Zimbabwe’s statements clearly demonstrate that a policy existed to perform the acts in question; however, given that the International Criminal Court and the *ad hoc* tribunals do not necessarily share a common understanding as to the nature of crimes against humanity, we caution against excessive reliance on the case law of the *ad hoc* tribunals.

Facts

25. The facts cited in the following paragraphs are based, unless otherwise indicated, both on the ‘Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina’¹⁹ by the UN Special Envoy on Human Settlements Issues in Zimbabwe, Mrs Anna Kajumulo Tibaijuka, and the Response of the Zimbabwean Government thereto, issued in a press release on August 2005.²⁰
26. The first official announcement that a comprehensive ‘operation’ was underway in Zimbabwe came in a speech by the Chairperson of the Government-appointed Harare Commission, Ms Sesesai Makwavarara at the Harare Town House on 19 May 2005. She characterized it as a ‘programme to enforce bylaws to all forms of

¹⁶ *Prosecutor v Tadić* (Judgement) ICTY IT-94-1-A Ch (15 July 1999) [hereinafter *Tadić*].

¹⁷ *Prosecutor v Kunarać* (Judgement) ICTY IT-96-23, IT-96-23/I-A (22 February 2001) [98].

¹⁸ W Schabas *An Introduction to the International Criminal Court* (2nd edn Cambridge University Press Cambridge 2004) 45–46.

¹⁹ A Kajumulo Tibaijuka (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’ (United Nations Human Settlement Programme) (31 October 2005) <http://www.unhabitat.org/documents/ZimbabweReport.pdf> [hereinafter ‘Report’].

²⁰ Government of Zimbabwe ‘Response by Government of Zimbabwe to the Report by the UN Special Envoy on Operation Murambatsvina/Restore Order’ <http://www.zimfa.gov.zw/speeches/president/UNresp.pdf> (31 October 2005) [hereinafter ‘Response’].

illegal activity’ and said it would be enforced ‘in conjunction with Zimbabwe Republican Police’. Five days later, the City of Harare issued a notice indicating to the people of the Greater Harare area that persons who had erected illegal structures should demolish them by 20 June 2005. There is no evidence that advance notice was given in other cities in Zimbabwe to which the Operation was extended. On 25 May 2005, only a few days after the notice appeared, and in complete disregard of the deadline announced, a massive military-style operation started.²¹

27. The Operation started in the capital, Harare, but was quickly extended to practically all urban centres, including Bulawayo, Chinhoyi, Gweru, Kadoma, Kwe Kwe, Marondera and Mutare.²²

28. According to the Government of Zimbabwe the Operation had been undertaken, *inter alia*, for the following purposes:

- a) 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;
- b) to minimise the threat of major disease outbreaks due to overcrowding and squalor;
- c) to stop economic crimes especially illegal black market transactions in foreign currency;
- d) to eliminate the parallel market and fight economic sabotage;
- e) to reorganise micro-, small and medium enterprises;
- f) to reduce high crime levels by targeting organized crime syndicates;
- g) to arrest social ills among them prostitution which promotes the spread of HIV/AIDS and other communicable diseases;

²¹ *ibid* 12.

²² ‘Zimbabwe’s Operation Murambatsvina: The Tipping Point?’ http://www.crisisgroup.org/library/documents/Africa/souther_africa/097_zimbabwe_s_operation_murambatsvina_the_tipping_point.pdf (31 October 2005) [hereinafter ‘International Crisis Group’] 1.

h) to stop the hoarding of consumer commodities, and other commodities in short supply; and

i) to reverse the environmental damage and threat to water sources caused by inappropriate and unlawful urban settlements.²³

29. Irrespective of whether the above justifications were the real motivations behind the Operation or not, or whether, for example, the Operation was an act of retribution against areas known by the Government to have voted for the opposition during the recent presidential and parliamentary elections,²⁴ it has been established that the Operation was initially targeted at street vendors and those operating in the informal urban economy.²⁵ Also, it rapidly extended to the demolition of informal and formal settlements, and small and medium enterprises countrywide.²⁶

30. Official government figures released on 7 July 2005 revealed a total of 92 460 housing structures that had been demolished directly affecting 133 534 households.²⁷ At the same time, the structures of 32 538 micro-, small and medium-sized enterprises were demolished. Based on average household size derived from the 2002 census, and authoritative studies on the informal economy, the population having lost their homes can be estimated at 569 685 and those having lost their primary source of livelihood at 97 614.²⁸ This present opinion only considers the lawfulness of the situation of those actually deprived of their households.

31. However, the Government of Zimbabwe, in its Response to the Report of the UN Envoy, denies the findings contained therein. First, it states that the persons made temporarily homeless in the major cities were the same persons placed in transit centres visited by the UN Envoy. The numbers of households in Transit Centres

²³ Response (n 20) 15–16.

²⁴ Report (n 19) 20, International Crisis Group (n 22) 4–5. However, the Government of Zimbabwe claims that: Contrary to the allegations by its critics that the operation targeted opposition supporters, the exercise has also affected ZANU PF supporters, war veterans and civil servants including members of the uniformed forces. Response (n 20) 20.

²⁵ Report (n 19) 31.

²⁶ *ibid.*

²⁷ For the purposes of the Report (n 19) 32 (fn 46), households include conventional family structures, multi-generational and/or extended family structures and individuals. The average family size has been taken to be 4.2 persons.

²⁸ Report (n 19) 32. Crisis Group's own extensive research, including inside Zimbabwe, has unearthed no basis for disagreement with UN Envoy's findings.

were as follows: Harare 1,077; Bulawayo 892; and Mutare 726.²⁹ Second, 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 Report and extrapolated to arrive at the final figure of 700,000 people deprived of their households.³⁰

32. Institutionally, the Operation was conducted by central Government authorities, including the military.³¹ The demolitions were conducted as a national police and military exercise.³² The operation was still underway as the UN Mission left the country.³³

Mens Rea

33. The present opinion does not deal with the criminal responsibility, if any, of specific or identifiable individuals; thus, the *mens rea* requirements for a conviction under international criminal law will only be discussed in general terms.

34. In order for an individual to be criminally responsible for crimes against humanity, in the case under question for forcible transfer of population, he or she must have committed the relevant act with knowledge of the attack. The element of knowledge

should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.³⁴

The perpetrator must therefore have actual or constructive knowledge of the broader context of the attack, meaning that he or she must know that his or her act is part of a widespread or systematic attack on a civilian population and pursuant to some

²⁹ Response (n 20) 28–29.

³⁰ *ibid* 21.

³¹ Report (n 19) 31.

³² *ibid* 67.

³³ It has been argued that the Operation remains ongoing: Carole Gombakomba, ‘Zimbabwe Carries Out New Evictions in Harare Township’ (Voice of America) <http://www.voanews.com/english/Africa/Zimbabwe/2005-10-07-voa47.cfm> (31 October 2005).

³⁴ ‘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’] 518.

kind of policy or plan.³⁵ The accused need not necessarily share the purposes or goals behind the broader attack.³⁶

35. The individual's actions themselves need not be widespread or systematic, providing that they form part of such an attack. Indeed, the commission of a single act—such as one murder—can, in the context of a broader campaign against the civilian population, constitute a crime against humanity.³⁷

36. It should be noted that under the Statute, a person need not be the actual perpetrator of a crime against humanity in order to bear individual criminal responsibility. Under Article 25 of the Statute,³⁸ a person can be liable for punishment if, for example, they have ordered the commission of the crime or assisted 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 military command who committed crimes under the jurisdiction of the Court and either knew or ought to have known that such crimes were about to be committed or failed to take all necessary and reasonable measures within their power to prevent or repress their commission.³⁹

³⁵ *Prosecutor v Rutaganda* (Judgement) ICTR-96-3 (6 December 1999) [71], *Prosecutor v Musema* (Judgement) ICTR 96-13-A (27 January 2000) [206].

³⁶ *Prosecutor v Semanza* (Judgement) ICTR-97-20-T (15 May 2003) [332].

³⁷ Dixon (n 12) 125.

³⁸ Rome Statute (n 2) Article 25 reads as follows:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; [...] (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

³⁹ Rome Statute (n 2) Article 28 reads as follows:

37. The criminal responsibility of each individual who may eventually be indicted must be determined on the basis of evidence not all of which is currently available and which is beyond the scope of this opinion.

Structure of the Opinion

Having discussed the preliminary considerations, this present opinion will examine the evictions carried out under the Operation in light of the definitions of

- a) ‘Forcible transfer of population’, to the extent to which these were:1) coerced;
- b) Whether the population so transferred was ‘lawfully present’;
- c) The extent to which these attacks were ‘widespread or systematic’, thus constituting a crime against humanity under Article 7 of the Statute;

Should a forcible transfer under the Statute be found to exist under the facts as described *supra*, a separate discussion of whether there are circumstances under international law which would otherwise render such forcible transfer lawful will follow.

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.

PART I: DEPORTATION OR FORCIBLE TRANSFER OF POPULATION

38. Article 7 (2) (d) provides that in order for an act to be considered forcible transfer of population it needs to be:

- i) a forced displacement of the persons concerned by expulsion or other coercive acts;
- ii) from the area in which they are lawfully present;
- iii) without grounds permitted under international law.

39. This section of the opinion will examine whether there was in fact a deportation or forcible transfer of population as defined in the Statute.

40. Article 7 of the Statute, which defines the concept of ‘crimes against humanity’ and enumerates various individual acts that fall under that definition, excludes, by its silence, the requirements that the acts in question take place during armed conflict and occur on discriminatory grounds.⁴⁰ This definition therefore differs from the definition of ‘crimes against humanity’ included in the Statutes of the *ad hoc* tribunals.⁴¹

41. Article 7 of the Statute lists ‘deportation or forcible transfer of population’, which under subparagraph (2)(d) thereof is defined 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’.⁴²

42. It is imperative that the concepts of deportation and forcible transfer of the population be properly distinguished: the former emphasises the ‘forced removal of people from one country to another’; the latter, the ‘compulsory movement of people from one area to another within the same State’.⁴³ The argument considered herein proceeds on the observation that nothing in the facts, discussed above,

⁴⁰ 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) 123.

⁴¹ See para 22 above.

⁴² Rome Statute (n 2) Article 7.

⁴³ MC Bassiouni *Crimes Against Humanity in International Criminal Law* (2nd edn Kluwer The Hague 1999) 312.

indicates that the people affected by the act in question were specifically transported across international boundaries. It is therefore the specific question of whether the acts in question constitute a forcible transfer that will be examined.

43. Forced population exchanges have been lawfully executed in the past: Greece and Turkey, after the First World War, had actually been required to do so by the Treaty of Lausanne,⁴⁴ and ethnic Germans and German nationals were expelled from countries in Central and Eastern Europe after the Second World War.⁴⁵ The crime against humanity of ‘deportation’ made its first appearance as an international crime in the Charter for the Nuremburg Trials, in which Article 6(c) listed a series of acts constituting crimes against humanity:

murder, extermination, enslavement, *deportation*, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁴⁶

The emergence of the specific crime against humanity of ‘forcible transfer of population’ was first codified in Article II(c) of the 1973 Apartheid Convention.⁴⁷ 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.⁴⁸

44. Although the latter two instruments find exclusive application during international or non-international armed conflict, the principles elucidated therein may be useful when considering the analogous crime against humanity during peacetime. In its

⁴⁴ Treaty of Peace between the Allied Powers and Turkey (1923), 28 LNTS 11 [hereinafter ‘Treaty of Lausanne’].

⁴⁵ Hall (n 40) 135.

⁴⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, Annex, 59 Stat. 1544; 82 UNTS 279; reprinted in 39 AJIL 257 (Supp. 1945) [hereinafter ‘Nuremburg Charter’ or ‘IMT Charter’]. [Emphasis added.]

⁴⁷ International Convention for the Suppression and Punishment of the Crime of Apartheid (opened for signature Nov. 30, 1973, entered into force Jul. 18, 1976), 1015 UNTS 243 [hereinafter ‘Apartheid Convention’].

⁴⁸ Geneva Convention [IV] relative to the Protection of Civilian Persons in Time of War (opened for signature 12 August 1949, entered into force 21 October 1950), 75 UNTS 287, Article 49, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (opened for signature 8 June 1977, entered into force 7 December 1978), 1125 UNTS 609, Article 17(1).

Rule 61 Decision in *Nikolić*,⁴⁹ rendered on 20 October 1995, the Trial Chamber of the ICTY declared that deportation could be qualified as both a ‘grave breach of the Geneva Conventions and as a crime against humanity’. The Trial Chamber held that,

[u]nder the supervision and on the orders of the accused...a large number of detainees are said to have been transferred from Suzica camp to Batković during the summer of 1992. Dragan Nikolić is said to have organised the transfers, calling out detainees from a list of names and telling them that they were to be exchanged for Serbian prisoners. In actual fact, the detainees were transferred to Batković camp; they were forced to travel by bus with their heads down, their hands behind their heads. They were beaten and forced to sing ‘patriotic Serbian’ songs. At Batković camp conditions were similar to those at Suzica camp, if not worse...the Chamber considers that Dragan Nikolić may have committed grave breaches of the Geneva Conventions of 1949—in particular of Convention IV—which fall under the Tribunal’s jurisdiction pursuant to Article 2 of the Statute. [The] Chamber, however, also considers that the same set of facts could be characterised as deportation and, accordingly, come under Article 5 of the Statute.⁵⁰

45. Despite the differences between the Rome Statute and the constitutive statutes of the *ad hoc* tribunals, the definitions enumerated in the Statute are considered to codify customary international law on the definition of crimes against humanity.⁵¹ The Statute makes no further distinction between the crimes against humanity of ‘deportation’ and ‘forcible transfer of population’. Jurist Christopher Hall has stated that, ‘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’.⁵² The terms, ‘forcible’ and ‘forced’, under this interpretation, should be given a broad reading consistent with the purpose of the Statute to include any form of coercion which leads to the departure of people from the area where they are located.⁵³ The *Krstić* decision of the Trial Chamber of the ICTY also stated that ‘deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacement within a State’ under customary international law.⁵⁴ In that case, about 25 000 Bosnian Muslim civilians were forcibly bussed outside the enclave of Srebrenica to the territory under Bosnian

⁴⁹ *Prosecutor v Nikolić*, ICTY IT-94-2-R61 (20 October 1995) Trial Chamber I.

⁵⁰ *ibid* at para 23.

⁵¹ A Cassese, ‘Crimes Against Humanity’ in Cassese, Gaeta, Jones (eds) *The Rome Statute of the International Criminal Court* (Oxford University Press Oxford 2002) vol 1 353, 370.

⁵² Hall (n 40) 136.

⁵³ *ibid*.

⁵⁴ *Prosecutor v Krstić*, ICTY IT-98-33 (2 August 2001) [531].

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’.⁵⁵ The Chamber concluded that the civilians transported from Srebrenica were not subjected to deportation but to forcible transfer, a crime against humanity.

46. Hall argues further that, ‘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.’⁵⁶

47. In light of the foregoing, it is reasonable to add that, when pertinent, any statements made by a municipal or international court, official government documents, treaties, conventions or the documents of international organisations concerning ‘deportation’ can assist, as the case may be and, *mutatis mutandis*, in further understanding the crime against humanity of ‘forcible transfer of population’.

Forcible Transfer in the ‘Elements of Crimes’

48. The ‘Elements of Crimes’, adopted by the Assembly of States Parties to the International Criminal Court on 18 September 2002, require that the following elements exist for the crime against humanity of ‘deportation or forcible transfer of population’ to be established:

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.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

⁵⁵ *ibid* [527].

⁵⁶ Hall (n 40) 162.

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.⁵⁷

49. Although the ‘Elements of Crimes’ adopted by the Assembly of States Parties are not in and of themselves binding,⁵⁸ nor in any way to be construed as modifying the Rome Statute, throughout the drafting process for the ‘Elements of Crimes’, great care was taken that the intent of the Statute not be modified when adopting the Elements of Crimes. Although the Vienna Convention on the Law of Treaties⁵⁹ declares in Article 31(1) that a treaty provision should be interpreted ‘in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’, the Elements of Crimes may be of use, as Article 31(3)(a) of the Vienna Convention also allows for a ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ to be taken into account in interpreting a treaty; Article 31(3)(c) similarly provides for ‘subsequent practice in the application of the treaty’ to be taken into account. Important considerations enumerated in the Rome Statute are emphasised in the ‘Elements of Crimes’, namely, that the persons deported or forcibly transferred *were lawfully present in the area from which they were so deported or transferred* and that *the perpetrator was aware of the factual circumstances that established the lawfulness of such presence.*’ [emphasis added]

50. In light of the foregoing, it is therefore reasonable to conclude that Operation Murambatsvina, as described herein, could fulfil the requirements under Article 7(2)(d) of the Rome Statute of a ‘forcible transfer of population’.

PART II: LEGALITY OF THE EVICTIONS UNDER ZIMBABWEAN LAW

51. This part of the opinion addresses the question of whether the persons subject to deportation and forcible transfer in Operation Murambatsvina were ‘lawfully present’ in the area from which they were removed.

52. In order to fully answer this third question, it must be further broken down into three sub-questions:

⁵⁷ Elements of Crimes (n 34) 118.

⁵⁸ United Nations, <http://www.un.org/News/facts/iccfact.htm> (12 November 2005).

⁵⁹ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331 [hereinafter ‘Vienna Convention’].

52.1. What is the meaning of ‘lawfully present’?

52.2. Were the persons subject to the deportation or forcible transfer lawfully present under Zimbabwean law?

52.3. Assuming that the persons subject to the deportation or forcible transfer were not lawfully present under Zimbabwean law, is that law compatible with international law?

53. These questions will be dealt with in turn below.

The Meaning of ‘Lawfully Present’ In the Rome Statute

54. 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.’

55. This section considers the meaning of the term ‘lawfully present’. These words can be interpreted as referring to:

55.1. Zimbabwean domestic law, exclusively;⁶⁰

55.2. International law, exclusively;

55.3. Zimbabwean domestic law, to the extent that it is compatible with general international law; or

55.4. Zimbabwean domestic law, to the extent that it is compatible with Zimbabwe’s specific treaty obligations under international law.

56. This section will conclude that the fourth interpretation, namely, that ‘lawfully present’ should be taken to refer to Zimbabwean domestic law to the extent that it is consistent with Zimbabwe’s international obligations, is correct. This conclusion was reached by examining how the European Court of Human Rights (hereinafter

⁶⁰ This appears to be the interpretation favoured by Mrs Kajumulo Tibaijuka in the Report, 64–66. If the evictees were not lawfully present under Zimbabwean domestic law, this interpretation of Article 7(2)(d) would, of course, negate the argument that Operation Murambatsvina constituted a crime against humanity.

‘European Court’), the African Commission on Human and Peoples’ Rights (hereinafter ‘African Commission’) and the United Nations Human Rights Committee (hereinafter ‘Human Rights Committee’) have interpreted similar provisions in the European Convention on Human Rights, the African Charter on Human and Peoples’ Rights, and the International Covenant on Civil and Political Rights, respectively. Although divergent approaches are evident, all of these bodies take the view that the words ‘lawfully’, when appearing in instruments such as these, should not be taken to refer solely to domestic law – an interpretation that would, after all, accord the State party *carte blanche* to behave as it liked, provided that it did so in accordance with pre-established domestic rules.

The European Court of Human Rights

57. Article 5 of the European Convention on Human Rights contains numerous provisions in which the word ‘lawful’ is used. By way of illustration, Article 5(1) provides that: ‘Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure established by law: (a) the lawful detention of a person after conviction by a competent court [...]’⁶¹

58. In interpreting the word ‘lawful’ in these provisions, the European Court of Human Rights is faced with a problem analogous to that encountered in interpreting Article 7(2)(d) of the Rome Statute, that is, should ‘lawful’ be taken to refer solely to domestic law, or is there another possible interpretation?

59. In *Amuur v France*⁶² the European Court held that: ‘Where the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention refers essentially to national law and lays

⁶¹ The remainder of Article 5 provides for the following cases: (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

⁶² (1996) 22 EHRR 533.

down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness.’⁶³ In other words, ‘these words do not merely refer back to domestic law ... they also relate to the quality of the law’.⁶⁴

60. This interpretation of Article 5 has both procedural and substantive consequences for the ‘quality’ of domestic law. Procedurally, the Court has insisted that:

Where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is essential that the conditions for deprivations of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention, a standard that requires that all law be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁶⁵

61. In this area, the European Court has dealt with cases in which domestic law has been found to be of insufficient procedural ‘quality’ either because it is impermissibly vague⁶⁶ or simply non-existent.⁶⁷ The circumstances of Operation Murambatsvina are somewhat different. There, legislation in the form of the Regional Town and Country Planning Act 1976 (Chapter 29:12) (hereinafter ‘Planning Act’) and the Housing Standards Control Act 1972 (Chapter 29:08) (hereinafter ‘Housing Act’) had been retained from the Rhodesian era. However, according to the United Nations Special Envoy, this legislation was ‘mostly ignored’ after independence.⁶⁸ Furthermore, the Zimbabwean government had adopted policies that directly contradicted these statutes, without engaging in the necessary legislative reform, before relying on these statutes to justify the campaign of evictions.⁶⁹

62. These circumstances were, it is submitted, equivalent to the government of Zimbabwe acting in accordance with statutory norms that were either ill-defined or non-existent. In other words, in the face of legislation that was not enforced, and

⁶³ *ibid* [50].

⁶⁴ *ibid*.

⁶⁵ *Baranowski v Poland* [2000] ECHR 120 [hereinafter *Baranowski*].

⁶⁶ *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241.

⁶⁷ *Baranowski* (n 65).

⁶⁸ Report (n 19) 56.

⁶⁹ *ibid* 24–25.

policies that directly contradicted such legislation, it cannot be said that the victims of Operation Murambatsvina could reasonably have foreseen the consequences of settling as they did. In the context of what the United Nations Special Envoy describes as the ‘general deterioration of the rule of law’⁷⁰ in Zimbabwe, it cannot be said that the principle of legal certainty—itself an aspect of the rule of law—was satisfied. If so, then the victims of Operation Murambatsvina cannot be said to have been unlawfully present in the areas in which they had settled, as the government of Zimbabwe alleges, which is tantamount to saying that they were lawfully present.

63. In these circumstances, a better course would have been for the Government of Zimbabwe to have promulgated new legislation that was consistent with its own policies, met its obligations under international law,⁷¹ and which recognised the present position of the evictees of Operation Murambatsvina, thereby signalling a return to the rule of law.

64. The European Court’s interpretation of ‘lawfulness’ in Article 5 of the European Convention also has substantive consequences for domestic law. Even where a national law is clear and has been complied with, a deprivation of liberty will not be ‘lawful’ if domestic law allows for arbitrary or excessive detention.⁷² Thus, in *Varbanov v Bulgaria*⁷³ the Court held that, in order for detention to be lawful under Article 5(1)(e), it is necessary for less severe measures to have been considered. As several commentators have noted, in assessing the ‘substantive’ lawfulness of such laws under the Convention, the Court effectively engages in a proportionality inquiry that recognises the right to liberty and security of the person, and balances the interests of the State against that.⁷⁴

65. This aspect of the European Court’s case law is important insofar as it demonstrates the Court’s unwillingness to interpret ‘lawfulness’ in Article 5 of the Convention as

⁷⁰ *ibid* 56.

⁷¹ As argued below in paragraphs 110–115, the Planning Act and Housing Acts are inconsistent with Zimbabwe’s obligations under the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

⁷² C Ovey & R White *Jacobs and White, The European Convention on Human Rights* (3rd edn Oxford University Press Oxford 2002).

⁷³ App 31365/96, Judgement of 5 October 2000.

⁷⁴ R Clayton & H Tomlinson *The Law of Human Rights* (Oxford University Press Oxford 2000) 10. 93; J Murdoch ‘Safeguarding the Liberty of the Person: Recent Strasbourg Jurisprudence’ (1993) 42 ICLQ 494.

referring solely to domestic law – an approach that would drain the right of substantive content and reduce it to a purely formal requirement. However, it is submitted that the Court’s judgements in this area are not otherwise relevant to the correct interpretation of Article 7(2)(d) of the Rome Statute, given that this provision does not establish a specific right and then demand that derogations from that right must be ‘lawful.’ As such, it does not lend itself to the type of enquiry employed by the European Court of Human Rights.

The African Commission on Human and Peoples’ Rights

66. The African Charter on Human and Peoples’ Rights likewise includes several provisions that establish a right and then provide that derogations from that right are permissible provided that they accord with ‘law.’ For instance, Article 10 thereof provides that ‘every individual shall have the right to free association provided that he abides by the law.’ In a similar vein, Article 9(2) states that ‘every individual shall have the right to express and disseminate his opinions within the law.’⁷⁵

67. In interpreting these provisions of the African Charter, the African Commission is faced with a problem analogous to that encountered in interpreting Article 7(2)(d) of the Rome Statute, that is, should ‘lawful’ be taken to refer solely to domestic law, or is some other interpretation available?

68. The African Commission has chosen to interpret the term ‘lawful’ in light of what it loosely terms ‘international standards’: a law which infringes upon a right will not pass muster unless it accords with international human rights law.⁷⁶ Thus in its ‘Resolution on the Right to Freedom of Association’ (1992) the African Commission noted, *inter alia*, that ‘[t]he competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards.’⁷⁷ Likewise, in the African Commission’s ‘Resolution on Freedom of Expression’ (2001), the Commission undertook to

⁷⁵ See also African Charter Articles 6 (the right to liberty and security of the person); 8 (freedom of conscience, the profession and free practice of religion); 12 (the right to freedom of movement); and 13 (the right to participate freely in the government of one’s country).

⁷⁶ This appears to be the approach favoured by Kriangsak Kittichaisaree who states, with reference to Article 7(2)(d) of the Statute, ‘[a]lthough lawfulness or otherwise of the presence is determined by national law, that national law must also be measured against the yardstick of international law,’ K Kittichaisaree *International Criminal Law* (Oxford University Press Oxford 2001) 109.

⁷⁷ ACHPR /Res.5(XI)92 (9 March 1992) at Art 1.

‘develop and adopt ... a Declaration of Principles of Freedom of Expression, drawn from a comprehensive range of international standards and jurisprudence, to elaborate and expound the nature, content and extent of the right to freedom of expression provided for under Article 9 of the African Charter.’⁷⁸

69. The African Commission has also followed this approach in its decisions. The Commission has, for example, ‘established the principle that where it is necessary to restrict rights, the restriction should be as minimal as possible and not undermine fundamental rights guaranteed under international law.’⁷⁹ Likewise, the Commission has drawn upon its resolutions to find that ‘[g]overnment should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law.’⁸⁰

70. In essence, therefore, the African Commission interprets the term ‘law’ in the African Charter as referring to domestic law to the extent that it is consistent with international human rights law. Once again, this is important insofar as it indicates the Commission's unwillingness to interpret ‘lawfulness’ as referring solely to domestic law. Questions can, however, be raised about the appropriateness of extending this approach to the Rome Statute, given the African Commission's understanding of the nature of ‘internationally binding legal rules’. In particular, ‘international human rights law’ is poorly defined, and in fact, the African Commission does not state whether it should be limited solely to those customary and treaty norms which bind the State in question, or whether it should be extended to include all norms that are well-established in the international community but which do not have the status of customary international law. The latter notion does not appear to reflect any recognised source of international law enumerated in Article 38 of the Statute of the International Court of Justice,⁸¹ which is generally accepted as the definitive list of sources of international law.⁸² For

⁷⁸ ACHPR /Res.54(XXIX)01 (7 May 2001) at Art 1.

⁷⁹ *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* African Comm. Hum. & Peoples’ Rights, Comm. No. 48/90, 50/91, 89/93 (not dated).

⁸⁰ *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* African Comm. Hum. & Peoples’ Rights, Comm. No. 102/93 (not dated).

⁸¹ Statute of the International Court of Justice, as annexed to the Charter of the United Nations (26 June 1945) UKTS 67 (1946), Cmd 7015, art 38.

⁸² I Brownlie *Principles of Public International Law* (6th edn Oxford University Press Oxford 2003) 3.

these, and for other reasons, it is not recommended herein that the approach of the African Commission be followed in interpreting Article 7(2)(d) of the Rome Statute.

The United Nations Human Rights Committee

71. The International Covenant on Civil and Political Rights (ICCPR) likewise contains several provisions that refer to ‘law’ and ‘lawfulness.’ Of particular relevance is Article 12(1) of the ICCPR, which provides that: ‘[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.’
72. 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.’⁸³ In this vein, the Human Rights Committee has held that an alien who entered the State illegally, but whose status has been regularised, must be considered to be lawfully within the territory for the purposes of Article 12.⁸⁴ In other words, for the Human Rights Committee, ‘lawful’ in the context of the ICCPR refers to domestic law to the extent that it is consistent with that State Party’s obligations under international law.
73. This approach has numerous advantages, and it is therefore reasonable to conclude that it should be applied to Article 7(2)(d) of the Rome Statute. Firstly, it avoids the obvious difficulties involved in interpreting ‘lawful’ as referring solely to domestic law. As mentioned, such an interpretation would allow the State party to behave as it liked, provided that it did so in accordance with pre-established laws. Secondly, it specifies which international laws – those customary and treaty norms that bind the particular State – should constrain domestic law. Thirdly, it accords with the well-established principle that, from the perspective of an international body such as the International Criminal Court, the international law that binds a particular State

⁸³ 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.

⁸⁴ UN Human Rights Committee *Celepli v Sweden* [1994] IIHRL 53 [9.2].

should prevail over its domestic law.⁸⁵ In other words, in asking what constitutes the law of Zimbabwe, it makes sense that, from the international perspective, Zimbabwe's international obligations should take precedence over its domestic law.

74. Since the Planning Act has not been enforced for a significant period, the doctrine of abrogation through disuse might render it void. As no definite conclusion on this question is expressed herein, and it will be discussed with the sole purpose of drawing attention to the doctrine for further consideration by a specialised Zimbabwean constitutional lawyer, it will be relegated to separate discussion in Part IV. Should it be decided that the doctrine is still operable in Zimbabwe, then those subject to the evictions were, arguably, 'lawfully present' since there was no legislation prohibiting their settlement in the area.

PART III : ARE THE ACTS PART OF A WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST A CIVILIAN POPULATION?

Widespread or Systematic attack

75. According to Article 7(1) of the Rome Statute, '[f]or 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: ... (d) deportation or forcible transfer of population;'. The phrase 'for the purposes of this Statute' signifies that the definition is intended to be applicable only before the International Criminal Court. Such a definition might extend beyond the Court's practice only insofar as it might contribute to the evolution of customary international law. Therefore, our analysis will be strictly limited to the above definition, irrespective of whether or not it is broader or narrower in some respects from the one under customary international law.
76. This section of this present opinion aims to determine whether 'Operation Murambatsvina' was committed as part of a widespread or systematic attack against a civilian population, thus falling under the aegis of the Article 7 definition. This analysis will be based on the presumption that the findings of the UN Envoy are

⁸⁵ Vienna Convention (n 59) Art 27: a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

valid insofar as the extent of the Operation and the way it was conducted are concerned.

77. To conclude whether or not a crime against humanity has taken place, it must first be determined whether there was an attack against a civilian population. We must therefore examine all the constituent elements of the notion of ‘attack’.
78. Paragraph 2(a) of Article 7 of the Statute states that ‘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 organisational policy to commit such attack. The text adopts the previously recognized threshold test of ‘widespread or systematic’ attack, but defines a simple ‘attack’ as well to assuage concerns about an unqualified disjunctive test.⁸⁶
79. As far as the ‘multiple commission of acts’ is concerned there is no requirement that more than one of the enumerated acts, or combination thereof, be committed.⁸⁷ This requirement either refers to more than one generic act, even though this is not required, or more than a few isolated incidents that would fall under one or more of the enumerated acts.⁸⁸ Thus, in the case at hand, the numerous incidents of forcible transfer of population suffice to establish the prerequisite of ‘multiple commission of acts’.
80. It should be emphasised that the acts need not constitute a military attack.⁸⁹ 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’.⁹⁰ In addition, the acts

⁸⁶ D Robinson ‘Defining “Crimes against Humanity” at the Rome Conference’ (1999) 93 AJIL 43, 49.

⁸⁷ Dixon (n 12) 124.

⁸⁸ *ibid* 158.

⁸⁹ Elements of Crimes (n 34) 518.

⁹⁰ *Prosecutor v Akayesu* (Judgement) ICTR-96-4-T (2 September 1998) [581], *Prosecutor v Rutaganda* (n 35) [70], *Prosecutor v Musema* (n 35) [205]. See also *Prosecutor v Semanza* (n 36) [327], *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.’

could constitute the attack itself. For example, the mass murder of civilians may suffice as an attack against the civilian population. There is no requirement that a separate attack against the same civilians, within which the murders were committed, be proven.⁹¹ Therefore, in the case at hand, the acts of forcible transfer of population may constitute the attack itself. It is not obligatory to prove that there was a separate attack against the same civilians in the context where the forcible transfer took place. The acts of forcible transfer fulfil two requirements of the Statute. They constitute: a) the acts enumerated in Article 7; and b) the attack itself.

81. A ‘state or organizational policy’ is a necessary component of a ‘widespread or systematic attack on the civilian population’ as defined in the Statute. It constitutes a basis for ensuring that random or isolated acts are excluded from the scope of crimes against humanity. The attack must be committed pursuant to or in furtherance of this policy irrespective of whether the attack is widespread or systematic.⁹² The Appeals Chamber of the ICTY, in *Prosecutor v Kunarac* held that the existence of a policy or plan may be evidentially relevant in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic, but that the existence of such a plan is not a separate legal element of the crime, interpretation which was upheld by the ICTR as well.⁹³
82. However, in the Statutes of the two *ad hoc* tribunals there was no requirement of state or organisational policy required for a finding that a crime against humanity had been committed. In contrast, as regards the International Criminal Court, the existence of a policy element is provided for explicitly in the Rome Statute and will be considered herein, notwithstanding critiques of whether this exceeds what is required under international customary law and unduly restricts the notion of crimes against humanity.⁹⁴ According to the ‘Elements of Crimes’ adopted by the Court in 2002,⁹⁵ it is understood that the policy to commit such attack requires that the State

⁹¹ Dixon (n 12) 124.

⁹² *ibid* 127.

⁹³ *Prosecutor v Kunarac et al* (Judgement) IT-96-23&23/1 (12 June 2002) [98], *Prosecutor v Semanza* (n 36) [329], *Prosecutor v Muhimana* (Judgement) ICTR-95-1B-T (28 April 2005) [527], *Prosecutor v Gacumbitsi* (Judgement) ICTR-2001-64-T (17 June 2004) [299], *Prosecutor v Kamuhanda* (n 90) [665], *Prosecutor v Kajelijeli* (Judgement) ICTR-98-44A-T (1 December 2003) [872].

⁹⁴ 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.

⁹⁵ See section on Elements of Crimes (n 34) in paragraph 48 above.

or organisation actively promote or encourage such an attack against a civilian population.⁹⁶ A policy which targets a civilian population as the object of an attack could also be implemented by State or organisational action.⁹⁷ In the case at hand, given that the execution of 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 the Operation and, by extension and should the Operation be deemed as such, an attack against the civilian population.

83. The term ‘civilian population’ has been defined as people who are not taking any active part in the hostilities, including members of the armed forces who lay down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population as a whole of its civilian character.⁹⁸ It also follows that the specific situation of a victim at the moment the crimes were committed, rather than their status, must be taken into account in determining their standing as a civilian.⁹⁹

84. In the instant case, the victims were predominantly civilians. The fact that some of the victims, according to the Government of Zimbabwe, were members of the uniformed forces¹⁰⁰ is of no importance, because: a) the presence of non-civilians within the civilian population does not alter the civilian character of the population; and b) the members of the uniformed forces under these circumstances were not exercising any military duties. It is therefore reasonable to conclude that their specific situation was of a civilian character.

85. Furthermore, it should be noted that the heading of Article 7 does not incorporate an element of discriminatory intent, in contrast with the ICTR Statute. Because of this, it has been said with regard to the International Criminal Court that ‘[t]herefore, although a policy will often involve an element of discrimination, the Prosecutor does not have to prove that the perpetrator acted pursuant to or in furtherance of a

⁹⁶ *ibid* 518.

⁹⁷ *ibid* fn 6.

⁹⁸ *Prosecutor v Akayesu* (n 90) [582], *Prosecutor v Kajelijeli* (n 93) [873], *Prosecutor v Rutaganda* (n 35) [72], *Prosecutor v Kamuhanda* (n 90) [667], *Prosecutor v Musema* (n 35) [207].

⁹⁹ *Prosecutor v Kajelijeli* (n 93) [874], *Prosecutor v Bagilishema* (Judgement) ICTR-95-1A-T (7 June 2001) [79], *Prosecutor v Blaskić* (Judgement) IT-95-14 (3 March 2000) [214], *Kamuhanda* (n 90) [668].

¹⁰⁰ Response (n 23) 20.

discriminatory policy in which the victims are selected on certain grounds, notably because they are members of a particular group. The reasons underlying an attack against a civilian population are thus irrelevant for qualifying conduct as a crime against humanity under Article 7'.¹⁰¹ Thus, the verity of the allegations concerning the targeting of supporters of the opposition is immaterial.

86. In addition, the term 'population' does not require that crimes against humanity be directed against the entire population of a geographic territory or area. The victims of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated acts form part of the attack.¹⁰² Thus, using the instant case as an example, it need not be proven that the whole population of Harare was forcibly transferred in order to establish the existence of a crime against humanity.

87. On the basis of the above analysis and the conclusion that the acts under question constitute forcible transfer of population under the Rome Statute, it is reasonable to conclude that Operation Restore Order constituted an attack against a civilian population. However, we must further examine whether this attack was 'widespread or systematic'. This requirement is expressly stipulated in Article 7 of the Rome Statute. The same requirement was stipulated in Article 3 of the ICTR Statute and although not expressly mentioned in Article 5 of the ICTY Statute, the ICTY has, in its case law, consistently upheld the requirement that the attack be directed against a civilian population to imply the widespread or systematic nature of the attack.¹⁰³ Although the test is explicitly disjunctive ('or'), there is considerable debate as to whether the policy element transforms it into a conjunctive ('and') test.¹⁰⁴ That debate, however, is immaterial for the purposes of this opinion; it will be argued below that both requirements have been met.

¹⁰¹ 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) 585.

¹⁰² *Prosecutor v Semanza* (n 36) [330], *Prosecutor v Kamuhanda* (n 90) [669-670], *Prosecutor v Kajelijeli* (n 93) [875-876].

¹⁰³ *Prosecutor v Tadić* (n 16) [271], *Prosecutor v Blaskić* (n 99) [202-3].

¹⁰⁴ Robinson (n 44) 48-51. His argument is that the policy element constitutes a lower threshold test compared to the other two.

88. It should be noted in the first place that the act in question can be part of a widespread or systematic attack and need not be part of both.¹⁰⁵ The concept of ‘widespread’ may be defined as massive, frequent, large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of ‘systematic’ may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.¹⁰⁶
89. In the case under question, the features of Operation Restore Order fall under the definition of both ‘widespread’ and ‘systematic. The 569 685 people who were rendered homeless and the fact that the Operation took place in numerous cities of Zimbabwe both serve to justify the conclusion that the attack was widespread as it was a large-scale action directed against a multiplicity of victims. The Operation can also be characterised as systematic since it 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).
90. Even if the above figures were not entirely accurate and we were to base our estimation on the figures given by the Zimbabwean Government in its Response, which mentions roughly 6 000 people, the Operation may still amount to a crime against humanity on the basis of being, if not widespread, at least systematic, as it was pursuant to a State policy. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that concern is assuaged by requiring that the acts be directed against a civilian population; thus even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or prosecution.¹⁰⁷ Therefore, it is reasonable to conclude that there has been a widespread and systematic attack as defined in Article 7 of the ICC Statute.

¹⁰⁵ *Prosecutor v Akayesu* (n 90) [579].

¹⁰⁶ *ibid* [580]; *Prosecutor v Rutaganda* (n 35) [69], *Prosecutor v Musema* (n 35) [204].

¹⁰⁷ *Prosecutor v Tadić* (Opinion and Judgement) IT-95-1 (7 May 1997) [649].

PART IV: THE LEGALITY OF THE EVICTIONS

91. While it is possible that some of those evicted were not lawfully present (under a narrow construction of that term),¹⁰⁸ it is clear that all of those evicted were evicted unlawfully both with respect to Zimbabwean law and international law. The legality of the evictions under both domestic law and international law will be considered in turn.¹⁰⁹
92. Although not strictly relevant to a discussion of the Rome Statute it is important to note that the evictions themselves were not in accordance with Zimbabwean law. This is relevant insofar as it counters any objections made by the Zimbabwean government that its actions were in accordance with its domestic legislation, and further contributes to the general understanding of the nature of the Operation that took place in Zimbabwe.
93. The Zimbabwean authorities have purported to carry out the evictions in Operation Murambatsvina through the Planning Act.¹¹⁰ For this reason, we have focussed on the Planning Act, rather than on other legislation which could potentially have been used to provide justification for Operation Murambatsvina.¹¹¹ There are two types of orders which could be issued under the Planning Act which are relevant to Operation Murambatsvina.
94. 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.¹¹² The enforcement order must state the nature of the contravention, and specify the action required to be taken,¹¹³ and

¹⁰⁸ This would be the interpretation discussed above in paragraphs 55.1.

¹⁰⁹ See the discussion of the legality of the evictions under international law at paragraphs 110–115 below.

¹¹⁰ Report (n 19) 57.

¹¹¹ *ibid* 58, where the Report points out that both the Housing Standard Control Act 1972 (Zimbabwe Chapter 29:08) and the Urban Councils Act 1997 (Zimbabwe Chapter 29:15) contain provisions similar to that in the Planning Act authorising the issue of enforcement orders. These Acts, however, do not make provision for the publication of notices through the newspaper. It would therefore appear that, since the orders were issued by newspaper, that the only Act the government of Zimbabwe could purport to rely on is the Planning Act.

¹¹² Planning Act s 32 (1).

¹¹³ *ibid* s 32(1)(a), (b).

may require the demolition of any building.¹¹⁴ The notice period for the enforcement order must be at least one month from the date on which the order is served¹¹⁵ 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.¹¹⁶

95. 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.¹¹⁷ 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.

96. In Harare, on 24 and 26 May 2005, the City of Harare issued an enforcement order in one of the local newspapers.¹¹⁸ 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 2005.¹¹⁹ There is no evidence that any of those evicted, apart from those in Harare, were given notice of the evictions.¹²⁰

97. In addition, again with the exception of the Harare enforcement notice, Operation Murambatsvina was carried out without consultation with local government, who are responsible for the enforcement of the Planning Act and the issuing of

¹¹⁴ *ibid* s 32(2)(c).

¹¹⁵ *ibid* s 32(3).

¹¹⁶ *ibid* s 32(3).

¹¹⁷ *ibid* s 34(1).

¹¹⁸ Report (n 19) 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.

¹¹⁹ *ibid* 12.

¹²⁰ *ibid* 58.

enforcement notices.¹²¹ Moreover, it is local government who should have been responsible for carrying out any demolitions in terms of the Planning Act, while it was in fact the national police and military who did so.¹²²

98. 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.¹²³ 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.

99. 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.

100. The question then arises as to whether ‘lawfully present’ could be extended to incorporate a duty to evict those present (lawfully or unlawfully) in accordance with domestic and international law. It is concluded herein that this interpretation is not possible; therefore, the fact that the evictions were unlawful does not have a bearing on the legality of the original occupation.

Doctrine of Abrogation by Disuse

101. Zimbabwe’s common law is Roman-Dutch in origin. Under Roman-Dutch common law, it is possible for legislation to come to an end through tacit consent or through contrary custom.¹²⁴ The rationale for this doctrine is that the authority for legislation comes from the people.¹²⁵ This position stands in contrast to the English common law’s rejection doctrine of *desuétude*.¹²⁶

¹²¹ *ibid* 26.

¹²² *ibid* 58.

¹²³ *ibid* 57–58.

¹²⁴ *Green v Fitzgerald* 1914 AD 88; *Glazer v Glazer NO* 1963 (4) SA 694 (AD), South African judgments giving authority for this proposition. South Africa shares the same Roman-Dutch common law as Zimbabwe.

¹²⁵ HR Hahlo and E Kahn *The South African Legal System and Its Background* (Juta, Wynberg 1968) 174.

¹²⁶ *Ashford v Thompson* (1818) 1 B & Ald 405, 59 George III Ch 46 (1819).

102. For the doctrine to operate under Roman-Dutch common law, it must be demonstrated that the legislation has ‘been long out of use’ and that it is ‘out of keeping with contemporary views’.¹²⁷
103. It may therefore be possible to argue that the Planning Act has been abrogated through disuse, if it can be shown that it has not been applied for a considerable period of time, and if it can be shown to be contrary to contemporary values.
104. The first consideration will depend on a detailed analysis of the facts, but we would argue that, given Zimbabwe’s obtaining independence in 1980, if the Planning Act has not been enforced since that date, this would constitute a ‘considerable period of time’ as it would constitute the entire post-independence period.
105. A further consideration which may lend weight to the argument that the Planning Act has not been applied is the issuing of SI 216. This statutory instrument had the effect of encouraging development of the informal sector in residential areas and suspending the requirements set out in the Planning Act. Unfortunately, a copy of SI 216 was not obtained for the drafting of this opinion, so to what extent to which it purports to suspend the Planning Act has not been considered. This issue would need to be explored by a Zimbabwean lawyer with detailed knowledge of the planning laws and application of those laws in Zimbabwe over the past 25 years. Nevertheless, based on the Report, it is possible to make a cautious proposition that the government of Zimbabwe, through issuing SI 216, expressed its intention to override the Planning Act, thereby abrogating its use in planning law in Zimbabwe through ‘contrary custom’.
106. The second consideration, that the Planning Act is contrary to the values of contemporary Zimbabwe, is of some weight given the fact that the Act itself was implemented by the former white regime of Ian Smith in order to set standards for urban dwellings so high as to exclude most (black) persons from moving into urban areas.¹²⁸

¹²⁷ Hahlo and Kahn (n 125) 174.

¹²⁸ UN Report (n 19) 25, 56. This is also discussed in para 61 above.

107. Another consideration is whether the doctrine has been expressly repealed in legislation or through the Constitution. In South Africa, for example, the doctrine was rendered inoperative by the South Africa Act 1909 and later the Republic of South Africa Constitution Act 1961. The doctrine was expressly overridden in this legislation, and in the 1961 Constitution, for example, section 107 expressly stated that all legislation continues in force until repealed or amended by the competent authority.¹²⁹ This legislation has now been replaced by the Constitution of the Republic of South Africa Act 1996, which does not confer sole authority on Parliament to repeal legislation. It is therefore possible that the doctrine may be revived in contemporary South African law.

108. Section 32(1) of the Zimbabwean Constitution provides as follows: ‘The legislative authority of Zimbabwe shall vest in the Legislature which shall consist of the President and Parliament.’ The Constitution contains no further reference to the authority of Parliament to repeal legislation or to legislation remaining in force until expressly repealed. It would appear, therefore, that the doctrine is not explicitly overridden in the Zimbabwean Constitution.

109. Thus, it may be possible that the doctrine of abrogation by disuse remains valid under Zimbabwean common law. It is strongly suggested, however, that further consideration of this issue should be undertaken by a specialised Zimbabwean constitutional lawyer and this opinion should not be taken to express any definite view that the doctrine is still valid law in Zimbabwe. Moreover, a detailed factual evaluation would need to be undertaken as to whether the Planning Act had indeed fallen into disuse. Again, such an evaluation would need to be undertaken by a Zimbabwean lawyer with close knowledge of the Planning Act.

PART V: THE COMPATIBILITY OF THE EVICTIONS WITH INTERNATIONAL LAW

110. The forced evictions in Zimbabwe are clearly in conflict with international law (as well as with domestic law, discussed above in paragraphs 91–100). The prohibition against forced evictions derives from Article 11(1) of the ICESCR and Article 17(1) of the ICESCR.¹³⁰ Article 11(1) of the ICESCR provides that: ‘The

¹²⁹ Section 107 of the Republic of South Africa Constitution Act 1961.

¹³⁰ General Comment 7 [8].

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.’ Similarly, Article 17(1) of the ICCPR provides 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.’

111. It should be repeated here that General Comment 4 of the UN Committee on Economic, Social and Cultural Rights (hereinafter ‘CESCR’) provides 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 under international law.’¹³¹

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

the 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.¹³²

The evictions carried out under Operation Murambatsvina thus fall under the definition of ‘forced evictions’ as defined by the CESCR.

113. General Comment 7 further provides that States, when carrying out (lawful) large-scale evictions, should ensure that the following procedural protections are provided:

(a) an 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 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

¹³¹ General Comment 4 [18].

¹³² General Comment 7 [3].

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.¹³³

In addition, '[e]victions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.'¹³⁴

114. The Report discusses the Zimbabwean Government's compliance with these requirements in some detail. In brief, the Report makes the following factual findings:

114.1. No effective consultations had taken place prior to Operation Murambatsvina. The government of Zimbabwe has argued that consultations took place through a notice on a monthly bill, but clearly (on the assumption that this assertion is factually correct), this is inadequate to constitute 'genuine consultation'.

114.2. Adequate and reasonable notice was not given.

114.3. Information was not made available on Operation Murambatsvina within a reasonable time.

114.4. Although uniformed policemen and the military were used in carrying out the Operation, the UN Report argues that, since evictions are a local government competence, they should not have been carried out by national military and police officers.

114.5. Operation Murambatsvina began in early winter in Zimbabwe, leaving many of those affected in the cold of winter. Rains are forecast to begin in October or November and it is feared that many of those affected will still not have adequate shelter by the time the summer rains start.

114.6. Legal remedies are inadequate, due to both insufficient legal aid (which is provided primarily by NGOs and not by the State), and a compromised judiciary.

¹³³ *ibid* [15].

¹³⁴ *ibid* [16].

114.7. Lastly, the evictions clearly resulted in many people being rendered homeless, as the State had not made adequate arrangements for alternative accommodation.

Thus, the Report concludes that, for all of these reasons, Operation Murambatsvina has clearly failed to comply with the requirements in international law regarding forced evictions.¹³⁵ On the assumption that the factual findings of the Report are accurate, the conclusions reached therein are adopted for the purposes of this opinion.

115. In addition, Zimbabwe has committed itself to a number of United Nations Resolutions on forced evictions, including Resolution 1993/77, Resolution 1998/9, and Resolution 2004/28.¹³⁶ 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’.¹³⁷

Grounds under international law permitting the forcible transfer of population

116. This part of the opinion will deal with the question whether, in the eventuality that Operation Murambatsvina constitutes a forcible transfer of population as understood in Article 7(2)(d) of the Rome Statute, there exist grounds under international law that would justify or otherwise permit such a transfer.

117. There exist a very limited number of exceptions under international law which empower States to restrict the freedom of movement of nationals and aliens who are lawfully present within the territory. Briefly summarised, these restrictions must be: in accordance with law and necessary in a democratic society in the interests of national security or public safety; for the maintenance of public order (*ordre public*); for the protection of health or morals or for the protection of the rights of others, provided such restrictions are consistent with other human rights’.¹³⁸

¹³⁵ Report (n 19) 59–62.

¹³⁶ *ibid* 57.

¹³⁷ UN ECOSOC Res 2004/28, UN Doc E/C.4/RES/2004/28 (2004) [1].

¹³⁸ Hall (n 40) 162.

118. These exceptions are codified in a slew of human rights instruments: Article 13, paragraph 1 of the Universal Declaration of Human Rights¹³⁹ recognises the right to freedom of movement and residence within the borders of a State; Article 12, paragraphs 1 and 3 of the International Covenant on Civil and Political Rights¹⁴⁰ recognise the right of everyone lawfully within the territory of a State to liberty of movement and freedom to choose one's residence, subject to certain restrictions; Article 2, paragraphs 1 and 3 of Protocol 4 to the European Convention on Human Rights¹⁴¹ recognise the right of everyone lawfully within the territory of a State to freedom of movement within the territory and freedom to choose one's residence, subject to certain restrictions; and Article 22, paragraphs 1, 3 and 4 of the American Convention on Human Rights¹⁴² recognise that everyone lawfully within a territory has a right to movement and residence in it, subject to certain restrictions. Taken as a whole, it has been argued that they establish the 'circumstances when forced displacement of persons within a territory is prohibited' under international law.¹⁴³

119. With regards to those grounds under which forced displacement is permitted under international law, the Report of the Representative of the Secretary-General, Mr Francis Deng, adopted by the Commission on Human Rights¹⁴⁴ would not be binding upon the Court, but may reasonably be considered as of a persuasive character. Mr Deng recognises that in human rights law, the prohibition of arbitrary displacement is only implicit in various international human rights instruments. In particular, Mr Deng's report refers to 'the right to freedom of movement and choice of residence, freedom from arbitrary interference with one's home and the right to housing. These rights, however, do not provide adequate and comprehensive coverage for all instances of arbitrary displacement, as they do not spell out the circumstances under which displacement is permissible.'¹⁴⁵

¹³⁹ UNGA Res 217 A (III) (10 December 1948) UN Doc A/810, 71 (1948).

¹⁴⁰ International Covenant on Civil and Political Rights (adopted (1966) 999 UNTS 171 [hereinafter 'ICCPR'].

¹⁴¹ European Convention on Human Rights (1948), 213 UNTS 222 [hereinafter 'ECHR'].

¹⁴² American Convention on Human Rights (1969), 1144 UNTS 123 [hereinafter 'ACHR'].

¹⁴³ Hall (n 40) 136.

¹⁴⁴ 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).

¹⁴⁵ E/CN.4/1998/53/Add.1 para. IV, 1

120. Mr Deng's report provides an overview of the rights in main human rights instruments that can be interpreted to have an element of 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.¹⁴⁶

121. Most human rights instruments permit States to place restrictions on freedom of residence and movement when specific and limited circumstances are met. These restrictions may permit certain, limited forced movement of persons or their settlement in other areas. The grounds permitted under each international treaty are discussed below:

International Covenant on Civil and Political Rights

122. Zimbabwe deposited its instrument of ratification for the ICCPR on 13 May 1991. Article 12 (3) of the ICCPR provides that the freedom of movement and choice of residence 'shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.' The right to freedom of movement as it related to coerced displacement is addressed in UN Resolution 1994/24 of 26 August 1994, adopted at its forty-sixth session, entitled 'The right to freedom of movement'. It affirms 'the right of persons to remain in their own homes, on their own lands and in their own countries' and urges all

¹⁴⁶ *ibid* para IV, 3–4.

countries to ‘cease at once all practices of forced displacement’.¹⁴⁷ A General Assembly resolution does not constitute a source of international law and would not be directly binding upon the Court; however, this particular resolution may be considered to be of a persuasive character, especially as it was adopted without a vote.

123. It has been argued that restrictions to freedom of movement and choice of residence *must be set down by a legislative body* and it must be widely accessible to all those subject to it, and must therefore possess an adequate degree of certainty.¹⁴⁸ For a detailed discussion of the legality of the evictions under Zimbabwean law, see Part II above.¹⁴⁹ Moreover, the evicted individuals did not have adequate access to information regarding their displacement. Even though the government of Zimbabwe did issue a notice to the individuals who occupied the evicted dwellings, it is possible to argue that the warning was not appropriately displayed and the date of the warning was not respected, as the evictions began mere days after the notice was displayed.¹⁵⁰

124. These limitations to the right must also be ‘consistent with the other rights’ in the ICCPR. The Report of the Secretary-General’s Representative explains that, for instance, ‘banishment within the State’s territory is only permissible as punishment when it is imposed in conformity with the guarantees in criminal proceedings set down in articles 14 and 15 of the ICCPR’.¹⁵¹ From the facts detailed in the report by the UN Special Envoy on Human Settlements Issues in Zimbabwe, it is arguable that the evictions in Operation Murambatsvina’ were not consistent with other rights in the ICCPR. For example, the way in which the state conducted the

¹⁴⁷ UNHCHR Res 1995/13 ‘The right to freedom of movement’ (18 August 1995) UN Doc E/CN.4/Sub.2/1995/6.11/Add.3.

¹⁴⁸ M Nowak *United Nations Covenant on Civil and Political Rights - CCPR Commentary*, (1st edn Engel Publisher Kehl-Strasbourg-Arlington 1993) 208.

¹⁴⁹ Moreover, it has been argued that the proportions advanced by Special Envoy suggest that the number of legal dwellings evicted were ‘significant given the total number of demolitions’ and that ‘many of the homes and businesses existed in a legal gray zone’. See M Langford ‘Accountability for Forced Evictions? A Response to The UN Special Envoy’s Report on Zimbabwe’ COHRE, available online at www.cohre.org (3 November 2005).

¹⁵⁰ See para 26 above.

¹⁵¹ Nowak (n 148) cites relevant case law of the Human Rights Committee: *Mpaka-Nsusu v Zaire*, Communication No. 157/1983, and *Ngahula Mpandanjila v Zaire*, Communication No. 138/1983.

evictions was carried out with disregard to the right to property in some reported instances.¹⁵²

125. Furthermore, these restrictions on the right *must be necessary for achieving one of the listed purposes for limitation*. The requirement of necessity is subject to an objective minimum standard and the principle of proportionality, striking ‘a precise balancing between the right to freedom of movement and those interests to be protected by the interference’.¹⁵³ The permissible reasons for interference under Article 12 (3) of the ICCPR are ‘national security’, ‘public order (*ordre public*)’, ‘public health’, ‘public morals’, and the ‘rights and freedoms of others’. The Report of the Secretary-General’s Representative expands on their scope:

125.1. National security is endangered only in grave cases of political or military threat to the entire nation, such that persons may have to be *temporarily* relocated in such situations. This was not the case in Zimbabwe, as any threat coming from the settlements, whether perceived or real, did not necessarily constitute a threat to the entire nation. Moreover, the government of Zimbabwe does not refer to the settlements as a matter of national security in any part of the Response.¹⁵⁴

125.2. Permissible restrictions on freedom of internal movement and residence on the ground of public order (*ordre public*) that could exceptionally justify displacement may include cases of development and infrastructure projects where the interests of the general welfare are clearly overriding. Even though the government of Zimbabwe claims to be reducing high crime levels and economic crimes through the Operation, the arbitrary eviction of all those who gained a livelihood in the involved settlements is unlikely to pass a proportionality test used to evaluate the means of combating crime.

125.3. The ‘public health’ exception might include relocation away from areas where acute health dangers exist (for example, areas contaminated as a result of a catastrophe). It must be noted that the emphasis of this ground under which displacement is permissible is the *physical area* as posing a threat to public

¹⁵² Report (n 19) 62-63.

¹⁵³ Nowak (n 148) 211.

¹⁵⁴ See para 28 above.

health due to contamination. In this case the government of Zimbabwe claimed that, among the reasons for launching the Operation, they aimed to ‘arrest the social ills among them prostitution which promote the spread of HIV/AIDS and other communicable diseases’.¹⁵⁵ However, there is no demonstrated link between the alleged social ills, the spread of diseases and the contamination of the physical area of the evicted dwellings. It should be noted that it is not the physical area of the settlements that causes the spread of HIV/AIDS and other communicable diseases; therefore, the relocation of the population was not strictly necessary. Even if it was deemed necessary, it could be argued that the means of evicting all the population from the area is not reasonably linked or proportional to the objective of preventing the spread of communicable diseases.

125.4. Finally, restrictions on freedom of movement and residence imposed in the interest of ‘the rights and freedoms of others’ may justify evictions to respect private property. However, States parties are obliged to ensure that interference in favour of private owners is proportional, that is, that it remain at a level which the public can tolerate.¹⁵⁶ Any interference must be reasonable, objective, and non-discriminatory. The extent and scope of the Operation, even if alleged by the Zimbabwe Government to be reasonable and objective, necessarily fails on the point of non-discrimination, because although the Zimbabwe Government claimed that some of the individuals concerned were illegally present, it failed to take the necessary measures to properly distinguish between those individuals who were legally and illegally present.

125.5. Finally, restrictions on Covenant rights are always exceptional and must therefore not become a generalised rule.

126. In addition, it must be noted that 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] According to Nowak, the protection of ‘home’ relates not only to dwellings but also to all types of residential property regardless of legal title or

¹⁵⁵ Nowak (n 148) 211.

¹⁵⁶ *ibid* 216.

nature of use: '[a]n invasion of this sphere without the consent of the individual affected represents interference, as does any activity that deprives one of his/her home.'¹⁵⁷

The International Covenant on Economic Social and Cultural Rights¹⁵⁸

127. Zimbabwe became a State Party to the ICESCR on 13 August 1991. Article 4 of the ICESCR recognised that the rights included therein are subject only to 'such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'. In such cases, important procedural guarantees in the conduct of such limitations must be followed. In the case of Zimbabwe, the government of Zimbabwe did not make any attempt to follow the procedural guarantees; therefore, it is reasonable to conclude that the evictions carried out under the Operation in Zimbabwe as restrictions to ICESCR rights are not justified.

128. Moreover, it should be noted that 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.'¹⁵⁹ In its Response, the Zimbabwean government has not specifically spoken of exceptional circumstances, but of social and economic problems that could amount to exceptional circumstances.¹⁶⁰ It is not clear what the CESCR would deem as 'exceptional'; however, most international human rights that are derogable in emergency circumstances require explicit recognition of the state of emergency before they may be suspended.¹⁶¹

¹⁵⁷ *ibid* 303.

¹⁵⁸ See n 71.

¹⁵⁹ UN Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment 4 on the Right to Adequate Housing'. UN Doc E/1992/23 Article 11 (1).

¹⁶⁰ See para 28 above.

¹⁶¹ *eg* Article 4(1) of the ICCPR (n 140).

*The African Charter of Human and Peoples' Rights*¹⁶²

129. Zimbabwe ratified the *African Charter on Human and Peoples' Rights* on 30 May 1986. The African Charter does not specifically provide for protection against forced evictions, but has extensive provisions on the protection of human rights that are typically affected by the practice of forced evictions, such as the right to freedom of movement and residence and the right to education. The right to freedom of movement and residence (Article 12(1)) is applicable to individuals provided that they abide by the law. As explained above,¹⁶³ the right to freedom of movement relates to coerced transfers of population in the right of persons to remain in their homes. The right to education of the children of the evicted families would have been affected by Operation Murambatsvina, since the long commutes to and from educational institutions as result of displacement to isolated areas would make constant education impermissible.

130. Similarly, the war crime, during international or non-international armed conflict, of 'the displacement of a civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand',¹⁶⁴ as articulated in Article 8 para. 2(d)(viii) of the Statute, strongly suggests that the powers of States to displace a civilian population are similarly limited in peacetime to equally compelling grounds. It is possible that the forced displacement of population for public projects, such as the construction of a highway or dam, might fall within the scope of Article 7 paragraph 1(d) of the Statute if the individuals are not provided with adequate compensation and given freedom of choice concerning their new homes. The evictions carried out under the Operation were not done with the purpose of building public projects, and the evicted individuals received no compensation.

131. It should be noted that there is a distinction that must be drawn between the Statute on the one hand, which enumerates certain acts it deems to be crimes against humanity, and the Report of the Secretary-General's Representative and the various international human rights instruments on the other, which merely consider such

¹⁶² African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), 21 ILM 58 [hereinafter 'African Charter'].

¹⁶³ See para 122 above.

¹⁶⁴ Hall (n 40) 162.

acts to be unlawful. The abundant case law available from the regional human rights courts and the United Nations Human Rights Commission is therefore of limited utility for assisting in finding that the facts in the instant case constitute or do not constitute a crime against humanity.

PART VI: CONCLUSION

132. Part I examined whether there was in fact a deportation or forcible transfer of population as defined in the Statute. It was concluded herein that the requirements of the Statute, namely, that there be the transfer of one or more persons and that such transfer be coerced or forced, have been met insofar as the factual situation as detailed in this opinion is correct. Because the transfers were executed without the consent of the individuals concerned and a range of coercive measures were employed, it is reasonable to conclude that the acts fall within the range of practices proscribed in the Rome Statute. Zimbabwe would therefore have to establish whether the impugned acts fall under the international law exceptions allowing for a forcible transfer of population.

133. Part II examined whether those subject to forcible transfer were ‘legally present’, the word ‘lawfully’ in ‘lawfully present’ requires that the laws that define the legality or illegality of one’s presence in a particular area comply with the principle of legal certainty. In terms of the case law of the European Court of Human Rights, the laws in question must be sufficiently precise to allow the individual to foresee, to a degree that is reasonable in the circumstances, the consequences of his or her actions. In the present case, while the Housing and Planning Acts are themselves sufficiently clear, the Zimbabwean government’s actions in largely ignoring this legislation after independence, and adopting contrary policies, arguably undermined the requirement of reasonable foreseeability and thus the principle of legal certainty. This, in turn, undermines the Zimbabwean government’s case that the evictees were unlawfully present in the areas in which they had settled.

134. Part III examined whether the forcible transfer of population was committed as part of widespread or systematic attack directed against any civilian population. It was concluded herein that the requirements of the Statute have been fulfilled.

Taking into consideration the size of and the manner in which the Operation was conducted, it is reasonable to conclude that it constituted an attack both widespread and systematic against a civilian population. Furthermore, the orchestration of the Operation has led to the conclusion that it was conducted pursuant to a State policy to commit such attack.

135. Part IV examined the question of whether, since the Planning Act has not been enforced for a significant period, the doctrine of abrogation through disuse renders the Act void. However, no definite conclusion on this question was expressed herein, and it has been mentioned merely to draw attention to the doctrine for further consideration by a specialised Zimbabwean constitutional lawyer. Should it be decided that the doctrine is still operable in Zimbabwe, then those subject to the evictions were, arguably, ‘lawfully present’ since there was no legislation prohibiting their settlement in the area.

136. Even if it is accepted that most of those evicted were not ‘lawfully present’, many of those evicted were ‘lawfully present’ within the meaning of the Rome Statute. Those evicted should therefore be constituted as those who were ‘lawfully present’ and those who were not for the purposes of the Rome Statute. The Rome Statute does not require that all of those in a group of displaced persons be lawfully present’ and it would therefore appear to be sufficient to constitute those lawfully present as a separate group.

137. Part V examined the question of whether, assuming that a forcible transfer of population as defined in the Rome Statute has occurred, Zimbabwe might be able to invoke one of the international law exceptions allowing for such forcible transfers in exceptional circumstances. It was concluded herein that the requirements under international law allowing for the limitation of these individuals’ rights to mobility, namely, that they be temporary, necessary and proportional to the threat, have not been met.

APPENDIX

Article 7 of the Rome Statute of the International Criminal Court

Crimes against humanity

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;
- (b) “Extermination” includes the intentional infliction of conditions of life,

inter destruction of part of a population;

- (c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (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;
- (e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (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;
- (h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.