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## Operation Murambatsvina: A Crime Against Humanity Under the Rome Statute?

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# OPERATION MURAMBATSVINA: A CRIME AGAINST HUMANITY UNDER THE ROME STATUTE?

JEFF NICOLAI\*

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## INTRODUCTION

In the summer of 2005, a massive internal displacement took place in Zimbabwe<sup>1</sup> under the watchful eye of President Robert Mugabe.<sup>2</sup>

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1. See Press Release, Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, U.N. Representative Calls Zimbabwe Crisis Massive Internal Displacement (July 29, 2005), <http://www.unhcr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet> [hereinafter Kälin Press Release] (determining, based upon the findings of the U.N. Special Envoy's report,

With little or no notice,<sup>3</sup> the Zimbabwean national police force and army burned, bulldozed, and demolished tens of thousands of businesses and homes operating without permits.<sup>4</sup> U.N. officials estimate up to 700,000<sup>5</sup> Zimbabwean citizens lost their homes and/or livelihoods as a result of the slum demolition the Zimbabwean government termed “Operation Murambatsvina” (“the Operation”).<sup>6</sup>

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that the situation in Zimbabwe “comes squarely within the definition of internal displacement”); *see also* U.N. 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*, 13, delivered to the U.N. Secretary-General (July 18, 2005) [hereinafter *U.N. Fact-Finding Report*] (reporting that the homes and businesses of hundreds of thousands of Zimbabwe’s urban poor were destroyed as part of the clean-up operation known as Murambatsvina), available at [http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe\\_rpt.pdf](http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf); Zimbabwe Human Rights NGO Forum, *Order Out of Chaos, or Chaos Out of Order? A Preliminary Report on Operation “Murambatsvina,”* 9-11 (June 2005), [http://www.sarpn.org.za/documents/d0001341/Order-Chaos\\_Murambatsvina.pdf](http://www.sarpn.org.za/documents/d0001341/Order-Chaos_Murambatsvina.pdf) [hereinafter *Preliminary Report*] (estimating, conservatively, that after two weeks the operation produced an internal refugee population of at least 300,000 people without shelter, sustenance, or, for children, access to schools); Michael Wines, *Zimbabwe Police Resume Drive to Raze Slums*, N.Y. TIMES, July 27, 2005, at A3 (placing the resulting homeless population at closer to 700,000 two months into the operation and noting that many of the displaced retreated to Zimbabwe’s rural regions, while the police moved others into poorly run government camps).

2. *See U.N. Fact-Finding Report, supra* note 1, at 91 (describing how President Mugabe justified Operation Murambatsvina to the U.N. Special Envoy by portraying it as the first step in providing better housing to Zimbabwe’s urban poor). Within days of the campaign’s commencement, President Mugabe voiced his public support for the mass evictions as a means of eradicating criminal and illicit activity in the capital. *Id.* at 88. Further, the government provided the Zimbabwe National Police Force and the Army to facilitate the commission of the Operation. *Id.* at 31.

3. *See id.* at 58 (citing that the residents of the City of Harare received notice by publication only a few days before the government launched the campaign). Testimony suggests that outside Harare, where the law requires individual notice, sometimes “as little as a few hours notice was given, leaving people unable to take action and resulting in the destruction of property as houses were demolished.” *Id.*

4. *See id.* at 12 (reporting that the police also ordered inhabitants of targeted areas to dismantle their own homes and thrashed those who protested).

5. *See id.* at 7, 31-33 (using data collected by the United Nations Country Team, reports from special interests groups, information based on field visit observations, and official statistics provided by the government of Zimbabwe).

6. *See Int’l Crisis Group, Zimbabwe’s Operation Murambatsvina: The Tipping Point?*, 1 n.1 (Afr. Rep. No. 97, Aug. 17, 2005) (asserting that the government chose the word Murambatsvina, which literally means “one who

U.N. Secretary-General Kofi Annan sent Special Envoy Anna Tibejukiti to Zimbabwe to report on the scope of the crisis and present recommendations concerning how to address the humanitarian problems.<sup>7</sup> Tibejukiti's report strongly condemns the forced displacement and suggests that the Zimbabwean government cannot handle the consequent crisis.<sup>8</sup> However, the report stops short of calling for international intervention or the prosecution of President Mugabe in the International Criminal Court ("ICC").<sup>9</sup> The report concludes that an international debate about the applicability of the Rome Statute of the International Criminal Court,<sup>10</sup> the founding treaty resulting in the creation of the ICC, would only "distract the attention of the international community from focusing on the humanitarian crisis facing the displaced who need immediate assistance."<sup>11</sup>

Despite the report's passive conclusion, various countries, nongovernmental organizations, and legislators from Zimbabwe argue that the government's actions violated the purpose and provisions of the Rome Statute.<sup>12</sup> Zimbabwe is not a party to the

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refuses dirt or filth," as a communication urging citizens to rebuff the intrinsic offensiveness of the informal markets and shantytowns); *see also* Craig Timberg, *Zimbabwe Police Raze Poor Towns in Rampage*, WASH. POST, June 5, 2005, at A23 (emphasizing that the term "Murambatsvina" translates to "drive out rubbish" and refers to the overwhelmingly poor citizens targeted by the Operation).

7. *See U.N. Fact-Finding Report, supra* note 1, at 13-14 (emphasizing that the mission had the cooperation of the Zimbabwean government, which granted unimpeded freedom of movement and access to high-ranking individuals).

8. *See id.* at 71 (blaming the government's overzealous conduct for creating a state of emergency, disrupting the economy, and exasperating political tension). The report questions the government's recovery strategy, which envisages providing plots to victims on land that the military and youth brigades will develop, and suggests that the government does not have the financial means to provide food, security, and shelter for the displaced victims. *Id.* at 48-49.

9. *See id.* at 67 (recommending that the responsible parties be prosecuted in Zimbabwean courts and that the government provide compensation to unlawfully dispossessed citizens).

10. July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

11. *U.N. Fact-Finding Report, supra* note 1, at 66.

12. *See, e.g., New Zealand Wants to Drag Mugabe to International Criminal Court*, ZIMONLINE, July 18, 2005, <http://www.zimonline.co.za/printme.asp?ID=10184> (describing New Zealand's efforts to investigate President Mugabe for

Rome Statute,<sup>13</sup> and the potential violations occurred within its own territory and against its own citizens.<sup>14</sup> Therefore, the ICC can only assert jurisdiction if the U.N. Security Council, acting pursuant to the U.N. Charter,<sup>15</sup> refers the situation to the ICC prosecutor.<sup>16</sup>

This Comment explores the legality of Operation Murambatsvina and the liability of President Mugabe under the Rome Statute for committing crimes against humanity. Part I of the Comment introduces the Operation and the international and domestic laws it potentially violated. Next, it lays out the relevant provisions of the Rome Statute and discusses the U.N. Security Council's ability to refer situations to the ICC for prosecution. Part II argues that prosecution under the Rome Statute can only proceed if the Council refers the situation to the ICC under its Chapter VII powers and the ICC prosecutor makes a case that the Operation violates either Article 7(d) or 7(k) of the Rome Statute. Part II also contends that

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possible crimes against humanity that might fall under the Rome Statute); *see also Lateline* (ABC television broadcast July 20, 2005) (transcript available at <http://www.abc.net.au/lateline/content/2005/s1418870.htm>) (reproducing an interview in which David Coultart, spokesperson on justice and legal affairs for the Zimbabwean Opposition Movement for Democratic Change, insists that the Operation qualifies as a crime against humanity under the Rome Statute).

13. *See* Status of Multilateral Treaties Deposited with the Secretary-General, Rome Statute of the International Criminal Court, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp> (last visited Apr. 9, 2006) (recording Zimbabwe's failure to ratify the treaty after signing it); *see also* Rome Statute, *supra* note 10, art. 4 (recognizing the jurisdiction of the ICC as extending only to those States that ratify the Rome Statute and other States by special agreement).

14. *See U.N. Fact-Finding Report, supra* note 1, at 12-13 (“[T]he operation targeted practically every town and business centre in the country, as well as countless homes, leaving a trail of destruction in Bulawayo, Chinhoyi, Gweru, Harare, Kadoma, Kwe Kwe, Marondera, Mutare, Rusape and Victoria Falls.”).

15. *See* U.N. Charter art. 39 (authorizing the Security Council to take any measures necessary to restore or maintain international peace and security when it determines that a threat to or breach of that peace and security exists).

16. *See* Rome Statute, *supra* note 10, art. 13(b); *see also* S.C. Res. 1593, ¶¶ 1-9, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in Darfur, Sudan to the ICC prosecutor and outlining the parameters of the investigation); Int'l Commission of Inquiry on Darfur, *Report to the Secretary-General*, ¶ 569, U.N. Doc. S/2005/60 (Jan. 25, 2005) [hereinafter *U.N. Report on Darfur*] (recommending a referral to the ICC because the Sudanese judicial system was incapable of prosecuting the responsible parties).

involving the ICC is justified because the Zimbabwean government refuses to hold the responsible parties accountable or to provide a forum for redress for dispossessed citizens who are guaranteed rights of action under both international and domestic law. Finally, Part II maintains that a U.N. Security Council referral to the ICC is also consistent with both past referrals and current norms addressing international intervention. Part III recommends that the ICC prosecute President Mugabe and that the international community strongly condemn the Operation to send a message that internal displacements are an international human rights problem, rather than a purely domestic issue.

## I. BACKGROUND

### A. OPERATION MURAMBATSVINA

On May 19, 2005, the Chairperson of the Harare Commission<sup>17</sup> announced that the city of Harare, with the assistance of the Zimbabwe Republic Police, would demolish all unlicensed dwellings, marketplaces, and other illegal structures within the city limits in an effort to stop all forms of illegal activity.<sup>18</sup> Five days later, the city of Harare issued an enforcement order pursuant to Section 32 of the Regional, Town and Country Planning Act,<sup>19</sup> stating that demolition of all illegal structures would commence on June 20, 2005.<sup>20</sup> On May 24, police officers and army officials arrested thousands of citizens, burned and bulldozed homes and

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17. See Regional, Town and Country Planning Act, 1976, c. 29:12, § 3-6 (Zimb.) (authorizing the president to establish local governing bodies, like the Harare Commission, to oversee regional construction and development).

18. See *U.N. Fact-Finding Report*, *supra* note 1, at 95 (providing a transcript of the speech describing the Operation as an effort to stop crime and improve the deteriorating conditions affecting the city's image).

19. Regional, Town and Country Planning Act § 32(1) (granting the local planning authority the power to demolish structures operating without lawful permits).

20. See *U.N. Fact-Finding Report*, *supra* note 1, at 96 (reproducing the published enforcement order, which instructed citizens to demolish all unregulated outbuildings and shanties used for habitation and business purposes).

businesses, and forced citizens to destroy their own property.<sup>21</sup> The military-style campaign began in Harare, but it quickly spread throughout the country.<sup>22</sup> The Operation first targeted street vendors operating in the informal economy and then demolished both formal and informal housing structures throughout the country.<sup>23</sup> Government officials encouraged displaced citizens to return to their “native” rural homes; however, many citizens could not afford to travel or simply had no alternative housing.<sup>24</sup> As a result, the most vulnerable citizens<sup>25</sup> were left either to sleep on the streets or to migrate to overcrowded government-run camps.<sup>26</sup>

Following the devastation of Operation Murambatsvina, the government failed to provide the displaced persons with basic necessities such as food, clothes and shelter.<sup>27</sup> The international

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21. *See id.* at 12 (reporting that the central police force arrested twenty thousand vendors within the first week of the Operation); Timberg, *supra* note 6 (asserting that most people complied with the police and destroyed their homes or businesses with their own hands or small tools).

22. *See U.N. Fact-Finding Report, supra* note 1, at 13 (reporting that evictions began in the urban commercial centers and then extended to more suburban and residential areas). “More than fifty-two sites were affected and practically no area designated as ‘urban’ was spared.” *Id.*

23. *See id.* at 35-36 (examining the impact of the Operation on workers in the informal marketplace, both those who lost their livelihoods directly and on those that lost legitimate employment because they were forced to relocate).

24. *See id.* at 13 (finding that most citizens living in major cities no longer owned their original rural homes); *see also Preliminary Report, supra* note 1, at 12 (clarifying the common misconception that the urban poor have migrated from rural areas and pointing out that foreign nationals displaced by the Operation do not have a “right of residence in any rural area in Zimbabwe”). Of those citizens with relatives in rural areas, many could not return home because of the high costs and shortage of gasoline. *Id.* at 10.

25. *See U.N. Fact-Finding Report, supra* note 1, at 39-44 (criticizing the government for not protecting women, children and people infected with H.I.V. during and after the evictions).

26. *See* Michael Wines, *Zimbabwe’s “Cleanup” Takes a Vast Human Toll*, N.Y. TIMES, June 11, 2005, at A1 (describing the worsening conditions for the displaced and homeless Zimbabweans); *see also Conditions Worsen for Homeless Zimbabweans*, WASH. POST, Aug. 21, 2005, at A22 (reporting that the government moved displaced citizens to the outskirts of Harare, where people had only sheets of plastic and blankets for shelter).

27. *See U.N. Fact-Finding Report, supra* note 1, at 36-39.



community strongly condemned the Operation<sup>28</sup> and the media placed it within the larger context of the breakdown of law and democracy under President Mugabe.<sup>29</sup> Although the exact motives behind the Operation remain unclear,<sup>30</sup> it adversely affected a broad cross-section of the population, particularly targeting the poorest and most helpless members of society.<sup>31</sup>

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28. See *id.* at 71 (criticizing the government for creating vast human suffering among its own citizenry, for disregarding the rule of law, and for inflaming political tensions within the country); *Preliminary Report*, *supra* note 1, at 9-10 (decrying the Zimbabwean government for needlessly creating a human rights disaster involving the displacement of hundreds of thousands of citizens); see also Kälín Press Release, *supra* note 1 (condemning the government for violating due process of law and for exacerbating the harmful effects of the crisis). *But see* Michael Wines, *Around Ruined Zimbabwe, Neighbors Circle Wagons*, N.Y. TIMES, July 6, 2005, at A4 (reporting that the African Union is unwilling to criticize the actions of the government because it considers the Operation an internal matter).

29. See, e.g., Craig Timberg, *Zimbabwean Activists Tell of Beatings*, WASH. POST, Mar. 5, 2005, at A12 (discussing police brutalities against opposition activists in the months leading up to the 2005 parliamentary elections in Zimbabwe); see also Craig Timberg, *Zimbabwe Shuts Down Independent Weekly*, WASH. POST, Feb. 27, 2005, at A24 [hereinafter *Zimbabwe Shuts Down Independent Weekly*] (describing President Mugabe's policy of passing strict media laws to shut down opposition newspapers); Craig Timberg, *Mugabe Said to Use Law as Political Tool*, WASH. POST, July 18, 2004, at A18 [hereinafter *Mugabe Said to Use Law as Political Tool*] (reporting on President Mugabe's manipulation of the criminal justice system to punish his political opponents); Michael Wines, *Zimbabwe to Outlaw Groups that Promote Human Rights*, N.Y. TIMES, Dec. 10, 2004, at A5 (describing President Mugabe's policy of passing strict domestic legislation to restrict basic freedoms and suppress opposition).

30. See *U.N. Fact-Finding Report*, *supra* note 1, at 20-21 (speculating that the government ordered the demolition of the unregulated homes and businesses to either gain greater control over the informal economy or to quell an increasingly restless population upset over record inflation and severe famine).

31. See *id.* at 33 (stating that the destruction of such a large portion of the functioning economy indirectly affected the livelihoods of 2.1 million poor and middle-class people who relied on the informal economy). The Operation left hundreds of thousands of poverty stricken men, women, children, and H.I.V.-positive citizens homeless and without livelihood. *Id.* at 39-44

### *1. Legal Justifications for the Operation*

The government of Zimbabwe justifies the Operation as legal under the Regional, Town and Country Planning Act.<sup>32</sup> The Act creates regions, districts, and townships that oversee construction and provide for the general welfare of society.<sup>33</sup> Section 10 of the Act creates city commissions to oversee and regulate building and development within the borders of their respective regions.<sup>34</sup> The city commissions have the power to issue permits<sup>35</sup> and enforcement orders requiring the demolition of structures operating without permits.<sup>36</sup> However, enforcement orders do not take effect until one month after delivery of notice.<sup>37</sup> During this reprieve, the resident has the right to apply for a permit or challenge the findings of the local commission.<sup>38</sup>

### *2. The Zimbabwean Government's Reaction to the Humanitarian Crisis*

President Mugabe consistently ignored questions about the legality of the Operation and the growing humanitarian crisis.<sup>39</sup> Although the

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32. See *Preliminary Report*, *supra* note 1, at 1-2 (reporting that the government issued an enforcement order calling for the demolition of the unregulated structures pursuant to Section 32 of the Act).

33. Regional, Town and Country Planning Act, 1976, c. 29:12, pmb. (Zimb.) (calling for the conservation and improvement of the physical environment and the maintenance of health, order, and general welfare).

34. *Id.* § 10(1)(a) (indicating that each municipal or town council shall function as the local planning authority over the area under its jurisdiction).

35. *Id.* § 26 (setting forth the requirements that a permit application must satisfy, the procedure by which the local planning authority may refuse an application, and the appeals process for the rejected applicant).

36. *Id.* § 32 (recognizing that the local planning commissions have discretion when determining whether to issue an enforcement order). The local planning authority may demolish existing regulated developments if the action is necessary to conform to a local building plan or if it appears expedient in the interests of the planning of the area. *Id.* § 35.

37. *Id.* § 32(3). The Act deems publication of the enforcement order in a newspaper to be sufficient notice when the enforcement order affects a substantial number of people. *Id.* § 32(6).

38. *Id.* § 31.

39. See *U.N. Fact-Finding Report*, *supra* note 1, at 88 (reporting that President Mugabe supports the Operation and described settlements in Harare as "a mess")

government launched a rebuilding project called "Operation Garikai,"<sup>40</sup> the United Nations had serious concerns about the viability of the plan and ultimately concluded that the government could not handle the humanitarian crisis.<sup>41</sup>

## B. POTENTIAL VIOLATIONS OF INTERNATIONAL OBLIGATIONS AND DOMESTIC LAWS

Operation Murambatsvina potentially conflicts with numerous domestic laws and international covenants signed and ratified by Zimbabwe, including the Zimbabwean Constitution,<sup>42</sup> the Universal Declaration of Human Rights,<sup>43</sup> the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),<sup>44</sup> the International Covenant on Civil and Political Rights ("ICCPR"),<sup>45</sup> and the African Charter on Human and Peoples' Rights.<sup>46</sup> Specifically, Operation Murambatsvina potentially violated several provisions within the Constitution of Zimbabwe and international covenants, such as the right to human dignity,<sup>47</sup> the right to housing

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from which new businesses should emerge). President Mugabe received the U.N. mission in an effort to convince the Secretary-General of the righteousness of the Operation. *Id.* at 91.

40. *See id.* at 47-48 (describing the government's plan to provide displaced citizens with plots of land to rebuild their homes and businesses).

41. *See id.* at 48-50 (concluding that Operation Garikai is a disingenuous plan that does not effectively address the developing humanitarian crisis).

42. *See* ZIMB. CONST. §§ 13, 15-16.

43. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

44. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR].

45. International Covenant on Civil and Political Rights, G.A. Res. 2200, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

46. African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982) [hereinafter African Charter].

47. *See* ZIMB. CONST. § 15 (protecting against inhumane and degrading treatment); African Charter, *supra* note 46, art. 4, 21 I.L.M. at 60 (pledging respect for the integrity of every person); *id.* art. 5, 21 I.L.M. at 60 (safeguarding every person's inherent dignity); *id.* art. 24, 21 I.L.M. at 63 (recognizing the right to a

and employment,<sup>48</sup> the right to freedom of movement,<sup>49</sup> and the right to due process before the taking of property.<sup>50</sup>

The Human Rights Committee (“HRC”) and the Committee on Economic, Social, and Cultural Rights (“CESCR”) enforce the ICCPR and ICESCR by issuing reports evaluating States parties’ efforts to carry out the Covenants’ provisions.<sup>51</sup> The Committees have written influential General Comments supporting the view that forced displacements are *prima facie* unlawful and “can only be justified in the most exceptional of circumstances.”<sup>52</sup> Moreover, the Committees have determined that States parties must respect the

satisfactory environment beneficial to development). The Zimbabwean government violated its citizens’ constitutional rights to personal liberty and protection from inhumane treatment when it ruthlessly demolished their homes and businesses. *See* ZIMB. CONST. §§ 13, 15.

48. *See* ICCPR, *supra* note 45, art. 17 (prohibiting arbitrary interference with a person’s home or family); ICESCR, *supra* note 44, art. 6 (recognizing the right to work and the duty of the government to safeguard its citizens’ livelihood); Universal Declaration of Human Rights, *supra* note 43, art. 23 (protecting the right to work and the right to choose employment); *see also id.* art. 25 (guarding the right to a reasonable standard of living including access to food, clothing, housing, medical care, and social services).

49. *See* ZIMB. CONST. § 22 (setting forth the right to freedom of movement, which the Zimbabwean government violated by forcing its citizens to return to rural areas or onto government-run camps); ICCPR, *supra* note 45, art. 12 (recognizing a person’s right to move freely and choose a personal residence).

50. *See* ZIMB. CONST. § 16(1)(b) (guarding citizens’ right to property by requiring authorities to provide reasonable notice of their intention to acquire such property); African Charter, *supra* note 46, art. 14, 21 I.L.M. at 61 (guaranteeing that the right to property shall not be disturbed except according to appropriate laws based upon the public need); ICCPR, *supra* note 45, art. 9 (forbidding deprivation of liberty without established procedures of law); Universal Declaration of Human Rights, *supra* note 43, art. 17 (protecting against arbitrary deprivation of property).

51. *See* ICCPR, *supra* note 45, art. 40(4) (providing that both committees may study the reports and issue comments to States parties); *see also* ICESCR, *supra* note 44, art. 21 (instructing the Committee to evaluate the reports and pass their findings along to other agencies within the United Nations).

52. U.N. Eco. & Soc. Council [ESCOC], Comm. on Econ., Soc. & Cultural Rts., *General Comment 4: The Right to Adequate Housing*, ¶ 18, U.N. Doc. E/1992/23 (1991), *reprinted in* *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 48, U.N. Doc HRI/Gen/1 (Sept. 4, 1992) [hereinafter *General Comment 4*].

Covenants' incorporation clauses and provisions instructing States to provide redress to citizens who claim a violation of the Covenants.<sup>53</sup>

Operation Murambatsvina may also conflict with soft international law.<sup>54</sup> For example, although not binding, the Guiding Principles on Internal Displacement provide a framework for determining when displacement of a population is lawful and for protecting populations from forced displacement.<sup>55</sup> The Guiding Principles also guarantee due process of law and adequate government care after displacement.<sup>56</sup>

### C. SECURITY COUNCIL REFERRAL PURSUANT TO ITS CHAPTER VII POWERS

The U.N. Security Council is the main body charged with preventing the disruption of international peace and security.<sup>57</sup> The scope of this duty has expanded to cover traditionally domestic situations where civilians suffer severe human rights violations.<sup>58</sup>

53. See ICCPR, *supra* note 45, art. 2(3)(a)-(c) (declaring that States parties must establish competent judicial or administrative bodies to hear claims of violations of the Covenant); *c.f.* African Charter, *supra* note 46, art. 26, 21 I.L.M. at 63 (calling for the establishment of national institutions to promote and protect the charter-based rights and freedoms).

54. See generally Dinah Shelton, *Introduction to COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 2* (Dinah Shelton ed., 2000) (defining "soft law" as "international non-binding norms").

55. ESCOC, Comm'n on Hum. Rts., *Guiding Principles on Internal Displacement, Addendum to the Report of the Representative of the Secretary-General, Submitted Pursuant to Commission Resolution 1997/39*, princ. 6, 8, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles*] (protecting citizens from arbitrary displacement of their habitual residences and stating that displacement should not violate the security, liberty, or dignity of the affected population).

56. *Id.* princ. 7(1) (stating that governments must explore all possible alternatives prior to displacement and must provide proper accommodations to citizens if displacements occur); *id.* princ. 7(3)(b) (recognizing that governments should fully inform their citizens prior to displacement and attempt to gain their consent before taking any action).

57. See U.N. Charter art. 24, ¶ 1.

58. See, e.g., *U.N. Report on Darfur*, *supra* note 16, at 162 (recommending U.N. Security Council intervention even though the internal conflict involved Sudanese victims and Sudanese combatants).

The International Commission on Intervention and State Sovereignty reported on the expanding role of international intervention in its report, *The Responsibility to Protect*.<sup>59</sup> The report concludes that sovereign nations have the primary responsibility to protect their people.<sup>60</sup> However, the report also advocates international intervention when a population suffers harm and the sovereign nation is unwilling or unable to stop the harm.<sup>61</sup> According to the report, the responsibility to protect encompasses three responsibilities: to prevent,<sup>62</sup> to react,<sup>63</sup> and to rebuild.<sup>64</sup>

In 2005, the Security Council acted under its Chapter VII powers to refer the situation in Darfur, Sudan, to the prosecutor of the ICC.<sup>65</sup> Prior to the resolution, a commission established by the U.N. Security Council determined that the government and militias killed, tortured, raped, and forcibly displaced civilians throughout Darfur.<sup>66</sup> The Commission recommended referral to the ICC because the continuing violence constituted a threat to international peace and

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59. See generally INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, ¶¶ 1.37-1.38 (2001), <http://www.iciss.ca/pdf/Commission-Report.pdf> [hereinafter RESPONSIBILITY TO PROTECT] (endorsing the broadening scope of international intervention); The Secretary-General, *Report of the Secretary-General, In Larger Freedom: Towards Development, Security, and Human Rights for All*, ¶ 135, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *Report of the Secretary-General*] (calling for international intervention when a sovereign State fails to protect its citizens).

60. RESPONSIBILITY TO PROTECT, *supra* note 59, ¶ 2.27 (recognizing that States must protect their citizens from threats against life, health, livelihood, and personal dignity).

61. *Id.* ¶ 1.35.

62. *Id.* at xi (acknowledging that the international community must address both the root and direct causes of the internal conflict).

63. *Id.* (stating that the international community must respond to human suffering with appropriate measures like sanctions, international prosecution, or military intervention).

64. *Id.* (determining that the international community must provide assistance with recovery following military intervention by addressing the causes that led to the intervention).

65. See generally S.C. Res. 1593, *supra* note 16, pmb. (determining that the situation in Darfur constituted a threat to international peace and security).

66. U.N. *Report on Darfur*, *supra* note 16, at 3 (reporting that widespread violations of international law caused immeasurable suffering and loss of livelihood throughout the region).

security<sup>67</sup> and the Sudanese judicial system was unable to ensure accountability or end the violence.<sup>68</sup>

#### D. CRIMES AGAINST HUMANITY UNDER THE ROME STATUTE

Under the Rome Statute, a crime only reaches the level of a “crime against humanity” if it meets the criteria set forth in the chapeau to Article 7 and falls within the specific crimes listed in Article 7(1).<sup>69</sup> Specifically, the chapeau<sup>70</sup> requires that an act be a widespread<sup>71</sup> or systematic<sup>72</sup> attack<sup>73</sup> against a civilian population,<sup>74</sup> and that the perpetrator have knowledge of the attack.<sup>75</sup> In other words, the chapeau requires that a perpetrator, in knowing furtherance of a State

67. *Id.* at 5.

68. *Id.* at 145.

69. Rome Statute, *supra* note 10, art. 7(1) (listing “forcible transfer of population” and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” as specific violations that may constitute crimes against humanity). *See generally* Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 47 (1999) (explaining that the chapeau necessarily sets a high threshold for the definition of a crime against humanity).

70. *See* Rome Statute, *supra* note 10, art. 7(1).

71. *See* Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 580 (Sept. 2, 1998) (defining a “widespread attack” as a “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims”).

72. *See id.* (finding that “systematic” means “thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources”).

73. *See* Antonio Cassese, *Crimes Against Humanity*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 353, 356-57 (Antonio Cassese et al. eds., 2002) (acknowledging that an “attack” must involve a large-scale action, a substantial number of victims, and a high degree of planning or orchestration, rather than “isolated or sporadic misbehavior, however heinous and revolting,” in order to qualify as a crime against humanity).

74. *See* Robinson, *supra* note 69, at 51 (maintaining that the negotiators chose the term “civilian population” to protect both nationals and aliens from crimes against humanity).

75. *See* Cassese, *supra* note 73, at 373 (identifying the necessary mens rea as an awareness that a specific criminal act is part of a larger widespread or systematic attack on a civilian population); *see also* Robinson, *supra* note 69, at 51-52 (asserting that to satisfy the necessary mens rea the accused must only be aware of the larger attack but need not actually orchestrate it).

policy, carries out multiple commissions of an act referred to in Article 7(1) against a civilian population. In addition, Article 7(1)(d) lists “deportation or forcible transfer of a population” as a specific act that could constitute a crime against humanity<sup>76</sup> and Article 7(2)(d) defines this act as the forced<sup>77</sup> displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.<sup>78</sup>

Finally, Article 7(1)(k) lists “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or to physical health” as a specific act that could also constitute a crime against humanity.<sup>79</sup> Commentators note that this provision allows the prosecution of heinous crimes that do not fall within the definitions laid out in Article 7(1).<sup>80</sup>

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76. Rome Statute, *supra* note 10, art. 7(1)(d); *see also* MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: *NULLUM CRIMEN SINE* AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 503 (2002) (differentiating “forcible transfer,” which encompasses a large-scale movement of a population within a country, from “deportation”).

77. *See* Preparatory Comm’n for the Int’l Crim. Ct., *Addendum: Part II, Finalized Draft Text of the Elements of Crimes*, art. 7(1)(d) n.12, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) (adding the important caveat that force is not limited to actual physical force); *see also* BOOT, *supra* note 76, at 504 (emphasizing that the threat of force may constitute forcible transfer of a population).

78. Rome Statute, *supra* note 10, art. 7(2)(d); *see also* Darryl Robinson, *The Elements of Crimes Against Humanity*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 57, 86 (Roy S. Lee ed., 2001) (acknowledging that cautious delegates created a stringent definition for “deportation or forcible transfer” because States are permitted to carry out legitimate and lawful internal transfers).

79. Rome Statute, *supra* note 10, art. 7(1)(k).

80. *See, e.g.*, Kelly D. Askin, *Crimes Within the Jurisdiction of the International Criminal Court*, 10 *CRIM. L.F.* 33, 49 (1999) (arguing that this serves as a catch-all provision granting jurisdiction over individuals whose crimes against humanity were “unforeseen or unspecified”).



### 1. Jurisdictional Limits of the Rome Statute

The Rome Statute grants jurisdictional power to the ICC over individuals<sup>81</sup> who commit the most serious crimes concerning the welfare of the international community.<sup>82</sup> Specifically, it establishes jurisdiction over the crime of genocide, war crimes, crimes against humanity, and the crime of aggression.<sup>83</sup>

The ICC has jurisdiction over nationals from countries who ratified the Rome Statute if the individual directly commits a crime, commits a crime through another person, or orders or solicits the commission of a crime.<sup>84</sup> The ICC may also exercise jurisdiction if a non-member State's national commits a prosecutable crime in a member State's territory or commits the crime against a national from a member State.<sup>85</sup> Although the Rome Statute recognizes the primacy of national governments, it grants the ICC complementary jurisdiction;<sup>86</sup> therefore, judges can determine a case is inadmissible if the State with jurisdiction over the crime is genuinely prosecuting or carrying out an investigation.<sup>87</sup>

The U.N. Security Council can also confer to the ICC jurisdiction over non-member States, such as Zimbabwe, by referring the situation to the ICC prosecutor for investigation or prosecution.<sup>88</sup> In this instance, the U.N. Security Council could initiate an investigation through the Secretary General,<sup>89</sup> review the resulting

81. Rome Statute, *supra* note 10, art. 25(1) (asserting jurisdiction over natural persons, not States).

82. *See id.* pmbl. (providing for prosecution of crimes that affect peace, security, and well-being).

83. *Id.* art. 5.

84. *Id.* art. 25.

85. *Id.* art. 12.

86. *See id.* pmbl.

87. *See id.* art. 17.

88. *See id.* art. 13. *See generally* Preparatory Comm'n for the Int'l Crim. Ct., *Addendum: Part I, Draft Relationship Agreement Between the Court and the United Nations*, arts. 2-20, U.N. Doc. PCNICC/2001/1/Add.1 (Jan. 8, 2002).

89. *Cf.* S.C. Res. 1564, ¶ 12, U.N. Doc. S/RES/1564 (Sept. 18, 2004) (demanding an immediate investigation into claims of genocide and breaches of international law by the Sudanese government in Darfur).

report, and decide whether the act constitutes a threat to international peace and security.<sup>90</sup>

## 2. *Statutory Interpretation and Application of Law Under the Rome Statute*

The Rome Statute requires strict interpretation of the definitions of crimes.<sup>91</sup> If ambiguity exists, the ICC must construe definitions in favor of the charged party.<sup>92</sup> When interpreting a provision, the ICC must first apply the Statute itself, the elements of crimes, and its rules of procedure and evidence.<sup>93</sup> If appropriate, the judges may secondarily apply “applicable treaties and the principles and rules of international law.”<sup>94</sup> If neither of these first two sources provides clarity, the ICC may apply general legal principles derived from national legal systems, including the national law of the State with jurisdiction, as long as that law is consistent with internationally recognized standards and the Rome Statute.<sup>95</sup> The ICC must apply and interpret law pursuant to this provision consistently with internationally recognized human rights.<sup>96</sup>

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90. Cf. S.C. Res. 1593, *supra* note 16, ¶ 1 (deciding that the situation in Darfur merited referral to the ICC prosecutor under the U.N. Security Council’s Chapter VII powers).

91. Rome Statute, *supra* note 10, art. 22(2).

92. *Id.*

93. *Id.* art. 21(1)(a).

94. *Id.* art. 21(1)(b).

95. *Id.* art. 21(1)(c).

96. *See id.* art. 21(3) (protecting against “any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”).

## II. ANALYSIS

### A. THE ZIMBABWEAN GOVERNMENT VIOLATED DOMESTIC LAW, INTERNATIONAL TREATIES, AND THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

The Zimbabwean government violated the Regional, Town and Country Planning Act by giving zero to three days notice to its citizens before demolishing their homes and businesses.<sup>97</sup> The short to nonexistent time span between notice and demolition further deprived citizens of their right to petition the decision or to apply for a permit.<sup>98</sup> This fundamental denial of due process also violated the Zimbabwe Constitution.<sup>99</sup> In addition to the gross violations of due process, the government exceeded the scope of the Regional, Town and Country Planning Act by bypassing local planning authorities and carrying out the Operation with the aid of the central police force and the army.<sup>100</sup>

The Zimbabwean government also violated numerous international covenants and the Guiding Principles on Internal Displacement. The Zimbabwean government violated numerous treaties protecting individuals' rights to choose their own employment and obtain a reasonable standard of living by destroying the livelihoods of over 700,000 men, women, and children.<sup>101</sup> The

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97. See Regional, Town and Country Planning Act, 1976, c. 29:12, § 32(3) (Zimb.) (stating that the local planning authority must wait at least thirty days after giving notice to demolish unregulated structures).

98. See *id.* § 38(1) (guaranteeing all citizens a right to appeal the local planning authority's decision and apply for a permit within one month of receiving notice).

99. See ZIMB. CONST. § 16 (protecting citizens from deprivation of property without due process of law).

100. See Regional, Town and Country Planning Act § 35 (granting local planning authorities jurisdiction over regulating permits and carrying out enforcement orders).

101. See Universal Declaration of Human Rights, *supra* note 43, art. 23(1) (preventing governments from infringing upon their citizens' right to work or choose their own employment); *id.* art. 25(1) (recognizing the right to a reasonable standard of living, including access to adequate housing); see also ICESCR, *supra* note 44, art. 6 (protecting the right to work and obtain a reasonable living). Article 6 also sets forth parties' obligation to take steps toward providing their citizens with vocational training. *Id.* See generally African Charter, *supra* note 46, art. 24,

government not only crushed their livelihoods, but it also thrust the victims into a desperate fight for survival that violates an obligation to respect human dignity.<sup>102</sup> The lack of planning<sup>103</sup> for the inevitable humanitarian crisis<sup>104</sup> demonstrates that the architects failed to meaningfully consider the possible alternatives to the mass demolition and did not secure alternative accommodations for displaced citizens.<sup>105</sup> Instead of creating a reasonable and effective humanitarian plan, the government likely violated its citizens' right to freedom of movement by requiring them to return to their native land or move to overcrowded and under-resourced government camps.

**B. THE ZIMBABWEAN GOVERNMENT MUST PROSECUTE  
INDIVIDUALS WHO VIOLATED DOMESTIC LAW AND  
PROVIDE A FORUM FOR REDRESS FOR INDIVIDUALS  
DEPRIVED OF THEIR RIGHTS**

The government of Zimbabwe has a legal duty to investigate whether the architects of the Operation or those who carried it out deprived citizens of their Constitutional right to protection from inhumane treatment.<sup>106</sup> The government of Zimbabwe must also

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21 I.L.M. at 63 (guaranteeing all Africans an environment beneficial to development).

102. See African Charter, *supra* note 46, art. 5, 21 I.L.M. at 60 (recognizing the inherent dignity of every individual); ICCPR, *supra* note 45, pmb. (establishing human dignity as the source of all human rights).

103. See *U.N. Fact-Finding Report*, *supra* note 1, at 47-48 (questioning whether the government's restoration efforts will be able to succeed given Zimbabwe's hyperinflation and chronic budget deficits); see also Wines, *supra* note 26 (criticizing the government's policy of forcing the displaced citizens into run-down camps and disingenuously promising permanent housing later).

104. See *U.N. Fact-Finding Report*, *supra* note 1, at 36-46.

105. See *Guiding Principles*, *supra* note 55, princ. 7 (instructing States to consider all possible alternatives to forced displacement and to provide citizens with adequate resources if displacement does occur).

106. See ZIMB. CONST. § 15 (protecting citizens from inhumane, degrading, or other such treatment); see also *U.N. Fact-Finding Report*, *supra* note 1, at 76-78 (suggesting that the potential negligence of the police officers, coupled with the commencement of the Operation during winter, intensified the vast human suffering); *Conditions Worsen for Homeless Zimbabweans*, *supra* note 26 (discussing the existence of inhumane conditions at government-run displacement camps).

provide a forum where citizens can seek redress for violations of domestic law because both the Zimbabwe Constitution and the Regional, Town and Country Planning Act contain provisions establishing rights of action for violations of their terms.<sup>107</sup> In particular, the government must provide a forum for redress for citizens claiming due process violations<sup>108</sup> and for citizens dispossessed despite holding lawful title to land.<sup>109</sup>

The government of Zimbabwe cannot invoke its domestic law to justify violations of its international treaty obligations because the African Charter, the ICECSR, and the ICCPR contain provisions requiring states to incorporate their terms into domestic legislation.<sup>110</sup> Further, the Zimbabwean government cannot deny citizens a forum of redress for violations of treaty-based rights because the African Charter and the ICCPR contain provisions calling for establishment

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107. See ZIMB. CONST. § 24; Regional, Town and Country Planning Act, 1976, c. 29:12, § 38 (Zimb.).

108. See Regional, Town and Country Planning Act § 38(1) (establishing a mandatory appeals process for any person aggrieved by a local planning authority decision); see also ZIMB. CONST. § 24 (providing a right of action for citizens claiming a violation of their constitutional rights).

109. See ZIMB. CONST. § 16 (stating that the government cannot acquire property without supplying reasonable notice and protecting citizens from the arbitrary deprivation of property); see also U.N. Fact-Finding Report, *supra* note 1, at 58-59 (citing evidence that the government destroyed numerous homes and businesses that held valid permits during Operation Murambatsvina).

110. See African Charter, *supra* note 46, art. 1, 21 I.L.M. at 60; ICCPR, *supra* note 45, art. 2(2); ICESCR, *supra* note 44, art. 2(1); Hum. Rts. Comm., *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 13, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter *General Comment 31*] (recognizing that States party to the ICCPR must amend and interpret their domestic law in conformity with their Covenant obligations); see also Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331, 339 [hereinafter Vienna Convention] ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). See generally ESCOC, Comm. on Econ., Soc. & Cultural Rts., *General Comment 7: The Right to Adequate Housing*, ¶ 10, U.N. Doc. E/C.12/1997/4 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 48, U.N. Doc HRI/GEN/1/Rev.3 (Aug. 15, 1997) [hereinafter *General Comment 7*] (calling for the amendment of domestic legislation that is inconsistent with the right to adequate housing).

of domestic institutions to hear such claims.<sup>111</sup> The Government of Zimbabwe is likely to argue that its Constitution explicitly rejects automatic incorporation of international treaties into domestic law.<sup>112</sup> However, the text of the Covenants<sup>113</sup> and influential General Comments<sup>114</sup> weaken that position. In fact, the Zimbabwean Constitution protects rights guaranteed in the Covenants.<sup>115</sup> For these reasons, the Zimbabwean government has a duty to protect covenant-based rights incorporated into Zimbabwean law and those guaranteed by domestic law; in order to fulfill this duty, it must make a good faith effort<sup>116</sup> to provide redress for violations of the Zimbabwean Constitution,<sup>117</sup> the Regional, Town and Country Planning Act,<sup>118</sup> the ICCPR,<sup>119</sup> the ICESCR,<sup>120</sup> and the African Charter.<sup>121</sup>

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111. African Charter, *supra* note 46, art. 26, 21 I.L.M. at 63; ICCPR, *supra* note 45, art. 2(3).

112. See ZIMB. CONST. § 111B (subjecting international agreements to parliamentary approval prior to their incorporation into domestic law).

113. See *supra* notes 110-111 and accompanying text (discussing the treaty provisions calling for domestic incorporation of the terms of the treaty).

114. See, e.g., ESCOC, Comm. on Econ, Soc. & Cultural Rts., *General Comment 9: The Domestic Application of the Covenant*, ¶ 11, U.N. Doc. E/C.12/1998/24 (Dec. 3, 1998) [hereinafter *General Comment 9*] (emphasizing that there should be no *a priori* assumption that the ICESCR is not self-executing).

115. See ZIMB. CONST. §§ 15-16, 22 (protecting Zimbabwean citizens from inhuman treatment, deprivation of property, and infringement upon freedom of movement).

116. See Vienna Convention, *supra* note 110, art. 26, 1155 U.N.T.S. at 339 (declaring that all States parties to a treaty must perform in good faith).

117. See ZIMB. CONST. § 24.

118. See Regional, Town and Country Planning Act, 1976, c. 29:12, § 38 (Zimb.).

119. See ICCPR, *supra* note 45, art. 2(3) (requiring effective judicial, administrative, or legislative remedies for violations of the treaty); see also *General Comment 31*, *supra* note 110, ¶ 7 (recognizing that a State's obligation includes providing effective remedy for breaches of the Covenant).

120. See ICESCR, *supra* note 44, art. 2(1) (calling for the protection of the treaty rights by all appropriate means, including the adoption of domestic legislation); see also *General Comment 9*, *supra* note 114, ¶ 2 (requiring a mechanism for ensuring government accountability and providing a means for legal redress); *General Comment 7*, *supra* note 110, ¶ 9 (calling for the punishment of persons or public bodies that negligently carry out forced evictions). See generally Universal Declaration on Human Rights, *supra* note 43, art. 8 (stating

C. THE U.N. SECURITY COUNCIL SHOULD REFER THE SITUATION  
IN ZIMBABWE TO THE ICC PROSECUTOR BECAUSE THE  
ZIMBABWEAN GOVERNMENT REFUSES TO PROTECT ITS  
CITIZENS' LEGAL AND HUMANITARIAN RIGHTS

Despite having a duty to act under domestic and international law, the Zimbabwean government refuses to meaningfully address the legal and humanitarian consequences of the Operation.<sup>122</sup> In reality, the government most likely will not provide its citizens with legal redress or investigate potential criminal activity because any admission of guilt would likely lead to further inquiries implicating high-ranking government officials, including the President himself.<sup>123</sup> Further, the government can effectively suppress any independent calls for investigation because the President exerts tight control over the media,<sup>124</sup> human rights groups,<sup>125</sup> and the three branches of the government.<sup>126</sup> Because the government will not defend its citizens'

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that national tribunals must provide effective remedies for violations of domestically ensured rights).

121. See African Charter, *supra* note 46, art. 26, 21 I.L.M. at 63 (calling for the establishment of appropriate national institutions that promote and protect the charter-based rights and freedoms).

122. See *U.N. Fact-Finding Report*, *supra* note 1, at 88 (reporting that President Mugabe supports the Operation and envisions a new environment rising up from the destruction). President Mugabe agreed to the U.N. fact-finding mission to show the Secretary-General that the Operation provides a better future for his people. *Id.* at 91. In addition, the police commissioner lent his support to the Operation by stating it will clean the "crawling mass of maggots bent on destroying the economy". *Id.* at 88.

123. See Int'l Crisis Group, *supra* note 6, at 6 (reasoning that President Mugabe must have at least known about, or perhaps even planned, the nation-wide government operation).

124. See *Zimbabwe Shuts Down Independent Weekly*, *supra* note 29 (reporting on the strict media laws that allow President Mugabe to arbitrarily shut down independent newspapers and maintain control over the daily newspapers, television, and radio).

125. See *Wines*, *supra* note 29 (describing Zimbabwean Parliament-approved legislation that bans foreign-controlled nongovernmental organizations).

126. See *Mugabe Said to Use Law as Political Tool*, *supra* note 29 (reporting that President Mugabe carries out his political objectives through the criminal justice system); see also Craig Timberg, *Mugabe Gains Expanded Powers*, WASH. POST, Aug. 31, 2005, at A20 (commenting on President Mugabe's expanded constitutional powers allowing him to restrict travel by opposition leaders, limit the

legal and humanitarian rights, the international community should collectively intervene for the sake of Zimbabwe's population.<sup>127</sup>

Specifically, the U.N. Security Council should investigate the situation and determine whether the Operation constitutes a crime against humanity under the Rome Statute.<sup>128</sup> The U.N. Security Council can refer the situation to the ICC under its Chapter VII powers because the Zimbabwean government's disregard for the rule of law and its complete abandonment of humanitarian responsibility constitutes a threat to peace and security in the region.<sup>129</sup> This type of collective intervention in traditionally domestic situations conforms to the emerging principle that the international community must protect the security of the world's citizens when sovereign governments refuse to do so.<sup>130</sup>

U.N. Security Council referral to the ICC prosecutor of the situation in Zimbabwe is consistent with the referral of the situation in Darfur to the ICC prosecutor.<sup>131</sup> Although the situation in Darfur was admittedly on a different scale than Operation Murambatsvina,<sup>132</sup>

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right of appeal in instances of government-sponsored land seizures, and appoint loyal supporters to a newly created sixty-five member senate).

127. See RESPONSIBILITY TO PROTECT, *supra* note 59, at 8 (recognizing that the international community must protect citizens from breaches of human rights law if the sovereign nation is unwilling to deal with the violations); see also *Report of the Secretary-General*, *supra* note 59, ¶ 135 (endorsing the idea that the international community is collectively responsible for preventing and intervening in humanitarian crises).

128. See *U.N. Fact-Finding Report*, *supra* note 1, at 64 (recognizing that a broad coalition of politicians, church leaders, academics, and concerned civilians argue that the Operation falls under the jurisdiction of the Rome Statute).

129. Cf. S.C. Res. 733, pmb., U.N. Doc. S/RES/733 (1992) (stressing that the internal conflict in Somalia constituted a threat to international peace and security); *U.N. Report on Darfur*, *supra* note 16, at 5 (reiterating that the Security Council determined that the internal conflict in Darfur constituted a threat to international peace and security).

130. See RESPONSIBILITY TO PROTECT, *supra* note 59, ¶ 2.22 (acknowledging that human security comprises security against threats to life, health, livelihood, personal safety, and human dignity).

131. See S.C. Res. 1593, *supra* note 16, ¶¶ 1-2 (referring the situation in Darfur, Sudan to the ICC prosecutor and demanding the full cooperation of the parties to the conflict in the investigation).

132. See *U.N. Report on Darfur*, *supra* note 16, at 3 (describing the widespread and reprehensible violations of international law in Darfur, including murder, rape,



the U.N. Security Council considered both the scope of the crisis and the inability of the government to stop or remedy the situation.<sup>133</sup> Therefore, U.N. Security Council referral is justified because of the large scope of the problem in Zimbabwe and the government's unwillingness and inability to protect its citizens' human rights.

U.N. Security Council referral<sup>134</sup> also fulfills the three elements comprising the responsibility to protect.<sup>135</sup> First, referral to the ICC would help prevent further harm by exposing the cause of the problem, President Mugabe, to liability under the Rome Statute.<sup>136</sup> Second, referral to the ICC prosecutor would be a sufficient reaction incorporating the need to take proportionate punitive measures against the responsible parties.<sup>137</sup> Finally, referring the situation to the ICC prosecutor addresses the root of the harm and the primary impediment to rebuilding, allowing the U.N. Security Council to fulfill its duty to rebuild.<sup>138</sup>

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and mass forced displacement); *see also* Luis Moreno-Ocampo, *Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives*, 21 AM. U. INT'L L. REV. 497, 498 (2006) (referring to the gravity of the harm as a justification for pursuing the situation in Darfur).

133. *See U.N. Report on Darfur*, *supra* note 16, ¶ 569 (recommending that the U.N. Security Council refer the situation because the Sudanese government could not protect its own citizens).

134. *See* 1 M. CHRIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT* 140 (2005) (stating that the U.N. Security Council's referral power is based on universal jurisdiction but that it is unclear whether a referral requires the prosecutor to indict or simply to investigate the claim).

135. *See* RESPONSIBILITY TO PROTECT, *supra* note 59, at xi (stating that the responsibility to protect includes the responsibility to prevent, the responsibility to react, and the responsibility to rebuild).

136. *But see* BASSIOUNI, *supra* note 134, at 131 (pointing out that the U.N. Security Council can only refer a situation, not a particular person, to the ICC for investigation).

137. *See* RESPONSIBILITY TO PROTECT, *supra* note 59, at xi (recognizing that the responsibility to react includes asserting appropriate measures including sanctions or international prosecution).

138. *See id.* (asserting that the responsibility to rebuild includes addressing the cause of harm that led to the intervention).

D. THE NARROW LANGUAGE OF ARTICLE 7(1)(D) OF THE  
ROME STATUTE MAKES PROSECUTION OF PRESIDENT  
MUGABE POSSIBLE BUT DIFFICULT

The Operation likely falls within the chapeau of crimes against humanity.<sup>139</sup> Operation Murambatsvina fulfills the widespread requirement because over 700,000 citizens lost their homes or businesses and an estimated 2.1 million civilians were affected to some degree.<sup>140</sup> Additionally, the Operation satisfies the systematic element of the chapeau because the government, in an act of official State policy, recklessly and without warning demolished tens of thousands of personal structures and forced the occupants to return to their “native lands.”<sup>141</sup>

Although the Operation satisfies the requirements of the chapeau, it is unlikely that it falls within the definition of forcible transfer of a population as defined by Article 7(1)(d).<sup>142</sup> While authorities forcibly transferred the citizens by expulsion and other coercive acts<sup>143</sup> without grounds permitted under international law,<sup>144</sup> many of the dispossessed civilians were not lawfully on the premises within the

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139. See Rome Statute, *supra* note 10, art. 7(1).

140. See Cassese, *supra* note 73, at 361 (arguing that one must establish if an act is an isolated event or part of a larger pattern of violence to determine if it is widespread or systematic); see also discussion *supra* Part I.A (detailing the scope of Operation Murambatsvina and quantifying its effect on the Zimbabwean population).

141. See Machteld Boot et al., *Crimes Against Humanity*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 117, 127 (Otto Triffterer ed., 1999) (recognizing that the attack must occur pursuant to, or in furtherance of, a State or organizational policy). The state action component eliminates isolated acts from crimes against humanity. *Id.*; see also discussion *supra* Part I.A (explaining the nature of the Operation and the process by which it spread across the country).

142. See Rome Statute, *supra* note 10, art. 7(1)(d).

143. See Preparatory Comm'n for the Int'l Crim. Ct., *supra* note 77, art. 7(1)(d) n.12 (explaining that the concept of “forcible” is not limited to physical force and may include the threat of force or coercion); see also BOOT, *supra* note 76, at 504 (emphasizing that the threat of force may constitute forcible transfer of a population).

144. See, e.g., *General Comment 4*, *supra* note 52, ¶ 18 (recognizing that forced evictions are fundamentally incompatible with international law and are only justified in exceptional circumstances).

meaning of the statute.<sup>145</sup> Most citizens did not have lawful permits because the informal market comprised over forty percent of the total economy.<sup>146</sup> Therefore, prosecution under the Rome Statute will be difficult because the strict interpretation of the words “lawfully on the premises” is required and any ambiguity in wording would be construed in favor of President Mugabe.<sup>147</sup>

If the ICC determines that Operation Murambatsvina constitutes a crime against humanity under the Rome Statute, it can likely hold President Mugabe accountable for his role in the Operation. Although the Special Envoy cautiously concludes that unnamed lower-level government officials provided the advice that led to the Operation,<sup>148</sup> logic dictates that authorization for a nationwide operation involving the national police and the military would have come from President Mugabe himself.<sup>149</sup> President Mugabe’s probable knowledge of the crime and its predictable effect of contributing to a widespread systematic attack on the Zimbabwean citizens further satisfies the mens rea requirement.<sup>150</sup> Moreover, even

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145. See Rome Statute, *supra* note 10, art. 7(2)(d) (stating that the displaced persons must be lawfully on the premises to satisfy the elements of forced eviction).

146. See *U.N. Fact-Finding Report*, *supra* note 1, at 17 (recognizing that the majority of Zimbabweans relied on the informal economy). The unregulated sector employed up to four million people and supported another five million individuals, whereas the formal economy only employed about one and a half million citizens. *Id.*; see also *Preliminary Report*, *supra* note 1, at 7-8 (suggesting that the government tacitly and even explicitly encouraged the growth of the informal sector).

147. See Rome Statute, *supra* note 11, art. 22 (calling for the strict interpretation of crimes with any ambiguity interpreted in favor of the accused).

148. See *U.N. Fact-Finding Report*, *supra* note 1, at 77 (finding that a number of officials, each with their own agenda, offered improper advice that led to the implementation of Operation Murambatsvina).

149. See Int’l Crisis Group, *supra* note 6, at 6 (concluding that the planning of the Operation reached the highest levels of the national government, including the office of President Mugabe).

150. See Preparatory Comm’n for the Int’l Crim. Ct., *supra* note 77, art. 7(1)(d)(5) (stating that the perpetrator must know or intend the conduct to be part of a widespread or systematic attack against a civilian population); see also Cassese, *supra* note 73, at 373 (arguing that the mens rea requirement includes “the awareness that the individual criminal act is part of a widespread or systematic attack on a civilian population”). See generally Machteld Boot et al., *supra* note 141, at 127 (finding that the perpetrator simply needs to intend to further the attack,

if President Mugabe did not directly order or authorize the Operation, he would still be complicit under the aiding and abetting provision of the Rome Statute<sup>151</sup> because he facilitated the army in its commission of the crime<sup>152</sup> as Commander-in-Chief of the Armed Forces.<sup>153</sup> Therefore, the ICC can likely assert jurisdiction over President Mugabe for his role in Operation Murambatsvina if the Operation satisfies the elements of a crime against humanity under the Rome Statute.

If prosecution under Article 7(1)(d) fails, it is also possible to prosecute President Mugabe under Article 7(1)(k), a catch-all provision that allows the ICC to prosecute “other inhumane acts of a similar character” that are not specified in the list of potential crimes against humanity.<sup>154</sup> Although the prosecutor could likely prove that President Mugabe, by carrying out the Operation, intentionally inflicted great physical and mental suffering,<sup>155</sup> it is unlikely that the ICC will extend the provision to include an act that logically falls under the forcible transfer of a population provision. A broad

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regardless of whether he knows all of the precise details of the plans or that his actions rise to the level of a crime against humanity).

151. Rome Statute, *supra* note 10, art. 25(3)(c) (granting jurisdiction over actors who facilitate the commission of a crime by assisting in its commission, including providing the means for its commission); *see also* Kai Ambos, *Individual Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 475, 481 (Otto Triffterer et al. eds., 1999) (recognizing that aiding and abetting encompasses almost any act that furthers the completion of a crime).

152. *See U.N. Fact-Finding Report*, *supra* note 1, at 12 (stating that the government assembled the army and the national police to carry out the operation).

153. *See ZIMB. CONST.* § 27.

154. Rome Statute, *supra* note 10, art. 7(1)(k) (stating that “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or to physical health” may constitute a crime against humanity if carried out in accordance with the chapeau requirements); *see also* Askin, *supra* note 80, at 49 (stating that the Court can use Article 7(1)(k) to assert jurisdiction over persons guilty of crimes against humanity that do not fall under the other statutory parameters of the Rome Statute). Delegates created the provision to deal with punishable crimes which are unforeseen or unspecified. *Id.*

155. *See Wines*, *supra* note 26 (describing the worsening conditions for displaced Zimbabweans); *see also Conditions Worsen for Homeless Zimbabweans*, *supra* note 26 (chronicling the horrendous and inhumane conditions in the government-run camps).

interpretation of the catch-all provision is less likely because Article 22 requires strict construction of crimes and there is a general principle that criminal statutes should be strictly construed.<sup>156</sup>

### III. RECOMMENDATIONS

The international community must punish leaders who commit internal forced displacements that needlessly result in vast human suffering. To avoid sending a message of passive compliance to President Mugabe and other world leaders, the U.N. Security Council should investigate the situation in Zimbabwe and, if warranted, refer the situation to the ICC prosecutor. If the situation is referred to the ICC, the prosecutor should argue that the Operation falls under both Articles 7(1)(d) and 7(1)(k) of the Rome Statute. Finally, the HRC and the CESCR should vocally assert that forced displacements are not acceptable under the ICCPR and the ICESCR by openly criticizing Zimbabwe and demanding a report regarding the country's domestic enforcement of the Covenant rights.

#### A. U.N. SECURITY COUNCIL MEMBERS SHOULD REFER THE SITUATION IN ZIMBABWE TO THE ICC PROSECUTOR AND PLEDGE NOT TO USE THEIR VETOES WHEN VOTES CONCERN LARGE SCALE VIOLATIONS OF HUMAN RIGHTS

The U.N. Security Council should investigate and, if necessary, refer the situation in Zimbabwe to the ICC prosecutor.<sup>157</sup> U.N. Security Council referral of the matter would deter other States from engaging in the forced displacement of their citizens and would further international peace and security.<sup>158</sup> However, it is highly

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156. See Robinson, *supra* note 69, at 56 (commenting on the general concern of some delegations that the ambiguous provision does not belong in a criminal law statute). As a solution, the ICC delegation required that the acts be of similar character. *Id.*

157. See *supra* notes 128-138 and accompanying text (arguing that the Security Council has a duty to refer the situation under their Chapter VII powers).

158. See Aryeh Neier, *Accountability for State Crimes, The Past Twenty Years and the Next Twenty Years*, 35 CASE W. RES. J. INT'L L. 351, 352 (2003) (recognizing that the potential of ICC prosecution deters world leaders from committing crimes under the jurisdiction of the Court). The author goes on to suggest that the ratification of the Rome Statute influenced President Mugabe's

unlikely that the U.N. Security Council would refer the situation to the ICC because multiple U.N. Security Council members have strong political and economic incentives to block such a resolution.<sup>159</sup> The members of the U.N. Security Council should prioritize the protection of human rights over political and economic concerns by pledging not to use their vetoes in cases of large-scale human rights abuses.<sup>160</sup>

**B. THE ICC PROSECUTOR SHOULD ARGUE THAT THE OPERATION FALLS UNDER THE ROME STATUTE SO THAT THE INTERNATIONAL COMMUNITY CAN DETER AND HOLD RESPONSIBLE LEADERS WHO ENGAGE IN MASSIVE HUMAN RIGHTS VIOLATIONS**

If the U.N. Security Council refers the case to the ICC, the prosecutor should argue that the Operation falls under either Article 7(1)(d) or 7(1)(k) of the Rome Statute. In reference to Article 7(1)(d), the forcible transfer of the smaller number of lawful permit-holding citizens during the Operation constitutes either a “widespread” or “systematic” attack on a civilian population.<sup>161</sup> This

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decision to withdraw troops from the Democratic Republic of Congo. *Id.* at 357-58.

159. See Gerhard Hafner, *An Attempt to Explain the Position of the USA Towards the ICC*, 3 J. INT’L CRIM. JUST. 323, 324 (2005) (categorizing the official U.S. position towards the ICC as a policy of active resistance); see also *Contemporary Practice of the United States Relating to International Law*, 99 AM. J. INT’L L. 691, 691-92 (John R. Crook ed., 2005) (explaining that the United States abstained from the resolution referring the situation in Darfur to the ICC prosecutor because of a concern for the ICC’s jurisdiction over non-party States); People’s Daily Online, China, Zimbabwe Friendship Further Strengthened: Ambassador, [http://english.people.com.cn/200504/23/eng20050423\\_182443.html](http://english.people.com.cn/200504/23/eng20050423_182443.html) (last visited Apr. 13, 2006) (reporting that China is the largest investor in Zimbabwe and has a warm, friendly, and paternal relationship with the country and President Mugabe).

160. See The Secretary-General, *Report of the Secretary General’s High-Level Panel on Threats, Challenges and Change*, ¶ 256, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004) (recognizing that the veto is an established U.N. Security Council mechanism that can only be improved through restrictive use, rather than complete abolishment).

161. Rome Statute, *supra* note 10, art. 7(1)(d); *U.N. Fact-Finding Report*, *supra* note 1, at 58-59 (acknowledging that the government destroyed the homes and businesses of permit-holding residents and business owners); see also Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 579 (Sept. 2, 1998) (finding that

argument satisfies the Article 7(2)(d) requirement that the dispossessed citizens must be lawfully present in the area where the deportation or forced eviction occurs.<sup>162</sup> Although this seems to conflict with the principle that judges must strictly construe the language of the Rome Statute, international courts and prominent international legal theorists acknowledge that a smaller number of attacks may still meet the “widespread or systematic” requirement if the acts occur within the context of a larger attack on a civilian population.<sup>163</sup> Because the meaning of “widespread or systematic” is ambiguous, judges may look to the decisions of international courts and other widely accepted international human rights when interpreting the language of the Rome Statute.<sup>164</sup>

If prosecution under Article 7(1)(d) fails, the prosecutor could argue that Article 7(1)(k) covers not only acts not enumerated by the Rome Statute, but also acts that logically fit within a specific provision. Delegates, with an eye toward justice, drafted the provision to ensure that the ICC could gain jurisdiction over crimes against humanity that would not otherwise fall under the mandate of the Rome Statute.<sup>165</sup> Operation Murambatsvina would constitute a crime against humanity under Article 7(1)(d) if the dispossessed citizens held proper permits for their homes and businesses.<sup>166</sup> However, most citizens could not obtain permits because they relied on an informal economy<sup>167</sup> propelled by poverty,<sup>168</sup> colonial-era

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the act need not be both widespread and systematic to rise to the level of a crime against humanity).

162. Rome Statute, *supra* note 10, art. 7(2)(d).

163. *See, e.g.*, Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶¶ 579-81 (Feb. 26, 2001) (finding that a single act may be considered widespread because of the cumulative effect of a broader series of inhumane acts); *see also* Robinson, *supra* note 69, at 48 (recognizing that an isolated act can satisfy the widespread or systematic element if it forms part of a State policy to commit a broader attack).

164. *See* Rome Statute, *supra* note 10, art. 21 (allowing the Court to look to international law and internationally recognized human rights norms for guidance).

165. *See* Askin, *supra* note 80, at 49 (contending that the ICC can assert jurisdiction over unforeseen crimes against humanity under Article 7(1)(k)).

166. *See supra* notes 140-145 and accompanying text (arguing that the Operation satisfies all of the elements of Article 7(1)(d) of the Rome Statute except for the requirement that dispossessed citizens be lawfully present in the area).

167. *See U.N. Fact-Finding Report, supra* note 1, at 17 (recognizing that the informal sector share of total employment grew to forty percent by 2004).

housing laws,<sup>169</sup> and government encouragement.<sup>170</sup> Therefore, the Operation could fall under Article 7(1)(k) if prosecution under Article 7(1)(d) fails.<sup>171</sup>

C. THE HRC AND THE CESCRC SHOULD PUBLICLY CRITICIZE  
ZIMBABWE FOR VIOLATING INTERNATIONAL HUMAN RIGHTS  
COVENANTS AND DEMAND A REPORT REGARDING ITS EFFORTS  
TO CARRY OUT ITS COVENANT OBLIGATIONS

The HRC and the CESCRC should publicly criticize the Zimbabwean government and request a report describing the country's efforts to implement the rights guaranteed by the ICCPR and ICESCR.<sup>172</sup> The Committees should encourage international dialogue regarding forced displacement and Operation Murambatsvina in particular by distributing the reports to each other and to other bodies within the United Nations.<sup>173</sup> Additionally, States parties should publicly comment on the report and vocally criticize the actions of President Mugabe. Finally, States within the HRC that have recognized the authority of the Committee to hear complaints should bring allegations that Zimbabwe is not fulfilling its treaty

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168. See *Preliminary Report*, *supra* note 1, at 4-5 (concluding that the government's negligent handling of the economy generated mass unemployment and poverty, which corresponds directly with the increase in informal trading and unregulated housing).

169. See *U.N. Fact-Finding Report*, *supra* note 1, at 56 (finding that the Planning Act is a colonial-era collection of laws that sets impossibly high housing standards to keep the majority of Africans out of the major cities).

170. See *Preliminary Report*, *supra* note 1, at 4-5 (reporting that local officials encouraged the growth of unregulated homes and businesses because the fees levied from the informal economic sector generated a substantial source of income).

171. See *Askin*, *supra* note 80, at 49 (recognizing the possibility of using Article 7(1)(k) to assert jurisdiction over persons guilty of crimes against humanity that do not fall under the statutory language of the Rome Statute).

172. See ICCPR *supra* note 45, art. 40(1) (noting how States parties must submit reports upon request); see also ICESCR, *supra* note 44, arts. 16-17.

173. See ICCPR *supra* note 45, art. 40(4) (allowing for the transmission of reports and comments to the CESCRC); ICESCR, *supra* note 44, arts. 19, 21 (allowing for transmission of reports and recommendation to the HRC, the General Assembly, and specialized agencies within the U.N.).



obligations.<sup>174</sup> Although the reports and the complaints will have no legal effect on Zimbabwe, the increased international dialogue will place further pressure on President Mugabe and possibly lead to a more meaningful discussion about the growing problem of internal forced displacements resulting in large-scale human rights violations.

## CONCLUSION

The government of Zimbabwe, under the direction of President Mugabe, violated numerous domestic and international laws as a result of Operation Murambatsvina. Accordingly, the government should prosecute the parties responsible for the Operation and provide redress to citizens deprived in violation of both domestic and international law. Since the Zimbabwean government refuses to carry out its legal and humanitarian obligations, the U.N. Security Council must send a strong message against reckless internal displacements by referring the situation to the ICC prosecutor. Although prosecution under the Rome Statute is difficult, the prosecutor, if the situation is referred to the ICC, should argue that President Mugabe committed crimes against humanity under Articles 7(1)(d) and 7(1)(k) of the Rome Statute. Finally, the HRC and the CESCR should send a clear message that internal displacements are incompatible with their covenants by criticizing Zimbabwe and demanding an official report describing the country's treaty implementation. A swift and serious international response sends the proper message that the international community will not tolerate barbaric forced displacements that result in wanton violations of human rights.

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174. See ICCPR, *supra* note 45, art. 41 (stating that members recognizing the authority of the Committee may bring complaints against other States).