



DISPLACEMENT
SOLUTIONS

Housing, Land and Property Rights and International Criminal Justice

Holding HLP Rights Violators Accountable

September 2012



Foreword

Crimes against the home are commonplace in situations of armed conflict, both international and national in origin, as well as in non-conflict settings where the perpetrators of such abuses target housing, land and property assets as a means of securing economic gain or simply sowing terror in the hearts and minds of those victimised by these crimes. For too long these particular actions – forced displacement, the wanton destruction of property, land theft/grabbing, unlawful expropriation of land, ethnic cleansing, deprivation of basic services crucial for life such as water and electricity, and so many others – have been treated as unfortunate side effects of conflict, political transition or processes of economic development, rather than as the crimes these acts so clearly constitute.

International law is becoming ever more precise as to which practices constitute crimes against humanity and war crimes, and this publication – prepared by DS legal consultant Ezekiel Simperingham – outlines which acts and omissions satisfy the criteria for being labelled as such crimes, and more importantly, the judicial and other avenues that are now available to provide redress for this misdeeds.

The report focuses in particular on the role of the International Criminal Court in this regard, and it is hoped that all associated with the ICC will review our findings and slowly incorporate ever growing attention to HLP abuses as the source of the crimes they have dedicated themselves to redressing. Beyond the ICC, the report is universally valid in showing the types of HLP crimes that are crimes against humanity and war crimes, and how individuals and companies can increasingly be held criminally liable for sanctioning, tolerating and carrying out these crimes.

We hope this report will put to rest any doubts as to the possibility of using international criminal law as a basis for prosecuting HLP violators, and that it will herald a new era of judicial enforcement against such crimes, which in turn helps to prevent the further commissioning of such heinous acts.

If you have any questions, comments or critiques, please feel free to contact Displacement Solutions on info@displacementsolutions.org.

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Executive Summary

Grave violations of housing, land and property (HLP) rights are an all too common feature of both conflict and non-conflict situations across the globe, from the practice of forced evictions to the forced displacement of populations, the demolition and destruction of housing during times of war, processes of land grabbing in all of its forms and the illegal appropriation of land and property.

Much attention has been paid to defining and clarifying the parameters of state responsibility under human rights law for HLP rights violations, however, far less attention has been paid to the issue of individual and corporate responsibility for violations and especially, international criminal responsibility. This is despite the fact that history has repeatedly demonstrated that where States have been left to investigate and prosecute individuals for human rights violations, including violations of HLP rights, they have consistently failed to launch genuine investigations or prosecutions - resulting in effective impunity for perpetrators.

However, developments in the system of international criminal justice have provided important opportunities for the international community to end this impunity. In particular, the creation of the International Criminal Court has provided the international community with an enhanced ability to press national authorities to fulfil their duty to investigate and prosecute violations of HLP rights and, where States are unable or unwilling to fulfil these obligations, to activate international judicial mechanisms to ensure justice.

This report clarifies the norms and institutions of international criminal justice that can be utilized by the international community to bring perpetrators of HLP rights violations to account for their crimes. In particular, this report examines the mandate and jurisdiction of the International Criminal Court and, especially, the Court's ability to prosecute war crimes and crimes against humanity that encompass violations of HLP rights.

It is essential that the international community does not relegate housing, land and property rights to the background of international criminal justice. As demonstrated by this report, war crimes and crimes against humanity that encompass HLP rights violations deserve to be accorded the same attention and seriousness as war crimes and crimes against humanity that encompass violations of other human rights.

This report also examines two contemporary situations of HLP rights abuses that may have amounted to crimes against humanity and war crimes – Operation Murambatsvina in Zimbabwe and Operation Cast Lead in the Gaza Strip. The report notes that in these instances, it is essential that the countries in question take seriously their responsibility to investigate and prosecute serious violations of HLP rights. It is equally imperative that the international community monitors these investigations and, where they are shown to not meet international standards, to activate international criminal justice mechanisms to ensure justice for these violations.

Through strengthening and deepening understanding of the ability of the international criminal justice system to hold violators of HLP rights to account, this report seeks to encourage effective investigations and prosecutions of HLP rights violations, and ultimately prevent future abuses of HLP rights. Genuine investigations and prosecutions that meet international standards are essential in acting as a deterrent to potential violators, enhancing the protection of HLP rights, restoring and maintaining peace in situations of armed conflict, providing victims and their families with the opportunity to obtain justice, truth and reparations as well as being vital to ensuring respect for the international rule of law.





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1 Introduction

Housing, land and property (HLP) rights have experienced considerable development under human rights law over the past 60 years. This development has focused on clarifying the content of HLP rights as well as the responsibility and obligations of States for their violation and towards their protection. However, far less attention has been paid towards the issue of individual and corporate responsibility for HLP rights violations and especially, international criminal responsibility. This is despite the fact that grave violations of HLP rights are an all too common feature of both conflict and non-conflict situations across the globe, from the practice of forced evictions, to the forced displacement of populations, the demolition and destruction of housing during times of war and the illegal appropriation of land and property.

History has demonstrated that where States have been left to investigate and prosecute human rights violations, including violations of HLP rights, they have consistently failed to launch genuine investigations or prosecutions - resulting in effective impunity for perpetrators. This has occurred for a number of reasons, including a lack of political will, a desire to protect violators, inadequate national laws criminalizing such violations, amnesty laws and statutes of limitation, discrimination against victims, collapsed or damaged post-conflict legal systems and a lack of resources to conduct effective investigations and trials.

Developments in the system of international criminal justice, however, have provided important opportunities for the international community to enhance the

protection of HLP rights and to end this impunity. In particular, the creation of the International Criminal Court has provided the international community with an enhanced ability to press national authorities to fulfil their duty to investigate and prosecute violations of HLP rights and, where States are unable or unwilling to fulfil these obligations, to activate international justice mechanisms to prevent impunity.

This report seeks to clarify the specific legal norms and institutions under the international criminal justice system that can be utilized by the international community to bring HLP rights violators to justice. In particular, the report examines the mandate and jurisdiction of the International Criminal Court and, especially, the Court's ability to prosecute war crimes and crimes against humanity that encompass violations of HLP rights.

Through strengthening and deepening understanding of the ability of the international criminal justice system to hold violators of housing, land and property rights to account, this report seeks to encourage effective investigations and prosecutions of serious violations of HLP rights. Genuine investigations and prosecutions that meet international standards are vital to ensuring respect for international law and the rule of law. They are also essential in acting as a deterrent to potential violators, enhancing the protection of HLP rights, restoring and maintaining peace in situations of armed conflict and providing victims and their families with the opportunity to obtain justice, truth and reparations.

Section 2 of this report explores the protection of HLP rights under human rights law. This section notes that the development of HLP rights under human rights law has focused on clarifying the content of HLP rights and on the responsibility and obligations of States to respect, protect, promote and fulfill these rights. This section also highlights the qualified duty of States to investigate and prosecute serious violations of HLP rights.

Section 3 examines the protection of HLP rights under international humanitarian law. This section describes the protection of HLP rights under both treaty and customary humanitarian law. Similar to their responsibilities under human rights law, States also have the qualified duty to investigate and prosecute grave breaches of humanitarian law – including violations that encompass HLP rights.

Section 4 outlines the purpose of the International Criminal Court and the scope of its mandate. This section also examines the principle of universal jurisdiction and the ability of national Courts to investigate and prosecute international crimes that encompass HLP rights violations.

Section 5 explores the capacity of the International Criminal Court to investigate and prosecute selected war crimes that encompass violations of HLP rights. This section examines the Court's mandate over war crimes that have occurred both during times of international armed conflict and non-international armed conflict.

Section 6 explores the capacity of the International Criminal Court to investigate and prosecute crimes against humanity that encompass HLP rights violations. This section examines the minimum conditions for the Court to find that a Crime against Humanity has been committed, as well as the specific crimes of deportation or forcible transfer, persecution and other inhumane acts.

This report concludes with **section 7** that examines two contemporary case studies of HLP rights violations that potentially amounted to war crimes or crimes against humanity – *Operation Cast Lead* in the Gaza Strip and *Operation Murambatsvina* in Zimbabwe. This section notes that where there are substantive allegations of HLP rights violations amounting to international crimes, it is essential that the country in question take seriously its responsibility to investigate and prosecute these violations. However, it is equally essential that the international community monitors the relevant investigations and prosecutions and, where they fail to exist or where they do not meet international standards, activates international criminal justice mechanisms to ensure there is no impunity.

2 Human Rights Law and Housing, Land and Property Rights

Housing, land and property rights have experienced significant clarification and development under human rights law over the past 60 years. This development began with the 1948 Universal Declaration of Human Rights (UDHR), which recognized both the right to housing⁽¹⁾ and the right to property.⁽²⁾ Since that time, HLP rights have been reaffirmed and developed in a series of international human rights treaties,⁽³⁾ declarations and other documents.⁽⁴⁾

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides a key international legal source of the right to housing:

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate...housing, and to the continuous improvement of living conditions.”

The right to housing has been authoritatively interpreted and clarified by the UN Committee on Economic, Social and Cultural Rights in *General Comment No. 4* (1991).⁽⁵⁾ Among many other crucial points it makes, *General Comment No. 4* emphasises that the right to adequate housing should not be interpreted in a narrow or restrictive sense but that housing rights should be seen as rights to live somewhere in security, peace and dignity.⁽⁶⁾

The principal regional human rights frameworks also provide protection of HLP rights.⁽⁷⁾

⁽¹⁾ Article 25(1) of the UDHR provides: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including...housing...”

⁽²⁾ Article 17 of the UDHR provides: “(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.”

⁽³⁾ Key HLP provisions occur in Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Article 27(3) of the Convention on the Rights of the Child (CRC); Article 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the International Covenant on Civil and Political Rights (1966); International Convention Relating to the Status of Refugees (1951).

⁽⁴⁾ Other HLP provisions are contained in International Labour Organization (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples; International Labour Organization (ILO) Convention No. 161 Concerning Occupational Health Services (1985); International Labour Organization (ILO) Convention No. 117 Concerning Social Policy (Basic Aims and Standards) (1962); International Labour Organization (ILO) Convention No. 110 Concerning Plantations (1958); International Labour Organization (ILO) Convention No. 82 Concerning Social Policy (Non-Metropolitan Territories) (1947); Declaration on the Right to Development (1986); Declaration on Social Progress and Development; The Vancouver Declaration on Human Settlements (1976); and the International Labour Organization Recommendation Concerning Workers’ Housing (1961).

⁽⁵⁾ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 U.N. Doc. E/1992/23.

⁽⁶⁾ *Ibid* para 7.

⁽⁷⁾ For instance, Article 31 of the European Social Charter (1996) states: “The right to housing: With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1. to promote access to housing of an adequate standard; 2. to prevent and reduce homelessness with a view to its gradual elimination; 3. to make the price of housing accessible to those without adequate resources.”

Beyond the contents of the relevant treaties, declarations and other documents, further interpretive *General Comments* of the UN Committee on Economic, Social and Cultural Rights,⁽⁸⁾ the *Guiding Principles on the Rights of Internally Displaced Persons* (1998),⁽⁹⁾ *The Principles on Housing and Property Restitution for Refugees and Displaced Persons* (2005)⁽¹⁰⁾ (the '*Pinheiro Principles*') and many others all combine to create a very considerable body of human rights laws and standards relevant to HLP rights.

Forced evictions are widely considered to be the most severe violation of HLP rights under human rights law.⁽¹¹⁾ The practice of forced evictions involves "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".⁽¹²⁾ Although the causes of forced evictions are diverse, all stages of the forced eviction process involve human rights implications and while the right to adequate housing is perhaps the clearest human right violated,⁽¹³⁾ a large number of other rights are also affected by this practice.

In clarifying the content of state obligations to prevent forced evictions, the UN Committee on Economic, Social and Cultural rights stated that "forced evictions are **prima facie** incompatible with the requirements of the [ICESCR] and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law".⁽¹⁴⁾

⁽⁸⁾ See, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, UN Doc. E/1992/23; *General Comment No. 7: The right to adequate: forced evictions housing (Art. 11(1) of the Covenant)*, 20 May 1997, UN Doc. E/1998/22 and *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, UN Doc. E/C.12/2002/11.

⁽⁹⁾ UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, 11 February 1998, UN Doc. E/CN.4/1998/53/Add.2.

⁽¹⁰⁾ UN Sub-Commission on the Promotion and Protection of Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, 28 June 2005, UN Doc. E/CN.4/Sub.2/2005/17.

⁽¹¹⁾ "The practice of forced evictions has generally been recognized as perhaps the most serious violation of the right to adequate housing," *Forced evictions: Analytical report compiled by the Secretary-General pursuant to Commission resolution 1993/77*, UN Doc. E/CN.4/1994/20 at paras 62 – 72.

⁽¹²⁾ Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The right to adequate housing (Art. 11(1)): forced evictions* UN Doc. at para 3.

⁽¹³⁾ The UN Commission on Human Rights has declared forced evictions as "gross violations of human rights, in particular the human right to adequate housing" Resolution 1993/77.

⁽¹⁴⁾ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991 U.N. Doc. E/1992/23 at para 18.



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States are bound by obligations to respect, protect, promote and fulfil housing, land and property rights.⁽¹⁵⁾ States also have the independent duty to investigate and, where appropriate, prosecute grave violations of human rights law. While this duty is most clear in regards to violations under the Convention against Torture⁽¹⁶⁾ and the Genocide Convention,⁽¹⁷⁾ States arguably have the same duty to investigate and prosecute violations of the rights contained in the ICCPR⁽¹⁸⁾ and the ICESCR,⁽¹⁹⁾ both of which include key housing, land and property rights.

⁽¹⁵⁾ *Ibid* at paras 10-15.

⁽¹⁶⁾ Article 5 of the Convention against Torture provides, *inter alia*: "Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4" and Article 7 provides: "The State Party...shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution", Convention against Torture (1987).

⁽¹⁷⁾ Article 5 of the Convention on the Prevention and Punishment of Genocide (1951) provides: "The Contracting Parties undertake to enact...the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3" and Article 6 provides: "Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

⁽¹⁸⁾ Although, the ICCPR does not contain the same clear provision on the duty to prosecute, such duty can be inferred through Article 2(3), which states: "Each State Party to the present Covenant undertakes...To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...[and] To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy..."

⁽¹⁹⁾ Article 2(1) of the ICESCR requires States Parties to undertake to "take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by *all appropriate means*, including particularly the adoption of legislative measures" [emphasis added].



This position has been supported by comments of the UN Human Rights Committee⁽²⁰⁾ and the Committee on Economic, Social and Cultural Rights.⁽²¹⁾ The duty to investigate and prosecute has also been reinforced by the UN *Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*⁽²²⁾ and the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law*.⁽²³⁾ The later document, which was adopted by the UN General Assembly, states clearly:

“The obligation to respect, ensure respect for and implement international human rights law [includes the duty to] investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.”⁽²⁴⁾

⁽²⁰⁾ The Human Rights Committee has made statements consistent with the view that States Parties have the duty to investigate and prosecute violations of ICCPR rights: “The positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities”, see Human Rights Committee, *General Comment No. 31 on Article 2 of the Covenant*, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 (2004), para. 8.

⁽²¹⁾ The Committee on Economic, Social and Cultural Rights, in *General Comment No. 9*, stated that “the central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so “by all appropriate means”, the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account... But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place. Committee on Economic, Social and Cultural Rights, *General Comment No. 9*, UN Doc. E/C.12/1998/24 (1998), paras 1 and 2.

⁽²²⁾ Principle 19 of the *Updated Principles for the protection and promotion of human rights through action to combat impunity*, states: “States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights...and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished”, Commission on Human Rights, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1 (2005).

⁽²³⁾ The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by General Assembly Resolution 60/147, 16 December 2005.

⁽²⁴⁾ *Ibid*, Basic Principle and Guideline II 3(b).

3 Humanitarian Law and Housing, Land and Property Rights

The violation of housing, land and property rights is an almost universal feature of armed conflict, from the destruction of civilian housing and property, to the illegal appropriation and occupation of housing and the forced displacement of populations. To this end, the laws of armed conflict – or international humanitarian law (IHL) – have consistently included the protection of HLP rights during times of conflict.

The protection of HLP rights under humanitarian law can be separated into two broad categories; the prohibition against attacking non-military targets and the prohibition against attacks on military targets that violate the principle of proportionality.

3.1 PROHIBITION AGAINST ATTACKING NON-MILITARY TARGETS

The protection of civilian objects (including housing, land and property) during armed conflict is a key principle of humanitarian law. The primary principle is that civilian objects (defined as all objects which are not military objectives) “shall not be the object of attack or reprisals”.⁽²⁵⁾

Thus, all attacks directed against non-military objectives are prohibited. This is irrespective of whether there is excessive damage or not (there is no proportionality test).

3.2 PROHIBITION AGAINST ATTACKS ON MILITARY TARGETS THAT VIOLATE THE PRINCIPLE OF PROPORTIONALITY

However, not all damage, destruction or appropriation of civilian objects (including housing, land and property) is prohibited. Civilian housing, land and property may be targeted where it constitutes a legitimate military objective and its destruction is justified by military necessity. It may also be damaged or destroyed where such damage is an incidental (unintended) and proportional effect of attacks on military objectives.

In terms of assessing military necessity, proportionality is a key factor - “the incidental harm caused to civilian property must be proportionate and not excessive in relation to the concrete and direct military advantage anticipated by an attack on a military objective”.⁽²⁶⁾ This principle prohibits many types of military actions that excessively damage or illegally appropriate civilian housing, land and property, including bombardment, pillage and reprisals.

⁽²⁵⁾ Article 52 of Additional Protocol I.

⁽²⁶⁾ *Ibid*, this principle is also widely considered to form part of customary humanitarian law.

These principles are expressed in the following provisions of humanitarian law:

Prohibitions during International Armed Conflict	Prohibitions during Non-International Armed Conflict
"Civilian objects shall not be the object of attack or of reprisals." ⁽²⁷⁾	"...The following acts...are and shall remain prohibited at any time and in any place whatsoever...(g) pillage; (h) threats to commit any of the foregoing acts". ⁽²⁸⁾
"Pillage is prohibited". ⁽²⁹⁾	"Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works". ⁽³⁰⁾
"Reprisals against protected persons and their property are prohibited". ⁽³¹⁾	
"Parties to the conflict shall at all times distinguish between...civilian objects and military objectives and accordingly shall direct their operations only against military objectives". ⁽³²⁾	
"...The following types of attacks are to be considered as indiscriminate...(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects". ⁽³³⁾	
"Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons...is prohibited, except where such destruction is rendered absolutely necessary by military operations". ⁽³⁴⁾	
"Starvation of civilians as a method of warfare is prohibited". ⁽³⁵⁾	

⁽²⁷⁾ Article 52, Additional Protocol I.

⁽²⁸⁾ Article 4(2)(g) & (h), Additional Protocol II.

⁽²⁹⁾ Article 33, Geneva Convention IV.

⁽³⁰⁾ Article 14, Additional Protocol II.

⁽³¹⁾ Article 33, Geneva Convention IV.

⁽³²⁾ Article 48, Additional Protocol I.

⁽³³⁾ Article 51(5)a, Additional Protocol I.

⁽³⁴⁾ Article 53, Geneva Convention IV.

⁽³⁵⁾ Article 54(1), Additional Protocol I.

3.3 THE FORCED DISPLACEMENT AND ILLEGAL TRANSFER OF CIVILIAN POPULATIONS

The prohibitions against forced displacement and the illegal transfer of civilian populations are also key tenets of HLP rights protection under humanitarian law.

These prohibitions are expressed in the following provisions of humanitarian law:

Prohibitions during International Armed Conflict	Prohibitions during Non-International Armed Conflict
<p>"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive".⁽³⁶⁾</p>	<p>"The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition".⁽³⁷⁾</p>
	<p>"Civilians shall not be compelled to leave their own territory for reasons connected with the conflict".⁽³⁸⁾</p>

THE PROTECTION OF HLP RIGHTS UNDER CUSTOMARY HUMANITARIAN LAW

Together with treaty law, customary humanitarian law is one of the principal sources of the law of armed conflict. Customary humanitarian law is of particular importance as it binds all States - including those that are not party to IHL treaties.

In 2005, the International Committee of the Red Cross (ICRC) published a study of the customary law of armed conflict, concluding that customary humanitarian law could be summarized in 161 rules.⁽³⁹⁾

⁽³⁶⁾ Article 49, Geneva Convention IV.

⁽³⁷⁾ Article 17(1), Additional Protocol II.

⁽³⁸⁾ Article 17(2), Additional Protocol II.

⁽³⁹⁾ The updated ICRC database of customary humanitarian law is available at <http://www.icrc.org/customary-ihl>. Although this is an influential assessment of customary international humanitarian law, it has not been endorsed by States and should not be taken as a definitive codification.

The following 16 rules provide protection of HLP rights under customary humanitarian law.

Rule 10	Civilian objects are protected against attack, unless and for such time as they are military objectives.
Rule 11	Indiscriminate attacks are prohibited.
Rule 13	Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.
Rule 14	Launching an attack which may be expected to cause...damage to civilian objects...which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.
Rule 15	In the conduct of military operations, constant care must be taken to spare...civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize... damage to civilian objects.
Rule 16	Each party to the conflict must do everything feasible to verify that targets are military objectives.
Rule 17	Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing...damage to civilian objects.
Rule 19	Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental...damage to civilian objects...which would be excessive in relation to the concrete and direct military advantage anticipated.
Rule 21	When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger...to civilian objects.
Rule 22	The parties to the conflict must take all feasible precautions to protect...civilian objects under their control against the effects of attacks.
Rule 24	Each party to the conflict must, to the extent feasible, remove civilian...objects under its control from the vicinity of military objectives.
Rule 51	Private property must be respected and may not be confiscated; except where destruction or seizure of such property is required by imperative military necessity.
Rule 52	Pillage is prohibited.
Rule 131	In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated.
Rule 132	Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.
Rule 133	The property rights of displaced persons must be respected.

3.4 THE DUTY TO INVESTIGATE AND PROSECUTE VIOLATIONS OF IHL

As with human rights law, humanitarian law establishes a qualified duty on States to investigate and, where appropriate, prosecute violations of humanitarian law – including those that encompass housing, land and property rights.

The duty to investigate and prosecute is expressed in Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention. These provisions provide that States Parties are:

“Under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches [of the Geneva Conventions], and shall bring such persons, regardless of their nationality, before its own courts...”⁽⁴⁰⁾

They also provide an obligation on States to “enact any legislation necessary to provide effective penal sanctions for violations of any of the grave breaches of the Geneva Conventions”.⁽⁴¹⁾

However, as with the duty to investigate and prosecute under human rights law, this is not an absolute duty on States. Despite many HLP rights violations being covered by the grave breaches provisions of the Geneva Conventions,⁽⁴²⁾ this duty does not expressly apply to all provisions of the Conventions. Further, this duty is only expressed in relation to situations of international armed conflict.⁽⁴³⁾ States may also, where they “prefer”, discharge this duty by handing over such persons for trial to another State Party, “provided such State Party has made out a *prima facie* case”.⁽⁴⁴⁾

However, this duty may, arguably, be required under customary humanitarian law, in which case it would apply to all States at all time. Rule 158 of the ICRC study on customary humanitarian law provides:

“States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.”⁽⁴⁵⁾

⁽⁴⁰⁾ Article 49, Geneva Convention I; Article 50, Geneva Convention II; Article 129, Geneva Convention III; Article 146, Geneva Convention IV.

⁽⁴¹⁾ *Ibid.*

⁽⁴²⁾ See, for example, Article 85(3)b, Additional Protocol I, “...The following acts shall be regarded as grave breaches... (b) launching an indiscriminate attack affecting... civilian objects in the knowledge that such attack will cause excessive... damage to civilian objects...”; Article 50, Geneva Convention I, Article 51, Geneva Convention II and Article 147, Geneva Convention IV (Article 147), “Grave breaches... shall be those involving... extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”.

⁽⁴³⁾ This duty does not expressly apply to the provisions of Additional Protocol II, nor to common Article 3, both of which cover situations of non-international armed conflict.

⁽⁴⁴⁾ Article 49, Geneva Convention I; Article 50, Geneva Convention II; Article 129, Geneva Convention III; Article 146, Geneva Convention IV.

⁽⁴⁵⁾ The updated ICRC database of customary humanitarian law is available at <http://www.icrc.org/customary-ihl>.



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4 Mechanisms of International Criminal Justice

4.1 THE INTERNATIONAL CRIMINAL COURT

The establishment of a permanent International Criminal Court in 2002 represented a major breakthrough in international justice. The Court is vested with a mandate to investigate and prosecute international crimes, including, genocide, crimes against humanity, war crimes, and aggression.

The Court was designed to end the long history of impunity that had surrounded serious violations of human rights and humanitarian law. Through creating an international institution for the investigation and prosecution of serious international crimes, it was hoped that the Court would act as a catalyst for states to fulfil their duty to investigate and prosecute violations of human rights and humanitarian law; to provide a deterrent function to perpetrators and to provide victims and their families with the opportunity to obtain justice, truth and reparations.

Importantly, the Court has the specific jurisdiction to investigate and prosecute war crimes and crimes against humanity that encompass a range of housing, land and property rights violations – whether committed in times of conflict or of peace.

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4.2 NATIONAL COURTS AND UNIVERSAL JURISDICTION

Under the principle of universal jurisdiction States may claim jurisdiction over persons whose alleged international crimes were committed outside the boundaries of the prosecuting state, regardless of nationality, country of residence, or any other relation with the prosecuting country. The jurisdiction is based on the grounds that the crime committed is so serious that it is considered a crime against all, which any state is authorized to punish.

It is now uncontroversial that States may exercise universal jurisdiction over international crimes, including war crimes, crimes against humanity and genocide. However, there remains controversy about the conditions or requirements for the exercise of universal jurisdiction and, in particular, about whether or not the alleged perpetrator should be physically in the territory of the prosecuting State.⁽⁴⁶⁾

While the Rome Statute of the International Criminal Court does not oblige States to establish universal jurisdiction over the crimes it lists, many States have incorporated the crimes contained in the Rome Statute in their national legislation and vested jurisdiction in their courts to prosecute persons suspected of having committed such crimes on the basis of the principle of universal jurisdiction.⁽⁴⁷⁾

Many countries have also more broadly incorporated the principle of universal jurisdiction into their national legislation.⁽⁴⁸⁾

The use of national courts in the prosecution of international crimes is a potentially effective tool for providing justice for violations of housing, land and property rights. The use of national courts can act to prevent impunity, promote respect for the international rule of law and ensure that countries cannot be used as safe-havens by perpetrators of international crimes.

⁽⁴⁶⁾ *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, para 1850, September 2009.

⁽⁴⁷⁾ See for example, the Nottingham Implementing Legislation Database: <http://www.legal-tools.org/en/access-to-the-tools/national-implementing-legislation-database>.

⁽⁴⁸⁾ See, for example, Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation around the World*, October 2011. <http://www.amnesty.org/en/library/info/IOR53/004/2011/en>.

5 War Crimes and Violations of HLP Rights

The 1998 Rome Statute is the international treaty that sets out the mandate and jurisdiction of the International Criminal Court. The Court's mandate specifically includes definitions of war crimes and crimes against humanity that encompass violations of HLP rights.

Article 8 of the Rome Statute gives the International Criminal Court jurisdiction over a wide range of war crimes. The Court's jurisdiction is separated into war crimes committed during an international armed conflict and those committed during a non-international armed conflict.

Of the enumerated prohibited types of conduct under the Court's jurisdiction, the following encompass violations of HLP rights:

International Armed Conflict	Non-International Armed Conflict
"Intentionally directing attacks against civilian objects..." ⁽⁴⁹⁾	"Pillaging a town or place, even when taken by assault". ⁽⁵⁷⁾
"Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly". ⁽⁵⁰⁾	"Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand". ⁽⁵⁸⁾
"Intentionally launching an attack in the knowledge that such attack will cause...damage to civilian objects... which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated". ⁽⁵¹⁾	
"Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives". ⁽⁵²⁾	
"Pillaging a town or place, even when taken by assault". ⁽⁵³⁾	
"The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory". ⁽⁵⁴⁾	
"Unlawful deportation or transfer or unlawful confinement". ⁽⁵⁵⁾	
"Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival...". ⁽⁵⁶⁾	

⁽⁴⁹⁾ Article 8(2)(b)(ii), Rome Statute of the International Criminal Court.

⁽⁵⁰⁾ Article 8(2)(a)(iv), Rome Statute of the International Criminal Court.

⁽⁵¹⁾ Article 8(2)(b)(iv), Rome Statute of the International Criminal Court.

⁽⁵²⁾ Article 8(2)(b)(v), Rome Statute of the International Criminal Court.

⁽⁵³⁾ Article 8(2)(b)(xvi), Rome Statute of the International Criminal Court.

⁽⁵⁴⁾ Article 8(2)(b)(viii), Rome Statute of the International Criminal Court.

⁽⁵⁵⁾ Article 8(2)(a)(iv), Rome Statute of the International Criminal Court.

⁽⁵⁶⁾ Article 8(2)(a)(iv), Rome Statute of the International Criminal Court.

⁽⁵⁷⁾ Article 8(2)(e)(v), Rome Statute of the International Criminal Court.

⁽⁵⁸⁾ Article 8(2)(e)(viii), Rome Statute of the International Criminal Court.

This report will now examine each of these specific crimes and the specific legal basis for the International Criminal Court to investigate and prosecute violators of HLP rights under these provisions.

5.1 WAR CRIMES COMMITTED DURING INTERNATIONAL ARMED CONFLICT

Article 8(2)(b)(ii) provides:

Intentionally directing attacks against civilian objects, that is, objects which are not military objectives

The Elements of Crimes⁽⁵⁹⁾ for this provision provide:

1. The perpetrator directed an attack.
2. The object of the attack was civilian objects, that is, objects which are not military objectives.
3. The perpetrator intended such civilian objects to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Civilian objects are defined as “all objects that are not military objectives”.⁽⁶⁰⁾ Military objects are defined as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage”.⁽⁶¹⁾

Additional Protocol I emphasizes that “in case of doubt whether an object which is normally dedicated to civilian purposes, such as a...house or other dwelling...is being used to make an effective contribution to military action, it shall be presumed not to be so used”.⁽⁶²⁾

⁽⁵⁹⁾ Article 9 of the Rome Statute provides: “Elements of Crimes shall assist the Court in the interpretation and application of articles 6 [genocide], 7 [crimes against humanity] and 8 [war crimes]”.

⁽⁶⁰⁾ Article 52, Additional Protocol I.

⁽⁶¹⁾ *Ibid.*

⁽⁶²⁾ *Ibid.*

Article 8(2)(a)(iv) provides:

Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly

The Elements of Crimes for this provision provide:

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.
4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

This provision has been drawn from the “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly” provision that is listed as a “grave breach” in all four Geneva Conventions.⁽⁶³⁾

The International Criminal Tribunal for the Former Yugoslavia (ICTY)⁽⁶⁴⁾ stated in *Prosecutor v Gotovina* that “wanton destruction or devastation [not justified by military necessity] breaches rules protecting important values and involves grave consequences for the victims”.⁽⁶⁵⁾ Further, “the prohibition on wanton destruction covers property located in any territory involved in the armed conflict. The requirement of destruction “on a large scale” may be met either if many objects are damaged or destroyed, or if the value of one or a few destroyed objects is very high”.⁽⁶⁶⁾

The ICTY also stated that, “as a rule, destruction carried out before fighting begins or after fighting has ceased cannot be justified by military necessity”.⁽⁶⁷⁾ Further, “all forms of seizure of public or private property constitute acts of appropriation, including isolated acts committed by individual soldiers for their private gain and acts committed as part of a systematic campaign to economically exploit a targeted area. The appropriation must [also] have been unlawful. In certain circumstances appropriation of property may not be regarded as unlawful where it can be justified under international humanitarian law...when the appropriation is justified by military necessity”.⁽⁶⁸⁾

⁽⁶³⁾ Article 49, Geneva Convention I; Article 50, Geneva Convention II; Article 129, Geneva Convention III; Article 146, Geneva Convention IV.

⁽⁶⁴⁾ Although the decisions of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) are not binding on the International Criminal Court, they are likely to be influential in the Court’s assessment of similar legal issues.

⁽⁶⁵⁾ *Prosecutor v Gotovina*, Case No. IT-06-90-T, para 1672, 15 April 2011.

⁽⁶⁶⁾ *Ibid*, para 1766.

⁽⁶⁷⁾ *Ibid*, para 1766.

⁽⁶⁸⁾ *Ibid*, para 1778-1779.



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Article 8(2)(b)(iv) provides:

Intentionally launching an attack in the knowledge that such attack will cause...damage to civilian objects...which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated

The Elements of Crimes for this provision provide:

1. The perpetrator launched an attack.
2. The attack was such that it would cause...damage to civilian objects...and that such...damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
3. The perpetrator knew that the attack would cause incidental...damage to civilian objects...and that such... damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The footnotes to the Elements of Crimes note “the expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack.

This provision is based on the principle contained in Article 51(5) of Additional Protocol I:

“Among others, the following types of attacks are to be considered as indiscriminate: [...] (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.

However, the Rome Statute restricts the prohibition to cases that are “*clearly* excessive in relation to the concrete and direct military advantage anticipated” (emphasis added). The application of Article 8.2(b)(iv) requires, *inter alia*, an assessment of:

- a. the anticipated civilian damage or injury;
- b. the anticipated military advantage;
- c. and whether (a) was “clearly excessive” in relation to (b).

Article 8(2)(b)(v) provides:

Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives

The Elements of Crimes for this provision provide:

1. The perpetrator attacked one or more towns, villages, dwellings or buildings.
2. Such towns, villages, dwellings or buildings were open for unresisted occupation.
3. Such towns, villages, dwellings or buildings did not constitute military objectives.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The footnote to the Elements of Crimes state "the presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective".

The term "undefended" can be defined to include all places that are not fortified and do not have an active military presence. However, in practice, the words "undefended" and "open" have been defined restrictively to mean simply places declared to be open for entry and occupation by an adverse party without resistance. In this view, the core meaning of the rule prohibiting attacks on undefended places is simply that such places in a war zone have declared themselves ready to accept the entry of the adversary's army and as such may not be attacked.⁽⁶⁹⁾

⁽⁶⁹⁾ Adam Roberts, Undefended Towns, Crimes of War, available at: <http://www.crimesofwar.org/a-z-guide/undefended-towns>.



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Article 8(2)(b)(xvi) provides:

Pillaging a town or place, even when taken by assault

The Elements of Crimes for this provision provide:

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

In essence, pillage means theft during war and is synonymous with other terms such as looting and plunder. The prohibition of pillage has been part of the laws of war from their earliest stages of development and represents a rule of humanitarian law and customary humanitarian law, applicable in both international and non-international armed conflicts.⁽⁷⁰⁾

However, the introduction of the requirement in the Rome Statute (through the Elements of Crimes) that the appropriation of property be for “private or personal use” is more restrictive than that required under customary humanitarian law. The footnotes to the Elements of Crimes note “as indicated by the use of the term ‘private or personal use’, appropriations justified by military necessity cannot constitute the crime of pillaging.

However, national Courts exercising universal jurisdiction are not bound by this same limitation and are able to prosecute the war crime of pillage if done for the use of the armed forces, rather than simply for private or personal use.

Article 8(2)(b)(xvi) provides:

The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

The Elements of Crimes provide:

1. The perpetrator:
 - a. Transferred, directly or indirectly, parts of its own population into the territory it occupies; or
 - b. Deported or transferred all or parts of the population of the occupied territory within or outside this territory.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The footnotes to the Elements of Crimes state “the term ‘transfer’ needs to be interpreted in accordance with the relevant provisions of international humanitarian law”.

For a discussion of the boundaries of the concepts of transfer and deportation under international humanitarian law, customary humanitarian law and human rights law, refer to the discussion on *deportation and forcible transfer* below under crimes against humanity.

⁽⁷⁰⁾ See ICRC study on Customary Humanitarian Law, *Practice Relating to Rule 52: Pillage*, http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule52

Article 8(2)(a)(iv) provides:

Unlawful deportation or transfer or unlawful confinement

The Elements of Crimes for this provision provide:

1. The perpetrator deported or transferred one or more persons to another State or to another location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 4 of Geneva Convention IV defines a protected person as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”.

Under this provision the focus is on “transfer, by expulsion or other coercive acts”, making clear that the displacement can be caused by “coercive acts”, rather than requiring physical force.⁽⁷¹⁾ This is especially important in the context of HLP rights violations – as forced displacement often occurs through coercion rather than specific military attack or violence.

Article 8(2)(b)(xxv) provides:

Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival

The Elements of Crimes for this provision provide:

1. The perpetrator deprived civilians of objects indispensable to their survival.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

⁽⁷¹⁾ Footnote 12 to the Elements of Crimes states: “The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment”.

Starvation of civilian populations as a method of warfare is prohibited in both international or in internal conflicts, stated explicitly in the two 1977 Additional Protocols to the Geneva Conventions.⁽⁷²⁾ It is also considered to be a rule of customary humanitarian law, applicable in both international and non-international armed conflicts.⁽⁷³⁾

5.2 WAR CRIMES COMMITTED DURING NON-INTERNATIONAL ARMED CONFLICT

Article 8(2)(e)(vii) provides:

Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand

The Elements of Crimes for this provision provide:

1. The perpetrator ordered a displacement of a civilian population.
2. Such order was not justified by the security of the civilians involved or by military necessity.
3. The perpetrator was in a position to effect such displacement by giving such order.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

This provision is based on Article 17 of Additional Protocol II, which provides:

“The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand”.

For a discussion of the boundaries of the concepts of displacement of civilian populations under humanitarian law, customary humanitarian law and human rights law, refer to the discussion on *deportation and forcible transfer* below under crimes against humanity.

⁽⁷²⁾ See Article 14, Additional Protocol II and Article 54, Additional Protocol I.

⁽⁷³⁾ See further, the ICRC study on Customary IHL: Rule 53 Starvation as a Method of Warfare, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule53

6 Crimes Against Humanity and HLP Rights Violations





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Crimes against humanity are among the crimes that shock the conscience of humanity. They are international crimes, whether or not they take place in times of armed conflict and independent of the nationality of victims.

The Rome Statute includes the following crimes against humanity that provide the Court with the legal basis to bring violators of housing, land and property rights to account:

1. Deportation or forcible transfer of population;
2. Persecution; and
3. Other inhumane acts.

6.1 MINIMUM CONDITIONS

For each of these crimes there are certain minimum conditions to be met to be considered crimes against humanity, namely, that they are "*committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*".⁽⁷⁴⁾

This report will now consider these minimum conditions and the impact they have on the Court's ability to prosecute crimes against humanity that encompass violations of HLP rights. In addition to the text of the Rome Statute and in the absence of significant jurisprudence from the ICC, it is here useful to refer to the jurisprudence of the ICTY and ICTR.

Attack Directed Against Any Civilian Population

Article 7(2)(a) of the Rome Statute states "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".

The Elements of Crimes provide further clarification and state that an attack directed against a civilian population, "is understood to mean a course of conduct involving the multiple commission of acts...against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population".

⁽⁷⁴⁾ Article 7(1) of the Rome Statute provides: "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".

In defining what is meant by “organizational policy”, the International Criminal Court Pre-Trial Chamber has stated that it may include non-state actors and that:

“The determination of whether a given group qualifies as an organization...must be made on a case by-case basis. In making this determination, the Chamber may take into account a number of considerations, inter alia: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.”⁽⁷⁵⁾

In determining that the attack was directed against a *civilian population*, the ICTY stated in *Prosecutor v Krajisnik* that “civilian population”, for the purposes of crimes against humanity, includes all persons who are not taking active part in the hostilities.⁽⁷⁶⁾ In *Prosecutor v Tadic*, the ICTY stated “it is clear that the targeted population must be of a predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population”.⁽⁷⁷⁾ Further, the ICTY in *Tadic* stated that “[civilian population] does not mean that the entire population of a given State or territory must be victimised by these acts in order for the acts to constitute a crime against humanity. Instead the “population” element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity”.⁽⁷⁸⁾

The inclusion of the word *any* makes it clear that crimes against humanity can be committed against civilians of the same nationality as the perpetrator or those who are stateless, as well as those of a different nationality.⁽⁷⁹⁾

⁽⁷⁵⁾ Decision Pursuant to Article 15 of the Rome Statute on the authorisation of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, ICC-01/09, 31 March 2010, para 93.

⁽⁷⁶⁾ *Prosecutor v Krajisnik*, Case: IT-00-39-T, para 706, 27 September 2006.

⁽⁷⁷⁾ *Prosecutor v Tadic*, Case No IT-94-1-T, para 638, 7 May 1997.

⁽⁷⁸⁾ *Ibid*, para 644, 7 May 1997.

⁽⁷⁹⁾ *Ibid* para 635.

Further, the ICTY has stated that the expression *directed against* “specifies that in the context of a crime against humanity the civilian population is the primary object of the attack” and that “in order to determine whether the attack may be said to have been so directed...the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war [should be considered]”.⁽⁸⁰⁾

The elements of crimes make it unambiguously clear that the *attack* need not constitute a military attack.⁽⁸¹⁾ In *Prosecutor v Krajisnik* the ICTY stated “the notion of “attack” is different from that of “armed conflict”, even though the attack and the armed conflict might be related or even indistinguishable...an attack is formed of conduct causing physical or mental injury, as well as acts preparatory to such conduct”.⁽⁸²⁾ In *Prosecutor v Kunarac*, the ICTY stated “the concepts of “attack” and “armed conflict” are not identical...under customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it” and that “the attack ...is not limited to the use of armed force; it encompasses any mistreatment of the civilian population”.⁽⁸³⁾

In sum, the requirement that there be an *attack directed against any civilian population* has been defined and interpreted in a broad manner. This broad interpretation strengthens the ability of the International Criminal Court to prosecute crimes against humanity that encompass HLP rights violations.

Widespread or Systematic

The attack in question may be either widespread or systematic.⁽⁸⁴⁾ In terms of defining the concepts of widespread and systematic, the ICTR, in *Prosecutor v Akayesu*, stated that “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.”⁽⁸⁵⁾

The report will now consider the three selected crimes against humanity that provide a legal basis for bringing violators of HLP rights to account – namely, deportation or forcible transfer; persecution and other inhumane acts.

⁽⁸⁰⁾ *Prosecutor v Kunarac*, Case No IT-96-23& IT-96-23/1-A, para 91, 12 June 2002.

⁽⁸¹⁾ Elements of Crimes, Introduction to Article 7, para 3.

⁽⁸²⁾ *Prosecutor v Krajisnik*, Case No. IT-00-39-T, para 706, 27 September 2006.

⁽⁸³⁾ *Prosecutor v Kunarac*, Case No IT-96-23& IT-96-23/1-A, para 86, 12 June 2002.

⁽⁸⁴⁾ See International Criminal Court, Pre Trial Chamber II, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009, ICC-01/05-01/08-424, para. 82.

⁽⁸⁵⁾ *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, 2 September 1998.

6.2 DEPORTATION OR FORCIBLE TRANSFER

Article 7 of the Rome Statute provides:

"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.

[...]

Article 7.2 of the Rome Statute provides:

"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.

The elements of crimes for this provision state:

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.
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.

The footnotes to the elements of crimes state that "'deported' or 'forcibly transferred' is interchangeable with 'forcibly displaced'".

Deportation and forcible transfer both entail the forcible displacement of persons from the area in which they are lawfully present, without grounds permitted under international law.

The crime of deportation requires that the victims be displaced across a state border. Forcible transfer involves displacement of persons within national boundaries.⁽⁸⁶⁾

Forcible displacement means that people are moved against their will or without a genuine choice. Fear of violence, duress, detention, psychological oppression, and other such circumstances may create an environment where there is no choice but to leave, thus amounting to the forcible displacement of people. Displacement of persons carried out pursuant to an agreement among political or military leaders, or under the auspices of the ICRC or another neutral organization, does not necessarily make it voluntary.⁽⁸⁷⁾

International humanitarian law recognizes limited circumstances under which the displacement of civilians during armed conflict is allowed, namely if it is carried out for the security of the persons involved, or for imperative military reasons. In such cases the displacement is temporary and must be carried out in such a manner as to ensure that displaced persons are returned to their homes as soon as the situation allows.⁽⁸⁸⁾

Both deportation and forcible transfer have clear links with HLP rights violations and particularly the practice of forced eviction. As stated by the ICTY in *Prosecutor v Krstic* "any forced displacement is by definition a traumatic experience which involves *abandoning one's home, losing property* and being displaced under duress to another location" [emphasis added].⁽⁸⁹⁾

The footnotes to the elements of crimes state that "the term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment". The ICTY had previously stated in *Prosecutor v Stakic* that "the term "forced", when used in reference to the crime of deportation, is not to be limited to physical force but includes the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment".⁽⁹⁰⁾

In assessing whether the deportation or forcible transfer was "without grounds permitted under international law", it is necessary to examine all branches of international law applicable to the case at hand, including humanitarian law and human rights law. In this way, the Rome Statute provides an important opportunity to examine whether the deportation or transfer was permitted or not under human rights law and, for this determination, to utilise the significant body of human rights law that has developed and clarified HLP rights in general and forced evictions in particular.

⁽⁸⁶⁾ *Prosecutor v Gotovina*, Case No. IT-06-90-T, para 1738, 15 April 2011.

⁽⁸⁷⁾ *Ibid*, para 1739.

⁽⁸⁸⁾ *Ibid*, para 1740.

⁽⁸⁹⁾ *Ibid*, para 523.

⁽⁹⁰⁾ *Prosecutor v Stakic*, Case No. IT-97-24-A, Para 281, 22 March 2006.

6.3 PERSECUTION

Article 7 of the Rome Statute provides:

1. Crimes 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:

[...]

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

Article 7.2(g) of the Rome Statute notes that persecution is "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

The Elements of the crime of persecution are:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender..., or other grounds that are universally recognised as impermissible under international law.
4. The conduct was committed in connection with any act referred to in Article 7, Paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. 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.

The definition of persecution adopted by the Rome Statute is very similar to that developed under the jurisprudence of the ICTY and later followed by the ICTR. However, one key difference is that the Rome Statute has widened the grounds on which persecution can be committed. Prior to the Rome Statute it was accepted that persecution could be committed on political, racial or religious grounds. However, the Rome Statute establishes that persecution may also be committed on national, ethnic, cultural, gender, and other grounds recognized as impermissible under international law. Importantly, the Rome Statute also adds the category of "other grounds recognized as impermissible under international law".

However, the Rome Statute has also narrowed the crime of persecution through requiring that persecution be committed “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”. It is possible that this requirement could negate the widening of the grounds on which persecution can be committed.

Although the crime of persecution was not defined in treaty form until the Rome Statute, a number of features of the jurisprudence from the ICTY and ICTR are illuminating as to the approach that may be taken by the ICC to this crime.

In *Prosecutor v Tadic*, the ICTY described persecution as “the violation of the right to equality in some serious fashion that infringes on the enjoyment of a basic or fundamental right that constitutes persecution, although the discrimination must be on one of the listed grounds”.⁽⁹¹⁾ Further, the ICTY stated that the crime of persecution “encompasses a variety of acts, including, inter alia, those of a physical, economic or judicial nature, that violate an individual’s right to the equal enjoyment of his basic rights”.⁽⁹²⁾

In *Prosecutor v Kupreskic*, the ICTY defined persecution as “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 [of the ICTY Statute]”.⁽⁹³⁾ Further, the ICTY stated that “it is clear that persecution may take diverse forms, and does not necessarily require a physical element”.⁽⁹⁴⁾

A crucial element of the act of persecution is that there is a severe deprivation of rights “contrary to international law”. It is thus clear that persecution may be founded on a severe deprivation of any human rights – including HLP rights. The Rome Statute does not prioritize the violation of one category of rights over any other.

The ICTY has supported this approach by stating that “in order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 [the ICESCR and the ICCPR] and other international instruments on human rights or on humanitarian law”.⁽⁹⁵⁾

The destruction of property has been considered by various chambers of the ICTY to constitute persecution as a crime against humanity.⁽⁹⁶⁾

⁽⁹¹⁾ *Prosecutor v Tadic*, Case No IT-94-1-T, para 697, 7 May 1997.

⁽⁹²⁾ *Ibid*, para 710.

⁽⁹³⁾ *Prosecutor v. Kupreskic*, Case No. IT-95-16, para 621, 14 January 2000.

⁽⁹⁴⁾ *Ibid*, para 568.

⁽⁹⁵⁾ *Ibid*, para 621.

⁽⁹⁶⁾ *Prosecutor v Blaskic*, Case No, IT-95-14-A, para 146, 29 July 2004.

In *Prosecutor v Kupreskic* the ICTY concluded that the comprehensive destruction of Bosnian Muslim homes and property constituted an act of persecution. The ICTY noted that “the question [in this case] is whether certain property or economic rights can be considered so fundamental that their denial is capable of constituting persecution”.⁽⁹⁷⁾ In assessing this question, the ICTY noted that in the Judgement of the International Military Tribunal at Nuremburg (IMT) “several defendants were convicted of economic discrimination”⁽⁹⁸⁾ and concluded that “attacks on property can constitute persecution”.⁽⁹⁹⁾

The ICTY further noted that “to some extent this may depend on the type of property involved...There may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds...”⁽¹⁰⁰⁾ However, the ICTY concluded that as the case at hand related to the “comprehensive destruction of homes and property” that “such an attack on property in fact constitutes a destruction of the livelihood of a certain population”, which “may have the same inhumane consequences as a forced transfer or deportation”. The ICTY concluded that the destruction of property “may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, may constitute persecution”.⁽¹⁰¹⁾

The ICTY also noted in *Prosecutor v Gotovina* that the imposition of discriminatory measures with regards to housing and property and particularly the drafting and adoption of discriminatory housing and property laws may amount to persecution as a crime against humanity. Specifically, the ICTY found that “under the circumstances at the time the vast majority of those affected by these restrictive and discriminatory measures were Krajina Serbs and that they therefore were discriminatory in fact. Considering the evidence reviewed...about the circumstances surrounding the drafting and adoption of the laws, and that these measures were imposed in the context of a wider discriminatory attack against Krajina Serbs, the Trial Chamber finds that they were imposed on discriminatory grounds”.

Specifically, the ICTY found that “the imposition of restrictive and discriminatory measures with regard to housing and property, considered in conjunction with deportation and other crimes...constitute[d] persecution”.⁽¹⁰²⁾

⁽⁹⁷⁾ *Prosecutor v. Kupreskic*, Case No. IT-95-16, para 621, 14 January 2000, para 630.

⁽⁹⁸⁾ *Ibid*, para 630.

⁽⁹⁹⁾ *Ibid*, para 631.

⁽¹⁰⁰⁾ *Ibid*.

⁽¹⁰¹⁾ *Ibid*.

⁽¹⁰²⁾ *Prosecutor v Gotovina*, Case No. IT-06-90-T, para 1843, 15 April 2011.

6.4 OTHER INHUMANE ACTS

The Rome Statute provides in Article 7:

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

[...]

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

The Elements of Crimes state:

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

The crime of "other inhumane acts" was deliberately created as a residual category for serious crimes that are otherwise not enumerated as crimes against humanity.

As with the crime of persecution, the category of "other inhuman acts" is broad enough to clearly encompass violations of HLP rights.

The ICTY has stated that "whether a given conduct constitutes inhuman treatment will be determined on a case-by-case basis and appears ultimately to be a question of fact",⁽¹⁰³⁾

⁽¹⁰³⁾ *Prosecutor v Delalić*, Case No. IT-96-21-T, para 544, 16 November 1998.

Further, the ICTY stated that "to assess the seriousness of an act, consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim. While there is no requirement that the suffering imposed by the act have long term effects on the victim, the fact that an act has had long term effects may be relevant to the determination of the seriousness of the act".⁽¹⁰⁴⁾

Importantly, a number of cases under human rights law give support to the principle that HLP rights violations may amount to cruel, inhuman or degrading treatment or punishment.⁽¹⁰⁵⁾ These cases provide support for the argument that HLP violations can amount to great suffering and thus constitute an inhumane act for the determination of crimes against humanity.

⁽¹⁰⁴⁾ *Prosecutor v Vasiljevic*, Case No. IT-98-32-T, para 235, 29 November 2002.

⁽¹⁰⁵⁾ See for example, African Commission on Human and People's Rights, *COHRE v Sudan*, Communication 296/2005, July 29, 2010, where the Commission found that forced eviction in the context of Darfur not only violated the right to adequate housing, but rose to a violation of the Article 4 (right to integrity of the person) and Article 5 (prohibition on cruel, inhuman or degrading treatment or punishment); see also, UN Committee against Torture, *Hajrizi Dzemajl et al. v. Yugoslavia*, CAT/C/29/D/161/2000, 2 December 2002, where the Committee against Torture found that "the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment".



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7 The Need for International Justice

This section of the report focuses on specific contemporary case studies that demonstrate the need for the international community to take action when grave violations of HLP rights occur and where it is clear that the States concerned are unable or unwilling to genuinely investigate and prosecute these crimes.

The first case study looks at the violations of HLP rights that were committed during *Operation Cast Lead* in the Gaza Strip and the second looks at the HLP rights violations committed during *Operation Murambatsvina* in Zimbabwe. The first case study focuses on HLP rights violations committed during an armed conflict and the second looks at violations committed outside of an armed conflict. In neither situation has the international community taken effective action to prevent impunity.

7.1 OPERATION CAST LEAD: THE GAZA STRIP

In December 2008, Israel launched Operation Cast Lead. The stated aim of the operation was to stop the ongoing rocket fire into Israel from Palestinian armed groups. The operation resulted in the deaths of 1,434 Palestinians, 960 of whom were civilians, 13 Israelis, 3 of whom were civilians and injuries to 5,303 Palestinians.⁽¹⁰⁶⁾ Beyond the loss of human life, more than 50,000 people were displaced, thousands of private homes were destroyed along with public infrastructure, schools, factories, workshops, businesses, vehicles, and agricultural land.⁽¹⁰⁷⁾

In light of the alleged violations of human rights and humanitarian law during the operation, an independent fact-finding mission was appointed by the UN Human Rights Council.⁽¹⁰⁸⁾ The Mission concluded that extensive violations of both human rights law and humanitarian law had been committed during the operation.

The Mission concluded, *inter alia*:

- The destruction of...residential houses was the result of a deliberate and systematic policy by the Israeli armed forces. It was not carried out because those objects presented a military threat or opportunity, but to make the daily process of living, and dignified living, more difficult for the civilian population.⁽¹⁰⁹⁾
- There appears also to have been an assault on the dignity of the people. This was seen not only in the...vandalizing of houses when occupied and the way in which people were treated when their houses were entered. The graffiti on the walls, the obscenities and often racist slogans, all constituted an overall image of humiliation and dehumanization of the Palestinian population.⁽¹¹⁰⁾
- The Mission has noted with concern public statements by Israeli officials, including senior military officials, to the effect that the use of disproportionate force...and the destruction of civilian property are legitimate means to achieve Israel's military and political objectives. The Mission believes that such statements not

⁽¹⁰⁶⁾ Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, A/HRC/13/53/Rev.1, 7 June 2010.

⁽¹⁰⁷⁾ Human Rights Watch, *I Lost Everything: Israel's Unlawful Destruction of Property During Operation Cast Lead*, p20, 2010.

⁽¹⁰⁸⁾ UN Human Rights Council, *Resolution S-9/1*, A/HRC/S-9/L.1, 12 January 2009.

⁽¹⁰⁹⁾ *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, para 1891, 25 September 2009.

⁽¹¹⁰⁾ *Ibid*, para 1892.

only undermine the entire regime of international law, they are inconsistent with the spirit of the Charter of the United Nations and, therefore, deserve to be categorically denounced.⁽¹¹¹⁾

- In a number of cases Israel failed to take feasible precautions required by customary law reflected in article 57 (2)(a)(ii) of Additional Protocol I to avoid or minimize incidental...damage to civilian objects.⁽¹¹²⁾
- The Israeli armed forces carried out widespread destruction of private residential houses... unlawfully and wantonly.⁽¹¹³⁾
- These extensive wanton acts of destruction amount to violations of Israel's duties to respect the right to an adequate standard of living of the people in the Gaza Strip, which includes the rights to...housing.⁽¹¹⁴⁾

In addition to finding that numerous HLP rights violations had been committed during the operation – under both human rights and humanitarian law – the mission also found that a number of these violations potentially amounted to war crimes and crimes against humanity.

Importantly, the Mission made a number of findings and recommendations to Palestinian armed groups and Palestinian authorities; however, as these did not relate to violations of HLP rights that potentially amounted to war crimes and crimes against humanity, they are not the subject of this report.⁽¹¹⁵⁾

The Mission looked at Israel's duty under international law to investigate and prosecute allegations of human rights and humanitarian law violations. The Mission reviewed Israel's system of investigation and prosecution of serious violations of human rights and humanitarian law, in particular of suspected war crimes and crimes against humanity, and found major structural flaws that, in their view, made the system inconsistent with international standards.⁽¹¹⁶⁾

The Mission stated that where domestic authorities are unable or unwilling to comply with the obligation to investigate and prosecute serious violations of human rights and humanitarian law, international justice mechanisms must be activated to prevent impunity.⁽¹¹⁷⁾

The Mission made a series of recommendations to the Human Rights Council, the Security Council, the General Assembly and the Prosecutor of the International Criminal Court based on pressing Israel to launch investigations that meet international standards and, if found that Israel is unwilling or unable to launch such investigations, to refer the situation to the International Criminal Court.⁽¹¹⁸⁾

The Mission recommended that Israel be given six months to establish their own independent, credible investigations of allegations and put in place procedures to assess accountability, that the process should be

⁽¹¹¹⁾ *Ibid*, para 1894.

⁽¹¹²⁾ *Ibid*, para 1919.

⁽¹¹³⁾ *Ibid*, para 1929.

⁽¹¹⁴⁾ *Ibid*, para 1930.

⁽¹¹⁵⁾ See, Part: Five, Conclusions and Recommendations, *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, A/HRC/12/48, 25 September 2009.

⁽¹¹⁶⁾ *Ibid*, para 1959.

⁽¹¹⁷⁾ *Ibid*, para 1963.

⁽¹¹⁸⁾ *Ibid*, para 1968-1971.

monitored by a body of independent experts appointed by the Human rights Council and, if the Council deemed the results unsatisfactory, then it would refer the report to the Security Council for transfer to the International Criminal Court for appropriate action. The Mission simultaneously recommended that the international community immediately begin criminal investigations under the principle of universal jurisdiction.

Operation Cast Lead provides a clear example of contemporary violations of HLP rights during an armed conflict. It also provides a clear example of HLP violations that may have amounted to war crimes and crimes against humanity. The UN Mission has, appropriately, highlighted the duty of Israel to investigate and prosecute these allegations. However, the UN Mission has also highlighted the role of the international community in monitoring these investigations and prosecutions and, if they are found to not meet international standards, to activate international justice mechanisms to prevent impunity.

In this situation, despite the strong recommendation of the UN fact-finding Mission, it is clear that a referral of this situation by the Security Council to the International Criminal Court is highly unlikely. However, this report emphasizes that the lack of referral by the Security Council would be for political, rather than legal reasons. In this situation it is clear that the legal and normative institutional framework exists for the international criminal court to investigate and prosecute the violations of HLP rights that amounted to war crimes and crimes against humanity during Operation Cast Lead.

In light of these considerations, it is especially important that the international community plays an active role in monitoring the domestic investigations and prosecutions by Israel. It is also essential that national courts implement universal jurisdiction to act against impunity and ensure justice for these international crimes.

7.2 OPERATION MURAMBATSVINA: ZIMBABWE

In May 2005, *Operation Murambatsvina* (Operation Restore Order) was launched in Harare, Zimbabwe with the stated aim of removing illegal developments from urban areas as well as combating attendant economic, social and health problems. During the operation, according to official government figures, a total of 92,460 housing structures were demolished, affecting 133,534 households. At the same time, the structures of 32,538 small, micro and medium-size enterprises were demolished. In sum, 569,685 people were rendered homeless and 97,614 people lost their primary source of livelihood.⁽¹¹⁹⁾

⁽¹¹⁹⁾ The report of the UN Special Envoy cites "Official Government figures released on 7 July 2005", see *Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe*, page 32, 18 July 2005. The International Crisis Group states that "[these] figures on housing structures and households are those given by Minister Counsellor Pritchard Zhou of the Zimbabwe High Commission in a public address at the Institute of Security Studies, Pretoria, on 7 July 2005 and accepted by [UN Special Envoy] Tibajuka", See International Crisis Group, *Zimbabwe's Operation Murambatsvina: The Tipping Point?*, 17 August 2005, page 1-2.

The UN Secretary General appointed a Special Envoy on Human Settlements Issues to assess the situation and present recommendations on how the conditions of those affected may be addressed.

The report of the Special Envoy found that the operation was a clear violation of both national and international law:

“Operation Restore Order...was carried out in an indiscriminate and unjustified manner, with indifference to human suffering, and, in repeated cases, with disregard to several provisions of national and international legal frameworks”.⁽¹²⁰⁾

The Special Envoy also considered whether these violations might amount to a crime against humanity under the jurisdiction of the International Criminal Court. In reaching the conclusion that it would be difficult to sustain that crimes against humanity were committed, the Special Envoy relied on a legal opinion “provided from a confidential source”,⁽¹²¹⁾ and stated:

“An international debate on whether the Statute of Rome could be successfully invoked is bound to be acrimonious and protracted. It would serve only to distract the attention of the international community from focusing on the humanitarian crisis facing the displaced who need immediate assistance.”⁽¹²²⁾

The Special Envoy also emphasized that, “nevertheless, it remains the strong recommendation of the Special Envoy that the culprits who have caused this man-made disaster are best handled and brought to book under Zimbabwean national laws.”

In response to the conclusions of the Special Envoy on the question of whether crimes against humanity had been committed, an independent legal opinion was commissioned by the Centre on Housing Rights and Evictions (COHRE) and Zimbabwe Lawyers for Human Rights.⁽¹²³⁾ The legal opinion entered into a substantial analysis of whether there were legal grounds for considering that crimes against humanity may have been committed and concluded that “the available evidence does disclose grounds to believe that a crime against humanity may have been committed under both of the following Articles of the Rome Statute:

- Article 7(1)(d) – deportation or the forcible transfer of population; and
- Article 7(1)(k) - other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

⁽¹²⁰⁾ *Ibid*, page 9.

⁽¹²¹⁾ Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe, Mrs. Anna Kajumulo Tibajuka, page 65, 18 July 2005.

⁽¹²²⁾ *Ibid*, page 66.

⁽¹²³⁾ See: COHRE & Zimbabwe Lawyers for Human Rights, *Operation Murambatsvina: A Crime Against Humanity, An Independent Legal Opinion on whether the 2005 Operation Murambatsvina Forced Evictions constituted a crime against humanity under the Rome Statute*, May 2007.

The legal opinion concluded that a prosecution could be commenced before the International Criminal Court subject to a referral being made by the United Nations Security Council.⁽¹²⁴⁾ The opinion also stated that national courts could and should exercise universal jurisdiction in this case.⁽¹²⁵⁾

Operation Murambatsvina provides a clear example of contemporary violations of HLP rights – committed outside the context of armed conflicts. Operation Murambatsvina also provides a clear example of HLP rights violations that may have amounted to crimes against humanity.

Whilst the report of the UN Special Envoy concluded that it would be difficult to sustain that crimes against humanity had been committed, it is difficult to assess the reasoning of the Special Envoy as it was – at least in part – based on a confidential legal opinion. Further, part of the reasoning of the Special Envoy appears to be based on political, rather than legal considerations, including that a debate on whether the Rome Statute could be invoked would be acrimonious and protracted and would distract the attention of the international community from focusing on the immediate humanitarian crisis.⁽¹²⁶⁾

The independent legal report, by point of comparison, contains detailed and compelling legal reasoning supporting the contention that the HLP rights violations of *Operation Murambatsvina* may indeed have amounted to crimes against humanity.

It is essential, where there are substantive allegations of HLP rights violations amounting to international crimes, that the State in question takes seriously its duty to investigate and prosecute these violations. It is equally important that the international community plays an active role in monitoring these investigations and prosecutions and, where they do not meet international standards, activates international justice mechanisms to ensure there is no impunity. Where international justice mechanisms are hampered by political considerations, it is vital that the international community utilize national courts and universal jurisdiction to ensure that there is no impunity for these crimes.

⁽¹²⁴⁾ *Ibid*, page 51.

⁽¹²⁵⁾ "Prosecutions could also be commenced in States where courts have universal jurisdiction over crimes against humanity. The most notable possibility is South Africa where a prosecution could be launched if the perpetrator was visiting or residing in South Africa, or a victim is ordinarily resident in South Africa, and the National Prosecution Authority granted their consent to the prosecution proceeding. Other possible jurisdictions include the Netherlands, Germany, Spain, Germany and to a lesser extent Belgium", see *Ibid* page 7.

⁽¹²⁶⁾ The International Crisis Group notes that "this may have been as much a policy as a legal judgment", see International Crisis Group, *Zimbabwe's Operation Murambatsvina: The Tipping Point?*, 17 August 2005, page 16.

8 Conclusion

As this report has demonstrated, both the normative and institutional framework exists for the international community to prosecute violations of housing, land and property rights that amount to war crimes and crimes against humanity. This is particularly the case as the Rome Statue provides the International Criminal Court with a specific mandate to prosecute war crimes and crimes against humanity that encompass violations of housing, land and property rights. However, despite this clear normative and institutional framework, a grave impunity gap – both at the national and international level - continues to exist for violations of housing, land and property rights.

It is essential that the international community does not relegate housing, land and property rights to the background of international criminal justice. As demonstrated by this report, war crimes and crimes against humanity that encompass HLP rights violations deserve to be accorded the same attention and seriousness as war crimes and crimes against humanity that encompass violations of other rights.

Where there are serious allegations of HLP rights violations that amount to international crimes, the State in question must fulfil its duty to investigate and prosecute these allegations according to international standards. It is equally essential that the international community monitors (and in certain circumstances, supports) this process. Where the State in question is unable or unwilling to launch investigations or prosecutions that meet international standards, the international community must utilise international criminal justice mechanisms – including the International Criminal Court – to ensure there is no impunity. Where international criminal justice mechanisms are hampered by political considerations, the international community must utilize national courts and universal jurisdiction to ensure justice.

This report has provided examples of two situations of housing, land and property rights violations that may have amounted to war crimes and crimes against humanity – namely, *Operation Cast Lead* in the Gaza Strip and *Operation Murambatsvina* in Zimbabwe. In both cases it is clear that efforts to provide justice for grave violations of HLP rights have been hampered by political, rather than legal reasons. However, this report emphasises that there are many other contemporary situations of HLP rights violations that also should be investigated as potential war crimes and crimes against humanity, including unresolved HLP rights violations in Cambodia, DRC, Iraq, Myanmar, Sudan, Syria and far too many other countries where impunity sadly remains the norm. In all of these situations it is imperative that the State in question launch effective investigations into allegations of housing, land and property rights violations. It is equally important that where these States are unable or unwilling to launch effective, impartial investigations or prosecutions, that the international community activates mechanisms of international justice – in particular, the International Criminal Court – to act against impunity.

It will only be through increased and sustained attention to violations of housing, land and property rights that amount to international crimes that the international criminal justice framework will fulfil its potential in acting as a deterrent to potential HLP rights violators, enhancing the protection of HLP rights, restoring and maintaining peace in situations of armed conflict and in providing victims and their families with the opportunity to obtain justice, truth and reparations.

Housing, Land and Property Rights and International Criminal Justice: Holding HLP Rights Violators Accountable

DISPLACEMENT SOLUTIONS, SEPTEMBER 2012

Grave violations of housing, land and property (HLP) rights are an all too common feature of both conflict and non-conflict situations across the globe, from the practice of forced evictions, to the forced displacement of populations, the demolition and destruction of housing during times of war and the illegal appropriation of land and property. However, insufficient attention has been paid to the issue of individual criminal responsibility for these violations.

This report examines and clarifies the specific legal norms and institutions under the international criminal justice system that can be utilized by the international community to bring perpetrators of HLP rights violations to justice. Through strengthening and deepening understanding of the ability of the international criminal justice system to hold violators of HLP rights to account, this report seeks to encourage effective investigations and prosecutions of HLP rights violations. Genuine investigations and prosecutions that meet international standards are essential in acting as a deterrent to potential violators, enhancing the protection of HLP rights, restoring and maintaining peace in situations of armed conflict, providing victims and their families with the opportunity to obtain justice, truth and reparations and are vital to ensuring respect for the international rule of law.



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