

6. Legal Analysis of Operation Restore Order

6.1 Background

The situation in Zimbabwe is both a humanitarian and a human rights issue. The Terms of Reference of the mission include an assessment of the ability of the Government of Zimbabwe and of the humanitarian community to assist the population affected by Operation Restore Order. The legal analysis of the Operation is intended to inform the assessment from a humanitarian and human rights perspective, and to provide a full appreciation of the responsibilities of both the Government and the international community to provide assistance to the affected people.

The human rights discourse in Zimbabwe is fraught with tension. The Government accuses those who raise human rights issues of applying double standards when it comes to African countries, and Zimbabwe in particular. Several officials cited recent alleged violations in Togo and Ethiopia during their respective elections and the fact that the outcry regarding those cases was nothing compared to what Zimbabwe is experiencing.¹⁰⁷

The legal context should be seen against a background of a general deterioration of the rule of law in Zimbabwe. Disregard for laws and court orders during the Fast Track land reform programme set a dangerous precedent. It also sent a signal that the rule of law could be subject to selective interpretation.

The legal context is mixed, and seems to reflect a set of conflicting legislation. On the one hand, there is the Regional, Town and Country Planning Act, and attendant municipal bylaws emanating from the colonial era meant to keep Africans out of the cities by setting very high housing and development standards beyond the reach of the majority of the people. On the other hand, there are the international commitments and obligations requiring Governments to provide adequate shelter to all its citizens. The national laws seem to have been subject to inconsistent policy statements that led them to be mostly ignored after independence, leading to the rapid formation of backyard extensions now dubbed illegal. The sudden application of the laws governing towns and cities under Operation Restore Order has exposed the clear conflict of these laws with human rights provisions under both national and international law.

The general view in Zimbabwe is that the debate around the Operation goes beyond legality, and borders on morality.¹⁰⁸ This debate notwithstanding, Operation Restore Order raises several legal issues under international and regional human rights frameworks, as well as national legal frameworks.

6.2 International and Regional Instruments

The fundamental right to human dignity, to shelter, to employment, to education and to health care are all entrenched in a variety of international and regional human rights instruments, all of which Zimbabwe is party to. The Government of Zimbabwe has a duty to protect and enforce the economic and social rights of its citizens as guaranteed by the Constitution of Zimbabwe and the

¹⁰⁷ BBC reported on 23 June 2005 that UK had announced a suspension of planned increase of aid to Ethiopia. This would suggest that other governance problems are not ignored as claimed. The debacle in Togo also attracted a lot of international condemnation.

¹⁰⁸ Several people the mission met including a law professor expressed this sentiment.

African Charter on Human and Peoples' Rights¹⁰⁹. The Government of Zimbabwe also has a duty to fulfil its obligations under the International Covenant on Economic, Social and Cultural Rights, which Zimbabwe ratified on 13th May 1991. General Comment Numbers 4 (13th December 1991) and Number 7 (20th May 1997) of the United Nations Committee on Economic, Social and Cultural Rights state that, "forced evictions are *prima facie* incompatible with the provisions of the Covenant and can only be carried out under specific circumstances". As a member of the United Nations Commission on Human Rights, Zimbabwe committed itself to advocating for the respect and implementation of key Resolutions on Forced Evictions passed in 1993 (Resolution 1993/77), 1998 (Resolution 1998/9, and 2004 (Resolution 2004/28).

The foremost statement of international law relating to housing rights is found in the International Covenant on Economic, Social and Cultural Rights which states in Article 11(1) that: "The State parties to the present Covenant recognise the right of every one to an adequate standard of living for himself [herself] and his [her] family, including adequate food, clothing and *housing*, and to the *continuous improvement of living conditions*. The States parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance to international co-operation based on free consent."¹¹⁰ The compliance with international law is treated as part of Section 6.4.

6.3 National and Domestic Legal Framework¹¹¹

6.3.1 Relevant National Laws

There are three main pieces of legislation in Zimbabwe relevant to the legal analysis of Operation Restore Order. These are the Regional Town and Country Planning Act 1976 [Chapter 29:12] ("Planning Act"); the Housing Standards Control Act 1972: Chapter 29:08; the Urban Councils Act: Chapter 29:15/ 1995; and several other municipal bylaws. The mission determined that although there were several legal instruments regulating use of buildings, structures and business activity, including in some cases clear procedures concerning violations, that could have been used by the government to justify the Operation, the Planning Act seems, however, to be the only one invoked through an enforcement order as the basis for the demolitions.

6.3.2 The Regional Town and Country Planning Act Chapter 29:12/ 1976

In instances where it is alleged that people have built structures without the prerequisite consent of the relevant authority, it is necessary for due process of the law to be followed. In terms of Section 32 of the Planning Act, it is necessary for the authorities to issue a prohibition order giving 30 days notice. The authority can also issue a prohibition order in terms of Section 34 of the Planning Act. If the order is not complied with, the authority has to take the requisite legal steps to destroy the offending structure. The person who has erected the unlawful structure has an opportunity to make presentations, and also has time to take steps to either regularise their position or find an alternative place to reside in or operate from. Similar provisions are provided

¹⁰⁹ *African Charter on Human and Peoples' Rights* Article. 14 provides that "the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws. See also Articles 15, 16, & 18

¹¹⁰ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), *Entered into force 3 Jan. 1976*, Emphasis added.

¹¹¹ For general discussions of the national legal framework see submissions of the Law Society of Zimbabwe 6 July 2005, Actionaid Zimbabwe, 8 July 2005, and Zimbabwe Lawyers for Human Rights, June 2005

by the Housing Standard Control Act 1972: Chapter 29:08, and the Urban Councils Act: Chapter 29:15/ 1997, and other bylaws

6.3.3 Enforcement Order

The City of Harare issued an enforcement order on 24 May 2005 a few days after the actual demolitions of structures had started.¹¹² The order was to become operative on 20 June 2005¹¹³. However, the demolition of business structures continued and that of homes started, thus giving the affected people no opportunity to apply for regularisation of their developments, which amounts to a violation of the law. With the exception of Harare, where an enforcement order was issued, in the press, under the Planning Act of the intending evictions and demolitions (albeit defective), no such order was issued under the Planning Act or any other legislation in the other areas where evictions and demolitions took place. The legal basis for the action by the police in destroying settlements and livelihood is questionable. The Cities of Bulawayo, Mutare, and Victoria Falls, which are the authorities responsible for any demolitions under their jurisdiction, were not consulted when the demolitions and evictions started in their respective cities.¹¹⁴ During discussions with the Government of Zimbabwe's technical team, the mission requested that it be provided with evidence that notices were given outside Harare. This evidence was not forthcoming. It is important to note that in all the laws, the body authorised to order and implement demolitions is the local authority and not the central government or the police, which was the case in Operation Restore Order.

6.3.4 Service and Adequacy of Notice

General practice requires notice to be served on individuals. The Planning Act does, however, make provision for notice to be served through publication in newspapers in certain circumstances¹¹⁵. Many people were of the view that in this instance notice should have been served on individuals. Adequacy of notice is a key principle of fairness and natural justice. Adequate notice of any action is to ensure that those who will be affected can make alternative arrangements within a reasonable time frame. The testimonies provided to the mission suggest that this did not happen in many cases. In some cases, as little as a few hours notice was given, leaving people unable to take action and resulting in the destruction of property as houses were demolished¹¹⁶. Some evictees had to leave their property behind because there was no room in the trucks used to transport them to transit camps.¹¹⁷ What was not collected was set on fire by the police in many cases.

6.3.5 Status of Evictees

The mission was provided with evidence of people evicted from their premises who are in possession of valid leases issued by the then Ministry of Local Government and National Housing

¹¹² See the Herald, 24 May 2005 and 26 May 2005

¹¹³ The Planning Act provides for 30 days notice. In the instance the notice was to become operative in 25 days.

¹¹⁴ See submission by City of Bulawayo on Operation Restore Order, 6 July 2005

¹¹⁵ With the exception of the Planning Act, it would appear that the other relevant laws does not provide for notice by publication

¹¹⁶ In some cases people were not home when their houses were demolished

¹¹⁷ This was witnessed by some of the Special Envoys team at Porta Farm on 29 June 2005

and/or by the local authority.¹¹⁸ It may well be that many of the evictees do not have leases, or have breached them; it remains essential that they be given the opportunity to raise such defences.

The mission was able to ascertain that in some cases the vendors, whose stalls and marketplaces were destroyed and whose goods were confiscated, held valid vendors' licenses. It would therefore appear that the actions against them were not in accordance with the planning regulations¹¹⁹. The mission obtained information that some properties, which had been constructed in compliance with relevant laws, were also destroyed.¹²⁰

Some affected people have filed applications in the Courts to prevent demolition and eviction. In some instances, provisional orders to interdict the police and relevant authorities from carrying out their actions and to restore possession to those who had been in possession of the same have not been heeded, while in other cases they have been.¹²¹

Notably, the High Court issued a provisional order on 29 June 2005 banning the government from allocating stands and constructing sample houses on property known as Whitecliff Farm, which is owned by a private individual.¹²² This site has been earmarked by Government to provide housing and livelihoods as part of Operation Garikai (Reconstruction /Resettlement) to provide stands/plots and vendor stalls in response to the consequences of Operation Restore Order. The Special Envoy had witnessed the launch of the reconstruction phase by the First Vice President on this very site. The sustainability of this intervention in terms of security of tenure can be seriously questioned as the very land allocated for reconstruction and resettlement soon became the subject of an unresolved legal challenge. The Special Envoy brought this serious development for Operation Garikai to the attention of the Minister of Local Government. He clarified, albeit verbally, that the new urban land acquisition law provides a landowner whose land has been earmarked for acquisition no option but to surrender the land while negotiations for compensation are ongoing. The Government further insisted that the courts had no basis to interdict its new plans, but this remains unclear.

6.4 When can Governments/State Parties be justified in law?

Under both relevant international law and national legislation forced evictions can be justified under certain circumstances. The Committee of Economic Social and Cultural General Comment 4, paragraph 18, states that instances of forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified under the most exceptional circumstances. These exceptional circumstances include persistent anti-social behaviour which threatens, harasses or intimidates neighbours; persistent behaviour which threatens public health or is manifestly criminal behaviour as defined by law, which threatens others; and illegal occupation of property without compensation.

¹¹⁸ *Tinashe Tafira & 6 others vs Harare City Council & 2 Ors Harare Magistrate Court Case No. 16596/05*. See submissions from Law Society of Zimbabwe, Action Aid, and Zimbabwe Lawyers for Human Rights. June/July 2005

¹¹⁹ See submission presented by the City of Bulawayo on the Clean-Up Operation, 6 July 2005.

¹²⁰ See the case of *Batsirai Children's Care vs The Minister of Local Government, Public Works & Urban Development & 4 Ors HC 2566/05*, in the submissions of Action Aid 8 July 2005

¹²¹ *Dare Remusha Co-operative vs. Ministry of Local Government and Public Works & Urban Development & 4 Ors HC 2467/05*

¹²² Submission of Law Society of Zimbabwe

The Government of Zimbabwe, in its written submission to the mission, appears to be relying on some of the above to justify its actions under international law.¹²³ However, there is no indication that procedural requirements were complied with. Forced evictions under the exceptions have to be in accordance with the law, which meets international standards. The Committee on Economic Social & Cultural Rights General Comment No 7, which provides the leading interpretation of article 11(1), calls on all state parties to ensure, prior to carrying out any evictions in exceptional cases, and particularly those *involving large groups* that certain procedural protections are ensured. These include:

- k. An opportunity for genuine consultation with those affected. The mission was informed that no consultations were undertaken prior to the evictions and when the Government of Zimbabwe technical team was asked, the mission was informed that “consultations” were undertaken because the affected people were informed of the evictions through their monthly bills, which included a fine levied on owners who had illegal structures!
- l. Provide adequate and reasonable notice for all affected persons prior to the date of the eviction. This was not provided. See discussion under section [9.3].
- m. Information on the proposed eviction should be made available in a reasonable time to those affected. This was not provided.
- n. Government officials or their representatives should be present during an eviction; persons carrying out the evictions should be properly identified. The Government said uniformed policemen were used making it easy to identify the persons carrying out the evictions. It is the view of the mission, however, that actions falling under the purview of local authorities should not be carried out by the (national) police or the military.
- o. Evictions should not take place in particularly bad weather or at night. At the time of Operation Restore Order, Zimbabwe was entering its winter season and experiencing very cold weather. The Government of Zimbabwe counter-argued that winter being a dry season is the best time to implement the operation. Operation Garikai is meant to provide alternative accommodation before the onset of the rains in October/November. It remains to be seen whether this will be accomplished and, in any case, not all those affected can be assisted.
- p. Legal remedies should be available and legal aid should be available to those in need of it to seek redress from the courts. Although legal assistance is being provided by some NGOs, their efforts are being hampered by a non-responsive judicial system. The High Court dismissed one case challenging the evictions, ruling that the Government was not in violation of the law to have illegal structures demolished.¹²⁴ The case did not consider the procedural aspect of the law. The case ignores the recommendation by the Human Rights Committee in its General Comment Number 16 where it makes the very important and pertinent point that appropriate procedures and due process are essential aspects of all human rights, and more so where forced evictions are concerned.
- q. Evictions should not result in individuals being rendered homeless; prior alternative adequate housing should be available. The Government did not provide alternative accommodation to those affected prior to the demolitions. In one of the areas affected (Porta Farm), an operative High Court order issued in September 2004 preventing the Government from evicting the residents until alternative accommodation including basic

¹²³ Paper on Legal Justification for Operation Murambatsvina/Operation Restore Order submitted to the mission on July 7, 2005 during a meeting with Ministry of Foreign Affairs chaired by Director of Multilateral Affairs

¹²⁴ *Dare Remusha Cooperative Vs. The Min of Local Government, Public Works & Urban Development & 4 Ors HC 2467 / 05*

infrastructure and services had been provided, was disregarded. The residents have since filed a contempt of court order on 28 June 2005. (See Box 1)

Box 1: The Porta Farm: A history of evictions and relocations of 15 years

- 1990: A massive clean up campaign to rid the City of Harare of all “perceived unsightly dwellings” and squatter settlements takes place for HRM Queen Elizabeth II’s visit. Scores of people mainly ex-farm workers of foreign origin, and people who have lost their jobs, elderly and orphans and the really poor are moved from their homes in areas such as Epworth, Mbare, Borrowdale, Gumba and the area around the Mukuvisi River. The evictees are resettled on Porta Farm about 25 kilometres from the city. They are told to stay there by the government pending the finding and allocation of suitable accommodation alternatives.
- 1991: The Harare City Council (HCC) threatens to remove the residents who obtain an injunction from the High Court [HC 3177/91] prohibiting the council from evicting them until it had found alternative accommodation with the necessary basic services for them.
- 1993: Churu farm residents evicted against a High Court Judgment and some are settled at Porta Farm. The population is rising and reaches 5,000.
- 1995: HCC tries again to evict the residents. Another court order [HC 4233/95] is obtained preventing the demolishing of houses and eviction of the residents. This order is still pending and HCC is yet to comply.
- Aug. 2004: Ministry of Local Government attempts to evict the residents. Another injunction [HC 10671/04] is obtained preventing the Ministry from evicting them.
- Sept. 2004: HCC files a suit in the High Court [HC 11041/04] seeking an eviction order. The case is dismissed with the court referring to the 1995 order, which had not been discharged.
- Nov. 2004: The Ministry responds to the 1991 and 1995 court orders stating that alternative accommodation has been made available to the residents and that the Government is now in a position to resettle them at the new location. The residents seek to verify the allocations and seek to visit the sites with the Ministry. This does not happen, so the order not to evict is still operative.
- 19 May 2005: Operation Restore Order starts in Harare.
- 27 June 2005: Police at 6:00am distribute flyers informing the residents that they would be moved to Caledonia farm the following day so they should pack their belongings.
- 28 June 2005: Demolitions start at 11:30 am, an hour after lawyers representing residents have served the Government with a letter reminding it of the November 2004 court order! The police are shown copies of the 1995 and 2004 orders which they ignore. “The residents report that the police responded by saying that they were not in a classroom and that they could not read, and that they were not going to obey any court Orders as they are acting on orders from above”.
- 29 June 2005: Special Envoy’s team visits Porta Farm and witnesses demolitions and transportation of residents to Caledonia Farm. The mission is shocked by the brutality. Population is estimated at 12,000. Residents file a contempt of court application against the Government for violating a court order, however the High Court is yet to hear the case.
- 30 June 2005: Special Envoy visits Porta Farm in the evening and witnesses the serious humanitarian crisis and around 1000 evictees sleeping out in the open.

Source: *Interview with Mbidzo, Muchadehama & Makoni, Lawyers of Residents*

There is general concern that the High Court's failure to safeguard the right of the victims of the Operation reaffirms the argument that the Zimbabwean Judiciary has generally failed to act and been seen to act as custodians of human rights in Zimbabwe and that there has been a regrettable failure by members of the Bench to remain independent from the national and local politics of the day.¹²⁵ The general view among many stakeholders is that this has had a severe impact on the rule of law and the administration of justice, and has caused the ordinary person on the street to lose faith in achieving justice through legal channels.¹²⁶ This problem is not limited to Zimbabwe. In its report, the Commission for Africa decries the crisis of the judiciary in Africa for its failure to ensure separation of powers between the State, the Judiciary and the Legislature.¹²⁷ Justice is said to be on "sale" for those who have money and "on hold" for those with political power and influence

6.5 Violations of Human Rights and Humanitarian Law

Although the Zimbabwe Constitution provides protection under Chapter III, Declaration of Rights, Operation Restore Order infringed upon many of these rights. The forced evictions and resultant displacements have rendered thousands of people homeless and thus vulnerable to the violations of a number of other rights. In addition to the violation of the right to adequate housing, other key rights including the right to life, property and freedom of movement have also been violated.¹²⁸

6.5.1 Right to Life and Property

Several allegations have been made of deaths in connection with Operation Restore Order by organisations such as Amnesty International, Human Rights Watch, Zimbabwe Peace Project and Zimbabwe Lawyers for Human Rights.¹²⁹ Of the six deaths alleged to have occurred as a result of demolitions, three involve a child hit by a truck, and another child and sick woman hit by falling debris alleged to have occurred at Porta Farm, Harare while the Special Envoy was present in Zimbabwe.¹³⁰ The Special Envoy had arrived at this demolition scene and was presented with a distressed crying baby whose mother could not be located in the commotion caused by the demolition.¹³¹ In all of these death claims the Government is yet to issue a certificate of

¹²⁵ Submission by Zimbabwe Lawyers for Human Rights: *Operation Murambatsvina, Public Interest Litigation*

¹²⁶ *ibid*

¹²⁷ Our Common Interest, Commission for Africa, see the section on Accountability pages 141-145, 2005

¹²⁸ See also Law Society Submission *op cit*

¹²⁹ See Amnesty International new release: "*Zimbabwe: More deaths mass evictions continue unabated*" 30 June 2005, Zimbabwe Peace Project news flash of July 1, 2005

¹³⁰ In the Zimbabwe Peace Project news flash of July 1, 2005, four people were identified as having died in Porta Farm as a result of Operation Murambatsvina. Mai Douglas (pregnant woman), Loyce Mandigora, Chrispen Kapenhure, (5 year old boy allegedly run over by government truck transporting evictees from Porta Farm, Rebecca Mupandani (terminally ill woman who died allegedly while being bundled into one of the moving trucks. This had been reported to the SE during her consultation session with NGOs in Harare. While at Porta Farm the SE inquired about the pregnant woman alleged to have fallen off the truck. The evictees still at the demolished site and sleeping out in the open denied this. If true this would support some of the Governments concern that some NGOs exaggerate.

¹³¹ The Special Envoy had to purchase a feeding bottle and milk which were given to another woman to care for the baby

confirmation or negation.¹³² Death allegations are coming from so many quarters that they warrant an independent inquest since the police carried out the operation. There also has been wanton destruction of properties. In some cases properties have been seized and even auctioned off with no accounting for the goods or the proceeds.¹³³ Arbitrary takeover of assets is happening against a backdrop of rhetoric of maintaining law and order.¹³⁴

Far less drastic measures could have been taken by the police implementing the enforcement order. It is a general principle of administrative law that when public authorities are exercising powers, they should do so in a manner that will seek to minimize loss. It appears this principle was not adhered to during the Operation, paving the way for holding those entrusted with implementing orders to be held accountable, including for criminal negligence charges where deemed appropriate by the Government.

6.5.2 Right to Freedom of Movement

The fact that a large number of people were evicted and their homes destroyed without any alternative accommodation is, in itself, unlawful. The movement of evictees has also been restrained in that those who are in camps can only go to the rural areas or other destinations of the Government's choice and are not allowed to move freely. The Government's policy stating that all Zimbabweans have a rural home, and that all those who have been evicted should return to their rural homes, implies a lack of freedom to choose one's own residence. This has particularly serious implications for those Zimbabweans of foreign origin who have no rural home. The mission visited Caledonia Camp, which was set up by the Government. The camp manager confirmed that the residents were waiting to be transported back to villages.¹³⁵ They are not being allowed to leave the camp, but children were allowed to go to school in the city, a considerable distance away. The proportion of people in the camps compared to the total number of evictees is however limited and this has implications for issues under the Rome Statute (see 6.7).

Box 2: Press Statement by the Law Society of Zimbabwe on Operation Restore Order, June 2005 In their submission the Law Society argued:

The justification for these actions is that illegal structures should not be allowed to stand, that businesses which operate without lawful authority should not be permitted to operate; and that unlawful elements of society should be arrested. It is however clear that the wholesale destruction of building and businesses and the mass arrest of citizens and non-citizens of Zimbabwe, without the due process of the law is a blatant and unacceptable violation of constitutional rights of those affected by these actions. Many people have been deprived of shelter, and thousands have been deprived of their livelihoods, and have lost their property and in many instances their liberty. A Government which genuinely respects the constitutional rights of individuals would have been expected to give warning of its intended actions, follow due process of law, and have made contingency plans for those who were suddenly left homeless or without an income. The stated purpose for these actions by the Government is to curb crime. However, the unfortunate consequences of such action is that persons who previously were able to earn an income in the informal sector, will in many cases, be forced to turn to crime to survive. The actions of the Government merits strong censure and the Law Society of Zimbabwe condemns these actions.

Source: Submission by J. James, President, Law Society of Zimbabwe, 6 July 2005

¹³² After she had left Zimbabwe the SE was faxed an unsigned Memorandum dated July 6, 2005 from Police General Headquarters. The document admits that one child was killed but not as a result of the operation. It is important to note that the memorandum is not on an official letterhead and is unsigned.

¹³³ Law Society of Zimbabwe, *op cit*

¹³⁴ *ibid*

¹³⁵ Some 5,000 people were being accommodated in one transit camp in Harare with totally inadequate shelter and protection from the elements.

6.6 Does Operation Restore Order warrant evoking the principle of “Responsibility to Protect”?

The Responsibility to Protect published in December 2001 by the International Commission on Intervention and State Sovereignty, outlines the core principles of how the United Nations and the wider international community should react when nations are degenerating into chaos. The principles were derived in direct response to the world’s failure to intervene in Rwanda, and the controversial interventions in Somalia, Bosnia and Kosovo. The basic principles the Commission arrived at are:

- e. State sovereignty implies responsibility, and the primary responsibility for the protection of its peoples lies with the state itself; and
- f. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.¹³⁶

The substance of the responsibility to protect is the provision of life-supporting protection and assistance to population at risk. According to the report this responsibility has three integral and essential components: responsibility to react; responsibility to prevent; and the responsibility to rebuild after the event.

With an estimated 700,000 people directly affected through loss of shelter and livelihoods, the mission sought to establish both the willingness and ability of the Government to protect its citizens, having clearly caused them to suffer in large numbers through the destruction of shelter and livelihoods. The Government, in apparent response to the crisis it had created, launched Operation Gerikai (Reconstruction and Rebuilding). The government’s response to the crisis has been discussed above and illustrates, to a large extent, recognition of its responsibility to protect its citizens. The issue remaining for the UN, however, is whether the Government of Zimbabwe is able to offer effective assistance to its people in practical terms. It is the view of the Special Envoy that the scale of the problem is too large and exceeds the present ability of the Government to address the basic needs of those affected by Operation Restore Order. The international community has a responsibility to protect those affected. The impact will not be easy to redress and requires immediate large-scale and unconditional humanitarian assistance to protect those in need.

6.7 Does Operation Restore Order Raise Issues Under the Rome Statute?

Several submissions received during the mission contend that the actions of the Government, in forcibly uprooting hundreds of thousands of its citizens from their homes, meets the criteria of a “crime against humanity”, as defined by Article 7 of the Rome Statute of the International Criminal Court.¹³⁷

It is important to note that this issue was not covered by the Special Envoy’s mandate. Zimbabwe is not a State Party to the Rome Statute therefore any referral would need a Security Council Resolution. The Terms of reference did not provide for the mission to assess the need for Security

¹³⁶ Report of the International Commission on Intervention and State Sovereignty para 2.30

¹³⁷ Rome Statute of the International Criminal Court 1998 *Entered into Force* 2002. .

Council referral¹³⁸. Nevertheless given several submissions invoking the *Rome Statute* including Parliamentarians¹³⁹, church leaders and a broad spectrum of political figures, academics and civil society actors, and their expectations that this issue would be discussed, the Special Envoy has decided to include a brief analysis on the matter based on a legal opinion provided from a confidential source. The presentation below must therefore be understood as preliminary, it remains up to the Secretary General to decide whether an independent and more thorough investigation is warranted.

For brevity, within the context of Operation Restore Order, the relevant acts listed by Article 7 as constituting a “crime against humanity” when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack are:

- r. “deportation or forcible transfer of population”. The Treaty defines deportation or forcible transfer of population as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”; and
- s. “other inhumane acts of similar character intentionally causing great suffering or serious injury to body or to mental or physical health”.¹⁴⁰

*The outcome of the legal analysis was complex. But concluded that with available evidence it would be difficult to sustain that crimes against humanity were committed. Four reasons were advanced*¹⁴¹.

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

The second issue is related to forced expulsions of people from their homes. According to the legal opinion obtained, this would be countered by the fact that for many people, police threats were imagined rather than real. This would be evidenced by the fact that some people demolished their own structures out of fear, the threat of hefty fines, or to salvage building materials even before the police had arrived. Meanwhile, there were others, who, after demolitions, chose to remain on their demolished property, making it difficult to make a case for systematic forced expulsion. Apart from their relatively small numbers, even evictees sent to camps could be said to have voluntarily opted to do so as the other alternative was to remain out in the open, and many had chosen or were seen to be using this option. After all, not everyone went to the camps, it would be argued.

¹³⁸ In the Sudan case, where the Security Council referred the case to the International Criminal Court, the decision was made after an international Commission of Enquiry had submitted its report. The Commission of Enquiry’s mandate was given by the Secretary General and was specifically required to investigate violations of international humanitarian law and human rights law. This is not the case for the Zimbabwe Mission

¹³⁹ See submission by David Coltart, MP for Bulawayo South

¹⁴⁰ *ibid* Article 72 (1)(d) Emphasis added

¹⁴¹ Preliminary Legal Opinion: on the Application or otherwise of the Treaty of Rome to the Situation of Rome, July 2005 Confidential source.

The third issue is general principles of international law, which permit states to derogate the exercise of rights, and international law provides exceptional grounds under which forced evictions are permitted. The Government of Zimbabwe has attempted to argue some of these grounds in the rhetoric that has dominated the operation viz: it was fighting criminality; public health was at stake; public morality citing mostly prostitution also linked to the spread of HIV/AIDS was consistently invoked; and the rights of others, e.g. that registered shop owners in the central business district were having their rights infringed by hawkers blocking their shop entrances.

The fourth and final issue relates to whether there was criminal intent (*mens rea*) to cause harm and suffering. In a report to ECOSOC in 1996[5], the Government had brought to the attention of the international community that it was faced with housing crisis problems, that the country was also experiencing economic hardships due to ESAP and that it would not be able to meet its obligations without international support, which it did not get.¹⁴² In criminal law this means that this presents a defence of the absence of *mens rea*.¹⁴³ In other words, there has been a housing crisis that the government had brought to the attention of the world 10 years ago. In any case only a court can determine and decide the issue of criminal intent.

While the Government clearly violated its own national laws and the constitutional rights of its people, and that those responsible must be brought to account, it is the view of the Special Envoy that in view of this preliminary legal opinion, 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 assistance¹⁴⁴.

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. The international community would then continue to be engaged with the dismal human rights record in Zimbabwe in consensus building political forums such as the UN High Commission for Human Rights, or its successor, the African Union Peer Review Mechanism, and the Southern African Development Community (SADC).

6.8 Conclusions and Recommendations:

The legal context for Operation Restore Order should be seen against a background of a general deterioration of the rule of law in Zimbabwe. Disregard for laws and court orders during the Fast Track land reform programme set a bad precedent. It also sent a signal that the rule of law could be subject to selective interpretation, paving way for the excesses now committed under the

¹⁴² See Zimbabwe 1995 Report to ECOSOC on its progress in implementing the Covenant on Economic, Social and Cultural Rights, E/1990/5/Add.28

¹⁴³ In addition the absence of a well laid out plan for the operation would support this defence. Special Envoy made several unsuccessful attempts to obtain a plan for the operation from the Minister of Local Government

¹⁴⁴ Under such a scenario, the Government of Zimbabwe might even be more belligerent as some officials repeatedly point out there is nothing to lose as the country is already being treated as pariah state because of its land reform programme. For those Zimbabweans who have now put their faith and trust in the UN and the international community, protracted wrangling and negotiations under Rome Statute would prove the international community after all, only cared about humiliating President Mugabe instead of offering tangible assistance.

clean-up operation, including destruction of legal businesses and homes paying taxes to local authorities.

Under both relevant international law and national legislation forced evictions can be justified under certain circumstances, viz: criminality; public health; public morality; and the rights of others. The Government of Zimbabwe appears to be relying on some of the above to justify its actions under international law. However, there is no indication that any of the procedural requirements were complied with: consultations were not undertaken; notices were not given in time if at all; information was not given on the proposed evictions; government officials or their representatives were not present during the demolitions conducted brutally as a national police and military exercise; the evictions took place during harsh weather; legal remedies were not available; and evictions resulted in thousands of people being rendered homeless without being provided viable alternatives.

There is general concern over the failure of the High Court to safeguard the right of the victims of the Operation and that there has been a regrettable failure by members of the Bench to remain independent from the national and local politics of the day.

With an estimated 700,000 people directly affected through loss of shelter and livelihoods, it has been established that while willing, the ability of the government's response to the crisis is limited, and the international community has a responsibility to protect those affected. The impact will not be easy to redress and requires immediate large-scale and unconditional humanitarian assistance to protect those in need.

Several submissions received during the mission contend that the actions of the Government, in forcibly uprooting hundreds of thousands of its citizens from their homes, meets the criteria of a "crime against humanity", as defined by Article 7 of the Rome Statute of the International Criminal Court. A preliminary legal opinion suggests that with available evidence it would be difficult to sustain that crimes against humanity were committed. In light of this the Special Envoy believes 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.

Nevertheless, it remains the strong recommendation of the Envoy that the culprits who have caused this man-made disaster be brought to book under Zimbabwean national laws. The international community would then continue to be engaged with the dismal human rights record in Zimbabwe in consensus building political forums such as the UN High Commission for Human Rights, or its successor, the African Union Peer Review Mechanism, and the SADC.

Other specific recommendations would include:

- t. The Government should make efforts to pay compensation to those whose properties and homes were illegally destroyed, seized and auctioned off;
- u. Deployment of monitors to observe compliance with human rights standards, and help reassure communities or groups at risk of their safety and rights; and
- v. The international community should engage with the Government to observe the rule of law in all its future undertakings; and to reform its laws in order to ensure that the minimum standards guaranteed in international conventions are conformed with, and to eliminate the unrealistic high standards for housing development.

The Humanitarian Situation



Living amidst the rubble in Mbare.



Mother living in the open in Porta Farm, June 30, 2005.



Over 4,000 people in Caledonia Transit Camp.



Makeshift shelter in Caledonia Transit Camp.



Sheltering in Agape Mission Church, Bulawayo.



Sleeping out at Sakubva Sports Oval Camp, Mutare.

UN Special Envoy's Tours and Visits



Official launch of Operation Garikai, Whitecliffe.



Visiting new stalls for informal traders, Harare.



Visiting Caledonia Transit Camp.



Being briefed about Ngozi demolitions, Bulawayo.



Interviewing woman living in the open, Mutare.



Interviewing families, Agape Mission Church, Bulawayo.