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Endnotes

1. Whenever facilitating a workshop or a conference, I have observed that two topics are very divisive: the condom when debating HIV prevention, and Zimbabwe when discussing governance and human rights.
2. While it is analytically rewarding to isolate some of the main reasons, it is important to remember that these reasons are not mutually exclusive.
3. It must be pointed out that being a beneficiary of a contested exercise (such as the fast-track land reform exercise) does not, in and of itself, imply that one necessarily subscribes to the tenets of the benefactor.

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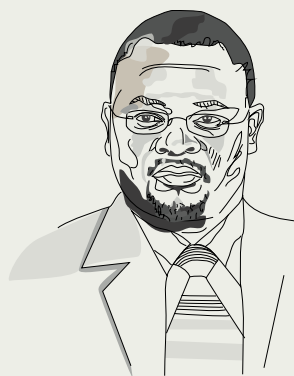
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Transitional justice and national healing:

Perpetrators must pay the price

Arnold Tsunga

Zimbabwe achieved its independence in 1980 after a brutal war during which widespread and serious human rights atrocities were committed. The new Prime Minister, Robert Mugabe, called for reconciliation and forgiveness and no one was prosecuted for the atrocities.

A few years later, Mugabe's government was involved in gross human rights violations during the Gukurahundi campaign in Matabeleland and Midlands Provinces, during which 20,000 people are believed to have been killed. In 1987, a Unity Accord was signed between the ruling Zimbabwe African National Union Patriotic Front (ZANU-PF) and the opposition Zimbabwe African People's Union (ZAPU) bringing an end to the violence. Once again, the government called for reconciliation and national healing and no one was prosecuted for those extra-judicial killings and enforced disappearances.

But the cycle of violence did not end. Zimbabwe has experienced spikes in organised violence and torture, particularly around elections. It has become obvious that ZANU-PF uses targeted, organised violence and torture against unarmed civilians as a primary method of power re-

tention. After the March 2008 elections that Mugabe lost to Morgan Tsvangirai, the leader of the Movement for Democratic Change (MDC-M), the country saw an escalation in orchestrated violence with reports showing that hundreds of unarmed civilians were extra-judicially killed and many more disappeared as ZANU-PF tried desperately to cling to power.

Despite the fact that the election violence was highly publicised, no meaningful prosecutions or investigations have occurred domestically due to an uncooperative government. Impunity has been a central feature accompanying the organised violence and torture against unarmed civilians. It is therefore critical that any process towards transitional justice and national healing is predicated on an unequivocal goal of breaking the cycle of impunity rather than letting 'bygones be bygones'.

VIOLENCE IN 2008 – EXTRA-JUDICIAL KILLINGS AND ENFORCED DISAPPEARANCES

After the March 2008 elections, the ZANU-PF leadership, under Robert Mugabe and others, either directly ordered or, at a minimum, allowed groups of ZANU-PF youth and political members, acting on the orders of the military, to commit crimes against members of the MDC and other opposition political parties.¹

Between 200 and 500 unarmed civilians perished as a result of the execution of this policy of politically motivated and targeted killings. Because of the involvement of the state apparatus in these targeted executions, no prosecutions or meaningful investigations have been done. Impunity prevails. For purposes of effective transitional justice and national healing, it is important that investigations into these killings are conducted promptly to ensure that 'as much evidence as possible is obtained that otherwise might degrade or be destroyed in the intervening period'.² The investigations need to obtain as much information as possible concerning the crimes, perpetrators and victims so as to be prepared for the widest possible range of future prosecutions, commissions or panels of inquiry. This is the only way in which the country can break the cycle of impunity that is so necessary for effective transitional justice and national healing.

Enforced disappearances were also a feature of the 2008 violence. In practice, the "act of enforced disappearance typically involves the abduction, arrest or detention of an individual — usually a perceived political opponent — by members of a state sponsored military group, and a deliberate denial by authorities of any knowledge of the victim's arrest, whereabouts, or condition: the individual effectively vanishes."³ According to Wayne Jordash, "enforced disappearances have become increasingly recognised as a crime throughout much of the world. It is considered a crime against humanity and can be prosecuted as one at the International Criminal Court."⁴

Many human rights groups have evidence that suggests that supporters of the MDC were routinely abducted, detained and tortured by individuals associated with ZANU-PF political structures in 2008. In this context, any process of transitional

justice and national healing in Zimbabwe must deal head on with the phenomenon of enforced disappearances so that a new state is built on a national value system that is intolerant of enforced disappearances.

COMMAND RESPONSIBILITY AND JOINT CRIMINAL ENTERPRISE

The political, military and police involvement in the enforced disappearances and extra-judicial executions that were part of a widespread and systematic attack against a civilian population in Zimbabwe constitute a crime against humanity. Human rights groups and communities are therefore encouraged during the documentation of these serious violations to identify the suspected perpetrators, their precise role in the commission of the crimes and attribute roles and responsibility to specific individuals, where appropriate. Those responsible for planning, ordering, instigating, aiding or abetting, or otherwise facilitating the crimes ought not to evade responsibility.

Senior officials can be punished for acts committed by their subordinates that they failed to prevent or punish through command responsibility. According to Jordash, command responsibility holds that just because crimes “were committed by a subordinate... [this]... does not relieve his superior of criminal responsibility if s/he knew or had reason to know that the subordinate was about to commit such acts



or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.”⁵

Jordash argues further that through the principle of joint criminal liability, the prosecution of individuals who act in furtherance of a common plan, design or purpose, which amounts to a crime in international law, is possible.⁶ The individuals can be found guilty of crimes, which emanate from acts committed in furtherance of this agreement.

In the Zimbabwean context, an obvious example of this agreement, arising from the evidence of human rights groups, might be a plan to persecute or terrorise MDC supporters in order to obstruct the elections by the commission of individual crimes such as murder, torture and enforced disappearances amounting to a crime against humanity.

Senior figures that agree on such a criminal objective, but rely upon others to achieve it through the commission of crimes, may still be held accountable for those crimes – providing the evidence demonstrates a nexus between the senior figures, the direct perpetrators and the crimes⁷. For instance, crimes committed by soldiers, who were on ‘leave’, if they were found to have committed crimes in furtherance of the original criminal purpose, may still be crimes for which the senior officials (or enterprise members) could be found guilty. Joint criminal liability is extremely expansive – even crimes which were not part of the original agreement formulated by the senior officials may still give rise to liability if the prosecution can show that they arose from the original plan and were reasonably foreseeable from the pursuit of it.

CONCLUSION

Any process of transitional justice and national healing in Zimbabwe has to be oriented towards the goal of breaking the cycle of impunity rather than obstructing the truth and violating the right to know. This will help to stop the cyclical violence mainly associated with elections. It will also create a basis for Zimbabweans to effectively participate in their civic affairs and be more meaningful members of their communities. If this happens Zimbabwe will fly again. ○

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Endnotes

1. Amnesty International, ‘Post-Election Violence Increases in Zimbabwe’ 17 April 2008 <http://www.amnesty.org/en/news-and-updates/news/post-election-violence-increases-zimbabwe-20080418>; Africa Press International, ‘Army Backs Mugabe’, 20 March 2008 <http://africanpress.wordpress.com/2008/03/20/zimbabwe-army-backs-mugabe/>
2. Wayne Jordash, an international criminal law expert from Doughty Street Chambers, London, UK.
3. Kirsten Anderson, *How Effective is the International Convention for the Protection of all Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?*, (2006) 7(2) *Melbourne Journal of International Law* 245.
4. See for example: OHCHR, *General Comment: Enforced Disappearance as a Crime Against Humanity*, (Citing numerous examples of enforced disappearance as a crime against humanity including: the 1983 Resolution 666 (XIII-O/83) of the General Assembly of the Organization of American States; the 1994 Inter-American Convention on Forced Disappearance of Persons; Article 18 of the 1996 International

- Law Commission draft Code of Crimes Against Peace and Security for Mankind*; Article 7(1) of the *Rome Statute of the International Criminal Court*; the *International Convention on the Protection of All Persons Against Enforced Disappearance* http://www2.ohchr.org/english/issues/disappear/docs/GCAs_crime_against_humanity.pdf;
5. The following authorities discuss Superior Responsibility: *Prosecutor v. Strugar*, Judgment, 31 January 2005, para. 368; *Prosecutor v. Blagojevic & Jokic*, Judgment, 17 January 2005, para. 792.
6. This is, in particular, a reference to the Third Form of Joint Criminal Enterprise utilized at the International Criminal Tribunals. This form of JCE concerns cases involving a common design to pursue one course of criminal conduct where one of the perpetrators commits a criminal act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose as in *Prosecutor v. Tadic*, Judgment, 15 July 1999, para 204.
7. Jordash (*supra*)