the global voice of the legal profession®

Zimbabwe: time for a new approach

September 2011

Report of the International Bar Association's Human Rights Institute (IBAHRI)
Supported by the Open Society Initiative for Southern Africa (OSISA)

This report has been compiled in accordance with the Lund – London Guidelines 2009
(www.factfindingguidelines.org)

International Bar Association
4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
Website: **www.ibanet.org**

Contents

Glossary of Acronyms

ADB	African Development Bank
AIPPA	Access to Information and Protection of Privacy Act
AU	African Union
BAZ	Broadcasting Authority of Zimbabwe
BSA	Broadcasting Services Act
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
COPAC	Constitution Parliamentary Affairs Select Committee
CPEA	Criminal Procedure and Evidence Act
CRC	Convention on the Rights of the Child
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
EU	European Union
GPA	Global Political Agreement
HRW	Human Rights Watch
IBA	International Bar Association
IBAHRI	International Bar Association's Human Rights Institute
ICAB	International Council of Advocates and Barristers
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICG	International Crisis Group
IFIs	International Financial Institutions
JA	Justice of Appeal
JOMIC	Joint Monitoring Committee
JSC	Judicial Service Commission
KP	Kimberley Process

MDC	Movement for Democratic Change
MDC-M	Movement for Democratic Change – Mutambara faction
MDC-T	Movement for Democratic Change – Tsvangirai faction
MIC	Media Information Commission
MP	Member of Parliament
NCA	National Constitutional Assembly
OSISA	Open Society Initiative for Southern Africa
POSA	Public Order and Security Act
RBZ	Reserve Bank of Zimbabwe
RG	Registrar-General
SADC	Southern African Development Community
UN	United Nations
UNDP	United Nations Development Programme
USAID	United States Agency for International Development
WOZA	Women of Zimbabwe Arise
YIDEZ	Youth Initiative for Democracy in Zimbabwe
ZANU-PF	Zimbabwe African National Union-Patriotic Front
ZAPU	Zimbabwe African Peoples Union
ZEC	Zimbabwe Electoral Commission
ZEDERA	Zimbabwe Democracy and Economic Recovery Act
ZELA	Zimbabwe Environmental Lawyers Association
ZESN	Zimbabwe Election Support Network
ZHRC	Zimbabwe Human Rights Commission
ZLHR	Zimbabwe Lawyers for Human Rights
ZMC	Zimbabwe Media Commission

Executive Summary

The International Bar Association's Human Rights Institute (IBAHRI) undertook a fact-finding mission to Zimbabwe to assess the state of the rule of law in the country. Funded by the Open Society Initiative for Southern Africa (OSISA), the IBAHRI delegation went to Johannesburg in South Africa, Harare, Mutare and Bulawayo in Zimbabwe, from 6 to 17 June 2011.

Three years on from the signing of the Global Political Agreement (GPA) it is clear that Zimbabwe remains in crisis. The political environment is gravely polarised and characterised by a resurgence of violence, arrests, intimidation and hate speech, which contradicts the letter and spirit of the GPA. Despite the formation of the Inclusive Government, it is clear that hard-line elements within the Zimbabwe African National Union-Patriotic Front (ZANU-PF) do not wish to share power with their political opponents and are using the control over the state apparatus in a blatantly partisan way. The current conditions are not conducive to a free and fair election.

The IBAHRI believes that all parts of the Inclusive Government should implement the GPA as a matter of urgency and, to this end, cooperate fully with the efforts of the Southern African Development Community (SADC) in its attempts to finalise a 'road map' for its full implementation. This should include human rights and rule of law reforms and reforming the criminal justice system. A new Constitution should protect the rule of law with, among other things, provisions that secure the independence of the judiciary. Consideration should also be given to creating a new top court, perhaps in the form of a constitutional court. The Constitution should also guarantee the genuine independence of a Judicial Service Commission (JSC), which should be responsible for the appointment of all judges using a transparent nominations process against agreed criteria based on merit. A Code of Conduct for judges and magistrates should be introduced providing for, inter alia, full and frank disclosure of the assets of the judges of the High Court and the Supreme Court. The JSC should also have the power to discipline judges. An independent Director of Public Prosecutions (DPP) should be created, removed from the Attorney General's (AG) office. Independence of the DPP from the executive for individual prosecutorial decisions is necessary.

SADC and the African Union (AU) should support the reform process through technical and financial assistance, as well as the deployment of personnel from the region, with the agreement of the parties to the Inclusive Government. SADC should also review the existing legislative agenda to identify GPA reform priorities that have not been addressed, with a focus on enabling conditions for credible elections. It should ensure that the facilitation team's road map recommends a revision of the GPA's internal monitoring and review mechanisms, in particular that: the Joint Monitoring Committee (JOMIC) should have a more active role to deal with cases of political violence, including oversight of investigations by national police and producing regular public reports to the GPA signatories, who in turn should be obliged to respond publicly in writing; and JOMIC reports should provide a basis for the Periodic Review Mechanism's reporting and recommendations.

The United Nations (UN) and the European Union (EU) should remain actively diplomatically engaged in supporting and assisting the efforts of SADC and the AU to facilitate processes and institutions supporting the development of democratic and accountable governance in Zimbabwe. The UN, EU and other donors should support and strengthen Zimbabwean civil society's efforts to

provide coherent, systematic and accurate reports and analysis of violence, including by improving verification methods, identifying priority concerns, developing clear and effective channels of communication and, ultimately, by bringing findings to the attention of local, regional and international policymakers, institutions and media. The EU, United States and United Kingdom governments should discuss with SADC and the AU how and when to suspend all sanctions and other measures imposed on Zimbabwe, pending their ultimate abolition, in return for clear progress in implementing the GPA through reforms of key government institutions and agencies and specific human rights and good governance benchmarks.

International donors should provide effective support for fundamental reforms to the Zimbabwean state, including strengthening judicial independence and institutions such as the Zimbabwe Electoral Commission (ZEC), the Zimbabwe Human Rights Commission (ZHRC), providing appropriate rights-relevant training for the police, and improving the administration and financial auditing of justice institutions. They should also ensure full accountability and transparency in the use of their funds in support of constitution-making so as to create greater confidence in the process.

Introduction

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. Its membership includes over 40,000 lawyers and 203 bar associations and law societies spanning every continent. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. The International Bar Association's Human Rights Institute (IBAHRI) works to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide.

The IBAHRI undertook a fact-finding mission to Zimbabwe in June 2011. The mission assessed the state of the rule of law in Zimbabwe and specifically examined the implementation of the Global Political Agreement (GPA) and its results, in particular, the steps being taken in preparation for the next elections, the constitution-making process – including the outreach process – and the proposed constitutional referendum. The delegation also looked more broadly at issues concerning the independence and needs of the judiciary and the Attorney-General's office, and whether those responsible for crimes committed in relation to the 2008 elections had been brought to justice. The complete terms of reference are provided in Annex A.

The GPA entered into force in September 2009, following the disputed election of 2008, which had resulted in allegations of widespread intimidation and violence and ballot-rigging and over 200 deaths. The main opposition candidate for the presidency, Morgan Tsvangirai ('Prime Minister Tsvangirai' or 'Tsvangirai'), withdrew from the second round of the contest although he was officially recognised as the front-runner in the first round of voting in March and the opposition had gained a clear majority in the parliamentary elections, conducted at the same time. This led to the unopposed re-election of President Robert Mugabe ('Mugabe' or 'President Mugabe') in June. The conduct of the poll was widely condemned and compounded the country's already deep economic problems, leading to a crisis of legitimacy for the Government of Zimbabwe.

The talks which led to the GPA were mediated by the Southern African Development Community (SADC), with South Africa taking the lead. The GPA is a power-sharing agreement, which lays out a framework for a new inclusive government and the drafting of a new constitution, to then be put to a referendum for approval. Its power sharing arrangements are entrenched in Zimbabwe's constitution by the 19th amendment. The GPA also set down a set of agreed principles regarding the principal challenges confronting Zimbabwean society, such as: respect for basic human rights, the land question, sanctions, promotion of national unity, a strengthening of the rule of law and the delivery of humanitarian assistance.

Disputes over the implementation of the GPA continue and are described in more detail in Section One of this report. At the time of the delegation visit, some members of Mugabe's Zimbabwean African National People's Union-Patriotic Front (ZANU-PF) were arguing for early elections, which could bring an end to the Inclusive Government, even without an agreement on a new constitution. They also linked cooperation on the other reforms envisaged in the GPA to the removal of targeted international sanctions against their senior leadership.

In assessing the GPA and the problems with its implementation, the delegation considered the role played by the international community, in particular the SADC institutions, the African Union (AU) and foreign states and donors in monitoring the GPA and restoring the rule of law in Zimbabwe and how this could be improved. It also considered the impact that the recent discovery of a large seam of diamonds has had on the rule of law, human rights and political process in Zimbabwe

The delegation sought to meet members of the all the political parties, senior members of the judiciary and government officials as well as members of civil society and the staff of embassies and international organisations. The mission included a number of meetings with senior figures from ZANU-PF and both factions of the Movement for Democratic Change (MDC). The delegation hopes that the wide range of views expressed to it is reflected in this report, which aims to provide a balanced and objective picture of events. The delegation would like to thank everyone that it met and hopes that this report can be used to facilitate future dialogue.

The mission

The IBAHRI appointed a delegation of legal experts who conducted a fact-finding mission in Zimbabwe from 6 to 17 June 2011. The delegation consisted of former High Court Justice Unity Dow from Botswana, who acted as the head of the delegation; Advocate Pansy Tlakula, Chief Electoral Officer of South Africa; Professor Bartram Brown, Professor of human rights and international law at Chicago-Kent College of Law, Illinois Institute of Technology, in Chicago, USA; Daniel Leader, Barrister at Leigh & Day in London; Professor Christina Murray, professor of constitutional and human rights law at University of Cape Town and former member of the Kenyan Committee of Experts appointed by the Kenyan Parliament to draft a new Kenyan Constitution; Marie-Pierre Olivier, Senior Programme Lawyer at the IBAHRI; and Conor Foley, humanitarian aid worker and author, who also acted as rapporteur for the delegation.

The delegation visited Harare, Mutare and Bulawayo in Zimbabwe and also held meetings in Johannesburg, South Africa. The mission was funded by the Open Society Initiative for Southern Africa (OSISA) and has been conducted in accordance with the Lund-London Guidelines 2009 (**www.factfindingguidelines.org**).

Section One: The Global Political Agreement

Historical background, context and results

Most of the differences that the IBAHRI delegation encountered in discussions about Zimbabwe's future revolved around different interpretations of its recent past and, in particular, the circumstances that led to the adoption of the GPA in the aftermath of the 2008 elections. This was a landmark agreement which will have significant implications for the future of Zimbabwe and needs to be set in a brief historical context.[1]

President Mugabe came to power in 1980 after a UK-brokered agreement ended a protracted guerrilla war against the racist white minority government of Ian Smith. The new government was initially viewed as moderate and pragmatic. Mugabe said he intended to 'draw a line through the past, in the interests of national reconciliation'.[2] His government took an incremental approach to land reform and invested heavily in the country's education and health sectors. It was less tolerant, however, towards political dissent.

By 1987, Zimbabwe was a de facto one-party state, under ZANU-PF, after the forced merger of its rival Zimbabwe African Peoples Union (ZAPU), whose base was primarily amongst the minority Ndebele population in Matabeleland and the Midlands. Human rights organisations have documented a campaign of considerable violence and serious abuses committed against ZAPU supporters and ordinary civilians by Zimbabwe's security forces. Thousands of people are estimated to have been killed during these operations.[3] Violence also accompanied the forcible acquisition of mostly white-owned farms by ZANU-PF 'war veterans' – beginning in the 1990s – and this led to a deepening economic crisis as agricultural production, Zimbabwe's main source of exports, dropped dramatically.

In early 2000, Mugabe lost a referendum on a constitution. This led to a further spike in violence as ZANU-PF supporters and 'war veterans' cracked down on opposition activists and stepped up farm invasions. Judges who opposed this, and other, government policies began to be forced out of office. Inflation and unemployment soared and shortages of basic commodities increased. Public sector salaries dramatically declined in value and allegations of corruption against state officials mounted. Zimbabwe became increasingly diplomatically isolated internationally. Meanwhile the government's domestic policies, such as the forcible clearing of slum areas in Operation Murambatsvina in 2005, which displaced an estimated 700,000 people from their homes and means of livelihood, aroused widespread domestic opposition, particularly in urban areas.

A new opposition party, the MDC, contested the parliamentary elections in 2000 and attracted growing support in the elections of 2002 and 2005. These elections were marked by well-documented instances of violence and intimidation as well as manipulation of the electoral process by the

1 ICG, 'Zimbabwe: the road to reform or another dead end?' Africa Report No 173 (ICG, 27 April 2011).

2 See: Heidi Holland, *Dinner with Mugabe: The Untold Story of a Freedom Fighter Who Became a Tyrant* (Penguin Books, Johannesburg 2008).

3 For details see: 'Gukurahundi in Zimbabwe, a report on the disturbances in Matabeleland and the Midlands 1980–1988', The Catholic Community for Justice and Peace in Zimbabwe and the Legal Resources Foundation (2011).

governing party.[4] The MDC split in November 2005 over whether to boycott elections for the Senate, Zimbabwe's second chamber. The main faction, led by Tsvangirai, is now referred to as MDC-T while the rival faction, led by Arthur Mutambara, became known as MDC-M.

Further violence followed after opposition groups attempted to hold a 'prayer meeting' in Harare on 11 March 2007. The gathering was banned and a large number of people were arrested and allegedly tortured in police custody. One opposition activist was shot dead by the police. Tsvangirai emerged from police custody with a fractured skull and said that his head had been repeatedly smashed against a wall and that he had been whipped, kicked and beaten with sticks for three days and nights. Sekai Holland, a 66-year-old grandmother and MDC activist, suffered multiple fractures in police custody and was unable to walk for several months. President Mugabe told a ZANU-PF rally shortly after the incident that 'of course he [Tsvangirai] was bashed. He deserved it... I told the police to beat him'.[5] Zimbabwe Lawyers for Human Rights documented 459 cases of human rights violations over the next three months and 944 politically-motivated arrests that took place during the course of the year.[6]

In response to this escalating crisis, the SADC mandated the then-South African President Thabo Mbeki to mediate between the ZANU-PF government and the two MDC formations, aiming to secure a new constitution and conditions for free and fair elections. These talks led to an agreement on a package of reforms, which were incorporated into the 18th amendment to Zimbabwe's constitution. They altered the size and formation of Zimbabwe's parliament, abolished the President's right to appoint 20 per cent of the members of the House of Assembly, created independent Electoral and Human Rights Commissions, and set out a fairer framework for defining constituency boundaries.[7] They also provided for the counting of ballot papers at polling stations and the announcement of results at each station.[8]

The intention of the talks was to create an environment conducive to a free and fair election, which the opposition parties otherwise threatened to boycott. Changes were made to the Electoral Act, the Zimbabwe Electoral Commission Act, the Access to Information and Protection of Privacy Act (AIPPA), the Broadcasting Services Act (BSA) and the Public Order and Security Act (POSA), although some human rights groups have questioned the significance of these measures.[9]

Talks stalled in January 2008 when Mugabe, facing pressure from within his own party, called a combined presidential and parliamentary election for 29 March 2008. The MDC formations initially considered boycotting this poll. They argued that the campaign of violence and intimidation against their supporters would make campaigning difficult, and that fresh presidential elections should be postponed until a new constitution was adopted. However, the MDC-T actually polled extremely well, winning more parliamentary seats than ZANU-PF and making unprecedented gains in rural areas, the traditional stronghold of ZANU-PF.

Tsvangirai also claimed to have won an outright victory in the first round of voting for the presidency, using an unofficial tally of the total number of votes he had secured in each polling station. However,

4 Human Rights Watch (HRW), 'Perpetual Fear: Impunity and Cycles of Violence in Zimbabwe' (HRW, March 2011).

5 HRW, '"Our Hands Are Tied", Erosion of the Rule of Law in Zimbabwe' (HRW, November 2008) p 25.

6 Roselyn Hanzi, 'Zimbabwe, geared up for another election?' Zimbabwe Lawyers for Human Rights (2010), p 18.

7 Constitution of Zimbabwe Amendment (No 18) Act, 2007.

8 Philip Barclay, *Zimbabwe years of Hope and Despair* (Bloomsbury, London 2010), pp 24–26.

9 See note 6, above, p 3.

after a six-week delay, the Zimbabwe Electoral Commission (ZEC) announced that he had polled 47.9 per cent of the vote to Mugabe's 43.2 per cent meaning that the voting went to a second round. The campaign for the second round was marked by a level of violence that was unprecedented even by the standards of previous elections in Zimbabwe.[10] Five days before polling day, Tsvangirai withdrew, leaving Mugabe to win an unopposed re-election in June 2008 and claim his sixth uninterrupted term in office.

Amid rising international condemnation, talks between ZANU-PF and the two MDC formations began again on 24 July under the mediation of South African President Mbeki. After stop-start negotiations, the GPA, a power-sharing deal, was eventually signed on 15 September 2008. It created an inclusive government, whereby Mugabe remained President and Tsvangirai became Prime Minister, with Vice Presidents drawn from all three parties.[11] Under the GPA, the Cabinet was also to include ministers drawn from the main parties and the Prime Minister was to be consulted on all appointments to public office made by the President. The GPA stated that this new government should embark on a series of reforms, described below. The key elements of the power-sharing agreement were incorporated into the Constitution by the 19th Amendment.[12]

The Inclusive Government was not in fact formed until February 2009, amidst considerable bitterness and accusations of bad faith among the parties to the agreement. The MDC formations have repeatedly complained about the ongoing arrest, detention and prosecution of their members, on what they state are spurious charges. They also accuse ZANU-PF of deliberately obstructing full implementation of the GPA, failing to enact agreed reforms and continuing to rely on violence and intimidation. ZANU-PF supporters reply that MDC members are themselves guilty of violence and that the continued imposition of sanctions on Zimbabwe is in violation of the agreement. They state that MDC supporters have failed to back the campaign for the lifting of these sanctions.

Some of the charges and counter-charges are examined in greater detail later in this report. However, the continued existence of the Inclusive Government may itself be considered a significant and tangible achievement of the GPA. A number of MDC Ministers that the delegation spoke to noted that, despite all the difficulties, they had been able to find significant common ground with their ZANU-PF counterparts while carrying out many of their day-to-day ministerial responsibilities. The delegation was repeatedly told that the real success, or otherwise, of the GPA will be the extent to which it is able to create an 'enabling environment' for reforms.

With the exception of the provisions incorporated in the Constitution of Zimbabwe by the 19th Amendment, the GPA has no legal status, but instead contains a series of declarations of intent agreed by its signatories. The most important of these are for the restoration of economic stability and growth (Article II); the 'Land Question' (Article V); the drafting of a new Constitution (Article VI); the promotion of equality, national healing, cohesion and unity (Article VII); freedom of assembly and association (Article XII); security of persons and prevention of violence (Article XVII); freedom

10 See, for example, Human Rights Watch: '"Bullets for Each of You": State-Sponsored Violence since Zimbabwe's March 29 Elections' HRW (June 2008); '"They Beat Me like a Dog": Political Persecution of Opposition Activists and Supporters in Zimbabwe' HRW (August 2008); see note 5, above.

11 Mutambara, who stepped down as MDC-M leader in December 2010, was Vice-Prime Minister and has now been replaced by Professor Welshman Ncube, elected as leader of the MDC-M in January 2011 – although Mutambara is contesting this result.

12 Act No 1 of 2009, *To amend the Constitution of Zimbabwe,* published in the Government Gazette Extraordinary of 13 February 2009 (General Notice 7A of 2009), Date of commencement: 13 February 2009.

of expression and communication (Article XIX); the framework for a new government (Article XX); and implementation measures (Article XXI).[13]

The decision by the two MDC formations to accept the GPA and enter a power-sharing government was controversial and remains the subject of considerable discussion. Many people with whom the delegation spoke, noted the weakness of ZANU-PF at the time the GPA was concluded and felt that the opposition should have held out either for a better deal or the complete removal of Mugabe from office. Even those who agreed with the principle of a compromise felt that the GPA contains significant weaknesses, which have negatively impacted on the political environment since. Many observers believe that the GPA bought Mugabe a breathing space at the moment that he was under greatest pressure and that he has subsequently adopted a deliberate policy of provoking the MDC-T to abandon the agreement and the Inclusive Government – through, for example, the repeated imprisonment of its leading members on dubious charges – so that they can be presented as the political 'spoilers'.

On the other hand, it was widely acknowledged that the political and economic environment has improved markedly since the signing of the GPA. Violence declined from its 2008 peak and the number of arrests and detention also dropped dramatically – although the trend started to increase again in late 2010 and early 2011. More than 20 print media outlets have been allowed to register, including two new daily newspapers which take an independent and critical stance towards the current government.[14] Civil society groups have more freedom to campaign and it has reportedly become easier to obtain permission to hold political rallies. Although there are worrying signs that the repression and violence could return once a new election campaign begins, some people whom the delegation spoke to felt that it was important to acknowledge the improvements.

It has also been widely reported that there are serious internal differences emerging within ZANU-PF about its political future after Mugabe, who is 87-years-old and visibly frail, steps down from office. Some ZANU-PF members spoke openly to the delegation about the need for a new president. ZANU-PF appears to be deeply divided on how to handle the transition with a moderate faction appearing ready to implement the GPA and continue to work within the Inclusive Government, while hard-liners prefer a return to confrontation and international isolation. The relative strength of these factions is difficult to judge.

The Zimbabwean economy has also stabilised since the GPA. In March 2009, the Inclusive Government published a document entitled Short Term Emergency Recovery Programme, an emergency short term stabilisation programme intended as part of the implementation of the GPA 'whose key goals are to stabilise the macro and micro-economy, recover the levels of savings, investment and growth, and lay the basis of a more transformative mid term to long term economic programme that will turn Zimbabwe into a progressive developmental State'.[15] Inflation has subsequently fallen and economic growth revived.

---

13 *Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement of Democratic Change (MDC) Formations, on resolving the challenges facing Zimbabwe* ('the Global Political Agreement' or GPA), 15 September 2008.

14 Interview conducted, Harare, 14 June 1011.

15 Short Term Emergency Recovery Programme, para 6.

A large part of this improvement is due to the abandonment of Zimbabwe's own inflation-debased currency and the adoption of the US dollar. Political instability, lack of security of tenure and concern about property rights have long hindered foreign investment in Zimbabwe. ZANU-PF's indigenisation policies, which have not been reversed by the Inclusive Government, also create a very uncertain investment climate.[16] However, as Elton Mangoma, an MDC-T member and Minister for Energy and Power Development, pointed out to the delegation, the current economic situation in Zimbabwe is far more favourable than it has been for many years. He argued that dollarisation has created a zero-risk foreign exchange and, if investors are prepared to take advantage of the country's highly educated population and vast natural resources, they could create a virtuous cycle of economic growth and development. [17] This could, in turn, help the political reform process.

The African Development Bank (ADB) re-opened its office in Harare in March 2011, stating that its field presence in Zimbabwe would enable the ADB to be part of the collective donors' dialogue in the country and to provide advice and support to the coalition government.[18] The rising global price of commodities creates a good climate for economic growth and the GPA's power-sharing arrangements mean that donors can have greater confidence that at least some government ministries can be trusted with greater direct budget support.

The GPA also sets out a framework against which the efforts of the Inclusive Government to achieve political reform can be assessed. Since all three political parties have signed up to this reform package, it provides an objective basis for measuring the reform process. Although there have been disputes about the interpretation of some of its provisions, subsequent SADC summit meetings have helped to provide a framework within which areas of agreement and disagreement can be aired. Progress has nonetheless been slow, and it was only while the delegation was in the country, some 34 months after the GPA was signed and under considerable pressure from the chief SADC negotiator, South Africa's President Zuma, that it was agreed to put times on a road map for implementation of the GPA at the SADC summit of Sandton.

Political participation and preparations for the next elections

It is widely agreed that free and fair elections require an environment in which basic rights to take part in the political process are upheld. Amongst the most important of these are: freedom of assembly and association; freedom of expression and information; the full participation of citizens in the political process; an equal opportunity for all to exercise their right to vote and be voted for; the independence and impartiality of electoral institutions; and the legal ability to challenge the election results. These principles have been set out in SADC's Principles and Guidelines to Democratic Elections, and elsewhere.[19]

16 The Indigenization and Economic Empowerment Act 2007 aims to transfer over 50 per cent of all the businesses in the country into local black African hands. The Act defines an indigenous Zimbabwean as 'any person who before the 18th of April, 1980, was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person'. The MDC had opposed the Indigenization and Economic Empowerment Bill in Parliament saying it was simply an electoral ploy by ZANU-PF. Other critics have argued that the law would only bring money to a few elite Zimbabweans instead of to the mass of impoverished locals that ZANU-PF claims the law will benefit.

17 Interview conducted, Harare, 9 June 2011.

18 *African Development Bank Group*, 'AfDB Publishes Infrastructure Action Plan for Zimbabwe' (25 March 2011) available at: **www.afdb.org/en/news-and-events/article/afdb-publishes-infrastructure-action-plan-for-zimbabwe-7864**/.

19 Available at: **www.sadc.int/index/browse/page/117**.

The GPA specifies the importance of upholding rights to freedom of assembly and association, and freedom of expression and communication.[20] It states that 'there should be free political activity throughout Zimbabwe within the ambit of the law in which all political parties are able to propagate their views and canvass for support, free of harassment and intimidation'.[21] It also acknowledges that 'state organs and institutions do not belong to any political party and should be impartial in the discharge of their duties'.[22] It calls for the government to undertake human rights training programmes, workshops and meetings for the police and other enforcement agencies to help them understand these provisions and of their roles and duties in a multi-party democratic system.[23] It states police recruitment policies and practices should be conducted in a manner that ensures that no political or other form of favouritism is practised.[24] It also states that the government should begin to license independent broadcast media stations.[25]

Although there has been some limited progress towards these objectives, principally through the creation of new institutions which is described below, many people that the delegation spoke to stated that the conditions for a free and fair election do not currently exist in Zimbabwe. While there have been some legislative improvements, these do not fully comply with international and regional standards and the delegation believes that they fail to deal adequately with the serious concerns expressed about the previous conduct of elections in Zimbabwe. Most seriously the IBAHRI believes that even the best-crafted laws and institutions will not be able to guarantee free and fair elections unless they are presided over by professional and politically neutral law enforcement agencies and prosecuting authorities. As is discussed in Section Two of this report, until the rule of law is properly and impartially upheld in Zimbabwe, it cannot claim to be a properly functioning democracy and free and fair elections will not be possible.

Amongst the positive developments, the IBAHRI notes that the creation of the Zimbabwe Media Commission (ZMC) in March 2010, is a step towards fulfilling the commitments contained within the GPA and Zimbabwe's own constitution. The ZMC was created by an amendment to the AIPPA, which reconstituted the controversial Media Information Commission (MIC), previously criticised by civil society groups for presiding over significant restrictions of media freedom in Zimbabwe. Between 2003 and 2008 the MIC shut down two privately-owned radio stations and four national newspapers using the provisions of the BSA and the AIPPA respectively. [26] These closures are currently being challenged before the African Commission on Human and Peoples' Rights.[27]

Appointments to the MIC were made by the Minister for Information and Publicity, after consultation with the President. Under the new system, the President, in consultation with the Prime Minister, appoints the ZMC's nine members directly from a shortlist of 12 names drawn up by a Parliamentary Committee.[28] While some civil society groups expressed concern that this continues to compromise the independence of its members, the Parliamentary Committee seems to have approached its task

20 GPA, Article XIX.

21 *Ibid*, Article X.

22 *Ibid*, Article XIII, 13.1.

23 *Ibid*, Articles XII, 12.1(b) and Article XIII, 13.2(a).

24 *Ibid*, Article XIII, 13.2(d).

25 *Ibid*, Article XIX.

26 See note 6, above, p 25.

27 *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v the Government of Zimbabwe, Communication* 283/2003 ACHPR.

28 AIPPA, section 38(2), as amended 2008.

of interviewing potential commissioners in a serious manner and tried to recommend appointments based on merit.

The requirement in the GPA, that the Prime Minister must agree to public appointments made by the President, seems to have ensured that there is an unofficial agreement that appointment to such public bodies will be balanced between the three parties. This still centralises an unhealthy amount of power in the executive, and the political balance achieved is entirely dependent on the continuation of the Inclusive Government. Nevertheless, the delegation was impressed with the way in which the new ZMC has gone about its work. It has licensed over 20 new publications, including two national daily newspapers, adding a much-needed pluralism to Zimbabwe's print media. The delegation was particularly interested to learn that ZMC has set out to issue as many licences as possible – with an approximate 98 per cent approval rate – and that almost all of its decisions have been unanimous, indicating a far higher degree of political cooperation than many would have thought possible.[29]

However, the Broadcasting Authority of Zimbabwe (BAZ) is still refusing to register new broadcasters for either radio or television and the government ministries responsible are not making use of the country's potential bandwidth to increase media diversity. Short wave frequencies used by radio stations outside Zimbabwe are regularly jammed and scrambled by the state authorities. They are also regularly referred to as 'pirate' and 'enemy' radio stations by both government ministers and sections of the media.[30] Recently, after a legal challenge to the BAZ's continuing refusal to issue new licences was launched, it published advertisements inviting tenders for two new national commercial broadcasters. Although this may increase consumer choice, the authority continues to refuse to license new community radio stations, which would genuinely increase freedom of expression by providing more space for different political opinions.[31] ZANU-PF supporters respond that foreign stations still broadcast into Zimbabwe, which they argue, is a breach of the GPA.

The public broadcasters still aggressively promote ZANU-PF in their coverage, which is extremely skewed against other political parties. The AIPPA and the Criminal Code[32] contain vague criminal defamation clauses, which impose severe penalties, including prison terms, on journalists and editors. Both the AIPPA and the BSA also restrict registration of media outlets to those owned by Zimbabwean nationals, which, particularly given the increasingly stringent requirements of the country's citizenship laws, significantly narrow freedom of expression rights in the country.

The delegation also met with members of the Zimbabwe Electoral Commission (ZEC) and was impressed by the professionalism and impartiality of the commissioners that it interviewed.[33] These had been appointed through a similar process to that used for the ZMC and it appears that the current system is being used to create some pluralist and independent-minded bodies. The ZEC reports to the Minister of Justice and Legal Affairs (the 'Justice Minister'), who is a ZANU-PF member, and in response to a recent request from him about the timeframe for an election, it had produced a detailed planning schedule, which said that it would take 15 months to organise one, noting that the electoral register, in particular, will need to be substantially updated. This led the Justice Minister to

29 Interview, Harare, 14 June 2011.

30 See note 6, above, p 24.

31 Interviews, Bulawayo and Harare, 13 and 14 June 2011.

32 Criminal Law (Codification and Reform) Act (Chapter 9:23), Act 23/2004.

33 Interviews, Harare, 14 and 16 June 2011.

declare that it would not be possible to hold an election this year, angering other ZANU-PF members who have been campaigning for early elections and an end to the Inclusive Government.

The commissioners that the delegation spoke to said that the Justice Minister was supportive of the principle that the ZEC should exercise its powers in an independent manner. They also defended the professional impartiality of their staff, some of whom have been vigorously criticised by some civil society groups because they are former army intelligence officers. They stated that, while it was difficult for any Zimbabwean not to have political opinions, all commissioners and staff were required to resign from any parties that they were a member of and behave in a politically neutral manner at all times.

The commissioners outlined a number of proposed reforms that are supposed to deal with violence and intimidation during election campaigns. After elections are called the police chief must, in consultation with the Zimbabwe Human Rights Commission (ZHRC), appoint a senior police officer for each provincial centre to act as a liaison and investigations officer on political violence in that district. Committees will be established in each province which will be chaired by the ZHRC and will consist of the police liaison officers and representatives of parties contesting the elections. Special police units will also be established to carry out prompt investigations. The ZEC, the ZHRC and the liaison committees will be able to refer cases of political violence to the police and accompany the police during their investigations. Special prosecutors and magistrates will also be created to deal with such cases. The Joint Monitoring and Implementation Committee (JOMIC) of the GPA will also set up a hotline to receive information about incidents of political violence and will be able to refer cases to the police.

The commissioners stated that for such measures to succeed, professional intervention by politically neutral law enforcement agencies and prosecuting authorities was required, and that the international community had an important role to play here in providing financial, technical and moral support. The decision by SADC to appoint three persons to JOMIC was seen as extremely important and they hoped that SADC would also deploy election monitors – rather than simply observers – who would come well in advance of the elections and have full access to all the preparations for them. The commissioners also noted that they had received only a small fraction of the budget that they believed would be necessary in order to conduct a proper election.

As a government body the ZEC was ineligible to receive direct support from a number of foreign donors whose governments are currently applying sanctions against Zimbabwe. A funding mechanism had been established via the UN Development Programme (UNDP) to pay the costs that the ZEC incurred for some of its capacity-building activities – such as booking rooms for training or paying for vehicle costs or printing. This is a cumbersome and bureaucratic means of providing technical support.[34] Some of these issues are discussed further in Section Four of this report.

The delegation also discussed the election and ZEC's role in it with a number of civil society groups. All agreed that the ZEC was under-resourced and its financial independence had to be constitutionally protected. Some felt that its independence had to be strengthened by making it accountable to parliament instead of the executive. Many said it needed to be reformed as well – citing the fact that its secretariat was largely unchanged since the 2008 election and included former army and security

34 *Ibid.*

service personnel. They also stated that the electoral register was widely inaccurate, and between 30 and 40 per cent of the names on it are invalid. They stated that while the ZEC Commissioners did appear to be approaching their task in a neutral and independent way, concerns remained about the bias of the office of the Registrar-General (RG) who would be directly administering much of the polling process. They also amplified the concerns that others had expressed about freedom of expression. It was repeatedly emphasised that without effective measures to uphold the rule of law, prevent violence and intimidation and end the campaign of politically-motivated arrests and detentions, the conditions for a free and fair election do not currently exist in Zimbabwe.[35]

The constitutional review process

The GPA spells out a procedure for drafting a new constitution to replace the present independence-era constitution adopted in 1980. The current constitution ('the Constitution') arose out of the Lancaster House agreement the previous year, which paved the way for independence and majority rule. It introduced a parliamentary system of government with a bicameral Parliament and a non-executive presidency. Executive authority was vested in the Prime Minister and his (or her) Cabinet. The Constitution included provisions, such as the protection of property rights and special representation in Parliament for the white population, which could not be amended for at least ten years. The provisions relating to property were meant to protect the minority white farmers from compulsory acquisition of land and were widely resented by the majority black population.

In 1987, the Constitution was amended to provide for a presidential system of government. The President was to be directly elected and to have increased powers, while the Prime Minister took on a subordinate role. The Senate was also abolished on the grounds that it was expensive and that it slowed down the legislative process.[36]

Since then, ZANU-PF used its complete dominance of Zimbabwe's Parliament to introduce a further series of constitutional amendments, the cumulative effect of which was to significantly increase the powers of a powerful, executive presidency.

There is widespread agreement on the need for a new constitutional settlement, although there are considerable differences about its form. In 1999, Mugabe established a Constitutional Commission, which produced proposals for a new constitution.[37] However, this draft was defeated in a national referendum in 2000. The NGO/civil society-based National Constitutional Assembly (NCA) then published its own Draft Constitution in 2001, with considerably more checks and balances on executive power and entrenched human rights for the people of Zimbabwe. A number of the NCA's leading members were subsequently involved in the formation of the MDC.

In 2007, members of Zimbabwe's three main political parties met in secret and negotiated, wrote and signed what is now known as the Kariba Draft Constitution (the 'Kariba Draft'). This draft has been strongly criticised by civil society groups, including the NCA, for granting the executive sweeping unchecked powers.[38] For example, the Kariba Draft essentially preserves the President's power

35 Interviews conducted Johannesburg, Harare and Bulawayo, 6–17 June 2011.

36 The Senate was reintroduced in 2005.

37 See John Hatchard, 'Some Lessons on Constitution-making from Zimbabwe' Journal of African Law (2001) Vol 45 No 2, p 210.

38 See for instance, National Constitutional Assembly 'Know the Kariba Draft' (26 April 2009): **www.ncazimbabwe.info/index.php?option=com_content&task=view&id=177&Itemid=31**.

over the judiciary; retains the President's power to dissolve or prorogue Parliament; and gives the President an unfettered discretion in appointing the chief of police among other senior officials. Moreover, its provisions on agricultural land are the same as those in the current Constitution which were found to contravene the rule of law by the SADC tribunal.[39] Nevertheless, both ZANU-PF and the MDC appear to regard it as a possible model. The GPA specifically refers to the Kariba Draft in its section on constitutional reform and observers fear that, despite a process of public participation, it will form the basis of a new constitution.

The GPA declares that it is 'determined to create conditions for our people to write a constitution for themselves' and that 'the process of making this constitution must be owned and driven by the people and must be inclusive and democratic.'[40] Accordingly, it sets out the process by which a new constitution is to be drafted which includes public consultation: First, a multiparty Constitution Parliamentary Affairs Select Committee (COPAC) is to produce a draft constitution in a process including two 'stake-holder' conferences, the first to discuss process and the second to discuss the draft itself, and a general public consultation process; secondly, Parliament is to debate the draft; thirdly, a referendum is to be held; and fourthly, if the draft is approved in the referendum, it is to be submitted to Parliament (presumably for final approval).

Despite the detail in the GPA, there is no guarantee that a constitution approved in a referendum will be adopted. The GPA expects the draft that emerges from the COPAC process to be debated in Parliament before being submitted to the referendum. This suggests that it will be presented to the people only once it has been approved by Parliament. However, if it is approved in the referendum, it is to be returned to Parliament. Under the current Constitution, to amend (or replace) the current constitution, the draft would have to be passed by a two-thirds majority of each House. The best reading of this process is that the draft approved in the referendum could not be amended by Parliament but only passed by the majority stipulated in the current Constitution or rejected. Nonetheless, the unconventional process of giving Parliament another say after public approval creates an opportunity for manipulation of the draft which was agreed upon. This is not unprecedented in the world of constitution-making.

Moreover, there has been considerable slippage in the timelines set out in the GPA. COPAC was not established until April 2009, and the constitutional outreach process only started in June 2010 after widely-publicised disputes about funding, including the allowances of COPAC members. The constitutional outreach programme was completed in January 2011 and a target date of 30 September 2011 was set for the referendum. However, few people that the delegation spoke to believed that this deadline would be met and it seems unlikely that the referendum will take place before 2012. According to the new targets set by COPAC in August 2011, drafting is due to start on 22 August 2011 and the referendum should take place in January 2012.[41]

The main concerns which were expressed to the delegation on the constitution-making process focused on the outreach process, which it was widely agreed had been disorganised at best and sometimes chaotic and violent. The first all-stake-holders conference in July 2009 was considerably

39 *Mike Campbell (PvT) Ltd v Republic of Zimbabwe* [2007] SADCT 1: **www.saflii.org/sa/cases/SADCT/2007/1.rtf**.

40 GPA, Article VI.

41 Rebecca Moyo, 'Jan Referendum', *The Zimbabwean* (3 August 2011) available at: **www.thezimbabwean.co.uk/human-rights/51454/jan-referendum.html**.

disrupted by ZANU-PF supporters.[42] It was also alleged that some of the parties – particularly ZANU-PF – had coached their supporters on demands to raise during the public consultation meetings and also deliberately set out to intimidate other people from speaking out during these meetings. ZANU-PF deny any intimidation or coaching, although the pro-ZANU-PF newspaper, *The Herald*, carries regular, approving stories of 'spontaneous' heckling and disruption of activities by MDC's leaders at public events.[43]

ZANU-PF argues that the results of the outreach process show that the majority of Zimbabweans back their vision of a constitution, which continues to vest most power in a centralised presidency and retains the current policies of land reform and indigenisation. MDC supporters counter that ZANU-PF's centrally controlled campaign of intimidation during the outreach process – codenamed *Operation Shut Your Mouth* – means that a quantitative compilation of the responses given provides a misleading picture of public opinion. They also argue that the results of the consultation process were skewed since far more meetings had taken place in rural areas which are ZANU-PF's traditional strongholds of support than the urban areas where the MDC's main support lies.

Eric Matinenga ('Minister Matinenga'), an MDC-T member and the Minister for Constitutional and Parliamentary Affairs, told the delegation that the constitution-making process had got off to a bad start, but he believed that establishment of a management committee had helped to move the process forward. [44] He stated that the parties had agreed on three independent drafters and each party would also be nominating five of their own supporters to take part in the process. He hoped the drafting process would begin in early July and predicted that it would take four to eight weeks, although he noted that other such deadlines had been missed in the past.[45]

Once a draft is agreed between the parties it will go before a second stakeholders conference and then to Parliament for consideration. Minister Matinenga suggested that this process would be unlikely to change the draft substantially – since there would have to be prior agreement amongst the different drafters for the draft to emerge – and so he envisaged that this process would be quite short and a referendum could be held shortly afterwards. He said that the process was unlikely to be finished by the end of the year but that 'it would be a bonus if this could be achieved.' He also said that while the conditions surrounding the process had been far from ideal, it had been 'an important step in the democratization of Zimbabwe'. Like other Zimbabweans, he noted that it had led to the development of more constructive relationships between ZANU-PF and the MDC formations and some sense of joint-ownership over the project. [46]

Similar points were made to the delegation by Douglas Mwonzora, one of the COPAC Co-Chairs. Like Minister Matinenga, he was also a member of MDC-T and has also faced arrest and detention since the 2008 election. He stated that one of the reasons for the slippage of the time-lines in the process was due to the 'continuing harassment of MDC members by the police,' noting that he had spent almost a month in prison earlier this year, time he would otherwise have spent working on the

---

42 Civil Society Monitoring Mechanism, *Annual Review of the Performance of the Inclusive Government of Zimbabwe, February 2010–February 2011*, (Zimbabwe Lawyers for Human Rights, 2011), p 14.

43 For example, the Herald newspaper gave prominence to the drowning out of a speech by Tsvangirai at the funeral or a former guerrilla leader in June 2011.

44 Interview, Harare, 9 June 2011.

45 According to timeline announced in August 2011, drafting is due to start on 22 August 2011. See Rebecca Moyo, 'Jan Referendum', note 41, above.

46 Interview, Harare, 9 June 2011.

process outlined in the GPA. He said that sometimes the media manufactured differences which simply did not exist, giving as an example a fictitious report from the state-run media that a routine three day delay in the process had been caused by an MDC insistence on inserting a reference to lesbians and gays in the constitution. He was also optimistic that an agreement could be reached, but pointed out that as well as the political difficulties encountered, COPAC was suffering from chronic funding problems. A number of Western donors refuse to fund it directly, because it is a part of the Zimbabwean State, and although UNDP has provided it with some indirect support – similar to that provided for the ZEC – the process is similarly cumbersome and bureaucratic and it had significantly impacted on COPAC's efforts, particularly during the outreach process.[47]

The delegation discussed the constitutional review process with a large number of stakeholders during the mission and, as noted above, received a variety of different opinions about it. Most civil society groups criticised the lack of transparency and some were overtly hostile to the document that may result. In particular, the NCA has strongly criticised both the way in which the parties to the GPA have approached the constitution-making process and the Kariba Draft which it believes will influence the outcome. Its leadership has repeated demands first made in 1997, for a truly 'people-driven process', and told the delegation that the NCA is prepared to campaign against the draft in a referendum even if it is supported by the two MDC parties.[48] However, this position is not unanimously backed by other civil society groups, which are waiting to see the new draft before deciding whether or not to support it.

The MDC politicians to whom the delegation spoke argued that while the draft which emerges from the current process may not be ideal, it should be supported if it contains significant improvements on the current Constitution. Prime Minister Tsvangirai was emphatic on this in his meeting with the delegation[49] arguing that 'any improvement on the status quo is welcomed, even the constitution with its limitations. It can be improved with time.'

Some argued that it was naïve to believe that a perfect constitution could be negotiated in current conditions and so the document that emerged should be regarded as a transitional one. Echoing a report in the press, one of the MDC-T negotiators in the constitution-making process stated that his party would make further constitutional reform a manifesto commitment for the next general election. However, Prime Minister Tsvangirai's position on this was less clear[50] and others, outside government, maintained that, whatever the outcome of the elections, the new governing party would probably be unwilling to surrender the powers that the constitution gives them and expressed considerable mistrust that the MDC would be willing to draw up a new constitution if they were actually to win an election outright. Certainly none of the senior MDC members with whom the delegation discussed the constitution-making process were prepared to consider following the South African model of formally identifying the new constitution as transitional and including in it a process for replacing it after the elections.

47 *Ibid*, 14 June 2011. See also, ICG (2011), p 15

48 Interview, Harare, 9 June 2011

49 *Ibid*, 15 June 2011.

50 *Ibid*.

Prime Minister Tsvangirai also supported this position in his meeting with the delegation.[51] He said that that 80 per cent of what should go in the document was agreed, but that the 15–20 per cent that remained included some fundamental issues, such as: the death penalty; the land question; abortion; the role of chiefs; powers of the President; and citizenship.

51 *Ibid.*

Section Two: Rule Of Law

Independence and needs of the judiciary

The judiciary in Zimbabwe consists of the chief justice as head of judiciary, judges of the Supreme Court, judge president and judges of the High Court, as well as judges of special courts and those presiding over subordinate courts established by law,[52] including magistrates. The Supreme Court is Zimbabwe's highest court of record and final court of appeal; it also has original jurisdiction in cases where violation of constitutional rights is alleged.[53] The High Court is a superior court of record and has original jurisdiction over all criminal matters in Zimbabwe.[54]

The Constitution provides for the appointment of judges by the President, after consultation with the Judicial Services Commission (JSC), which means that the President is not required to follow JSC recommendations or secure its agreement. The JSC comprises six members, four of whom are directly appointed by the President, and two of whom are appointed by the President by virtue of their holding office to which they are likewise appointed by the President, in consultation with others. Although this arrangement is now subject to the GPA's requirement of agreement on key appointments between the President and the Prime Minister, it nonetheless means that there is no representative on the JSC who is independent of the direct or indirect influence of the executive.

Independence of the judiciary is guaranteed by the Constitution of Zimbabwe, which states that 'In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary'.[55] The Constitution also specifies, in the section on conditions of service for judges, that the remuneration of judges shall be charged to the Consolidated Revenue Fund and may not be reduced during a judge's tenure.[56] Zimbabwe has also ratified the African Charter (Banjul) on Human and Peoples' Rights and the International Covenant on Civil and Political Rights (ICCPR), which obliges the Government to respect due process and fair trial rights.

However, numerous reports suggest that over the last decade, this independence has been progressively and systematically compromised. As a 2004 report to the International Council of Advocates and Barristers (ICAB) noted:

> 'The provisions of the Constitution safeguarding judicial tenure serve to provide only formal protection for the higher judiciary. In reality the Executive and ZANU-PF do not observe the constitutional protections for the judiciary but instead enforce the removal of judges whose independence represents an impediment to Government policy or other action. Judges have been removed through a combination of physical and psychological intimidation and threats of violence.

52 Constitution of Zimbabwe, section 79A.

53 *Ibid*, section 24 and 80.

54 *Ibid*, section 81.

55 *Ibid*, section 79B.

56 *Ibid*, section 88.

> The integrity of the Supreme Court and High Court has been damaged. Judges reputedly sympathetic to the Government have been appointed and have been promoted above more senior and experienced colleagues. Some Supreme Court and High Court Judges have been allocated land under the Government's commercial farms allocation scheme and hold that land at nominal rents and at the Government's pleasure. The deleterious effect that this has for judicial independence is too obvious to require stating.'[57]

A Human Rights Watch report in November 2008 similarly observed that since 2000 President Mugabe's government 'has purged the judiciary, packed the courts with ZANU-PF supporters and handed out "gifts" of land and goods to ensure the judges' loyalty'.[58] The current delegation saw no reason to change these damning assessments.

This process began in earnest in 2000 when judges, on a number of occasions, ruled against the Government's controversial land reform programme. On 17 March 2000, Justice Paddington Garwe declared that the 'invasion' occupation of a number of farms by squatters, claiming to be veterans of Zimbabwe's liberation war, was unlawful. He ordered all squatters to vacate the farms within 24 hours, and directed the Police Commissioner-General Augustine Chihuri ('Chihuri') to enforce the order. The Court also ordered Chihuri to disregard any instruction from any 'person holding executive power in Zimbabwe' that countered the eviction order. The police commissioner appealed, arguing that he did not have sufficient resources to comply. On 10 April 2000, Justice Moses Chinhengo dismissed this and upheld Justice Garwe's order. However, the police still did not take enforcement action. On 10 November 2000, the Supreme Court granted an order by consent reinforcing the original judgment. On 21 December 2000, the Supreme Court ruled that the Government's land reform programme was unconstitutional and violated article 16 of the Constitution, which guarantees property rights.[59]

The police continued to refuse to implement the orders of the courts and, according to former Chief Justice Anthony Gubbay ('Justice Gubbay'), on 24 November 2000, 'war veterans' forcibly entered the Supreme Court building shouting ZANU-PF political slogans and calling for judges to be killed.[60] In December 2000 President Mugabe described judges as guardians of 'white racist commercial farmers'. Another government minister accused the Supreme Court, particularly Chief Justice Gubbay, of being biased in favour of white landowners. President Mugabe accused him of aiding and abetting racism. Justice Minister, Patrick Chinamasa, told Justice Gubbay that the government no longer had confidence in him and asked him to step down. Justice Gubbay resigned in March 2001, well before his term of office had expired, and, following his resignation, ZANU-PF members of Parliament passed a vote of no confidence in the Supreme Court, and the Minister of Justice encouraged remaining Supreme Court judges to resign.

Justice Gubbay was replaced by Godfrey Chidyausiku (a former deputy Minister of Justice in the ZANU-PF government and a beneficiary of the government's land reform programme), who was appointed chief justice ahead of more senior judges. Several more senior judges then also resigned and some went into exile. Many had received threats from the Government after they made

---

57 *The State of Justice in Zimbabwe: A Report to the International Council of Advocates and Barristers by five Common Law Bars into the state of justice in Zimbabwe* (April 2004), p 4, available at: **http://austbar.asn.au/dmdocuments/The_State_of_Justice_in_Zimbabwe_-Final_Report_03_12_04.pdf**.

58 See note 5, above, pp 13–18.

59 *Ibid.*

60 *Ibid*, quoting a speech by Chief Justice Anthony Gubbay, (8 January 2001).

judgments contrary to the interests of ZANU-PF – for example, licensing independent radio stations, acquitting MDC activists on criminal charges or criticising the Government's undermining of the judiciary. According to Human Rights Watch, the government also began to issue presidential decrees to overturn judicial rulings that it disagreed with.[61]

Since 2000, the Government has appointed to the bench judges with previous connections and known sympathies to ZANU-PF. These have also been the recipients of land that the Government has seized under its controversial land allocation programme. According to Minister Matinenga, up to 95 per cent of sitting judges have been allocated farms that were forcibly seized from white commercial farmers.[62] As the ICAB report of 2004 noted, the fact that they hold these farms at nominal rents, but without security of tenure gives the Government an obvious source of patronage and pressure over them. It clearly also creates a conflict of interest for any judge asked to rule on issues relating to the land reform programme.

In August 2008, the Government announced that it had bought and delivered luxury cars, plasma television sets and electricity generators to all judges, using funds from the Reserve Bank of Zimbabwe (RBZ). A statement explained that these were to enable judges to focus more on their work and to enable them to work from home in the event of the frequent power cuts.[63] It was also reported that houses were allocated to judges to augment their salaries.[64] Inflation was running at 2.79 quintillion per cent at the time and so these gifts were purportedly designed to compensate for the fact that judges' salaries were effectively worthless. Nonetheless, such 'gifts' from the executive compromised the judiciary deeply. The appropriate response to deteriorating salaries would have been an increase in salary (which might have been linked to inflation) or, if the State did not have adequate funds for this, an arrangement of payment 'in kind' formalised through legislation. (For instance, in many jurisdictions, the most senior judges are provided with some form of official accommodation by law.) Ad hoc gifts by the executive to judges are incompatible with judicial independence.

Magistrates follow a separate career path to the judiciary. They qualify for office by obtaining a university law degree or by graduating from the Judicial College of Zimbabwe. After qualification magistrates must apply to the Public Service Commission for employment. The JSC is now responsible for judges and magistrates. While it is generally accepted that magistrates have been exposed to less political interference than judges, there have been allegations of threats and intimidation of some magistrates, particularly in rural areas. For example, Human Rights Watch reports that in June 2008, in Bindura, Mashonaland Central province, a group of ZANU-PF youths severely assaulted senior magistrate Felix Mawadze because he had granted bail to detained MDC activists accused of political violence.[65] Two months earlier Musaiona Shortgame, a resident magistrate in Gutu, Masvingo province, had his home invaded and car burnt out following a series of threats from ZANU-PF supporters in the area. It is also claimed that the Government dispatches 'partisan senior magistrates and prosecutors from Harare to handle "political cases" wherever they occur'.[66]

---

61 *Ibid.*

62 *Ibid*, HRW interview with Eric Matinenga, Harare, (29 August 2008).

63 'Enhancement of Working Conditions for the Judiciary' Reserve Bank of Zimbabwe press statement (15 August 2008). See also the *Sunday Mail* (17–23 August 2008).

64 *The Zimbabwe Independent* 'RBZ Splurges on Judges' (7 August 2008).

65 See note 5, above, p 19.

66 *Ibid*, p 20.

The delegation also heard many accounts of prosecutors delaying trials and judges and magistrates failing to hand down judgments or, having made a decision, failing to hand down reasons, which would require to them to make criticisms of these explicit. Moreover, judges and magistrates seem to exert very little control over the prosecution process. For instance, it is proper for a judicial officer to prevent the prosecution process being used unjustly by refusing endless requests by the prosecution to postpone trials, especially when the accused is in detention. But judges and magistrates in Zimbabwe were reported to have agreed to over 40 remands in cases dragged out over many years – effectively allowing prosecuting authorities to conduct campaigns of harassment.

Nonetheless, it was pointed out to the delegation on a number of occasions that the vast majority of prosecutions of political activists eventually result in acquittals or the charges being withdrawn. As discussed in the subsection of this report on politically motivated prosecutions, this could be because the prosecuting authorities are misusing their powers to persecute activists. However, it also indicates that at least some judges and magistrates are prepared to uphold the law. Moreover, it was widely acknowledged that the low salaries of magistrates, in particular, and the lack of resources available to the judiciary, in general, is affecting their professionalism and could make some susceptible to corruption.

It proved difficult to discuss these issues with serving judges in Zimbabwe because almost all attempts by the delegation to obtain meetings with the Zimbabwean judiciary failed and the only meeting that did take place, with a group of judges in Bulawayo, was abruptly terminated when the delegation leader outlined the mission's terms of reference. The senior judge present, Justice Maphios Cheda, stated that he thought the meeting was only intended as a 'courtesy call' and he would have to obtain permission from the Judge President and the Chief Justice before he could answer any questions.[67] Attempts to arrange a meeting with the Chief Justice were unsuccessful.

Importantly, the delegation also heard that the quality of judicial appointments appears to have improved since the formation of the Inclusive Government now that these have to be agreed between the President and Prime Minister. However, it should be noted that Prime Minister Tsvangirai complained to President Mugabe regarding the lack of consultation in the appointment process, after President Mugabe unilaterally appointed three judges to the High Court in 2010.[68] The delegation was told that judges seemed more open to contact with civil society organisations and had participated in some trainings and forum meetings run by the Law Society of Zimbabwe and Zimbabwe Lawyers for Human Rights.

The Attorney-General

The Attorney-General of Zimbabwe has three basic functions: he or she is the Government's chief legal advisor; is the main office responsible for legal drafting; and is the chief prosecuting authority, to whom the Director of Public Prosecutions (DPP) directly reports. This fusion of political and law enforcement power is not uncommon. In the case of Zimbabwe, it was directly inherited from the British colonial authorities. However, many former British colonies have subsequently taken steps to separate the two functions into different bodies to ensure that decisions on who to prosecute are not politically directed.

67 Interview in Bulawayo, 13 June 2011.

68 Kholwani Nyathi, 'Angry Tsvangirai takes on Mugabe', *The Standard* (22 May 2010) available at **http://allafrica.com/stories/201005230002.html**.

The current Attorney-General, Johannes Tomana ('Tomana'), was appointed by President Mugabe in December 2008, without the consent of Prime Minister Tsvangirai. This unilateral appointment occurred before the formation of the Inclusive Government and clearly violated the stipulation in the GPA that all such appointments should be agreed between the President and the Prime Minister. [69] The Prime Minister told the delegation that he considered Tomana 'totally unfit for office' and said that 'we have got someone who sits in Cabinet and is supposed to advise the whole Government, yet he only advises one section of the Inclusive Government – ZANU-PF ministers – and is responsible for the continual arrest and persecution of MDC members, including our government ministers.'[70]

The delegation met Tomana, who said that he saw no need for a separation of his political and prosecutorial functions as he felt that his office performed both functions professionally and impartially.[71] He completely rejected any suggestion of political bias and said that 'our understanding of the rule of law is that our laws apply equally without discrimination or reference to politics or ethnicity.'[72] On the same day that he met with the delegation Tomana gave an interview to a newspaper in which he was quoted as having stated that he is a ZANU-PF supporter and that the discretion on who his office should prosecute 'is entirely in my hands'.[73]

In both the newspaper interview and the meeting with the delegation Tomana declared that his office was committed to prosecuting those responsible for breaking the law on an impartial basis. In the newspaper interview he implied that any discrepancy between the prosecutions of ZANU-PF supporters and MDC supporters was simply down to timing. 'Everyone is judged on his own misdeeds,' he commented. 'The MDC people have not said they are not committing offences. They are saying ZANU-PF and them are offenders and complaining that they cannot be arrested alone leaving ZANU-PF out. If you are guilty does it matter whether I have started with you leaving others?' asked Tomana.[74]

In his meeting with the delegation, however, Tomana advanced a slightly different argument. He first stated that both the MDC and ZANU-PF have admitted that their supporters committed acts of violence, but that the GPA had resolved these differences and that the country should move on from its previous divisions through the formation of the Inclusive Government. When it was pointed out that the GPA specifically states that the prosecuting authorities should bring charges against those accused of politically related violence during these elections, he reversed this position. He said that there had been 'numerous' such prosecutions that 'many ZANU-PF people are now in prison', but that 'most of the victims of the violence were not MDC'. Given the claims and counter-claims that have been made, the next sections of this report consider whether the prosecuting authorities have addressed the crimes committed during the 2008 elections and whether or not the rule of law continues to be selectively applied.

69 ICG, April 2011, p 6. President Mugabe also unilaterally appointed the Reserve Bank's Governor and refused to appoint Roy Bennett, Prime Minister Tsvangirai's nominee for deputy Agriculture Minister.

70 Interview, Harare, 15 June 2011.

71 *Ibid*, 14 June 2011.

72 *Ibid.*

73 *Zimbabwe Daily News,* 'Tomana threatens MDC' (15 June 2011).

74 *Ibid.*

Prosecutions for crimes committed in relation to the 2008 elections

There is no single authoritative figure on the extent of the violence or the number of people who were killed during the 2008 elections. According to the most recent report published on the events by the International Crisis Group (ICG):

> 'Over 15,000 serious violations were recorded, including confirmation of more than 300 politically-related murders. Available empirical evidence collected by non-governmental human rights organisations shows that the primary victims were associated with the MDC-T and that the bulk of perpetrators were associated with ZANU-PF (ie, the party's youth groups, militia and war veterans) and state security forces.'[75]

A report published by Human Rights Watch in March 2011, stated that: 'ZANU-PF supporters, war veterans, and the armed forces killed up to 200 people following the 2008 general elections. They subjected those accused of supporting the MDC to severe beatings and torture with heavy wooden sticks and iron bars, often resulting in fatal injuries. Others were abducted and then murdered. To Human Rights Watch's knowledge, there have been no serious investigations let alone prosecutions for the serious crimes that took place during this time.'[76] The report also stated that its researchers had interviewed serving police officers who spoke of a national level policy to not pursue ZANU-PF militia and other allies of ZANU-PF implicated in political violence.[77] One stated that, in April 2008:

> 'Senior police officers came to address us. We knew by the rank displayed on their clothes that they were senior, but they were not introduced to us. They probably came from police headquarters in Harare. One of them said, "You are under instruction not to arrest ZANU-PF supporters who may be implicated in political violence or whom you may come across committing acts of political violence. Do not use force when dealing with them. At most, you may, when you find them in the act of committing political violence, gently disperse them, but make no arrests, I repeat, do not arrest ZANU-PF supporters."'[78]

An earlier Human Rights Watch report, published in November 2008, stated that: 'Human Rights Watch also found that of at least 163 politically motivated extrajudicial killings—almost entirely of MDC supporters — since the March 29, 2008 general elections, police have only made two arrests, neither of which led to prosecutions'.[79] A subsequent report, published in March 2011, noted that: '[t]he failure of police to act has left many communities, in provinces around the country, vulnerable to further violence. Many victims and their family members believe that they remain at risk because of the failure of the police to prosecute perpetrators, some of whom still live in the areas in which they committed the crimes'.[80] An Amnesty International report, published in October 2008, stated that: '[s]ources in Zimbabwe documented over 180 violence related deaths and more than 9,000 people tortured and beaten. The bulk of these victims reported being attacked because they were accused by security forces, "war veterans" and ZANU-PF supporters of having voted "wrongly" in the March elections.'[81]

---

75 See note 1, above, p 1–2.

76 See note 4, above, p 26.

77 *Ibid*, p 25–27.

78 *Ibid*, p 26.

79 See note 5, above, p 2.

80 See note 4, above, p 4.

81 Amnesty International, *Zimbabwe: Time for Accountability* (Amnesty International Publications, London 2008).

These figures have been dismissed by ZANU-PF supporters. However, despite a promise to the delegation from the AG's office that it could forward more detailed information about violence and arrests during the election, no alternative documentation has been provided.

The delegation also spoke to a Zimbabwean NGO which has been working with relatives of the victims of violence during the 2008 election campaign.[82] It does not claim to have a comprehensive list of the numbers of deaths, but has worked on 115 such cases, primarily organising memorials and providing material aid and income generating projects to surviving dependents of the victims. According to its director, 113 of these victims were MDC supporters and two were ZANU-PF supporters. He also said that two ZANU-PF supporters are in the process of being prosecuted. However, the police embarked on investigating these cases only after relatives of the dead carried the corpses to the homes of the alleged perpetrators and placed them outside their doors. This is a traditional ritual to shame the perpetrators of a violation and the publicity which the act received is believed to have forced the police to act. Both accused have been granted bail, however, and no date for their trial has been set.

The discrepancy in the number of reported killings in the various reports cited above is not surprising, given the difficulties of collecting such information, particularly in rural areas. Collating the total number of deaths would also take time and, unless evidence can be shown to the contrary, it seems likely that the most recently published figures by the ICG are the most accurate.

In any case it is clear that the AG's claims to the delegation that 'many ZANU-PF people are now in prison' and that 'most of the victims of the violence were not MDC' were either extremely ill-informed or deliberately misleading. His other, subsequently retracted, statement to the delegation that the GPA granted the perpetrators of this violence some type of amnesty for their crimes is also directly contradicted by the document itself. The GPA notes that the parties to it are '[g]ravely concerned by the displacement of scores of people after the election of March 29, 2008 as a result of politically motivated violence' and that 'violence dehumanises and engenders feelings of hatred and polarisation within the country'.[83] It was further agreed that 'the government shall apply the laws of the country fully and impartially in bringing all perpetrators of politically motivated violence to book' and that '[…] the prosecuting authorities will expedite the determination as to whether or not there is sufficient evidence to warrant the prosecution or keeping on remand of all persons accused of politically related offences arising out of or connected with the March and June 2008 elections'.[84]

Continuing selective application of the rule of law

The delegation heard numerous accounts of ongoing harassment of MDC members and civil society activists. Many of the people that the delegation spoke to have been arrested and either detained for short periods of time without charge or charged on what appears to be extremely weak evidence so their cases are either dismissed or dropped at the pre-trial stages. Others alleged clear bias in the behaviour of the police and security forces in charging civil society and MDC activists with offences, while ignoring crimes committed by ZANU-PF supporters.

82 Interview, Harare, 14 June 2011.

83 GPA, Article XVIII, 18.2 and 18.3.

84 *Ibid*, 18.5(c) and (j).

For example, on 24 June 2011, shortly after the delegation left Zimbabwe, Jameson Timba, a Minister of State in the office of the Prime Minister, was arrested after stating that Mugabe and his party leaders were not truthful over the findings of a SADC summit meeting, which is discussed in more detail below. He was held for two days, until a court ordered his release, during which he was denied anything to eat.[85] Douglas Mwonzora, MDC-T parliamentarian and co-chair of COPAC, was detained in mid-February 2011, on charges of inciting public violence and spent over three weeks in custody before being released on US$50 bail.[86] Later, in the same month, former MDC-T parliamentarian Munyaradzi Gwisai ('Gwisai') and 45 others were arrested and charged with treason for holding a meeting which discussed the uprisings taking place in the Middle East and North Africa. Some of those arrested, including Gwisai, have alleged they were tortured. Six have now been charged with treason and face up to 20 years in prison if convicted.[87]

Charles Rapozo, the MDC-T's director of elections in Dangamvura in Mutare, was arrested in January 2011 for allegedly holding a caucus meeting without notifying the police.[88] Elton Mangoma, the MDC-T Energy Minister and co-chair of the JOMIC, whom the delegation also met, was arrested in March 2011 on charges relating to an oil supply tender. He was held for several days and then released on US$5,000 bail, but was subsequently rearrested later in March and held in custody for over a week before being released on bail.[89] Abel Chikomo, the director of the Zimbabwe Human Rights NGO Forum, whom the delegation met, was arrested with two members of staff in February 2011 for conducting a survey on transitional justice.

The delegation also met with staff of the Bulawayo Agenda and Radio Dialogue who described how they had been arrested in March 2010 for carrying out community radio outreach initiatives without police permission. A number of newspaper editors and journalists were arrested and detained in the second half of 2010, while others were attacked or threatened by ZANU-PF supporters.[90] In October 2010, 83 members of a women's group (WOZA) were arrested for participating in a protest on community safety. [91] In the same month four university students were arrested for taking part in a protest against tuition fees, while Eliah Jembere, an MDC member of parliament was charged with 'undermining the authority of or insulting the President'.[92]

Artists have also been targeted. For example, in March 2010, Owen Maseko was charged with publishing or communicating false statements prejudicial to the state and undermining the authority or insulting the president for displaying an exhibition depicting the atrocities allegedly committed by the army during their counter-insurgency campaign in Matabeleland and Midlands provinces during the early 1980s.[93] The following month an independent film producer, Zenzele Ndeble, said he was

85 *Guardian*, 'Zimbabwean minister who branded Robert Mugabe a liar is freed' (26 June 2011).

86 See note 1, above, p 4.

87 Amnesty International Urgent Action, AFR 46/013/2011 (15 June 2011).

88 allAfrica.com, 'Police in Renewed Crackdown Against MDC officials' (12 January 2011) available at **http://allafrica.com/stories/201101130145.html**; *US concerned about Zimbabwe political arrests*, The Zimbabwe Situation, (4 March 2011), available at: **www.zimbabwesituation.com/mar5a_2011.html**.

89 See note 1, above, p 2

90 For details see, *Annual Review of the Performance of the Inclusive Government of Zimbabwe, February 2010 – February 2011*, Civil Society Monitoring Mechanism, Zimbabwe Lawyers for Human Rights, 2011, p 30.

91 *Ibid.*

92 *Ibid.*

93 Southern Africa: Litigation Centre – Cases, 'Zimbabwe: Defending the Right to Freedom of Expression', available at: **www.southernafricalitigationcentre.org/cases/item/Zimbabwe_Owen_Maseko**.

threatened with arrest by police officers in relation to a film that he had produced three years earlier on the same theme. [94]

The rate of arrests also appears to have increased dramatically since some members of ZANU-PF began calling for an early election and an end to the Inclusive Government. Zimbabwe Lawyers for Human Rights (ZLHR), which maintains a hotline to assist people arrested on politically motivated charges, told the delegation that it received 300 requests for assistance for the whole of 2010, but this had jumped to over 800 for the first six months of 2011.[95]

At the same time reports of violence from ZANU-PF supporters have also increased. For example, in January 2011, Amnesty International reported that its delegates witnessed ZANU-PF supporters in central Harare beating members of the public in the presence of anti-riot police. A high school student was reportedly attacked for taking a photograph, while a young woman wearing an MDC-T t-shirt was beaten and stripped. Anti-riot police monitoring the 'protest' did not intervene to assist the victims. The two were seriously injured and needed medical treatment. It also stated that it had received reports from Harare's high density suburb of Mbare where MDC-T supporters were attacked and some forcibly evicted from their homes by ZANU-PF supporters. Police failed to protect those attacked and even arrested victims who came to report the incidents. In February it claims that alleged ZANU-PF supporters in Harare's central business district beat up vendors from *Newsday* – an independent newspaper.[96]

The Zimbabwe Human Rights Association has reported that there has been a sharp increase in arson attacks against supporters of Prime Minister Tsvangirai's MDC party since the former opposition's congress'.[97] While the delegation was visiting Zimbabwe in June 2011, the home of Tendai Biti, the MDC-T Minister for Finance, was bombed by unknown assailants. While everyone that the delegation spoke to agreed that the current level of repression is not anywhere near the same scale as that which took place during the 2002 and 2008 election campaigns, these incidents do cause concern about the preparations for the next general election campaign in Zimbabwe. Such an election will not be credible without the type of reforms which the parties to the GPA have called for.

Finally, it should be noted that the current wave of arrests fit into a broad pattern that gives rise to considerable concern about the selective application of the law. The IBAHRI, in October 2007, noted a similar pattern of partisan policing.[98] It appears that the police and prosecuting authorities are simply arresting and detaining people as a form of harassment and persecution, without any reasonable prospect of successfully prosecuting them. ZLHR has assisted hundreds of people charged with politically-motivated offences, yet not a single person has actually been convicted of any crime. While many cases are still ongoing, ZLHR reports that 985 people were charged with politically motivated offences in 2006 and 944 people were charged in 2007, but not a single one of these cases subsequently resulted in a conviction.[99]

---

94 For details see note 40, above, p 30.

95 Interview, Harare, 16 June 2011.

96 Amnesty International, Zimbabwe: Urgent need for security sector reform to stem human rights abuses (Public statement, AI Index: AFR 46/002/2011, 11 February 2011).

97 *The Zimbabwean* 'ZimRights concerned at continued violence' available at: **www.thezimbabwean.co.uk/index.php?option=com_content&view=article&id=39807:zimrights-concerned-at-continued-violence&catid=69:sunday-top-stories&Itemid=30**.

98 IBAHRI *Partisan Policing: An obstacle to human rights and democracy in Zimbabwe* (IBAHRI, October 2007).

99 See note 6, above, p 24.

Section 117 of Zimbabwe's Criminal Procedure and Evidence Act (CPEA) states that bail should not be refused unless there is clear evidence that the accused is likely to commit other offenses, interfere with witnesses or abscond. Nevertheless, prosecutors routinely invoke section 121 of the CPEA, which provides them with the opportunity to file a notice of intention to appeal against a bail ruling, which has the effect of suspending a magistrate's order to release a suspect, for another seven days. For example, when Matinenga, who is now Minister for Constitutional and Parliamentary Affairs, was arrested in May 2008, the public prosecutor told the court at the outset that he would oppose bail irrespective of the conditions offered the application.[100] The public prosecutor allegedly stated that it was the AG's official policy that bail in cases of alleged political violence would be opposed regardless of the merits of the application. When the magistrate granted Matinenga bail, the public prosecutor immediately invoked section 121 of the CPEA and Matinenga was remanded in custody pending appeal. Denying bail in order to punish an accused person contravenes the principle that an accused person shall be presumed innocent until proven guilty by a competent court of law, enshrined in Zimbabwe's Constitution[101] and international human rights law.[102]

National reconciliation

Almost everyone that the delegation spoke to expressed the hope that Zimbabwe would move beyond the political polarisation and violence of recent years towards a future based on national reconciliation. However, the issue of how to 'start healing the wounds caused by decades of injustice, intolerance, exclusion and impunity'[103] is a sensitive and emotive one.

International human rights law obliges the appropriate authorities in Zimbabwe to promptly, impartially and credibly investigate serious violations of human rights, prosecute those implicated by the evidence and, if their guilt is established following a fair trial, impose proportionate penalties. Victims have a right to an effective remedy for the violations that they suffered, including adequate compensation and guarantees of non-repetition, which can best be ensured by bringing those responsible to justice. These obligations are contained in treaties to which Zimbabwe is a party, as is discussed below, and cannot be set to one side on grounds of political expediency.

On the other hand, there are both practical and principled obstacles to relying on a strategy of prosecutions to deal with past human rights violations. The delegation heard from numerous interviewees that the only way in which a peaceful transformation of Zimbabwe can occur will be if the senior members of the army, police and intelligence services agree to relinquish power voluntarily. Many, like President Mugabe himself, are veterans of the liberation struggle and now well beyond their retirement ages. Others have asserted that they will resign from office should the MDC ever win a Presidential election (such statements are often ambiguously worded and are interpreted by some as an indication that they might use their security positions to prevent MDC from assuming office). However, the delegation was repeatedly told that these generals and commanders would only step down from office without resistance if they had guarantees that they would not be subject to investigation and possible prosecutions.

100 See note 5, above, p 19.

101 Section 18.

102 ICCPR, Article 14(2).

103 CivilSocietyForum.org, 'Towards Development of a National Framework for National Healing, Integration and Reconciliation in Zimbabwe' (Church and Civil Society Forum, November 2009–April 2010), p 1.

In addition, it was pointed out that a partial investigation into past violations would appear one-sided, but a full accounting for the crimes committed in Zimbabwe's violent past would need to investigate the whole of the country's history. The pre-colonial period saw violent clashes in which tribes subjugated and displaced one another. Zimbabwe's experience of colonial conquest and rule was brutal and exploitative. Both the struggle for liberation and the post-independence era also saw violence committed by many different parties. Zimbabweans have suffered grave human rights violations for generations, imposing a cut-off date for which ones can be investigated would undoubtedly be seen by some as arbitrary and unfair.[104] Many argued that it was better to draw on 'African traditions' of forgiveness as a way of dealing with the past rather than rely on 'international legal standards', which some perceive as being largely based on 'Western values'. This debate obviously has a very wide resonance, but this report confines itself to the IBAHRI's findings in relation to Zimbabwe.

The GPA states that the parties agree to 'promote the values and practices of tolerance, respect, non-violence and dialogue as a means of resolving political differences' and 'to renounce and desist from the promotion and use of violence'.[105] It also states that the parties 'shall give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre and post independence political conflicts'.[106] In accordance with the last of these provisions the new Government set up the Organ for National Healing, Reconciliation and Integration (the 'Organ'), comprising three ministers of state, one from each of the three main political parties. The delegation was able to meet Sekai Holland ('Holland'), the MDC-T minister in the Organ.[107]

Holland outlined the work of the Organ, which she stressed was starting with almost a completely blank sheet of paper, due to the limited nature of its terms of reference derived from the GPA. She said that the Organ's first aim was to consult Zimbabweans on how they felt the issue should be approached. This had been done by a series of workshops involving traditional elders, youth, women and church groups. An international consultant had also been hired to help develop a policy framework, which would be submitted to an all-stakeholders conference in September 2011. It was hoped that this would be able to discuss a draft Peace and Reconciliation Bill, which would then be submitted to Parliament to produce a legal framework, including a machinery and process for dealing with national healing and reconciliation.

The Organ is based in the office of the President, to whom Holland reports. She was tortured by state security agents in 2007, which left her unable to walk for several months, but she stressed that she saw her role as a 'bridge-builder', who wished to address the sources of conflict in Zimbabwe rather than simply dealing with the symptoms. She outlined some of the small-scale projects that the Organ has undertaken so far, on a cross-party basis, and also described the mutually supportive relationship that she had developed with her ZANU-PF co-chair. She said that President Mugabe had become increasingly interested in the project and described his warm welcome for a recent visit by a group of UN women to Zimbabwe, including Mary Robinson, the former High Commissioner for Human Rights.

104 Interview, Harare, 16 June 2011.

105 GPA, Article 18.5(a) and 9(b).

106 *Ibid*, Article 7(1)(c).

107 Interview, Harare, 16 June 2011. The other chairs of the Organ are John Nkomo (ZANU-PF) and Gibson Sibanda (MDC-M).

Holland notes that President Mugabe had publicly declared that he wanted to draw a line through the past at independence in order to achieve national reconciliation and she rhetorically asked 'why if we could forgive the whites in 1980 can we not learn to forgive each other?' She also stated that 'as a torture survivor I think that we have to accept that Zimbabweans have a culture that tortures and that does it in secrecy.' She said that there were probably a million torture survivors in Zimbabwe and that one of the priorities for the Organ would be to ensure that the health, education and psychosocial sectors addressed these needs. She also said that the Organ was trying to make Zimbabweans work together and that it had developed a number of practical projects to help bring people together. (The World Bank is currently considering funding some of these projects, although the Organ itself cannot be funded directly by many Western donors because it is part of the Zimbabwean Government.)

Holland said that 'Africans have a traditional conflict resolution mechanism, which involves three stages of truth, justice and forgiveness.' The first step is to acknowledge the wrong that has been done, then the victim and the violator must work together to devise a plan for making amends, which should finally be followed by forgiveness. Broadening this to the current situation in Zimbabwe she argued that 'without full disclosure by the state of how the repressive measures work we will not get very far, but that this needed to be followed by a healing and forgiveness process.'[108]

The delegation also met a number of civil society groups who were critical of the Organ and argued that it had failed to consult sufficiently with the victims of human rights violations. They pointed out that the Organ has no justice and accountability mechanisms within its mandate. They also noted that the Inclusive Government's first 100-day plan was silent on the issue, containing no mention of the issues of tackling impunity and dealing with the politicisation of the police and security forces or restoring the independence of the judiciary. Instead, its section on targets for the Ministry of Justice and Legal Affairs merely committed it to: 'Meet the needs of prisoners'; 'Operationalize the Judicial Services Commission'; and 'Meet the minimum standards, best practices and needs of justice delivery institutions'.[109] These activists, some of whom were also torture survivors, expressed the fear that the issue would be simply swept under the carpet in a deal between ZANU-PF and the leadership of the two MDC formations.

The delegation was told that most victims of human rights violations are more interested in civil actions to obtain redress than in trying to pursue criminal cases against the perpetrators. However, Zimbabwe's own history also provides a note of caution about the consequences of failing to hold perpetrators to account for their crimes. During Zimbabwe's transition to democracy in 1980, two laws were enacted by the British-imposed transitional governor, Lord Soames, stating that no prosecution could lawfully take place for acts committed by the security forces or guerrilla forces in the liberation struggle. Some members of the former Rhodesian military forces remained in office and the new ZANU-PF Government retained some ministers who had been detained and tortured by them.[110] While this showed a remarkable personal level of magnanimous behaviour by Zimbabwe's new rulers, it should also be noted that these officers formed a vital core of the force that was subsequently unleashed in Matabeleland in the 1980s, which set a pattern of brutality and impunity that has continued to the present day.

---

108 *Ibid.*

109 The Government of Zimbabwe 100-Day Plan (29 April–6 August 2009).

110 Catholic Commission for Justice and Peace in Zimbabwe and Legal Resources Foundation in Harare, *Gukurahundi in Zimbabwe: A Report on the Disturbances in Matabeleland and the Midlands, 1980–1988* (Jacana Media, Johannesburg 2007), p 43.

Prime Minister Tsvangirai pointed out the problem of how far back to go in investigating human rights violations, but also said that those who had committed the most recent violations were prepared to cling to power by any means.[111] He said that the GPA's failure to deal adequately with security sector reform was its biggest weakness and that the problem of how to 'deal with the bad eggs' was not an easy one to solve. Although MDC-T has not taken a formal position for or against a blanket amnesty, he commented that 'some people say that we should just guarantee their pension rights and future liberty and then allow them to retire.' At a press conference in September 2010, Tsvangirai appeared to rule out any criminal prosecution of Mugabe or senior members of ZANU-PF after they left office, arguing that the power-sharing deal and the possibility of a new constitution were processes of finding reconciliation and that a retributive agenda would be counterproductive to such a process. Tsvangirai stated that, 'Reconciliation is the only solution for the country to have assured stability, peace and progress.'[112]

However, even if the main political parties agreed to a blanket amnesty for all human rights violations, Zimbabwe is still bound by international law, which prohibits this practice, both through the provisions of specific treaties to which Zimbabwe is a party and by principles of general international law. The ICCPR, to which Zimbabwe is party, requires that states adopt measures, including through the legal system, to protect fundamental rights.[113] According to the UN Human Rights Committee, a state's failure to investigate and bring perpetrators to justice, particularly with respect to crimes such as killings, torture and other ill-treatment, could in itself be a violation of the Covenant.[114] Similarly, the African Charter on Human and Peoples' Rights places obligations on states to ensure protection of charter rights, and for individuals to have rights violations against them heard by competent national institutions.[115]

Various international standards also seek to promote state efforts to obtain justice for victims. For instance, the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions call upon states to remove officials implicated in such crimes from direct or indirect power over the complainants and witnesses, as well as those conducting the investigation.[116] The UN Declaration against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that the competent authorities impartially investigate allegations of torture even if there has been no formal complaint, and to institute criminal proceedings if torture appears to have been committed.[117] Combatting impunity requires the identification of the specific perpetrators of the violations.

The doctrine of superior or command responsibility imposes liability on superiors – with either de jure or de facto command – for the unlawful acts of their subordinates, where the superior knew or had reason to know of the unlawful acts, and failed to prevent or punish those acts.[118]

---

111 Interview, Harare, 15 June 2011.

112 Cited in HRW, 2009, p 36–37.

113 ICCPR, Articles 2(2) and (3).

114 UN Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on States under the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, Articles 15 and 18.

115 African Charter, Articles 1 and 7.

116 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions: Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, principle 15.

117 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res. 3452 (XXX), annex, 30 UN GAOR Supp (No 34) at 91, UN Doc A/10034 (1975), Articles 9 and 10.

118 See *Prosecutor v Delalic*, International Criminal Tribunal for the former Yugoslavia (ICTY), Case No IT-96-21-T, 16 November 1998, para 346 (Celebici) and Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002, Article 28.

In addition to the obligation to investigate and prosecute, states have an obligation to provide victims with information about the investigation into the violations. Victims should be entitled to seek and obtain information on the causes and conditions resulting to rights violations against them.[119] Under the ICCPR, states also have an obligation '[t]o ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy'.[120] The ICCPR imposes on states the duty to ensure that any person shall have their right to an effective remedy '[…] 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'.[121] The state is under a continuing obligation to provide an effective remedy; there is no time limit on legal action and the right cannot be compromised even during a state of emergency.[122]

Zimbabwe is not a party to the International Criminal Court (ICC) and so this can only conduct an investigation into crimes committed under its statute if it receives a referral from the UN Security Council, according to article 13(b) of the Rome Statute. However, such an action cannot be ruled out if the violence and violations that accompanied the 2008 election are ever repeated. Individual political and military leaders of Zimbabwe could also be arrested under universal jurisdiction laws should they travel abroad in the future. For all the above reasons it is to be hoped that Zimbabwe finds a mechanism for dealing with past human rights violations in a way that both satisfies the victims and the strictures of international law. The experiences of truth and reconciliation commissions and traditional 'forgiveness' mechanisms in places such as South Africa, Sierra Leone and northern Uganda could be helpful in this regard.

Zimbabwe Human Rights Commission

The GPA required a ZHRC to be established. It was provided for in the 18th and 19th Amendments to Zimbabwe's Constitution.[123] However, Commissioners were not in fact appointed until December 2009 and the Bill to make provision for the powers and operations of the Commission was only published in 2011.

The delegation met the Chair of the ZHRC who outlined the progress that had taken place towards its establishment and the challenges that still remain. The constitutional functions of the ZHRC include: promoting awareness of and respect for human rights and their development; monitoring and assessing the observance of human rights in Zimbabwe, recommending to Parliament effective measures to promote human rights; and investigating violations and assisting with the preparation of reports to international monitoring bodies.[124]

---

119 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, 21 March 2006, adopted by the 60th session of the United Nations General Assembly, A/RES/60/147, paras 11(c) and 24.

120 ICCPR, Article 2(3)(1).

121 ICCPR, Article 2(3)(1). 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, 21 March 2006, adopted by the 60th session of the United Nations General Assembly, A/RES/60/147, principle II 3(d).

122 UN Human Rights Committee, General Comment 29, States of Emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para 14.

123 Section 108B of the 2007 Act and section 100R of the 2009 Act.

124 Section 100R, (5)(a)–(f) of the 2009 Act. The wording is similar in the 2007 Act.

However, the Human Rights Commission Bill significantly reduces the jurisdiction of the ZHRC to conduct investigations. A 'human rights violation' is declared to mean either a violation of the Declaration of Rights in Zimbabwe's Constitution, or any human rights instrument to which Zimbabwe is a party and has domesticated as part of its laws. Moreover, the ZHRC will only be allowed to investigate in the latter cases provided that the law domesticating the instrument in question has expressly bestowed on the Commission the jurisdiction to entertain such complaints. In practice this can only apply to future laws. The Bill also states that 'the Commission may on its own initiative investigate any action or omission on the part of the authority or person that constitutes a human rights violation'. It may also receive complaints from victims – or their legal representatives or family members if the victim has died – but the Bill specifies that the Commission shall not investigate a complaint if it relates to events that occurred earlier than 13 February 2009.[125] While this would seem to rule out investigating the events surrounding the 2008 election, it does potentially leave open the possibility of investigating the state's continued failure to investigate past violations, since this 'omission' could be construed as a continuing violation.

The independence of the ZHRC is also not protected, either by the Constitution or the Bill, with the Executive retaining power over the appointment of Commissioners and failing to grant them security of tenure or expressly prohibit ministers from seeking to give them instructions. The Commissioners must also consult the government over the hiring and firing of most staff members – with the exception of the chief executive – and there is concern that it will not receive adequate funding to carry out its functions. As with the other commissions described in this report, it is currently receiving some indirect financial support from UNDP, but many donors cannot support it directly because it is defined as part of the Zimbabwean state. The ZHRC currently does not have an office or any administrative support to allow it to start its work.

On the positive side the Chair noted that the appointment of the first set of Commissioners did seem to have been carried out in a balanced and transparent manner. A parliamentary select committee had carried out the initial short-listing of 16 candidates after a thorough interview process, and the President, in consultation with the Prime Minister, had then selected the final eight Commissioners from this list. An initial programme of meetings had been held and the Commissioners had hired an international consultant to help them draw up a work programme.

A number of civil society groups also expressed concern to the delegation that the proposed constitutional and legislative framework of the ZHRC did not fully comply with the Paris Principles relating to the status of national human rights institutions.[126] However, there is still scope for addressing these concerns, both during the parliamentary debate on the Bill and in the current constitution-making process. The very fact that a human rights commission has been created during what may be a transitional time in Zimbabwe's history and politics may offer opportunities for expanding its role and work. However, it is hoped that it can promptly start its work and receive the means necessary to fulfil its mandate.

125 Zimbabwe Human Rights Commission Bill, Part IV, 9(4)(a).

126 See, for example, 'Creating a foundation for a credible Zimbabwe Human Rights Commission' (Zimbabwe Lawyers for Human Rights, June 2010).

Section Three: The Extractive Industries

Part of the delegation's terms of reference included looking at policing and allegations of violence in the extractive industries and the impact that this may have had on rule of law issues in Zimbabwe. This has become a particular concern since the discovery of a large diamond mine in Marange, in the east of Zimbabwe, in 2008, believed to be one of the largest alluvial diamond fields in the world.

The delegation met with the Chair of the Parliamentary Portfolio Committee on Mines, the Chief Mining Commissioner at the Ministry of Mines and Mining Development, representatives of the Kimberley Process Civil Society Coalition of Zimbabwe, and NGOs in Mutare. In addition, members of the mission undertook a site visit to Arda Transau, at Odzi, where families had been relocated.

The week after the delegation had left Zimbabwe, a meeting of the Kimberley Process (KP), in Kinshasa, ended in confusion as to whether or not Zimbabwe would be allowed to resume selling diamonds on the world market. A number of human rights and monitoring NGOs walked out of the Kinshasa meeting before the final statement could be read. The KP Chair subsequently announced that a document had been approved which will allow Zimbabwe to 'continue exports'. However, both the US and EU said that there was no consensus on this agreement and so no decision had been made.[127]

The KP is an international initiative set up to stem the flow of 'blood diamonds' – rough diamonds used by rebel movements to finance wars against legitimate governments. All diamond exports by Zimbabwe were suspended in 2009 after allegations of widespread abuses and killings by the security forces at the Marange mines. In March 2011, the KP's new Congolese Chairman, Mathieu Yamba, released a statement saying that Zimbabwe should be allowed to resume selling these diamonds, but this was contradicted by a letter from the Chair of the Working Group on Monitoring, which stated that there was no such consensus amongst the membership of the KP.[128] A number of African countries, together with India and China, have since announced that they will resume buying Zimbabwean diamonds. One observer, from a human rights NGO, warned that the KP 'might not survive its "Zimbabwe crisis"' saying that: 'Without a resolution very soon and without an agreement coming out of Kinshasa, we'll just find the Kimberley Process collapses, because it can't cope with the weight of its members all taking different approaches and breaking rules whenever they please.'[129]

Following the meeting, Zimbabwe's Deputy Mines Minister, Gift Chimanikire, announced that the Inclusive Government plans to introduce new diamond mining and trading laws aimed at making the industry more transparent.

127 *BBC News*, 'Kimberley Process diamond sale "approval" row' (24 June 2011).

128 *Voice of America*, 'Zimbabwe's Marange Diamonds Put Kimberley Process to the Test' (22 June 2011).

129 *Ibid.*

The so-called 'Diamond Act' will create a commissioner who will ensure Zimbabwe's diamond mines and exports meet all international standards, the Harare-based newspaper said. The law will also specify the role of state security at gem mines.[130]

The IBAHRI is not in a position to comment on the level of compliance Zimbabwe has demonstrated with regard to the Kimberley Process Certification Scheme and the Joint Work Plan. Strong arguments were put to the delegation both for bringing Zimbabwe into the process so that the whole country could benefit from the diamond sale revenue and in favour of its continued exclusion due to lack of compliance.

Human rights concerns

The widespread human rights abuses perpetrated against civilians in the Marange diamond mines by members of the Zimbabwean Army ('the Army') from November to December 2008 are a matter of public record.[131] It was reported to the delegation that a mass grave containing 78 bodies was discovered at Dangamvura, near Mutare, in January 2009. It appears that these bodies have not been identified to their families and apparently no attempt has been made to investigate or to prosecute the perpetrators of these killings or indeed any other abuses in the mines.

According to the NGOs met by the delegation, 'human rights violations had significantly declined during the last quarter of 2010. This was followed by a slight increase during the month of December 2010.' However, NGOs reported that there was an upsurge in violence in March and April 2011 during two major operations to clear the diamond fields of artisanal miners. 'During these operations the soldiers and police used brutal force against the artisanal miners. An estimated 600 people were caught by soldiers and police between the 1st of March and the 24th of April. The casual miners were beaten, tortured and bitten by police dogs. There are some unconfirmed reports indicating that some women were raped and illegally detained at army bases.'[132] They also claim that the Army remains present in diamond mines despite an undertaking by the Zimbabwean Government to demilitarise the Marange area. According to a recent investigation conducted by the BBC, 'torture camps' operated by the Zimbabwean security forces are present in Marange. Civilians have reportedly been beaten and attacked by dogs.[133]

It is clearly of immense concern to the IBAHRI if serious human rights abuses related to the Marange diamond mines are ongoing and whether or not the past allegations have been properly investigated and the perpetrators of such violations held to account.

130 *Bloomberg*, 'Zimbabwe Plans Diamond Rules to Improve Industry Transparency, News Says' (27 June 2011).

131 See, for example, HRW, *Deliberate Chaos: Ongoing Human Rights Abuses in the Marange Diamond Fields of Zimbabwe* (HRW, 2010).

132 Center for Research and Development, Marange Diamond Fields: March–April 2011 Report (copy handed to the delegation).

133 Hilary Andersson, 'Marange diamond fields: Zimbabwe torture camp discovered' (BBC, 8 August 2011), available at: **www.bbc.co.uk/news/world-africa-14377215**.

Relocation of local inhabitants from Marange to Arda Transau

The discovery of minerals – and particularly diamonds that are easy to extract – inevitably causes social upheaval. In the case of the Marange diamonds, the need to move people from their customary homes to secure the diamond fields is disrupting life for thousands of people. About 4,000 families (25,000 people) have been identified for relocation and to date about 220 families (1,100 individuals) have been relocated.[134] NGOs and local inhabitants that the delegation met with expressed numerous concerns with regard to the relocation process. As a general point, local inhabitants complained of a lack of consultation, expressing the view that they had simply been told what was going to happen to them and their families without consultation and due process. Community members stated that the community had difficulty in bringing their concerns to the attention of the Zimbabwean Government and had been left to deal with the mining companies who have been granted extraction rights. The delegation was informed that numerous issues remain unresolved and which include the following:

1. Lack of infrastructure: local inhabitants complained that there was a lack of infrastructure at Arda Transau. In particular, there were complaints that the schools were too far from the new habitation and that access to water and health facilities was extremely difficult.

2. Livelihood: most of the families were subsistence farmers and yet they had only been allocated small plots of land upon which to farm ($100m^2$) and many had been forced to sell their livestock. They complained that there has been little or no thought as to how they would be able to sustain themselves on the new land.

3. Compensation: the delegation understands that the local inhabitants have been assured that they would receive individual compensation packages and that the value of the land they are being moved from would be individually valued. Our understanding is that those valuations which did take place were not undertaken by independent valuers and that, other than a 'disturbance fee' of US$1,000, no compensation has been paid.

It is of concern to the IBAHRI if the property rights of local inhabitants who have been identified for relocation have not been properly considered. The delegation urges both the Zimbabwean Government and the relevant mining companies to respond in detail to the concerns listed above and to engage proactively with relevant community organisations.

134 Interview, Mutare, 10 June 2011.

Transparency

The delegation was repeatedly told by members of Government and civil society that there was little or no transparency and accountability in place with regard to the allocation of mining licences. It was informed by several interviewees that the Government tendering procedure had not been respected with regard to the allocation of mining rights and that the licences were granted by 'special grants' direct from the Office of the President. The delegation was also told that the majority of the diamond revenues, for those diamonds which have been sold, cannot be accounted for. It was reported that Finance Minister Tendai Biti told the cabinet in February 2011 that US$174m in diamond revenues cannot be accounted for and a further US$125.8m, which had been realised in January 2011, had not been remitted to the treasury.

The delegation was unable to determine what steps, if any, had been taken by the Zimbabwean Government to ensure effective transparency with regard to the allocation of mining licences and the accountability of revenue streams. Plainly both issues raise critical rule of law concerns and given the significance of the income stream for the Zimbabwean economy the IBAHRI would urge the Zimbabwean Government to ensure that both issues are dealt with expeditiously.

Finally, the delegation was informed by a cabinet minister that the Zimbabwean Government had requested technical assistance from the KP two years ago and that this had not been forthcoming. The delegation cannot confirm this information as it has received conflicting claims on this point. However, clearly Botswana, South Africa and Namibia have considerable expertise in the extraction of diamonds and technical assistance from them may be appropriate to assist Zimbabwe to introduce the procedures and reforms to address the serious concerns outlined above.

Section Four: The Role Of The International Community

The GPA explicitly recognises the importance of external mechanisms in monitoring its implementation. It stipulates that the 'implementation of this agreement shall be guaranteed and underwritten by the Facilitator, SADC and the AU'[135] and that ZANU-PF and both MDC formations will 'continually review the effectiveness and any other matter relating to the functioning of the Inclusive Government established by the Constitution in consultation with the Guarantors.'[136] South Africa President Zuma has been appointed as facilitator and reports to SADC, which reports in turn to the AU.

Zimbabwe is also a party to a variety of international treaties, including a number of UN and AU human rights conventions, which impose certain obligations on its Government to respect, protect and promote the rights of people living within its jurisdiction.[137] These require it to submit various reports to treaty monitoring mechanisms outlining how it is complying with these obligations. The UN and AU have also created various thematic human rights mechanisms, such as rapporteurs or working groups, to monitor issues of particular concern and these may request visits to member states such as Zimbabwe. The reports and recommendations of these various monitoring bodies provide an important means of measuring Zimbabwe's compliance with international human rights standards.

Almost everyone that the delegation spoke to acknowledged the importance of the 'international community' in helping to resolve the current political crisis in Zimbabwe. However, views differed as to how effective the principal regional bodies have been to date and also about the potential role of other international institutions and foreign governments. In particular, strong views were expressed about the role of those 'Western' governments and institutions which are currently imposing selective sanctions on Zimbabwe and which have suspended donor aid from its Government.

Many people that the delegation spoke to argued that SADC is the best placed international organisation to help the people of Zimbabwe resolve their current crisis and that this will require it to remain actively engaged with the present political process. They stated that other international organisations and donors should play a supportive role, channelling technical and financial assistance through SADC, as well as deploying additional personnel where necessary. International treaty and non-treaty mechanisms provide important normative standards against which Zimbabwe's record can be judged. It was argued that SADC itself should step up its monitoring and assistance efforts, provide more resources for institutions such as JOMIC, and deploy monitors and assessment teams particularly in the run-up to the next elections. Donors should continue to support Zimbabwean civil society groups as well as providing funds directly to those state institutions that are supporting the reform process outlined in the GPA. In this context it was argued that the targeted sanctions imposed on a number of leading Zimbabwean politicians and business people should be suspended if the parties can, under SADC's supervision, agree to a road map towards the next election with credible timelines for the implementation of all the commitments contained within the GPA. Others

135 GPA, Article 22.6 (Implementation mechanisms).

136 GPA, Article 23.2 (Periodic review mechanism).

137 It is additionally bound by general principles of international law, such as the absolute prohibition of torture, genocide and slavery.

maintained that SADC had up until recently failed to exert sufficient pressure on ZANU-PF to engage in meaningful reform and so there was a need for further external monitoring and pressure.

The Southern African Development Community and the African Union

Zimbabwe is party to the SADC treaty that was signed on 17 August 1992 and entered into force the following year. SADC consists of 15 member states: Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. Its current Chairperson is Angolan President, José Eduardo dos Santos.

SADC has been actively involved in trying to resolve the crisis in Zimbabwe for a number of years. In March 2007, it mandated South African President Thabo Mbeki ('President Mbeki') to mediate an agreement aiming to secure a new constitution and free and fair conditions for the 2008 elections. It also provided election observers during the two polls and their reports were strongly critical of the political violence and media bias that took place.[138] The observer team noted that 'the security forces did very little to stop the violence' and that SADC observer teams were harassed in the course of their duties. Their final report concluded that 'the prevailing environment impinged upon the credibility of the electoral process. The elections did not reflect the will of the people of Zimbabwe.' President Mbeki also despatched a group of retired South African generals to Zimbabwe to advise him on the conduct of the elections and, although their report has never been published, it is believed to have significantly contributed to his decision not to explicitly recognise Mugabe's victory.

However, SADC has been extremely cautious in its public statements in relation to events in Zimbabwe, preferring mainly to rely on 'quiet diplomacy' instead. The SADC summit meeting which mandated President Mbeki's intervention in 2007 described Zimbabwe's 2002 election as 'free and fair' despite the well-documented reports of violence, intimidation and electoral fraud that took place during this period. President Mbeki has also been criticised for failing to publicly condemn the outcome of the 2008 elections, which allowed Mugabe to stay in office. In October 2008, during the impasse between the signing of the GPA and the formation of the Inclusive Government, MDC-T leader Tsvangirai was reported as having publicly accused President Mbeki of favouring ZANU-PF and not proceeding 'fairly and impartially' as a facilitator.[139]

Nevertheless, SADC's mediation efforts have produced some significant achievements. The package of reforms that preceded the 2008 elections proved more substantial than many observers had predicted and the GPA also clearly represents an important development in Zimbabwe's history. Jacob Zuma, who replaced Mbeki as South Africa's President in 2009, had initially indicated that he would be taking a more critical position towards Mugabe than his predecessor and around this time South African trade unionists took industrial action to block the importation of a shipment of Chinese weapons to Zimbabwe. Pressure from SADC in January 2009 appears to have pushed Mugabe to agree to a timetable for forming the Inclusive Government the following month.

---

138 SADC Election Observer Mission, (SEOM), Preliminary statement presented by The Honourable José Marcos Barrica, Minister of youth and sports of the Republic of Angola and head of the SEOM on the Zimbabwe Presidential runoff and House of National Assembly by-elections held on 27 June 2008.

139 *The Zimbabwe Independent*, 'Tsvangirai accused Mbeki of Bias' (31 October 2008).

Since the formation of the Inclusive Government, SADC has largely avoided making public statements about the situation in Zimbabwe, which has caused considerable frustration amongst many civil society activists, who have repeatedly accused ZANU-PF of violating the GPA. MDC-T suspended their participation in the Inclusive Government in late 2009, in protest at alleged non-compliance with the GPA by ZANU-PF, although they subsequently reversed this decision after further negotiations. Nevertheless, a SADC summit meeting held at Windhoek, Namibia, in August 2010, 'commended the Zimbabwe stakeholders for their efforts towards implementation of the GPA' and 'urged the Zimbabwe stakeholders to remain committed to the implementation of the GPA'. It also 'reiterated its call on the international community to lift all forms of sanctions imposed on Zimbabwe in view of the negative effects they have on Zimbabwe and the SADC region in general'.[140]

By early 2011, both MDC formations were claiming they had lost confidence in President Zuma's facilitation efforts and were unhappy with SADC's handling of negotiations. According to the ICG, the MDC-M's newly elected President and chief negotiator, Welshman Ncube, described South Africa's conduct as 'disgraceful' and argued that both it and SADC 'should have paid more attention, devoted more time to assisting the parties to find common ground'.[141] MDC-T spokesman Nelson Chamisa stated that 'we feel the actions of our guarantors, SADC and the African Union, [are] in deficit … They have the leverage to help solve the matter, and they can also flex their muscles a little bit to make the issues move forward.'[142] Prime Minister Tsvangirai reinforced these calls:

> 'We urge SADC, the African Union and the international community at large to keep an eye on Zimbabwe. The country risks sliding over the precipice if the guarantors of the GPA do not take immediate action to come up with a binding roadmap as a precondition ahead of the next election.'[143]

On 31 March 2011, a SADC troika meeting took place, in Livingstone, which issued a communiqué that differed markedly in tone.[144] It 'recalled past SADC decisions on the implementation of the GPA and noted with disappointment insufficient progress thereof and expressed its impatience in the delay of the implementation of the GPA.' It welcomed a 'frank' report on the political and security situation in the country from President Zuma and noted 'with grave concern the polarization of the political environment as characterized by, inter alia, resurgence of violence, arrests and intimidation in Zimbabwe.' It stated that 'there must be an immediate end of violence, intimidation, hate speech, harassment, and any other form of action that contradicts the letter and spirit of GPA'.

The communiqué also committed SADC to stepping up its involvement in Zimbabwe through more direct participation with structures responsible for monitoring, evaluation and implementation of the GPA. It stated that 'the Troika of the Organ shall appoint a team of officials to join the Facilitation Team and work with JOMIC to ensure monitoring, evaluation and implementation of the GPA. The Troika shall develop the Terms of Reference, time frames and provide regular progress reports, the first, to be presented during the next SADC Extraordinary Summit. Summit will review progress on the implementation of GPA and take appropriate action.'

---

140 Communiqué of the 30th Jubilee summit of SADC Heads of State and Government, 16–17 August 2010, para 18.

141 Paidamoyo Muzulu, '"Zuma Mediation 'Disgraceful" – MDC', *Zimbabwe Independent* (13 January 2011) available at **http://allafrica.com/stories/201101140866.html**.

142 *Ibid.*

143 See note 1, above, pp 22–23.

144 Communiqué, Summit of the Organ Troika on Politics, Defence and Security Cooperation, Livingstone, Republic of Zambia, 31 March 2011.

ZANU-PF has vigorously protested that the communiqué represents 'interference in Zimbabwe's internal affairs' and has tried to have this communiqué reviewed or annulled by SADC. However, after a series of meetings in Harare, in April 2011, the parties to the GPA were able to agree the first draft of a 'road map to Zimbabwe's elections', which seems to have revived some confidence in the process. The road map contains a list of areas of agreement, as well as deadlock, on the activities that 'must be executed and implemented before the next election.'[145] The delegation was told by some participants in the negotiations that the sense of deadlock had been broken by focusing on how to implement reforms in areas of agreement rather than continuing to dwell on those areas of disagreement.

Another SADC summit meeting was held in Sandton, South Africa, in June 2011, while the delegation was in Zimbabwe. This noted the outcome of previous summits and the Troika meeting and 'mandated the Organ Troika to continue to assist Zimbabwe in the full implementation of the GPA'. It also 'urged the Organ Troika to appoint their representatives as soon as possible to participate in JOMIC' and 'mandated the Secretariat to mobilise resources for JOMIC for it to discharge its functions.' It 'encouraged the parties to the GPA to move faster in the implementation of the GPA and create a conducive environment to the holding of elections that will be free and fair, under conditions of a level political field.' It commended President Zuma's efforts as a facilitator and 'urged the Organ Troika to remain seized with the implementation of the Global Political Agreement in Zimbabwe'.[146]

President Zuma is reported to have stated – in his report first submitted to the Livingstone Troika – that an election in the prevailing atmosphere of 'violence, intimidation and fear' would lead the country back to the crisis of the last elections three years ago or even to 'a far worse situation', which is why clear conditions for a new poll, including outside observers and the unfettered access of all parties to print and broadcast media, were needed. He said the situation in the country could no longer be tolerated. The recent anti-government uprisings in North Africa had shown the need to unblock the Zimbabwean impasse speedily and 'in a way that will not just satisfy the SADC region but also that would be acceptable to the entire world.'[147]

At a further summit meeting, in August 2011, SADC merely 'took note of progress in the implementation of its decisions taken during the Extra-Ordinary Summit in June, 2011.' The summit 'urged the parties to GPA to remain committed to the implementation of the Agreement and finalise the Roadmap for resolving outstanding issues'. It also 're-affirmed its decision of the Sandton Extra-Ordinary Summit and urged the Troika of the Organ to appoint a team of officials to join the facilitation team and work with the JOMIC to ensure monitoring, evaluation and implementation of the GPA. The Troika shall develop the terms of reference, time frames and provide regular progress reports. Summit will review progress on the implementation of GPA and take appropriate action.'[148] Civil society groups expressed their frustration that the summit had 'failed to take a definitive stand on Zimbabwe' and some activists said that this was calling its wider credibility into question.[149]

---

145 *Road map to Zimbabwe's election*, undated copy given to the IBAHRI Delegation, June 2011.

146 Communiqué, Extraordinary Summit of Heads of State and Government of the Southern African Development Community, Sandton, Republic of South Africa, 11–12 June 2011, paras 22–28.

147 *Economist*, 'A new road map for Zimbabwe?' (23 June 2011).

148 Communiqué of the 31st SADC Heads of State and Government Summit, The 31st Summit of Heads of State and Government of the Southern African Development Community (SADC), Luanda, Republic of Angola, 17–18 August 2011.

149 *The Standard*, 'Zimbabwe: SADC summit fails to tackle Mugabe' (21 August 2011).

Despite these frustrations at its cautious pace, at the time of the Sandton Summit, while the delegation was in Zimbabwe, SADC seemed to have secured the confidence of many Zimbabweans. At that time, the delegation received a consistent message from all stakeholders interviewed that, of the possible international actors, SADC was best placed to assist Zimbabwe in resolving the issues linked to the implementation of the GPA. This report, therefore, includes a specific set of recommendations aimed at SADC and the AU.

Zimbabwe's international legal obligations

Zimbabwe is a party to number of international and regional human rights instruments, including: the ICCPR,[150] International Covenant on Economic, Social and Cultural Rights (ICESCR),[151] International Convention on Elimination of All Forms of Racial Discrimination (ICERD),[152] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[153] Convention on the Rights of the Child (CRC),[154] Convention on the Prevention and Punishment of the Crime of Genocide,[155] Freedom of Association and Protection to the Right to Organise Convention,[156] African (Banjul) Charter on Human and Peoples' Rights,[157] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,[158] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights[159] and African Charter on the Rights and Welfare of the Child.[160]

Zimbabwe is also a party to the SADC Treaty, whose provisions include a non-discrimination clause[161] and also create a tribunal 'to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.'[162] However, in September 2009, Zimbabwe withdrew from the tribunal's jurisdiction following a ruling that its land allocation programme violated the rights of a number of commercial farmers who had been dispossessed from their land without compensation. Zimbabwe subsequently lobbied successfully for the suspension of the SADC Tribunal, arguing that the protocol which established it should have been ratified separately by member states, rather than as part of the SADC Treaty. The tribunal has been inoperative since August 2010, when a moratorium on hearing new cases came into effect. At the same time, it was decided not to appoint new judges or renew the tenure of six judges, making the Tribunal effectively inactive. A SADC summit, in May 2011, decided to maintain this moratorium for another year.[163]

150 Accession: 13 May 1991.

151 *Ibid.*

152 *Ibid.*

153 Accession: 12 May 1991.

154 Accession: 11 September 1990.

155 See note 142, above.

156 Ratification: 9 April 2003.

157 Ratification: 30 May 1986.

158 Signature: 18 November 2003.

159 Signature: 9 June 1998.

160 Accession: 19 January 1995.

161 SADC Treaty, Article 6.

162 *Ibid*, Article 16.

163 Communiqué Extraordinary Summit Heads of State and Government of the Southern Africa Development Community, Windhoek, Republic of Namibia, 20 May 2011, paras 7– 8.

Zimbabwe withdrew from the Commonwealth in 2003, following repeated criticism of its human rights record. Its most recent report to the UN treaty-monitoring mechanisms was in 2000 when it submitted a report to the Committee for the Elimination of Racial Discrimination, under ICERD. It last reported to the Committee on Elimination of Discrimination against Women, under CEDAW, in 1998; the UN Human Rights Committee, under the ICCPR, in 1998; the Committee on Economic, Social and Cultural Rights, under the ICESCR, in 1997; and the Committee on the Rights of the Child in 1996.[164] Zimbabwe submitted its periodic report to the African Commission on Human and Peoples Rights in 2006. It is also due to have its record considered under the Universal Periodic Review process in October 2011, but for most of the last decade it has proved extremely uncooperative in allowing UN human rights mechanisms to scrutinise its record. In October 2009, for example, Manfred Nowak, the then-UN Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment, was deported from Harare International Airport after he was invited by Prime Minister Tsvangirai to investigate cases of torture.[165]

This reluctance to allow a proper external scrutiny of its human rights record has undoubtedly increased Zimbabwe's international isolation and made it more difficult to develop dialogue with its Government about how this record could be improved.

Sanctions and other measures

The GPA notes in Article IV, 'the present economic and political isolation of Zimbabwe […] over and around issues of disputed elections, governance and differences over the land reform programme.'[166] It states that 'some sections of the international community have since 2000 imposed various sanctions and measures against Zimbabwe, which have included targeted sanctions'. These include: 'the United Kingdom, European Union, United States of America and other sections of the International Community'. It further notes that 'this international isolation has over the years created a negative international perception of Zimbabwe and thereby resulting in the further isolation of the country by the non-availing of lines of credit to Zimbabwe by some sections of the international community'[167] and that this has contributed to a 'fall in the standards of living of our people'. The parties, therefore, agree 'that all forms of measures and sanctions against Zimbabwe be lifted in order to facilitate a sustainable solution to the challenges that are currently facing Zimbabwe; and […] commit themselves to working together in re-engaging the international community with a view to bringing to an end the country's international isolation.'[168]

The issue of sanctions is controversial and the delegation heard a range of views on the issue from political and civil society actors. Some maintain that the debate is a completely artificial construct used by ZANU-PF as a convenient excuse for their disastrous mis-handling of the economy in the last two decades. They say that even the phrase 'sanctions' is a misnomer, because it implies the country faces a commercial trade embargo, while the measures that are in fact in place are far more targeted and selective. Zimbabwe is a large recipient of international aid and some argue that the only people

164 Information from the Office of the High Commissioner of Human Rights (OHCHR) website, Zimbabwe home page: **www.ohchr.org/EN/countries/AfricaRegion/Pages/ZWIndex.aspx**.

165 *Reuters*, 'UN rights expert Nowak deported from Zimbabwe' (29 October 2009).

166 GPA, Article IV, 4.2.

167 *Ibid*, 4.4.

168 *Ibid*, 4.6.

who have been negatively affected by the international restrictions are a tiny group of corrupt ZANU-PF politicians, business people and military leaders. They also argue that lifting these measures, in the absence of significant and meaningful reform by the Zimbabwean authorities would reward the intransigence of ZANU-PF's current leadership and send entirely the wrong signal about the international community's attitude towards its despotic regime.

Others argue that sanctions have become part of the problem rather than the solution, providing ZANU-PF with an excuse not to fully engage with the GPA process and a convenient alibi for the Government's economic incompetence. All of the MDC ministers with whom the delegation spoke said that the restrictions should be lifted – or at least suspended – to be replaced by a strategy of 'positive engagement' by the international community that seeks to open up the space for and encourage reform. Some spoke of their genuine regret at having to travel to international meetings without their Government colleagues and said that they felt that the psychological impact of these restrictions was to reinforce a sense of isolation and bitterness. Others noted that ending Zimbabwe's economic isolation would provide a better climate for political reform. One said that they 'get in the way of discussion'.[169] Another concluded that 'sanctions are well-past their sell by date. The financial restrictions never had much impact anyway, because they were signalled in advance and so the money was just hidden. Their purpose was to stigmatize and they have served that purpose. Sanctions never stopped a single murder, detention or act of torture and now they have become an obstacle to serious dialogue. They should go.'[170]

The 'sanctions' referred to include a series of restrictive measures that the EU imposed in 2002 against a group of named ZANU-PF leaders and their wives. These include visa restrictions preventing them from entering member states and a freezing of their assets held in bank accounts in these countries. They also include a more general ban on export of all military and security equipment which could be for internal repression or external aggression, which applies to all countries that the EU trades with.

The US imposed similar restrictions in 2001 through the Zimbabwe Democracy and Economic Recovery Act (ZEDERA), which directs that the US vote in international financial institutions (IFIs) should be used to oppose any financial support for Zimbabwe until a number of conditions (including restoration of the rule of law, and establishing an environment conducive to free and fair elections) have been met. This legislation is sometimes characterised as a ban on Zimbabwe's access to the resources of IFIs such as the IMF and World Bank, but in fact it is not. It affects only the US vote in these institutions which, alone, is not sufficient to prevent loans to Zimbabwe or to any country. Decisions by these IFIs suspending Zimbabwe's access to their resources have required the support of EU members and other states not bound by US legislation. It should also be noted that in any case the ZEDERA allows the US President to waive these restrictions if he determines that it is in the national interest of the US to do so.

Although the GPA lists all of these issues under the single heading of 'sanctions and measures', they should in fact be considered separately. Zimbabwe has run up a huge and unsustainable national debt in recent years. It has suffered hyper-inflation and a complete collapse of its national currency and is regarded as amongst the more corrupt countries in the world.[171] Zimbabwe's finance minister has also recently declared that over US$100m of projected revenues from diamond sales have not

169 Interview, Harare, 14 June 2011.

170 Interview, Bulawayo, 13 June 2011.

171 Transparency International UK, Corruption Perceptions Index 2010, ranks it at 134 – level with Sierra Leone and Nigeria.

reached the treasury.[172] Clearly donors have a right to ensure that grants and loans will be spent for their intended purposes and should be accompanied by reforms to increase transparency and good governance. The GPA's goal of lifting 'all forms of measures and sanctions against Zimbabwe'[173] needs to be seen in this context.

In February 2011, the EU lifted asset freezes and travel bans against 35 people linked to President Mugabe's government, but extended them against 163 individuals and 31 businesses for another year. It claims that all of those on the current list are involved in human-rights abuses and anti-democratic activities in Zimbabwe.[174] Catherine Ashton, the EU's foreign policy head commented that while there had been 'significant progress in addressing the economic crisis and in improving the delivery of basic social services'[175] in Zimbabwe, political reform has been slow. She expressed her 'deep concerns' at an upsurge in violence in early 2011, but stressed that the measures could be 'lifted at any moment' if there was progress on democratisation. The EU also pointed out that since the Government of National Unity was formed in February 2009, Zimbabwe has received €365m in EU aid for social programmes, food security and good governance.

Along with the EU, Britain and the US are also amongst Zimbabwe's largest foreign donors and the issue of sanctions remains under discussion in both countries. A report published by the British House of Commons, *Zimbabwe since the Global Political Agreement*, notes that: 'ZANU-PF has consistently argued that it is not under any obligation to fully implement the GPA while western sanctions are in place, accusing the MDC-T of failing so far to deliver on this side of the "bargain".'[176] Nevertheless, in March 2010, the International Development Committee of the UK's House of Commons stated that 'We agree that further progress on democracy and human rights needs to be demonstrated before all the measures can be lifted.'[177]

The delegation had an opportunity to discuss the issue with a representative of United States Agency for International Development (USAID) and the US Ambassador to Zimbabwe.[178] Both stressed that the targeted sanctions imposed on selective individuals were not intended to harm the ordinary people of the country, but admitted that they had been represented as such in ZANU-PF propaganda and were 'widely misunderstood'. They also said that the policy was under review and that there were grounds for thinking that it might be counter-productive. The US Ambassador pointed out that the travel ban provisions of ZEDERA have never actually been applied, since no one on the list has ever sought to visit the US, and so the Act's significance was largely symbolic. He questioned whether the symbolism was still appropriate since the formation of the Inclusive Government and argued that 'positive engagement' could yield far greater results in the current political climate.

---

172 **MiningReview.com**, 'Zimbabwe plans to take majority stake in diamond mines' (18 February 2011).

173 GPA, Article IV, 4.6(b).

174 European Voice, 'EU renews Zimbabwe sanctions', 15 February 2011.

175 EU, press release, 'Declaration by the High Representative Catherine Ashton on behalf of the European Union on Zimbabwe', Brussels (15 February 2011) available at: **www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/119309.pdf**.

176 Jon Lunn and Gavin Thompson, 'International Affairs and Defence Section and Economic Policy and Statistics Section: Zimbabwe since the Global Political Agreement', Standard Note: SN/IA/5793 (7 December 2010) available at: **www.parliament.uk/briefingpapers/commons/lib/research/briefings/snia-05793.pdf**.

177 House of Commons, International Development Committee, 'DFID's Assistance to Zimbabwe', Eighth Report of Session 2009–10 Volume I (26 March 2010), p 52.

178 Interviews, Harare, 14 and 17 June 2011.

In May 2010 three US Senators tried to amend ZEDERA to authorise technical assistance to reformist government ministries and to parliament in its efforts to amend or repeal repressive legislation. It also aimed to amend restrictions on assistance to the government of Zimbabwe in the areas of health and education.[179] The Bill, which was introduced before the second session of the 111th Congress, states that:

> It shall be the policy of the United States Government to –
>
> (1) support a transition to democratic and economic recovery in Zimbabwe that reflects the new political conditions and opportunities created by the GPA;
>
> (2) support the advancement of human rights, labour rights, democracy, rule of law, independence of the judiciary, freedom of the press, and economic development in Zimbabwe
> (13) engage international partners and regional governments to develop a coordinated strategy to prepare for future elections in Zimbabwe, particularly to help reduce the risk of violence and other election-related abuses.

The Bill however never became law and has not been resubmitted before the 112th Congress.

As noted above, current US and EU restrictions prevent direct support from being provided to official state bodies in Zimbabwe even where they are not controlled by the executive and that funding is intended to support the reform process provided for in the GPA. Of course donors may legitimately ask for assurance that spending will follow widely accepted norms regarding transparency and financial accountability. However, the IBAHRI also believes that the symbolic impact of lifting, or at least suspending, the other restrictions would be to send a sign to the government and people of Zimbabwe that these 'western' countries support the process of political reform. While their removal would probably be claimed as a victory by ZANU-PF, it would be most likely to benefit the moderate faction within the party who can see the benefits of ending Zimbabwe's international isolation. The suspension could also be made conditional on compliance with the GPA and the agreement of a credible road map through the SADC process.

Both the AU and SADC have repeatedly called for an end to sanctions and their easing would send a signal it is these bodies which should play the leading role in assisting Zimbabwe towards a functioning democracy. The AU and SADC have been criticised in the past for not speaking out publicly against the well documented record of violence, intimidation, censorship, electoral fraud and other human rights violations that have taken place in Zimbabwe in recent decades. However, there is a widespread agreement that the decisions of the most recent SADC summit meetings have seen tangible advances. An African-endorsed alternative to the current restrictions imposed on Zimbabwe by 'Western' countries could also help to ensure that the whole of the international community was approaching the crisis in Zimbabwe in a positive coherent and unified manner.

179 Zimbabwe Renewal Act of 2010. 111th Congress, 2009–1010. See SW Radio Africa news: The Independent Voice of Zimbabwe, 'US Senators introduce bill to review sanctions on Zimbabwe' (5 May 2010).

Recommendations

To the Inclusive Government of Zimbabwe

1. All parts of the Inclusive Government should cooperate fully with the recommendations in the communiqué of the 31 March 2011 SADC summit of the Organ Troika on Politics, Defence and Security Cooperation, restated in the communiqué issued by the Extraordinary Summit of Heads of State and Government of the Southern African Development Community, Sandton, Republic of South Africa, 11–12 June 2011. This should lead to the finalisation of a 'road map' for full implementation of the GPA, along with timetables, ready for adoption at SADC's next summit, as no timelines were adopted at the SADC Summit of Luanda in August 2011.

2. The Inclusive Government should make finalisation of the COPAC constitution-writing exercise a priority, including by identifying and utilising available resources and support from the GPA guarantors and the wider international community, so as to enable a process that allows Zimbabweans to express their free will in a referendum. The Constitution should protect the rule of law with, among other things, provisions that secure the independence of the judiciary. Consideration should also be given to creating a new top court, perhaps in the form of a constitutional court.

3. The Constitution should also guarantee the genuine independence of a JSC, which should be responsible for the appointment of all judges using a transparent nominations process against agreed criteria based on merit. A Code of Conduct for judges and magistrates should be introduced providing for, inter alia, full and frank disclosure of the assets of the judges of the High Court and the Supreme Court. The JSC should also have the power to discipline judges and magistrates, after a procedure that guarantees full due process to the accused judge or magistrate, including by suspension from office or dismissal in extreme cases such as serious misconduct or incapacity.

4. An Independent DPP should be created, removed from the AG's office. Independence of the DPP from the executive for individual prosecutorial decisions is necessary. The models of Kenya or South Africa might be considered.

5. The sections of the POSA, which oblige political parties to get police permission to hold public meetings, and the CPEA, which permits prosecutorial appeals of bail rulings, should be amended to limit the possibility of misuse. All appropriate steps should be taken to ensure that the police respect court orders concerning the rights of persons arrested and detained. All allegations of human rights abuses by members of the police force should be impartially investigated. Sanctions under the doctrine of command responsibility should be applied to superior officers who knew or should have known of abuses, and who failed to prevent or punish it.

6. The authorities should publicly condemn and bring an end to partisanship by police officers, including by ending selective application of the law and targeted harassment. The police should be put under a new, non-partisan and professional leadership, itself accountable to a politically neutral, citizen-based, supervisory board.

7. International assistance should be sought to provide appropriate training and education to members of the police and other state agencies on human rights. All training should be consistent with international human rights standards, such as the UN Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

8. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment should be ratified. Relevant UN and AU special mechanisms should be invited to Zimbabwe to investigate and make recommendations.

9. A credible mechanism should be established for dealing with national reconciliation and past violations of human rights that is in accordance with Zimbabwe's international legal obligations.

To the Southern African Development Community and the African Union

1. The Zimbabwean Government should be pressed through public and private diplomacy to implement the GPA fully and with urgency and to implement the above recommendations. As guarantor of the GPA, and to ensure that future elections in Zimbabwe are held in an atmosphere free of violence and intimidation, SADC and the AU should call on the Zimbabwean Government to institute human rights and rule of law reforms and reform the criminal justice system. SADC should also monitor the progress of all parties in fulfilling their commitments made under it.

2. SADC and the AU should (i) support the COPAC process and broader GPA reform initiatives through technical and financial assistance, as well as the deployment of personnel from the region where feasible; and (ii) review, in coordination with the political parties, the existing legislative agenda to identify GPA reform priorities that have not been addressed, with a focus on enabling conditions for credible elections.

3. SADC should ensure that the facilitation team's road map recommends a revision of the GPA's internal monitoring and review mechanisms, in particular that: JOMIC should have a more active role to deal with cases of political violence, including oversight of investigations by national police and producing regular public reports to the GPA signatories, who, in turn, should be obliged to respond publicly in writing; and JOMIC reports should provide a basis for the Periodic Review Mechanism's reporting and recommendations.

4. SADC and the AU should affirm that participation of civil society organisations is necessary to provide full legitimacy to the COPAC and other GPA reform processes and to this end establish a channel for direct access to the SADC facilitator for civil society actors to raise concerns about implementation of the GPA.

5. The AU should conduct a comprehensive assessment of violence and related matters in Zimbabwe to determine whether conditions are conducive for free and fair elections. SADC and the AU should support Zimbabwe in holding free and fair elections that meet international standards and publicly support full, unfettered international monitoring of future elections well in advance of polling day.

6. SADC and the AU should facilitate greater involvement in the mediation process by the UN, and its human rights monitoring mechanisms, in order to bring additional expertise to bear on problems in Zimbabwe.

To the wider international community, including the United Nations, European Union and other donors

1. The UN and EU should remain actively diplomatically engaged in supporting and assisting the efforts of SADC and the AU to facilitate processes and institutions supporting the development of democratic and accountable governance in Zimbabwe.

2. The UN, EU and other donors should support and strengthen Zimbabwean civil society's efforts to provide coherent, systematic and accurate reports and analysis of violence, including by improving verification methods, identifying priority concerns, developing clear and effective channels of communication and, ultimately, by bringing findings to the attention of local, regional and international policymakers, institutions and media.

3. The EU, US and UK Governments should discuss with SADC and the AU how and when to suspend all sanctions and other measures imposed on Zimbabwe – pending their ultimate abolition – in return for clear progress in implementing the GPA through reforms of key Government institutions and agencies and specific human rights and good governance benchmarks.

4. Donors should provide effective support for fundamental reforms to the Zimbabwean State, including strengthening judicial independence and institutions such as the ZEC, the ZHRC, providing appropriate rights-relevant training for the police, and improving the administration and financial auditing of justice institutions. They should also ensure full accountability and transparency in the use of their funds in support of constitution-making, so as to create greater confidence in the process.

Annex I: Terms of reference

The IBAHRI will undertake a fact-finding mission to Zimbabwe to assess the progress of the rule of law in the country. As the GPA, entered into force in September 2009, officially ends in February 2011, the mission will assess the state of the rule of law in Zimbabwe in preparation for the next elections.

Specific areas to be addressed are:

- assessment of the implementation of the GPA and its results;
- independence and needs of the judiciary and the Attorney-General's office;
- assessment of steps to be taken in preparation for the next elections and the referendum on the constitution;
- impunity for crimes committed in relation to the 2008 elections;
- assessment of the role played by the SADC institutions in monitoring the GPA and in restoring the rule of law in Zimbabwe;
- assessment of what is needed from the SADC institutions in the restoration of the rule of law in Zimbabwe;
- role played by the African Union during the GPA and actions to be taken in its aftermath;
- assessment of the constitutional review process, including the content of the proposed draft and the outreach process;
- assessment of the role played by foreign states and donors: impact of sanctions and what is needed in preparation for the elections; and
- violence and policing in the extractive industries: impact on the rule of law and assessment of actions taken.

The IBAHRI team of legal experts will be meeting with:

- judges;
- government officials;
- lawyers and lawyers' organisations;
- NGOs;
- human rights organisations;
- representatives of civil society;
- women's groups;
- international and regional organisations; and
- embassies.

The mission's report will contain recommendations to the Government of Zimbabwe, regional and international organisations, as well as donor states, in order to ensure the conditions for fair and violence-free elections are present in Zimbabwe. The report will present an assessment of the successes and gaps of the GPA and will also include an agenda for what remains to be done in order to restore the rule of law in Zimbabwe.

International Bar Association
4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
Website: **www.ibanet.org**