

ZIMBABWE: THE ROAD TO REFORM OR ANOTHER DEAD END?

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ZIMBABWE: THE ROAD TO REFORM OR ANOTHER DEAD END?

EXECUTIVE SUMMARY AND RECOMMENDATIONS

Intensified violence against those deemed to be ZANU-PF enemies has exposed the limitations of Zimbabwe's much delayed reform process and threatens to derail the Global Political Agreement (GPA). President Mugabe's call for early elections has increased fears of a return to 2008's violence. Prime Minister Tsvangirai has appealed for help from the region. Eventual elections are inevitable, but without credible, enforceable reforms, Zimbabwe faces another illegitimate vote and prospects of entrenched polarisation and crisis. GPA guarantors – the African Union (AU) and the Southern African Development Community (SADC) and its South African-led facilitation team – have an uphill battle to secure implementation. ZANU-PF is increasingly confident it can intimidate opponents and frustrate reform, and there is waning faith, internally and externally, in MDC-T capacities. Mugabe's health and ZANU-PF succession turmoil are further complications. Without stronger international pressure on ZANU-PF, the tenuous current coalition may collapse, triggering further violence and grave consequences for southern Africa.

The GPA, signed by the three political parties (ZANU-PF, MDC-T and MDC-M) in September 2008, was intended to provide a foundation for response to the multiple political and economic crises, but it has become a battleground for control of the country's future. As in 2008, ZANU-PF's ability, in partnership with the unreformed security sector leadership (the "securocrats"), to thwart a democratic transfer of power remains intact. The state media is still grotesquely unbalanced, and the criminal justice system continues to be used as a weapon against ZANU-PF opponents, in particular the MDC-T.

The centrepiece of GPA reforms is a parliament-led constitution-making process under the direction of the Constitution Parliamentary Affairs (Select) Committee (COPAC). That body launched an outreach program in the latter half of 2010, but several civil society organisations and the MDC-T criticise it for falling far short of being inclusive and open and accuse ZANU-PF of having captured and manipulated the process. Many Zimbabweans, however, still consider the constitution-writing exercise important for moving the country forward. While drafting has begun, leading toward an all-stakeholders conference, parliamen-

tary approval and a referendum, every step presents opportunity for opposition, delay and obfuscation.

Both MDC parties argue that COPAC must finish its work before elections are held, but ZANU-PF says elections can proceed with or without a new constitution and links its cooperation on democratic reforms to removal of targeted international sanctions, over which the parties have no control. In late February 2011, the facilitation team's visit to Harare resulted in a commitment from the three party leaders to implement their August 2010 agreement on outstanding GPA issues. This did not include a commitment to the sequence of elections after a constitutional referendum. Nevertheless, having failed to produce an agreed plan themselves, the party leaders deferred to the facilitators to produce a roadmap for pre-election action.

The GPA guarantors and the facilitation team have until very recently shied from addressing poor progress directly. On 31 March 2011, however, the SADC troika (Namibia, Mozambique and Zambia) took note of the lack of progress in GPA implementation and related matters and the rise in levels of violence and intimidation and laid out steps that must now be taken to address the situation. This is a significant development that illustrates a public hardening of attitudes and increasing frustration within the regional organisation toward the GPA signatories, in particular ZANU-PF. The MDC-T welcomed the communiqué, which is a direct response to the multiple grievances it as well as civil society groups have expressed. ZANU-PF and Mugabe have countered that they will not tolerate external interference, even from neighbours. The next few months will determine whether SADC can follow its words by producing action that advances the reform agenda and prospects for a sustainable transition. That in turn will indicate whether the conditions necessary for credible elections exist.

The worsening climate of fear and violence means security sector reform (SSR) should be the most immediate challenge. In addition, important institutions need to be strengthened, including parliamentary committees and the Human Rights, Media and Electoral Commissions. These measures should be supplemented by continued support for civil society to engage with those bodies as set out in

the GPA. Until the draft constitution is produced, however, it is unlikely that even the limited SSR contained in the GPA will be meaningfully addressed.

The facilitation team recognises that it needs a constant presence in Zimbabwe. Its roadmap should propose an audit of what has and has not been done, what the parties can and cannot achieve. If further power-sharing is inevitable, a pragmatic assessment of the current arrangement's failure is needed. The guarantors and facilitation team have relied on the Joint Monitoring and Implementation Committee (JOMIC), set up by the GPA – four members from each of the three signatory parties – for evaluations, but it has not fulfilled its mandate, due to inadequate monitoring capacity, no enforcement leverage and problems navigating the distorted balance of power within government. In recognition of its poor performance, the SADC troika recommended strengthening the facilitation team's monitoring and reporting capacity, so it could work closer with the JOMIC. The annual progress review the Periodic Review Mechanism should provide in consultation with the guarantors has not been done, though the party leaders recently agreed to correct this. The guarantors must ensure a comprehensive review.

The roadmap should call upon the political leadership to collectively establish clear priorities, with a particular focus on how to secure conditions for credible elections. As endorsed by the recent troika summit, the SADC "Principles and Guidelines Governing Democratic Elections" provides the accepted frame of reference. The referendum envisaged for the draft constitution would be an important opportunity to test electoral conditions.

The GPA still offers a coherent framework for putting in place conditions for credible elections. However, progress remains stymied because ZANU-PF has not demonstrated a credible commitment to democratic reforms, and the MDC-T is not strong enough to force them through. The GPA guarantors and South Africa have now indicated they are prepared to take a much more hands-on approach, although it is unclear how this will manifest itself. It is important that they continually engage Zimbabwe's political leaders to take their own commitments seriously and set clear benchmarks and timelines for achieving the concrete steps set out in the SADC communiqué. Accelerating the implementation of key reforms, many of which have already been approved, is all the more necessary because a credible election process cannot take place until the appropriate conditions are in place.

RECOMMENDATIONS

To the Inclusive Government formed pursuant to the GPA:

1. 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.
2. Make finalisation of the COPAC constitution 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 campaign for or against the draft constitution without fear or persecution.

To the Constitution Parliamentary Affairs (Select) Committee (COPAC):

3. Pursue constitutional reform and other legislative measures that advance rule of law and overcome the legacy of political violence and impunity, including by promoting professional and accountable policing, removing the military's involvement in internal policing and promoting effective parliamentary oversight of all security and intelligence structures.

To the Southern Africa Development Community (SADC) and the African Union (AU) as GPA Guarantors:

4. Endorse at head of state level in both organisations the 31 March 2011 SADC troika communiqué calling for constitutional reform before elections and a roadmap to enable credible elections to take place.
5. Initiate, including by deploying an AU exploratory mission, a comprehensive assessment of violence and related matters in Zimbabwe to determine whether conditions are conducive for free and fair elections, as envisaged under the African Charter on Democracy, Elections and Governance and the SADC "Principles and Guidelines Governing Democratic Elections".
6. Make recommendations to assist in the achievement of such conditions, including with respect to the need to ensure that the country's security forces are not undermined by renegade elements.
7. 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 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.

8. Ensure that the facilitation team's roadmap recommends a revision of the GPA's internal monitoring and review mechanisms, in particular that:
 - a) 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
 - b) JOMIC reports should provide a basis for the Periodic Review Mechanism's reporting and recommendations as set out in Article 23 of the GPA.
9. 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.

To the United Nations Development Programme (UNDP):

10. Ensure full accountability and transparency in the use of its funds in support of constitution-making so as to create greater confidence in the process.

To the Government of South Africa:

11. Seek to use the South Africa-Zimbabwe Joint Permanent Commission on Defence and Security to undertake an assessment of defence and security conditions in Zimbabwe and their related implications for South Africa.

To the wider International Community, including the UN and European Union:

12. Assist, including by active diplomatic engagement, the efforts of the GPA guarantors to ensure and facilitate processes and institutions supporting the development of democratic and accountable governance.
13. Support and strengthen 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.

**Harare/Johannesburg/Nairobi/Brussels,
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ZIMBABWE: THE ROAD TO REFORM OR ANOTHER DEAD END?

I. INTRODUCTION

In September 2008, following a violent election campaign that targeted mainly activists and supporters of the two factions of the divided opposition Movement for Democratic Change (MDC), Zimbabwe's political leaders signed a Global Political Agreement (GPA) that committed them to resolve their differences by implementing its provisions.¹

At the general election held in March 2008 the MDC-T had won the parliamentary majority and control over most municipal governments. The electoral commission announced that Morgan Tsvangirai, the MDC-T candidate, had led the presidential contest, securing 48 per cent of the vote, ahead of President Robert Mugabe of ZANU-PF, who polled 43 per cent. It was clear that Mugabe faced a real prospect of defeat in the second round. The violent campaign that followed prompted Tsvangirai to withdraw from the June run-off, thus giving Mugabe a hollow re-election "marred by violence, intimidation and displacements impinging the credibility of the result".²

The violent second round starkly illustrated ZANU-PF's monopoly over the security sector and its ability to mobilise coercive surrogate forces to prevent a democratic transition. The MDC-T demonstrated that it had a popular mandate but was unable to secure a transfer of power. Desiring to prevent intensification of conflict, SADC proposed a transitional government, with the GPA as the framework for its reform agenda.

All understood that this was a temporary arrangement, put in place with the explicit intention of moving toward

a long-term political solution by ending violence, stabilising the economy, preparing a constitution and conducting legitimate elections. It provided for creation of an inclusive government that brought together the three political foes – the long-time ruling ZANU-PF and the two wings of the divided opposition, MDC-T and MDC-M – and focused on a series of broad economic, political, security and media commitments.

This report examines the post-2008 reform program, with a particular focus on the constitution-making process that has recently completed its public outreach phase and is now in the drafting phase. It considers the prospects that process can address the country's democratic deficits in a context of considerable resistance to change and renewed violence and intimidation.³

¹ They agreed to "work together to create a genuine, viable, permanent, sustainable and nationally acceptable solution to the Zimbabwean situation". Article 2, "Declaration of Commitment", Global Political Agreement (GPA) between the Zimbabwean African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) Formations, on resolving the challenges facing Zimbabwe, 15 September 2008. See Crisis Group Africa Briefings N°59, *Engaging the Inclusive Government*, 20 April 2009; and N°70, *Zimbabwe: Political and Security Challenges to the Transition*, 3 March 2010.

² SADC Election Observer Mission statement, Harare, 29 June 2008.

³ Other relevant factors, including evolving internal political party dynamics and the challenges of security sector reform, will be assessed in more detail in subsequent Crisis Group reports.

II. DEVELOPMENTS UNDER THE INCLUSIVE GOVERNMENT

To understand the importance and potential of the current constitutional reform initiatives, it is necessary to reflect on the events of 2008 and subsequent developments around the GPA and its implementation.⁴ Less than two weeks after the 29 March 2008 elections, analysts were already warning that an unprecedented campaign of violence would be unleashed against the MDC-T's structures and supporters, in what was described by one group as "a final orgy of repression".⁵ What unfolded over the following ten to twelve weeks has still not been fully assessed, although it was certainly the most egregious manifestation of violence the country has experienced since the Gukurahundi.⁶ 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.⁷

Accusations have been levelled against the Southern African Development Community (SADC) and the wider international community for failing to act more decisively after the first round of elections in March, concluding that

⁴ Also see Crisis Group Briefings, *Engaging the Inclusive Government*; and *Political and Security Challenges to the Transition*, both op. cit.

⁵ "The Ugly Endgame", *Africa Confidential*, vol. 49, no. 8, 11 April 2008.

⁶ Between 1983 and 1987 as many as 20,000 people in Matabeleland and Midlands provinces were killed in an anti-dissident campaign, spearheaded by members of the Zimbabwe National Army. See "Breaking the Silence – Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands, 1980-1988", Catholic Commission for Justice and Peace and the Legal Resources Foundation, Harare, April 1999.

⁷ Crisis Group interview, human rights defender, Harare, 30 January 2011. See also "Zimbabwe: A Trail of Violence after the Ballot", Amnesty International, June 2008; "Zimbabwe: Time for Accountability", Amnesty International, October 2008; and "Perpetual Fear: Impunity and Cycles of Violence in Zimbabwe", Human Rights Watch, March 2011. ZANU-PF has dismissed such evidence as political propaganda and continues to brand human rights NGOs as "imperialist puppets". Without offering equivalent documentation, ZANU-PF has blamed the MDC for the violence and/or claimed these incidents were a spontaneous response to perceived threats against the achievements of ZANU-PF's revolutionary agenda. See, for example, ZANU-PF inputs in the parliamentary debate following a motion by MDC-T parliamentarian Innocent Gonese to establish a parliamentary committee to investigate the violence that took place after the 2008 March elections, 16 and 17 March 2010.

this unwittingly had enabled the violent campaign that eventually forced the MDC to withdraw from the June second round.⁸ For better or worse, their subsequent intervention pushed ZANU-PF and the MDC formations into negotiations that resulted in a political deal in September (the GPA) that, in addition to specific commitments respecting a new government and its program – including a semblance of equitable power-sharing – established a monitoring and review process through the Joint Monitoring and Implementation Committee (JOMIC) and the reports of the Periodic Review Mechanism.⁹ Article 6 made specific provisions for a parliament-led constitution-making effort, inferring that it would be completed before new elections.¹⁰

Backsliding began shortly after signature, with unilateral appointments by President Mugabe and the abduction, detention and torture of opposition activists by state security agents. By early 2009, a new government had not been established and many grievances had accumulated, including over who would get which cabinet portfolios. The prospect of a stillborn agreement prompted SADC and other international intervention, so that the power-sharing

⁸ Grace Kwinjeh, "Staring a Gift Horse in the Mouth. Death spiral in Zimbabwe: Mediation, Violence and the GNU", 18 June 2008, States in Transition Observatory, IDASA-African Democracy Institute.

⁹ The JOMIC was established under GPA Article 22 ("Implementation Mechanisms") and is composed of four members from each of the three signatory parties. It is the "principal body dealing with issues of compliance and monitoring of the GPA". It has a broad mandate and is tasked with ensuring "the implementation in letter and spirit of this Agreement; to assess the implementation of this Agreement from time to time and consider steps which might need to be taken to ensure the full and speedy implementation of this Agreement in its entirety; to receive reports and complaints with respect to any issues related to the implementation, enforcement and execution of this Agreement; to serve as a catalyst in creating and promoting an atmosphere of mutual trust and understanding between the parties; and to promote continuing dialogue between the parties". Under GPA Article 23, the Periodic Review Mechanism is comprised of two representatives from each signatory party and is tasked with providing an annual review focusing on "progress on the implementation and achievement of the priorities and objectives set out in the Agreement", as well as "to make recommendations ... that may be necessary to take and make to realise full implementation of this Agreement". A further provision states that "this Agreement and the relationship agreed to hereunder will be reviewed at the conclusion of the constitution-making process".

¹⁰ Article 6 addresses the constitution-making process and the steps to be taken to realise it. An associated timeline stipulates the periods required for each step and envisages a maximum of nineteen months from start to conclusion. See Section III below. It is the only GPA article to contain specific implementation timeline.

government was sworn in on 11 February 2009, but with most grievances still unresolved.¹¹

The balance was distorted from the start, as ZANU-PF kept virtually exclusive control over the security forces, the criminal justice system and senior civil servants, as well as leverage over implementation of the new arrangement via Mugabe's reasserted authority. Morgan Tsvangirai's MDC-T was given the influential finance portfolio, as well as health and education and was able to drive policies that helped secure some measure of fiscal stability and restore a semblance of public services. But it did not have adequate leverage to resolve the growing array of complaints against the ZANU-PF-controlled sectors of government. In effect, the inclusive government has often acted as two distinct competing, sometimes opposing, entities rather than a government of national unity.

The GPA breached ZANU-PF's monopoly, but it also rewarded the party for employing violence to avert a transfer of political power. Espousing the language of unity and common purpose, the reluctant partners entered into a fragile coalition with sharply differing agendas, but with the shared objective of ultimately securing or retaining unilateral power. For the MDC-T, this has meant pursuit of incremental reform and a somewhat indecisive and incoherent policy of non-confrontation, even in the face of acute provocation. The party appears caught between the theoretical narrative of what should be possible and the practical realities of compromise as part of a government that is not delivering necessary reforms and whose most powerful element is intent on frustrating them.¹² For ZANU-PF, the GPA provided a breathing space to consolidate its position both inside Zimbabwe and on the continent and at the same time an opportunity to frustrate those reforms that it felt threatened its interests. These agendas inevitably clashed.

¹¹ Morgan Tsvangirai and Arthur Mutambara were sworn in as prime minister and deputy prime minister respectively on 11 February 2009. MDC ministers were sworn in and the inclusive government was established two days later.

¹² The MDC-T has raised problems and concerns from inside, but it has not pushed proactively for a coherent reform agenda, thus generating uncertainty as to its ability to pursue a consistent strategy, and it has not been able to engage its support base to make better use of opportunities. It repeatedly points to the multiple violations of the GPA and accuses ZANU-PF of insincerity on reforms, while looking to the GPA guarantors – SADC and the African Union (AU) – to be more assertive in helping to resolve core problems.

A. GPA REFORM PROGRESS

Aptly described by Morgan Tsvangirai as a “marriage of inconvenience”,¹³ the GPA and the current inclusive government do represent a new political era. The GPA is a compromise, born of bargaining, but it includes a package of reforms and by extension opportunities for engagement, including a constitutional exercise that should encapsulate many of the steps needed for a new social contract. However, after two years of the inclusive government's fractious coexistence, progress remains painfully slow. The agreement's language is ambiguous, which means that implementation depends on continued good-faith cooperation. Its vagueness has also provoked “considerable doubt that these arrangements will be workable and will produce the necessary changes that will restore democracy and the rule of law in Zimbabwe”.¹⁴ The parties are unable or unwilling to work together in the inclusive government toward joint goals, and the constitution-making process, discussed below, is a victim of their machinations.

The GPA provides only oblique references to the security forces and criminal justice system, and neither has been brought under democratic control.¹⁵ Formal security sector reform within the GPA framework has in effect remained off limits; a number of unofficial initiatives to constructively engage the security sector have not gained traction.¹⁶ This remains the most immediate and profound challenge to the transition and continues to have a large effect on public confidence. Many commentators point to the reduc-

¹³ Address to a conference organised by IDASA-An African Democracy Institute and the South African Liaison Office, 28 May 2010.

¹⁴ “Some Preliminary Comments on the Agreement”, compiled by the Research and Advocacy Unit for the States in Transition Observatory, IDASA-An African Democracy Institute, 16 October 2008.

¹⁵ Article 13 stipulates that “State organs and institutions do not belong to any political party and should be impartial in the discharge of their duties. For the purposes of ensuring that all state organs and institutions perform their duties ethically and professionally in conformity with the principles and requirements of a multiparty democratic system in which all parties are treated equally, the Parties have agreed that the following steps be taken: (a) that there be inclusion in the training curriculum of members of the uniformed forces of the subjects on human rights, international humanitarian law and statute law so that there is greater understanding and full appreciation of their roles and duties in a multiparty democratic system; (b) ensuring that all state organs and institutions strictly observe the principles of the Rule of Law and remain non-partisan and impartial; (c) laws and regulations governing state organs and institutions are strictly adhered to and those violating them be penalised without fear or favour; and (d) recruitment policies and practices be conducted in a manner that ensures that no political or other form of favouritism is practised”.

¹⁶ Crisis Group interview, 6 February 2011.

tion in violence and intimidation in the wake of the GPA as evidence of real progress. This is illusory, as violations have continued and indeed have recently surged.¹⁷ An analysis of the violence is either avoided or masked as a symptom of organic political competition, with inferences of equal responsibility between the main political formations.¹⁸

Other provisions have been ignored or blatantly violated, including those for holding perpetrators of political violence to account.¹⁹ The scope of challenges facing reformers is daunting and includes the failure to effect relevant institutional and legislative changes,²⁰ systemic impunity

for widespread human rights violations, ongoing media restrictions and partisan reporting by the dominant public broadcaster and endemic corruption and income diversion (ie, from diamond revenues).²¹ The poor pace of GPA implementation has exposed ZANU-PF's encroachment on the state and its security apparatus and by extension the MDC's lack of capacity to address this distortion. The balance of power in effect prevents the necessary reforms of the major institutions that ZANU-PF relies on for continued dominance. Though the JOMIC and Periodic Review Mechanism have not analysed the systemic nature of the problems, selective engagement and GPA violations have been the order of the day.

¹⁷ In the latest incidents, MDC-T parliamentarian and co-chair of the COPAC process Douglas Mwonozora was detained in mid-February 2011, on charges of inciting public violence and spent over three weeks in custody before being released on \$50 bail. (All currency figures in this report are in U.S. dollars unless otherwise indicated.) In late February, former MDC-T parliamentarian Munyaradzi Gwisai and 45 others were arrested and charged with treason for holding a meeting at which the tumultuous events in the Middle East and North Africa were debated. Gwisai and six others have alleged they were tortured. In early March, the MDC-T energy minister and co-chair of the JOMIC, Elton Mangoma, was arrested by junior police officers at his office on charges relating to an oil supply tender the party says was approved in cabinet. He was released on \$5,000 bail after several days. He was rearrested on 25 March on a related charge and held in custody for over a week before being released on bail.

¹⁸ Available evidence illustrates that violence has become an ingrained part of Zimbabwe's authoritarian political culture and is an underlying causal factor in its crisis. See Lloyd Sachikonye, *When a State Turns on its Citizens: Institutionalized Violence and Political Culture*, (Johannesburg, March 2011). No credible effort has been made by the police or courts to hold perpetrators of past or current political violence accountable, despite MDC-T and civil society efforts and GPA commitments (Article 18 (4)). Security force elements are deeply implicated, and several known torturers continue to operate with impunity.

¹⁹ Civil society groups inside South Africa and the wider region post regular monitoring and assessment reports; these include the NGO collective project Civil Society Monitoring Mechanism (CISOMM), www.cisomm.org; and Sokwenele's "Constitution Watch", www.sokwenele.com/. CISOMM's 2010-2011 Annual Review, released in February 2011, noted that "the Inclusive Government is not on track in terms of implementation of the GPA. It is being hamstrung by political brinkmanship and increasing levels of polarisation between the parties" and that "state-sponsored violence or intimidation has not ceased as a tactic to ensure compliance with party positions and the structures have not in the least been dismantled". It also expressed disappointment with the failings of the GPA's own monitoring and oversight mechanisms.

²⁰ Constitutional and Parliamentary Affairs Minister Eric Matinenga (MDC-T) – himself arrested, detained and subsequently acquitted in May 2009 on charges of public violence relating to the 2008 election violence – contends that the inclusive government missed multiple targets it set itself in the 2010 Government Work Program, "because of a lack of political will".

Government administration and basic service delivery continue to function, albeit haphazardly and on a shoestring budget, but there is no clear policy direction from the executive. While the overall economic situation has improved, most Zimbabweans remain below the poverty line.²² The millions who left the country have little incentive to return. International support has continued, largely as humanitarian aid, and there have been some positive signs in several sectors.²³ But the economic challenges are immense, and recovery requires massive investment, balance of payments support and access to credit – none of which will be forthcoming without evidence of reform, which includes commitment to restructure the national debt.²⁴ A mixed policy environment – including threats to take over Western businesses unless sanctions are lifted and ZANU-PF's decision to require majority black Zimbabwean ownership of mining companies²⁵ – creates uncertainty whether the inclusive government can deliver a sustained recovery.²⁶

"Death of political will retarding reform", www.theindependent.co.zw, 3 March 2011.

²¹ "Biti furious over missing \$300m", *The Zimbabwe Independent*, 25 February, 2011. Finance Minister Tendai Biti told the cabinet that \$174 million in diamond revenues cannot be accounted for, and a further \$125.8 million realised in January 2011 had not been remitted to the treasury.

²² Hyperinflation has ended, and a semblance of more reliable service delivery and supply of goods and food has been restored.

²³ 8 per cent economic growth in 2010 is largely credited to improvements in agriculture and mining. For an overview, see "Annual Review of the Performance of the Inclusive Government of Zimbabwe, February 2010-February 2011", Civil Society Monitoring Mechanism (CISOMM), February 2011, pp. 17-27.

²⁴ According to Reserve Bank Governor Gideon Gono, Zimbabwe was behind on payments to foreign creditors of \$4.8 billion, and total foreign debt was \$6.929 billion on 31 December 2010. Zimonline, 4 February 2011.

²⁵ The Indigenisation and Economic Empowerment Act came into force on 28 February 2010 and compels foreign-owned companies with a capitalisation in excess of \$500,000 to have at least 51 per cent shareholding by black Zimbabweans.

²⁶ "Policy uncertainty bad for investment and growth", *The Zimbabwe Independent*, 3 February, 2011.

The MDC-T is considerably weaker than it was when it entered government.²⁷ Its ability to provide a credible alternative to ZANU-PF has been questioned, leading some to believe that a revision of the power-sharing formula to its further disadvantage is a likely, if unpalatable, next development.²⁸ Despite holding a majority in parliament, the two MDC wings have not rigorously pursued possibilities for legislative reform, thereby demonstrating an apparent inability to share and implement a strategic vision or wrestle control of policymaking from the executive.²⁹ Concerns have also been raised that the MDC-T has not taken sufficient advantage of opportunities within the new political configuration to consolidate and build its position around key policies and programs.³⁰

ZANU-PF demonstrates confidence in its continued ability to block efforts to legislate minimum conditions for free and fair elections and other reforms.³¹ It accuses those who criticise its unwillingness to implement the GPA of promoting external agendas designed to instigate regime change or simply denies the allegations. It appears emboldened by alleged control of alternative income streams, in particular, revenue from the Marange diamonds fields, which has been described as “the real game-changer in Zimbabwe, not the GPA”.³²

Within the executive, ZANU-PF’s ability to outmanoeuvre the MDC-T has set back progress on democratic transformation. Despite GPA commitments, an early study concluded, “ZANU-PF could not enter into any agreement which did restore democracy and the rule of law, as the result would be a loss of power”.³³ Conversely, “it was pointless for the MDC to enter into any agreement with ZANU-PF which did not ensure the restoration of democracy and the rule of law. Without this, no [W]estern aid would be forthcoming and Zimbabwe’s economic recovery would not be possible”.³⁴ The consequence of this dichotomy has been an undermining of MDC-T credibility, while ZANU-PF continues to focus on consolidating its position and a semblance of legitimacy.

The MDC-T appears conscious of its dilemma, but the suspension from participation in the inclusive government it declared in October 2009 and maintained for a short time because of minimal GPA progress betrayed its weakness.³⁵ The party also felt that a dramatic step was needed to gain the attention of SADC. Subsequent efforts by the organisation to broker a measure of progress elicited only new verbal assurances from Mugabe to engage in the GPA reform process.

²⁷ The MDC-T has deployed key individuals and resources for its work within the inclusive government and has not concentrated on strengthening party structures, many of which were seriously affected during the 2008 violence. Its participation in government has also alienated it from some of its traditional allies within civil society.

²⁸ Stephen Chan, “International views of Zimbabwe”, 21 January 2011, www.solidaritypeacetrust.org.

²⁹ The two MDC parties joined forces around the re-election of the MDC-T candidate, Lovemore Moyo, as Parliament Speaker on 29 March 2011, illustrating the potential for legislative cooperation. It remains to be seen whether they can forge a longer-term alliance in parliament to promote a strategy that addresses priority democratic deficits.

³⁰ Crisis Group interviews, January and February 2011. See also, Dumisani Nkomo, “Zimbabwe: Weaknesses Limiting MDC-T’s Effectiveness”, *The Zimbabwe Independent*, 13 January 2011.

³¹ “ZLHR’s Position on Key Political Processes and Imperatives”, press statement, Zimbabwe Lawyers for Human Rights, 21 January 2011.

³² Crisis Group interview, senior political analyst, Harare, 28 January 2011. See also Thierry Vircoulon, “Time to rethink the Kimberley Process: The Zimbabwe Case”, Crisis Group Blog, On the Africa Peacebuilding Agenda, 4 November 2010. The Marange diamonds fields are located in Mutare West in the south east. The relationship between the main parties in government has become more polarised since the diamond controversy developed. The nexus between the GPA and ZANU-PF business-security interests requires closer examination. See, Richard Saunders, “Geologies of Power: Blood Diamonds, Security Politics and Zimbabwe’s Troubled Transition”, in M. Clarke

and C. Bassets (eds.), *Legacies of Liberation: Post-colonial Struggles for a Democratic Southern Africa* (Toronto, forthcoming), preview chapter available at www.envirosecurity.org/pathfinder/conference/BloodDiamondsChapter.pdf.

³³ Derek Matyszak, “Power Dynamics in Zimbabwe’s Inclusive Government”, Research and Advocacy Unit, 15 September 2009, p. 18. www.swradioafrica.com/Documents/Power_Dynamics_In_Zimbabwes280909.pdf. See also, Richard Saunders, “Zimbabwe: Liberation Nationalism – Old and Born-Again”, *Review of African Political Economy*, vol. 38, no.1 (March 2011), pp. 117-128. This is premised on the assertion, backed by current survey data, that ZANU-PF no longer commands majority support and thus cannot afford to engage in a political contest under free and fair conditions.

³⁴ “Power Dynamics in Zimbabwe’s Inclusive Government”, op. cit., p. 18.

³⁵ In frustration with unresolved issues and new GPA violations, the MDC-T suspended cooperation with ZANU-PF in the cabinet and council of ministers, returning after three weeks on the assurance of intervention from the SADC mediator, Jacob Zuma, and after the November SADC troika summit set 6 December 2009 as the deadline for implementing the agreement’s remaining elements. “A ministerial report tabled at the summit laid the blame squarely on the non-implementation of the GPA as the root cause of the shaky government. But it did not specifically name Mugabe as being at the root of the problem”. “SADC sets December deadline to implement outstanding issues”, www.swradioafrica.com, 6 November 2009.

B. OUTSTANDING ISSUES

Key aspects of the GPA remain in dispute, euphemistically referred to as “outstanding issues”. There were some positive developments during 2010, so that by August the parties were agreed on a matrix of issues requiring implementation.³⁶ Some of the most important were re-gazetting of Constitution Amendment 19,³⁷ amendments to the Electoral Act, establishment of a Land Audit Commission, Land Tenure systems and a National Economic Council and media issues (including hate speech, regularisation of the Broadcasting Authority and appointment of its new Board).³⁸ Other positive developments included appointment of independent commissions to address media, human rights and election issues and the issuing of new print media licenses.³⁹ But these commissions have been hampered by lack of funds and ambiguous mandates. The Human Rights Commission and the Media Commission still do not have legislative frameworks for their activities or support staff. The Electoral Commission retained the same staff that served its predecessor and is perceived as being heavily biased in favour of ZANU-PF.

The main contentious issues remain unresolved.⁴⁰ These relate to Mugabe’s unilateral appointments of the Reserve Bank governor and the attorney general and his refusal to appoint Roy Bennett – Tsvangirai’s nominee for deputy

agriculture minister.⁴¹ Instead of addressing these matters, the president made further unilateral appointments. In August 2010, he reappointed provincial governors in disregard of an agreement to share the positions proportionately. In September, he named several ambassadors despite another agreement requiring the parties to share these positions. Arthur Mutambara, the MDC-M leader⁴² and deputy prime minister, complained:

Mugabe’s move was seen as intended on antagonising and humiliating the MDC and to make a statement about where power lies in the unity government; it was meant to distract democratic forces from focusing on the 24 areas agreed. What then happened was that we lost an opportunity to insist on implementing the reforms necessary to give Zimbabwe a free and fair election.⁴³

President Mugabe insists that the “outstanding issues” can only be dealt with on the basis of reciprocity and that he will make no further concessions or further reforms until Western countries remove targeted sanctions. ZANU-PF joins him in blaming the country’s economic woes on sanctions, denouncing MDC-T as the primary sponsor of an unpatriotic foreign agenda and demanding cooperation in removing sanctions as the *quid pro quo* for any new progress.⁴⁴ The allegations against the party, which the

³⁶ Agreement in principle had been reached in March 2010, but it was not until August that the principals, cabinet and SADC signed off on the matrix showing agreed issues and actions, implementation mechanisms and timeframes.

³⁷ Adopted by parliament in February 2009, The Constitution of Zimbabwe Amendment (no. 19) Act (no. 10 of 2009) gives constitutional expression to the GPA, establishing among other things the office of prime minister and two deputy prime ministers.

³⁸ A significant number of critical issues were omitted from the matrix, including the National Security Council and concerns about the continued role of the Joint Operations Command, delays in legislative reform, violence and impunity and unilateral appointments of judges, ambassadors and governors by the president. See BillWatch, 32/2010, 30 August 2010. It remains to be seen if and how these issues will be addressed in forthcoming reports anticipated from the JOMIC and the Periodic Review Mechanism.

³⁹ During 2010, the new Media Commission licensed fifteen publications, including several newspapers and news agencies, but many have not started operations. Licenses were only given for print media. Broadcast media, from which most Zimbabweans receive their information, remains exclusively in the control of state elements favourable to ZANU-PF. Crisis Group interview, senior political analyst, Harare, 28 January 2011.

⁴⁰ Several interviewees in civic structures have questioned why these issues receive priority attention, as they do not fundamentally address the broader problems that reflect the imbalance in power within the inclusive government. Crisis Group interviews, civil society groupings, January-February 2011.

⁴¹ Roy Bennett was acquitted in May 2010 after a High Court judge ruled the state had failed to link him to an alleged plot to assassinate Mugabe. In March 2011, the Supreme Court dismissed the state’s application to appeal the acquittal.

⁴² At the time of the interview, Mutambara was the undisputed MDC-M leader. At the leadership congress in January 2011, Professor Welshman Ncube was elected leader of the party. Mutambara has subsequently challenged the legality of Ncube’s election and has refused to relinquish his position as deputy prime minister. The dispute remains unresolved at the time of publication.

⁴³ Crisis Group interview, Victoria Falls, 17 December 2010. The MDC-M convened a congress on 8 January 2011, at which Welshman Ncube was elected party leader and a decision was made to “recall” and “redeploy” Mutambara. In early February, Mutambara rejected the legality of the congress, refused to resign as deputy prime minister and sought to expel Ncube from the party. Both men are using the courts to challenge the other’s position and have approached the facilitators to help resolve the conflict.

⁴⁴ ZANU-PF Annual National People’s Conference 2011 Resolutions, 15-19 December 2010, www.zanupf.org.zw. The party has used the sanctions issue to present itself as a victim of foreign aggression, claiming they are responsible for the poor economy and are part of a neo-liberal agenda supported by the MDC-T and puppet civil society organisations. It has had some success with these claims in Africa, and it launched a country-wide signature campaign around them in January 2011. For a recent review of the sanctions, see Bryan Sims, Sydney Masamvu and Havi Mirrel, “Restrictive Measures and Zimbabwe:

state media echo, appear designed to delegitimise it and provide a basis for further destabilisation.⁴⁵

To resist mounting domestic and international pressure over GPA breaches, Mugabe and ZANU-PF have diverted attention by calling for general elections in 2011.⁴⁶ Mugabe has made several public statements supporting finalisation of the constitutional process⁴⁷ but has also argued that a new constitution is not a precondition for new elections.⁴⁸ Nevertheless, ZANU-PF continues to set conditions that in effect prevent reforms that are widely deemed necessary to create the basis for free and fair elections. In the circumstances, an early vote might well deepen the crisis.⁴⁹ Perennial delays in the implementation of reforms, however, would also undermine the prospect for a democratic outcome. Zimbabwe is at a critical juncture that will determine its chances for a sustainable and legitimate resolution of its many problems.

ZANU-PF's own internal situation with respect to concerns about Mugabe's health and the unresolved tensions around the leadership succession have created pressure for elections to be held while Mugabe is still relatively fit.⁵⁰ Several medical leaves of absence in the first few months of 2011 have heightened speculation that the 87-year old

may not be able to carry on much longer.⁵¹ Hardliners and securocrats are thus keen to collapse the inclusive government and push for an early election that they believe ZANU-PF can win, by whatever means necessary, and so guarantee its grip on power until 2016.⁵² Analysts point to the opportunities lost and the dangerous precedents set by accommodating anti-democratic behaviour, both in the run-up to GPA signature and in the inclusive government era.⁵³ Violence was used to win the presidential election run-off, yet those who employed it were awarded a dominant position in the inclusive government. Now, with so little political will evident, there is little prospect for implementation of a substantial part of the GPA agenda, or even for incremental change.

Neither the MDC-T nor ZANU-PF wants to be seen as engineering the collapse of the inclusive government, but the political arrangement is clearly not working, and elections appear necessary to escape the stalemate. ZANU-PF does not have majority support, yet seeks an electoral test, albeit without the GPA reform process having been completed. MDC-T acknowledges the inclusive government is increasingly dysfunctional, and elections will ultimately be decisive, but though opinion polls consistently show it to be still the most popular political party,⁵⁴ it agrees with

Political Implications, Economic Impact and a Way Forward", IDASA-An African Democracy Institute, November 2010. In addition, ZANU-PF has identified what it calls "pirate" radio stations as part of the unresolved issues and as further justification for not addressing other GPA reforms. "Resolution D3", ZANU-PF National People's Congress, 13 December 2009.

⁴⁵ These allegations are complemented by investigations of the attorney general and police commissioner into Wikileaks disclosures of MDC-T interactions with the U.S. embassy in Harare and assertions by Prime Minister Tsvangirai of political bias following the Supreme Court decision removing the MDC-T's Lovemore Moyo as speaker of parliament in March 2011.

⁴⁶ "Elections To Be Held Mid-Next Year – Mugabe", *The Zimbabwe Independent*, 14 October 2010. Mugabe made the announcement in an address to his party's youth wing. His party confirmed its preference for a general election in 2011 in a resolution at its annual December conference.

⁴⁷ "Mugabe sees an end to Zimbabwe Power-Sharing in February", Reuters, 15 October 2010.

⁴⁸ "Mugabe threatens to call early elections without new constitution", Deutsche Presse-Agentur, 24 January 2011. In the wake of the 31 March SADC Troika communiqué, presidential spokesman George Charamba asserted that finalising the COPAC process is "something Zanu-PF and the President have been agitating for". "The truth about SADC troika summit", *The Herald*, 6 April 2011.

⁴⁹ "What Options for Zimbabwe?", Solidarity Peace Trust, 31 March 2010.

⁵⁰ "Mugabe's health woes sparks intense infighting in Zanu-PF", <http://greatindaba.com>, 6 March 2011.

⁵¹ "Fresh fears over Mugabe's health", *The Standard*, 3 April 2011.

⁵² "Mnangagwa pleads the 18th", *Southern Africa Report*, vol. 29, no. 13, 13 April 2011. If the inclusive government collapses, many commentators believe that Constitutional Amendment 19 (see fn. 37 above) would fall away and that possible succession issues would be governed by provisions in Constitutional Amendment 18. That amendment was passed in December 2007 and included changes to the rules around presidential succession that had previously provided for elections within 90 days should an incumbent die or be incapacitated while in office. It would leave the presidency in the hands of the ex-president's party. If an election is won in 2011 with Mugabe as ZANU-PF's candidate, the party's control of the presidency would be guaranteed for a full five-year period, whether or not Mugabe was able to serve out the term.

⁵³ "What are the options for Zimbabwe? Dealing with the obvious!", Research and Advocacy Unit, www.advocacy.org.za/countries/output/what_are_the_options_for_zimbabwe/, 4 May 2010.

⁵⁴ However, overt support for the MDC has eroded over the last year in a climate of increased insecurity. "Zimbabwe: The Evolving Public Mood", Afrobarometer Briefing Paper no. 97, December 2010. Three public opinion polls in May and September 2009 and again in December 2010 showed such support declining from 57 per cent to 55 per cent and then to 36 per cent, with ZANU-PF support increasing in the same surveys from 10 per cent to 11 per cent and 18 per cent. In the most recent of these polls, over 44 per cent of respondents were unable or unwilling to divulge their political preference or said they would not vote, suggesting fear and suspicion are increasing as the security situation deteriorates. *Ibid.*, pp.7-8.

its erstwhile colleagues in MDC-M that reforms must be in place first and in particular that a new constitution must be part of the roadmap to the ballot box.⁵⁵

The South African-led SADC facilitation team supports this position, contending that elections cannot be held in 2011.⁵⁶ Its visit to Zimbabwe in late February 2011 secured an undertaking from the three political principals to implement the August 2010 matrix of actions on outstanding issues.⁵⁷ There was also agreement that JOMIC and the Periodic Review Mechanism would produce required reports, but these mechanisms have failed in their mandate to provide an institutional record of the GPA process. The facilitators have themselves been tasked by the ZANU-PF and MDC negotiating teams to develop a roadmap for elections rooted in the GPA reform agenda.⁵⁸

However, ZANU-PF is perceptive in making power calculations and tends to interpret all engagements through a political lens that assesses how it can consolidate its position.⁵⁹ Its approach to the GPA has involved agreeing in principle to reform, while frustrating implementation and aggravating conditions on the ground. It has skilfully maintained an upper hand in setting the agenda and determining what issues receive priority attention. As a senior MDC-T official said, “ZANU-PF moves the goalposts, and enormous energy is spent trying to get back to the starting point. If and when we eventually get back there, this is presented as progress”.⁶⁰

⁵⁵ A human rights defender said a new constitution with necessary reforms is “first prize”, but a more targeted reform agenda around elections and security issues may prove to be more realistic. Crisis Group interview, 31 January 2011. However, Crisis Group researchers found a general lack of optimism that reforms (including those relating to the security sector, media and elections) would be in place before elections or that the COPAC process would lay the foundations for them.

⁵⁶ “South Africa’s Zuma to lobby African Union to tap brakes on Zimbabwe Election”, Voice of America (online), 26 January 2011; “SA finally finds its voice on Zimbabwe and Mugabe rule”, *The Times* (South Africa), 1 March 2011. In 2007, SADC appointed the then South African president Thabo Mbeki as its official facilitator. Following his recall from the presidency by the African National Congress Party (ANC) in September 2008, Jacob Zuma assumed responsibility as SADC facilitator. Each facilitator has had a team of senior officials with responsibility for the hands-on work and reports to the SADC troika and heads of state, who in turn report to the AU. SADC and the AU are guarantors of the GPA.

⁵⁷ “Principals agree to start GPA implementation”, www.theindependent.co.zw, 3 March 2011.

⁵⁸ Crisis Group interview, member of SADC facilitation team, Pretoria, 7 March 2011.

⁵⁹ Crisis Group interview, senior political analyst, Harare, 28 January 2011.

⁶⁰ Crisis Group interview, 2 February 2011.

Any prospective roadmap and corresponding timeframe require agreement from negotiators and their respective principals, but the experience of how unresolved issues have been dealt with suggests that such agreement does not necessarily translate into actions. The roadmap will thus also require hands-on engagement from SADC – in its role as facilitator and as guarantor of the GPA with the AU – also in the all-important implementation phase.

C. RE-RUN OF THE 2008 ELECTION VIOLENCE?

Fears have understandably surfaced that the 2008 coercion campaign is being resurrected, and new elections will be held in conditions similar to, if not worse than, those that prevailed during the run-off campaign that year.⁶¹ There are reports of youth militia deployments across the country ahead of the constitutional referendum, including induction of many of these young people into the police and army through ZANU-PF’s control of security force recruitment and the civil service.⁶² This correlates with allegations about deployment of army officers into rural areas to coordinate intimidation, though these are vehemently denied by Defence Minister Emmerson Mnangagwa.⁶³ The charges, denials and counter-charges underscore the importance of independent verification and investigation. JOMIC has such a mandate, but it too has become a forum for mutual recrimination. Failure to do its job has inadvertently allowed the GPA guarantors and SADC facilitators to sidestep the question of culpability. Their new hands-on approach to JOMIC, discussed below, should lead to more robust engagement on responsibilities and solutions.

⁶¹ Despite the appointment of new electoral commissioners, reforms required for credible elections have not been secured, and a range of concerns remain. Electoral reforms followed by the constitutional referendum and harmonised elections would be expensive. The Zimbabwe Electoral Commission (ZEC) chairperson, Justice Simpson Mutambanengwe, has estimated the cost at \$240 million, money the country does not have. “Bankrupt ZEC requires \$240 million for polls”, *The Zimbabwe Independent*, 25 February 2011. A subsequent Crisis Group report will examine the electoral environment and ZEC dynamics.

⁶² “Zanu-PF Plans Bloodiest Election to Keep Mugabe in Power”, Zimonline, 19 January 2011. Zimonline carried out a three-month investigation. There are questions about the number of youth militia personnel who have been recruited into the police (and other state structures) and later deployed into rural communities. An audit of civil servants was conducted in 2009 but has not been made public. Prime Minister Tsvangirai recently blamed the civil service crisis over salaries and employment conditions on the incorporation of youth militia. “Tsvangirai blames Zanu (PF) for Civil Service Crisis”, www.radiovop.com, 23 January 2011.

⁶³ “Mugabe and SADC set to impose Mnangagwa as Zimbabwe President”, *The Zimbabwe Mail*, 25 November 2010.

SADC and the AU, as GPA guarantors, should seek agreement and support from Zimbabwe's principals for an independent assessment of the security situation, to include the resourcing of internal oversight mechanisms such as JOMIC and the Human Rights Commission; examine options for civilian oversight and involvement in investigations of political violence; and authorise the deployment of policing and security elements from regional states in an observation and monitoring capacity.

The increase in violence and intimidation following the facilitators' visit, including arrest of MDC-T supporters and attacks on party and civil society figures, has been accompanied by intense political propaganda from the state broadcaster that echoes ZANU-PF assertions of primary MDC-T responsibility.⁶⁴ This version – in direct contradiction to accounts from members of civil society, independent media and other observers – is publicly supported by the Zimbabwe Republic Police.⁶⁵ ZANU-PF's allies also accuse the MDC-T of trying to engineer an il-

legal regime change, pointing to Wikileaks disclosures⁶⁶ and alleged support for revolutions in North Africa.⁶⁷

Dealing with violence and security concerns lies at the heart of the reform program but has not been attempted. A senior Zimbabwean political analyst said, "violence is now an integral part of the body politic; it has infected and affected all institutions of state and is not confined to the security sector. Violence has become a celebrated instrument for settling scores in Zimbabwe".⁶⁸ Widespread fear and insecurity go unacknowledged, and the related role and responsibilities of the security sector remain essentially off-limits.⁶⁹ The MDC-T secretary general and finance minister, Tendai Biti, has warned of a "blood bath" if elections are held without meaningful reform.⁷⁰ In those circumstances, it is unlikely that many citizens who have left the country would want to return. This presents a serious problem for South Africa, grappling with the economic impact of assimilating hundreds of thousands of indigent Zimbabwean refugees.

On 31 March 2011, the troika summit of SADC's Organ on Politics, Defence and Security Cooperation⁷¹ met in Livingstone, Zambia to consider the political and security situation in the region, with particular attention to Madagascar and Zimbabwe. In response to an internal report tabled by South African President Jacob Zuma, the SADC facilitator on Zimbabwe, the troika issued its strongest statement to date on the deteriorating situation, suggesting that the organisation may be prepared to act more vigorously and directly to move the reform process back on track. The relevant passage is reproduced in full below:

13. On Zimbabwe, Summit received the report on the political and security situation in the country as presented

⁶⁴ Comrade Rugare Gumbo, "Tsvangirai must stop the violence", ZANU-PF press statement, www.zanupf.co.zw, undated. Gumbo is the party secretary for publicity and information.

⁶⁵ In early March 2011, the police released statistics claiming that 101 of the 121 cases of recent politically-motivated violence were perpetrated by the MDC-T and twenty by ZANU-PF. The commissioner general of police, Augustine Chihuri, stated in parliament that, "The MDC is a political party which survives on political violence, and this why they are being arrested. If the country is peaceful it does no good to the MDC. But as police, we are ready to deal with them", *The Zimbabwe Mail*, 9 March 2011. Reports and statements alleging primary ZANU-PF culpability include, "Perpetual Fear: Impunity and Cycles for Violence in Zimbabwe", Human Rights Watch, March 2011; "Statement on Increased Human Rights Violations in Zimbabwe", Crisis in Zimbabwe Coalition, 14 February 2011; "Political Violence – Nyanga North Villagers Flee to Mozambique", Zimbabwe Peace Project Information Alert 3/2011; "Statements from the police negate facts on the ground", Movement for Democratic Change, 7 April 2011; "Statement on violence, instability, victimisation of civil society leaders, the media and ordinary citizens", 8 April 2011 (signed by 56 civil society organisations); "ZLHR condemns police abuses in suppressing prayer for peace", Zimbabwe Lawyers for Human Rights, 9 April 2011. In early April, in response to the SADC Troika's 31 March communiqué (see below), presidential spokesman George Charamba pointed out that SADC had blamed the violence "on all parties to the GPA" and said, "this is consistent with the facts on the ground and consistent with the findings of JOMIC which blames all parties for spurts of violence we have witnessed in the country". "The truth about the SADC troika summit", *The Herald*, 6 April 2011.

⁶⁶ "Zimbabwe AG to set up Wikileaks commission", Reuters, 25 December 2010.

⁶⁷ "Zimbabwe Police vow to crush any Egyptian-Style Uprising in Harare", 6 February 2011, <http://www.voanews.com>.

⁶⁸ Crisis Group interview, Harare, 28 January 2011.

⁶⁹ Crisis Group Briefing, *Political and Security Challenges to the Transition*, op. cit.

⁷⁰ "Zimbabwe Faces Election Bloodbath, MDC Minister Tendai Biti warns", *The Guardian* (UK), 19 January 2011.

⁷¹ The Organ on Politics, Defence and Security is coordinated on a troika basis and reports to the Chair of SADC. Like the SADC summit, the chair of the Organ is rotated annually. The chair of the Organ is not simultaneously the chair of the summit. The structure, operations and functions of the Organ are regulated by the Protocol on Politics, Defence and Security Cooperation that was approved and signed at the August 2001 summit in Blantyre, Malawi. At the executive level, its work is coordinated by the directorate of the Organ at the SADC secretariat. The current troika is comprised of Zambia (chair), Mozambique, (previous chair) and Namibia (chair of SADC), www.sadc.int.

by the SADC Facilitator H.E. Jacob Zuma, the President of the Republic of South Africa.

14. Summit appreciated the frankness with which the report was presented by the SADC Facilitator and commended him for the work that he has been doing on behalf of SADC.
15. Summit 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.
16. Summit noted with grave concern the polarisation of the political environment as characterised by, inter alia, resurgence of violence, arrests and intimidation in Zimbabwe.
17. In view of the above, Summit resolved that:
 - (a) 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;
 - (b) all stakeholders to the GPA should implement all the provisions of the GPA and create a conducive environment for peace, security, and free political activity;
 - (c) the Inclusive Government in Zimbabwe should complete all the steps necessary for the holding of the election including the finalisation of the constitutional amendment and the referendum;
 - (d) SADC should assist Zimbabwe to formulate guidelines that will assist in holding an election that will be peaceful, free and fair, in accordance with the SADC Principles and Guidelines Governing Democratic Elections;
 - (e) the Troika of the Organ shall appoint a team of officials to join the Facilitation Team and work with the Joint Monitoring and Implementation Committee (JOMIC) to ensure monitoring, evaluation and implementation of the GPA. The Troika shall develop the Terms of Reference, time frames and provide regular progress report, the first, to be presented during the next SADC Extraordinary Summit. Summit will review progress on the implementation of GPA and take appropriate action.
18. Summit endorsed the report of the SADC Facilitation on Zimbabwe.⁷²

This is the first time SADC has provided a framework to deal with issues relating to the non-implementation of the GPA's reform program. The detail on what action is now required demonstrates a hardening of attitudes among at least these SADC leaders⁷³ and reflects the deep frustration

and growing impatience with the failure of Zimbabwe's political leaders to seriously engage on the agenda they have set for themselves. Although no particular entity was singled out, there is general consensus that the communiqué was a shot across the bows of ZANU-PF and that progress is now required.⁷⁴ Mugabe's initial response – to the effect that any interference would be tantamount to undermining Zimbabwe's sovereignty – showed that he recognised he and his party were the primary targets. Subsequent comments from within ZANU-PF and from Mugabe himself suggest there may be considerable differences of opinion within the party.⁷⁵

The public acknowledgement of the deteriorating security situation is another important shift. It is unacceptable that Zimbabwe's political leaders have not developed concrete plans to stop the violence and have done little more than make public statements. Measures to stem violence also need to involve a much wider set of political, social and economic actors and focus on rebuilding confidence in the

Namibia and its ruling SWAPO party have previously been key supporters of Mugabe and ZANU-PF. It remains to be seen whether other SADC leaders who have traditionally supported Mugabe, including Angolan President Jose Eduardo dos Santos and Democratic Republic of Congo President Joseph Kabila, will endorse the communiqué.

⁷⁴“SADC leaders turn against ailing Mugabe”, *The Standard*, 3 April 2011.

⁷⁵“Zimbabwe's Mugabe hits back at regional criticism”, Reuters, 2 April 2011; “We won't brook interference: Mugabe”, www.zimonline.co.za, 2 April 2011. ZANU-PF propagandist Professor Jonathan Moyo posted a vitriolic attack on SADC and President Zuma, “Unmasking SADC Troika circus”, *Sunday Mail*, 3 April 2011; but the presidential spokesman, George Charamba, who is also permanent secretary in the media, information and publicity ministry, was more moderate, “The truth about SADC troika summit”, *The Herald*, 6 April 2011. Charamba pointed out that the government had not officially responded to SADC but was concerned about the process employed in Zambia, which he called closer to dictation than facilitation. At the independence day celebrations on 18 April, in what many perceived as a volte face, Mugabe spoke out against violence, pledged support for the GPA and thanked SADC for its ongoing support. “Mugabe trying hard to appease SADC”, *The Financial Gazette*, 21 April 2011. Senior ZANU-PF members have been deployed to apologise personally to President Zuma. “ZANU PF continues regional apology spree”, www.swradioafrica.com, 21 April 2011. This backtracking is unlikely to please powerful securocrats, who regard SADC's pronouncement on the GPA as interventionist, offensive and indicative of a worrying shift in the balance of forces within the regional organisation only two days after ZANU-PF's defeat in the election for parliament speaker in which several of its legislators voted with the MDC parties. Ibbo Mandaza, “The SADC Troika on Zimbabwe: Against the Arrogant Disdain, Impunity and Reckless Rhetoric in Harare”, Southern Africa Political and Economic Series Trust, 4 April 2011.

⁷²“Communiqué – Summit of the Organ Troika on Politics, Defence and Security Cooperation”, Livingstone, Zambia, 31 March 2011.

⁷³President Rupiah Banda (Zambia), President Armando Guebuza (Mozambique) and President Hifikepunye Pohamba (Namibia). Pohamba's support of the communiqué is significant, as

police and criminal justice institutions, whose credibility is badly tarnished.

The full memberships of SADC and AU heads of state should support the SADC troika's 31 March 2011 communiqué in order to deliver the strongest and clearest possible message to all parties about their responsibilities. They should also push JOMIC to take a more active role in dealing with cases of political violence and overseeing investigations by the Zimbabwe Republic Police as part of confidence building. JOMIC should produce regular public reports and submit them to the GPA signatories, who in turn should be obliged to respond publicly in writing. These reports should provide a basis for the Periodic Review Mechanism's reporting and recommendations as set out in Article 23 of the GPA.

In light of the security and economic implications of Zimbabwean refugees for South Africa, President Zuma should also consider seeking to use the South Africa-Zimbabwe Joint Permanent Commission on Defence and Security to assess conditions in Zimbabwe with a view to identifying ways in which that body might assist in reducing violence ahead of elections.⁷⁶

⁷⁶ A South Africa-Zimbabwe Joint Permanent Commission on Defence and Security was established in November 2005 with a broad mandate to identify areas of cooperation and to establish channels for the exchange of information and experience in the defence and security fields. Working through ministries and committees, it meets annually to review developments. The focus has been largely technical and bureaucratic (ie, training exchanges, cooperation agreements on health and prisoner transfer and crime intelligence), but it recently delivered the following assessment and recommendation: "The Commission noted that the political and security situation in the SADC region is generally stable. It was further noted that the Inclusive Government in Zimbabwe had made significant progress in its efforts to turn around the economy. To this end, the Commission called upon the European Union and the USA to unconditionally lift the illegal sanctions against Zimbabwe to allow for sustainable solutions to existing challenges". Report of the "fifth session", 3 December 2010.

III. CONSTITUTION-MAKING

The constitution-making process should take centre stage in laying an important foundation for elections, but it has suffered significantly in the current context of violence and intimidation. To reinvigorate political momentum for renewed civic engagement and ensure that subsequent constitutional reforms would reflect genuine popular agendas, the GPA envisaged public hearings and consultations. After stops and starts that caused the timetable to go awry before it had even started, preparations for the outreach program began in early 2010, raising some hope but also concerns about what might realistically be achieved.

A. GPA PROVISIONS AND INSTITUTIONAL ARRANGEMENTS

Article 6 of the GPA sets out a series of objectives and refers specifically to the Lancaster House constitution that ushered in Zimbabwe's independence from the UK in 1980 and the Kariba draft constitution (secretly negotiated in 2007).⁷⁷ It provides a sequence of detailed steps for a parliament-driven process and related consultation that would inform development of the new document. Using language taken directly from the constitutional reform movement, the article also highlights the importance of giving citizens an opportunity to contribute to the drafting.⁷⁸

Article 6 further provides for the establishment of a select committee of parliament to lead the process and be responsible for setting up thematic committees, holding public consultations and hearings, convening conferences of all stakeholders, developing a draft and reporting to parliament. Additional provisions deal with debate and amendment of the draft before it is put to the electorate in a referendum, as well as gazetting the final product and introducing it formally following referendum approval. Although senior politicians have said that parliament would not amend the document after it has been endorsed by a second stakeholders conference, there is nothing to prevent this during the 30-day period of legislative review.

A 25-member Select Committee of Parliament on the new Constitution (COPAC), co-chaired by ZANU-PF, MDC-M and MDC-T representatives, was established in April

⁷⁷ A brief sketch of the history of constitutionalism in Zimbabwe is in Appendix B below. See also Crisis Group Africa Briefing N°38, *Zimbabwe's Continuing Self-Destruction*, 6 June 2006, pp. 2-5.

⁷⁸ Article 6 says "making this constitution must be owned and driven by the people and must be inclusive and democratic". These have been central demands of the National Constitutional Assembly, created in 1997 to campaign for a new constitution.

2009 to drive the process.⁷⁹ A management committee comprising the GPA negotiators (the three political parties), the three co-chairs of the Select Committee and the constitutional and parliamentary affairs minister (Eric Matinenga, MDC-T) was created to provide policy direction and oversight. A steering committee composed of the three co-chairs of the Select Committee, their three deputies and two representatives from civil society is responsible for overseeing implementation of management committee decisions.⁸⁰ Although the constitutional and parliamentary affairs ministry is the agreed focal point for the exercise, the management committee is in practice the pivotal institutional body.

B. FUNDING

Constitution-making is expensive, and the government is largely dependent on external funding.⁸¹ Drawing on a UN Development Programme (UNDP) fund supported by several donors, an estimated \$70 million has been spent, with another \$10 million required to finalise the process, excluding referendum costs.⁸² Uncertainties and delays in the release of funding have compounded the challenges.⁸³ Minister Matinenga has argued that “funding problems are our main concern” and that the process has been more negatively affected by shortages than politics.⁸⁴

According to a senior civil society activist, there are concerns about rash expenditure and lack of transparency and accountability, as well as fears that money allocated for COPAC processes has been manipulated by political par-

ties to indirectly finance their political programs.⁸⁵ COPAC staff, rapporteurs, facilitators and committees are drawn from the parties through an agreed formula, but there is a strong impression that the process has provided an avenue for all three to extend patronage and reward activists as well as opportunity for some individuals to enrich themselves.⁸⁶

As COPAC moves to the drafting stage, the finance ministry is believed to have allocated \$2.5 million in a demonstration of its commitment, but this is inadequate. Budgetary constraints may continue to hamper COPAC’s ability to deliver over the coming months.⁸⁷

C. ALL-STAKEHOLDERS CONFERENCE

An initial all-stakeholders conference was convened in July 2009 to affirm the COPAC framework, endorse the establishment of thematic committees and develop the agenda for nationwide outreach. Participation was based on invitation by a political party. This raised concerns of partisanship that had serious implications for the legitimacy of NGO and civic group work. Over 80 civic groups had met in Harare during June 2009 to discuss COPAC and their prospective role in it. They acknowledged that COPAC provided important opportunities but raised concerns that Article 6 was not an adequate framework for a truly people-driven agenda. They identified three distinct approaches to the process: direct participation, indirect support (ie, through awareness-raising around constitutional issues and monitoring), and non-participation.⁸⁸ Some civic groups that had initially endorsed and committed

⁷⁹ The Select Committee is led by three co-chairpersons, one from each party; Paul Mangwana (ZANU-PF), Douglas Mwonzora (MDC-T) and Edward Mkhosi (MDC-M).

⁸⁰ See www.copac.org.zw/home/copac-organisation-profile.html.

⁸¹ Support has been received from the European Commission, Swedish International Development Agency, U.S. Agency for International Development and the governments of Australia, Denmark, France, the Netherlands, Norway and the UK.

⁸² “Broke COPAC wasted donor money on posh hotels”, www.swradioafrica.com, 7 February 2011. A full breakdown of direct and hidden expenditure on COPAC is not available. Details of donor contributions to COPAC, amounting to \$12,723,012, are available on the UNDP website, www.undp.org.zw. UNDP informed Crisis Group that an additional \$10 million has been raised but is not yet reflected on the website. Communication to Crisis Group, New York, April 2011. The government of Zimbabwe has reportedly contributed \$12.5 million to the process. “Broke Copac Gets US\$10m From Donors”, www.radiovop.com, 19 April 2011.

⁸³ Crisis Group interview, Douglas Mwonzora, MDC-T co-chair of COPAC, Victoria Falls, 17 December 2010.

⁸⁴ Crisis Group interview, Eric Matinenga, constitutional and parliamentary affairs ministers, Victoria Falls, 17 December 2010.

⁸⁵ Crisis Group interview, civil society activist, Harare, 20 December 2010. According to UNDP, it maintains, as with other programs, an “internal control framework” that is utilised to make sure that funds are “really used for what they are intended to be used for and are accounted for”. In addition, staff are dedicated to ensure that this practice is properly implemented. UNDP also noted that it holds regular “project review meetings” and conducts audits both throughout and at the end of any such project. Communication to Crisis Group, New York, April 2011.

⁸⁶ Members of parliament, for example, were paid \$75 per day and several other allowances for participation in the outreach process. They are currently demanding that the state replace their vehicles, for which they have drawn allowances during the process. Crisis Group interview, civil society activist, Harare, 21 December 2010. Ordinarily, parliamentarians earn \$450 per month; the COPAC process has provided an important opportunity to supplement that income.

⁸⁷ Crisis Group interview, Douglas Mwonzora, MDC-T, co-chair of COPAC, Victoria Falls, 17 December 2010.

⁸⁸ “Declaration of the civic society leaders conference on constitutional reform”, Zimbabwean civic society organisations, Harare, 3 June 2009.

to take full part in the conference changed positions and reverted to mere monitoring.⁸⁹

The National Constitutional Assembly (NCA),⁹⁰ a body set up in 1997 as the primary advocacy platform for a new constitution, was particularly vocal in opposition to COPAC and the dominance of political players. It argued that constitution-making should be close to the citizenry, allowing free and informed public participation, and that this could only happen under a truly independent commission devoid of executive influence. The NCA felt it was important to demonstrate the democratic nature of its position and launched the “Take Charge” campaign, in partnership with the Zimbabwe Congress of Trade Unions (ZCTU) and the Zimbabwe National Students Union (ZNSU), to promote opposition to COPAC.⁹¹ This was regarded as a hard-line stance, antithetical to GPA objectives, by part of civil society and a number of key donors, who were intent on constructive engagement with the inclusive government.⁹² Subsequently, some sceptics have acknowledged, however, that the partners’ position has helpfully exerted pressure on the political parties to develop an acceptable draft.⁹³

The conference was poorly organised and descended into chaos, division and recrimination, prompting police intervention and concerns that the overall process would be sharply partisan. Differences among the political parties were apparent from the onset. MDC-M was opposed to an elaborate process, preferring that the parties confine themselves to the secretly-negotiated 2007 Kariba Draft that parliament would ratify and so avoid a referendum. Its party negotiators had based that document largely on the current constitution and the government draft constitution that had been rejected at a referendum in 2000. ZANU-PF and the MDC-T favoured consultations, though they differed on the starting point. ZANU-PF wanted public sessions limited to input on the Kariba Draft. The MDC-T recognised popular sentiment against that document – criticised as elite-driven – as well as pressure from its traditional allies, the NCA and ZCTU, so despite a reference to the document in the GPA, insisted that it be

considered just one of several resources on constitutional reform to be considered.⁹⁴

To bridge differences around content, eighteen themes were identified that laid the basis for the development of a framework of talking points by technical teams attached to COPAC to facilitate the public outreach and submission process.⁹⁵ Each theme was the responsibility of a specific sub-committee, comprised of parliamentarians and civil society representatives and established under Article 6.1(a)(i) of the GPA. The talking points became subject to party positioning, and the final product approved by the management committee was criticised for its restrictive interpretations, prompting some further amendments to incorporate civil society inputs.⁹⁶

D. KEY ISSUES

The history of constitutionalism in Zimbabwe between 1980 and 2008 reinforces the importance of addressing several fundamental issues that permeate politics and the social contract between government and citizens.⁹⁷ These relate to the powers of the executive, in particular the presidency; separation of powers and their devolution to provincial and local authorities; accountability and a framework to address corruption; and promotion and protection of human rights. All of these are points of dispute in the COPAC process.⁹⁸

1. Executive authority

ZANU-PF wants to retain a strong executive president and opposes creation of a prime minister’s office, citing

⁸⁹ This included the Crisis Coalition of Zimbabwe Lawyers for Human Rights, Zimbabwe Election Support Network and Zimbabwe Rights. The first two and the Zimbabwe Peace Project have produced weekly reports under the acronym ZZZICOMP.

⁹⁰ See Appendix B below.

⁹¹ Crisis Group interview, Dr Lovemore Madhuku, NCA Chair, Harare, 20 December 2010. See also “Take Charge” website, www.takechargezimbabwe.com.

⁹² NCA’s negative stance on the COPAC process hurt its donor support, but Dr Madhuku, the group’s chair, believes the problems that process has encountered have vindicated its position.

⁹³ Crisis Group interview, NGO director, Victoria Falls, 16 December 2010.

⁹⁴ The Kariba Draft, the name given to a draft constitutional framework negotiated between the MDC parties and ZANU-PF in 2007, is discussed in Appendix B below.

⁹⁵ The themes were: (i) Preamble, (ii) Founding Principles of the Constitution, (iii) Principle of the Separations of Powers, (iv) Systems of Government, (v) Citizenship and the Bill of Rights, (vi) Women and Gender Issues, (vii) Youth, (viii) The Disabled, (ix) Media, (x) War Veterans, (xi) Land, Natural Resources and Empowerment, (xii) Labour, (xiii) Elections, Transitional Mechanisms and Independent Commissions, (xiv) Executive Organs of State, (xv) Public Finance, (xvi) Traditional Institutions and Customs, (xvii) Religion, (xviii) Languages, Arts and Culture.

⁹⁶ “ZZZICOMP Baseline Report”, Zimbabwe Peace Project, Zimbabwe Electoral Support Network, Zimbabwe Lawyers for Human Rights, 16 June 2009, p. 5.

⁹⁷ See Appendix B below.

⁹⁸ The following points and related analysis are drawn from a range of interviews conducted by Crisis Group between December 2010 and February 2011. None of the issues have been formally finalised, though several civil society interviewees expressed concerns that MDC-T and ZANU-PF have reached broad agreement on at least some.

the unhappy experience with two centres of power in the inclusive government as justification. MDC-T prefers executive authority to be shared between a president, prime minister and cabinet, as a way of guarding against the concentration of power in the presidency. The emerging consensus, however, is for a directly elected executive president who would appoint a cabinet from elected members of parliament. The president would be required, however, to consult with parliament in making senior appointments, thereby giving the legislature a sense of oversight. The president's term would be five years and renewable once.

2. Appointment and oversight of security services

The MDC-T seeks a role for both the executive and the legislature in the appointment and oversight of the security force chiefs. ZANU-PF wants to retain the current situation that enables the president to make appointments after consultation with the relevant ministers and rejects in particular the MDC-T position that parliament's oversight of the security services should be robust.

3. Land

ZANU-PF insists on land reform – traditionally a controversial issue made all the more sensitive by its policies over the past decade⁹⁹ – being acknowledged and embedded in the constitution. The MDC-T endorses this but ties it to a requirement for a land audit designed to ensure equitable and fair distribution, as set out in GPA Article 5.9 but hitherto resisted by ZANU-PF. President Mugabe's party also argues that land should belong to the state, thereby suspending independent ownership of farms, but supports leasehold options for land registered as A2 farms.¹⁰⁰ The dispute reproduces those of recent years, with apparent agreement only on putting responsibility for compensating disowned farmers on the UK as the colonial power. The MDC-T is bound by such a clause in the GPA. The party upholds the right to private ownership but affirms the state's right to "acquire land for the public good", provided domestic courts determine "just and fair compensation".¹⁰¹ It also warns that ensuring leasehold rights for A2 farmers without a land audit would reward ZANU-PF elites and other patronage beneficiaries.¹⁰²

⁹⁹ Crisis Group Africa Report N°85, *Blood and Soil: Land, Politics and Conflict Prevention in Zimbabwe and South Africa*, 17 September 2004.

¹⁰⁰ A2 farms are relatively larger and focus on commercial production. A1 farms are smallholds.

¹⁰¹ "Movement for Democratic Change Constitution Positions", no. 11, Land and Natural Resources, undated.

¹⁰² Crisis Group interview, Eric Matinenga, constitutional and parliamentary affairs minister, Victoria Falls, 17 December 2010.

4. Bill of Rights

Several areas of discord include the MDC's desire to include media freedoms and abortion rights. The issue of the rights of gays and lesbians and other minorities is more complex.¹⁰³ ZANU-PF characterises the minority rights as similar to the resented special protections for whites that were included in the Lancaster House constitution.¹⁰⁴

5. Citizenship

The MDC-T supports citizenship rights for everyone born in Zimbabwe and would acknowledge a possibility for dual citizenship, while ZANU-PF argues that eligibility should be derived from the nationality of the parents or ancestors and opposes dual citizenship.

6. Voting

The MDC-T wants the constitution to require a minimum voter turnout for an election to be valid, apparently to maximise enfranchisement.¹⁰⁵ Diaspora groups have pressed for the right to vote in forthcoming elections from locations

¹⁰³ President Mugabe's negative opinions on gays and lesbians are well known, and he has stated there is no possibility these rights would be included in a new constitution. Prime Minister Tsvangirai reportedly made comments construed as support for the president's position. Tsvangirai subsequently clarified that "there can be no place in the new Zimbabwe for hate speech or the persecution of any sector of our population based on race, gender, tribe, culture, sexual orientation or political affiliation." "PM Tsvangirai calls for Tolerance and Freedom of Choice", statement from Morgan Tsvangirai, www.mdc.co.zw, 1 April 2010. MDC-T's spokesperson, James Marididi, claimed Tsvangirai was expressing a personal opinion and that in the constitutional process, the party would respect the position of Zimbabweans. "Zimbabwe PM Tsvangirai's Comments on Gay Rights only Personal Opinion – Spokesman", www1.voanews.com, 26 March 2010. The MDC-T appears deliberately ambiguous, remaining silent on the issue in its position paper on constitutional rights, presumably out of concern that a liberal position would be used by ZANU-PF against it.

¹⁰⁴ "Comparative Analysis of MDC and ZANU(PF) Constitutional Positions", ZANU-PF Constitution Making Process Working Group, 24 November 2009.

¹⁰⁵ Zimbabwe's voters roll is notoriously inaccurate, as hundreds of thousands have been disenfranchised as a result of internal displacement and new citizenship rules, and millions more because they left the country. Turnout in recent elections has been poor, resulting in mandates being given by a small minority of the electorate. Turnout in 2008 was under 43 per cent. In December 2011, the registrar general publicly confirmed that the voters roll was a shambles, underscoring the need for a clean roll as a prerequisite for a credible electoral process. See "A Report on a Voters' Roll Observation Conduct in Zimbabwe", Zimbabwe Electoral Support Network, 2011, www.zesn.org.zw/publications/publication_279.pdf.

outside the country. ZANU-PF opposes that, and somewhat surprisingly both MDC formations have been reticent on the issue, though they would appear to be the primary beneficiaries.

E. THE OUTREACH PROGRAM

Shortage of funding and logistical difficulties meant that preparation for the outreach process did not start until late 2009. 70 ten-member teams were appointed, including a representative of each CPA-signatory party, three rapporteurs and four civil society representatives. Training for the teams began in January 2010, but the same month COPAC suspended the process, citing unresolved differences between the parties over secondments and the impartiality of rapporteurs.¹⁰⁶ The latter were finally selected in April, but the process was delayed again and only got underway in late June 2010, the date initially scheduled in the GPA for holding the referendum.

COPAC made no plans to consult the millions of Zimbabweans in the diaspora, though they eventually were invited to make contributions.¹⁰⁷ More recently however, the constitutional affairs minister has been pressing hard for a diaspora vote in the referendum. In Zimbabwe, COPAC planned to convene 5,805 consultative meetings over four months, though an extension into October 2010 became necessary to ensure adequate engagement with the metropolitan areas.¹⁰⁸

The fact that most meetings took place demonstrated a measure of positive collaboration between politicians and functionaries from the various parties. Effective outreach, however, presupposes a well-prepared community that feels empowered and free to take part without negative consequence. Repressive laws such as the Public Order Security Act (POSA) and the Access to Information and Protection of Privacy Act (AIPPA) that have traditionally restricted civil and political rights constrained the level of participation. Groups brave enough to ignore such laws

have been threatened with violence and arrest.¹⁰⁹ Civic education was restricted not least by donors, who redirected funds to official channels, but also in various locations primarily by ZANU-PF functionaries. The state media, in particular radio and television, failed at awareness-raising.¹¹⁰

General awareness of the COPAC process nevertheless improved significantly throughout 2010,¹¹¹ although not necessarily because of public outreach and media. Greater awareness, however, has not translated into enhanced participation. Making civil society participation in that process dependent upon the nomination and invitation of particular political parties raised concerns that the GPA partners sought to control who could engage and to exclude any serious independent civic actors.¹¹² Some civil society monitors were subjected to harassment and arrest.¹¹³ Although COPAC had initially called for the arrest of monitors, it subsequently authorised their involvement as long as they secured accreditation from the committee.

Public engagement with COPAC was frustrated by a range of logistical challenges, including late notification of meetings and restricted opportunities for participation.¹¹⁴ It was also undermined by the restrictive media environment, partisan reporting (especially by the state outlets) and limited access to media products, which for many Zimbabweans are now considered luxury items.¹¹⁵ COPAC itself did not have a clearly defined media strategy and has not been effective in disseminating information. This obstructed

¹⁰⁶ There was no response to public exposure of the inclusion of 44 ZANU-PF officials and supporters, including over twenty members of the legislature, who have been implicated in incidents of violence (including murder and torture) in 2008, www.swradioafrica.com/Documents/Constitutional_Outreach_Members_180110.htm.

¹⁰⁷ "Zimbabwe Exile Forum Report on Diaspora Constitutional Symposium", Johannesburg, 27 June 2009, unpublished. The invitation came in response to the few diaspora initiatives to generate some form of engagement with the process.

¹⁰⁸ A final audit of meetings that were convened in the outreach process by COPAC has yet to be made public. In early October 2010, the human rights group ZimRights reported there had been 4,529 meetings. *Constitution Bulletin*, Day 84, ZimRights, 6 October 2010.

¹⁰⁹ "Murehwa D.A. bans civic education", Crisis in Zimbabwe Coalition, 4 August 2010; and "Police after WOZA leader Jenni Williams over Constitutional Program", SW Radio Africa, 26 August 2010, www.sokwanele.com/zigwatch-issue-19-August-2010.

¹¹⁰ Crisis Group interview, civil society activist, 20 December 2010.

¹¹¹ Compared with 2009, the awareness level grew from 38 to 70 per cent. Susan Booyens, "Changing Perceptions in Zimbabwe – Nationwide Survey of Political Climate in Zimbabwe: November 2010-January 2011", Freedom House, 4 March 2011, p. 38. Fieldwork and data-processing was done by the Mass Public Opinion Institute.

¹¹² Crisis Group interview, Dr Lovemore Madhuku, NCA Chair, 26 January 2011.

¹¹³ "COPAC Monitors severely assaulted", *NewsDay*, 30 June 2010, "Zimbabwe: NGO Monitors arrested in Midlands", *NGO News Africa*, 10 July 2010.

¹¹⁴ "Six Month Shadow Report on the Performance of the Inclusive Government of Zimbabwe, 2010", Civil Society Monitoring Mechanism, CISOMM, undated.

¹¹⁵ Media monitoring reports reflect some limited improvements in information about COPAC during 2010, but also the regularity with which the state media has employed selective and partisan reporting. For a detailed weekly overview of media reporting on the process, see the Media Monitoring Project of Zimbabwe, www.mmpz.org, commissioned by COPAC.

public access to reliable news.¹¹⁶ AIPPA, as well as the Criminal Law (Codification and Reform Act), make it an offence punishable by jail to publish “falsehoods”. This has led to local media and reporters often choosing not to put themselves at risk. In addition, most media lack adequate budgets to deploy journalists, especially to more remote rural areas. The result has been a widespread shortage of public information to help formulate an inclusive national debate on the constitution.¹¹⁷

Participation in the process is also undermined by the fear and uncertainty that permeate many communities affected by the legacy of unaddressed political violence.¹¹⁸ Many alleged perpetrators remain in these communities, and there are allegations that they are engaged in ongoing campaigns of low-intensity repression.¹¹⁹ Numerous allegations have surfaced of intimidation and harassment during the COPAC preparatory period, including that ZANU-PF forced villagers to support its positions at outreach sessions or to keep silent and allow the ZANU-PF spokespersons to do all the talking.¹²⁰ Reportedly villagers were also made to raise issues often unrelated to the constitution, and some meetings were turned into campaign affairs for Mugabe’s party.¹²¹

Reports of violations at COPAC meetings were less common, although a number of them were disrupted and abandoned.¹²² Many more were wrongly advertised, raising

suspensions of manipulation.¹²³ Security during the COPAC process has been a police responsibility, despite concerns about impartiality. In a number of rural areas, reports were received of officers actively mobilising ZANU-PF *pungwes*¹²⁴ or turning a blind eye to abuses.¹²⁵

The outreach process was extended into October 2010 in order to reach communities in Harare and surrounding high-density areas. These meetings were also “plagued by disturbances caused mainly by ZANU-PF elements that were hired from the peri-urban and farming areas surrounding Harare and Chitungwiza”.¹²⁶ In Mbare, a Harare township, MDC-T activist Crispin Mandizvidza was severely assaulted by ZANU-PF supporters during the COPAC meeting on 19 September and later died of his injuries. The assault took place in full view of the police, who allegedly did nothing to avert the attack or take action against the perpetrators.¹²⁷ Bussing in troublemaking elements as a method for disrupting MDC strongholds is likely to continue in the build up to any referendum.

In spite of such accounts, recent survey data suggest the COPAC experience has been mixed.¹²⁸ It is not clear how much of the reporting and accompanying analysis by COPAC structures will eventually be available for public scrutiny. Attendance and participation levels at meetings varied, and the process was largely contrived. In many sessions, there was limited opportunity for inputs, and in a number of areas the selection of those who made them was carefully controlled.¹²⁹ However, the Freedom House survey of the political climate concluded that the process

¹¹⁶The official COPAC website, www.copac.org.zw, contains only limited resource material and no comprehensive detail on schedules. Public access to it is also limited, since polling suggests only some 1 per cent of the population uses the internet.

¹¹⁷Crisis Group interview, civil society activist, Harare, 20 December 2010.

¹¹⁸Crisis Group interview, Sekai Holland, MDC-T, national healing, reconciliation and integration co-minister, Harare, 20 January 2011.

¹¹⁹Crisis Group interview, senior MDC-T official, 21 January 2011.

¹²⁰Within weeks of the outreach process beginning, monitoring and media reports were claiming ZANU-PF had launched Operation Vhara Murumo (Shut Your Mouth), designed to suppress dissenting voices, particularly in rural areas.

¹²¹Violations have been recorded in the ZZZICOMP weekly reports, Constitution Watch and numerous media reports. In late September 2010, the MDC-T published a 21-page selective list of violations ranging from intimidation to murder that occurred during the outreach period from June to September 2010. It remains unclear if and how COPAC and the state institutions are responding to these allegations.

¹²²Crisis Group has been given access to a list of recorded violations relating to the COPAC processes during 2010 prepared by a well-respected Zimbabwean civil society organisation. It contains detail on threats, intimidation, and beatings prior to and during the COPAC meetings. Although such allegations are generally ignored, denied or subject to the counter-claim of “foreign agendas” by the Zimbabwe Republic Police and ZANU-PF, in many instances there is specific corroborative evidence

(ie, witness statements, medical evidence, etc.), as well as contextual corroboration in patterns of behaviour.

¹²³Crisis Group interview, ZZZICOMP project staff member, Victoria Falls, 18 December 2010.

¹²⁴A *pungwe* is an all-night political meeting that was popular with Zimbabwean guerrilla forces during the 1970s liberation war, when it was used for mobilisation, building support and awareness-raising, but also as a forum for intimidation, coercion and punishment. *Pungwes* were used extensively during the Gukurahundi as an instrument for terrorising communities and revived over the last decade as a critical mobilising tool for ZANU-PF in its “Third Chimurenga”, the term used by the party to describe its mobilisation for land reform and economic liberation since 2000. The first Chimurenga was in the 1890s against colonial settlers; the second was the war of liberation against the Rhodesian state.

¹²⁵Crisis Group interview, NGO director, Victoria Falls, 16 December 2010.

¹²⁶“ZANU-PF Supporters Disrupt COPAC Outreach Meetings in Harare & Chitungwiza”, Centre for Community Development in Zimbabwe, September 2010.

¹²⁷“Guard dies after Zanu (PF) rampage”, *Business Day*, 23 September 2010.

¹²⁸Susan Booyens, “Changing Perceptions in Zimbabwe”, op. cit.

¹²⁹Crisis Group interview, senior political analyst, Harare, 28 January 2011.

“is seen as quite credible”, and “only small percentages of respondents report having experienced problems, or having experienced prescriptions regarding the nature of inputs”.¹³⁰

F. POLITICAL PARTY ENGAGEMENT

Article 6 of the GPA seeks to promote an inclusive constitution-making process, but in practice COPAC has been dominated by the political parties. Rapporteurs were political appointees, and party liaison committees were tasked with disseminating information on COPAC itineraries at a community level.

The absence of a common position and defined working relationship between the two MDC formations has continued to undermine their effectiveness in promoting democratic reform in the broader GPA process. The MDC-T has been at a clear disadvantage; its infrastructure was decimated in parts of the country during the 2008 violence, and some provinces, in particular rural areas in Mashonaland Central and West, became virtual “no-go” areas for it. The party has not recovered from this and consequently has lacked relevant capacity, beyond its Legal and Constitutional Committee. That committee was stretched thin by the need to second its key members to COPAC.¹³¹

As a result, MDC-T could not fully engage in the constitutional outreach. Its five-page document outlining the party position on the eighteen talking points has remained its main contribution to that exercise, as it refrained from attempts to rally its institutional base. The party’s lack of visibility otherwise was conspicuous¹³² and fostered a distinct impression, articulated in several interviews with civil society actors, that it had “dropped the ball” and was unable to take advantage of the opportunities of the outreach process.

Conversely, ZANU-PF actively mobilised around the process and was able to use it to effectively engage its structures across the country and prepare its supporters to make relevant interventions during COPAC meetings.¹³³ The Kariba Draft was the party’s reference point for in-

forming its constitutional position. Emmersen Mnangagwa, the defence minister and party heavyweight, said its legal department convened several workshops to devise a strategic plan for the constitutional outreach, with a focus on “evolving strategies to counter the neo-liberal threats that Western sponsored political parties posed to the ideals and tenets of ZANU-PF”.¹³⁴ By doing so, it tied the constitutional process debate to its own political agenda to consolidate power by demonising and delegitimising critics and opposition, in particular the MDC-T, as unpatriotic and intent on undermining national sovereignty. Engagement with the broader community through its party channels also enabled ZANU-PF to gauge levels of MDC support, which in turn informed its campaign of low-level intimidation and coercion.

During the party’s 2010 Annual Conference, President Mugabe told the Central Committee that 80 per cent of the views gathered during the outreach process reflected ZANU-PF positions.¹³⁵ Indeed, there is an emerging impression that ZANU-PF out-manoeuvred both MDC formations and has been able to ensure that its voice and, by extension, its positions will predominate.¹³⁶

G. PROGNoses AND POSSIBILITIES

The Civil Society Monitoring Mechanism (CISOMM), in its 2010-2011 review of GPA compliance, concluded that the constitution “process shows significant progress” but called for the parties to tackle a range of shortfalls. The NCA’s “Take Charge” campaign, supported by the ZCTU and ZNSU, rejected the COPAC undertaking from its inception, arguing that a bad process could never deliver a positive result. It maintains this position and has confirmed it will work to defeat any draft constitution that emerges.¹³⁷

The MDC-T spokesperson acknowledged that the process has “failed to pass the credibility and legitimacy test, [that is,] qualifying ... as people-driven”,¹³⁸ but was subsequently contradicted by the party’s COPAC co-chair, Douglas Mwonzora, who argued that it was fair in the circumstances.¹³⁹ After the disturbances at outreach meetings in September 2010, MDC-T announced it would not participate in the remaining meetings, leaving the field in

¹³⁰ Susan Booyens, “Changing Perceptions in Zimbabwe”, op. cit., p. 38.

¹³¹ Crisis Group interview, senior MDC-T official, 21 January 2011.

¹³² Crisis Group interview, senior political analyst, Harare, 28 January 2011.

¹³³ Civil society monitors point out that all three parties were involved in coaching participants, but that ZANU-PF was most prolific, and that this happened more frequently in the Mashonaland and Masvingo provinces; monitors report few such incidents in the Matabeleland provinces. See “Annual Review”, CISOMM, op. cit., p. 13.

¹³⁴ “Zanu (PF) Confirms Coaching People Over Constitution”, www.radiovop.com, 30 December 2010.

¹³⁵ Ibid.

¹³⁶ Crisis Group interview, human rights activist, Harare, 31 January 2011.

¹³⁷ Crisis Group interview, Dr Lovemore Madhuku, NCA chair, Harare, 22 January 2011.

¹³⁸ “Nelson Chamisa, MDC-T spokesperson”, Constitution Bulletin, Day 84, ZimRights, 6 October 2010.

¹³⁹ Crisis Group interview, Victoria Falls, 17 December 2010.

effect to ZANU-PF and leaving its own support base uncertain whether it should engage.¹⁴⁰ Mwonozora himself was subsequently arrested, charged with committing public violence in his home constituency in Manicaland and detained for three weeks before being granted bail of \$50, in what the MDC-T contended was a deliberate attempt to subvert COPAC's work.¹⁴¹

Such contradictory signals illustrate the "damned if you do, damned if you don't" dilemma the MDC-T finds itself in, needing to respond to violations perpetrated against its supporters, yet also believing there is a relative advantage in remaining part of the process. With no internal mechanism available to them to mediate or otherwise remedy the violations, MDC-T representatives signed off on most COPAC meetings. This reflects a belief among some leaders that there is still space for the parties to find common ground and that the management committee will ensure that COPAC meets the minimum standards for an acceptable draft.¹⁴² This aligns with MDC-T's strategic objective of securing incremental reforms. The situation remains fluid, though it is likely that the party will continue to participate in the process and try to leverage further concessions for improving the conditions for elections. Nevertheless, recent violence and repression have sharpened tensions and resulted in further calls for SADC and the AU to intervene.¹⁴³

The constitution-making process is now in the critical drafting stage. Thousands of inputs at COPAC meetings and other submissions are supposed to be collated and analysed by the thematic committees during April and May.¹⁴⁴ These are then to be fashioned into a draft for presentation to the second all-stakeholders conference in July or August. From there, the draft is to go to parliament for two months of "scrutiny and approval", before a projected referendum.¹⁴⁵ Little credence, however, is given to COPAC's timetables, which have never been adhered to. Delays and controversy are already developing around the uploading of data that is part of the collation of inputs that began in mid-January. Funding, logistical and political

problems are likely to continue to frustrate virtually every step of the process.

The referendum poses a number of challenges and to be run properly probably must be preceded by legislative and policy reforms that enable an overhaul of the voters roll and meaningful voter registration, which in turn requires proper resourcing for the new Zimbabwe Electoral Commission.¹⁴⁶ Under the current Referendums Act and Regulations, individuals need not be registered as voters to cast a ballot in the referendum but merely prove eligibility for registration by presenting an identity document, such as a passport or driving licence. However, there is a provision that would allow the authorities to use the voters roll as the basis for the referendum. In that case, registration would be necessary. All this is likely to be subject to political and legal debate and take time to work through. Should the public approve the new constitution, it would still need parliamentary ratification. That in turn would initiate the preparations for general elections to enable formation of a new government, ultimately to be sworn in under the new constitution.¹⁴⁷

Political parties rule out the possibility of a "no" vote in the referendum. For some, too much has already been invested in the process. "It is not in any of the parties' interests to see a 'no' vote win; this would be tantamount to a vote of no confidence", the MDC-M leader said.¹⁴⁸ If a draft constitution goes to a referendum, it will already have received official endorsement from all the parties.¹⁴⁹ The MDC-T's likely support, however, would bring the party into direct conflict with key constituencies in its support base.¹⁵⁰ Its May congress will provide a critical insight into whether a "no" vote option has gained any momentum within the leadership. Though senior party officials do not appear concerned,¹⁵¹ Crisis Group was told there is no unanimity, and there is growing consternation about the resurgence of attacks on party members and leaders, as

¹⁴⁰ "Annual Review", CISOMM, op. cit., p. 15.

¹⁴¹ "Mwonozora's arrest stalls progress in COPAC", www.swradioafrica.com, 23 February 2011.

¹⁴² Crisis Group interview, Elton Mangoma, MDC-T, energy minister, Harare, 21 January 2011.

¹⁴³ "Tsvangirai urges SADC and AU to act on violence in Zimbabwe", www.swradioafrica.com, 2 March 2011.

¹⁴⁴ Crisis Group phone interview, Douglas Mwonozora, MDC-T co-chair of COPAC, Harare, 8 April 2011.

¹⁴⁵ "Constitutional Referendum may be held in September 2011", <http://swradioafrica.com>, 23 December 2010. Given the delays in the process, it is likely that the referendum can now only be held in or after October 2011 rather than September as once anticipated.

¹⁴⁶ Crisis Group interview, Rindai Chipfunde, executive director, Zimbabwe Election Support Network, 17 December 2010.

¹⁴⁷ There are also other scenarios to consider: a new constitution may require enabling legislation, for a new electoral commission for example. The process thus presents many opportunities for further delays. Alternatively, transitional provisions might allow certain institutions, such as ZEC, to remain in place until after the election.

¹⁴⁸ Crisis Group interview, Arthur Mutambara, Victoria Falls, 17 December 2010.

¹⁴⁹ Crisis Group interviews Eric Matinenga, constitutional and parliamentary affairs minister, and Ian Makone, permanent secretary in the office of the prime minister, Victoria Falls, 17 December 2010.

¹⁵⁰ Crisis Group interview, Dr Lovemore Madhuku, NCA Chair, Harare, 21 December 2010.

¹⁵¹ Crisis Group phone interview, Ian Makone, permanent secretary in the office of the prime minister, Harare, 20 January 2011.

well as concerns about whether the party has given away too much in the COPAC process.

The GPA includes a provision that once Constitutional Amendment 19 had been agreed, the parties will ensure its passage by parliament. However, according to an analyst:

There is no equivalent undertaking that any “people driven” constitution approved by the citizenry in a referendum will be passed by parliament. ZANU-PF thus retains full control over this process, as a two-thirds majority [and thus ZANU-PF support] will be required to enact any new constitution. It is clear that ZANU-PF will not allow any new constitution to contain clauses with which it is not comfortable – such as one rendering anyone (such as Mugabe) who has held office for more than two terms ineligible for re-election as president, or elections based on proportional representation. As a result, the MDC is aware that any constitution presented to the people for approval must be one capable of garnering the support of ZANU-PF in parliament. This means that if a new constitution is to be adopted, the MDC will have to ensure that it is one which is acceptable to Mugabe, and one that leaves his powers intact, rather than one which is “people driven”.¹⁵²

In the unlikely event that a draft constitution was defeated in the referendum, the consequences would be unpredictable. The GPA is silent on this. Potentially, it could sideline (at least for the time being), any further engagement on longer-term constitutional objectives, stir up formidable challenges around the GPA and so give ZANU-PF an excuse to unilaterally dissolve parliament and call for elections. Alternatively, it could create a new impetus for a genuine reform process, as some activists hope. Public utterances by Mugabe at the December 2010 ZANU-PF Annual Conference suggested a “no” vote would mean reverting to the current constitution, leaving his extensive powers intact. This position was reiterated by ZANU-PF’s chief spin doctor, Jonathan Moyo,¹⁵³ who recently returned to the politburo.¹⁵⁴

The NCA has argued that even if the draft receives a popular mandate, it should at most be seen as an interim

constitution.¹⁵⁵ This corresponds with the evolving MDC-T view that now regards COPAC as a stepping stone toward a more credible, inclusive constitutional process. Yet, supporting a diluted constitution puts the party at risk of further alienating its traditional support base, especially if an important part of that base makes a concerted effort to reject the draft. There is concern that those promoting a “no” vote are out of touch with the national mood¹⁵⁶ and fail to recognise the need for a more integrative approach encompassing civil society.¹⁵⁷ It remains to be seen whether a meeting of minds can be generated by the MDC-T and its civic partners around tactical and strategic approaches to this process. In the meantime, the MDC-T is likely to concentrate on trying to influence drafting in the committee stage.

It is not clear how long it will take to develop the draft. COPAC Co-chair Mwonozora suggested it could not be finished until the second half of 2011, and this was contingent on funding.¹⁵⁸ As noted, current projections suggest – probably unrealistically – that the referendum might take place in September 2011,¹⁵⁹ but there are mounting concerns that conditions for the campaign would not be free and fair. To a degree, the referendum could provide an important opportunity for Zimbabweans and the GPA guarantors to assess whether adequate conditions for general elections have been met.

There are suggestions that agreement exists between the parties on the core content of a document modelled on the Kariba Draft, with additional provisions to accommodate some positions the parties campaigned for during the outreach program.¹⁶⁰ Crisis Group was told there are “no fundamental differences” that “can break the process”.¹⁶¹

There are indications the broad terms of issues such as multiple citizenship, land reform and the parameters of executive powers have been generally agreed. ZANU-PF has yielded to citizenship demands for the four million members of the diaspora, but does not support a diaspora

¹⁵² Derek Matyszak, “Power Dynamics in Zimbabwe’s Inclusive Government”, op. cit., p. 16.

¹⁵³ Moyo, former University of Zimbabwe lecturer, was information minister (2000-2005) and a key ZANU-PF strategist and propagandist. In 2005, he uncharacteristically was on the wrong side of internal party power dynamics and heavily censured, prompting him to leave. He was the only independent in parliament between 2005 and 2009, then rejoined ZANU-PF.

¹⁵⁴ Jonathan Moyo “GPA mixes like oil and water”, *Sunday Mail*, 24 January 2011.

¹⁵⁵ Crisis Group interview, Dr Lovemore Madhuku, NCA Chair, Harare, 22 January 2011.

¹⁵⁶ Crisis Group interview, Eric Matinenga, constitutional and parliamentary affairs minister, Victoria Falls, 17 December 2010.

¹⁵⁷ Crisis Group interview, Gordon Moyo, MDC-T, public enterprises minister, Victoria Falls, 18 December 2010.

¹⁵⁸ Crisis Group interview, Douglas Mwonozora, MDC-T COPAC co-chair, Victoria Falls, 17 December 2010.

¹⁵⁹ “Zimbabwe could still hold planned referendum on Constitution in September”, www.bloomberg.com, 15 March 2011. But see fn. 145 above with respect to scepticism about the feasibility of a September date.

¹⁶⁰ Crisis Group interview, Dr Lovemore Madhuku, NCA Chair, Harare, 22 January 2011

¹⁶¹ Crisis Group interview, Elton Mangoma, MDC-T, energy minister, Harare, 21 January 2011.

vote.¹⁶² As noted, the MDC-T has mostly remained silent on that subject,¹⁶³ despite the potential advantage it might gain from a constituency generally thought to be broadly sympathetic to it.¹⁶⁴ Those in the diaspora seeking to participate would have to return for both registration and voting and would be subject to the same Electoral Act as other citizens.¹⁶⁵ In the short term, this arrangement would address ZANU-PF's electoral concerns.¹⁶⁶ Given the extent of political compromises emerging from the process, expectations on the quality of the draft have been tempered. The NCA chair said:

At the very best we are hoping the parties will agree to a more democratic draft that trims executive powers, gives more powers and independence to parliament and judiciary, that ensures civilian oversight of the security structures and that has a broader and enforceable Bill of Rights. We would also want to see a truly independent electoral system accommodated.¹⁶⁷

This appears to echo Prime Minister Tsvangirai's bottom line of meaningful checks and balances on executive power and appropriate structures in place to deliver a free and fair election.¹⁶⁸ But it also relates to the pivotal concern that the GPA has failed to even mitigate the symbiotic relationship between violence and elections.¹⁶⁹

Mugabe and ZANU-PF insist elections cannot be kept hostage to an interminably delayed constitution-making process, and they could be held without a final draft. Currently, those promoting reform are themselves hostage to the GPA. Its collapse would mean elections under existing constitutional provisions that are unlikely to be viewed

as complying with SADC Guidelines on the Conduct of Democratic Elections. There is considerable variety of opinion on whether elections can proceed without reforms, constitutional or otherwise. According to the director of Zimbabwe Lawyers for Human Rights, the argument that they can only be held after a referendum is based more on a political than legal interpretation.¹⁷⁰ But the GPA infers elections should follow adoption of a new constitution, meaning after a referendum. The MDC-T and South Africa support this,¹⁷¹ though both may change if they feel other GPA-related reforms are a sufficient basis for proceeding.

MDC-M argues the GPA must stay in place, with or without a new constitution, until reforms are implemented.¹⁷² MDC-T is sympathetic but believes the longer it stays in its "marriage of inconvenience", the more it risks alienating supporters. It sees the process as part of a longer-term effort to build on incremental gains made during negotiations before and after signing the GPA and says there is increasingly recognition that the infrastructure of violence and repression remains the biggest inhibiting factor to legitimate elections and peaceful transfer of power.¹⁷³

¹⁶² As noted above, diaspora mobilisation around these issues has been fragmented and direct engagement with COPAC limited. Some accuse COPAC of neglecting the diaspora. Crisis Group interview, Brian Kagoro, Zimbabwe Development Forum, Victoria Falls, 18 December 2010. Efforts by the Pretoria-based Zimbabwe Exiles Forum produced a submission to COPAC calling for legislative reform that would enable Zimbabweans outside the country to register and vote.

¹⁶³ There is no reference to a diaspora vote in the MDC-T's document, "Movement for Democratic Change Constitution Positions" (undated). Crisis Group could not confirm rumours the party now seeks diaspora inclusion in the referendum.

¹⁶⁴ This also reflects longer-term shortcomings in how the two MDC parties have engaged with the diaspora community.

¹⁶⁵ Crisis Group interview, Eric Matinenga, constitutional and parliamentary affairs minister, Victoria Falls, 17 December 2010.

¹⁶⁶ Crisis Group interview, Douglas Mwonozora MDC-T, COPAC co-chair, Victoria Falls, 17 December 2010.

¹⁶⁷ Crisis Group interview, Dr Lovemore Madhuku, NCA Chair, 20 December 2010.

¹⁶⁸ Crisis Group interview, MDC-T official, office of the prime minister, Victoria Falls, 16 December 2010.

¹⁶⁹ Crisis Group interview, senior political analyst, Harare, 28 January 2011.

¹⁷⁰ Crisis Group interview, Irene Petras, Harare, 20 December 2011. A senior political analyst concurred but questioned whether it would be politically correct to proceed without meaningful reforms and in a context of insecurity – a position echoed by South African facilitators, 28 January 2011.

¹⁷¹ Crisis Group interview, Ian Makone, permanent secretary, office of the prime minister, Victoria Falls, 17 December 2010. "SA finally finds its voice on Zimbabwe and Mugabe rule", *The Times* (South Africa), 1 March 2011.

¹⁷² Crisis Group interview, Arthur Mutambara, MDC-M president and deputy prime minister, Victoria Falls, 17 December 2010.

¹⁷³ Crisis Group interviews, Eric Matinenga, constitutional and parliamentary affairs minister, Victoria Falls, 17 December 2010; Sekai Holland, MDC-T, national healing, reconciliation and integration co-minister, Harare, 20 January 2011.

IV. SADC AND THE AU

The GPA stipulates that the “implementation of this agreement shall be guaranteed and underwritten by the Facilitator, SADC and the AU”¹⁷⁴ 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”¹⁷⁵. South Africa President Zuma has been appointed as facilitator and reports to SADC, which reports in turn to the AU. Multiple violations of and failures to implement key reforms stipulated in the GPA have raised profound questions about what guaranteeing and underwriting the agreement means in practice, as well as how and what is being reviewed in terms of the inclusive government’s functioning.

Over the last 30 months, MDC formations and civil society groups have repeatedly alleged GPA breaches, primarily by ZANU-PF. This has been accompanied by recurring calls, often via the media, for direct SADC intervention. Until the 31 March 2011 SADC troika communiqué, the facilitator and SADC had not responded publicly, creating an impression they were turning a blind eye to ZANU-PF violations.¹⁷⁶ Meanwhile, ZANU-PF has avoided engagement with the substance of the allegations and has instead called on SADC and the AU to publicly support the lifting of sanctions. Both have obliged, raising concerns thereby about a selective manner in addressing their guarantor responsibilities.¹⁷⁷

After relations between MDC-T and ex-South African President Thabo Mbeki soured, with the former accusing the latter of favouring ZANU-PF and not proceeding “fairly and impartially”,¹⁷⁸ there was considerable hope that President Zuma would inject renewed energy into securing full implementation of the GPA and be firmer toward ZANU-PF. This seemed possible in January 2009, when SADC appeared to push Mugabe to agree to a timetable for forming the inclusive government. That was construed as progress, but in fact it represented little more than a return to the original agreement and reflected Mugabe’s mastery at repeatedly shifting the agenda in his favour. By selectively violating aspects of the GPA, he has diverted attention from implementation to long-winded negotiations around outstanding issues and even clear violations. This

has placed the MDC formations in a largely reactive mode, forced to work around an agenda not of their own making.

President Zuma has appeared powerless in his facilitation role to prevent these machinations, and it is unclear whether he and his team have a coherent base with which to work, as it is dependent for engagement on the positions taken by the several Zimbabwean negotiation teams as well as GPA implementation structures. If these are not effective, and it is demonstrated that this is so with respect to the JOMIC for example, there is unlikely to be adequate leverage.

In July 2009, Sydney Mufamadi, no longer in the facilitation process but a Mbeki team member during the crafting of the GPA, was asked at a civil society gathering in Harare why the guarantors were not doing more to ensure compliance. He insisted that the Zimbabwean people were the main custodians of the agreement and urged them to be realistic about what SADC could achieve in the circumstances, as its leverage, especially with recalcitrant elements, was limited: “If one party decides to place itself beyond persuasion there is very little you can do”.¹⁷⁹ Mufamadi also pointed out the significance of the JOMIC, which, he argued:

... must also serve as an instrument for enabling the signatory parties to keep the Guarantors mobilised behind the implementation of this agreement. The Guarantors must be in dynamic contact with JOMIC in order to understand what is going on and to take such supportive action as may be necessary from time to time. The feedback that the signatories get from JOMIC must enable the parties to mobilise their own support base to support the work of implementing the agreement. JOMIC must provide interface between the signatories and organisations of civil society. And for me that is just logical; JOMIC must be able to do that.¹⁸⁰

JOMIC has never played its envisaged role and has remained under-resourced and generally ineffective since its formation. For most of this period, it has had less than a dozen staff, overseen by a political committee comprised of the three parties. Access for the public is limited, and only a fraction of violations have been reported to it. The facilitation team has recognised the body’s potential and is emphasising a greater role for it as articulated by Mufamadi.¹⁸¹ Its reports are meant to inform the Periodic Review Mechanism evaluation process, which in turn is

¹⁷⁴ Article 22.6 (Implementation Mechanisms), GPA.

¹⁷⁵ Article 23.2 (Periodic Review Mechanism), GPA.

¹⁷⁶ Crisis Group interview, human rights defenders, 30 and 31 January, 1 February 2011.

¹⁷⁷ Ibid.

¹⁷⁸ “Tsvangirai accused Mbeki of Bias”, *The Zimbabwe Independent*, 31 October 2008.

¹⁷⁹ Transcript of Sydney Mufamadi’s input at the Zimbabwe Consultative Conference on Regional Solidarity, 21 July 2009, Harare International Conference Centre. Mufamadi was a member of President Mbeki’s facilitation team.

¹⁸⁰ Ibid.

¹⁸¹ Crisis Group interview, South African facilitation team, Pretoria, 7 March 2011.

supposed to report on GPA progress to SADC and the AU. The recent SADC troika statement recognised that this has not been happening and expressed a commitment to help JOMIC deliver on its monitoring, evaluation and implementation mandate.

This may be an important development, but it is unlikely that JOMIC and, by extension, the Periodic Review Mechanism, can currently provide such overview satisfactorily. A civic activist said bitterly, "I'm reminded of the social science adage, 'garbage in, garbage out'".¹⁸² The Periodic Review Mechanism, for example, has yet to produce a report, though recent interventions by the facilitation team have secured agreement that one will be developed shortly.¹⁸³ JOMIC has been utilised by some in civil society who report incidents of political violence, and it has now set up a 24-hour hot line for this purpose and plans to ask the police to deal with such cases.

By late 2009, and in the face of multiple violations, independent media commentary was describing SADC as a primary problem because it repeatedly ignored MDC-T complaints and deferred to Mugabe. This contributed significantly to the MDC-T's dramatic decision to suspend involvement in the inclusive government.¹⁸⁴ With few real options, however, it soon rejoined the government; a further eight months of negotiations followed that secured agreement on a number of outstanding issues but left critical matters unresolved and a number of violations and other implementation concerns unaddressed. The facilitation team and SADC were subsequently unable to acquire traction on any of these.

Late in 2010, civil society representatives were able to meet with and present their concerns directly to the facilitation team,¹⁸⁵ only to be told "they were largely process facilitators as mandated by SADC and as such would not drive the process or interact especially with non-state actors on the basis of opinions".¹⁸⁶ Members of the facilitation team have emphasised that they cannot take sides in the process and must remain neutral,¹⁸⁷ but the answer

given the group highlighted the importance of civil society developing its lobbying and advocacy strategies and being able to present validated empirical evidence to the team. It also raised questions as to the quality of what had been provided to date by both civil society groups and the MDC formations.

This civil society delegation and many other civil society actors have echoed calls for SADC to establish some form of long-term monitoring presence for at least six months before elections and reiterated that the organisation's engagement must be guided by SADC's "Principles and Guidelines Governing Democratic Elections". The facilitation team has responded that it is the GPA signatories' responsibility to take the necessary steps to resolve differences and chart their course,¹⁸⁸ while pointing to non-implemented agreements and arguing that it was "the political actors who were stalling progress ... [exemplified by] the failure of the principals and negotiating teams to meet ...".¹⁸⁹

In October 2010, the facilitation team also defined procedural standards that needed to be followed, reiterated that the constitution-making process had to be concluded and reforms implemented before elections could be held and encouraged civil society groups to undertake an advocacy campaign with local and regional politicians and diplomats on what they felt needed to be done. They could "take advantage of the stated vision in President Zuma's Report to SADC on the need to have 'free and fair elections' and use this as the starting point of advocacy with different political stakeholders", it explained. Further pressure, the team also indicated, was required on individual SADC countries to help develop a common set of priorities and build substantive momentum.¹⁹⁰ Despite individual initiatives, however, a coordinated civil society strategy to identify key priorities and develop such an agenda has yet to materialise.

By early January 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. The MDC-M's newly elected president and chief negotiator, Welshman Ncube, reportedly labelled 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, and they have not done so".¹⁹¹ MDC-T spokesman Chamisa concurred, pointing out that "we feel the actions of our

¹⁸² Crisis Group phone interview, human rights defender, 2 March 2011.

¹⁸³ Crisis Group interview, South African facilitation team, Pretoria, 7 March 2011.

¹⁸⁴ "SADC now part of the problem", <http://thezimbabwean.co.uk>, 4 November 2009.

¹⁸⁵ "Briefing Paper to the Facilitation Team on the Political Conflict in Zimbabwe", Crisis in Zimbabwe Coalition, 20 October 2010.

¹⁸⁶ "Narrative Report of Meeting with President Jacob Zuma's Facilitation Team, 20 October 2010", Crisis in Zimbabwe Coalition on behalf of the Civic Society Delegation, Johannesburg, undated.

¹⁸⁷ Crisis Group interview, South African facilitation team, Pretoria, 7 March 2011.

¹⁸⁸ Ibid.

¹⁸⁹ "Narrative Report of Meeting with President Jacob Zuma's Facilitation Team", op. cit.

¹⁹⁰ Ibid.

¹⁹¹ "Zuma mediation 'disgraceful': MDC", www.theindependent.co.zw, 13 January 2011.

guarantors, SADC and the African Union, [are] in deficit". He acknowledged the guarantors had made a difference but felt they could do more: "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".¹⁹² Prime Minister Tsvangirai reinforced calls for SADC intervention in the face of the deteriorating security situation:

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.¹⁹³

By mid-March, Tsvangirai was pleading for external intervention: "I appeal to all peace-loving people and leaders of SADC, the African Union and the broader international community to help Zimbabwe by stopping the violence".¹⁹⁴ The arrest of MDC-T leaders during the month and prospects of further detentions, including of Tsvangirai himself and other senior figures, prompted additional efforts to secure SADC protection.¹⁹⁵ By the end of the month, an increasingly desperate MDC-T was again considering pulling out of government.¹⁹⁶

SADC's apparent immobility reflected differences of opinion among its member states as to how to deal with the democratic deficit in Zimbabwe at a time when several member countries are grappling with their own challenges. The reluctance to engage more robustly also revealed a continuing lack of faith in the MDC-T, including concerns about its competence and political maturity.¹⁹⁷ It reflected as well that for a long time neither the MDC formations nor civil society had devoted sufficient atten-

tion to developing a clear strategy for prioritising regional engagement and investing in an extended process to build relations with a range of constituencies in individual SADC countries.

Nevertheless, an enhanced focus on such engagement by the MDC-T's leadership and some civil society groups since late 2010 may be paying dividends. The 31 March 2011 troika communiqué, as noted, marks an apparently radical departure in SADC's position with respect to core concerns around non-implementation and violation of GPA provisions and provides a coherent framework for measuring progress. It also commits SADC, and by extension the AU, to stepping up involvement in Zimbabwe through more direct participation with structures responsible for monitoring, evaluation and implementation of the GPA.

ZANU-PF has been caught off-balance, especially as the communiqué was signed by the Namibian President Hikepunye Pohamba, one of the party's strongest regional allies and currently the SADC chairperson. It remains to be seen how much support the communiqué receives from other regional players, including Angola and the Democratic Republic of Congo, both traditional ZANU-PF allies, but strongly negative responses from elements within the party to the communiqué suggests concern it has lost significant ground.¹⁹⁸ At the least, the clear call for an end to the violence and intimidation should ensure that these issues, as well as related critical concerns for security sector reform and the urgent need to rebuild the credibility of the criminal justice system, take centre stage as monitoring and evaluation priorities.

For many years, the Mbeki administration in South Africa systematically refused to publicly acknowledge the nature and extent of the human rights violations in Zimbabwe. Following the mission of retired South African generals Mbeki sent in 2008 to assess and advise on the violent post-March election campaign, however, the reality on the ground could no longer be ignored.¹⁹⁹ This contributed significantly to the decision not to recognise the legitimacy of the June presidential run-off, which paved the way for a negotiated settlement, namely the GPA. SADC and its facilitators have subsequently argued that Zim-

¹⁹² Ibid.

¹⁹³ "Zimbabwe's March to Real Change", statement by Morgan Tsvangirai, www.mdc.co.zw/, 2 March 2011.

¹⁹⁴ "Prime Minister Tsvangirai's statement after his four day visit to the SADC region", MDC Information & Publicity Department, www.mdc.co.zw/, 18 March 2011.

¹⁹⁵ "Tsvangirai runs to Zuma for protection", *The Sunday Independent*, 27 March 2011. It is widely believed that the arrests are designed to reduce the number of MDC-T parliamentarians able to vote for a new speaker of the parliament. The Supreme Court declared the 2009 election of the MDC-T's Lovemore Moyo as speaker invalid in early March 2011, prompting Tsvangirai's criticism of the court as partisan, that ZANU-PF then cited as "evidence" of his contempt of the judiciary.

¹⁹⁶ Ibid.

¹⁹⁷ According to Sydney Mufamadi, the South African team facilitation member, "there are two important ingredients that are required in order to guide a thorough-going process of the situation in Zimbabwe. One of them is the renewal of Zanu-PF. The other was a self-conscious process on the part of the MDC to facilitate itself into political maturity. I'm saying that was agreed amongst the negotiators". Transcript, op. cit.

¹⁹⁸ Input from Brian Raftopolous, director of research and advocacy at the Solidarity Peace Trust, at the launch of "The Hard Road to Reform", Solidarity Peace Trust, Johannesburg, 13 April 2011.

¹⁹⁹ During two visits in May and June 2008, the former South African generals were exposed to the realities of the violent campaign and were genuinely shocked by what they witnessed. Crisis Group interview, human rights defender, 31 January 2011. South African civil society organisations have sought through the 2001 Promotion of Access to Information Act to obtain a copy of their report to former President Mbeki but been told that no such report exists.

babweans bear responsibility for resolving their disagreements over how to carry out the commitments contained there in.

While this is certainly true, SADC and the AU have important responsibilities as guarantors. They are needed to help ensure that the context is as equitable as possible and that the resolution process itself is legitimate and sustainable. Without that assistance, it will be difficult if not impossible for the parties to find their way to a renewed or extended agreement that enables them to correct distortions in power sharing, ameliorate differences over economic and political interests and, critically, end ZANU-PF's partisan monopoly of the security agencies. The latter issue is not effectively treated by the GPA. Until it is addressed, it will present a fundamental challenge to meaningful and sustainable reform. Nevertheless, the SADC communiqué's formulations provide an important framework around which strategies and tactics for engagement can now be developed.

V. CONCLUSION

The GPA offered the possibility of a transformative agenda, the foundation of which would be constitutional reform, but no such agenda has been realised. Although the constitution-making process is far from over, there is now a real prospect that Zimbabwe will be pushed into elections without the necessary changes in place to provide a political environment conducive to confidence that they can be free and fair. The MDC-T and ZANU-PF both remain intent on winning an absolute victory and for their own reasons do not seek to extend the current power-sharing arrangements. Some form of further power-sharing might, however, be the outcome of such an electoral contest, especially if, as in 2008, the loser at the ballot box is able to prevent a democratic transfer of power.

In a context where elections have become synonymous with violence and intimidation, and the infrastructure of repression used in 2008 remains firmly in place, there is understandably massive insecurity and anxiety about what happens next. Without the necessary reforms, oversight and monitoring structures, there is widespread concern that the experience of 2008 will be repeated.²⁰⁰

The path of the constitution-making process and related political developments is replete with uncertainty. For some, the momentum for reform has been lost, with the GPA and inclusive government eroding a common sense of purpose. A civil society critic reflected: "It [the GPA] has turned out to be the biggest destabiliser of our unity and [has] ultimately undermined the cohesion we have had over the years".²⁰¹

Despite the widespread fear that new elections will result in more violence, however, seven in ten Zimbabweans support the need to hold them in 2011, an indication of the growing dissatisfaction with the inclusive government.²⁰² But citizens also stress the importance of making the elections free and fair, a prospect hampered by the failure to fully implement the democratic reform agenda set out in the GPA.

It remains to be seen whether further tangible reforms will be secured through either the COPAC process or measures agreed to in the GPA. Experience suggests these will be marginal at best, raising legitimate questions about what conditions will be in place when elections are held. There is equal uncertainty that the enactment of reforms

²⁰⁰ Crisis Group interviews, human rights defenders, 30 and 31 January, 1 February 2011.

²⁰¹ Crisis Group interview, Dr Lovemore Madhuku, NCA chair, Harare, 20 December 2010.

²⁰² "Zimbabwe: The Evolving Public Mood", Afrobarometer, op. cit.

or even a new constitutional framework would provide reliable guarantees that the rules will be adhered to. Even if the elections are pushed back into 2012 or 2013, that uncertainty is likely to remain. At the least, it will be impossible to qualify elections as free and fair if one party is prevented from campaigning and is not protected against violence because of the partisan nature of the law enforcement agencies. The critical concern is for the availability and capacity of remedial options to avert and respond to violations and for the political will to support such measures, even if against one's own followers.

Zimbabwe is far from satisfying that concern. A new and viable constitution might go some way toward preparing the ground, but much would still depend on its political and security leaders, who have yet to make good on what they recognised in the GPA: their "historical obligation and need to reach a solution that will allow us to put Zimbabwe first and give the people a genuine chance of rebuilding and reconstructing their livelihoods".²⁰³

**Harare/Johannesburg/Nairobi/Brussels,
27 April 2011**

²⁰³ Preamble of the GPA.

APPENDIX A

MAP OF ZIMBABWE



APPENDIX B

CONSTITUTIONALISM IN ZIMBABWE: 1980-2008

A. Lancaster House and ZANU-PF's Consolidation of Power

The Lancaster House constitution governing Zimbabwe was drawn up as part of a ceasefire arrangement that ushered in formal political independence from the UK in 1980. It incorporated protections for the white minority, including a guarantee on racial quotas in parliament, and for existing land ownership arrangements.²⁰⁴ These in effect limited the scope of constitutional reform during the first decade of independence but did not prevent amendments that invested great authority in the executive presidency of what, by the late 1980s, was a de facto one-party state. The bicameral parliament was abolished and a unitary parliament was elected in 1990.

Zimbabwe retained Rhodesia's security laws and maintained a continuous state of emergency until 1990. In a context of regional destabilisation due to the situation in apartheid South Africa, these were used throughout the 1980s to silence critics and cover up widespread abuses, particularly in Matabeleland and the Midlands provinces. This significantly undermined opportunities for civil society and opposition political party growth. The main political opposition, the Zimbabwe African People's Union (ZAPU), was absorbed by ZANU-PF as a junior party in the 1987 Unity Accord, after its officials and supporters had been subjected to the horror of the Gukurahundi.²⁰⁵

The state of emergency was lifted in 1990, contributing to the emergence of pluralist political engagement and critical civil society activism among trade unions, churches, lawyers and other groupings. Though the resulting more vocal opposition to the government and its policies did not initially present a significant challenge to ZANU-PF's political hegemony, objections to its plans to introduce a one-party state forced the senior hierarchy to adapt. By the late 1990s, the constitutional reform movement was challenging the structure of an all-powerful executive and calling for a more democratic framework of government.

²⁰⁴ The Lancaster House constitution created a parliament of which 80 seats were for blacks and twenty were for whites in the lower house – each elected on a separate voters roll. Fourteen members of the senate were elected by black parliamentarians and ten by white parliamentarians. This constitutional provision could not be changed for five years. Protections for existing land tenure had a ten-year guarantee.

²⁰⁵ On the Gukurahundi, see fn. 6 above.

B. The National Constitutional Assembly and the 1999 Constitutional Commission

A new democratic constitution became a key demand and rallying point for the democracy movement and played a significant role in transforming the political landscape, with the constellation of opposition voices around the founding of the National Constitutional Assembly (NCA) in 1997 as the primary advocacy platform. This in turn led to the formation of the Working People's Convention in February 1999 and the Movement for Democratic Change (MDC) in January 2000.²⁰⁶

Mobilisation for a new constitution centred on four key areas: the excessive powers of the executive, in particular, the presidency; devolution of powers to provinces and local authorities; accountability and a framework to address corruption; and promotion and protection of human rights.

For the first time, President Mugabe responded to domestic civic pressure for democratic reform, establishing a Constitutional Commission, chaired by Godfrey Chidyau-siku (now chief justice), in May 1999. It comprised all 150 parliamentarians (all from ZANU-PF) and 241 business leaders, farmers, political commentators, opposition party figures, lawyers, journalists and civil society members. The views of ordinary citizens were collected in over 5,000 meetings, and a draft was submitted to President Mugabe's government, which made a number of changes, most notably concerning land reform, before submitting it to a popular referendum. The newly-formed MDC rejected both the commission process and the draft and supported the NCA's "No-Vote" campaign that dealt ZANU-PF's its first ever national electoral defeat in February 2000.²⁰⁷ This was followed four months later by parliamentary elections in which the MDC won 57 seats, just four fewer than ZANU-PF's 61, despite a campaign of violent intimidation prior to the election.²⁰⁸

²⁰⁶ The Zimbabwe Congress of Trade Unions (ZCTU) played a pivotal role in these developments, and its then secretary general, Morgan Tsvangirai, went on to become the NCA's founding chairman and subsequently the MDC's founding president. The ZCTU has remained a staunch proponent for constitutional reform and along with the NCA has been a key critic of the GPA-inspired constitution-making process.

²⁰⁷ The referendum vote was held on 12-13 February 2000.

²⁰⁸ Prior to the GPA, the remaining 32 non-elected seats were exclusively presidential appointments. The GPA stipulates a

C. Constitutionalism Post-2000

The referendum result blocked implementation of the new constitution but left in place the amended Lancaster House rules. ZANU-PF resurrected and reconstructed a political narrative rooted in its liberation credentials that cast the opposition agenda as counter-revolutionary, conceived and directed by the former colonial power, the UK. A violent campaign of land occupation under the auspices of a Fast Track Land Reform Program was begun across the country, after the referendum and before the elections, coupled with both legal and extra-legal efforts to undermine the MDC and its allies. Meanwhile, the process of constitutional reform reverted back to the adoption of amendments and the introduction of laws targeted at consolidating power and circumventing legislative and judicial oversight.²⁰⁹ New legislation restricting civil and political rights included the Public Order and Security Act (POSA) and the Access to Information and Protection of Privacy Act (AIPPA), as well as draconian additions to the Criminal Law (Codification and Reform) Act.

The crafting of a new constitution was revisited again during talks secretly facilitated by then South African President Thabo Mbeki, as Zimbabwe lurched into further crisis following the controversial 2002 presidential elections. By 2004, the parties had produced a draft largely influenced by ZANU-PF positions and the old Constitutional Commission documents but without civil society input. Major substantive differences remained, however, with the MDC insisting on changes to the structure of the executive; independence of the judiciary and legislature; establishment of independent commissions on corruption, human rights and elections; and civilian control of the military.

Mugabe rejected the draft, and pushed through instead the far-reaching Constitutional Amendment 17 that removed from the existing constitution any provision for judicial inquiry and challenges to land expropriation; re-established a bicameral legislature; and replaced the Elec-

toral Supervisory Commission with a new Zimbabwe Electoral Commission (ZEC) authorised to run elections rather than simply supervise them.²¹⁰ Differences over whether to participate in the subsequent elections for the new senate contributed in 2005 to the MDC's split into two factions.

D. Negotiations and the Kariba Draft

In March 2007, a violent attack on MDC-T President Morgan Tsvangirai and other opposition political and civic figures during a prayer campaign prompted SADC to formally mandate the South African president to mediate the crisis.²¹¹ Zimbabwean activists again called for constitutional reform as the basis for engagement.²¹²

Both MDC formations generally agreed on the imperative of pushing for a new constitution that would satisfy demands on limits to executive powers; separation of powers; rule of law; elections; security sector reform; and a Bill of Rights.²¹³ ZANU-PF wished to avoid the creation of a legal framework that could facilitate its loss of power. Mugabe sought to manage the process, in order to curb the surge in MDC strength, while buying himself and his party time to organise and clamp down on the democracy movement. On key constitutional issues, ZANU-PF insisted on the 2004 concessions and the Constitutional Commission (Chidyauyiku Draft), while the MDC tried to leverage its March 2007 campaigns to promote its reform agenda.

A compromise document – the Kariba Draft – that contained some improvements on the existing constitution was secretly negotiated in August-September 2007, again without civil society input. It reflected the balance of power at the time, so favoured ZANU-PF positions on several important points, in particular a new formula for addressing presidential succession that satisfied the party's hardliners and security chief allies. It increased the number of parliamentary seats from 120 to 210 in the lower house and 66 to 93 in the senate. ZANU-PF also proposed harmonisation of presidential, parliamentary and local elections, an idea some saw as facilitating opportunities for vote manipulation and others as creating

consultative process for these and a number of other positions, though Mugabe has continued to make unilateral appointments.²⁰⁹ Crisis Group interview, lawyer and human rights defender, Harare, 31 January 2011. Constitutional Amendment 16, for example, would give the state power to expropriate and redistribute land without compensation. The existing citizenship laws were amended to deny citizenship to and withdraw it from "any person who has the potential of being a citizen of another country", placing the obligation to prove otherwise on the affected individual. This had the effect of purging hundreds of thousands from the voters roll, mainly farm workers, many of whom were descendants of immigrants from neighbouring countries and were portrayed as foreigners allied with the alleged MDC agenda to reverse the gains of liberation.

²¹⁰ Constitution of Zimbabwe Amendment (no. 17) Act (no. 5 of 2005).

²¹¹ They were arrested by the police on their way to a prayer rally in Harare organised to protest a three-month ban on rallies and demonstrations imposed under the POSA. Some were beaten and others tortured during detention. Tsvangirai was taken to the army's Cranborne Barracks on 12 March 2007 and severely beaten.

²¹² "Constitutional reform basis for mediation, say activists", IRIN News, 5 April 2007.

²¹³ Crisis Group interview, Ian Makone, permanent secretary, office of the prime minister, Victoria Falls, 17 December 2010.

the possibility for voters to make more tactical use of their ballots.²¹⁴

The concessions it made enabled ZANU-PF to regain some international political capital, especially with SADC, while avoiding a broader transformation agenda that could weaken its position. The MDC-T regarded the Kariba Draft as what was possible at that stage and simply another step toward a permanent constitutional solution.²¹⁵

The Kariba Draft was to be adopted as a new constitution before the 2008 elections, but Mugabe proposed instead to incorporate elements of it into the existing constitution via an amendment (18) with three main provisions: to give parliament powers to act as an electoral college if a president left office prematurely; to change the composition of the legislature; and – in what was seen as a concession to the MDC – to establish a Public Protector and Human Rights Commission.²¹⁶ Parliament passed the amendment unanimously, setting the scene for the elections. The MDC claimed progress in the “politics of incremental gain” and a step forward in the constitutional debate. Some civic groups criticised the party for not addressing priority concerns regarding the restrictive political environment. Others considered it had been pragmatic and realistic in the political circumstances.²¹⁷

²¹⁴ Crisis Group interview, Eric Matinenga, constitutional and parliamentary affairs minister, Victoria Falls, 17 December 2010.

²¹⁵ During a public meeting in Harare, Tendai Biti, MDC-T secretary general, stated: “The draft constitution that we negotiated at Kariba was not intended to be the permanent national constitution but a temporary document that would create an environment necessary for the holding of free and fair elections. We should remember that Zimbabweans were concerned about the manner in which previous elections had been held and how election results had been manipulated by ZANU-PF. So, we had agreed that the Kariba Draft would be adopted and then elections held and after that there would be a people-driven constitution making process”. “Kariba Draft was just a stop-gap measure”, Community Radio Harare, 5 August 2009, www.kubatana.net/html/archive/media/090805corah.

²¹⁶ Constitution of Zimbabwe Amendment (no. 18) Act (no. 11 of 2007).

²¹⁷ “Controversial Election Bill passed unopposed”, Institute for War and Peace Reporting, 10 October 2007.

APPENDIX C

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